

**WINNING THE BATTLE AND THE WAR: WHY THE  
MILITARY SERVICES SHOULD APPOINT CAPITAL DEFENSE  
ATTORNEYS FROM A HYBRID PANEL**

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*Capital defense counsel in the military are at a disadvantage. They are expected to perform effectively in surely the most challenging and long-lasting litigation they will face in their legal careers, without the benefit of the exposure, training, guidelines, or experience in capital litigation that is available to federal civilian lawyers. We do military lawyers, and accused servicemembers, a disservice by putting them in this position.<sup>1</sup>*

## I. Introduction

“You’re playing a very dangerous game.”<sup>2</sup> That was the warning to the government in a recent oral argument from a judge on the highest military court, the Court of Appeals for the Armed Forces (CAAF).<sup>3</sup> The dangerous game was not providing “learned counsel” or other requested resources on a capital appeal, potentially rendering the defense team

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<sup>1</sup> United States v. Akbar, 74 M.J. 364, 418 (C.A.A.F. 2015) (Baker, C.J., dissenting).

<sup>2</sup> Oral Argument at 12:22, United States v. Hennis, 77 M.J. 7 (C.A.A.F. 2017) (No. 17-0263/AR), <http://www.armfor.uscourts.gov/newcaaf/CourtAudio6/20171010C.wma> [hereinafter Hennis Oral Argument].

<sup>3</sup> *Id.* Another judge described the government’s tactics as a “morbid game of chicken.” *Id.* at 16:59.

ineffective.<sup>4</sup> In other words, if the government denies resources up front, but the case is overturned for ineffective assistance of counsel, then the government may “win the battle but lose the war.”<sup>5</sup>

While the CAAF ultimately found it lacked the power under the previous law to provide “learned counsel,” most of the CAAF judges expressed sympathy for the appellant’s plight.<sup>6</sup> Put bluntly by another CAAF judge to defense counsel, “[i]t looks awful that it looks like you don’t have somebody who knows what the heck they are doing.”<sup>7</sup> Thus, the majority of CAAF judges shared one bellwether sentiment: “Can’t the [Judge Advocate General of the Army] just fix *this*?”<sup>8</sup>

Under the new Military Justice Act of 2016 (MJA), fixing “*this*” by providing learned counsel appears to be what all the Judge Advocates General (TJAGs) may be required to do.<sup>9</sup> Namely, the MJA now requires capital defense counsel at trial and on appeal to be “learned in the law applicable to such cases” as determined by each Service’s TJAG.<sup>10</sup> Accordingly, each Service’s TJAG is required to determine not only what learned counsel is, but also how to appoint them.<sup>11</sup>

However, under the regulations implementing the MJA, there appears to be a loophole that allows each Service’s TJAG<sup>12</sup> to continue with business as usual.<sup>13</sup> Especially in the Army, business as usual has been to

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<sup>4</sup> United States v. Hennis, 77 M.J. 7 (C.A.A.F. 2017); Hennis Oral Argument, *supra* note 2, at 00:01-29:16.

<sup>5</sup> Hennis Oral Argument, *supra* note 2, at 19:35.

<sup>6</sup> Hennis, 77 M.J. at 7-10; Hennis Oral Argument, *supra* note 2, at 00:01-29:16.

<sup>7</sup> Hennis Oral Argument, *supra* note 2, at 23:45.

<sup>8</sup> See *id.* at 13:30-35 (emphasis added).

<sup>9</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114- 328, §§ 5186, 5334, 130 Stat. 2000, 2902, 2936 (2016) [hereinafter MJA 2016]

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> It is important to note that the Coast Guard has determined not to refer any capital case as a matter of policy. See Annual Report Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense Secretary of Homeland Security and the Secretaries of the Army, Navy and Air Force Pursuant to the Uniform Code of Military Justice for the period October 1, 2015 to September 30, 2016 112 (2016) [hereinafter 2016 CAAF Report] (noting the Coast Guard’s policy on capital cases). Thus, when referencing the military services and TJAGs through this article, it is referencing the Army, Navy, Air Force, and Marines.

<sup>13</sup> See Exec. Order No. 13825, 83 Fed. Reg. 46, 9940-43, 10057 (1 Mar. 2018) [hereinafter New MCM] (amending R.C.M. 502).

select military counsel with varying qualifications on an ad hoc basis.<sup>14</sup> However, according to CAAF, continuing business as usual is a “dangerous game.”<sup>15</sup>

Thus, each Service’s TJAG should adopt a system for appointment of “learned counsel” similar to the system most analogous to courts-martial: the Military Commissions.<sup>16</sup> This system would prevent costly litigation, bring military practice in line with federal practice and substantially comply with ABA principles. Moreover, the benefits to this system outweigh alternatives such as “growing” learned counsel internally and the potential costs. In other words, the system would allow the government to win both the battle and the war.

Accordingly, this article examines how capital defense counsel are currently appointed in the military justice system and the military specific challenges to implementing a new system. Next, it compares how learned capital defense counsel are appointed in the federal, state, and Military Commissions systems. The article also analyzes how the Military Commissions system should be altered to fit military justice practice and apply the system to a potential hypothetical situation. Finally, this article analyzes how the proposed system is better than “growing” learned counsel and how the system could be implemented for as little as a million dollars a year.

## II. Current Practice in the Military Justice System

### A. How Capital Defense Counsel Are Appointed in the Military

Similar to non-capital cases, the military services provide capital trial defense counsel services on a regional basis.<sup>17</sup> Typically, a supervisory

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<sup>14</sup> Telephone Interview with Lieutenant Colonel Franklin Rosenblatt, Deputy Chief, U.S. Army Trial Def. Service (Feb. 7, 2018) [hereinafter LTC Rosenblatt Interview] (stating current Army practices).

<sup>15</sup> See Hennis Oral Argument, *supra* note 2, at 12:22.

<sup>16</sup> While a centralized, inter-service system for qualification and selection of learned counsel implemented by the Department of Defense would also “win the battle,” such a system may conflict with amended Articles 27 and 70, UCMJ, which vests the power solely with each service TJAG. See MJA 2016, *supra* note 9, §§ 5186, 5334.

<sup>17</sup> See, e.g., U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 6-3 (11 May 2016) [hereinafter AR 27-10]; U.S. DEP’T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE para. 5.3.1.1. (8 Dec. 2017); U.S. DEP’T OF NAVY, JAGINST

defense counsel appoints a defense counsel to a case when it arises in their region.<sup>18</sup> If necessary, the chief of the defense service appoints counsel outside the region or from the reserves after solicitation.<sup>19</sup> Critically, the pool of available counsel consists only of those currently assigned to the defense services and any additional resources are provided at the discretion of the government.<sup>20</sup> An accused is also able to hire a civilian attorney or request individual counsel if reasonably available.<sup>21</sup> However, capital defense counsel have been appointed on an ad hoc basis without the benefit of a comprehensive list of capital counsel or an ability to appoint or fund civilian counsel.<sup>22</sup>

On appeal, counsel are generally assigned to an appellate defense organization through the normal assignments process without any requirement for criminal, let alone capital experience.<sup>23</sup> Once assigned to the division, appointment to a capital case is solely at the discretion of the director of that appellate division and, in the case of the Army, has been on an ad hoc basis.<sup>24</sup>

## B. Changes under the Military Justice Act of 2016

Upon this background, Congress recently enacted the MJA requiring “to the greatest extent practicable” at least one capital trial and appellate defense counsel be “learned in the law” applicable to capital cases as “determined by the [TJAG].”<sup>25</sup> The Department of Defense’s (DoD) legislative proposal reveals the purpose for these amendments was to bring military capital defense counsel qualifications more in alignment with

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5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) sec. 0130 (26 June 2012). For brevity, this article will focus mainly on Army regulations.

<sup>18</sup> See, e.g., AR 27-10, *supra* note 17, para. 6-3.

<sup>19</sup> *Id.* LTC Rosenblatt Interview, *supra* note 14 (noting appointment procedures).

<sup>20</sup> See, e.g., AR 27-10, *supra* note 17, para. 6-3.

<sup>21</sup> See *id.*

<sup>22</sup> LTC Rosenblatt Interview, *supra* note 14 (stating recent capital counsel have been appointed on an individual basis for each case and there is no internal funding authority for capital counsel).

<sup>23</sup> See Motion to Vacate, *United States v. Hennis*, 75 M.J. 796 (A. Ct. Crim. App. 2016) (No. 20100304) (describing appointment and qualifications of counsel in U.S. Army Defense Appellate Division). It is important to note that the author was the lead counsel on this appeal before the Army Court and drafted the motion. *Id.*

<sup>24</sup> See AR 27-10, *supra* note 17, Appendix C-3 (noting detailing authorities on appeal).

<sup>25</sup> See MJA 2016, *supra* note 9, §§ 5186, 5334 (“To the greatest extent practicable, in any capital case, at least one defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases.”).

federal counterparts to the greatest extent practicable.<sup>26</sup> To that end, the amended statutes specifically provide authority to hire or contract for a civilian who is “learned in the law.”<sup>27</sup>

In order to comply with this mandate, the President has signed changes to Rules for Courts Martial [hereinafter RCM] 502 and 1202, effective 1 January 2019, which now include language mirroring the new statutes, allowing TJAGs to determine who is learned counsel.<sup>28</sup> In addition, the new RCM 502(d)(2)(C)(ii) defines learned counsel broadly,<sup>29</sup> with the exact language from Rules for Trial by Military Commissions.<sup>30</sup> However, the updated RCM 502 omits language from the Commissions regulation stating that compliance with federal standards is sufficient to be learned counsel, again leaving it to TJAG’s discretion.<sup>31</sup> In other words, under the new rules, each Service’s TJAG will be free to both qualify and appoint learned counsel at their discretion.

Consequently, the MJA changes appear to allow each Service’s TJAG to maintain business as usual or create an exception that swallows the rule, but doing so will not address the issues outlined by CAAF. For example, under the statute and the RCMs, TJAG could determine that any judge advocate meeting the minimum practice requirements and has taken one hour of online capital training is considered “learned in the law.”<sup>32</sup> However, such a practice still comes with the risks warned of by the CAAF. Thus, to win both the battle and the war, any new system must address the current challenges of the military system.

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<sup>26</sup> MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 278 (Dec. 22, 2015) [hereinafter MJRG REPORT].

<sup>27</sup> See MJA 2016, *supra* note 9, §§ 5186, 5334.

<sup>28</sup> See New MCM, *supra* note 13, at 9942.

<sup>29</sup> New MCM, *supra* note 13, at 9942 (“[Learned counsel] is an attorney whose background, knowledge, or experience would enable him or her to competently represent an accused in a capital case.”).

<sup>30</sup> Compare *id.* with U.S. DEP’T OF DEF., REG. FOR TRIAL BY MILITARY COMMISSION, para. 9.1.b.1.C (2016) [hereinafter COMMISSION REG.].

<sup>31</sup> COMMISSION REG., *supra* note 30, para. 9.1.b.1.C.

<sup>32</sup> See MJA 2016, *supra* note 9, §§ 5186, 5334; New MCM, *supra* note 13, at 9942.

### C. Military Specific Challenges to a Learned Counsel Appointment System

#### 1. Lack of Experienced, Qualified Counsel<sup>33</sup>

Since the modern military capital system was implemented, both trial and appellate defense counsel have lacked experience and qualifications similar to civilian counterparts.<sup>34</sup> This inexperience is due to the relative small number of capital cases in the military.<sup>35</sup> Until now, there have been no specialized qualifications or experience necessary to serve as capital defense counsel at any stage of litigation.<sup>36</sup> Instead, the only qualification to practice is being licensed to practice within a state and being certified by TJAG.<sup>37</sup>

This absence of qualifications and experience has been criticized by military practitioners and judges alike.<sup>38</sup> In nearly every capital case reaching appeal since 1984, counsel have raised errors with the qualifications, experience, or ineffectiveness of trial or appellate

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<sup>33</sup> In this section, qualifications refer to minimum practice standards, i.e., training, skills necessary, and/or good performance. Experience refers to previous experience as a defense counsel in a capital case.

<sup>34</sup> See Colonel Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 47-48 (2006) (discussing historical inexperience of military capital counsel); Lieutenant Commander Stephen Reyes, *Left Out in the Cold: The Case for a Learned Counsel Requirement in the Military*, ARMY LAW., Oct. 2010, at 5, 7-11 (comparing military capital counsel lack of experience to civilian counterparts).

<sup>35</sup> See LTC Rosenblatt Interview, *supra* note 14 (stating there are two capital trials progressing in the Army); E-mail from Lieutenant Colonel Christopher Carrier, Chief Complex and Capital Litig., U.S. Army Def. Appellate Div., to author (Mar. 14, 2018, 6:08 EST) (on file with the author) [hereinafter E-mail from LTC Carrier] (stating there are only two active capital appeals and one potential military habeas case in the Army).

<sup>36</sup> See Reyes, *supra* note 34, at 5 (stating none of the service regulations reflected any practice requirements above the minimum requirements of Articles 27 and 70, UCMJ). However, in 2016, Army regulations were amended to include recommended, non-binding qualifications. See *Hennis*, 77 M.J. at 8.

<sup>37</sup> See UCMJ, arts. 27, 70 (1994).

<sup>38</sup> See, e.g., *Hennis* Oral Argument, *supra* note 2, at 00:01-2916; *United States v. Akbar*, 74 M.J. 364, 418 (C.A.A.F. 2015) (Baker, C.J., dissenting); WALTER T. COX III ET AL., NAT'L INST. OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM OF MILITARY JUSTICE 10 (2001) [hereinafter COX COMMISSION] (“[i]nadequate counsel is a serious threat to the fairness and legitimacy of capital courts-martial, made worse at court-martial by the fact that so few military lawyers have experience in defending capital cases.”); see also Sullivan, *supra* note 34, at 47-48; Reyes, *supra* note 29.

counsel.<sup>39</sup> While CAAF has remained reluctant to interfere in what it has deemed “internal personnel management of the military,”<sup>40</sup> CAAF judges have negatively commented on the lack of both minimum qualifications and experience for counsel.<sup>41</sup>

Underqualified and inexperienced capital counsel are not just a feature of trial, but persist on appeal as well. In the Army, the current lead capital appellate counsels are generally company grade officers with varying degrees of criminal law experience, if any.<sup>42</sup> Critically, the Air Force,<sup>43</sup> Navy, and Marines,<sup>44</sup> mitigate this gulf of experience by employing civilian counsel with significant appellate experience, usually assigned to all capital or complex cases.<sup>45</sup> However, having only one experienced appellate counsel may create conflict of interest problems on appeal.

