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Erin Michele Baxter

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## **CAPITAL PUNISHMENT IN THE MILITARY – AMERICA V. CHINA: AN ESSAY ON THE POLICY CONSIDERATIONS, SIMILARITIES AND DIFFERENCES**

*Erin Michele Baxter<sup>†</sup>*

### **I. TO DIE OR NOT TO DIE**

Capital punishment has been used since the beginning of recorded history as a means of punishing wrongdoers. There is no nation in our world that has not, at one point in its history, used this form of punishment. Over time, the areas of the world that continue using corporal punishment have changed. The types of governments that have utilized corporal punishment have changed as well. Additionally, the crimes that are punished by a death sentence have also varied. It is interesting to note that in most countries, the military system has its own form of government, rules, regulations, judiciaries and punishments. Ironically, the judiciary system of a military assemblage of a particular country does not always mimic the country's own system.

In this article, I will discuss the differences between the United States Military's and the Chinese Military's conception and assessment on capital punishment. I will evaluate both countries' military laws and usage of the death penalty, past and present, and show the similarities and differences between the two. I will reflect on the policy considerations for the utilization of such punishments, consider the negative aspects, the positive aspects and the equality of the apportioning. However, I will first describe in a broad overview the history of military justice systems.

The general functions of a system of military law are to govern the persons within the military and to maintain discipline so as to assure the accomplishment of assigned tasks. Military law has both a broad and a narrow sense. It has been defined as: "body of law governing members of

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<sup>†</sup> Legal Specialist, 71 Delta, United States Army. When Ms. Baxter served as legal specialist in the United States Army, she developed an interest in the military's utilization of the death penalty. B.S. Business Management, University of South Florida, J.D. University of Tulsa, Dec. 2000.

the military services, distinguished from martial law."<sup>1</sup> Another definition of military law is that in its wider sense, it includes that law which, operative only in times of war or like emergencies, regulates the relations of enemies and authorizes military government and martial law.<sup>2</sup>

There is documentation of military judges existing as early as the Roman Empire, at a time when Roman soldiers were subject to the absolute will of their commanders.<sup>3</sup> After the Norman Conquest in England, military justice was a matter of Royal prerogative.<sup>4</sup> Richard Coeur de Lion's Ordinance of 1190 deterred sedition among his crusaders by disciplining the accused with "a series of penalties ranging from fines and ignominious expulsion from the army, to tarring and feathering, loss of a hand, and burial alive."<sup>5</sup> In 1385, Richard II circulated the first extensive articles of war.<sup>6</sup> The Articles of 1385 "punished a variety of military offenses, such as disobedience of orders, pillage, and theft . . . with penalties that progressed from amputation of the left ear for minor transgression to hanging, drawing and beheading" for major offenses.<sup>7</sup> More intricate and less barbaric military codes were realized in the sixteenth and seventeenth centuries. The codes<sup>8</sup> promulgated by military commanders serving under royal commissions were not uniform or rigid, rather "each war, each expedition had its own edict" whose jurisdiction was limited to that particular expedition.<sup>9</sup> It is important to note that these codes governed only the conduct of soldiers during wartime. However, in times of peace, "the Common Law made no distinction between the crimes of soldiers and those of civilians. . . . [A]ll subjects were tried alike by the same civil court."<sup>10</sup>

William and Mary were in need of a standing army and a source to

1. GILBERT'S LAW DICTIONARY 162 (1st ed. 1994).

2. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 5, ch. I (2d ed. Reprint 1920).

3. See The awareness that the king or other war commander could exert unlimited powers of subjugation in the command of his troops was shared by Medieval law and Roman law. See JOSEPH W. BISHOP, JR., *JUSTICE UNDER FIRE* 3-4 (1974).

4. See *id.* at 4.

5. *Id.*

6. See *id.*

7. *Id.*

8. Examples of these codes include the Articles of War of the Free Netherlands of 1590 and Gustavus Adolphus's Articles of War of 1621. See BISHOP, *supra* note 3. Gustavus's Articles of War of 1621 contained 167 articles and provided for formal court-martial proceeding. This is the first documentation of formal court martial proceeding. Gustavus' Articles inaugurated the history of modern military justice. See *id.* at 5. In effect, they formalized recognition of the four moral virtues necessary to any army: order, discipline, obedience and justice, and are the foundation of military justice today. See *id.* at 4.

9. GREAT BRITAIN WAR OFFICE, *MANUAL OF MILITARY LAW 1914-18* (1914).

10. *Reid v. Covert*, 354 U.S. 1, 42 n.44 (1955).

assure its discipline; therefore, they accepted the Bill of Rights, and Parliamentary law began to govern military justice in 1689.<sup>11</sup> The Bill of Rights required Parliament's consent to the raising and keeping of armies. The Mutiny Act was passed by Parliament in 1689, which provided for the establishment of a standing army as well as provisions for its discipline.<sup>12</sup> However, Courts-martial were given a very restricted jurisdiction by The Mutiny Act.<sup>13</sup> Courts-martial jurisdiction applied only to regular soldiers, and they only applied to strictly military offenses - sedition, desertion and mutiny.<sup>14</sup>

## II. UNITED STATES MILITARY LAW IN THE BEGINNING

The United States military justice system was in existence several hundred years prior to the adoption of the United States Constitution.<sup>15</sup> The Framers of the United States Constitution were observant of the limits Parliament set on the peacetime jurisdiction of courts-martial over capital crimes. The framers fostered a great distrust of military tribunals as they had been controlled by the revelry of military power in the colonies. Therefore, they were acutely aware of the perils of the domineering military justice system.<sup>16</sup> Many problem areas were cited within the Declaration of Independence and they consisted of the following: the submissiveness of civil power to the military, the quartering of troops during peace time, and the authorizing of incalculable cruelties performed through the hand of the King's mercenaries.<sup>17</sup> Coincidentally, one reason the Revolutionary War was fought was to protest the standing armies.<sup>18</sup> The "standing army" debate, which took place at the Constitutional Convention, was a debate to determine whether to have a standing army or a militia.<sup>19</sup> This debate was derived from the experiences of the Revolu-

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11. See BISHOP, *supra* note 3, at 6.

12. See *id.* at 8.

13. See *id.* THE MUTINY ACT OF 1689 stated that "noe Man may be forejudged of Life of Limbe or subjected to any kinde of punishment by Martiall Law or in any other manner then by the Judgment of his Peeres, and according to the Knowne and Established Laws of this Realme. . . . Soldiers. . . who shall desert Their Majestyes Service be brought to a more Exemplary and speedy Punishment than the usuall Forms of Laws will allow. . . ." See *id.* at 7.

14. See *id.* at 8.

15. See generally Nicole E. Jaeger, *Supreme Court Review: Maybe Soldiers Have Rights After All*, 87 J. CRIM. L. & CRIMINOLOGY 895-96 (1997).

16. See Reid v. Covert, *supra* note 10, at 16.

17. See Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 183-84 (1962).

18. See *id.*

19. "[S]tanding army" can be understood as a permanent, professional peacetime army. In contrast, a militia, or "armed citizenry" was composed of "free independent citizens that

tionary War. As United States citizens had opposed and rebelled against the oppressive British Rule, many harbored severe anxiety regarding the subsistence of a peacetime army.<sup>20</sup>

On the other hand, many citizens saw the very existence of the war as clear evidence that the new nation was in the need of a strong standing army.<sup>21</sup> The need for a standing army was a thought on the front burner for the Founding Fathers in 1775 when they passed the first legislation of the Continental Congress, which dealt extensively with discipline in the military.<sup>22</sup> While the Framers made it known that they distrusted the notion of a standing army, they did see the greater need to authorize a national armed force. They did this by adopting the American Articles of War, which authorized the national armed force and provided for a means to discipline the troops swiftly and without the required formalities of civilian justice.<sup>23</sup>

The Framers carefully diffused the war powers between the three separate branches of government, probably because of their distrust of unmitigated military power.<sup>24</sup> A separate court system was provided for the armed forces, and Article III did not include military courts.<sup>25</sup> Instead, Congress established courts-martial<sup>26</sup> under its Article I powers,<sup>27</sup> which

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would band together to defend themselves as necessary; as soon as peace was restored, they would return to their homes and regular occupation." Stephanie A. Levin, *The Deference That is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009, 1023-24 (1990). In modern terms, a militia is similar to the reserve components of the military.

