JUSTICE THOMAS: STAUNCH DEFENDER OF CRIMINAL DEFENDANTS' FIFTH AND SIXTH AMENDMENTS RIGHTS

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Justice Thomas: Staunch Defender of Criminal Defendants' Fifth and Sixth Amendments Rights

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In addition to receiving the incredible privilege of clerking for Justice Thomas, we have also both had the honor of serving as judges on the U.S. Court of Appeals for the Armed Forces (USCAAF). Others will recount the joys of clerking for Justice Thomas: suffice to say that it was an amazing year for both of us, and we were blessed to serve with this extraordinary man who believes in the Constitution, hard work, and principle—with an ample dose of humor. We were asked to comment on how Justice Thomas impacted the military justice system. Our court's predecessor, the Court of Military Appeals, was established by Congress in 1950 as a civilian court exercising appellate jurisdiction over the military courts.[3] Congress created our court as part of a broader set of reforms to the military justice system after World War II when millions of American servicemembers were exposed to the "rough form of justice" imposed by the military.[4] Essentially, Congress recognized that the rights of servicemembers accused of committing crimes were not being sufficiently protected by the military and took significant action—including the creation of our court—to better guard them. In this essay, we describe how Justice Thomas' steadfast commitment to the constitutional rights of criminal defendants both shaped the Supreme Court's jurisprudence and compelled the military courts to reevaluate some of their longstanding precedents with respect to the due process rights of servicemembers.

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[3] United States Court of Appeals for the Armed Forces, *About the Court*, https://www.armfor.uscourts.gov/about.htm (last accessed Aug. 20, 2021).

[4] Reid v. Covert, 354 U.S. 1, 35–36 (1957) ("Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks.").

It has long been well-settled that the Fifth and Sixth Amendments of the Constitution guarantee a criminal defendant in federal court certain rights. First, the government must provide the defendant with notice of the specific offense with which he has been charged.[5] And second, the defendant has the right to have an impartial jury determine, beyond a reasonable doubt, his guilt of every element of the crime—that is, "every fact necessary to constitute the crime"—with which he is charged.[6] Although no Justice disputed these fundamental principles, in a series of cases stretching over two decades, an often fractured Supreme Court wrestled with the scope of these rights. More specifically, the Justices debated what facts "*constitute the crime*" of which the defendant must be given notice and which a jury must find beyond a reasonable doubt.

In *McMillian v. Pennsylvania*,[7] the Supreme Court "coined the term 'sentencing factor' to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge."[8] The Court concluded that it did not violate a defendant's constitutional due process or jury trials rights for a legislature to mandate, and for a judge to then impose, a higher, five-year mandatory minimum penalty, if the judge found by a preponderance of the evidence that the defendant visibly possessed a firearm while committing certain enumerated penalties.[9] The Court distinguished "sentencing factors" from elements of the charged offense even though sentencing factors, if found by the judge, could change the scope of punishment to which a defendant could be sentenced.

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[5] Schmuck v. United States, 489 U.S. 705, 717 (1989) ("It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him."); Cole v. Arkansas, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than . . . notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge. . . .").
[6] United States v. Gaudin, 515 U.S. 506, 522–23 (1995); In re Winship, 397 U.S. 358, 364 (1970).
[7] 477 U.S. 79 (1986).
[8] Apprendi v. New Jersey, 530 U.S. 466, 485 (2000).
[9] *McMillian*, 477 U.S. at 91–92.