## 2. *Revolving Door of Counsel and the Potential for Conflicts of Interest*

In the past, the services have assigned numerous capital defense counsel or a “revolving door” of capital counsel during and between the stages of capital litigation.<sup>46</sup> This has been due to the length of capital litigation, transition between trial and appeals, and the normal military

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<sup>39</sup> See *Hennis*, 77 M.J. at 7; *Akbar*, 74 M.J. at 418; *United States v. Gray*, 51 M.J. 1, 18 (C.A.A.F. 1999); *United States v. Murphy*, 50 M.J. 4, 5 (C.A.A.F. 1998); *United States v. Loving*, 41 M.J. 213, 300 (C.A.A.F. 1994); *United States v. Curtis*, 46 M.J. 129, 130 (C.A.A.F. 1997); *United States v. Witt*, 72 M.J. 727, 749 (A.F. Ct. Crim. App. 2013); *United States v. Walker*, 66 M.J. 721, 759-60 (N-M. Ct. Crim. App. 2008); *United States v. Kreutzer*, 59 M.J. 773, 775 (A. Ct. Crim. App. 2004); *United States v. Simoy*, 46 M.J. 592, 601-07 (A.F. Ct. Crim. App. 1996); *United States v. Thomas*, 43 M.J. 550, 575 (N-M. Ct. Crim. App. 1995).

<sup>40</sup> *Loving*, 41 M.J. 213 at 300.

<sup>41</sup> See *Hennis* Oral Argument, *supra* note 2, at 00:01-29:16; *Akbar*, 74 M.J. at 418 (Baker, C.J., dissenting); see also *Reyes*, *supra* note 34, at 7-11.

<sup>42</sup> See Motion to Vacate, *United States v. Hennis*, 75 M.J. 796 (A. Ct. Crim. App. 2016) (No. 20100304) (stating the ranks and qualifications of all counsel within U.S. Army Defense Appellate Division).

<sup>43</sup> See 2016 CAAF REPORT, *supra* note 12, at 112 (noting a civilian attorney was employed at the Air Force Defense Appellate Division).

<sup>44</sup> See *id.* at 58 (noting Code 45 was staffed with one civilian attorney).

<sup>45</sup> See, e.g., *id.*; *United States v. Dalmazzi*, 76 M.J. 1 (C.A.A.F. 2016), cert. granted 138 S.Ct. 53 (2017) (Mr. Brian Mizer as counsel); *United States v. Witt*, 75 M.J. 380 (C.A.A.F. 2016) (Mr. Brian Mizer as counsel).

<sup>46</sup> See, e.g., *United States v. Loving*, 41 M.J. 213, 320 (C.A.A.F. 1994) (Wiss, J., dissenting); *United States v. Quintanilla*, 60 M.J. 852, 868 (N-M. Ct. Crim. App. 2005) (noting revolving door of appellate counsel).

personnel rotation.<sup>47</sup> Especially on appeal, the problem arises because by the time each new counsel can get up to speed on a case or learn about capital defense (if that is possible), a new counsel is rotated in.<sup>48</sup> This practice has drawn significant criticism from practitioners and judges.<sup>49</sup> However, in spite of this criticism, the problem persists, primarily on appeal.<sup>50</sup>

Further, due to the lack of availability of learned counsel, some military services have assigned one capital defense attorney to multiple cases on appeal,<sup>51</sup> but this may also create the possibility of conflicts of interests between clients. Most obvious is a conflict that arises between co-accused, which usually requires different capital counsel.<sup>52</sup> However, there are additional appellate issues that may also necessitate different learned counsel for each capital appellant. Namely, because military appellate courts must conduct a “proportionality” review, a death row appellant may argue his or her crimes were “not as bad” as another death row inmate.<sup>53</sup> Thus, different learned counsel for each capital appellant may be necessary to avoid conflicts of interest.<sup>54</sup>

Issues of conflicts of interest, rotating counsel, and inexperienced capital defense counsel, are not unique to the military, but other systems have largely resolved these issues. Indeed, one goal of the DoD legislative proposal mandating learned counsel was to make military practice more

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<sup>47</sup> See *Loving*, 41 M.J. at 320 (Wiss, J., dissenting).

<sup>48</sup> See *United States v. Hennis*, 77 M.J. 7 (C.A.A.F. 2017); *Loving*, 41 M.J. at 320 (Wiss, J., dissenting); *United States v. Witt*, 72 M.J. 727 (A.F. Ct. Crim. App. 2013). While this revolving door of counsel was common in early capital trials, the rotation of counsel has been primarily on appeal in the most recent capital cases. See *id.*

<sup>49</sup> See *Hennis Oral Argument*, *supra* note 2, at 00:01-29:16; COX COMMISSION, *supra* note 38, at 10; Reyes, *supra* note 34, at 7-11.

<sup>50</sup> See, e.g., Consolidated Motion to Compel Funding for Learned Counsel, a Mitigation Specialist, & a Fact Investigator; for Appointment of Appellate Team Members; & for a Stay of Proceedings, *United States v. Hennis*, 77 M.J. 7 (C.A.A.F. 2017) (No. 17-0263/AR), <http://www.armfor.uscourts.gov/newcaaf/briefs/2017Term/Hennis170263AppellantMotion.pdf> (noting appellant has been assigned seven different appellate counsel just before the Army Court alone).

<sup>51</sup> See, *United States v. Akbar*, 74 M.J. 364 (C.A.A.F. 2015) (noting Lieutenant Colonel Jonathan Potter as counsel); *United States v. Hennis*, 75 M.J. 796 (A. Ct. Crim. App. 2016) (noting Lieutenant Colonel Jonathan Potter as counsel).

<sup>52</sup> See e.g., U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS Rule 1.7 (1 May 1992).

<sup>53</sup> See, e.g., *United States v. Curtis*, 33 M.J. 101, 109 (C.M.A. 1991) (discussing proportionality review).

<sup>54</sup> See *id.*



like the federal system.<sup>55</sup> Thus, a review of the federal method of appointing learned counsel appears to be a good starting point for a solution to the above issues.

### III. How Other U.S. Justice Systems Provide Capital Defense Counsel

#### A. The Federal System

##### 1. *Learned Counsel in the Federal System*

Similar to the language in the new Articles 27 and 70, UCMJ, federal capital defense counsel must be “learned in the law applicable to [capital] cases.”<sup>56</sup> Critically, “learned in the law applicable to capital cases” is undefined in 18 U.S.C. § 3005, but federal courts have found learned counsel must, at a minimum, have prior distinguished experience in capital litigation.<sup>57</sup> In practice, federal learned counsel generally have decades of defense experience in complex cases and lead trial counsel must have prior experience as part of a capital defense team before leading one.<sup>58</sup>

##### 2. *How Learned Counsel Are Appointed in the Federal System*

Learned counsel are appointed by the federal judge presiding over the capital trial or appeal.<sup>59</sup> There are two main ways to be appointed learned counsel.<sup>60</sup> First, a federal public defender may be detailed by the district’s chief federal defender and is then appointed by the judge.<sup>61</sup>

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<sup>55</sup> See MJRG REPORT, *supra* note 26, at 278.

<sup>56</sup> Compare MJA 2016, *supra* note 9, with 18 U.S.C. § 3005 (requiring two counsel in capital cases and at least one must be “learned in the law applicable to capital cases.”).

<sup>57</sup> See, e.g., *In re Sterling-Suarez*, 323 F.3d 1, 5-6 (1st Cir. 2003); *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996); *United States v. Miranda*, 148 F.Supp. 2d 292 (S.D.N.Y. 2001).

<sup>58</sup> See, e.g., Patrick Radden Keefe, *The Worst of the Worst*, THE NEW YORKER (Sep. 14, 2015) (noting the Boston Bomber’s attorney Judy Clarke has over thirty years of experience and defended the Unabomber among many other death penalty clients before that case).

<sup>59</sup> 18 U.S.C. § 3006A (2010).

<sup>60</sup> See 18 U.S.C. § 3006A; *Defender Services*, U.S. COURTS, <http://www.uscourts.gov/services-forms/defender-services> (last visited Mar. 19, 2019).

<sup>61</sup> See *Defender Services*, U.S. COURTS, <http://www.uscourts.gov/services-forms/defender-services> (last visited Mar. 19, 2019). Such counsel are federal employees. See *id.*

Second, learned counsel may be appointed by the judge from a pool of Criminal Justice Act (CJA) “panel attorneys.”<sup>62</sup> Namely, a list of qualifying attorneys are maintained by the appointing court, clerk, or designee.<sup>63</sup> These attorneys are private attorneys meeting the local and federal requirements for learned counsel, and there is a requirement of previous capital experience for appointment as a lead counsel.<sup>64</sup> After appointment, the judge then approves all funding requests for private counsel *ex parte* at the current rate of \$185 per hour for lead learned counsel.<sup>65</sup>

### 3. Comparison with the Military

Comparatively, the federal system lacks the issues of inexperienced, unqualified and revolving counsel and meets most of the American Bar Association (ABA) principles for providing defense services.<sup>66</sup> Partly due to mandatory guidelines,<sup>67</sup> learned counsel in the federal system have prior capital experience and years of defense experience, thus the “[d]efense counsel’s ability, training, and experience match the complexity of the case.”<sup>68</sup> These qualifications also help to ensure a fair process and focuses litigation, which may result in shorter trials and direct appeals.<sup>69</sup> Further, the federal system employs a panel of civilian learned counsel that alleviates caseload concerns for federal defenders and prevents issues with

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<sup>62</sup> See *id.*; see also 18 U.S.C. § 3006A.

<sup>63</sup> See 18 U.S.C. § 3006A (requiring each district court creates its own plan for appointment of counsel); see also, *CJA Attorney Information*, U.S. DIST. COURT E. DIST. OF VA., <http://www.vaed.uscourts.gov/cja/index.htm> (last visited 20 Mar. 2019) (noting the clerk maintains the list of attorneys).

<sup>64</sup> See UNITED STATES COURTS, 7 GUIDE TO JUDICIARY POLICY – DEFENDER SERVICES, §§ 610-680 (2018), <http://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines> [hereinafter JUDICIAL GUIDE].

<sup>65</sup> *Id.* at § 630.

<sup>66</sup> See ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANT, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002) [hereinafter TEN PRINCIPLES].

<sup>67</sup> JUDICIAL GUIDE, *supra* note 64, § 620.

<sup>68</sup> TEN PRINCIPLES, *supra* note 66, Principle 6.

<sup>69</sup> Compare *United States v. Hennis*, 77 M.J. 7, 8 (C.A.A.F. 2017) (noting ten years between initiation of court-martial and first appellate decision), with Simon Jeffrey, *The Execution of Timothy McVeigh*, THE GUARDIAN (11 Jun 2001, 10:55 AM) <https://www.theguardian.com/world/2001/jun/11/qanda.terrorism> (noting four years between conviction and execution).

conflicts of interest, especially with co-accused.<sup>70</sup> Finally, there are less issues with “revolving” counsel because learned counsel are not subject to military personnel rotation and trial attorneys often remain on a capital case through the initial appeal.<sup>71</sup>

However, the appointment of capital counsel by a judge creates additional issues. First, waiting for appointment by a trial judge prevents immediate representation by learned counsel upon detention or arrest, creating a significant risk that clients do not receive representation by capably qualified counsel as soon as possible.<sup>72</sup> Second, judicial appointment and funding creates an appearance of lack of independence from the government.<sup>73</sup> In other words, there is a lack of defense independence when the “selection, funding, and payment” of learned counsel is solely at the discretion of a federal judge, not the defense.<sup>74</sup>

#### *4. The Federal System is Not a Perfect Fit for the Military*

The federal method of appointment is not well suited to the military because military judges have limited jurisdiction and are poorly equipped to delve into personnel issues of the services. Without particularized knowledge of the second and third order effects of appointment, military judges are not positioned to make decisions that may affect the “internal personnel management” of the services.<sup>75</sup> More importantly, unlike Article III judges, military judges lack plenary power over collateral, purely administrative issues unrelated to a specific court-martial.<sup>76</sup> Thus,

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<sup>70</sup> See Ten Principles, *supra* note 66, Principle 2; see also NAT'L LEGAL AID & DEF. ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS, Standard 3.1.B (1989) [hereinafter STANDARDS FOR ASSIGNED COUNSEL].

<sup>71</sup> See JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES-JUDICIAL CONFERENCE OF THE UNITED STATES UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 90 (September 2010) [hereinafter DEFENDER SERVICES REPORT].

<sup>72</sup> See TEN PRINCIPLES, *supra* note 66, Principle 3; STANDARDS FOR ASSIGNED COUNSEL, *supra* note 70, Standard 2.5.

<sup>73</sup> See TEN PRINCIPLES, *supra* note 66, Principle 1; STANDARDS FOR ASSIGNED COUNSEL, *supra* note 70, Standard 2.2.

<sup>74</sup> TEN PRINCIPLES, *supra* note 66, Principle 1; see STANDARDS FOR ASSIGNED COUNSEL, *supra* note 70, Standard 2.2.

<sup>75</sup> *United States v. Loving*, 41 M.J. 213, 300 (C.A.A.F. 1994) (declining to involve itself in the “internal personnel management” of the services).