20. *See id.* The standing army debate was between the federalists, who favored a professional military, and the anti-federalists, who favored a militia. *See id.* at 1023-24.

21. *See id.* at 1030.

22. *See* 2 JOURNALS OF THE CONTINENTAL CONGRESS 1775, June 30, 1775 (1905) at 111.

23. *See* Warren, *supra* note 17, at 184 (quoting Madison, Federalist No. 41, at 251 (Lodge ed. 1888)). The American Articles of War were based on the British Articles of War, which, in turn, had their origin in the military codes promulgated by King Gustavus in 1621. BISHOP, *supra* note 3, at 5. The Articles of War underwent major amendments in 1776, 1786, 1806, 1874, 1916, 1920 and 1948. Of the changes, there was a reduction in the number of members requisite to assemble a general court-martial, changes in the specification of officers authorized to convoke court-martial, and the addition of a field officer court-martial, precursor of the summary court-martial. David Schlueter, *The Court-Martial: A Historical Survey*, 87 MIL. L. REV. 129, 131-44 (1980).

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

25. *See id.* at 140. Article III is the Article which established the federal judiciary.

26. A court-martial is a military court for both trying and punishing military offenses and those common law crimes provided for in the Uniform Code of Military Justice (UCMJ). *See generally* CHARLES A. SHANOR & TIMOTHY P. TERRELL, MILITARY LAW IN A NUTSHELL 80-95 (1980). The jurisdiction is entirely penal and disciplinary; only criminal charges are tried

grant Congress the authority to make rules for the Government and Regulation of the land and naval Forces.<sup>28</sup> The assurance of disciplined troops was historically the function of the military justice system, and the tool to instill fear was the court-martial.<sup>29</sup> That tool was at the commander's complete discretion, and was used to instill fear and obedience in his soldiers. Commanders of the military accepted and vigorously defended the brutal nature of military justice because it was determined that in order to be effective, military justice must be swift and harsh.<sup>30</sup> While it was clear that there were some extreme deficiencies in the military justice system, interest in reform did not develop for almost another century.<sup>31</sup>

Brigadier General Samuel T. Ansell, the acting Judge Advocate General of the Army, advocated a radical revision to the 1916 Articles of War in the early part of the twentieth century.<sup>32</sup> Ansell was extremely critical of the Army's lack of uniformity regarding disciplinary actions and sentencing and the lack of a formal appeals process for courts-martial convictions.<sup>33</sup> Therefore, he advocated the creation of a centralized mandatory review system in the form of an appellate tribunal, as well as for the creation of uniformity in the judicial system.<sup>34</sup> However, Ansell's proposals were not adopted in the 1920 Articles, and this was largely due to the opposition from the Provost Marshall General Crowder, the principal author of the 1916 Articles and an outspoken defender of the then-existing system.<sup>35</sup>

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by court-martial, and the court-martial must have jurisdiction over the person and the offense. *See id.*

27. U.S. CONST. art. I, §8, cl. 14.

28. *See generally* Steven J. Carroll, *A Proposal for Streamlining the Military Justice System*, 36 NAVAL L. REV. 187 (1986).

29. *See id.*

30. *See* BISHOP, *supra* note 3, at 21. For example, in an attempt to combat desertion during the Revolution War, General George Washington ordered public execution of deserters with mandatory attendance by the members of the condemned soldier's unit. This was in an attempt to emphasize the gravity of the offense. Andrew M. Ferris, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 446 (1994).

31. *See* John O'Brien wrote a treatise on military law while he was a lieutenant in the Army. He advocated for a complete revision of the American Articles of War to make the military justice system more compatible with a republican form of government. *See* Ferris, *supra* note 30, at 447.

32. *See* General S.T. Ansell was a principal influence in the evolution of our now-existent system of military discipline. *See generally* Terry Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967).

33. *See id.* at 4.

34. *See id.*

35. *See* Frederic I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary - A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL

The need for a change became more apparent during World War II. A number in excess of sixteen million men and women volunteered, or were drafted into, active military service.<sup>36</sup> Tales of grave injustices were purported by the tens of thousands of citizens who had been subjected to the military's system of discipline during the more than two million courts-martial.<sup>37</sup> This far-reaching displeasure with the military justice system finally instigated a movement towards reform, which took place in the enactment of the Uniform Code of Military Justice (UCMJ) in 1950.<sup>38</sup> Since the adoption of the Articles of War by the Continental Congress in 1775, the execution of the UCMJ presented the first momentous alteration in the management of military discipline in the American armed forces. As Professor Edmund Morgan, the primary drafter of the UCMJ, had served under General Ansell, many of the proposals suggested by General Ansell four decades earlier were incorporated into the UCMJ.<sup>39</sup> In addition to bringing uniformity to the armed forces by way of procedural and substantive law,<sup>40</sup> the UCMJ also created a centralized review panel in each of the armed forces that had jurisdiction to hear the appeals from defendants whose sentences had reached certain jurisdictional thresholds.<sup>41</sup> Also created by the UCMJ was a three member panel of civilian judges who had the jurisdiction to hear mandatory appeals regarding all death penalty cases.<sup>42</sup>

The UCMJ governed the military throughout the Korean War and into the 1960's without any significant changes. However, in 1968, Congress enacted the Military Justice Act of 1968.<sup>43</sup> Congress enacted this

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Rts. J. 629, 636-37 (1994).

36. See Keith M. Harrison, *Be All You Can Be (Without the Protection of the Constitution)*, 8 HARV. BLACKLETTER J. 221, 227 (1991).

37. See Ferris, *supra* note 30, at 450.

38. See 10 U.S.C. §§ 801-940.

39. See Lederer & Hundley, *supra* note 35, at 636.

40. Prior to the UCMJ, each branch of the military was regulated by a different set of laws. The conduct of Army soldiers was regulated by the Articles of War; sailors and marines were regulated by Articles for the Governance of the Navy; and Coast Guard was regulated by yet other laws. The Air Force had been independent of the Army until 1947, and the existing Articles of War were made applicable to the Air Force in 1948. Now, all military branches are regulated by the UCMJ. See *generally id.*

41. An original requirement in the UCMJ was that any sentence that included the death penalty was to be reviewed by a Board of Review. See *id.* However, in 1968, the Board of Review was re-named as the Courts of Military Review. Review of a death penalty sentence is now mandatory. See Military Justice Act of 1968, 10 U.S.C. § 861 (1988).

42. The three person panel was increased to a five person panel by Congress in the 1989. Defense Authorization Act. See *id.*

43. See Walter T. Cox, *The Twenty-Seventh Annual Kenneth J. Hodson Lecture: Echoes and Expectations: One Judge's View*, 159 MIL L. REV. 183, 187 (1999). Chief Judge Walter

new Act during a time when there were several societal and judicial issues affecting our nation, one of which was the Civil Rights movement. Some of the most important military bases were surrounded by completely segregated communities.<sup>44</sup> While it is true that President Truman had integrated the military almost two decades earlier, the majority of communities rejected integration.<sup>45</sup> This was also an era in which the Vietnam was escalating, and there were a great number of angry protesters. These protesters were members of not only the civilian sector, but also the military sector.<sup>46</sup> Due to the environment, it is no surprise that Congress became interested in improving the military justice system. Thus, there were some significant changes made under the Military Justice Act of 1968.

