Nos. 19-108 and 19-184

IN THE

Supreme Court of the United States

UNITED STATES, *Petitioner*,

v.

MICHAEL J.D. BRIGGS, *Respondent*.

UNITED STATES, *Petitioner*,

v.

RICHARD D. COLLINS, *Respondent*.

UNITED STATES, *Petitioner*,

v.

HUMPHREY DANIELS III, *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF U.S. ARMY DEFENSE APPELLATE DIVISION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Army Defense Appellate Division (DAD) represents soldiers on appeal from convictions at courts-martial pursuant to Article 70 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 870 (2018).[1] This includes representation at the Army Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and this Court. *Id*. Defense Appellate Division, including the authors of this brief, is comprised of active-duty attorneys and one civilian attorney.[2]

Army Defense Appellate Division has an inherent interest in the disposition of this case as it will affect current and future representation of soldier-clients.

INTRODUCTION AND SUMMARY OF ARGUMENT

The individual liberty protections provided by the United States Constitution—to include the Eighth Amendment prohibitions on the imposition of Cruel and Unusual Punishment—extend to servicemembers of the United States Armed Forces except in cases of narrow, well-established military exceptions. The history of military justice and the UCMJ support the conclusion that, in applying the Eighth Amendment's

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[1] No counsel for a party authored this brief in whole or in part, and no person or party, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of intent to file and have consented to the filing of this brief.

[2] The Judge Advocate General of the United States Army has appointed a civilian as Senior Appellate Counsel, to represent soldiers in capital cases during appellate review.

prohibition on cruel and unusual punishment, servicemembers enjoy the same protections enjoyed by every other citizen of the United States.

The laws governing the military justice system and the rights of servicemembers have changed numerous times since the founding of the Republic. What was born as a cousin of British regulations quickly became something entirely American. But with each successive congressional revision, common threads emerge: Congress has consistently expanded protections for servicemembers in a system that initially provided little protection for the accused. In so doing, Congress wove Constitutional protections into the fabric of military justice, particularly in areas where doubt or ambiguity existed about the applicability of those protections to servicemembers.

Article 55 of the UCMJ illustrates as much. That article states:

> 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 any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

10 U.S.C. § 855 (2018) (emphasis added). The provisions of Article 55 mirror those protections provided in the third clause of the Eighth Amendment of the United States Constitution prohibiting the infliction of "cruel and unusual punishment." U.S. CONST. amend. VIII. This brief provides background on the history and development of Article 55, and discusses its interplay with the Eighth Amendment.

This brief begins with a summary of the history of Article 55, explains the interaction between other Constitutional protections and corresponding articles of the UCMJ, and briefly analyzes several specific examples of Constitutional protections that this Court has determined apply to servicemembers. This brief concludes that based on Article 55's history and this Court's prior jurisprudence related to similar Constitutional protections, there can be little doubt Eighth Amendment protections apply to servicemembers, or that Congress could have intended otherwise.

ARGUMENT

I. THE DEVELOPMENT OF THE ARTICLES OF WAR

The history of Article 55 is intertwined with the development of the Articles of War—and later, the UCMJ. Accordingly, any discussion of Article 55 should begin with a discussion of the *types of crimes* that historically were punished under military justice provisions.

The breadth of military justice has evolved significantly over time. For over one hundred years, many civilian offenses were not punishable by court-martial. Military justice was narrowly confined to offenses with a military nexus, such as desertion and disobeying orders. Under this system, servicemembers were tried by civilian courts for non-military related misconduct. This included the offense of rape, unless it occurred within the unique circumstances of military operations during a time of war.

However, as military law expanded to encompass a broader swath of offenses—including quintessentially "civilian" offenses—the Legislative

and Executive Branches codified additional legal protections incorporating, mirroring, and expanding Constitutional protections to servicemembers. Congress's intent and judicial understanding of the application of Constitutional rights to servicemembers serves to help this Court resolve the Questions Presented.

A. The Initial Developments

Military justice in the United States predates the Declaration of Independence and the Constitution. *Ortiz v. United States*, 138 S. Ct. 2165, 2174–2175 (2018). The Second Continental Congress passed the Articles of War on June 30, 1775. 2 JOURNALS OF THE CONTINENTAL CONG., 1774–1789, at 112–122 (1775). However, this version was deemed deficient in addressing the discipline needed in the Continental Army and allowed commanders unfettered discretion to impose severe punishments. *Id.; see* Letter from William Tudor to John Adams (Jul. 7, 1776) *in* THE ADAMS PAPERS, PAPERS OF JOHN ADAMS, VOL. 4, FEBRUARY–AUGUST 1776, 367–69 (Robert J. Taylor, ed.) (1979).