<sup>76</sup> See *Clinton v. Goldsmith*, 536 U.S. 529, 534-35 (1999) (discussing how, unlike Article III courts, military courts derive their powers solely from statute and cannot act without express authority from Congress).

military judges appear to lack the broad authority necessary to maintain a standing list of learned counsel or order payment.<sup>77</sup>

Also, the federal system's high level of mandatory capital qualifications would likely create problems in the military. Specifically, requiring distinguished service that amounts to decades of defense experience and numerous capital trials is problematic in the military because there are so few capital cases from which to gain experience.<sup>78</sup> In other words, imposing higher federal standards with no way of reaching them does not solve the lack of experience problem in the military. On the other hand, setting minimum requirements without capital experience that are low enough to ensure a broad pool of attorneys appears to fail the most minimum definition of "learned counsel": prior capital defense experience.<sup>79</sup>

However, this Hobson's choice has been avoided by some states using different appointment methods. Thus, a review of state systems that mitigate or avoid those concerns altogether is necessary.

## B. State Systems

### 1. How Learned Counsel Are Appointed in Death Penalty States

There is no unanimity among the states for qualifications or procedures for the appointment of capital defense counsel. The majority of states employ a method of appointment similar to that of the federal system: judicial appointment.<sup>80</sup> Also, similar to the federal system, twenty-five of the judicial appointment states utilize some form of a pool of private attorneys qualified for capital cases.<sup>81</sup> While some states utilize different systems by county, others have a statewide system.<sup>82</sup> In many states, these pools of private attorneys are managed by a state office

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<sup>77</sup> See *id.*

<sup>78</sup> See Sullivan, *supra* note 34, at 47; Reyes, *supra* note 34.

<sup>79</sup> See, e.g., *In re Sterling-Suarez*, 323 F.3d 1, 5-6 (1st Cir. 2003); *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996) (interpreting the prior statute but noting the current statute requires prior capital experience); *United States v. Miranda*, 148 F.Supp. 2d 292 (S.D.N.Y. 2001).

<sup>80</sup> See *infra* Appendix A.

<sup>81</sup> See *infra* Appendix A.

<sup>82</sup> See *infra* Appendix A.

separate from the judiciary and are often employed when conflicts arise.<sup>83</sup> Accordingly, many of the same issues of the federal system discussed above exist in judicial appointment state systems; however, other states have successfully avoided those issues.

Fifteen death penalty states utilize a modified public defender system that avoids the federal problems by internally setting qualifications and selecting capital defense counsel.<sup>84</sup> Additionally, many of these states authorize agencies to maintain a list or pool of qualified attorneys to utilize as they see fit.<sup>85</sup> For example, in North Carolina, the Office of Indigent Defense Services (IDS) assigns counsel to indigent capital defendants at every stage of litigation.<sup>86</sup> Upon notification by the court of an indigent capital client, the head of the IDS office then selects the attorney from an internal list of capitally qualified counsel or contracts out for a private attorney if necessary.<sup>87</sup> Funding for contract attorneys and case specific expenditures is provided directly by the state through the Commission on IDS that cannot be comprised of any prosecutor, law enforcement official, or active judge.<sup>88</sup> In short, the government plays no role in determining who will be appointed—preserving independence.

Comparatively, the modified public defender system bears many similarities with the military system, but ensures more independence, best-qualified counsel, and flexibility. Similar to the state public defender appointment system, each Service's TJAG delegates the authority to appoint capital defense counsel to the head of the respective defense service.<sup>89</sup> However, unlike the military system, the modified state public defender systems have the ability to set mandatory qualifications, assemble and maintain a pool of civilian attorneys, and authorize funding for contract attorneys.<sup>90</sup> Thus, these modified public defender systems alleviate all of the aforementioned ills suffered by the federal and military

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<sup>83</sup> See *infra* Appendix A.

<sup>84</sup> See *infra* Appendix A.

<sup>85</sup> See *infra* Appendix A.

<sup>86</sup> N.C. OFFICE OF INDIGENT DEF. SERV., PART 2: RULES FOR PROVIDING LEGAL REPRESENTATION IN CAPITAL CASES (2015), [hereinafter RULES FOR LEGAL REPRESENTATION IN CAPITAL CASES], <http://www.ncids.org/Rules%20&%20Procedures/IDS%20Rules/IDS%20Rules%20Part%202.pdf>.

<sup>87</sup> *Id.*

<sup>88</sup> N.C. GEN. STAT. § 7A-498.4 (2001).

<sup>89</sup> See, e.g., AR 27-10, *supra* note 17, para. 28-6.

<sup>90</sup> See, e.g., RULES FOR LEGAL REPRESENTATION IN CAPITAL CASES, *supra* note 86..

systems, but may create budgetary and funding authority issues unique to the military.

*2. The Modified State Public Defender System May Not Be Suited to the Military*

A modified public defender system may not suit the military because defense services are usually not budgeted to fund capital counsel and because removing the funding authority from the convening authorities removes a disincentive for capital cases. First, in the military, the convening authority normally funds the costs for a capital defense team,<sup>91</sup> but under a modified state public defender system, the individual defense services would have to either provide qualified military counsel or fund civilian counsel internally.<sup>92</sup> This may be problematic because military defense services generally do not have internal budgets large enough or internal authorities to contract counsel.<sup>93</sup> More importantly, removing the requirement to fund resources by the convening authorities may remove a financial disincentive against capital referrals. In other words, a convening authority may be more likely to refer a death penalty case knowing that his command will not pay the litigation costs.

Accordingly, the modified state defender system does not appear well suited to the military due, in part, to the military's structure. Thus, a review of the capital appointment system most similar to the military, the Military Commissions, is necessary.

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<sup>91</sup> See, e.g., AR 27-10, *supra* note 17, para. 28-5. However, in the case of capital appeals, the government provides detailed counsel. *Id.* para. 28-6. Additional resources are ordered by the appellate courts or the convening authority with jurisdiction over the appellant. See *id.* para. 5-6. However, whether appellate courts have the authority to order funding has been called into question by CAAF. *United States v. Hennis*, 77 M.J. 7, 10 n.5 (C.A.A.F. 2017).

<sup>92</sup> See, e.g., N.C. GEN. STAT. § 7A-498.4 (2001).

<sup>93</sup> LTC Rosenblatt Interview, *supra* note 14 (stating there are currently no internal budget authorities to support hiring contract civilian counsel and the current budget is unlikely to be enough to cover the average capital case).

### C. The Military Commissions

#### 1. *How Learned Counsel Are Appointed in the Military Commissions*

The Military Commissions adopts many of the appointment procedures from both federal and modified public defender systems. The Regulation for Trial by Military Commission sets the minimum binding qualifications with expansive language, but explicitly references the federal statute requiring prior capital defense experience.<sup>94</sup> However, unlike the federal system, the Office of the Chief Defender (OCD) determines whether an attorney qualifies as a learned counsel.<sup>95</sup> Thus, this method effectively side-steps the Hobson's choice of qualifications being too high or too low by letting the Chief Defender choose the best attorney for each case.

Further, the Chief Defender can pick from an expansive pool. Specifically, in addition to the military and civilian attorneys assigned to the OCD, the OCD maintains a list of civilian learned counsel from which to select learned counsel.<sup>96</sup> If counsel can be selected from within the Chief Defender's office, then that attorney is appointed.<sup>97</sup> However, if the Chief Defender determines outside counsel is required, a funding request is forwarded to the convening authority.<sup>98</sup> If the request is "reasonable," the convening authority "shall" approve the appropriate funding and execute the contract action.<sup>99</sup> Accordingly, this system solves many of the problems discussed above and complies with nearly every American Bar Association principle by establishing qualifications, achieving equality between case complexity and counsel experience, maintaining independence, providing flexibility to address conflicts and excessive workload, and establishing a funding source with government accountability.

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<sup>94</sup> COMM'N REG., *supra* note 30, para. 9.1.b.1.C. Specifically, the regulation defines learned counsel as an attorney "whose background, knowledge and/or experience would enable him or her to properly represent an accused in a capital case, with due consideration of the seriousness of the possible penalty and the unique and complex nature of the litigation." *Id.* Further, it states "[a] counsel who meets the requirements of 18 U.S.C. § 3005 qualifies as learned counsel under this section." *Id.*

<sup>95</sup> COMMISSION REG., *supra* note 30, para. 9.1.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* para. 9.1.a.6.C (stating the content of the request for funding is solely administrative criteria, not a justification on the merits of the selection by the Chief Defender).

<sup>99</sup> *Id.* para. 9.1.

## 2. Advantages of the Military Commissions System

Perhaps the biggest advantage of the Military Commissions system is the delegation of authority to appoint to the Chief Defender because it increases independence, potentially reduces litigation, and best matches attorney to client. Even though the convening authority funds the defense counsel, the appointment of learned counsel by the Chief Defender preserves the independence of the defense system.<sup>100</sup>

Critically, appointment by the Chief Defender may reduce litigation or mitigate risk of overturned convictions. Issues with qualifications or effectiveness of counsel have been raised in numerous capital cases since 1984, creating substantial litigation.<sup>101</sup> Like in *Hennis*, these arguments may include that the defense counsel is unqualified or that the government is systemically withholding adequate counsel.<sup>102</sup> However, such arguments are undermined and litigation is potentially avoided if an independent Chief Defender appoints learned counsel.

Further, a Chief Defender is better able to match the skills of an attorney to the specific facts of the case, making it less likely that learned counsel will be ineffective. Certain skills known only through client confidential information may be unique and necessary for capital defense such as experience with childhood abuse, traumatic brain injury, certain cultural heritages, or psychosocial behaviors.<sup>103</sup> Proper investigation and use of this mitigating evidence could literally mean the difference between life and death. Multiple military capital cases have been overturned for

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<sup>100</sup> See TEN PRINCIPLES, *supra* note 66.

<sup>101</sup> See *United States v. Hennis*, 77 M.J. 7 (C.A.A.F. 2017); *United States v. Akbar*, 74 M.J. 364 (C.A.A.F. 2015); *United States v. Gray*, 51 M.J. 1, 18 (C.A.A.F. 1999); *United States v. Murphy*, 50 M.J. 4, 5 (C.A.A.F. 1998); *United States v. Curtis*, 46 M.J. 129, 130 (C.A.A.F. 1997); *United States v. Loving*, 41 M.J. 213, 300 (C.A.A.F. 1994); *United States v. Witt*, 72 M.J. 727, 749 (A.F. Ct. Crim. App. 2013); *United States v. Walker*, 66 M.J. 721, 760 (N-M. Ct. Crim. App. 2008); *United States v. Kreutzer*, 59 M.J. 773, 775 (A. Ct. Crim. App. 2004); *United States v. Simoy*, 46 M.J. 592, 601-07 (A.F. Ct. Crim. App. 1996); *United States v. Thomas*, 43 M.J. 550, 575 (N-M. Ct. Crim. App. 1995).

<sup>102</sup> See *Hennis*, 77 M.J. at 7.

<sup>103</sup> See, e.g., Am. Bar Ass'n, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 955-960 (rev. ed. 2003), [hereinafter ABA Guidelines] (stating these types of evidence are of special importance in capital cases and the ABA has emphasized this difference from normal trials as a basis for selection and qualification of learned counsel).



failure to discover such evidence.<sup>104</sup> Thus, by matching the correct skillset to the client based on this confidential information, the risk of potential error on appeal is likely reduced.

Ultimately, the Military Commissions system for qualification and appointment of learned counsel appears to be the best fit for the military system. Accordingly, the remainder of this article outlines how the Commissions system could be tailored to the military justice system, examines how such a system would work, and addresses remaining criticisms of the proposed system.

#### IV. Applying the Military Commissions Appointment System to the Military Justice System

While some adaptations are intuitive due to the different structure of the two systems, there are two substantive alterations made to the Military Commissions system that should be made upon implementation in the military justice system: (1) require prior capital experience absent military exigency and (2) widen the pool of attorneys from which to appoint learned counsel.

##### A. Suggested Alterations to the Commissions System upon Implementation

###### 1. *Prior Capital Defense Experience Absent Military Exigencies*

One necessary departure from the Military Commissions regulations should be a clarification that prior capital defense experience should be required “absent military exigencies.” The Manual for Military Commissions requires “learned counsel” in all capital cases, not just to the greatest extent practicable.<sup>105</sup> However, unlike the Commissions, the military must maintain flexibility for wartime operations, such as during a declared war or national emergency. Thus, any regulation implementing

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<sup>104</sup> See, e.g., *Murphy*, 50 M.J. at 11-16 (failure to investigate mental health issues); *Witt*, 72 M.J. at 749 (failure to investigate possible brain injury); *Kreutzer*, 59 M.J. at 775 (failure to investigate psychiatric and mitigating evidence).

<sup>105</sup> MANUAL FOR MILITARY COMMISSIONS, UNITED STATES, R.M.C. 506(b) (2016) (stating the right to learned counsel applies to all capital cases, not just to the greatest extent).

the proposed system should allow for the flexibility to deprive a capital accused of learned counsel only in the most dire of military exigencies.

Additionally, the deviation from the Commissions regulations should include a requirement for prior capital experience in order to align the military with federal practice. Currently, the Commissions regulations do not explicitly require learned counsel to have prior capital experience.<sup>106</sup> However, DoD's explicit purpose for proposing the new learned counsel requirement to Congress was to align military practice with the federal learned counsel, which courts have interpreted learned counsel to require distinguished prior capital experience.<sup>107</sup> Thus, adding regulatory language that prior capital experience should be afforded "absent military exigencies" would effectuate legislative intent of a similar federal standard while maintaining wartime flexibility.

## 2. *Expanded Hybrid Panel of Attorneys*

Military defense service chiefs should be able to select learned counsel from an expanded hybrid panel consisting of contract civilians, department civilians, and eligible<sup>108</sup> active and reserve military attorneys. Currently the Chief Defender may appoint counsel assigned to the OCD or from a contract list, but cannot unilaterally review and select counsel from other eligible personnel in the services.<sup>109</sup> However, the military services have a robust source of active, reserve, and civilian personnel outside the defense services who could be appointed.<sup>110</sup> Thus, in order to tap into such a resource, the chief of the defense service should be provided a list of eligible personnel to consider for appointment.