### III. CHINESE MILITARY LAW IN THE BEGINNING

The relationship of the United States with the People's Republic of China (PRC) has progressed from one of armed conflict to the present alliance of limited, yet incipient, cooperation within the last thirty-five years. As China's armed forces are the most massive in the world, its study is of great interest as well as great importance.<sup>47</sup> With a military so large, surprisingly little has been printed about its military legal system. However, there are several reasons for such a lack of written information, and they are as follows: (1) the Chinese Communist Party (CCP) displaced virtually all law by rule through policies and directives; (2) there is extreme sensitivity in the PRC regarding "state secrets;" and (3) many of the military legal documents are considered classified; therefore, relatively few have emerged from China.<sup>48</sup>

Of particular interest is the Chinese People's Liberation Army's (PLA) theory and employment of capital punishment for crimes committed by soldiers and tried by the courts of the PLA. But, it is first important to understand the military system as a whole. The Chinese PLA's military regulations are based on political sentence and warrant that the revolu-

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T. Cox currently serves in the US Army Judge Advocate General Corps, and he wrote of his experiences in the JAG Corps, especially during times of change.

44. *See id.* at 188.

45. *See id.*

46. *See id.*

47. The last available count of the members of the armed forces of the PRC, collectively entitled the Chinese People's Liberation Army (PLA), done in 1996, had a total strength of 2,950,000. 71.5% of this number was army, 11.9% was navy and 16.6% was air force. *See* Captain David C. Rodearmel, *Military Law in Communist China: Development, Structure and Function*, 119 MIL. L. REV. 1 n.1 (1988).

48. However, of the documents that have been published, such as source documents and accounts of military trials, an adequate representation may be realized. *See generally id.*



tionary line will be carried out.<sup>49</sup> The principal functions of the Chinese Communist Military legal system are twofold: (1) to sustain an elevated degree of political oneness between the CCP and the PLA, and (2) to maintain military order and discipline, thereby increasing the overall military potential.<sup>50</sup> The military legal system has not only had the task of maintaining order and discipline within the PLA, it has also been responsible for governing the civil sector during both times of drastic political change and periods of crisis.<sup>51</sup> Additionally, the legal authority for large areas of Communist China has been comprised of the Military Tribunals of Military Control Committees during significant periods of its history, when conditions of martial law prevailed.<sup>52</sup>

It is vital to obtain a rudimentary understanding of some key concepts within the broader setting of traditional Chinese law in order to understand the role of the military legal system of Communist China. The military legal system of Communist China consists of both communist law and Chinese law.<sup>53</sup> While it is true that the legal system of the PRC has drawn heavily upon Soviet sources, it still retains many of the distinctive features of China's own legal heritage.<sup>54</sup>

Traditional China was guided primarily by the Confucian philosophy: upright and benevolent personal behavior and proper observance of social relationships produced societal order and well being.<sup>55</sup> The belief was that upright behavior on the part of individuals would bring order and harmony to each family, and that in turn would lead to order and harmony in the states (making them well-governed), which would lead to order and harmony in the world – world peace.<sup>56</sup> This overall behavior was governed by *li* – the moral code or customary law of China.<sup>57</sup> Confucius expressed the preference for moral persuasion as opposed by rule by harsh punishment and formalized codes. He said if a society regulates by the use of penalties when laws are broken, this would serve as a deterrent to avoid jail. Yet, this form of moral code will deter persons from having a sense of shame. In order for people to be truly good, they must have a sense of shame. This can be accomplished by leading people by virtue

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49. See generally KIM HYUNG I, *FUNDAMENTAL LEGAL CONCEPTS OF CHINA AND THE WEST: A COMPARATIVE STUDY* (1981).

50. See Rodearmel, *supra* note 47, at 2.

51. See *id.* at 2-3.

52. See generally JEROME ALAN COHEN, *THE DYNAMICS OF CHINA'S FOREIGN RELATIONS* (1970).

53. See Rodearmel, *supra* note 47, at 3.

54. See *id.* at 3.

55. See generally JEROME ALAN COHEN ET AL., *ESSAYS ON CHINA'S LEGAL TRADITION* (1980).

56. See *id.*

57. See *id.*

and to restrain them by the rules of decorus (*li*).<sup>58</sup>

The Confucian philosophy was opposed by the Legalist school of thought, which favored a ruthless punitive system of positive law (*fa*)<sup>59</sup> in order to sustain public tranquility and establish a strong state. The legalists disparaged *li* as being a volatile basis for government since the *li* are unwritten, particularistic, and subject to arbitrary interpretation.<sup>60</sup>

The Confucian philosophy did eventually prevail as the origin of traditional Chinese society; however, facets of legalism were also integrated. The laws were primarily penal in nature, used to penalize violations of the codified Confucian ethical norms.<sup>61</sup> Yet, the law was rarely utilized to uphold these norms; the law was only needed when moral persuasion and societal pressure failed. Laws that only affected an individual were rarely used. There was a stronger focus on the laws that, if broken, violated the entire social order, and ultimately, the entire harmony within the world.<sup>62</sup> The belief that disastrous natural phenomena – floods, droughts, tempest, insects and pests – were the consequence of human disorder provided further theoretical justification for punishment of wrongdoers; they were a double menace to society.<sup>63</sup>

China law differs greatly from that in the United States. There was no concept that the accused is presumed innocent until proven guilty.<sup>64</sup> Also, the principle of equality before the law did not exist; rather, differing treatment was accorded based on the relative class and social status of the offender and the victim.<sup>65</sup> Additionally, voluntary surrender and confession, to keep with Confucian beliefs, were highly encouraged and could be a mitigating factor in criminal cases.<sup>66</sup> As a matter of fact, torture was an acceptable means of procuring a confession during trials under the penal code of the Ch'ing dynasty.<sup>67</sup> Failure to confess, on the other hand, was generally seen as obstinacy and could be equivalent to an

58. See generally JACQUES GUILLERMAZ, *A HISTORY OF THE CHINESE COMMUNIST PARTY* (Anne Destenay trans.) (1972).

59. For an exposition of the meaning and functions of *li* and *fa*, see Benjamin Schwartz, *On Attitudes Toward Law in China*, in *GOVERNMENT UNDER LAW AND THE INDIVIDUAL* (M. Katz ed. 1957), reprinted in JEROME ALAN COHEN, *THE CRIMINAL PROCESS IN THE PEOPLES REPUBLIC OF CHINA, 1949-63* 62 (1968) [hereinafter COHEN].

60. See DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 23 (1967).

61. See Rodearmel, *supra* note 47, at 4.

62. See generally *id.*

63. See Bodde, *supra* note 60.

64. See Michael Thieme, *The Debate on the Presumption of Innocence in the People's Republic of China*, 10 Rev. Socialist L. 277 (1984).

65. See BODDE, *supra* note 60, at 33.

66. See generally W. Allyn Rickett, *Voluntary Surrender and Confession in Chinese Law: The Problem of Continuity*, 30 J. OF ASIAN STUD. 797 (1971).