Upon recommendation of the first Judge Advocate of the Continental Army, William Tudor, the articles were revised in 1776 to mirror the British Code of 1774. *Id.* This included explicit limitations on punishments. 5 JOURNALS OF THE CONTINENTAL CONG., 1774–1789, at 788 (1776). Specifically, Congress limited the death penalty to those crimes expressly authorized by the articles and otherwise set a cap of 100 lashes as a punishment. *Id*. at 806. On the other hand, officers or soldiers accused of capital crimes against people or property of the United American States were to be turned over to civilian

magistrates for trial upon request. *Id*. at 795. Most importantly, the Articles of War in both 1775 and 1776 only contained military specific offenses, which did not include the offenses of rape or murder. *See generally id.*

B. The 1806 Amendments

The next major revision of the Articles of War began in 1805, at which time Congress had been granted the power to regulate the armed forces. *See* U.S. CONST. art. I, § 8. The new amendments to the Articles of War were passed in 1806, in large part due to the efforts of then-Senator John Quincy Adams. *See generally* JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS (1874). In his memoirs, Adams noted that the original Articles of War were poorly constructed and that

> [D]efects of various kinds were numerous, and among the most conspicuous was a continual series of the most barbarous English that ever crept through the bars of legislation. In many instances the articles prescribing oaths, and even penalties of death, were so loosely and indistinctly expressed as to be scarcely intelligible, or liable to double and treble equivocation.

Id. at 338.

As such, several of the revisions appear to conform the Articles of War to the protections of the Bill of Rights. Although not explicitly stated, these amendments undoubtedly reflected the individual liberty protections guaranteed by the Fifth, Sixth, and

Eighth Amendments. *See* U.S. CONST. amends. V, VI, & VIII.

Congress intended many of the rights espoused in the Fifth Amendment, to include protections against self-incrimination, double jeopardy, and due process violations, to apply to the Articles of War. Specifically, Congress amended Article 69 to require a prosecuting judge advocate to object to "any question to the prisoner, the answer to which might tend to incriminate himself . . . ." 9th Cong., 2 Stat. 367–68 (1806). Article 87 stated: "no officer, non-commissioned officer, soldier, or follower of the army, shall be tried a second time for the same offence." *Id.* at 360.

Congress codified the Sixth Amendment's confrontation protections as well. Article 91 permitted a court of inquiry to investigate accusations and gave the accused the right to cross-examine witnesses. *Id.* at 370. Article 74 required that depositions of witnesses could only be taken in the presence of a justice of the peace, and could only be read into evidence if both the prosecutor and accused were notified or present at the time the deposition was taken. *Id.* at 368.

The 1806 amendments also included a nascent version of Eighth Amendment protections. Article 87 now required that two-thirds of the members of a general court-martial were required to allow a sentence to death. *Id.* at 369. Additionally, the maximum number of lashes allowed was reduced from 100 to 50 lashes. *Id.*

Notably, the Articles of War of 1806 continued to criminalize only military specific offenses. Murder and rape were still excluded. *See generally id.*

Officers and soldiers accused of capital crimes against persons or property of the United States were still handed over to civilian magistrates. *Id.* at 364.

C. Amendments from 1806–1916

In 1916 the Articles of War were amended due to concerns arising from their application during prior armed conflicts. MANUAL FOR COURTS-MARTIAL, UNITED STATES, App. I (1917) (containing the Articles of War, as amended). During this time Congress added Article 41, expressly prohibiting punishment by flogging, branding, marking, or tattooing on the body. *Id.*

Congress also added Article 58, which for the first time allowed for servicemembers to be court-martialed for non-military, common law offenses:

> *In time of war, insurrection, or rebellion*, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the State, Territory, or District in which such offense may have been committed.

Id. (emphasis added).

D. Amendments from 1916–1949

The House Committee on Military Affairs conducted hearings in 1912 to consider further

revisions to the Articles of War later adopted in 1919. *See generally Revision of the Articles of War: Hearing on H.R. 23628 Before the H. Comm. on Military Affairs,* 62nd Cong. 1 (1912). One such proposal included splitting Article 58 into two different punitive articles—Article 92, to address murder and rape specifically, and Article 93, to address the remaining various common law crimes. *Id*. at 73–74 (statement of Brigadier General Enoch Crowder, the Judge Advocate General of the Army). Under the proposal, murder and rape were not punishable by courts-martial unless they occurred outside the geographical limits of the United States or in a time of war. *Id.* at 11.

So important was the limitation of jurisdiction of courts-martial for murder and rape that Brigadier General Enoch Crowder, the Army Judge Advocate General, testified before Congress to advocate against any expansion. *Revision of the Articles of War: Hearing Before the S. Subcomm. on Military Affairs*, 64th Cong. 88–89 (1916). During the Senate hearing, he read the proposed amendment to Article 92 of the Articles of War of 1916, noting his objection to expanding jurisdiction of the court-martial to be concurrent with civil courts for capital crimes occurring within the geographical limits of the United States. *Id*. at 89. As he pointed out, civilian courts normally had exclusive jurisdiction over capital offenses occurring within the United States. *Id*. He emphasized that when those subject to military law are in the United States, they should have the same protections as civilians for non-military specific offenses. *Id* at 32.

When Congress eventually passed the 1916 version of Article 92, it contained express jurisdictional limitations for rape and murder:

> ART 92. MURDER; RAPE – Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct, but 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*.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, App. I (1917) (emphasis added). The 1916 version of Article 92 contained no definitions for murder and rape, so the Manual for Courts-Martial adopted the definitions from the Federal penal code and other civilian sources. *Id.*, para. 442 & 443. There was no military specific definition or element of rape.

