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William R. Cauley

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Stuck Between a CAAF and a Hard Place: The Coram Nobis Petition of Private Ronald Gray and the Weakening of Military Justice*

INTRODUCTION

Private Ronald Gray is the United States military's longest resident of death row.¹ Only three other prisoners sit there with him at the United States Disciplinary Barracks at Fort Leavenworth, Kansas, where he has awaited execution since 1988.² Private Gray's case has been through numerous rounds of hearings, appeals, and petitions in both the military justice system and in the federal Article III courts. His most recent attempt at review has hit an interesting, and frustrating, roadblock.

Private Gray's story begins in December 1986, when a spree of rapes, robberies, and murders took place at Fort Bragg and the neighboring city of Fayetteville, North Carolina.³ The victims included Kimberly Ann Ruggles, a civilian cab driver who was raped and murdered, her cab abandoned in the woods near Fort Bragg; Private Laura Lee Vickery-Clay, who was abducted, raped, and murdered, her body also abandoned in the woods of Fort Bragg; and Private Mary Ann Lang Nameth, who was raped and stabbed in her barracks room but survived the attack.⁴ Private Gray was arrested, charged with the above crimes, and convicted on April 12, 1988, by a general court-martial on twelve counts or "specifications," as they are called in the military justice system.⁵ He was sentenced to death.⁶

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1. *Description of Cases for Those Sentenced to Death in U.S. Military*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/description-cases-those-sentenced-death-us-military> [<https://perma.cc/VX4E-4HAH>].

2. *Id.*; *The U.S. Military Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/us-military-death-penalty> [<https://perma.cc/64ZS-JD34>].

3. *United States v. Gray*, 37 M.J. 730, 735–36 (A.C.M.R. 1992); *see also* Brief for the United States in Opposition at 2–4, *Gray v. United States*, 532 U.S. 919 (2001) (mem.) (No. 00-607), 2001 WL 34117598, at *2–4 [hereinafter Brief in Opposition].

4. *Gray*, 37 M.J. at 735–36; Brief in Opposition, *supra* note 3, at 2–4. Gray also pleaded guilty to twenty-two other counts of, inter alia, murder, rape, and robbery in North Carolina Superior Court and was given eight life sentences. Brief in Opposition, *supra* note 3, at 2 n.1.

5. *Gray*, 37 M.J. at 733 (stating that Gray was convicted of two specifications of premeditated murder, one specification of attempted murder, three specifications of rape,

Private Gray filed a petition for a writ of error coram nobis in the first military court of appeals, the Army Court of Criminal Appeals (“ACCA”).⁷ A writ of error coram nobis is a request for extraordinary relief that asserts a fundamental error by that court or a lower court in a previous judgment, order, or conviction.⁸ After ACCA denied the merits of Gray’s claims of error, he appealed to the highest military appellate court, the Court of Appeals for the Armed Forces (“CAAF”).⁹ It was here that Private Gray’s roadblock appeared. CAAF did not deny the merit of his claims but rather held that it did not have jurisdiction to hear such a petition in the first place.¹⁰ Furthermore, CAAF dismissed the petition with prejudice.¹¹ This holding was issued about a year after a federal district court similarly dismissed Gray’s petition for a writ of habeas corpus for want of jurisdiction.¹² Thus, Private Gray was stuck: both CAAF and the district court ruled that he needed to exhaust his remedies in the other court before his cause could proceed in their court.¹³

This outcome is a significant development in the history of the military justice system and of the military’s capital punishment process in particular. Over time, the system has grown more protective of defendants’ rights—such as by liberally granting juror disqualifications and conforming rules of evidence and procedure to those of civilian courts—thus enhancing the legitimacy of military courts as a tool of criminal justice in America. But a growing tendency on the part of these courts to refuse to exercise their full powers of review, as in their summary dismissal of Private Gray’s petition, now threatens that very legitimacy.

This Recent Development proceeds in three parts. Part I describes the background of Private Gray’s case from his crime and conviction to his many appeals and reviews. Part II briefly tells the story of the last military defendant to be executed in 1961 and uses that as a starting point to discuss the evolving legitimacy of the

two specifications of robbery, one specification of larceny, one specification of burglary, and two specifications of forcible sodomy).

6. *Id.*

7. Gray v. United States, 76 M.J. 579, 581 (A. Ct. Crim. App. 2017).

8. *See infra* Section III.A.

9. United States v. Gray, 77 M.J. 5, 6 (C.A.A.F. 2017), *cert. denied*, 138 S. Ct. 2709 (2018) (mem.).

10. *Id.*

11. *Id.*

12. *See* Gray v. Belcher, No. 5:08-cv-03289-JTM, 2016 U.S. Dist. LEXIS 149574, at *4 (D. Kan. Oct. 26, 2016).

13. *See* Gray, 77 M.J. at 6; Gray, 2016 U.S. Dist. LEXIS 149574, at *2–4.

military's capital process. Part III argues that military courts possess the authority to review a petition like Private Gray's and that failure to do so not only leaves Private Gray out in the cold but also weakens the legitimacy and independence of the military justice system.

I. PROCEDURAL BACKGROUND

While this Recent Development is concerned with Private Ronald Gray's most recent appearance before CAAF, it is first necessary to trace some of the winding path through the military justice system that led him there. As noted above, Gray was convicted of twelve specifications by a general court-martial in 1988 and sentenced to death.¹⁴ After a series of motions, hearings, and interlocutory appeals on Gray's mental capacity and the adequacy of his defense counsel, Gray's first appeal on the merits of his case was heard by the Army Court of Military Review ("ACMR"), predecessor to ACCA, on April 8, 1992.¹⁵ The defense alleged twenty-seven errors in their petition, but the ACMR held that all the assignments of error were meritless, and the court affirmed the conviction and sentence.¹⁶ A supplemental hearing was then granted on twenty-nine additional assignments of error, but the ACMR again upheld the conviction and sentence.¹⁷ Additional delays interrupted Gray's appeal to CAAF,¹⁸ but the military's highest appellate court ultimately affirmed the conviction and sentence in 1999.¹⁹

With his opportunities for relief on direct review exhausted, Private Gray awaited presidential approval of his sentence.²⁰ First, the case went through clemency review, both at the Office of the Judge Advocate General and at the U.S. Department of Justice.²¹ President George W. Bush approved the sentence on July 28, 2008, and the Secretary of the Army scheduled his execution for December 10,

14. *United States v. Gray*, 37 M.J. 730, 733 (A.C.M.R. 1992).