67. See generally BODDE, *supra* note 60. The Ch'ing dynasty reigned from 1644 – 1912.

aggravating factor in criminal cases.<sup>68</sup> Another difference was that if the laws did not specifically speak to a given offense or penalty, a magistrate had the authorization to apply another statute by analogy.<sup>69</sup> Finally, there were no defense attorneys to assist the accused.<sup>70</sup> The laws penalized as disrupters of harmony both those who encouraged others to bring about court actions, as well as those who benefited from them; therefore, the development of a legal profession was problematic.<sup>71</sup>

Within the imperial legal codes, there was a separate section devoted to regulating the military.<sup>72</sup> There was a section, the fifth division of the *Ta Ch'ing Lu-li*, which was devoted to military laws.<sup>73</sup> These laws punished offenses such as divulging state military secrets,<sup>74</sup> unauthorized sale of military material<sup>75</sup> and desertion.<sup>76</sup> If the military law was not abided by, officers had the authority to adjudge eighty blows with a bamboo stick to the offender; furthermore, if there was a second offense, the officer was authorized to administer up to one hundred blows.<sup>77</sup> Yet, if an officer punished too harshly, he could be punished for the crime of exciting and causing rebellion by oppressive conduct, which is also a capital offense.<sup>78</sup> A death sentence to an officer under these circumstances could only be executed after two years imprisonment.<sup>79</sup> However, oftentimes the offender was pardoned or had his sentence reduced during this period. There were other more serious crimes which called for immediate execution.

There was not a great dissimilarity between civilian law and military law within the imperial system. There were no courts or tribunals dedicated to the military. Military defendants, as well as civilian defendants, were tried before the standard court system under the supervision of the imperial government's Board of Punishments.<sup>80</sup> For example, in 1807 the Department for Kuangtung of the Board of Punishments sentenced Naval First Captain Ch'en P'an-kuei to sixty blows with the heavy bamboo in addition to one year of penal servitude. This sentence was imposed for

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68. See Rickett, *supra* note 66.

69. See BODDE, *supra* note 60, at ch. VI.

70. See *id.* at 69.

71. See Rodearmel, *supra* note 47, at 5.

72. See *id.* at 7.

73. See *id.* at n.31.

74. See *id.* at n.32.

75. See *id.* at n.33.

76. See Rodearmel, *supra* note 47, at 7 n.34.

77. See *id.* at n.35.

78. See *id.* at 7.

79. See *id.* at n.36.

80. See generally BODDE, *supra* note 60. Three representative trials of military defendants in the civilian court system are reported.

diverting funds from his sailors' payroll to repair his ship's sails and other equipment. These acts were in violation of the Ch'ing code's prohibitions on exceeding authorizations for expenditures. He was tried in the same courts as civilians. However, because none of the funds had been directed for his personal use, and because he had restored them, the Board recommended to the Board of War that Ch'en be reinstated to his office and that his punishment be remitted.<sup>81</sup>

Another example of a war crime heard in a general court is as follows: a sergeant of the military, Sergeant Li Ch'ung-shen, unlawfully attempted to mediate a debt dispute in the Chihli province. In an attempt to force a confession, Sergeant Li ordered his soldiers to beat one of the parties, Kuo Fu-jen, and his son. Kuo was so enraged, he hung himself. Sergeant Li was sentenced to one hundred blows with the heavy bamboo, three years of penal servitude and payment of ten ounces of silver to the family for funeral expenses. The soldier who followed the order and beat Kuo was also punished. He received eighty blows of the heavy bamboo for doing what ought not be done.<sup>82</sup>

Not only were military members adjudged in general state courts, but punishment under the Military Laws of the Ch'ing code was not limited to members of the military.<sup>83</sup> Some of the Military Laws for which civilians could be punished were as follows: crossing a border without examination at a government border post;<sup>84</sup> divulging state secrets;<sup>85</sup> purchasing military material sold without authorization;<sup>86</sup> and harboring deserters.<sup>87</sup> Additionally, military personnel were also subjected to punishment under laws other than those listed under the Military Laws.

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81. *See id.* at 478-80.

82. *See id.* at 458-60.

83. *See* Rodarmel, *supra* note 47, at 7.

84. *See generally id.* The penalty for such a crime consisted of one hundred blows and three years' imprisonment. The punishment could be increased to death by strangulation after two years' imprisonment if the offender had communicated with foreign nations beyond the borders. Additionally, officers and guards who knew of the unauthorized border crossing, or they were not vigilant at their post, could suffer similar penalties.

85. *See generally id.* After two years imprisonment, death by beheading was the punishment for divulging military dispositions and plans to an enemy. The wrongful opening and reading of any sealed government or official correspondence was punishable by sixty blows. If the correspondence related to any important military affairs, the punishment was increased to one hundred blows and three years banishment as a divulger of state secrets, even though there is no requirement in the law that the secrets be shared with another.

86. *See generally id.* The unauthorized purchase carried a lesser penalty. If the article purchased was not prohibited, such as a weapon, the punishment was forty blows. However, purchasing prohibited articles meant punishment of eighty to one hundred blows and perpetual banishment to a distance of 3,000 *li*.

87. *See generally id.* The punishment for harboring a deserter is one hundred blows and military banishment.

For many years, the Military Law was not only for military members, and it was not heard in military tribunals. There were many different dynasties throughout the years, yet no changes were drastic. However, there was a need, however, for a separation of the military and civilian legal systems. The changes slowly began to take place, and then finally the separation was reinforced by the 1943 Shensi-Kansu-Ningsia Border Region Statute Protecting Human and Property Rights.<sup>88</sup> The statute provided that except in periods of martial law, non military personnel who commit crimes will not be tried by military law.<sup>89</sup> Additionally, the statute provided for numerous other procedural safeguard for both the military and civilian legal systems. The right to appeal was allowed.<sup>90</sup> Of great importance, cases involving the death penalty were to be reviewed and approved by the central border region government before execution, even if no appeal was filed.<sup>91</sup> However, there is an exception for emergency wartime situations.<sup>92</sup> There was a provision for speediness, specifically, that arrested persons and any evidence is to be brought to the Public Security Bureau within twenty four hours of the arrest,<sup>93</sup> and judicial procedures were to be completed within thirty days of having received it.<sup>94</sup>

Military trials during this time were conducted publicly, and they tended to be rather informal in procedure. There was no yelling or screaming from the on-lookers; however, they were free to question the accused during the proceeding. The defendant and the witnesses testified, and the judge asked questions of them.

By the end of this period, the Chinese Communist military legal system had undergone considerable development, both substantively and procedurally. The military legal system became functionally differentiated from the civilian system as its jurisdiction over civilians and civilian offenses was continuously reduced.<sup>95</sup> There were periods where, during turmoil, the military laws governed civilians. However, it was determined that the separation was better.

A separate formal system of military courts was established by the 1954 Constitution and the organic laws enacted under its authority. In addition to establishing a Supreme People's Court and local people's courts, the Constitution provided for military courts as part of a system of

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88. See generally DAVID BACHMAN, *THE FOURTEENTH CONGRESS OF THE CHINESE COMMUNIST PARTY*, Nov. 1992.

89. See generally COHEN, *supra* note 59.

90. See *id.*

91. See *id.*

92. See *id.*

93. See *id.*

94. See generally COHEN, *supra* note 59.

95. See Rodarmel, *supra* note 47, at 32.

“special courts.”<sup>96</sup> The Organic Law of the People’s Courts,<sup>97</sup> adopted one day after the Constitution was proclaimed, specified the establishment of military courts as one of the special courts.<sup>98</sup> Military procuracies were also authorized under the provision for special people’s procuracies of the Organic Law of the People’s Procuratorates.<sup>99</sup> While it is true that both statutes specified that the organization of military courts and procedures would be prescribed separately by the National People’s Congress,<sup>100</sup> no such acts have been published in the official *Collection of Laws and Regulations of the People’s Republic of China*.<sup>101</sup> If they truly were enacted, they are probably regulated and classified under the broad 1951 Regulation for the Preservation of State Secrets.