Apprendi v. New Jersey[10] involved another purported sentencing factor—a fact found by a judge by the preponderance of the evidence after the defendant pleaded guilty to a charge that did not contain or otherwise reference that fact. The presence of the sentencing factor triggered an "enhanced" maximum sentence of 20 years and resulted in an adjudged sentence of 12 years on the relevant count, both of which were greater than the statutory maximum sentence of 10 years for the crime as charged in the indictment.[11] "The question whether Apprendi had a constitutional right to have a jury find [this fact] on the basis of proof beyond a reasonable doubt [was thus] starkly presented."[12] The majority, which Justice Thomas joined in full, held that any fact that increased a defendant's punishment beyond the prescribed statutory maximum (except the fact of a prior conviction) must be submitted to a jury and proved beyond a reasonable doubt.[13]

In a separate concurrence, Justice Thomas examined the common law after the founding, and concluding that the "Constitution requires a broader rule than the Court adopts,"[14] staked out a stronger position: "that a 'crime' includes *every fact* that is by law a basis for imposing or increasing punishment."[15] Justice Thomas suggested an alternative, bright line approach in which "one need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts."[16] Under this "traditional understanding" of a crime,[17] "[e]ach fact necessary for that entitlement" would be an "element" of the offense and thus subject to the requirements of the Fifth and Sixth Amendments.[18] Justice Thomas rejected the

[10] 530 U.S. 466 (2000).
[11] *Id*. at 468.
[12] *Id.* at 475–76.
[13] *Id.* at 490.
[14] *Id.* at 499 (Thomas, J., concurring).
[15] *Id.* at 501 (emphasis added).
[16] *Id.*
[17] *Id.* at 510 (citing 1 J. BISHOP, LAW OF CRIMINAL PROCEDURE 50 (2d ed. 1872)).
[18] *Id.* at 501.

post-*McMillan* "multi-factor parsing of statutes" to determine whether a fact was an element,[19] and forthrightly asserted that the majority opinion in *Almendarez-Torres v. United States*[20]—holding that a sentence enhancement beyond the statutory maximum based on a prior conviction was nonetheless a sentencing factor—was wrong.[21] In Justice Thomas' view, the original meaning of the Fifth and Sixth Amendments requires that we treat as elements of the offense *any* facts that increased a defendant's potential punishment by law, including those necessary to establish a higher statutory minimum sentence.[22] Justice Thomas was both more willing to jettison bad precedent than his colleagues and more protective of a criminal defendant's rights.

Two terms later, the Supreme Court revisited the issue that divided Justice Thomas from his fellow Justices in the *Apprendi* majority in *Harris v. United States*.[23] In *Harris*, the district court judge had determined, by a preponderance of the evidence, that the defendant had "brandished" a gun during or in relation to a drug trafficking crime, a fact that had neither been alleged in the indictment nor proven during the guilt phase of the trial.[24] Based on the fact of the defendant's brandishing, and pursuant to the statutory sentencing scheme outlined in 18 U.S.C. § 924(c)(1)(A), the district court sentenced the defendant to an elevated mandatory minimum sentence of seven-years imprisonment.[25] The Supreme Court granted certiorari to determine whether *McMillan* remained good law after *Apprendi*.

Writing for the plurality, Justice Kennedy concluded that *Apprendi* could be reconciled with *McMillan*, because a distinction can be drawn between facts increasing the defendant's

[19] *Id.* at 501.
[20] 523 U.S 224 (1998).
[21] *Apprendi*, 530 U.S. at 520–21 (Thomas, J., concurring).
[22] *Id.* at 518.
[23] 536 U.S. 545 (2002).
[24] *Id.* at 551.
[25] *Id.*

minimum sentence and facts extending the sentence beyond the statutory maximum.[26] Focusing on judges' undisputed discretion to impose a sentence based on matters presented in extenuation and mitigation,[27] and that the jury had convicted the defendant of "the crime,"[28] the plurality concluded that "the Fifth and Sixth Amendments have been observed; and the Government has been authorized to impose any sentence below the maximum."[29] It was of no moment to the plurality that a mandatory minimum based on a fact determined by a mere preponderance of the evidence both relieves a judge of any discretion to award a lesser sentence and changes the range of permissible punishments for the verdict arrived at by the jury in a manner detrimental to the defendant. In the end, the plurality simply concluded that "the *Apprendi* Court's understanding of the Constitution is consistent with the holding in *McMillan*,"[30]and cabined *Apprendi*'s holding to facts that increase the statutory maximum sentence.