15. *Id.* at 734–35.

16. *Id.* at 733–34. This part covers the general procedural history of Gray's case. Some of the specific issues raised on appeal will be addressed in greater detail in Part II.

17. *United States v. Gray*, 37 M.J. 751, 754, 761 (A.C.M.R. 1993).

18. *See United States v. Gray*, 51 M.J. 1, 10 (C.A.A.F. 1999). Gray's original appellate counsel was forced to withdraw by a transfer to new military duties. *Id.* In addition, the court heard supplemental arguments in the wake of a Supreme Court decision concerning military capital punishment in *Loving v. United States*, 517 U.S. 748 (1996). *Gray*, 51 M.J. at 10; *see also Loving*, 517 U.S. at 751, 774.

19. *Gray*, 51 M.J. at 64.

20. A military execution cannot be carried out without the approval of the President. *See* 10 U.S.C. § 857(a)(3) (Supp. 2017).

21. *Gray v. Gray*, No. 5:08-CV-3289-JTM, 2015 WL 5714260, at *17 (D. Kan. Sept. 29, 2015), *rev'd*, 645 F. App'x 624 (10th Cir. 2016).

2008.²² Gray filed a petition to stay the execution and for a writ of habeas corpus in the United States District Court for the District of Kansas.²³ The stay was granted pending further review.²⁴

Around 2015, the case entered truly complex procedural territory. The district court considered most of the claims in the habeas corpus petition to be without merit under a “full and fair consideration” standard.²⁵ There were, however, other issues raised by the petition that were never considered by the military courts.²⁶ Ordinarily, these new objections would be considered waived, but Gray’s counsel, anticipating this procedural hurdle, concurrently filed a petition for extraordinary relief in the form of a writ of error coram nobis in the military courts.²⁷ This presented the possibility that the new assignments of error would in fact be reviewed by a military court, thereby removing the procedural bar to the district court’s consideration of his habeas petition.²⁸ As such, the district court created a “hybrid dismissal,” dismissing without prejudice those claims pending review in the military courts under the coram nobis petition and considering the remaining claims on the merits.²⁹ The Tenth Circuit summarily reversed the hybrid dismissal and remanded with orders for the district court to adopt an alternative disposition, such as total dismissal of the petition.³⁰ The district court chose to dismiss the entire petition without prejudice pending final disposition of Gray’s petition for coram nobis relief in the military courts.³¹

Private Gray’s case then arrived at the point of interest to this Recent Development. Gray’s petition for coram nobis relief began in ACCA. ACCA determined that it had jurisdiction to consider six of Gray’s seven claims for relief but denied all of them.³² This holding would have seemed ordinary enough, but upon appeal to CAAF, the jurisdictional holding—and the whole case—was turned on its head.

22. *Id.* at *17–18.

23. *Id.* at *18.

24. *Id.*

25. *Id.* at *22 (“[W]hen a military decision has dealt ‘fully and fairly’ with an allegation . . . it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.” (quoting *Watson v. McCotter*, 782 F.2d 143, 144 (10th Cir. 1986))).

26. *Id.* at *22–23.

27. *Id.* at *23.

28. *See id.* at *24.

29. *See Gray v. Gray*, 645 F. App’x 624, 625 (10th Cir. 2016); *Gray*, 2015 WL 5714260, at *37.

30. *Gray*, 645 F. App’x at 625–26.

31. *Gray v. Belcher*, No. 5:08-cv-03289-JTM, 2016 U.S. Dist. LEXIS 149574, at *1–4 (D. Kan. Oct. 26, 2016).

32. *See Gray v. United States*, 76 M.J. 579, 594 (A. Ct. Crim. App. 2017).

CAAF held that the military courts altogether lacked the jurisdiction to hear the *coram nobis* petition.³³ The court reasoned that the case had reached final judgment under Article 76 of the Uniform Code of Military Justice (“UCMJ”) and thus was beyond all review or alteration by the military courts.³⁴ Furthermore, the court held that even if Article 76 were not an obstacle, the military courts could not extend extraordinary relief until Gray had exhausted his remedies in the Article III courts.³⁵ After the Supreme Court’s recent denial of Gray’s petition for a writ of certiorari,³⁶ Private Gray now finds himself in the strange position of having been denied review in both the military courts and the Article III federal courts on the basis of having not yet exhausted his remedies in the other system.

II. THE MILITARY CAPITAL PROCESS: EVOLUTION AND LEGITIMACY

The military justice system is, at its core, unique, as its power comes not from Article III of the U.S. Constitution but from Article I’s commitment to Congress of the power “[t]o make Rules for the Government and Regulation of the land and naval Forces.”³⁷ It also has unique goals. It is designed not only to “promote justice” but also “to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”³⁸ Despite its uniqueness, it has recently become the stated goal of some members of Congress to steadily align military justice more closely with the federal Article III courts.³⁹ Differences remain—particularly the core principle of maintaining order and discipline—but the military justice system continues to be fundamentally legitimate because there has been a concerted effort

33. *United States v. Gray*, 77 M.J. 5, 6 (C.A.A.F. 2017), *cert. denied*, 138 S. Ct. 2709 (2018) (mem.).