Military courts were organized in each of the country’s eleven Military Regions and at the Military Provincial District level.<sup>102</sup> The military courts tried a variety of cases involving contradictions between members and the enemy or criminal elements who violated criminal law.<sup>103</sup> A functionally specialized class of judge advocate officers to carry out legal duties was provided for in the Regulations on the Service of Officers.<sup>104</sup>

While the military courts post-1954 were modernized and regulated, they also exposed several distinctive aspects retained from the traditional Chinese and early Communist judicial systems. First, the established penchant for procuring confessions is evident. The related traditional practice of granting leniency for repentance shown after confession is also retained.<sup>105</sup> Finally, the court applied the traditional principle of analogy by citing the analogy article of the Statute on Punishing Counterrevolutionaries as one of the bases for its judgement.<sup>106</sup>

Lesser offenses were normally handled within local military units, as

96. XIANFA [Constitution of the People’s Republic of China] art. 73 (1954) *cited in* FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA 34 (A. Blaustein ed. 1962).

97. ORGANIC LAW OF THE PEOPLE’S COURTS OF THE PR (1954). *Id.* at 131 [hereinafter ORGANIC LAW].

98. *See generally* XIANFA, *supra* note 96, at 34.

99. *See generally* ORGANIC LAW, *supra* note 97, at 144.

100. *Id.*

101. *See* VINCENT S. GREEN, *EXTREME JUSTICE*, ch. 5 (1995).

102. *See* GUILLERMAZ, *supra* note 58.

103. *See generally* CHINESE COMMUNIST AFFAIRS, FACTS AND FEATURES (1969).

104. *See* Rodearmel, *supra* note 47, at 39.

105. This practice is codified in Article 14 of the Statute on Punishing Counterrevolutionaries: persons who have committed crimes specified in this Statute may be treated leniently, their punishment may be mitigated or may be completely exempted from punishment if one of the following circumstances exists: 1) they voluntarily appear before the people’s government; admit their guilt, and sincerely repent of their crimes; 2) before the discovery or investigation of a crime, or after it, they frankly confess to what they have done and are sincerely repentant and by their selfless work atone for the crime. *See id generally.*

106. *See id.* at 41.

opposed to going through the military courts. The handling of inter-military discipline was a joint responsibility of the commander of the unit and the unit political commissar.<sup>107</sup>

During the Cultural Revolutionary Period of 1966–1976, changes occurred once again. The military jurisdiction was extended to include the civilian sector. However, this period was very short lived.<sup>108</sup> The next move was to that of complete Communist Party control.

During this time, reference in case law was not based upon any written laws or regulations. Instead, the focus was in accordance with party policy.<sup>109</sup> There also was no mention made of the crime of the accused. Rather, a lenient sentence was given for crimes, which the defendant confessed to, and more severe treatment was threatened for “those who resist.”<sup>110</sup> These policies discourage an accused from attempting a defense or challenging any evidence presented by the authorities.

The formal military legal system was not spared during the Cultural Revolution. The military courts and procuracies were basically “dismantled,” and it was not officially revived until October of 1978.<sup>111</sup>

Until 1982, the PLA had never operated under a unified criminal code governing military crimes.<sup>112</sup> However, such a code was needed, according to the PLA General Political Department, for four key reasons. Those reasons are as follows: 1) strengthen the army legal system; 2) correctly punish servicemen for their criminal offenses against their duties; 3) educate the large numbers of commanders and fighters in strictly abiding by the state’s laws and honestly executing their duties; and 4) consolidate and enhance the army’s combat effectiveness.<sup>113</sup>

The PRC Provisional Regulations on Punishing Servicemen Who Commit Offenses Against Their Duties, which the NPC Standing Committee adopted as a military criminal law on June 10, 1981, was implemented on January 1, 1982.<sup>114</sup> While most military matters were handled as state secrets in the past, this law was announced and published in the press. The new military criminal law was adopted as a supplement and continuation of the Criminal Law to cover crimes committed by servicemen that are not written into the Criminal Law.

Serious violations of the Military criminal law may be punished by

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107. *See id.*

108. *See id.* at 42.

109. Rodearmel, *supra* note 47, at 47.

110. *Id.*

111. *See id.*

112. *See generally* Major Darla P. Wollschlaeger, *OTJAG's China Initiatives: Past, Present, Future*, 1998 - JUL ARMY L. 55 (1998).

113. Xinhua News Agency, *Explanation of Regulations*, June 10, 1981, translated in Foreign Broadcast Information Service, June 12, 1981, at K4.

114. *See* Rodearmel, *supra* note 47, at 57.

the military courts. If there was only a minor offense of the military criminal law, that offense would likely be handled in accordance with military discipline.<sup>115</sup>

#### IV. DEATH PENALTY IN THE US MILITARY

Since the first American Articles of War in 1775, Congress allowed court-martial jurisdiction for service members for non-military crimes, yet limited the authority to all crimes that were not capital.<sup>116</sup> In order to construe the meaning of "not capital," Colonel Winthrop, referred to as the Blackstone of Military Law,<sup>117</sup> stated that the Articles deliberately debarred from the jurisdiction of courts-martial all capital crimes of officers or soldiers, no matter under what circumstances they are committed. It mattered not if they were against military persons or civilians. Capital crimes are to be understood as crimes punishable by death by the common law, or by statute of the United States, for example: murder, arson or rape.<sup>118</sup>

During the Civil War, however, the military was granted the authority (by Congress) to try a service member for the civilian offense of capital murder.<sup>119</sup> However, this new statute was limited, and the military's jurisdiction only extended to times "of war, insurrection, or rebellion."<sup>120</sup> This statute had no application when the "the civil courts were open and in the undisturbed exercise of its jurisdiction."<sup>121</sup> The Court further restricted the application of the jurisdiction of courts-martial by indicating that in order for a non-military offense to be tried by the military, the offense had to be one that prejudiced good order and discipline.<sup>122</sup>

Changes occurred once again in 1916 when Congress extended courts-martial jurisdiction to specified non-military offenses, such as larceny, robbery and assault. There was no requirement of prejudice of good order and discipline.<sup>123</sup> Congress took a look at the death penalty during the same time and explicitly provided that murder and rape were punish-

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115. *See id.*

116. *See* WINTHROP, *supra* note 2, at ch. XXV.

117. *See* Reid v. Covert, *supra* note 10, at 19 n.38.

118. *See* WINTHROP, *supra* note 2, at 721.

119. *See* Lee v. Madigan, 358 U.S. 228, 233 (1959).

120. Coleman v. Tennessee, 97 U.S. 509, 513 (1878).

121. Caldwell v. Parker, 252 U.S. 376, 386 (1920) (quoting Coleman v. Tennessee, 97 U.S. 509, 515 (1978)).

122. *See Ex parte Mason*, 105 U.S. 696, 698 (1882) (stating that the graveness of the military offense was not simply an assault with intent to kill, but an assault *by a soldier on duty* with intent to kill *a federal prisoner which he was standing guard* (emphasis added)).

123. *See* WINTHROP, *supra* note 2, at ch. XXV.



able by death in a court-martial; however, it further provided that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.<sup>124</sup> Although the Articles were revised in 1920, there was no change made to the jurisdiction of courts-martial regarding capital offenses until the enactment of the UCMJ. The UCMJ extended the military's jurisdiction to try service members for murder and rape within the geographical limits of the United States for capital offenses in peacetime.<sup>125</sup>

While at first blush it may appear that US service-members would be given the same rights and liberties as civilians, established through the Constitution of the United States, this is not the case. For example, it is unclear how the Eighth Amendment applies to the military. The question of the Eighth Amendment's applicability is generally focused on the type of punishment permissible.<sup>126</sup> It is ironic that the men and women who defend the constitutional rights enjoyed by Americans are themselves deprived of some of those rights.