Congress amended the Articles of War again in 1919 due to substantial abuses of military justice during World War I. *See Establishment of Military Justice-Proposed Amendment of The Articles of War*: *Hearing Before the S. Subcomm. on Military Affairs*, 66th Cong. 1134 (1919). Concerns included that the military justice system had excessive punishments without sufficient safeguards and military members' Constitutional rights lacked adequate protections. *Id.* at 1162. Amidst these concerns, Congress first prohibited "cruel and unusual" punishment under the newly revised Article 41. MANUAL FOR COURTS-MARTIAL, UNITED STATES, App. 1 (1921).

E. The Uniform Code of Military Justice

In 1949, Congress returned to the Articles of War in its drafting of the UCMJ. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of H. Comm. On Armed Services*, 81st Cong. 565 (1949). Congress adopted substantial provisions from the Articles of War, in addition to including significant new language to support the UCMJ. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951). In so doing, Congress continued to expand the Constitutional rights of servicemembers. At the same time, Congress also removed the geographical limitations previously contained in Article 92, delineating jurisdiction by status rather than geography. *See* Article 2, UCMJ, 10 U.S.C. § 802 (1956).

The trajectory of the development of the Articles of War and the UCMJ ultimately provides a clear picture: Congress intended to guarantee individual Constitutional rights to servicemembers, and, in return, expanded the jurisdiction of the UCMJ. The current state of the UCMJ and the Constitutional redundancies Congress has built into the UCMJ reflect that effort.

II. THE COURTS' RECOGNITION OF CONSTITUTIONAL RIGHTS UNDER THE UNIFORM CODE OF MILITARY JUSTICE

This Court as recently as 2018 observed that servicemembers receive essentially the same protections as do accused in civilian proceedings. *Ortiz*, 138 S. Ct. at 2174. Likewise, military courts with the specialized task of interpreting the UCMJ have consistently held that there is a presumption that Constitutional protections apply to military

defendants unless there is an intentional relinquishment or overriding demand associated with military service. *United States v. Jones*, 78 M.J. 37 (C.A.A.F. 2018); *United States v. Easton*, 71 M.J. 168 (C.A.A.F. 2012); *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011)(citing *United States v. Olano*, 507 U.S. 725 (1993)); *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008)(citing *Glasser v. United States*, 315 U.S. 60 (1942)). *But see United States v. Hartman*, 69 M.J. 467 (C.A.A.F. 2011) (acknowledging that Constitutional safeguards can apply differently to members of the military.)

The following table details the individual rights guaranteed by the constitution, and demonstrates whether this Court, or military courts, have determined that the right applies to servicemembers.

Constitutional Protection	**Service Member Protection**	**UCMJ Article, Case Law, and Presidentially promulgated rules**
Free Speech	Limited Protection	*Parker v. Levy*, 417 U.S. 733 (1974); *US v. Rapert*, 75 M.J. 164 (C.A.A.F. 2015)
Free Exercise	Limited Protection	*Cutter v. Wilkinson*, 544 U.S. 709 (2005); *US v. Sterling*, 75 M.J. 407 (C.A.A.F. 2016)
Free Press	Limited Protection	Limited by policy*
Assembly	Limited Protection	*United States v. Reed*, 24 M.J. 80 (C.M.A. 1987) (Everett, C.J. concurring).
Petition	Limited Protection	*Secretary of the Navy v. Huff*, 444 U.S. 453 (1980); *Brown v. Glines*, 444 U.S. 348 (1980).
Bear Arms	Full Protection	*District of Columbia v. Heller*, 554 U.S. 570 (2008); *United States v. Smith*, 56 M.J. 711 (A.F. Ct. Crim. App. 2001) *pet. denied*, 56 M.J. 477 (2002)
Search and Seizures	Limited Protection	*United States v. Stevenson*, 66 M.J. 15 (C.A.A.F. 2008); *United States v. United States v. McMahon*, 58 M.J. 362 (C.A.A.F. 2003) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) and *Katz v. United States*, 389 U.S. 347 (1967)); R.C.M. 302–305; Military Rule of Evidence (M.R.E). 311–317.