34. *Id.*; see 10 U.S.C. § 876 (Supp. 2017). Article 76 codifies the common law principle of final judgments, which are meant to prevent repeated attacks on fully tried and reviewed cases. See § 876; see also *United States v. Denedo*, 556 U.S. 904, 916 (2009).

35. *Gray*, 77 M.J. at 6 (citing *Denedo*, 556 U.S. at 911).

36. *Gray v. United States*, 138 S. Ct. 2709 (2018) (mem.).

37. U.S. CONST. art. I, § 8, cl. 14.

38. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2019) [hereinafter MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019)], [https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf?ver=2019-01-11-115724-610](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610) [https://perma.cc/4NB2-LJZT].

39. See, e.g., 162 CONG. REC. S6871 (daily ed. Dec. 8, 2016) (statement of Sen. McCain) (“The legislation . . . incorporates best practices from Federal criminal practice and procedures.”).

throughout its history to scrutinize its practices and develop necessary procedural safeguards.

The military last executed an American soldier, Private John A. Bennett, in 1961.⁴⁰ His case serves as an interesting companion case to Private Gray's and a starting point for examining the evolution of military capital punishment, both at trial and on appeal. This part briefly discusses the facts and history of Private Bennett's case to show how the nascent UCMJ worked in practice. It then discusses the ways in which military justice, particularly military capital punishment, has changed and how, consequently, the system is a legitimate counterpart to civilian criminal justice. Finally, it will apply this historical analysis to some of the issues raised in Private Gray's court-martial and show how his case was, in its initial stages, a display of proper military justice at work.

A. *A Comparison Case: Private John A. Bennett*

The most recent military execution was the hanging of Private John A. Bennett in 1961 for the December 1954 rape of Gertrude Aigner, an eleven-year-old Austrian girl.⁴¹ On February 8, 1955, after five days of trial, a general court-martial convicted Private Bennett of rape and attempted murder and sentenced him to death.⁴² Within eighteen months, the Court of Military Appeals (predecessor to CAAF) heard his final direct appeal and upheld his conviction.⁴³ He filed a habeas petition, but it was denied in 1959.⁴⁴ President Dwight Eisenhower approved Bennett's sentence, and he was hanged at the United States Disciplinary Barracks at Fort Leavenworth, Kansas, on April 13, 1961.⁴⁵

Without doubt, Private Bennett's case raises eyebrows at first glance. First, he was executed less than seven years after his arrest.⁴⁶ By comparison, as of 2006, the average capital case took more than eight years just to get to a final direct appeal (excluding collateral

40. Richard A. Serrano, *Pvt. John Bennett Is the Only U.S. Soldier Executed for Rape in Peacetime*, L.A. TIMES (Sept. 10, 2000), <http://articles.latimes.com/2000/sep/10/magazine/tm-18406> [<https://perma.cc/6P23-DZL5>].

41. See *United States v. Bennett*, 21 C.M.R. 223, 225 (C.M.A. 1956).

42. Transcript of Record at 1, *United States v. Bennett*, 21 C.M.R. 223 (C.M.A. 1956) (No. 7709) [hereinafter *Transcript of Record*]; see also Stephen C. Reyes, *Dusty Gallows: The Execution of Private Bennett and the Modern Capital Court-Martial*, 62 NAVAL L. REV. 103, 104 (2013).

43. *Bennett*, 21 C.M.R. at 228.

44. *Bennett v. Davis*, 267 F.2d 15, 18 (10th Cir. 1959).

45. See Serrano, *supra* note 40.

46. See *supra* text accompanying notes 41–45.

proceedings).⁴⁷ Second, Private Bennett is the only American soldier to be executed for rape during peacetime.⁴⁸ Moreover, it is at least plausible that racial bias influenced Private Bennett's case. Like ten of the eleven other soldiers who were executed during the time of his case,⁴⁹ Private Bennett was black.⁵⁰ Furthermore, of the six white soldiers awaiting execution during that same period, all six were given a reprieve—two by presidential commutation and four by judicial decisions.⁵¹

Notwithstanding any potential racial bias, there are still a number of reasons that his conviction, sentence, or both would likely be overturned today. First, he was tried by a panel⁵² of nine members,⁵³ whereas modern rules require twelve members in a capital case.⁵⁴ Second, his defense counsel seemingly had no capital litigation experience, and his assistant defense counsel was not even a lawyer.⁵⁵ While the military has no strict learned-counsel requirement in capital cases⁵⁶—though it is a feature of another facet of military justice: the military commissions used at Guantanamo Bay⁵⁷—it would be unthinkable today to put on a capital defense with a nonlawyer in the second chair. Finally, Bennett received virtually no mitigation defense, aside from a few fellow soldiers testifying to his good military character.⁵⁸ No thorough examination or challenge was made

47. See Dwight Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 41 (2006).

48. Serrano, *supra* note 40. This fact is more notable considering that only sixteen years later, the Supreme Court held that death sentences for rape not resulting in murder were unconstitutional. See *Coker v. Georgia*, 433 U.S. 584, 597–98 (1977).

49. See Dwight Sullivan, *A Matter of Life and Death: Examining the Military Death Penalty's Fairness*, FED. LAW., June 1998, at 38, 44 (discussing military executions between 1954 and 1961).

50. Serrano, *supra* note 40.

51. See *id.*

52. Court-martial panels are roughly equivalent to juries in civilian courts.

53. Transcript of Record, *supra* note 42, at 6. Eleven members were assigned to the panel, but one did not appear for duty, *id.* at 2, and another was peremptorily struck by the defense, *id.* at 10.

54. 10 U.S.C. § 825a (Supp. 2017). While there is an exception to this rule for “military exigencies,” *id.*, Bennett was tried in peacetime Europe nearly ten years after the end of World War II, see *supra* text accompanying notes 41–42, so this exception likely would not bear on the case.