In 1973, the D.C. Circuit reviewed a military death sentence that had been commuted to life imprisonment.<sup>127</sup> In dicta, the court noted that *Furman*<sup>128</sup> had not invalidated the military sentencing statute, article 118.<sup>129</sup> On appeal, the Supreme Court did not decide this question specifically, but indicated that the *Furman* concern of the arbitrariness might not be a problem in military courts.<sup>130</sup>

Thus far, there has been one military appellate court to review the

124. *See id.*

125. *See* 10 U.S.C. § 918 (1994).

126. *See* 10 U.S.C. § 855 (stating that punishment by flogging, or by branding, marking or tattooing on the body, or any other cruel or unusual punishment may not be adjudged by any court-martial or inflicted upon a person subject to this chapter.).

127. *See* *Schick v. Reed*, 483 F.2d 1266 (D.C. Cir. 1973), *aff'd*, 419 U.S. 256 (1974).

128. *See* *Furman v. Georgia*, 408 U.S. 238 (1972). This case regards the eighth amendment issue of cruel and unusual punishment. *Furman* invalidated the statutory capital punishment schemes of three states because the sentencing portions did not guard against arbitrary and capricious imposition of the death penalty.

129. *See generally* *Shick v. Reed*, 419 U.S. 256 (1974).

130. *See id.* "Does *Furman* apply to death sentences imposed by military courts where the asserted vagaries of juries are not present in other criminal cases? Our disposition of the case will make it unnecessary to reach this question." *Id.* at 260. However, Justice Marshall argued the very opposite. He argued for the *Furman* applicability and stated:

[n]othing in *Furman* suggests that it is inapplicable to the military. The per curiam carves out no exception to the prohibition against discretionary death sentences. The opinions of the five-member majority recognize no basis for excluding the members of the Armed Forces from protection against this form of punishment.

*Id.* at 271 n.5 (Marshall, J., dissenting).

constitutionality of the UCMJ on capital sentencing schemes. That court assumed without question that the concerns of *Furman* do apply in military courts.<sup>131</sup> The Court of Military Appeals (hereinafter CMA) affirmatively stated that the Bill of Rights applies to the military personnel, as well as civilian citizens. The *Matthews*<sup>132</sup> case involved a general court martial sentencing a Private First Class to death for the rape and murder of an American civilian in Germany. The court looked to determine if the crimes which Matthews committed had any "characteristics which, for purposes of applying the prohibition against 'cruel and unusual punishments' distinguish them from similar crimes tried regularly in State and Federal courts."<sup>133</sup> The Court determined that there was no "military necessity" for distinguishing the courts-martial capital sentencing procedures from their civilian counterparts; therefore, the CMA applied the Supreme Court precedent to the military justice system.<sup>134</sup>

Upon reviewing Supreme Court precedent, the *Matthews* court found that constitutionally valid death penalty statutes shared certain common features. Those features include: 1) bifurcated sentencing procedure; 2) the presence of aggravating factors; and 3) the opportunity for the defendant to present unlimited extenuation and mitigation evidence.<sup>135</sup> The CMA based their analysis on these features, and while they held most of the death penalty procedures followed by the courts-martial as valid, they did find one fundamental defect. Neither the UCMJ nor the Rules for Court-Martial (RCM) requires that courts-martial members "specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty."<sup>136</sup> Due to this defect, the Court reversed Matthews' death sentence. The Court stated, in dicta, that Congress or the President could lawfully and easily remedy the defect in the UCMJ capital sentencing scheme.<sup>137</sup> That defect was ultimately corrected by the President by promulgating the RCM 1004.<sup>138</sup> The specific purpose of RCM 1004 was to correct the deficiency by enumerating established procedures for capital cases,<sup>139</sup> including a list of aggravating factors which

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131. See *United States v. Matthews*, 13 M.J. 501, 521 (A.C.M.R. 1982).

132. See *United States v. Matthews*, 16 M.J. 354, 359, 361 (C.M.A. 1980).

133. *Id.* at 369.

134. See *id.* at 369, 377-78.

135. See *id.* at 377.

136. *Id.* at 379.

137. *Matthews*, 16 M.J. at 380-82.

138. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.) [hereinafter MANUAL]. Ironically, Rules for Court-Martial (RCM) 1004 had been circulated for public comment prior to the *Matthews* decision, and it was cited in the *Matthews* opinion. *Matthews*, 16 M.J. at 381.

139. RCM 1004 requires a unanimous finding that the accused is guilty of a capital offense before a death sentence may be imposed. RCM 1004(a)(2). This, of course, should sound

determine death penalty eligibility:

the offense was committed before the enemy, except in the case of rape or murder; the accused knowingly created a grave risk to national security or mission accomplishment; the offense caused substantial damage to national security, except in the case of rape or murder the offense substantially endangered the lives of persons other than the victim, except in the case of aiding the enemy, espionage, or rape; the accused intended to avoid hazardous duty; in the case of rape or murder, the offense was committed in time of war; in the case of premeditated murder: (a) the accused was serving a sentence of thirty years or more at the time of the murder; (b) the murder was committed while the accused was engaged in the commission or attempted commission of robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel; (c) the murder was committed to receive money or value; (d) the accused procured another person to commit the murder; (e) the murder was committed to avoid apprehension; (f) the victim was the President, a member of Congress, a U.S. Judge, or the head of a foreign state; (g) the accused knew the victim was a member of civilian law enforcement or of military rank of noncommissioned officer or above; (h) the murder was committed with the intent to obstruct justice; (i) the murder was preceded by the intentional infliction of substantial mental or physical harm to the victim; or (j) the accused had been found guilty in the same case of another murder specification.<sup>140</sup>

In the case of a violation of Article 118 (4), the accused was the actual perpetrator of the killing; in the case of rape: (a) the victim was under the age of twelve, or (b) the accused maimed or attempted to kill the victim; if death is authorized under the law of war for the offense; or in the case of aiding the enemy or espionage, the accused had received a prior life or death sentence involving espionage or treason, or the accused knowingly created a grave risk of death to a person other than the victim.<sup>141</sup>

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similar as this is what is utilized in civilian courts. The Rule also requires unanimous finding that at least one aggravating factor is present, and that any extenuating or mitigation circumstances are substantially outweighed by any admissible aggravating factor. RCM 1004(b)(4)(A). Additionally, the Rule provides that the accused is to have broad latitude in extenuation and mitigation, RCM 1004(b)(3), and is entitled to have members of the courts-martial instructed to consider all such evidence before deciding upon a sentence of death. RCM 1004(b)(6). This, again, is very similar to what is practiced in civilian courts.

140. See RCM 1004(c).

141. See MANUAL, *supra* note 138, at 128-30. All eleven aggravating factors are listed in this cite.

Specifically within the UCMJ, the imposition of the death penalty can be permitted for eleven purely military offenses and three traditional common law crimes. The military offenses include: 1) desertion in time of war;<sup>142</sup> 2) assaulting a superior commissioned officer in time of war;<sup>143</sup> 3) mutiny or sedition;<sup>144</sup> 4) misbehavior by a subordinate compelling surrender;<sup>145</sup> 5) improper use of a countersign in time of war;<sup>146</sup> 6) forcing a safeguard;<sup>147</sup> 7) aiding the enemy;<sup>148</sup> 8) spying in time of war;<sup>149</sup> 9) espionage;<sup>150</sup> 10) misbehavior of a sentinel in time of war;<sup>151</sup> and 11) willfully disobeying a superior commissioned officer in time of war.<sup>152</sup> Those three crimes authorized under the UCMJ which are traditionally common law crimes are as follows: 1) premeditated murder;<sup>153</sup> 2) felony murder,<sup>154</sup> and 3) rape.<sup>155</sup> Of the fourteen listed offenses, wartime spying is the only one that carries a mandatory death penalty. All others carry a permissive death penalty, namely: premeditated murder, murder committed in the course of certain felonies, rape, mutiny, certain types of espionage and certain other wartime offenses.<sup>156</sup> Strangely, with all the current excitement regarding the death penalty issues, Congress has not revised the death sentencing provision of the UCMJ since the Code was enacted.