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<sup>106</sup> COMMISSION REG., *supra* note 30, para. 9.1 b.1.C.ii.

<sup>107</sup> MJRG REPORT, *supra* note 26, at 278 ("This proposal would align defense counsel qualification requirements in capital cases in military practice with the requirement for learned counsel under 18 U.S.C. § 3005."). These provisions were adopted by Congress without any amendment. *Compare id.* at 280, 644-45 with MJA 2016, *supra* note 9, §§ 5186, 5334.

<sup>108</sup> Eligibility for appointment could be determined by the government similar to the criteria for availability of individual mobilized counsel. *See* AR 27-10, *supra* note 17, para. 6-10.

<sup>109</sup> *See* COMMISSION REG., *supra* note 30, para. 9.1.

<sup>110</sup> *See* CAAF REPORT 2016, *supra* note 12, at 4-8 (noting over 6,000 active and reserve attorneys).

To implement this change, the relevant personnel organization,<sup>111</sup> would track active and reserve military and department civilian attorneys with capital or complex defense experience who could serve as learned counsel at trial or on appeal.<sup>112</sup> The defense service chief would then select learned counsel from the combined list of: (1) the eligible active, civilian, and reserve attorneys from the entire service, (2) those personnel already assigned to the defense service organization, and (3) potential contract civilian attorneys.

This widening of the pool has multiple benefits. First, it maximizes the size of the pool to ensure a properly qualified attorney is appointed by capitalizing on all the talent of an entire service. Second, it maximizes the possibility that learned counsel will be selected from the DoD, potentially lessening the need for contract attorneys. This will minimize excess costs and increase flexibility because military attorneys could be appointed learned counsel. This is especially true at a time of war or if qualified, experienced judge advocates became more available.

## B. Practical Analysis of the Proposed System

While the analysis above has been abstract, the following section explores a more practical view of how the system would work in the Army.<sup>113</sup> This nuts and bolts illustration lays bare both the benefits of the system as well as the possible criticisms such as the increased monetary cost or that “growing” learned counsel is a better, simpler option. However, further analysis reveals that any costs of the system are relatively minimal and “growing” counsel does not address the immediate problems in the military system.

### *1. Hypothetical: Co-Accused Capital Defendants*

Sergeant (SGT) X enters the trial defense service (TDS) office at Fort Bragg, stating that his wife has threatened to report him for murder. SGT

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<sup>111</sup> For example in the Army, this could be monitored by the Personnel, Plans, and Training Office in the Office of the Judge Advocate General.

<sup>112</sup> The majority of services have implemented litigation tracking systems for judge advocates, thus tracking capital defense experience is likely easy to implement. *See, e.g.*, 2016 CAAF REPORT, *supra* note 12, at 31, 72 (discussing Army skill identifier program and Navy litigation career track).

<sup>113</sup> A draft of the regulatory framework for the proposed system is in Appendix B.

X's wife suspects that he helped a co-worker, Staff Sergeant (SSG) Y, stab a fellow soldier to death after he threatened to report them for dealing drugs in the unit.<sup>114</sup> Sergeant X is a Haitian citizen applying for naturalization as a U.S. citizen and his entire family is in Haiti.<sup>115</sup> A TDS attorney, Captain (CPT) A, a first tour officer having represented clients in five contested courts-martial sees SGT X for suspect rights.<sup>116</sup> CPT A informs his senior defense counsel (SDC) of his client's situation.<sup>117</sup> The SDC, understanding this may qualify as a capital offense, informs his regional defense counsel and immediately calls the operations officer at TDS.<sup>118</sup>

The Chief, TDS, is briefed on the situation and authorizes the operations officer to submit a formal request to the Office of Personnel, Planning, and Training Office (PP&TO) for a list of eligible capital attorneys.<sup>119</sup> In the interim, the Chief, TDS, discusses the case directly with CPT A, obtaining client confidential information relevant to appointment.<sup>120</sup> Upon receipt of the eligible attorney list, the Chief reviews the outside civilian counsel list, eligible attorney list, and internal TDS manning.<sup>121</sup> The Chief then appoints: (1) a TDS employee with prior capital experience (Mr. C) as learned counsel and (2) reserve Major (MAJ) B as an assistant capital attorney, from the eligible attorney list. Major B is currently working as a private defense counsel who has significant trial defense experience and is fluent in French.<sup>122</sup> Further, the Chief formally appoints CPT A as additional capital attorney due to his already strong relationship with SGT X. The Office of The Judge Advocate General (OTJAG) then begins the process to mobilize MAJ B as soon as possible.<sup>123</sup>

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<sup>114</sup> This offense qualifies for learned counsel because the offense may subject the accused to the death penalty, and for which there is probable cause that an aggravating factor exists. Appendix B para. 28-5a(1).

<sup>115</sup> This information is relevant to the appointing authority's consideration of qualifications of counsel. *See infra* Appendix B paras. 28-5a, 28-8a.

<sup>116</sup> Qualifications are relevant for case-specific appointment of counsel. *See infra* Appendix B, paras. 28-5a, 28-8a.

<sup>117</sup> *See* AR 27-10, *supra* note 17, para. 6-3f.

<sup>118</sup> *See* AR 27-10, *supra* note 17, paras. 6-3c, 6-3f; *see infra* Appendix B, para. 28-5c.

<sup>119</sup> *See infra* Appendix B, para. 28-5c(2)i.

<sup>120</sup> *See infra* Appendix B, para. 28-5c(2)ii.

<sup>121</sup> *See infra* Appendix B, para. 28-5c(2)ii.

<sup>122</sup> *See infra* Appendix B, para. 28-5c, 28-6a.

<sup>123</sup> *See infra* Appendix B, para. 28-5c(2)iv.

In the meantime, SGT X and SSG Y are arrested by Criminal Investigations Command (CID).<sup>124</sup> Having anticipated the upcoming need, the Chief, TDS, had previously selected a new appointing authority for SSG Y, the Deputy Chief, TDS. The appointing authority appoints MAJ D, who has attended capital training, but has no capital experience, as assistant capital defense counsel from another field office.<sup>125</sup> MAJ D immediately flies out to meet with SSG Y along with CPT E, a second year TDS attorney from the Fort Bragg Field Office appointed as additional capital counsel.<sup>126</sup> After meeting with SSG Y, MAJ D calls the appointing authority and tells him that SSG Y had recently gone to mental health for hearing voices starting after coming back from classified operations in Afghanistan.<sup>127</sup> The appointing authority reviews the lists and finds the appointment of learned counsel from within TDS and the eligible attorney list is impracticable.<sup>128</sup> Accordingly, the appointing authority calls three top candidates from the outside counsel list and appoints Mr. AA due to workload, performance history, security clearance, and expertise in defending a capital accused with mental health issues.<sup>129</sup>

Within forty-five days of SSG Y's arrest, the appointing authority completes and submits to the commanding general (CG) of the Judge Advocate General's Legal Center and School (TJAGLCS) the required paperwork to include nondisclosure agreements, proof of security clearance, statement of good standing, and oath to following the applicable military laws, rules, and regulations.<sup>130</sup> The request indicates that the outside attorney will be paid commensurate with the federal rate of \$185 per hour.<sup>131</sup>

Upon receipt of the timely request and if the terms are reasonable, the CG, TJAGLCS, approves the request for funding.<sup>132</sup> After approval, TDS forwards the request to the CG, XVIII Airborne Corps, who shall approve

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<sup>124</sup> This likely triggers the forty-five day timeline to appoint learned counsel. *See infra* Appendix B, para. 28-5c(2)v.

<sup>125</sup> *See infra* Appendix B, para. 28-5c(1).

<sup>126</sup> *See infra* Appendix B, para. 28-6a(2).

<sup>127</sup> *See infra* Appendix B, para. 28-6a(3).

<sup>128</sup> *See infra* Appendix B, para. 28-5c(2)iii.

<sup>129</sup> *See infra* Appendix B, para. 28-5c(2)iii.

<sup>130</sup> *See infra* Appendix B, paras. 28-5c(2)iii, 28-7.

<sup>131</sup> *See infra* Appendix B, para. 28-7h.

<sup>132</sup> *See infra* Appendix B, paras. 28-5c(2)iii, 28-7.

reimbursement and the contracting process is initiated by TDS.<sup>133</sup> Had forty-five days elapsed without a request or extension, the CG, XVIII Airborne Corps, could have appointed an attorney from the eligible attorneys list.<sup>134</sup> After referral, the military judge reviews any subsequent request for funding of learned counsel for reasonableness and validates the documentation.<sup>135</sup> Afterward, it is forwarded to the contracting authority for TDS.<sup>136</sup>

Both capital litigation teams remain appointed for the duration of the case.<sup>137</sup> However, SGT X becomes no longer entitled to learned counsel on appeal after he pleads guilty in exchange for a non-capital referral.<sup>138</sup> Staff Sergeant Y is sentenced to death and after the case is docketed at Army Court of Criminal Appeals (ACCA), the Chief, Defense Appellate Division (DAD), uses the same process as the Chief, TDS, and appoints a civilian employee at DAD as learned counsel.<sup>139</sup> The appointing authority, knowing this case is coming, has coordinated with PP&TO during the previous assignments cycle to ensure a major with prior appellate experience was assigned to DAD and is appointed as assistant capital appellate defense counsel until his normal permanent change of station.<sup>140</sup>

Under this hypothetical, nearly all the benefits of the systems analyzed above are on display while conforming to the unique military system. First, the ABA requirements of experience, independence of the system, continuity of counsel, and flexibility to address conflicts are met.<sup>141</sup> Further, the use of military or civilian personnel already employed by the organization is maximized. And, finally, the costs of outside counsel are set at fixed, reasonable rates with oversight by the general court-martial convening authority (GCMCA), another independent general, and the military judge.

Accordingly, while this method appears to solve many of the aforementioned issues, it raises others. Namely, the system would

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<sup>133</sup> See *infra* Appendix B, paras. 28-5c(2)iii, 28-7. The contracting process may be conducted by the installation contracting command with funding by XVIII Airborne Corps. See *id.*

<sup>134</sup> See *infra* Appendix B, para. 28-5c(2)vi.

<sup>135</sup> See *infra* Appendix B, para. 28-7h.

<sup>136</sup> See *infra* Appendix B, para. 28-5c(2).

<sup>137</sup> See *infra* Appendix B, para. 28-8a.

<sup>138</sup> See *infra* Appendix B, para. 28-6a(1).

<sup>139</sup> See *infra* Appendix B, para. 28-6b(2).

<sup>140</sup> See *infra* Appendix B, para. 28-6a.

<sup>141</sup> See TEN PRINCIPLES, *supra* note 66.

necessarily increase costs and the additional requirements begs the question of whether it is simpler to “grow” learned counsel internally.

## 2. *Increasing Military Capability in Lieu of the Proposed System*

Even though new initiatives could theoretically create qualified and experienced military learned counsel, such efforts still suffer from military personnel turnover, a lack of flexibility, and delayed implementation. For example, in recent years the services have been attempting to increase litigation skills through a variety of methods, such as career tracks addressing non-capital litigation.<sup>142</sup> In addition, assuming institutional and attorney-client hurdles could be overcome, military defense counsel could intern with federal or state defenders to gain capital experience.<sup>143</sup> Accordingly, with increasing litigation experience and capital opportunities, one could argue that the proposed system is unnecessary.

However, even if the number of potential military learned counsel increases, it does not remedy the relative frequent turnover of military personnel, provide the requisite flexibility, or address those issues right now. Assuming that a few attorneys could become qualified as learned counsel, such attorneys may have personal issues preventing assignment, leave the service, or retire, creating a continually moving target. Critically, growing internally also does not have the flexibility to address abnormal spikes in capital cases, conflicts of interest between co-accused, and conflicts arising due to the small military justice community.<sup>144</sup>

Finally, waiting for the military system to grow experienced capital attorneys takes time. Growing learned counsel in the future does not fix the aforementioned problems today. Instead, the proposed system would bridge that gap by allowing appointment of civilian attorneys now, but prioritize military personnel when experienced counsel are available.

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<sup>142</sup> See 2016 CAAF REPORT, *supra* note 12, at 77-78 (discussing Navy Military Justice Career Track); MJA 2016, *supra* note 9, § 542 (directing pilot program for military justice development of judge advocates); Lieutenant Colonel Jeri Hanes & Major Zelalem Awoke, *Strategic Initiatives Update*, QUILL & SWORD, Winter 2017, at 6, [https://www.jagcnet2.army.mil/8525799500461E5B/0/4EDF6E197B04FAB1852581FD0072A0A7/%24FILE/Quill%20Sword%20\(Winter%202017\).pdf](https://www.jagcnet2.army.mil/8525799500461E5B/0/4EDF6E197B04FAB1852581FD0072A0A7/%24FILE/Quill%20Sword%20(Winter%202017).pdf) (discussing Army pilot program which may increase focus on litigation skills).

<sup>143</sup> See LTC Rosenblatt Interview, *supra* note 14 (noting a similar internship program is being explored in the Army).

<sup>144</sup> See, e.g., *United States v. Hennis*, 75 M.J. 796 (Army Ct. Crim. App. 2016) (noting six of the ten Army Court judges recused themselves from the case).

### 3. Costs Are Easily Mitigated and Are Relatively Insignificant

Another concern with implementing the proposed system to appoint learned counsel in the military is the potential price tag. Namely, at first, it seems likely civilian contract attorneys may be common due to the limited number of judge advocates with capital defense experience.<sup>145</sup> Additionally, capital trials are expensive.<sup>146</sup> For example, the median cost for attorney's fees in fully tried federal capital cases in 2010 was \$465,602.<sup>147</sup> Rates are continuing to increase.<sup>148</sup> Thus, contracting for learned counsel may cost millions of dollars per year.