55. Transcript of Record, *supra* note 42, at 5 (noting that assistant defense counsel Captain Thomas Guptill was “not certified in accordance [with Article] 27(b)” and that he was branched “AGC,” presumably the Adjutant General's Corps).

56. See *United States v. Hennis*, 77 M.J. 7, 9 (C.A.A.F. 2017). In federal court, capital defendants must be afforded access to at least one counsel “learned in the law applicable to capital cases.” 18 U.S.C. § 3005 (2012).

57. 10 U.S.C. § 949a(b)(2)(C)(ii) (2012).

58. See Reyes, *supra* note 42, at 127.

on the basis of Bennett's low IQ, family history of mental illness, or probable state of extraordinary intoxication and incapacity at the time of his crime.⁵⁹ Since 2004, the military appellate courts have made clear that a death sentence cannot stand without a thorough mitigation defense that raises these issues if they are present.⁶⁰

B. *The Evolution of Military Justice*

With Private Bennett's case in mind, the next question of interest is how the system arrived at its current status. In the last half century, the Supreme Court has raised the constitutional floor for the use of capital punishment by any sentencing court, military or civilian. Alongside this development, the Supreme Court has also scrutinized the scope of military criminal jurisdiction, with an eye toward guaranteeing military defendants at least basic due process. Given these steady and major changes in the law, it is not surprising that there have been so few capital sentences or executions since Private Bennett's. A close look at this evolution bolsters the claim that military justice has, through responsive adaptation, maintained its legitimacy. Furthermore, these changes provide a starting point for the analysis of the ultimate fairness of Private Ronald Gray's own conviction and sentence—fairness undermined by CAAF's summary treatment of his petitions.

1. Changes to Capital Punishment

A decade or so after Private Bennett's execution, capital punishment in America underwent a change. In 1972, *Furman v. Georgia*⁶¹ brought all executions to a halt.⁶² The rationale for this decision was split into five opinions,⁶³ but ultimately all of the concurring judges agreed that capital punishment as practiced at the time was so arbitrary and capricious as to violate the Eighth and Fourteenth Amendments.⁶⁴ Thirty-five states responded by amending their death penalty statutes in hopes the changes would pass constitutional muster.⁶⁵ The Supreme Court subsequently dispensed with any notion that the death penalty is unconstitutional per se.⁶⁶ In

59. *See id.* at 104, 132–34.

60. *See United States v. Kreutzer*, 59 M.J. 773, 783 (A. Ct. Crim. App. 2004).

61. 408 U.S. 238 (1972).

62. *Id.* at 239–40.

63. *Id.* at 240–374.

64. *See, e.g., id.* at 256–57 (Douglas, J., concurring).

65. *Gregg v. Georgia*, 428 U.S. 153, 179–81 (1976).

66. *See id.* at 169.

1976, the Court in *Gregg v. Georgia*⁶⁷ held that a system of capital punishment “circumscribed by legislative guidelines” was no longer constitutionally suspect.⁶⁸ However, in 1977, *Coker v. Georgia*⁶⁹ narrowed the death penalty when the Supreme Court held that death was “disproportionate” to the crime of rape.⁷⁰ And in 2008, *Kennedy v. Louisiana*⁷¹ confirmed the rule that the death penalty is similarly disproportionate for the rape of a child.⁷²

The military justice system followed the federal system’s lead in adopting greater procedural protections for capital defendants. In 1983 in *United States v. Matthews*,⁷³ the defendant was convicted of premeditated murder and rape, and the panel sentenced him to death following a secret ballot with no further report of their findings of fact.⁷⁴ On appeal, the Court of Military Appeals held that this sentencing procedure was not adequate under the Supreme Court’s *Furman* and *Gregg* rulings.⁷⁵ The court reversed the sentence and pronounced that military capital punishment would only be constitutional if Congress or the President promulgated new procedures to provide for specific findings of aggravating circumstances in capital sentences.⁷⁶ In 1984, President Ronald Reagan issued an Executive Order promulgating these new procedures,⁷⁷ which are now found in Rule for Courts-Martial 1004.⁷⁸

In most respects, military capital sentencing now bears a reasonable resemblance to its federal counterpart. Panels must have at least twelve members and must vote unanimously.⁷⁹ In peacetime, the penalty is only available for murder under specified aggravating circumstances.⁸⁰ Imposition of such a sentence triggers mandatory

67. 428 U.S. 153 (1976).

68. *Id.* at 206–07.

69. 433 U.S. 584 (1977).

70. *Id.* at 597–98 (stating that “the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life”).

71. 554 U.S. 407 (2008).

72. *Id.* at 413.

73. 16 M.J. 354 (C.M.A. 1983).

74. *See id.* at 359, 361.

75. *See id.* at 377–80 (holding that the failure to specify aggravating factors rendered the sentencing procedure inadequate).

76. *See id.* at 383, 392.

77. *See* Exec. Order No. 12,460, 49 Fed. Reg. 3,169 (Jan. 26, 1984).

78. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019), *supra* note 38, pt. II, r. 1004(c); Reyes, *supra* note 42, at 105.

79. 10 U.S.C. § 825a (Supp. 2017).

80. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019), *supra* note 38, pt. II, r. 1004(c).

review in the military appellate court.⁸¹ In comparison, federal statutes also require Article III courts to consider aggravating and mitigating circumstances in cases of capital sentencing.⁸² The jury must also consist of twelve members.⁸³ While a death sentence does not trigger automatic review,⁸⁴ it is mandated that such an appeal, if timely filed, be given priority over all others.⁸⁵

2. Evolving Standards of Due Process and Fluctuating Military Jurisdiction

Even before *Furman*'s changes to capital punishment, the Supreme Court briefly put a stop not merely to military death sentences but to all courts-martial that did not concern crimes of a strictly military nature.⁸⁶ In *O'Callahan v. Parker*,⁸⁷ the defendant had been convicted of an assault and attempted rape while off base and off duty.⁸⁸ The Court held the Constitution's mandate that Congress "[govern] . . . the land and naval Forces" was limited to crimes related to military service—"the flouting of military authority, the security of a military post, or the integrity of military property."⁸⁹ Justice Douglas, writing for the Court, put great emphasis on the insufficiency of the military courts in protecting the constitutional rights of citizen-soldiers.⁹⁰ Under this new construction, if a soldier misbehaved off post—or on post in a manner not connected to his duties—the case would have to go before civilian authorities.⁹¹

The Court would not recognize a full restoration of court-martial jurisdiction over all crimes committed by servicemembers until 1987, when it upheld a coast guardsman's court-martial conviction for sexual assault of a minor while off duty.⁹² In reinstating court-martial

81. 10 U.S.C. § 867(a)(1) (2012).

82. 18 U.S.C. §§ 3592, 3593(d) (2012).

83. *Id.* § 3593(b).

84. *See id.* § 3595(a) (requiring review by the court of appeals only if the defendant timely appeals).

85. *Id.*

86. *See O'Callahan v. Parker*, 395 U.S. 258, 273 (1969), *overruled by Solorio v. United States*, 483 U.S. 435 (1987). "[E]xpansion of military discipline beyond its proper domain carries with it a threat to liberty." *Id.* at 265.

87. 395 U.S. 258 (1969).

88. *Id.* at 259–60.

89. *See id.* at 273–74 (quoting U.S. CONST. art. I, § 8, cl. 14).

90. *See id.* at 262 ("Those civil rights are the constitutional stakes in the present litigation."); *id.* at 265 ("A court-martial is not yet an independent instrument of justice . . .").

91. *See id.* at 262, 268–69, 273–74.

92. *See Solorio v. United States*, 483 U.S. 435, 450–51 (1987).

jurisdiction, Chief Justice Rehnquist reasoned that for a century before *O'Callahan*, the Court had interpreted the plain language of Article I to extend court-martial jurisdiction to all crimes determined appropriate by Congress.⁹³ Furthermore, *O'Callahan* had served only to create confusion, as courts were forced to determine what terms such as “service-connected” really meant.⁹⁴ Military law can extend to virtually all activity conducted by soldiers because the UCMJ assimilates most federal and state crimes (of the state in which the act occurred) into the so-called General Article, regardless of their relationship to military duties.⁹⁵

A revival of respect for the fairness of the military justice system since the nadir of *O'Callahan* was more than a mere caprice of changing justices on the Supreme Court. The system itself has changed to establish its legitimacy through guarantees of due process and fairness. Even prior to *O'Callahan*, the very establishment of the UCMJ in 1950 stands as a marker of the commitment to a process that is as fair as it is orderly.⁹⁶ Congress and the President have continued to make improvements to the guarantees of due process over the years, including the institutionalization of military judges in 1968⁹⁷ and the creation of the Military Rules of Evidence in 1980.⁹⁸

93. *Id.* at 439.

94. *See id.* at 448–49.

95. *See* 10 U.S.C. § 934 (Supp. 2017) (making criminal “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty”). The “Punitive Articles” part of the *Manual for Courts-Martial* provides a nonexhaustive list of specific offenses that can be tried under the General Article. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019), *supra* note 38, pt. IV. Assimilation of state crimes into “areas within federal jurisdiction,” including military installations and courts-martial, is effected by what is known as the Federal Assimilative Crimes Act. *See* 18 U.S.C. § 13 (2012).

96. *See* U.S. ARMY JUDGE ADVOCATE GEN. LEGAL CTR. & SCH., CRIMINAL LAW DESKBOOK: PRACTICING MILITARY JUSTICE 1–2 (2018). The citizen-army of WWII chafed under the swiftness of military justice. After over a century of using the Articles of War, Congress adopted a unified military justice system that would more closely resemble civilian criminal justice. *Id.*

97. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (codified as amended in scattered sections of 10 U.S.C.). Previously, courts-martial only required a “law officer” to advise the panel on the law. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 39 (1951) [hereinafter MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951)], http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1951.pdf [<https://perma.cc/Y69V-CXF5>]. The law officer was an attorney, but one whose regular duties were not that of a judge. *Id.*

98. H.F. Gierke, *The Thirty-Fifth Kenneth J. Hodson Lecture on Criminal Law*, 193 MIL. L. REV. 178, 190 (2007).

C. What Does This Mean for Private Ronald Gray?

Given the twists and turns of this history, it is not surprising that the military did not perform an execution for at least the first few decades since Private Bennett was put to death. Still, there remains the question of the lengthy delay since Private Ronald Gray's conviction and sentencing. Interestingly enough, the delay is mostly attributable to the modern military system's ultimate fairness, and that same fairness is probably the reason why Private Gray's sentence will remain in place.

Some substantial differences still remain between the military capital process and that of the civilian system. As mentioned above, there is no requirement for learned capital defense counsel for military cases.⁹⁹ Another difference of note is a feature of the military justice system as a whole: the convening authority selects the jury pool (or panel)—that is, the same person who charges the defendant and approves their sentence.¹⁰⁰ On the other hand, some differences in the military system actually offer the defendant arguably more protection than they would receive in a civilian court. In courts-martial, all trials, capital or otherwise, have bifurcated findings and sentencing phases, so even a relatively inexperienced defense counsel would be familiar with the process of offering mitigation defenses.¹⁰¹ Military voir dire includes a “liberal grant mandate” of for-cause strikes requested by defense counsel.¹⁰² Lastly, during military appeals, the courts have the power to exercise de novo review of even the findings of fact.¹⁰³

Consequently, it is unlikely Private Gray's cause will advance very far. The federal courts usually grant great deference to the rules and procedures of the military courts.¹⁰⁴ This standard of review has remained largely constant since Private John Bennett's trial and execution.¹⁰⁵ Given the deferential standard of review, it would take a

99. Compare *United States v. Hennis*, 77 M.J. 7, 9 (C.A.A.F. 2017), with 18 U.S.C. § 3005 (2012) (requiring learned defense counsel in all federal capital prosecutions).