Private First Class (PFC) John Arthur Bennett, at age nineteen, was sentenced to death by a court-martial. He was tried and convicted of rape and attempted murder of an eleven year old Austrian girl.<sup>157</sup> Seven years later PFC Bennett, United States Army, requested fried shrimp, peaches, hot rolls, and biscuits for his last meal.<sup>158</sup> A few hours after dinner, just after midnight on April 13, 1961, Bennett's life came to an end. He fell from a rain-drenched scaffold with a hangman's noose tightened around his neck. He held on to life for sixteen minutes and five seconds, and then

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142. *See* 10 U.S.C. § 855

143. *See id.* §890.

144. *See id.* §894.

145. *See id.* §801.

146. *See id.*

147. *See id.* §802.

148. *See id.* §803

149. *See id.* §806.

150. *See id.* §806 (a).

151. *See id.* §913.

152. *See id.* §890.

153. *See id.* §918.

154. *See id.*

155. *See id.* § 920.

156. *See* R.C.M. 1004 (b)(1).

157. *See generally* Cody M. Weston, *United States v. Loving: The Resurrection of Military Capital Punishment*, 77 OR. L. REV. 365 (1998).

158. *See id.*

he died.<sup>159</sup> His death marked the last United States Military execution for quite some time.

The United States military executed one hundred and sixty service members from 1930 to 1961.<sup>160</sup> However, from 1961 to 1989, the United States Court of Appeals for the Armed Forces (CAAF) heard very few death penalty cases. Since the enactment of UCMJ, the military has executed ten service members.<sup>161</sup> Of those cases heard, there were four with significant importance.<sup>162</sup> One of these cases, *United States v. Matthews*,<sup>163</sup> held that the military death penalty scheme of the time was unconstitutional under the Supreme Court capital punishment decision of *Furman v. Georgia*.<sup>164</sup>

The first in a series of cases regarding the death sentence was *United States v. Curtis*.<sup>165</sup> A central issue in this case was whether Congress could delegate to the President the authority to proscribe the rules and procedures for death sentences in the military. The *Curtis* case was remanded to the Navy-Marine Corps Court of Military Review.<sup>166</sup> Finally, in 1997, the five-judge Court of Appeals for the Armed Forces<sup>167</sup> reversed *Curtis*'s death sentence, for other reasons.<sup>168</sup>

While it is true that the *Curtis* case was the seminal decision regarding constitutional questions of capital punishment, it was the case of *United States v. Loving*,<sup>169</sup> in 1994, that first made its way to the Supreme

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159. Richard A. Serrano, *Last Soldier to Die at Leavenworth Hanged on an April Storm*, L.A. TIMES, JULY 12, 1994, at A14.

160. See National Institute of Justice Reports, U.S. Dept. of Justice, Office of Justice Programs, 1991.

161. See Cynthia Swarthout Conners, *The Death Penalty in Military Courts: Constitutionally Imposed?*, 30 UCLA L. REV 366, 404 (1982). The first nine executions were for murder, occurring over a condensed time period from 1954 to 1959 and then Bennett's 1961 execution was for rape. See *id.* at 369 n.18.

162. See *United States v. Hutchinson*, 18 M.J. 281 (C.M.A. 1984), *cert. denied*, 469 U.S. 981 (C.M.A. 1984) (the United States Court of Military Appeals was redesignated the CAAF in 1994); *United States v. Rojas*, 17 M.J. 154 (C.M.A. 1984); *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983); *United States v. Kemp*, 13 C.M.A. 89, 32 C.M.R. 89 (1962).

163. See *Matthews*, 16 M.J. 354. Army Private First Class Wyatt Matthews had received a death sentence for the rape and murder of an American civilian in Germany.

164. See *Furman v. Georgia*, *supra* note 128 (holding a civilian death sentence unconstitutional under the Eighth Amendment because the sentence was imposed arbitrarily).

165. See *United States v. Curtis*, 33 M.J. 101, 110 (C.M.A. 1991).

166. See *id.*

167. On the fifth of October, 1994, the National Defense Authorization Act for Fiscal Year 1995 changed the name of the U.S. Court of Military Appeals to the U.S. Court of Appeals for the Armed Forces.

168. See *United States v. Curtis*, 46 M.J. 129, 130 (C.A.A.F.1997).

169. See *United States v. Loving*, 41 M.J. 213 (1994); *Loving v. United States*, 577 U.S. 748 (1996).

Court. The Supreme Court affirmed Loving's death sentence and approved the death penalty rules and procedures adopted by the President in the *Manual for Courts-Martial*. Additionally, the Court recognized that the military constitutes a specialized community governed by a separate discipline from that of the civilian, and the President can be entrusted to determine what limitations and conditions on punishment are best suited to preserve that special discipline.<sup>170</sup> It seems appropriate that the President should have a part in determining what is best for military justice. He is, after all, the Commander-in-Chief of the Armed Forces. Additionally, it is important to note that the Framers of our Constitution did not want the military justice system to have enormous power; they preferred the safeguards as they were leery of a standing army.

With *United States v. Loving*,<sup>171</sup> the Supreme Court smoothed the path for what could be the military's first execution in thirty-eight years. In *Loving*, the court espoused the constitutionality of the restructured, post-*Matthews* military capital punishment method, which grants the President, pursuant to congressional delegation, the power to stipulate aggravating factors in military capital murder cases.<sup>172</sup>

The facts of *Loving* are as follows: On the evening of December 11, Loving robbed a 7-Eleven store at gunpoint. Roughly an hour later, he robbed a second 7-Eleven store at gunpoint. He was displeased with the small sums of money he obtained during the robbery, so he decided to rob taxicab drivers. Subsequently, the next night, he got in a taxicab around 8:00 p.m. The driver was an active-duty soldier who was taxi driving for extra money. He robbed the driver and then shot him in the back of the head two times. A mere fifteen minutes later, Loving called another taxicab to pick him up from his barracks. Again, he robbed the driver, this time a retired Army sergeant, and shot him in the head. Loving then went to a nightclub with his girlfriend. However, his felonious night was not over. Yet a third incident ensued. Loving had a taxicab driver drop off his girlfriend at home, and he then robbed the third driver. This driver believed he was about to be killed; therefore, he wrestled the pistol away from Loving and attempted to shoot him. However, the weapon did not fire, and the driver fled the scene. Loving chased the driver in order to regain his pistol, he regained the gun, and then went to his girlfriend's house for the rest of the night.<sup>173</sup>

With the help of Howard Harrison, the escaped taxicab driver, the civilian and military police arrested Loving. Among other charges, a

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170. See *United States v. Loving*, 577 U.S. 748, 773 (1996).

171. See *id.*

172. See *id.* President Reagan responded to the *Matthews* analysis of *Furman* by detailing categories of aggravating factors adequate for imposing a military death penalty for murder.