Constitutional Protection	**Service Member Protection**	**UCMJ Article, Case Law, and Presidentially promulgated rules**
Self-Incrimination and Right to counsel	Full or Modified Protection	**Article 31, UCMJ**; *United States v. Vela*, 71 M.J. 283 (C.A.A.F. 2012); *United States v. Mapes*, 59 M.J. 60 (C.A.A.F. 2003); M.R.E. 301, 304, & 305.**
Double Jeopardy	Full Protection	**Article 44, UCMJ**; *Wade v, Hunter*, 336 U.S. 684 (1949); *United States v. Easton*, 71 M.J. 168 (C.A.A.F. 2012).
Due Process	Full Protection	*Weiss v. United States*, 510 U.S. 163 (1994) (citing *Rostker v. Goldberg*, 453 U.S. 57 (1981) and *Middendorf v. Henry*, 425 U.S. 25 (1976)); *Frontiero v. Richardson,* 411 U.S. 677 (1973); *United States v. Meakin*, 78 M.J. 396 (C.A.A.F. 2019).
Grand Jury	Different Protection	**Article 32, UCMJ (specifically excluded by U.S. CONST., amend. V)**
Speedy Trial	Full Protection	**Article 10, UCMJ**; *United States v. Thompson*, 68 M.J. 308 (C.A.A.F. 2010); *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); Rule for Court Martial (R.C.M.) 707.
Impartial Fact Finder	Full Protection	*United States v. Commisso*, 76 M.J. 315 (C.A.A.F. 2017); *United States v. Lambert,* 55 M.J. 293 (C.A.A.F. 2001).
Informed of Charges	Full Protection	**Articles 30 & 35, UCMJ**; *United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013); United States v. Girouard, 70 M.J. 5 (C.A.A.F. 2011) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Cole v. Arkansas,* 333 U.S. 196 (1948)).
Confrontation	Full Protection	*United States v. Bess*, 75 M.J. 70 (C.A.A.F. 2016) (citing *Herring v. New York,* 422 U.S. 853 (1975)); *United States v. Katso*, 74 M.J. 273 (2015) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)); *United States v. Israel,* 60 M.J. 485 (C.A.A.F. 2005).
Compel Production	Limited Protection	**Article 46, UCMJ**; *United States v. Manos,* 17 C.M.A. 10 (C.M.A. 1967); *United States v. Jones,* 20 M.J. 919 (N-M.C.M.R. 1985).
Public Trial	Full Protection	*United States v. Lambert,* 55 M.J. 293 (C.A.A.F. 2001); *United States v. Fleming,* 38 M.J. 126 (C.A.A.F. 1993); *United States v. Moses,* 4 M.J. 847 (1978).***
Counsel	Full Protection	**Article 27, UCMJ**; *United States v. Gooch*, 69 M.J. 353 (C.A.A.F. 2011); *United States v. Dewrell,* 55 M.J. 131 (C.A.A.F. 2001) (quoting *Strickland v. Washington,* 466 U.S. 668 (1984).

Constitutional Protection	**Service Member Protection**	**UCMJ Article, Case Law, and Presidentially promulgated rules**
Jury Trial	Different Protection	*Reid v. Covert*, 354 U.S. 1 (1957); *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001).
Cruel and Unusual Punishment	***Full protection (as decided by the Court of Appeals of the Armed Forces)***	**Article 55, UCMJ**; *United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007) (quoting *Estelle v. Gamble,* 429 U.S. 97 (1976)); *United States v. Avila*, 53 M.J. 99 (C.A.A.F. 2000); *United States* v. *Martinez*, 19 M.J. 744, 748 (C.M.R. 1984); *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983); *United States v. Wappler*, 9 C.M.R. 23 (C.M.A. 1953).
Excessive Fines	Full Protection	**Articles 15 and 66, UCMJ**; *United States v. Stebbins*, 61 M.J. 366 (C.A.A.F. 2005).
Bail	Different Protection	**Articles 10 and 13, UCMJ**; *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976).

* https://www.esd.whs.mil/DOPSR/

** *Davis v. United States*, 512 U.S. 452 (1994) declined to definitely resolve whether the self-incrimination clause or right to counsel clause of the Fifth Amendment apply to the military justice system. However, Article 31, UCMJ and case law from the military courts clarify that Soldiers possess comparable if not greater protection than the Fifth Amendment provides.

*** The right to a public trial may be infringed for good reason such as classified information, youthful witnesses, or to protect a victim witness "in relating the lurid details" of a rape case. *Moses*, 4 M.J. at 848-49. However, certain civilian jurisdictions follow similar rules. *See, inter alia, Harris v. Stephens*, 361 F.2d 888 (8th Cir. 1966), *cert denied* 386 U.S. 964 (1967).

III. COMPARISON OF INDIVIDUAL ARTICLES

Only in the instances of military exigencies is there a narrowly-tailored exception to servicemembers' Constitutional rights. This Court has recognized that the military is undoubtedly a "unique society." *Parker v. Levy*, 417 U.S. 733 (1974). Servicemembers' rights only differ from those afforded to their civilian counterparts in two circumstances: (1) Where there is a military specific reason that courts believe that protections should not apply, or (2) where the Constitution explicitly abrogates the right in question. Even in the second instance, Congress has stepped in, and in the interest of protecting

servicemembers' rights, has provided a functional alternative to safeguard the underlying interest.

A. Servicemembers' Constitutional Rights are Only Curtailed for Military-Specific Reasons.

1. Fourth Amendment

Congress and the courts have long recognized that the Fourth Amendment right against unreasonable search and seizure applies differently to servicemembers. *See* U.S. CONST. amend. IV; *United States v. Doyle*, 4 C.M.R. 137, 139 (C.M.A. 1952) ("[T]here has long existed in the services a rule to the effect that a military commanding officer has the power to search military property within his jurisdiction."). Such is the case, however, because the government interest in maintaining combat readiness and creating good order and discipline directly relates to a commander's ability to inspect and exercise control over his subordinate servicemembers and their communal environment. *United States v. Stuckey*, 10 M.J. 347, 352 (C.M.A. 1981). In this context, there is a direct nexus between military effectiveness and military inspections that would violate Fourth Amendment protections in a civilian context.