100. See *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2019), *supra* note 38, pt. II, r. 503(a).

101. See *id.* pt. II, r. 1001(a).

102. See, e.g., *United States v. Clay*, 64 M.J. 274, 276–77 (C.A.A.F. 2007).

103. See *United States v. Matthews*, 16 M.J. 354, 378 (C.M.A. 1983).

104. See *Middendorf v. Henry*, 425 U.S. 25, 44 (1976) (holding that findings of due process violations are only appropriate if the need for other or additional process is “so extraordinarily weighty as to overcome the balance struck by Congress”).

105. See *Bennett v. Davis*, 267 F.2d 15, 17 (10th Cir. 1959) (“We inquire only to determine whether competent military tribunals gave fair and full consideration to all of the procedural safeguards deemed essential to a fair trial under military law.”); *Gray v.*

very substantial showing by any petitioner to convince the Article III courts that their case warranted reversal. That showing becomes even more difficult to assert given the many procedural safeguards and advantages afforded military defendants. Many of the safeguards described above have been in place since the UCMJ was promulgated in 1950,¹⁰⁶ and those that were not had been put into place in time for Ronald Gray's court-martial. Indeed, Gray's direct appeals took more than a decade to complete because the appellate courts granted motion after motion to examine his competency; file supplemental assignments of error; and replace, withdraw, and replace again his defense counsel.¹⁰⁷ CAAF considered no fewer than seventy asserted issues and errors in its review and found none warranted reversal.¹⁰⁸ Another eight years passed after this review because no execution may be carried out without the personal authorization of the President.¹⁰⁹

This is not to say that Private Gray's original case did not raise interesting questions. His appeal presented a chance for CAAF to consider a host of issues, many unique to military justice, such as whether the practice of panel members asking questions of witnesses during trial infringed upon the right to an impartial jury.¹¹⁰ Another example was whether the post-trial discovery of Private Gray's brain damage required a new trial be ordered.¹¹¹ The courts answered both of these questions in the negative,¹¹² but the more important question answered was the adequacy of the appellate review given to Private Gray's case. The issues were thoroughly and exhaustively considered,

Gray, No. 5:08-CV-3289-JTM, 2015 WL 5714260, at *22 (D. Kan. Sept. 29, 2015) (repeating the Supreme Court's admonition that "when a military decision has dealt 'fully and fairly' with an allegation . . . 'it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence'" (quoting *Watson v. McCotter*, 782 F.2d 143, 144 (10th Cir. 1986))), *rev'd*, 645 F. App'x 624 (10th Cir. 2016). Even the brief foray into limits on military jurisdiction imposed by *O'Callahan* recognized this deference to military process so long as proper military jurisdiction was found. *See O'Callahan v. Parker*, 395 U.S. 258, 272 (1969).

106. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951), *supra* note 97. In addition, one of the more glaring inconsistencies with ordinary judicial procedure noted in Bennett's case, representation of the defendant in part by a nonlawyer, had been rectified by the time of the promulgation of the 1968 *Manual for Courts-Martial*. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. III, ¶ 6d. (1968), http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1968.pdf [<https://perma.cc/9PJY-DGEY>].

107. *See United States v. Gray*, 51 M.J. 1, 9–10 (C.A.A.F. 1999).

108. *See id.* at 6–8, 64.

109. 10 U.S.C. § 857(a)(3) (Supp. 2017).

110. *See Gray*, 51 M.J. at 50.

111. *See id.* at 12–14.

112. *See id.* at 14, 50.

and military justice was shown to be something more than a “rough form of justice.”¹¹³ It may be cold comfort to capital defendants, but it is precisely this exhaustive treatment coupled with the aforementioned procedures and safeguards that undergird the legitimacy of the military justice system. But, as will be discussed in the next part, CAAF’s treatment of Private Gray’s latest petition for relief threatens this legitimacy.

III. THE MILITARY COURTS MUST ASSERT THEIR AUTHORITY TO PRESERVE THE LEGITIMACY OF THEIR SYSTEM

CAAF’s determination that it lacked the jurisdiction to issue a writ of error coram nobis is part of a broader trend in the military courts over the past several years to decline to issue extraordinary writs and to, more importantly, narrow the scope of their own authority.¹¹⁴ This is an unfortunate trend for two reasons. First, it threatens to subordinate the military courts to their Article III counterparts such that it calls into question the military courts’ usefulness. Second, in the meantime, it leaves defendants and petitioners like Private Gray stuck between an Article III system that defers to the military courts and military courts that are unwilling to exercise their own power. Professor Stephen I. Vladeck’s essay *Military Courts and the All Writs Act* discusses these developments in great detail,¹¹⁵ but further examination is required when the stakes are raised to life or death. This part will first outline the scope of the military courts’ authority as it relates to collateral review and extraordinary relief, with particular reference to the All Writs Act.¹¹⁶ It will then show how the military courts’ failure to properly utilize this power has negatively impacted both Private Gray’s petition and, more broadly, the foundations of the military justice system.

A. *The Scope of the Authority of Military Courts*

The powers of the military courts flow directly from Congress’s constitutional mandate to make “[r]ules for the Government and Regulation of the land and naval Forces.”¹¹⁷ The standing military appellate courts are specifically endowed with vast powers of review,

113. *Reid v. Covert*, 354 U.S. 1, 35 (1957).

114. *See generally* Stephen I. Vladeck, *Military Courts and the All Writs Act*, 17 GREEN BAG 2D 191 (2014) (examining military courts’ refusal to exercise the extent of their powers).

115. *See id.* at 191–205.