173. See *United States v. Loving*, *supra* note 169, at 231.

military court-martial found Loving guilty of both premeditated murder and felony murder,<sup>174</sup> violations of Article 118 of the UCMJ.<sup>175</sup> As three aggravating factors were found, the court-martial unanimously sentenced him to death. The three aggravating factors consisted of: 1) committing premeditated murder during the commission of a robbery; 2) acting as triggerman in a felony murder; and 3) being found guilty of premeditated murder and then being found guilty of a second murder in the same case.<sup>176</sup> Private Loving's commanding officer approved the findings and sentence of the court-martial.<sup>177</sup>

The United States Army Court of Military Review rejected a plethora of appellate issues and affirmed the death sentence in two separate opinions.<sup>178</sup> Loving's arguments also failed before the CAAF.<sup>179</sup> Loving's last chance was to be heard by the Supreme Court, and the Supreme Court did grant certiorari<sup>180</sup> on the specific contention that the Eighth Amendment<sup>181</sup> and the doctrine of separation of powers prevents Congress from delegation to the President the determination of aggravating factors that warrant a military death penalty.<sup>182</sup>

Joined by five other Justices and three concurring opinions, Justice Kennedy concluded that the congressional delegation of the implementation of the military capital punishment scheme to the President violated neither the Eighth Amendment nor the separation of powers doctrine.<sup>183</sup> Throughout this opinion, Justice Kennedy interwove rationales drawn from three primary sources: the history and precedent of (1) the delegation doctrine; (2) capital punishment; and (3) military discipline. It is clear that the military discipline arguments carried the most weight, with the Court only paying lip service to the first two sources.

The military death penalty practice has been carefully structured "to make sure there is no arbitrary imposition of the death penalty in the military."<sup>184</sup> In her opinion in one of the *Curtis* cases, Judge Crawford listed eight significant protections built into the rules. The enforcement of

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174. See *id.* at 229-31.

175. See 10 U.S.C. § 918.

176. According to the Rule of Courts-Martial 1004 (a) (2), a military death sentence must be a unanimous decision. In Loving, this was not a problem.

177. *United States v. Loving*, 577 U.S. 748 (1996).

178. *Id.*

179. *United States v. Loving*, 41 M.J. at 232, 241, 297. Loving argued seventy errors which ranged from improper voting procedures during sentencing to ineffective counsel to a defective court-martial order. *Id.*

180. See *Loving v. United States*, 515 U.S. 1191 (1995).

181. See U.S. CONST. amend. VIII ("cruel and unusual punishments" shall not be inflicted).

182. See *United States v. Loving*, 517 U.S. 748 (1996).

183. See *id.*

184. *United States v. Curtis*, *supra* note 166, at 166.

the protections will ensure the death penalty is not imposed arbitrarily.<sup>185</sup> An adjudged death sentence must withstand close, and often times prolonged, scrutiny. All adjudged finding and sentences of court-martial (all courts-martial, not just death sentence cases) must be reviewed by the commanding officer of the accused, or the commanding officer's replacement, who convened the court.<sup>186</sup> All approved death sentences are automatically reviewed by the military appellate courts.<sup>187</sup> Presidential approval is also required before a death sentence can be executed pursuant to Article 71 (a) of the UCMJ.<sup>188</sup> There has not been presidential approval on any military death sentence since President Eisenhower approved Bennett's sentence in 1957.<sup>189</sup> The only subsequent military death penalty case to even reach the President was commuted to life imprisonment by President Kennedy in 1961.<sup>190</sup>

Despite all these layers of procedural protection, a service member legally could have been executed until 1983, when the CAAF, in *Matthews*, held that military capital punishment scheme of the time to be unconstitutional under *Furman*.<sup>191</sup> However, it is important to note that changes were made in order to ensure the military capital punishment scheme is once again constitutional. Therefore, the sentence is still a legally and constitutionally sound one, assuming the Courts can overcome all the hurdles placed in front of it. With the 1972 *Furman* decision, the Supreme Court initiated a line of jurisprudence that has consistently invalidated arbitrary and capricious impositions of the death penalty. The Court stated that a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and reasonably justify a death sentence for a defendant when compared to others convicted of the same capital crime.<sup>192</sup> In light of this jurisprudence, *Matthews* reversed a death sentence because neither the UCMJ nor the RCM required a spe-

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185. *See id.* at 166-67.

186. *See* 10 U.S.C. § 860. Convening authorities can approve, disapprove, or reduce the findings and sentences of courts-martial. *Id.*

187. A death sentence must first be reviewed by the relevant service branch's court of criminal appeals. *See* 10 U.S.C. § 866(b)(1). If the sentence is affirmed, the CAAF must review the case. *See* 10 U.S.C. § 867(a)(1).

188. *See* 10 U.S.C. § 871 (a). The president may commute, remit, or suspend the sentence as he sees fit.

189. *See* Captain Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 MIL. L. REV 1, 3-4 (1994).

190. *See generally id.*

191. *See* *Matthews*, 16 M.J. 354.

192. *See generally* *Furman v. Georgia*, 408 U.S. 238 (1972). No specific rationale commanded a majority in *Furman*. For examples of subsequent decisions that followed *Furman* guidance, *see* *Lockett v. Ohio*, 438 U.S. 586 (1978); *Jurek v. Texas*, 428 U.S. 262 (1976); *Gregg v. Georgia*, 429 U.S. 153 (1976).



cific identification of aggravating factors upon which court-martial members relied in determining a death sentence.<sup>193</sup> However, as discussed earlier this procedural problem was remedied with the enactment of the *Manual for Courts-Martial*.

#### V. THE DEATH PENALTY IN THE CHINESE MILITARY

Within the military in China, it is not uncommon to see the death penalty utilized. There are several crimes for which this punishment will be applied. During the early days of military law, the death penalty was not looked upon fondly. Military law, which was synonymous with civilian law, followed the Confucius Code. The Chinese did not choose to use harsh treatment; they instead desired to change behavior by pressures from the general community.<sup>194</sup> If a person is executed, he cannot repent and repay his debt to society, therefore, this form of discipline was not popular. However, it was used in times where moral pressures would not work and there was no chance of repentance.

However, that was early law in China. Under the Provisional Regulations of the PRC on Punishing Servicemen who Commit Offenses Against their Duties, adopted June 6, 1981, which became effective January 1, 1982,<sup>195</sup> there are several crimes listed which depict the death penalty as the punishment. For example, stealing or collecting or furnishing secrets to enemies is punishable by death, even during peacetime. Another example is obstructing the performance of the duty of others, thereby causing severe injury or death. A final example is sabotage, which carries with it a death sentence.<sup>196</sup>

It is ironic that today, the death penalty is frequently used in the People's Republic of China. However, the moral and legal code of the past explicitly forbade such harsh penalties. The Code of Confucius is clearly no longer followed as a way of life in modern day China.

#### VI. CONCLUSION

As is evident, The Chinese Military and the United States Military have different positions regarding the sentence of the death penalty. The different opinions are obvious due to the background of the two countries. Both the military background and the judicial system background of the countries indicate the basis for the views the countries hold.

The United States Government was leery of the existence of a

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193. Matthews, 16 M.J. at 356.

194. See discussion *supra* Part III.

195. See Rodearmel, *supra* note 47, at 58.

196. See *id.*

standing army ever since the formation of it, so it is not a surprise to realize that the military must have final approval from the President of the United States prior to following through with corporal punishment. The U.S. government does not want to give too much power to the military courts, just as they were distrusting of relinquishing that power in the past. Yet, when more power rested in the hands of the military, the use of the death penalty was more prevalent. Similarly, in times of war, the U.S. military is granted more leeway, and they more frequently employ the death penalty.

The Chinese military, on the other hand, holds most of the country's power. In the past, China shied away from corporal punishment because the Code of Confucius disagreed with it. However, as time passed, power shifted to the military, and the military mind set prevailed. The code in the military was and is to harshly punish wrongdoers. That is why we see the utilization of the death penalty to be more prevalent in the Chinese military.