Justice Breyer concurred in the judgment, but only because he dissented in *Apprendi* and was not ready "to accept its rule."[31] He explained his division from the plurality: "I cannot easily distinguish *Apprendi v. New Jersey* from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction."[32]

Justice Thomas, writing for the dissent, similarly found no such distinction. "We made clear in *Apprendi* that if a statute 'annexes a higher degree of punishment' based on certain circumstances, exposing a defendant to that higher degree of punishment requires that those circumstances be charged in the indictment and proved beyond a reasonable doubt."[33] In his

[26] *Id.* at 566–67.
[27] *Id.* at 558.
[28] *Id.* at 565.
[29] *Id.*
[30] *Id.* at 564.
[31] *Id.* at 569–70 (Breyer, J., concurring in part and in the judgment).
[32] *Id.* at 569 (citation omitted).
[33] *Id.* at 576 (Thomas, J., dissenting) (quoting *Apprendi*, 530 U.S. at 480).

view, it was "a matter of common sense" that an increased mandatory minimum should trigger constitutional safeguards because it "heightens the loss of liberty and represents the increased stigma society attaches to the offense."[34] The logic of *Apprendi* applies: "Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed."[35] Rather than adhere to *McMillan*, Justice Thomas found it "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements."[36]

Eleven years later, the position championed by Justice Thomas in both his *Apprendi* concurrence and his *Harris* dissent prevailed in *Alleyne v. United States*.[37] Justice Thomas, writing for the Court, stated simply: "Because there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum, *Harris* was inconsistent with *Apprendi*. It is, accordingly, overruled."[38] Following *Harris*, the Court has adhered to the simple rule that Justice Thomas laid out in *Apprendi*: any fact that increases the penalty for a crime is an element of the offense.

The Supreme Court's focus on the *Apprendi* issue, and Justice Thomas' leadership defending the due process rights of the criminally accused and willingness to revisit his prior position and precedent, motivated significant reforms in the military justice system. Although the military justice system has not utilized sentencing factors like those at issue in *Apprendi*, *Harris*, and *Alleyne*, other traditions in the military justice system raised similar due process concerns.

[34] *Id.* at 577–78.
[35] *Id.* at 579.
[36] *Id.* at 581–82.
[37] 570 U.S. 99 (2013).
[38] *Id.* at 116.

A longstanding feature of western military justice systems is the general article: a catch-all provision that criminalizes a broad range of unspecified conduct that interferes with the good order and discipline of the military forces. For example, the final provision in the British Articles of War for 1627 instructed that "[a]ll other abuses and offences, not specified in these Orders shall be punished according to the discipline of war and opinions of such officers and others as shall be called to make a Council of War."[39] Accordingly, it is not surprising that when the Second Continental Congress enacted the first Articles of War to govern the conduct of the fledgling Continental Army in 1775, it also included a general article, stating:

> All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the above articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion.[40]

Today, even though Congress has replaced the Articles of War with the Uniform Code of Military Justice (UCMJ)—a modern, complete, statutory criminal code codified in Title 10 of the United States Code[41]—the general article persists. Known in the military justice community as "Article 134", the current version of the general article still subjects American servicemembers to criminal liability for "all disorders and neglects to the prejudice of good order and discipline in the armed forces" (Article 134 clause 1), for "all conduct of a nature to bring discredit upon the armed forces" (Article 134 clause 2), and for "crimes and offenses not capital" (Article 134 clause 3).[42]

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[39] H. Bullock, *Articles of War—1627*, 5 J. SOC'Y FOR ARMY HIST. REC. 111, 111–15 (1926).
[40] *Articles of War; September 20, 1776*, JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1779. (Edited from the original records in the Library of Congress by Worthington Chauncey Ford; Chief, Division of Manuscripts. Washington, DC: Government Printing Office, 1905) (retrieved from the Yale Law School Avalon Project at https://avalon.law.yale.edu/18th_century/contcong_09-20-76.asp).
[41] 10 U.S.C. §§ 801–946.
[42] *Id.* § 934.