This nexus is understandable. On the one hand, there is the presumptive need to protect the rights of servicemembers against unreasonable search and seizure. On the other hand, military commanders must have the authority to maintain good order and discipline, particularly in the context of mission readiness. Further complicating this balancing act, courts have recognized that military members are

often located in places or subject to conditions that do not fit neatly into the paradigm that Fourth Amendment jurisprudence contemplates: access to a judge who can issue a warrant. For this reason, members of the armed forces and federal courts alike have long applied Fourth Amendment rights in a manner that maximizes the Constitutional protections of servicemembers while balancing military exigency. It is not that the Fourth Amendment does not apply; instead, the circumstances and conditions of military searches make some searches reasonable when they would otherwise not be in a civilian context. Accordingly, Congress and the President have *narrowly* tailored any divergence from civilian practices.[3]

While the Fourth Amendment has a different application to members of the military, the presumptive application of Constitutional protection remains the well-understood, and historically intended norm. Commanders may not, under any circumstance, conduct any search without probable cause, and the commander's ability to grant that probable cause is limited to only those areas under his or her control. As a result, when a servicemember is located in the United States and not on a military

[3] As early as 1949, Congress defined areas of diminished privacy expectations to two specific situations: (1) where the property was "owned or controlled by the United States," or (2) where the property was "located in a foreign country or in occupied territory and occupied or used by persons subject to military law or to the law of war." MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 138 (1949). Outside of these areas, servicemembers were entitled the full panoply of Fourth Amendment protections.

installation, they have identical protection under the Fourth Amendment as their peers.

This demonstrates a well established pattern that while courts do apply the Fourth Amendment protections against search and seizure differently in the military, they are careful to do so in a manner that offers the maximum amount of protection to the servicemember, and only abrogates the right when absolutely necessary. Throughout their history, "courts-martial have operated as instruments of military justice . . . not military command." *Ortiz*, 138 S. Ct. at 2175.

2. Grand Jury

The right to a grand jury is perhaps the most obvious area in which servicemembers' rights deviate from the norm. The Constitution specifically exempts military members accused of a crime from the Fifth Amendment right to a grand jury indictment. U.S. CONST. amend. V. Based upon this exemption, this Court has determined that there is no right to a civil jury in courts-martial. *See Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Nevertheless, the military justice system has created, in most instances, equal if not greater procedural protections for military members. For instance, Congress provided for a pretrial hearing that includes greater protections than a traditional grand jury proceeding. Article 32, UCMJ.

The legislative history indicates that Congress, yet again, stepped in to fill Constitutional lacunas by adding protections. Congress first recognized the need for such protections in 1919 during its revisions to the Articles of War. When the Senate Committee took testimony on these revisions, Mr. Samuel Ansell,

formerly the acting-Judge Advocate General of the United States Army, testified that one of the primary concerns with the then-existing system of military justice was the lack of meaningful independent review before a court-martial was sent to trial. *See Establishment of Military Justice-Proposed Amendment of The Articles of War*: *Hearing Before the S. Subcomm. on Military Affairs*, 66th Cong. 278–79 (1919). He suggested an independent preliminary investigation followed by a review by a judge advocate. *Id.* at 281–82.

In 1920, Congress took the action that Mr. Ansell recommended and amended Article 70 to the following:

> No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, App. 1 (1921).

Even at this early stage, Congress thought that a servicemember's Constitutional rights were important enough that it provided statutory protections. In so doing, Congress has more than filled the gap left by the Fifth Amendment. In fact, it provided additional rights to servicemembers subject to court-martial than exist under the Fifth Amendment.[4]

B. Congress has Enshrined, and even Expanded, Constitutional Protections for Servicemembers, Absent Military Necessity.

Neither Congress, the President, nor any court has ever determined that the protections against double jeopardy or the right to a speedy trial afforded under the Fifth and Sixth Amendments were inapplicable to servicemembers. In fact, the President and Congress have demonstrated that where there was a question as to their applicability, additional legislation and regulations would ensure servicemembers enjoy the same protections as their civilian counterparts.

1. Double Jeopardy Rights

The protection against double jeopardy enshrined in the Fifth Amendment has long been adopted and codified by the military. Since 1806, Article 87 of the Articles of War stated that "no officer, non-commissioned officer, soldier, or follower of the army, shall be tried a second time for the same offence." 9th Cong., 2 Stat. 369 (1806). Article 40, Article of War

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[4] Although the Article number has changed on numerous occasions, the content of the article has remained largely the same. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 2 (2019).

(1920), similarly held that "[n]o person shall, without his consent, be tried a second time for the same offense." MANUAL FOR COURTS-MARTIAL, UNITED STATES, App. 1 (1921). *See also Grafton v. United States*, 206 U.S. 333 (1907) (holding court-martial acquittal barred subsequent prosecution in Philippine civil tribunal).