116. 28 U.S.C. § 1651 (2012).

117. U.S. CONST. art. I, § 8, cl. 14.

including the power to review findings of fact.¹¹⁸ Important for the purposes of this Recent Development, the military courts as “courts established by Act of Congress” are endowed with the power of the All Writs Act.¹¹⁹ This power covers both writs “in aid of [the court’s] jurisdiction”¹²⁰ and interlocutory writs and judgments.¹²¹ The powers of the All Writs Act enable jurisdiction, but they may not be used to enlarge a court’s jurisdiction.¹²² The Supreme Court has explicitly recognized this power in *Noyd v. Bond*¹²³ with regard to any case a military court may review.¹²⁴

Writs of error coram nobis are “ancient writ[s] . . . available at common law to correct errors of fact.”¹²⁵ Roughly translated, coram nobis means “before us,” meaning it may be used to challenge the validity of judgments or orders in the court that issued the judgment or order.¹²⁶ It is an extraordinary remedy meant to correct “errors of the most fundamental character.”¹²⁷ It is not a true collateral attack, although it bears some resemblance in that it is distinct from ordinary direct appeals.¹²⁸ Rather, coram nobis is another form of appeal within the same criminal case.¹²⁹ Procedural finality of a judgment is not a bar to consideration of coram nobis relief.¹³⁰

The military courts began to waver on the use of the All Writs power following *Clinton v. Goldsmith*.¹³¹ In that case, an Air Force officer was administratively—that is, not as a result of a court-martial proceeding—removed from the service, and he petitioned the military

118. See 10 U.S.C.A. § 866(d)(1) (Westlaw through Pub. L. 116-5 & 116-8).

119. 28 U.S.C. § 1651(a) (2012).

120. *Id.*

121. *Id.* § 1651(b) (granting the power of “writ or rule nisi,” meaning an intermediate or interlocutory ruling).

122. See *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 41–43 (1985). Specifically, the Court quoted a Supreme Court opinion in which Chief Justice Stone wrote that “[t]he writs may not be used as a substitute for an authorized appeal.” *Id.* at 41 (quoting *U.S. Alkali Exp. Ass’n v. United States*, 325 U.S. 196, 203 (1945)).

123. 395 U.S. 683 (1969).

124. See *id.* at 695 n.7.

125. *United States v. Morgan*, 346 U.S. 502, 506–07 (1954).

126. See *id.* at 507 n.9.

127. *Id.* at 512 (quoting *United States v. Mayer*, 235 U.S. 55, 69 (1914)).

128. See *United States v. Denedo*, 556 U.S. 904, 913 (2009); *Morgan*, 346 U.S. at 505 n.4.

129. See *Denedo*, 556 U.S. at 913; *Morgan*, 346 U.S. at 505 n.4.

130. *Denedo*, 556 U.S. at 915–16.

131. 526 U.S. 529 (1999); cf. Vladeck, *supra* note 114, at 194–203 (using *Goldsmith* as a starting point in tracing a path to other cases in which military courts have declined, wrongly in Professor Vladeck’s view, to use extraordinary writs).

appellate courts for extraordinary relief by an injunction.¹³² CAAF issued the injunction against the President as Commander-in-Chief, relying on the All Writs Act as authority.¹³³ The Supreme Court unanimously reversed, holding that CAAF's jurisdiction only extended reviewing matters tried and disposed of by courts-martial.¹³⁴ CAAF's enjoining of the President on a related, but nonetheless separate, administrative decision was an expansion of the court's jurisdiction, a direct contravention of All Writs Act jurisprudence.¹³⁵ This rebuke of the use of extraordinary writs was not an extraordinary action; rather it was in conformity with longstanding doctrine across the federal courts, not just the military courts.¹³⁶ It was not a substantive narrowing of the military courts' power but rather a restraining of that power to what it was all along.

If there was any doubt about the scope of military courts' authority under the All Writs Act, the Supreme Court provided some clarity in *United States v. Denedo*.¹³⁷ There, the Court considered the cause of a sailor discharged under a court-martial conviction and facing subsequent deportation in immigration proceedings.¹³⁸ The sailor, Denedo, petitioned for a writ of error coram nobis, claiming his court-martial conviction was invalid.¹³⁹ If true, the writ of error might stay his deportation.¹⁴⁰ CAAF had held that coram nobis review was appropriate, but remanded the case to the lower court for further proceedings.¹⁴¹ A dissenting CAAF judge argued that this was incorrect under *Goldsmith* because the case had reached final judgment, removing it from CAAF's jurisdiction.¹⁴² Justice Kennedy,

132. *Goldsmith*, 526 U.S. at 531. It is notable, though, that Major Goldsmith was in fact convicted by a court-martial for the same conduct underlying his administrative separation. *Id.* at 531–32. However, this simply was not the basis of his petition to the Air Force Court of Criminal Appeals and appeal to CAAF.

133. *Id.* at 532.

134. *See id.* at 531.

135. *See id.* at 537; *see also* Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 41–43 (1985) (stating that the All Writs Act is not meant to expand jurisdictions or provide alternatives to available statutory remedies).

136. *See* Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32–34 (2002); Pa. Bureau of Corr., 474 U.S. at 41–43.

137. 556 U.S. 904 (2009).

138. *Id.* at 907.

139. *Id.* at 907–08.

140. *Id.*

141. *Id.* at 908.