To a civilian observer, the general article can appear shockingly vague and broad. Exactly what conduct Article 134 proscribes is a question that is not readily answered by the text of the statute itself. Presumably, there are innumerable slight offenses committed by servicemembers that interfere with the "good order and discipline" of the military or are "of a nature" to harm the reputation of the military, but certainly not all such offenses result in criminal trials by court-martial. One might reasonably wonder how an 18-year old recruit enlisting in the military can be expected to know what he or she must do to avoid violating Article 134. Indeed, in 1963, only twelve years after Congress enacted the UCMJ, the Third Circuit held that Article 134 failed to satisfy the standard of precision required by the due process clause of the Fifth Amendment and was therefore void for vagueness.[43] Although the Supreme Court reversed that decision, a significant part of its reasoning for doing so was that the military appellate courts—including the predecessor court to our court—had construed Article 134 "in such a manner as to at least partially narrow its otherwise broad scope."[44] While no doubt we did so in some respects, there remained ways in which Article 134 raised serious concerns related to notice and conviction for elements that were not charged or proven beyond a reasonable doubt in the military justice system. Following the Supreme Court's decisions in the *Apprendi* line of cases, the military appellate courts would once again act to preserve service members Fifth and Sixth Amendment rights, especially with respect to Article 134.

First, in *United States v. Medina*,[45] USCAAF reversed a line of precedent that had strongly suggested that every federal offense in Title 18 was *inherently* prejudicial to good order and discipline (Article 134 clause 1) and service discrediting (Article 134 clause 2) such that

[43] Levy v. Parker, 478 F.2d 772, 796 (3d Cir. 1973), *rev'd*, 417 U.S. 733 (1974).
[44] Parker v. Levy, 417 U.S. 733, 752 (1974).
[45] 66 M.J. 21 (C.A.A.F. 2008).

Article 134 clauses 1 or 2 would always be lesser included offenses (LIOs) of Article 134 clause 3, which incorporates into the UCMJ all non-capital federal crimes codified in the United States Code, even if the elements of those clauses were not charged. Thus, whenever the government failed to prove all the elements of a Title 18 offense (charged under Article 134 clause 3), or the Title 18 offense failed on jurisdictional grounds, the government was still able to garner a conviction under Article 134 clauses 1 or 2. In *Medina*, USCAAF clarified that Article 134 clause 1, Article 134 clause 2, and Article 134 clause 3 are alternative means of violating the general article, and thus independent offenses with distinct elements. Accordingly, the fact that a defendant's conduct was prejudicial to good order and discipline (Article 134 clause 1) or was service discrediting (Article 134 clause 2) are elements of a crime that need to be charged and proven beyond a reasonable doubt.

In addition to Article 134, the UCMJ contains enumerated offenses for crimes with detailed elements, Articles 77–133, that both mirror common law offenses and detail offenses unique to the military justice system.[46] In *United States v. Miller*,[47] USCAAF applied the logic of *Medina* to reverse a related line of precedent that held that every enumerated offense in the UCMJ was *inherently* prejudicial to good order and discipline (Article 134 clause 1) and service discrediting (Article 134 clause 2) such that Article 134 clauses 1 or 2 would always be LIOs of every other offense codified in the UCMJ, whether their unique elements had been charged and proven or not. Quoting the Supreme Court, USCAAF noted that "[t]o uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process."[48] In subsequent cases, USCAAF made explicit what was

[46] 10 U.S.C. §§ 877–933.
[47] 67 M.J. 385 (C.A.A.F. 2009).
[48] *Id.* at 388 (quoting *Dunn v. United States*, 442 U.S. 100, 106 (1979)) (internal quotation marks omitted).