Eventually, Article 44 of the UCMJ, in its present form, enshrined the exact same protections when it adopted the language of Article 40 verbatim. As Colonel William Winthrop observed:

> Where indeed the offences are crimes of which military courts are invested with jurisdiction concurrently with the criminal courts, (as for example, the crimes cognizable by courts-martial under Art. 58, in time of war), the same are not distinct but identical in law, and an acquittal or conviction of one of such offences, or rather of the actual single offence, in a civil court, will be *a complete bar to a prosecution of the same in a military court*, and vice versa.

WILLIAM WINTHROP, MILITARY LAW AND PRECEDENT 265 (2d ed. 1920) (emphasis added).[5]

The applicability of these protections has been apparent in the decisions of both the Federal and State courts. In *Wade v. Hunter*, 336 U.S. 684 (1949), the Supreme Court addressed the issue of *when* double jeopardy applied to servicemembers, not *if* it

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[5] *See*, *e.g.*, 6 Op Atty Gen 506 (1854) (captain who beat his subordinate to death was tried for manslaughter by the state and cruel treatment at court-martial); 6 Op. Atty Gen 413 (1854) (surgeon who shot and killed his superior was tried for murder by the state and mutiny at court-martial).

applied. Prior to that, a Federal district court held in *In re Stubbs*, 133 F. 1012 (W. D. Wash., 1905), that a soldier tried and acquitted by a civilian court for the murder of another soldier could be tried by the Army for the separate and different charge of "assault prejudicial to good order." Denying *habeas* relief, that court noted that the Constitution "exempt[ed] him from a second prosecution for that identical offense," the command had taken "special care . . . to charge him with an offense different from the one of which he was acquitted by the superior court." *Id*. at 1014. It was indisputable that the Accused, acquitted of the killing in civilian court, "could not be [tried] for murder, manslaughter, or a criminal assault . . . ." *Id.* at 1013.

Mirroring the Fifth Amendment's prohibition that an individual cannot "be twice put in jeopardy of life or limb" for the same offense, today's Article 44(a), UCMJ, guarantees that "[n]o person may, without his consent, be tried a second time for the same offense." *United States v. Stringer*, 17 C.M.R. 122, 127 (C.M.A. 1954). Derived from the aforementioned Fifth Amendment protections and codified in prior Articles of War, Article 44, UCMJ, was "a substantial strengthening of the rights of an accused," which "incorporate the traditionally military rules of jeopardy." S. REP. NO. 81-486, at 19–20 (1949).

The legislative record reveals no Congressional doubts as to the application of double jeopardy protections to servicemembers or concerns as to the outcomes of cases like *Grafton*, 206 U.S. at 333 or *In re Stubbs*. The possibility of successive prosecutions under the military and federal civilian system was

universally abhorrent to Congress.[6] Moreover, it was roundly accepted that lawmakers "have increased the protections of double jeopardy." 96 CONG. REC. 1354 (1950) (statement of Sen. Estes Kefauver, Member, S. Comm. on Armed Services). The undisputable history of the application of the double jeopardy provisions to the military demonstrates Congress's intent to preserve and further servicemembers' Constitutional rights.

2. Speedy Trial Rights

The Sixth Amendment provides that the accused shall enjoy the "right to a speedy . . . trial." U.S. CONST. amend VI. Congress and the military have explicitly created additional procedural safeguards to compensate for the exigencies of the military not present in the civilian court system.

The expansion of these rights addressed the unique legal circumstances of military service and law. Recognizing that the military lacks a system of

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[6] When asked, "And you believe double jeopardy, when it relates to the service—in civilian courts or the service itself—should be prohibited?" the American Bar Association's representative testified "Absolutely." *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of H. Comm. On Armed Services*, 81st Cong. 727 (1949) (testimony of George A. Spiegelberg, Chairman of the Special Committee on Military Justice of the American Bar Association). Law professor Arthur John Keefe echoed the same sentiment: "From the cases our board reviewed we were worried about the prevalence of double jeopardy in the armed services. An enlisted man gets into trouble. He is arrested and tried and jailed in the civil courts or his case is heard and he is acquitted or his sentence is suspended. When he is released by the civil authorities he is promptly tried again by the military for the same offense. This is wrong." *Id.* at 839.

bail, Congress addressed the Sixth Amendment implications in Article 79 of the Articles of War of 1806, and later in Article 70 of the revisions of 1916. Specifically, those Articles required that an imprisoned servicemember receive his charges within 8 days and be brought to trial within 40 days. Failure to do so necessitated immediate release by the government.

Under Article 10 of the modern UCMJ:

> When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken . . . to inform the person of the specific offense of which the person is accused; and . . . to try the person or to dismiss the charges and release the person.