However, as in the practical example, these costs may be mitigated through hiring full time federal civilian attorneys in each defense service organization. For example, the maximum salary of a Department of the Army General Schedule 15 (GS-15) attorney at the Trial Defense Service at Fort Belvoir would be \$164,200 per year.<sup>149</sup> As long as there are neither conflicts nor workload concerns, one learned counsel could serve as learned counsel on multiple trials.<sup>150</sup> Thus, hiring a GS employee as learned counsel could reduce the cost well below the median federal attorney's fees of \$465,602 per trial.<sup>151</sup> Most importantly, at both trial and appeal, the annual salaries for each GS-15 attorney would be less than half the cost of employing a contract civilian at the federal rate for an entire year.<sup>152</sup>

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<sup>145</sup> See LTC Rosenblatt Interview, *supra* note 14. In the Army, TDS is tracking very few attorneys with capital experience. *Id.* However, TDS has begun sending select TDS attorneys to capital litigation training. *Id.*

<sup>146</sup> See DEFENDER SERVICES REPORT, *supra* note 71, at 27.

<sup>147</sup> See Reyes, *supra* note 34, at 12.

<sup>148</sup> JUDICIAL GUIDE, *supra* note 64, § 630 (setting a table of increasing rates).

<sup>149</sup> See *Salary Table 2018-DCB, Incorporating the 1.4% General Schedule Increase and a Locality Payment of 28.22% for the Locality Pay Area of Washington-Baltimore-Arlington, DC-MD-VA-WV-PA, Total Increase: 2.29%, Effective January 2018*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2018/DCB.pdf> (last visited Mar. 20, 2019) [hereinafter *OPM Salary Table 2018-DCB*].

<sup>150</sup> See, e.g., ABA GUIDELINES, *supra* note 103, Guideline 6.1 (stating workload cannot affect high quality of legal representation); TEN PRINCIPLES, *supra* note 66, Principle 5.

<sup>151</sup> Compare *OPM Salary Table 2018-DCB*, *supra* note 149 (GS-15 rate) with Reyes, *supra* note 34, at 12 (noting the historical average capital court-martial has been 27.8 months).

<sup>152</sup> Compare *OPM Salary Table 2018-DCB*, *supra* note 149 (GS-15 rate) with JUDICIAL GUIDE, *supra* note 64, § 630 (setting federal rate). The total contract cost of \$384,800 is calculated by multiplying the federal rate of \$185 per hour for 2080 work hours in a normal year. See JUDICIAL GUIDE, *supra* note 64, § 630.



At as little as a million dollars per year,<sup>153</sup> the system cost pales in comparison to recent Special Victim's Initiatives, the Military Commissions budget, or the overall DoD Budget. For example, representation in the six capital courts-martial and appeals pending at the beginning of 2018,<sup>154</sup> could cost as much as \$2.3 million a year at the contract federal rate or as little as approximately \$1 million for six GS-15 attorneys.<sup>155</sup> However, the annual budget for the Special Victim's Counsel Program is over ten times larger with a budget of \$25 million.<sup>156</sup> Even more, the 2013 operating budget for the Office of the Military Commissions was approximately forty times the most expensive way of implementing the proposed appointment system.<sup>157</sup> Most strikingly, the cost of implementation of the proposed system is approximately .0003% of the 2017 DoD Budget.<sup>158</sup> Thus, the cost of providing outside counsel to a service member before the gallows would be a fraction of the cost it takes to provide qualified counsel to sexual assault victims and alleged terrorists.

## V. Conclusion

For the reasons above, each Service's TJAG should adopt the proposed system for appointment of learned counsel because it would bring military practice in line with federal practice, the vast majority of states, and ABA standards. Practitioners, scholars, and judges alike have

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<sup>153</sup> The MJA does not apply to cases already referred. Thus, the immediate costs are even less. See MJA 2016, *supra* note 9, § 5542. However, nothing prevents providing counsel now because it is "prudent or appropriate." See *United States v. Hennis*, 75 M.J. 7, 10 (C.A.A.F. 2017) (internal citations omitted).

<sup>154</sup> See *United States v. Witt*, 75 M.J. 380, 385 (C.A.A.F. 2016) (returning a capital case for sentence rehearing); LTC Rosenblatt Interview, *supra* note 14 (stating there are two capital trials progressing in the Army); E-mail from LTC Carrier, *supra* note 35 (stating there are only two active capital appeals and one potential extraordinary writ).

<sup>155</sup> See JUDICIAL GUIDE, *supra* note 64, § 630 (setting federal rate); *OPM Salary Table 2018-DCB*, *supra* note 149.

<sup>156</sup> Consolidated Appropriations Act 2017, Pub. L. No: 115-31, § 8059; 131 Stat. 135, 261 (2017).

<sup>157</sup> See *The Cost of Detention at Guantanamo Bay*, HOUSE ARMED SERV. COMM. (June 5, 2013), [https://armedservices.house.gov/press-releases?ContentRecord\\_id=06EBC758-48D5-4D17-B6D3-124E5C6F0A4F](https://armedservices.house.gov/press-releases?ContentRecord_id=06EBC758-48D5-4D17-B6D3-124E5C6F0A4F).

<sup>158</sup> See Sheryl Gay Stolberg, *Senate Passes \$700 Billion Pentagon Bill, More Money Than Trump Sought*, NEW YORK TIMES (Sept. 18, 2017) <https://www.nytimes.com/2017/09/18/us/politics/senate-pentagon-spending-bill.html>. The percentage was calculated by dividing 2.3 million by 700 billion, the 2017 DoD Budget. See *id.*

consistently raised concerns with the qualifications and effectiveness of military capital defense attorneys.<sup>159</sup> While the services may be able to conduct business as usual, the time may be at hand where military courts will begin to scrutinize why the military does not “just fix this.”<sup>160</sup> Thus, the proposed system may allow the services to win both the battle and the war.

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<sup>159</sup> See, e.g., Hennis Oral Argument, *supra* note 2, at 00:01-29:16; United States v. Akbar, 74 M.J. 364, 418 (C.A.A.F. 2015) (Baker, C.J., dissenting); COX COMMISSION, *supra* note 38; Reyes, *supra* note 34, at 7-11.

<sup>160</sup> Hennis Oral Argument, *supra* note 2, at 00:01-29:16.

Appendix A. Table of State Capital Qualifications and Appointment Methods

	Trial - Lead	Direct Appeal	Post-Conviction	Source	Appointment from a pool of capially qualified counsel?
AL	Section 13A-5-54 (2008) of the Code of Alabama. Office of Indigent Defense Service Admin Rule ALABAMA DEPARTME NT OF FINANCE ADMINISTRATIVE CODE CHAPTER 355-9-1	Section 13A-5-54 (2008) of the Code of Alabama. Office of Indigent Defense Service Admin Rule ALABAMA DEPARTMEN T OF FINANCE ADMINISTRATIVE CODE CHAPTER 355-9-1	None.	Alabama Code for minimum requirements . Then Department of Finance for Admin regulations.	Yes. County by County. Code of Ala. § 15-12-4. Jefferson County - Public Defender and list of attorneys.
AZ	Sections 13-4041(B) and (C) of the Arizona Revised Statutes (2008); Arizona Supreme Court amended Rule of Criminal Procedure 6.8 -	Sections 13-4041(B) and (C) of the Arizona Revised Statutes (2008); Arizona Supreme Court amended Rule of Criminal Procedure 6.8 -	Sections 13-4041(B) and (C) of the Arizona Revised Statutes (2008); Arizona Supreme Court amended Rule of Criminal Procedure 6.8 -	Sections 13-4041(B) and (C) of the Arizona Revised Statutes (2008) authorizing Sup Court; Arizona Supreme Court amended Rule of Criminal Procedure 6.8	Yes for Maricopa County. Maricopa County Admin Order 2012-008. Rule 6.2 allows each county to determine.
AR	Rule 37.5(c)(1) Ark Rules Crim Pro:	Rule 37.5(c)(1) Ark Rules Crim Pro:	Rule 37.5(c)(1) Ark Rules Crim Pro:	Pub Defender Commission sets minimum standards for trial; Judiciary for Rules of Criminal Procedure	Yes. Arkansas Public Defense Commission maintains list <a href="http://www.apdc.myarkansas.net/news/posts/initial-rule/">http://www.apdc.myarkansas.net/news/posts/initial-rule/</a>

CA	California Rules of Court Rule 4.117.	Rules 8.605(d)-(e) of the California Rules of Court (2008) (2)	Rules 8.605(d)-(e) of the California Rules of Court (2008)	Sup Ct. Standards, appointed by court or public defender	Some Counties Yes; pub defender, private, or ct. appointed. Biggest counties have pool.
CO	No Listed Qualifications - Completely up to Public Defender to Decide.	No Listed Qualifications - Completely up to Public Defender to Decide.	Colorado Revised Statutes 16-12-205 (IV)(2) (2008)	Colo Statute. Colorado Rule 44 of Crim Pro	No. Public Defenders only. May contract out only for conflicts. Colo Rev. Stat. sec. 21-1-101 to 21-2-107.
FL	Rules of Crim Pro Rules 3.112 (f),	Rules of Crim Pro Rules 3.112 (h) (1)	Rules of Crim Pro Rules 3.112 (h)	Rules of Crim Pro promulgated by Supreme Court of Florida.	Yes. section 27.40(3)(a), Florida Statutes
GA	Unified Appeal Rule II (2014):	Unified Appeal Rule II (2014):	None.	GA Statute; Supreme Court Rules	Public defenders, but pool for contract attorneys if conflicts. O.C.G.A. sec. 17-12-1 to 17-12-14
ID	Idaho Administrative Regulation (IDAPA) 61.01.08	Idaho Administrative Regulation (IDAPA) 61.01.08	Idaho Administrative Regulation (IDAPA) 61.01.08	Idaho Code § 19-851, 19-851; Idaho Rule of Criminal Procedure 44.3; Also 19-850(1)(a)(vii) gives Public Defender authority to make standards. (IDAPA) 61.01.08	County by County. Public defenders and pool. Idaho Code § 19-850; IDAPA 61 mandating "roster."

IN	Indiana Criminal Procedure Rule 24 (2001):	Indiana Criminal Procedure Rule 24 (2001):	Indiana Rules of Court Rules of Post-Conviction Remedies Section 9a.	Indiana Criminal Procedure Rule 24 (2001)	Yes. Roster maintained by county for appointment by judge at trial or appeal. For Post-conviction proceedings, Public Defender appointed and solely decides representation.
KS	The Kansas State Board of Indigents' Defense Services is responsible for providing "standards of competency and qualification for the appointment of counsel in capital cases." Kansas Statutes Chapter 22-4505(d)(1)(B) (2008). Kan. Admin. Regulation §105-3-2(a)(4)-(6) (2012)	Kan. Admin. Regulation §105-3-2(a)(4)-(6) (2012)	Kan. Admin. Regulation §105-3-2(a)(4)-(6) (2012)	Kan. Stat. 22-4505(d)(1)(B) (2008) and Kan. Admin. Regulation sec. 105-3-2(a); 2003 ABA Guidelines	Yes. Created by regulation and maintained by state district judge. K.A.R. § 105-3-1

KY	Department of Public Advocacy has adopted 2003 ABA Standards. See <a href="https://dpa.ky.gov/who_we_are/Education/Pages/Capital-Defense-Institute.aspx">https://dpa.ky.gov/who_we_are/Education/Pages/Capital-Defense-Institute.aspx</a> ;	Department of Public Advocacy has adopted 2003 ABA Standards. See <a href="https://dpa.ky.gov/who_we_are/Education/Pages/Capital-Defense-Institute.aspx">https://dpa.ky.gov/who_we_are/Education/Pages/Capital-Defense-Institute.aspx</a> ;	Department of Public Advocacy has adopted 2003 ABA Standards. See <a href="https://dpa.ky.gov/who_we_are/Education/Pages/Capital-Defense-Institute.aspx">https://dpa.ky.gov/who_we_are/Education/Pages/Capital-Defense-Institute.aspx</a> ;	Ken. Rev. Stat. Sec. 31.030(4) the Department of Public Advocacy has the responsibility for "[d]eveloping and promulgating standards and regulations, rules, and procedures for administration of the defense of indigent defendants in criminal cases."	No. Public Defenders only unless conflict attorney required. See ABA Report EVALUATING FAIRNESS AND ACCURACY INSTANT DEATH PENALTY SYSTEMS: The Kentucky Death Penalty Assessment Report Ch. 6 (2010)
LA	Louisiana Supreme Court Rule XXXI (A)(1) (2008) sets standards for indigent defense. Further, La. Admin. Code tit. 22, pt. XV (2011) adopts 2003 ABA Standards as well as 2010 Supplemental Guidelines.	Louisiana Supreme Court Rule XXXI (A)(1) (2008) sets standards for indigent defense. Further, La. Admin. Code tit. 22, pt. XV (2011) adopts 2003 ABA Standards as well as 2010 Supplemental Guidelines.	Louisiana Supreme Court Rule XXXI (A)(1) (2008) sets standards for indigent defense. Further, La. Admin. Code tit. 22, pt. XV (2011) adopts 2003 ABA Standards as well as 2010 Supplemental Guidelines.	Louisiana Supreme Court Rule XXXI (A)(1) (2008) and La. Admin. Code tit. 22, pt. XV (2011)	No. Public Defenders appointed by court. However, contract attorneys pool exists for conflicts. See Louisiana Public Defender Board Website, <a href="http://lpdb.la.gov/Serving%20The%20Public/Programs/Regional%20Capital%20Conflict%20Panels.php">http://lpdb.la.gov/Serving%20The%20Public/Programs/Regional%20Capital%20Conflict%20Panels.php</a>

MS	None.	None.	Mississippi Rules of Appellate Procedure 22(d) and (e):	Mississippi Rules of Appellate Procedure and Case law	No. Public Defenders appointed by Court with Capital Division. Contract pool exists for conflicts. See Mississippi Office of State Defender Capital Division Website <a href="http://www.ospd.ms.gov/REPORTS/OSPD%20Report%20of%20Activities%20and%20Expenditures%20July%2016-%20June%2030,%202017.pdf">http://www.ospd.ms.gov/REPORTS/OSPD%20Report%20of%20Activities%20and%20Expenditures%20July%2016-%20June%2030,%202017.pdf</a>
MO	None. Public Defender Practice is to assign two counsel, but no minimum requirements. See ABA Report EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: The Missouri Death Penalty Assessment Report at CH 6.	None. Public Defender Practice is to assign two counsel, but no minimum requirements. See ABA Report EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: The Missouri Death Penalty Assessment Report at CH 6.	Supreme Court Rules 24.036(a) and 29.16(a) (2001), respectively, provide that the court shall appoint two attorneys. Rule 24.036(b):	Missouri Supreme Court Rule 24.036	No. Primarily public defenders. Conflict attorneys hired through contract. See ABA Report EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: The Missouri Death Penalty Assessment Report at CH 6.