necessarily implied by its decisions in *Medina* and *Miller*: if the government wanted to obtain a conviction under clauses 1 or 2 of Article 134, the facts that a defendant's conduct was prejudicial to good order and discipline or was service discrediting must, "like any element of any criminal offense, be separately charged and proven."[49]

One year after *Miller*, in *United States v. Jones*,[50] USCAAF addressed another due process concern in the military justice system: the proper manner for determining whether an offense is a LIO of a charged offense. In the decades after the enactment of the UCMJ, military courts had taken a variety of approaches toward recognizing LIOs. Notably, the military courts expressly rejected the notion that an LIO must necessarily be included in the greater offense, adopting more liberal standards such as the "inherently related" and "fairly embraced" tests.[51] Under the often-used "fairly embraced" standard, military courts would recognize an LIO when, even though the proposed LIO contained different elements from the charged offense, those "different elements are fairly embraced in the factual allegations of the other offense and established by evidence introduced at trial."[52] Even after the Supreme Court formally adopted the "elements" test in *Schmuck v. United States*—holding that "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense" [53]—USCAAF's predecessor court declined to strictly apply *Schmuck* in the military context despite the obvious notice and proof problems.[54] Instead, USCAAF concluded that a modified version of the elements test should apply in military courts that took a

[49] United States v. Ballan, 71 M.J. 28, 33 (C.A.A.F. 2012); *United States v. Fosler*, 70 M.J. 225, 232 (C.A.A.F. 2011) ("The Government must allege every element expressly or by necessary implication, including the terminal element.").
[50] 68 M.J. 465 (C.A.A.F. 2010).
[51] *Id.* at 468–69.
[52] United States v. Baker, 14 M.J. 361, 368 (C.M.A. 1983).
[53] 489 U.S. 705, 716 (1989).
[54] United States v. Foster, 40 M.J. 140, 143 (C.M.A. 1994).

"qualitative, not quantitative approach."[55] Under that modified standard, courts would determine whether an offense was an LIO "by lining up elements *realistically* and determining whether *each* element of the supposed 'lesser' offense is *rationally* derivative of one or more elements of the other offense—and *vice versa*."[56]

In *Jones*, USCAAF expressly rejected these alternative approaches and formally adopted the elements test for identifying LIOs.[57] The court observed that the elements test was more consonant with the requirements of the Fifth and Sixth Amendment, Supreme Court precedent, and USCAAF's "more recent focus . . . on the significance of notice and elements" in determining whether one offense is an LIO of another offense.[58] In reaffirming the elements test, USCAAF also terminated the long-standing practice in the military justice system of permitting the President to specify—by Executive Order—certain offenses as LIOs of other offenses irrespective of their elements.[59]

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In the *Apprendi* line of cases, Justice Thomas fought for and obtained a strict, bright line approach to identifying and proving "the crime" of which criminal defendants stood accused, as required by the Fifth and Sixth Amendment and hammered home the constitutional imperative of notice. This emphasis on elements and the protection of the due process right of a civilian criminal defendant reminded the military courts that American servicemembers deserved the same protections, and caused some of its more troubling precedents to be reversed.

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[55] *Id.* at 146.
[56] *Id.* (emphasis in original).
[57] 68 M.J. at 468.
[58] *Id.* (citing *Miller*, 67 M.J. at 388–39, and *Medina*, 66 M.J. at 26–27).
[59] *Id.* at 471; *see also* United States v. Girouard, 70 M.J. 9 (C.A.A.F. 2011) (holding that negligent homicide under Article 134 was not an LIO of premeditated murder under Article 118 despite being identified as such by the President because negligent homicide requires proof of elements that premediated murder does not); United States v. McMurrin, 70 M.J. 18 (C.A.A.F. 2011) (same).