10 U.S.C. § 810 (2018).

Thus, Article 10 provides a more stringent framework of restrictions on the pace of prosecution by requiring that immediate steps be taken to inform the accused of the charges, and reasonable diligence be used by the prosecution to bring them to trial as soon as possible. *See United States v. Kossman*, 38 M.J. 258, 269 (C.A.A.F. 1993) (citing *United States v. Burton*, 21 U.S.C.M.A. 112, 117, 44 C.M.R. 166, 171 (C.M.R. 1971)). Failure to adhere to these requirements warrants dismissal of the affected charges with prejudice. *Kossman,* 38 M.J. at 262.

Additional separate rights have also been granted by the President under Rule for Court-Martial (R.C.M.) 707. It is similarly restrictive of the prosecution, requiring that servicemembers must be brought to trial within 120 days of the initiation of charges, placed under certain restraints or returned

to active duty. R.C.M. 707(b)(1); *see United States v. Doty*, 51 M.J. 464 (C.A.A.F. 1999). Like Article 10, R.C.M. 707 limitations are designed to exceed the existing Sixth Amendment protections. Again, the consequences of violating this provision are as extreme as the violation itself: the charges must be dismissed with prejudice if the accused's Constitutional right to a speedy trial was violated. R.C.M. 707(d).

Thus, through the application of Article 10 of the UCMJ and R.C.M. 707, servicemembers enjoy additional due process protections that flow from the Sixth Amendment. *See Kossman*, 38 M.J. at 269 (labeling both Article 10 and R.C.M. 707 as "sub-constitutional rights" in comparison to the overarching application of the Sixth Amendment).

Based on this legal history, military courts have explicitly recognized that the Sixth Amendment inherently applies to servicemembers. *See United States v. Edmond,* 41 M.J. 419, 421 (C.A.A.F. 1995) (discussing additional methods "to ensure speedy-trial protections *in addition to those granted* by the Sixth Amendment.") (emphasis added); *United States v. Vogan*, 35 M.J. 32, 33 (C.A.A.F. 1992) (enumerating the Sixth Amendment as the first of "five sources of the right to speedy trial in the military"); *United States v. Vigneault*, 3 U.S.C.M.A. 247, 252, 12 C.M.R. 3, 8 (C.M.A. 1953) (upholding a conviction where the accused was "accorded a speedy trial as contemplated and guaranteed by the Sixth Amendment.").

IV. ARTICLE 55 AND THE EIGHTH AMENDMENT

The question of whether the prohibition on cruel and unusual punishment contained in the Eighth Amendment applies to servicemembers, or whether

Congress intended as much, requires a two part analysis: (1) Whether there any military specific reasons why Eighth Amendment protections should not apply to the military, and (2) Whether Congress has codified Eighth Amendment equivalent protections, thereby congressionally mandating Eighth Amendment protections for servicemembers.

A. The Eighth Amendment applies to servicemembers.

Every decision from this Court, and of every military court, has assumed the Eighth Amendment applies to servicemembers. *Loving* v. *United States*, 517 U.S. 748 (1996); *United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007) (quoting *Estelle v. Gamble*, 429 U.S. 97 (1976)); *United States v. Avila*, 53 M.J. 99 (C.A.A.F. 2000); *United States* v. *Martinez*, 19 M.J. 744, 748 (C.M.R. 1984); *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983); *United States v. Wappler*, 9 C.M.R. 23 (C.M.A. 1953).

In *Loving*, this Court assumed without deciding that the Eighth Amendment applies to courts-martial. 517 U.S. at 755. There, this court declined to interpret a narrowly tailored and military-specific exception to the Eighth Amendment's protection against cruel and unusual punishment. After all, as discussed above, courts have taken this approach to Fourth Amendment jurisprudence, so such an idea is certainly not novel.

No court has carved out a narrowly tailored and military-specific exception to the Eighth Amendment because there is no cogent reason for an exception to exist. Put simply, there is no military exigency that would necessitate the imposition of a cruel and unusual punishment for servicemembers. *See*

Matthews, 16 M.J. at 369 ("There is no military necessity for such a distinction; and we do not believe that applying lower standards in this case would conform to the intent of . . . the Eighth Amendment."). Nor is there any reason Congress would have intended otherwise.

This conclusion is particularly obvious in the context of non-military specific offenses such as rape. As established above, for over a hundred years, as far as Congress and the President were concerned, rape was a purely civilian crime. *See* 2 JOURNALS OF THE CONTINENTAL CONG., 1774–1789, at 112–122 (1775). It was simply not punishable at court-martial. And, when Congress did determine murder was punishable by court-martial, it was limited to incidents *committed in a time of war and outside of United States*. MANUAL FOR COURTS-MARTIAL, UNITED STATES, App. I (1917) (emphasis added). As such, both the drafters of the Articles of War and the leading military law practitioners of that era did not believe that rape had an inherent military nexus. *Revision of the Articles of War: Hearing Before the S. Subcomm. on Military Affairs*, 64th Cong. 88–89 (1916). While Congress would ultimately expand military justice to include non-military specific offenses, Congress did not indicate it was abrogating the Constitutional rights of servicemembers. If anything, Congress's expansion of protections to servicemembers suggests that the more expansive the reach of the criminal code, the more likely Congress intended robust Constitutional protections for servicemembers.