MT	Montana Supreme Court Order No. 97-326 , dated 29 Jun 1999.	Montana Supreme Court Order No. 97-326 , dated 29 Jun 1999.	Montana Supreme Court Order No. 97-326 , dated 29 Jun 1999.	M.C.A. §2-15-1028; M.C.A. 47-1-101 to 47-1-126; Public Defender Internal Standards; Montana Supreme Court Rules	No. Primary public defenders. Conflict attorneys hired through contract meeting PD qualifications for capital attorneys. See M.C.A. sec. 47-1-121
NE	None.	None.	None.	In Nebraska, standards/qualifications for death penalty counsel are established by the Nebraska Commission on Public Advocacy, working in conjunction with the Indigent Defense Standards Advisory Council. R.R.S. Neb. § 29-3927.	County by County. Public defenders and pool. See A Report of the Nebraska Minority and Justice Task Force/ Implementation Committee (2004) (available at <a href="https://c.yecd.com/sites/www.nebar.com/resource/resmgr/MJC/MJIC-2004IndigDefenSys.pdf">https://c.yecd.com/sites/www.nebar.com/resource/resmgr/MJC/MJIC-2004IndigDefenSys.pdf</a> ).
NV	Nev. SCR 250: Nevada Supreme Court issued administrative order ADKT 411 requiring counsel to meet minimum standards substantially similar to the 2003 ABA Guidelines.	Nev. SCR 250: Nevada Supreme Court issued administrative order ADKT 411 requiring counsel to meet minimum standards substantially similar to the 2003 ABA Guidelines.	Nev. SCR 250: Nevada Supreme Court issued administrative order ADKT 411 requiring counsel to meet minimum standards substantially similar to the 2003 ABA Guidelines.	Supreme Court Order pursuant to SCR 39 to regulate practice of law.	Nev. SCR 250(h): Public Defender or Pool at each trial district court.



NH	Judicial Conference requires capitally qualified attorneys to have the following, modeled after the 2003 ABA Guidelines:	Judicial Conference requires capitally qualified attorneys to have the following, modeled after the 2003 ABA Guidelines:	New Hampshire Judicial Council enacted standards for post-conviction proceedings. See New Hampshire Judicial Council Website, <a href="https://www.nh.gov/judicialcouncil/documents/capital-post-conviction-counsel.pdf">https://www.nh.gov/judicialcouncil/documents/capital-post-conviction-counsel.pdf</a> )	NH Judicial Council; Internal requirements of Public Defender's Office.	Yes, appointed by the judge. And public defenders. Judicial Counsel maintains capital list IAW RSA 604-A:2. See also Judicial Counsel Website, <a href="https://www.nh.gov/judicialcouncil/documents/private-bar-2014.pdf">https://www.nh.gov/judicialcouncil/documents/private-bar-2014.pdf</a> .
NC	Statutes delegate authority to Office of Indigent Services under Courts to promulgate rules on qualifications of counsel. See Indigent Defense Services Act of 2000 (IDS Act), S.L. 2000-144, Senate Bill 1323	Statutes delegate authority to Office of Indigent Services under Courts to promulgate rules on qualifications of counsel. See Indigent Defense Services Act of 2000 (IDS Act), S.L. 2000-144, Senate Bill 1323	Statutes delegate authority to Office of Indigent Services under Courts to promulgate rules on qualifications of counsel. See Indigent Defense Services Act of 2000 (IDS Act), S.L. 2000-144, Senate Bill 1323	Indigent Defense Services Act of 2000 (IDS Act), S.L. 2000-144, Senate Bill 1323	Yes. Managed by Office of Indigent Services. See IDS Rules for Appointing Counsel in Capital Cases. <a href="http://www.ncids.org/Rules%20&amp;%20Procedures/IDS%20Rules/IDS%20Rules%20Part%202.pdf">http://www.ncids.org/Rules%20&amp;%20Procedures/IDS%20Rules/IDS%20Rules%20Part%202.pdf</a>
OH	Supreme Court Rules for Appointment of Counsel in Capital Cases (App. Coun.R) available at <a href="https://www.supremecourt.ohio.gov/Boards/capitalCases/">https://www.supremecourt.ohio.gov/Boards/capitalCases/</a>	Supreme Court Rules for Appointment of Counsel in Capital Cases (App. Coun.R) available at <a href="https://www.supremecourt.ohio.gov/Boards/capitalCases/">https://www.supremecourt.ohio.gov/Boards/capitalCases/</a>	None.	Supreme Court Rules	Yes. Managed by Commission on Appointment of Counsel in Capital Cases under Ohio Supreme Court. <a href="https://www.supremecourt.ohio.gov/Boards/capitalCases/">https://www.supremecourt.ohio.gov/Boards/capitalCases/</a>

OK	<p>Oklahoma Indigent Services Organization may set qualifications. See Okla. Stat. §§ 22-1355.1 through 22-1355.7 OISO has adopted 2003 and 2010 ABA Guidelines. See Application for Appointment in Capital Cases, <a href="https://www.ok.gov/OIDS/documents/ques_app_trl.pdf">https://www.ok.gov/OIDS/documents/ques_app_trl.pdf</a></p>	<p>Oklahoma Indigent Services Organization may set qualifications. See Okla. Stat. §§ 22-1355.1 through 22-1355.7. OISO has adopted 2003 and 2010 ABA Guidelines. See Application for Appellate Cases, <a href="https://www.ok.gov/OIDS/documents/ques_app.pdf">https://www.ok.gov/OIDS/documents/ques_app.pdf</a></p>	<p>Oklahoma Indigent Services Organization may set qualification s. See Okla. Stat. §§ 22-1355.1 through 22-1355.7. OISO has adopted 2003 and 2010 ABA Guidelines. See Application for Appointment in Appellate Cases, <a href="https://www.ok.gov/OIDS/documents/ques_app.pdf">https://www.ok.gov/OIDS/documents/ques_app.pdf</a></p>	<p>Oklahoma Indigent Services Organization may set qualification s. See Okla. Stat. §§ 22-1355.1 through 22-1355.7</p>	<p>Yes. But Public defenders in all but 2 counties. Appointed by district judge in other 2. Contract attorneys possible for conflicts. See Okalahoma Indigent Services 2017 Annual Report. <a href="https://www.ok.gov/OIDS/documents/Annual%20Report%202017.pdf">https://www.ok.gov/OIDS/documents/Annual%20Report%202017.pdf</a>. In other 2 counties,</p>
OR	<p>2015 ORS 151.213 established Oregon Office of Public Defense Services and gives authority to set attorney qualifications. <a href="http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf">http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf</a></p>	<p>2015 ORS 151.213 established Oregon Office of Public Defense Services and gives authority to set attorney qualifications. <a href="http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf">http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf</a></p>	<p>2015 ORS 151.213 established Oregon Office of Public Defense Services and gives authority to set attorney qualifications. <a href="http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf">http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf</a></p>	<p>2015 ORS 151.213 established Oregon Office of Public Defense Services. <a href="http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf">http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf</a></p>	<p>Yes, appointed by judge. And public defenders. See Qualification Standards for Court Appointed Counsel <a href="http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf">http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf</a>. County by county. 2015 ORS 151.010.</p>

PA	Penn. Rules of Crim Pro Rule 801 sets qualifications of capital trial counsel:	Penn. Rules Crim Pro 811 allows initial post-trial appeal at trial. Thus, same qualifications for lead counsel apply.	Penn. Rules Crim Pro 904 commentary states : An attorney may not represent a defendant in a capital case unless the attorney meets the educational and experiential requirements set forth in Rule 801 (Qualifications for Defense Counsel in Capital Cases).	State Supreme Court	Yes. State Supreme Court division maintains list. Penn. Rule Crim Pro. 801. Selection by County. No statewide public defenders or centralized list. Attorneys appointed by court. See Penn. Rule Crim. Pro 122.
SC	South Carolina (Title 16-3-26(B)(1))	South Carolina Appellate Court Rule 608: provisions of Rule 421 applicable to trial, appeal, and post-conviction.	South Carolina Appellate Court Rule 608(f)(1):	State Supreme Court	Yes. South Carolina Bar creates and maintains lists by county at direction of State Supreme Court. SCACR 608
SD	None	None.	None.	Statute	Yes. County by county. Private attorneys appointed as well as public defenders.
TN	Rule 13, Section 3 of the Rules of the Tennessee Supreme Court (b)(1)	Rule 13, Section 3 of the Rules of the Tennessee Supreme Court	Rule 13, Section 3 of the Rules of the Tennessee Supreme Court (h)	Supreme Court Rule 13	Yes. Local court will maintain list of attorneys.\ meeting minimum requirements. TSCR Rule 13, Section 1. Public defenders may be appointed. Id.

TX	Texas Code of Criminal Procedure, Article 26.052:	Texas Code of Criminal Procedure, Article 26.052:	Article 11.071 of the Texas Code of Criminal Procedure, which governs post-conviction proceedings, requires appointment of counsel from the Office of Capital and Forensic Writs. If that office is not appointed, the convicting court appoints counsel from a list pursuant to Texas Government Code § 78.056,	Sup Ct. sets standard in Code of Criminal Procedure	Yes. Or public defender meeting same qualifications. Tex Code of Crim Pro 26.052. Court appoints from list maintained by local selection committee. Id.
UT	Rule 8 of the Utah Rules of Criminal Procedure	Rule 8 of the Utah Rules of Criminal Procedure:	Rule 8 of the Utah Rules of Criminal Procedure. Code Ann. § 78-35a-202(2)(a)	Utah Judicial Council created by statute to create rules.	County by County. Most contract private attorneys. 2016 Commission on Indigent Defense may change that. Rule 8 of the Utah Rules of Criminal Procedure. Court appoints.
VA	Virginia Statute Pursuant to § 19.2-163.8 E and Virginia Administrative Code Title 6, Chapter 10 (6 VA ADC 30-10-10)	Virginia Statute Pursuant to § 19.2-163.8 E and Virginia Administrative Code Title 6, Chapter 10 (6 VA ADC 30-10-10)	Virginia Statute Pursuant to § 19.2-163.8 E and Virginia Administrative Code Title 6, Chapter 10 (6 VA ADC 30-10-10)	Virginia Statute Pursuant to § 19.2-163.8 E and Virginia Administrative Code Title 6, Chapter 10 (6 VA ADC 30-10-10)	Yes. Supreme Court and Indigent Commission maintain list, court appoints from the list. See Virginia Statute Pursuant to § 19.2-163.8 E

WA	Washington Superior Court Special Proceedings Rules -- Criminal; SPRC 2; In addition, the Washington Supreme Court (NO. 25700-A-1004)	Washington Superior Court Special Proceedings Rules -- Criminal; SPRC 2; In addition, the Washington Supreme Court (NO. 25700-A-1004)	Washington Rules of Appellate Practice 16.25 state:	Washington Supreme Court Rules of Practice	Yes. Supreme Court directs panel to maintain list. WSCSPR 2 allows trial judge to appoint and Supreme Court appoints appellate attorney. See <a href="http://www.courts.wa.gov/apellate_trial_courts/supreme/clerks/?fa=atc_supreme_clerks.display&amp;fileID=attorney">http://www.courts.wa.gov/apellate_trial_courts/supreme/clerks/?fa=atc_supreme_clerks.display&amp;fileID=attorney</a>
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WY	Wyoming statutes creates public defender's office. Office of public defender strategic plan states: "The Public Defender must provide high quality representation in capital cases pursuant to the federal and state constitutional law and the ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition, February, 2003, as well as the ABA Supplementar y Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.	Wyoming statutes creates public defender's office. Office of public defender strategic plan states: "The Public Defender must provide high quality representation in capital cases pursuant to the federal and state constitutional law and the ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition, February, 2003, as well as the ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.	§ 7-14-104. No right to appointed counsel	Wyoming Statutes W.S.1977 § 7-6-104	No. Public defender and court appointed by district. See W.S.1977 § 7-6-104.
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## Appendix B. Draft Regulation

### Chapter 28 Capital Litigation

#### 28-1. Applicability and Purpose

This chapter sets forth the policies and procedures for all Army cases in which an accused is charged, or could be charged, with an offense that may subject the accused to the death penalty, and for which there is probable cause that an aggravating factor exists as set forth in RCM 1004(c). The provisions of this chapter apply regardless of whether the GCMCA intends to charge the accused with an offense which may subject the accused to the death penalty.

#### 28-2. Reports

Reports and updates will be provided in accordance with paragraph 5-13*b* of this regulation.

#### 28-3. Referral

At least 7 days prior to referral of a potential capital case, or other serious offense as defined in paragraph 5-13 of this regulation, the SJA must consult with the Chief, OTJAG-CLD. After an offense is referred as a capital offense, a copy of the capital referral notice must be sent to the Chief, USATDS and the affected RDC (see para 5-13).

#### **28-4. Judge advocates with capital litigation experience**

*a.* TJAG will establish a system to track the capital litigation experience of judge advocates in the active and reserve component of the U.S. Army JAGC. At a minimum, capital litigation experience includes any experience as a detailed or appointed defense counsel in any capacity during any phase of proceedings to include pretrial, trial, post-trial, appeal, and post-conviction proceedings where the death penalty was sought.