142. *See* Denedo v. United States, 66 M.J. 114, 136 (C.A.A.F. 2008) (Ryan, J., dissenting), *aff'd*, 556 U.S. 904 (2009).

writing for the Court, held that the rule of *Noyd v. Bond*¹⁴³ still controlled: the military courts do have the power of extraordinary relief under the All Writs Act.¹⁴⁴ Furthermore, the Court held that any determination of “finality” was immaterial, as it is in the very nature of a coram nobis petition to reconsider what had been a final judgment.¹⁴⁵

B. CAAF’s Dismissal of Private Gray’s Claim Is a Failure to Exercise Proper Authority

Despite the Court’s clear statements that CAAF has jurisdiction to issue extraordinary writs, CAAF nevertheless found that it lacked jurisdiction to hear Private Gray’s petition.¹⁴⁶ This finding was in error for several reasons. First, CAAF relied on the finality of the judgment under Article 76 of the UCMJ in determining that it could not entertain a coram nobis petition,¹⁴⁷ but this is a direct contradiction of Justice Kennedy’s analysis from *Denedo*.¹⁴⁸ In addition, CAAF stated that coram nobis relief is entirely unavailable if other remedies exist.¹⁴⁹ This is based on dicta in *Denedo* commenting that coram nobis relief is limited in such a way as to protect the finality of judgments in most cases.¹⁵⁰ But, tracing the origins of this statement from *United States v. Morgan*,¹⁵¹ the *Denedo* Court read its own precedent a little too broadly.¹⁵² The cited segment of *Morgan* does indeed discuss the alternative remedy of habeas corpus.¹⁵³ However, *Morgan* did not find that access to habeas corpus is a limit on extraordinary writs, but quite the opposite: the federal habeas statute

143. *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969) (“[T]here can[not] be any doubt as to the power of the Court of Military Appeals [under the All Writs Act] to issue an emergency writ.”).

144. *See Denedo*, 556 U.S. at 911.

145. *See id.* at 915–16 (“Article 76 codifies the common-law rule that respects the finality of judgments. Just as the rules of finality did not jurisdictionally bar the court in *Morgan* from examining its earlier judgment, neither does the principle of finality bar the [military court] from doing so here.” (citation omitted)).

146. *See United States v. Gray*, 77 M.J. 5, 6 (C.A.A.F. 2017).

147. *Id.*

148. *Denedo*, 556 U.S. at 915–16.

149. *Gray*, 77 M.J. at 6.

150. *See Denedo*, 556 U.S. at 911 (citing *United States v. Morgan*, 346 U.S. 502, 511 (1954)).

151. 346 U.S. 502 (1954).

152. *See Denedo*, 556 U.S. at 911 (citing *Morgan*, 346 U.S. at 511).

153. *Morgan*, 346 U.S. at 510–11.

should not be read as a bar to other writs and remedies.¹⁵⁴ Moreover, CAAF seems to ignore the fact that Private Gray's case is before them in part because the federal courts have barred his habeas petitions until such time as the military courts render a decision on the issues raised by the coram nobis petition.¹⁵⁵

It is admittedly likely that even if CAAF had granted review, Private Gray's petition would have failed on the merits. ACCA had already reviewed the petition on the merits and denied all of his claims.¹⁵⁶ This is not the point, though. CAAF's failure lies not so much in miscarrying justice with respect to Ronald Gray but rather in its refusal to fully exercise its power of review. The military courts narrowed their own jurisdiction by standing so stubbornly on the "finality" ordered by Article 76, refusing to exercise their authority to review final decisions despite the Supreme Court's recognition of such power. Doing so weakens the legitimacy of military justice as an independent judicial system because it treats the collateral review power of the Article III courts as superior and preferable to the military courts' power to review their own judgments.¹⁵⁷

It is also a disservice to Private Gray. Even though ACCA's denial of his claims portends denials by other reviewing courts, he at least enjoyed a full consideration of his rights before it was determined that none had been violated in this instance. He now sits both unvindicated and unheard. This can only lead to one of two judicial outcomes: either intervention from the Article III courts or inaction from the whole of the judiciary. In either event, the military courts are left worse off, either as "subservient . . . to their Article III civilian counterparts"¹⁵⁸ or as a place where soldiers only find that proverbial "rough form of justice."¹⁵⁹ Neither outcome is a welcome one.

CONCLUSION

This much is clear: the military courts have the power to review petitions for extraordinary relief just like any other court created by

154. See *id.* at 511 ("Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions." (quoting *United States v. Hayman*, 342 U.S. 205, 219 (1952))).

155. See *Gray v. Belcher*, No. 5:08-CV-03289-JTM, 2016 U.S. Dist. LEXIS 149574, at *3 (D. Kan. Oct. 26, 2016).

156. See *Gray v. United States*, 76 M.J. 579, 594 (A. Ct. Crim. App. 2017).

157. See Vladeck, *supra* note 114, at 204–05.

158. *Id.* at 200.

159. See *Reid v. Covert*, 354 U.S. 1, 35 (1957).

Congress. The exercise of this power is acutely important when life and death are at stake, even if the end result is to deny such relief. Even a denial of relief after a full and fair consideration better respects the rights of defendants than simply refusing to consider the claim. CAAF failed in this regard when it claimed a lack of jurisdiction to grant Private Ronald Gray's coram nobis petition.

The precise facts of Private Gray's situation are relatively rare. Only a few servicemen sit on death row, and few are likely to join them. However, while Gray's case is perhaps the most perplexing, it is not the only example of military courts weakening their own authority. The military courts have declined to use the All Writs power to enforce certain First Amendment protections in the Guantanamo military commissions and in the Chelsea Manning case.¹⁶⁰

The precedents of the Supreme Court make clear that CAAF does possess such jurisdiction. CAAF's failure to exercise its authority either leaves Private Gray without a venue to be heard or invites intrusion into the independence of the military courts. Without that independence, the need for such courts is called into question. This is a disservice to a system that has willingly adapted over time to afford soldiers a substantial degree of due process. It also undermines a system established to serve the cause of the "good order and discipline [of] the armed forces," which "thereby . . . strengthen[s] the national security of the United States."¹⁶¹ CAAF must, therefore, do better for us all.

WILLIAM R. CAULEY**

160. See Vladeck, *supra* note 114, at 198–203.

161. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019), *supra* note 38, pt. I, ¶ 3.

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