Accordingly, when a crime is of a civilian (not military) nature there is no compelling reason to develop military-specific exceptions to Eighth Amendment protections. If anything, Congress

intended to treat the Eighth Amendment as it had other Constitutional protections.

A. Congress codified Eighth Amendment equivalent protections through Article 55, thereby mandating Eighth Amendment protections for servicemembers

This history of Article 55 demonstrates that even if the Eighth Amendment did not apply to servicemembers, Congress intended to provide the same protections by statute by employing identical language to that contained in the Eighth Amendment.

The words "cruel and unusual punishments" first appeared in a 1920 revision to the Articles of War. MANUAL FOR COURTS-MARTIAL, UNITED STATES, App. 1 (1921). Prior to the inclusion of this language, Congress held hearings expressly discussing this amendment. In those hearings, Major General Enoch Crowder, the Army Judge Advocate General, provided testimony to Congress regarding the importance of this language. *Establishment of Military Justice-Proposed Amendment of The Articles of War*: *Hearing Before the S. Subcomm. on Military Affairs*, 66th Cong. 1170 (1919).

In this hearing, members of the committee specifically requested Major General Crowder provide his opinion regarding the applicability of the individual liberties contained in the Bill of Rights to military members. *Id.* at 1162–1175. He testified that he did not believe Congress had ever explicitly recognized that the Bill of Rights applied to military offenders or offenses. But, he subsequently noted that Congress incorporated, through statute, the rights therein "in large measure," thereby applying "*practically every provision of the Bill of Rights . . . to*

offenders against Military law." *Id.* at 1168 (emphasis added).

General Crowder drew a direct corollary between the provisions of Article 41—prohibiting flogging, branding, marking and tattooing the body—and Article 45, which set the maximum punishments during time of peace, and the Eighth Amendment's protection against cruel and unusual punishment. *Id.* at 1170. In response to the suggested amendment to Article 41 inserting the words "cruel and unusual punishments prohibited," he offered his support, saying: "If any good can come from the provision of the pending bill . . . in *enacting the general language of the Constitution prohibiting cruel and unusual punishments* by courts-martial, let it be done." *Id.* (emphasis added).

Subsequent to General Crowder's testimony, Congress revised the Articles of War and imported the Eighth Amendment's language in Article 41. Article 41 read:

> Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body, are prohibited.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, App. 1 (1921).

When the Congress passed the UCMJ, it incorporated this language regarding specific types of punishments. These amendments were included in the committee's draft of what became Article 55, expressly retaining the "cruel and unusual punishment" language from the Eighth Amendment.

During hearings before the Committee on the Armed Services of the House of Representatives, the

permanent staffer presenting the proposed bill to the committee stated that Article 55 "just takes us out of the dark ages," and no member objected. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of H. Comm. On Armed Services*, 81st Cong. 1087 (1949) (testimony of Robert W. Smart, Professional Staff Member). In one of the comments submitted to the corresponding Senate committee, the proposed Article 55 was described as necessary "on the basis, apparently, that the [E]ighth [A]mendment is inapplicable." 95 CONG. REC. 6166 (1949). Congress subsequently approved Article 55, and has remained unchanged ever since. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 2 (2019).

Regardless of what Congress thought at the time that it drafted the UCMJ, it deliberately chose to use the precise language of the Eighth Amendment in Article 55 to incorporate those same protections and ensure they applied to servicemembers.

Various subsequent judicial interpretations of Article 55 support this conclusion. As discussed, *supra*, since 1953 the Court of Appeals for the Armed Forces (CAAF) (and its predecessor, the Court of Military Appeals) has consistently held that Article 55 extends Eighth Amendment protections against cruel and unusual punishment to servicemembers. *Wappler*, 9 C.M.R. at 26. Accordingly, the CAAF has held that Congress, through Article 55, plainly intended the Eighth Amendment to apply. The court did so because there was no conceivable military-necessity to subject servicemembers to what would otherwise be cruel and unusual punishment.

The idea that Congress incorporated a Constitutional protection via statute is hardly unique

to the Eighth Amendment. As discussed earlier, Congress has consistently created overlap between Constitutional protections and the UCMJ in situations where there is any question about the application of Constitutional protections. *See supra* discussion of Articles 10 and 44, and table detailing the overlap between nine Constitutional rights and corresponding UCMJ articles. Additionally, in the singular situation where a Constitutional right explicitly does *not* apply—the right to a grand jury—Congress legislated an effective substitute to that right via Article 32, thereby effectually extending that right to servicemembers.

In summary, the history of Article 55, judicial interpretation of Article 55, and the history and interpretation of similar rights and UCMJ provisions all point to the same conclusion: Congress has applied the Eighth Amendment protections against cruel and unusual punishments to servicemembers.

CONCLUSION

The prohibitions on cruel and unusual punishment contained in the Eighth Amendment apply to servicemembers. As a preliminary matter, there are no narrowly tailored and military-specific reasons why Eighth Amendment protections should not apply to servicemembers. Yet, this Court need not even decide that preliminary matter, because Congress intended the Eighth Amendment protections against cruel and unusual punishment apply through Article 55.

Respectfully submitted,

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