*b.* A list of eligible attorneys with capital litigation experience as well as any other relevant litigation experience shall be maintained and available to the Chief, USATDS, and Chief, DAD, upon request in accordance with this chapter. Eligible attorneys are those attorneys in the active and reserve component that are reasonably available for appointment as capital defense counsel as determined by TJAG or designee.

**28-5. Court-martial personnel**

a. *Qualifications.* Unless noted otherwise, the following subparagraphs are suggested minimum requirements to serve as guidelines to assist the Chief, USATDS, or that officer's delegate, in determining the appropriate personnel to assign to capital cases. Unless noted otherwise, these guidelines shall not be construed as mandatory requirements, and they shall not be construed as a right to a particular counsel or as a standard for determining the effectiveness of counsel under the U.S. Constitution. All military personnel assigned to a capital case must be qualified and certified under UCMJ, Art. 27(b). Outside civilian attorneys must comply with the requirements set forth in paragraph 28-6.

(1) ~~Lead defense counsel~~ Learned Counsel. In accordance with Article 27, UCMJ, and R.C.M. 502, an accused who is charged, or could be charged, with an offense that may subject the accused to the death penalty, and for which there is probable cause that an aggravating factor exists as set forth in RCM 1004(c) has the right to be represented by at least one counsel who is learned in applicable law relating to capital cases. Absent military exigencies, learned ~~United States Army Trial Defense Service~~ counsel representing such an accused ~~who must possess the following attributes to the maximum extent practicable:~~ have prior capital defense trial experience. In addition, to the maximum extent practicable learned counsel should possess the following attributes: prior experience as lead defense counsel in GCM panel cases tried to findings; substantial knowledge and understanding of the procedural and substantive law governing capital cases; skill in the management and conduct of complex negotiations and litigation; skill in legal research, analysis, and the drafting of litigation documents; skill in oral advocacy; skill in the use of expert witnesses and familiarity with common areas of forensic investigation; skill in the investigation, preparation, and presentation of evidence bearing upon mental status; skill in the investigation, preparation, and presentation of mitigating evidence; skill in the elements of trial advocacy, such as panel selection, cross-examination of witnesses, and opening and closing statements; familiarization with capital litigation training; and the necessary proficiency, diligence, and quality of representation appropriate to capital cases.

(2) ~~Assistant defense counsel.~~ ~~United States Army Trial Defense Service~~ Military counsel representing an accused ~~who is charged with a capital offense~~ as outlined above as an assistant defense counsel should possess the following attributes to the maximum extent



practicable: prior experience as lead counsel in GCM panel cases tried to finding; skill in the use of expert witnesses and familiarity with common areas of forensic investigation; familiarization with capital litigation training; and the necessary proficiency, diligence, and quality of representation appropriate to capital cases.

(3) *Additional defense counsel.* ~~United States Army Trial Defense Service~~ Military counsel representing an accused ~~who is charged with a capital offense~~ as outlined above as an additional defense counsel should possess the following attributes to the maximum extent practicable: prior experience as lead or assistant counsel in panel cases tried to findings and the necessary proficiency, diligence, and quality of representation appropriate to capital cases.

(4) *Alternative qualifications.* ~~The Chief, USATDS, may appoint counsel even if he or she does not meet all of the qualifications stated above. If appointed under this section, TDS counsel must state on the record his or her qualifications. The appointed counsel must be qualified under UCMJ, Art. 27(b), and should possess the following attributes to the maximum extent practicable: extensive criminal or civil trial experience; skill in the use of expert witnesses and familiarity with common areas of forensic investigation; familiarization with capital litigation training; and the necessary proficiency, diligence, and quality of representation appropriate to capital cases.~~

*b. Defense counsel appointment and training.* United States Army Trial Defense Service capital-qualified counsel should be appointed as soon as there is reason to believe a case may be referred capital. All capital-qualified counsel assigned to a capital case should be detailed no later than seven days after referral of the capital case. In capital-referred cases, the Chief, USATDS, or his designee, should detail at least two qualified defense counsel. The Chief, USATDS will develop programs and policies consistent with paragraph 6-6 to ensure regular capital defense training opportunities for USATDS counsel. Capital training opportunities should be made available as part of routine professional development and not based on specific assignment to a capital case.

*c. ~~Detailing~~ Appointment.*

(1) *Defense counsel.* ~~Defense counsel for capital cases shall be detailed by the Chief, USATDS, or if the Chief, USATDS is conflicted, his or her designee~~ The Chief, USATDS, or their designee, shall act as appointing authority for all capital defense counsel in accordance with the procedures set forth below.

(2) Learned Counsel Selection Pool.

i. Prior to appointment of capital defense counsel, the appointing authority shall request from the Office of the Judge Advocate General the list of capitally qualified active and reserve judge advocates eligible for appointment as described in paragraph 28-4.

ii. The appointing authority shall create a combined pool comprised of the eligible attorney list received from the Office of the Judge Advocate General, military and civilian personnel assigned or employed by USATDS, and the pool of civilian attorneys maintained in accordance with paragraph 28-7.

iii. After reviewing all relevant case specific information and the qualifications of all attorneys in the combined pool, if it is not practicable to 1) detail an attorney assigned to, or employed by, USATDS or 2) appoint an attorney from the eligible attorney list, the appointing authority shall select a member of the civilian pool, or other civilian counsel not yet a member of the civilian defense pool, who has the appropriate qualifications as outside learned counsel and forward a request for approval of funding to the CG, TJAGLCS. Upon approval, the request for reimbursement of funding will be forwarded to the GCMCA with jurisdiction over the accused.

iv. If selection of an eligible attorney is practicable, the appointing authority shall notify the Office of the Judge Advocate General. Upon notification, reassignment or mobilization of the will be initiated in accordance with the applicable regulations by TJAG or designee. .

v. Requests for the approval of funding for outside learned counsel shall be made within 45 business days of receiving notice that an accused is charged, or could be charged, with an offense that may subject the accused to the death penalty, and for which there is probable cause that an aggravating factor exists as set forth in RCM 1004(c). Notice is received by receipt by USATDS of qualifying charges or when a qualifying client seeks representation.

vi. Requests for approval of funding shall include all the completed and executed applications, forms, and other materials as required by the government in order to qualify the selected outside learned counsel pursuant to paragraph 28-7. Requests for extension of reasonable time to request funding shall be liberally granted by the CG, TJAGLCS. However, failure to make a timely request for funding or extension authorizes TJAG or designee to appoint learned counsel from the eligible attorneys list.

vii. The GCMCA with jurisdiction over the accused shall approve all reasonable requests for reimbursement of appointed outside civilian defense counsel.

(3) Assistant and Additional Defense Counsel. The appointing authority may appoint assistant or additional defense counsel from the eligible attorney list if reasonably available as determined by TJAG or designee or from military and civilian personnel assigned or employed by USATDS.

(4) *Trial counsel.* Trial counsel shall be detailed in accordance with paragraph 5-3.

(5) *Military judge.* The Military Judge shall be detailed by the Chief Trial Judge, or if the Chief Trial Judge is conflicted, his or her designee.

## **28-6 Appellate personnel**

a. Qualifications. Unless noted otherwise, the following subparagraphs are suggested minimum requirements to serve as guidelines to assist the Chief, DAD, or their delegate, in determining the appropriate personnel to assign to capital cases. Unless noted otherwise, these guidelines shall not be construed as mandatory requirements, and they shall not be construed as a right to a particular counsel or as a standard for determining the effectiveness of counsel under the U.S. Constitution. All military personnel assigned to a capital case must be qualified and certified under UCMJ, Art. 27(b). Outside civilian attorneys must comply with the requirements set forth in paragraph 28-6.

(1) Learned Counsel. In accordance with Article 70, UCMJ, an appellant sentenced to death has the right to be represented by at least one counsel who is learned in applicable law relating to capital cases. Absent military exigencies, learned counsel representing an appellant sentenced to death must have prior capital defense trial or appellate experience. In addition, due to the potential for collateral issues special to capital appeals, to the maximum extent practicable learned counsel should possess the following attributes: prior experience as lead defense counsel in GCM panel cases tried to findings; substantial knowledge and understanding of the procedural and substantive law governing capital cases; skill in the management and conduct of complex negotiations and litigation; skill in legal research, analysis, and the drafting of litigation documents; skill in oral advocacy; skill in the use of expert witnesses and familiarity with common areas of forensic investigation; skill in the investigation, preparation, and presentation of evidence bearing upon mental status; skill in the investigation, preparation, and presentation of mitigating evidence; skill in the elements of trial advocacy, such as panel selection, cross-examination of witnesses, and opening and closing

statements; familiarization with capital litigation training; and the necessary proficiency, diligence, and quality of representation appropriate to capital cases.

(2) Assistant appellate defense counsel. Military counsel representing an appellant sentenced to death as an assistant appellate defense counsel should possess the following attributes to the maximum extent practicable: at least three years of military defense appellate experience, prior experience as lead counsel in GCM panel cases tried to finding; skill in the use of expert witnesses and familiarity with common areas of forensic investigation; familiarization with capital litigation training; and the necessary proficiency, diligence, and quality of representation appropriate to capital cases.

(3) Additional appellate defense counsel. Military counsel representing an appellant sentenced to death as an additional defense counsel should possess the following attributes to the maximum extent practicable: prior experience as lead or assistant counsel in panel cases tried to findings and the necessary proficiency, diligence, and quality of representation appropriate to capital cases.

b. Appointment.

(1) Appellate Defense counsel. The Chief, DAD, or their designee, shall act as appointing authority for all capital appellate defense counsel in accordance with the procedures set forth below.

(2) Learned Counsel Selection Pool.

i. Prior to appointment of capital defense counsel, the appointing authority shall request from the Office of the Judge Advocate General the list of capitally qualified active and reserve attorneys eligible for appointment as described in paragraph 28-4.

ii. The appointing authority shall create a combined pool comprised of the eligible attorney list received from the Office of the Judge Advocate General, military and civilian personnel assigned or employed by DAD, and the pool of civilian attorneys maintained in accordance with paragraph 28-7.

iii. After reviewing all relevant case specific information and the qualifications of all attorneys in the combined pool, if it is not practicable to (1) detail an attorney assigned to, or employed by, DAD, or (2) appoint an attorney from the eligible attorney list, the appointing authority shall select a member of the civilian pool, or other civilian counsel not yet a member of the civilian defense pool, who has the appropriate qualifications as outside learned counsel and forward a request for approval of funding for this counsel to the CG, TJAGLCS.

iv. If selection of an eligible attorney is practicable, the appointing

authority shall notify the Office of the Judge Advocate General. Upon notification, reassignment or mobilization of the will be initiated in accordance with the applicable regulations by TJAG or designee.

v. Requests for the approval of funding for outside learned counsel shall be made within 45 business days of notice docketing with ACCA.

vi. Requests for approval of funding shall include all the completed and executed applications, forms, and other materials as required by the government in order to qualify the selected outside learned counsel pursuant to paragraph 28-7. Requests for extension of reasonable time to request funding shall be liberally granted by the CG, TJAGLCS. However, failure to make a timely request for funding or extension authorizes TJAG or designee to appoint learned counsel from the eligible attorneys list.

vii. The CG, TJAGLCS, shall approve all reasonable requests for funding appointed outside civilian defense counsel.

(3) Assistant and Additional Defense Counsel. The appointing authority may appoint assistant or additional appellate defense counsel from the eligible attorney list if reasonably available as determined by TJAG or designee or from military and civilian personnel assigned or employed by DAD.

(4) Government Appellate Counsel. Government appellate counsel shall be detailed in accordance with Art. 70, UCMJ, by the Chief, Government Appellate Division as delegated by TJAG.

(5) Appellate military judge. In accordance with Art. 66, UCMJ, upon docketing, any case where an appellant has been sentenced to death will be assigned to a panel in accordance with the United States Army Court of Criminal Appeals Internal Rules of Practice and Procedure, and the Joint Rules of Practice and Procedure of the Courts of Criminal Appeals. In accordance with 28 U.S.C. § 455, it is the duty of each judge assigned to the case to determine whether recusal is necessary as soon as possible and notify the parties of recusal. Once recused, a military judge will remain recused and cannot take any part of subsequent proceedings.

## **28–7 Outside Civilian Attorneys**

a. Both the Chief, USATDS, and Chief, DAD, shall maintain a list of qualified outside civilian defense counsel for appointment as civilian capital defense counsel.

b. Outside civilian qualifications. In addition to the qualifications outlined in paragraphs 28-5 and 28-6, qualified civilian defense counsel is an attorney who:

(1) is a member of the bar of a Federal court or of the bar of the

highest court of a State, the District of Columbia, or U.S. possession;

(2) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct;

(3) has been determined to be eligible for access to information classified at the level SECRET or higher, as required, in accordance with the procedures prescribed in Chapter 18 of this Regulation; and

(4) has signed the appropriate non- disclosure agreement(s) (Form 4414, SF 312, and/or DD Form 1847, Non- Disclosure Agreement Form 4414, and

(5) has signed an Affidavit and Agreement by Civilian Defense Counsel, Form XXX

c. *Civilian attorney application procedures.* An attorney seeking qualification as a member of the pool of available civilian defense counsel shall submit an application, by letter, to the following:

(1) *Capital Trial Defense Counsel:* U.S. Army Trial Defense Service, United States Army Legal Services Agency, (Attn: Operations Officer, US Army Trial Defense Service) 2200 Gunston Road, Fort Belvoir, Virginia, 22060;

(2) *Capital Appellate Defense Counsel:* U.S. Army Defense Appellate Division, United States Army Legal Services Agency, (Attn: Chief, Complex and Capital Litigation Division, Defense Appellate Division) 2200 Gunston Road, Fort Belvoir, Virginia, 22060. Applications will be comprised of the letter requesting qualification for membership, together with the following:

- (a) *Proof of citizenship.* Applicants will provide proof of citizenship (e.g., certified true copy of passport, birth certificate, or certificate of naturalization).
- (b) *Proof of Good Standing.* Applicants will submit an official certificate showing that the applicant is an active member in good standing with the bar of a qualifying jurisdiction. The certificate must be dated within three months of the date of the defense service's receipt of the application.
- (c) *Statement of Disciplinary Action.* An applicant will submit a statement detailing all sanctions or disciplinary actions, pending or final, to which he has been subject, whether by a court, bar or other competent governmental authority, for misconduct of any kind. The statement shall identify the jurisdiction or authority that imposed the sanction or disciplinary action, together with any explanation deemed appropriate by

the applicant. Additionally, the statement shall identify and explain any formal challenge to the attorney's fitness to practice law, regardless of the outcome of any subsequent proceedings. In the event that no sanction, disciplinary action or challenge has been imposed on or made against an applicant, the statement shall so state. Further, the applicant's statement shall identify each jurisdiction in which he has been admitted or to which he has applied to practice law, regardless of whether the applicant maintains a current active license in that jurisdiction, together with any dates of admission to or rejection by each such jurisdiction and, if no longer active, the date of and basis for inactivation. The above information shall be submitted either in the form of a sworn notarized statement or as a declaration under penalty of perjury of the laws of the United States. The sworn statement or declaration must be executed and dated within three months of the date of the USATDS's receipt of the application. Further, applicants shall submit a properly executed Authorization for Release of Information [Form XXX], authorizing the Chief, USATDS, or their designee, to obtain information relevant to qualification of the applicant as a member of the Civilian Defense Counsel pool from each jurisdiction in which the applicant has been admitted or to which he has applied to practice law.

- (d) *Security Clearance.* Civilian defense counsel applicants who possess a valid current security clearance of SECRET or higher shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the adjudicating authority. Civilian defense counsel applicants who do not possess a valid current security clearance of SECRET or higher shall state in writing their willingness to submit to a background investigation in accordance with regulation issued pursuant to DoD Directive 5200.2-R, "Personnel Security Program" and to pay any actual costs associated with the processing of the same. The security clearance application, investigation, and adjudication process will not be initiated until the applicant has submitted an application that otherwise fully complies

with this Regulation and the Chief Defense Counsel has determined that the applicant would otherwise be qualified for membership in the civilian defense counsel pool. Favorable adjudication of the applicant's personnel security investigation must be completed before an applicant will be qualified for membership in the pool of civilian defense counsel. The Chief Defense Counsel may, at his discretion, withhold qualification and wait to initiate the security clearance process until such time as the civilian defense counsel's services are likely to be sought.

- (e) Agreement to Abide by Applicable Rules and Regulations. Civilian defense counsel shall have signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules or orders of the commission for conduct during the course of proceedings. This requirement shall be satisfied by the execution of the Affidavit and Agreement by Civilian Defense Counsel [Form XXX]. Form XXX shall be executed and agreed to without change (i.e., no omissions, additions or substitutions). Proper execution shall require the notarized signature of the applicant. Form XXX shall be dated within three months of the date of the Chief Defense Counsel's receipt of the application. Applications mailed in a franked U.S. Government envelope will not be considered. Failure to provide all of the requisite information and documentation may result in rejection of the application. A false statement in any part of the application may preclude qualification and/or render the applicant liable for disciplinary or criminal sanction

d. Review of Qualifications. The appointing authority shall review all civilian defense counsel pool applications for compliance with 10 U.S.C. § 949c(b) and this Regulation. The applicable defense service chief shall consider all applicants for qualifications as members of the pool of available civilian defense counsel without regard to race, religion, color, sex, age, national origin, or non-disqualifying physical or mental disability. The applicable defense service chief may reject any civilian defense counsel application that is incomplete or otherwise fails to comply with 10 U.S.C. § 949c(b) and this Regulation.

e. Setting the Pool. Subject to review by the Commanding General, The Judge Advocate General's Legal Center and School, the applicable



defense service chief shall determine the number of qualified attorneys that shall constitute the pool of available civilian defense counsel. Subject to review by the Commanding General, The Judge Advocate General's Legal Center and School, the applicable defense service chief shall determine the qualification of applicants for membership in such pool. This shall include determinations as to whether any sanction, disciplinary action, or challenge is related to relevant misconduct that would disqualify the civilian defense counsel applicant. The Chief Defense Counsel's determination as to each applicant's qualification for membership in the pool of qualified civilian defense counsel shall be deemed effective as of the date of the Chief Defense Counsel's written notification publishing such determination to the applicant. Subsequent to this notification, the retention of qualified civilian defense counsel is effected upon written entry of appearance, communicated to the military commission through the Chief Defense Counsel.

f. *Reconsideration of Qualification.* The Chief Defense Counsel may reconsider his determination as to an individual's qualification as a member of the pool of available civilian defense counsel on the basis of subsequently discovered information indicating material nondisclosure or misrepresentation in the civilian counsel's application, or material violation of obligations of the civilian defense counsel, or other good cause, or he or she may refer the matter to the Convening Authority or the Deputy General Counsel (Personnel and Health Policy), who may revoke or suspend the qualification of any member of the civilian defense counsel pool

g. *Compliance by Outside Counsel.* It is the responsibility of the chief of the applicable defender service to ensure that outside learned counsel are adhering to the provisions of applicable laws, rules, regulations, and practice guidelines.

h. *Compensation.* Outside learned counsel shall be retained and compensated in a manner consistent with the procedures employed by federal courts under 18 U.S.C. §§ 3005 and 3006A. The applicable hourly rate for the appointment of qualified outside learned counsel shall be the maximum hourly rate for federal capital prosecutions, as provided by the Administrative Office of the United States Courts.

(1) *At trial.* Consistent with practice in federal courts, after referral, the military judge shall review payment for reasonable requests for attorney's fees and expenses submitted ex parte by outside learned counsel, keeping in mind the complexity of capital cases and validate the request for the GCMCA to make the reasonable payment of those funds. Fee and expense requests shall be submitted ex parte to the military judge in a manner consistent with 18 U.S.C. § 3006A(d)(5) and each claim shall

be supported by a sworn written statement specifying the time expended, services rendered, and the fees and expenses incurred in the performance of representation services. If outside learned counsel requests payment prior to detailing of a military judge, payment for reasonable requests for attorney's fees and expenses shall be approved by the GCMCA with jurisdiction over the accused.

(2) On appeal. For representation relating to an appeal at ACCA, the CG, TJAGLCS, shall review and validate the payment of all reasonable fee and expense requests. Fee and expense requests shall be submitted to the CG, TJAGLCS, on appeal, in a manner consistent with 18 U.S.C. § 3006A(d)(5) and each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and the fees and expenses incurred in the performance of representation services.

i. Compensation Reporting. Consistent with 18 U.S.C. § 3006A(d)(4), information regarding validated requests for payment of services to outside defense counsel shall be made available to the public. The defense service shall redact any detailed information on the payment voucher provided by defense counsel to justify the expense and make public only the amounts approved for payment to the outside defense counsel. Upon completion of the trial, the government shall, consistent with 18 U.S.C. § 3006A(d)(4)(C), make available an unredacted copy of the expense voucher.

## **28–8. Suggested trial capital litigation teams**

*a. General guidance.* The suggested capital litigation team serves as a guideline to the SJA, the ~~detailing~~ **appointing** authority for the defense counsel, PPTO, and HRC; however, every case must be analyzed and resourced individually, based on its specific circumstances. ~~Nothing in~~ **Unless noted otherwise,** this paragraph is **not** to be construed as a right to a particular counsel or staff, or as a standard for determining the effectiveness of counsel under the U.S. Constitution. The members of each team should be relieved of other duties (for example, CQ, motor pool, non-paralegal sergeants time, other case assignments, and so forth), to the maximum extent practicable, and PPTO, HRC, or other personnel assignment agencies should not reassign the members during the investigation, pretrial, trial, and clemency stages, unless requested by the SJA or RDC, or as approved or directed by TJAG. This includes reassignment for professional courses (JAGC Graduate Course, ILE, and so forth) or other reasons.

*b. The prosecution team.* The prosecution team should consist of members whose duties substantially are dedicated to the capital case

and may include: at least two experienced, qualified trial counsel, detailed by the SJA in the affected jurisdiction; a legal administrator in the grade of CW2 or higher, or an office manager in the grade of E-7 or higher; two paralegals, at least one of which should be an NCO; a criminal investigator; a victim witness liaison; and a public affairs representative.

*c. The defense team.* The defense team ~~shall, absent military exigency, consist of one learned counsel substantially dedicated to the capital case as required as a right under Article 27, UCMJ. Additionally, the team~~ should consist of members whose duties are substantially dedicated to the capital case and shall include at least ~~two~~ **one** experienced, qualified defense counsel, detailed by the Chief, USATDS or by his or her designee, and one paralegal (GS-9 or E-6). ~~In addition to the supervisory chain including, but not limited to the Deputy and Chief, DAD and the Chief, Capital Litigation.~~ Other personnel may include, but shall not be limited to, a warrant officer, criminal investigator, mitigation specialist, and/or mental health professionals, as deemed appropriate **by the Chief, USATDS.** ~~Because appellate review in capital cases normally takes a number of years, significant effort shall be made to ensure continuity of counsel. Counsel representing capital defendants on appeal shall undergo specialized training as determined by the Chief, DAD. Such training should seek to fulfill, to the extent practicable, the training requirements of the American Bar Association Guidelines for the Appointment and Performance of Death Penalty Counsel in Death Penalty Cases Guideline 8.1.~~ **Funding requests for additional team members shall be funded by the GCMCA after validation by the military judge or magistrate.**

*d. Experts.* The type and number of experts, whether for consultation or use at trial, will vary depending on the facts and circumstances of the case. Defense may typically request experts or specialists in the area of mitigation, psychology and/or psychiatry, science (for example, DNA, crime scene analysis and reconstruction, firearms, and so forth), jury consulting, and sentencing.

*e. Reserve personnel.* ~~The SJA or RDC must notify PPTO if the use of Reserve Component personnel will be requested.~~

## **28-8. Suggested appellate capital litigation teams**

*a. General guidance.* **The suggested capital litigation team serves as a guideline to the Chief of GAD, the detailing Chief of DAD or appointing authority designees, PP&TO, and HRC; however, every case must be analyzed and resourced individually, based on its specific**

circumstances. Unless noted otherwise, this paragraph is not to be construed as a right to a specific counsel or staff, or as a standard for determining the effectiveness of counsel under the U.S. Constitution. The members of each team should be relieved of other duties (for example, CO, motor pool, non-paralegal sergeants time, other case assignments, and so forth), to the maximum extent practicable. Because appellate review in capital cases normally takes a number of years, significant effort shall be made to ensure continuity of counsel.

b. *The appellate prosecution team.* The prosecution team should consist of members whose duties substantially are dedicated to the capital case and may include: at least two experienced, qualified government appellate attorneys, a supervisory attorney, and a paralegal.

c. *The defense team.* The defense team shall, absent military exigency, consist of one learned counsel substantially dedicated to the capital case as is required by right under Art. 70, UCMJ. Additionally, the team should also consist of one assistant appellate defense counsel, one additional appellate defense counsel, and one paralegal (GS-9 or E-6) whose duties are substantially dedicated to the capital case, as well as supervisory counsel. Other personnel may include, but shall not be limited to, a warrant officer, criminal investigator, mitigation specialist, and/or mental health professionals, as deemed appropriate by the Chief, DAD. Funding requests for additional team members shall be validated by the CG, TJAGLCS.

d. *Experts.* The type and number of experts, whether for consultation, use at a *DuBay* hearing, or sentencing rehearing will vary depending on the facts and circumstances of the case. Defense may typically request experts or specialists in the area of mitigation, psychology and/or psychiatry, science (for example, DNA, crime scene analysis and reconstruction, firearms, and so forth), jury consulting, and sentencing. Requests for expert assistance on appeal will be filed with the ACCA or with the GCMCA with jurisdiction over the *DuBay* hearing or rehearing.

**28–10. Administrative and logistical support during pretrial and trial.**

*a. Prosecution support.* The SJA shall use internal resources to the maximum extent practicable. For additional personnel support, the SJA may coordinate with PPTO and TCAP.

*b. Defense counsel support.* In any case after preferral in which an offense punishable by death under the UCMJ is charged, the defense may submit a request in writing to the servicing SJA for support greater than that required by paragraph 6-4, including but not limited to: paralegals (with criminal law experience), legal administrator, investigative support, office administrative resource support (as defined by the defense team), security managers, interpreters, translators, and other specialized expertise as required.

(1) Office administrative resource support may include support such as private, lockable office space, SIPRnet capability, computers authorized to handle classified information and documents, separate defense witness waiting room under the control of the defense team, desktop computers with double monitors, copiers, printers, case management software, projectors, routine office supplies, textbooks and reference materials, and full access to installation network and internet. This list is not to be interpreted as exhaustive, but rather illustrative.

(2) The SJA must make reasonable efforts to provide the additional support within 30 days of the request or deny the request by stating the reasons in writing within the same period.

(3) The requesting counsel will forward all denied requests through the defense technical chain to Chief, USATDS. The Chief, USATDS will make reasonable efforts to fill the request internally. The Chief, USATDS will forward all unfilled requests for personnel to PPTO within 15 days of receipt stating the reasons that USATDS is unable to support the request. Assets provided by USATDS will be funded in accordance with paragraph 6-5.

(4) Nothing in this section should be interpreted to create a substantial right or remedy to the accused, but rather this section provides a system of accountability to ensure proper resources and support are provided.

*c. Outside defense counsel support.* Outside defense counsel shall have access to the applicable defense service paralegals, interpreters, analysts, investigators, supplies, and other resources. Prior to appeal, outside defense counsel may request additional support greater than paragraph 6-4 under the same procedures as outlined in paragraph b of this section. Outside defense counsel shall not be entitled to

reimbursement for expenses associated with the hiring of interpreters, analysts, or investigators. When appointed outside defense counsel is approved for travel by the chief of the applicable defense service the appropriate authority shall issue invitational travel orders or validate travel costs for reimbursement in accordance with the applicable contract.