

# Left Out in the Cold: The Case for a Learned Counsel Requirement in the Military

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## I. Introduction

Under the Military Commissions Act of 2009 (MCA), Congress granted defendants facing the death penalty the right to a counsel learned in capital law. Congress's intent in creating a "learned counsel" position was to ensure the fairness and effectiveness of the commissions.<sup>1</sup> This learned counsel requirement was neither created *ex nihilo* nor is it unique to military commissions. As outlined below, the federal system and an overwhelming majority of states that authorize the death sentence have a similar requirement.<sup>2</sup> Surprisingly, a servicemember facing the death penalty has no such right.

In 2001, the Cox Commission recognized the need to provide adequate representation to defendants in capital courts-martial.<sup>3</sup> The commission noted that "[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."<sup>4</sup> The commission recommended that "Congress should study and consider the feasibility of providing a dedicated source of external funding for experienced defense counsel if military capital litigation continues to be a feature of courts-martial in the 21st century."<sup>5</sup> Almost nine years have passed since the commission issued its recommendation and the military still remains one of the rare jurisdictions that have not adopted specific minimum requirements for capital counsel.

Recently, the horrific events that occurred in Fort Hood have placed considerable attention on the military's death penalty jurisprudence.<sup>6</sup> This glaring spotlight and Congress's recent adoption of a learned counsel requirement for alien unprivileged enemy belligerents are ample reasons to reopen the discussion raised by the Cox Commission report and to push for the creation of a learned counsel requirement in the military.

Capital courts-martial<sup>7</sup> represent a very small percentage of the thousands of courts-martial tried and appealed each year.<sup>8</sup> Even so, they are the most complex and time-consuming cases in the military justice system. In other words, "death is different."<sup>9</sup> What makes defending a death penalty case so different is that this ultimate penalty hovers like a specter over every aspect of the trial.

In the military, the capital sentencing scheme is set out in Rule for Court-Martial (RCM) 1004.<sup>10</sup> Under RCM 1004, in order to impose a death sentence, the members must unanimously (1) convict the accused of a capital offense;<sup>11</sup> (2) find that one of the aggravating factors listed in RCM

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<sup>1</sup> In the MCA, Congress specifically noted that "the fairness and effectiveness of the military commissions system . . . will depend to a significant degree on the adequacy of defense counsel and associated resources for individuals accused, particularly in the case of capital cases . . ." National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1807 123 Stat. 2190 (2009).

<sup>2</sup> Many states do not use the term "learned counsel." For purposes of this article this term shall be used to denote counsel that meet the respective jurisdiction's qualifications to try capital cases.

<sup>3</sup> WALTER T. COX III ET AL., NAT'L INST. OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001).

<sup>4</sup> *Id.* at 10.

<sup>5</sup> *Id.* at 11.

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<sup>6</sup> Dionne Searcey, Gary Fields & Nathan Koppel, *Death-Penalty Case Would Likely Take Years*, WALL ST. J., Nov. 10, 2009, at A7.

<sup>7</sup> For purposes of this article a capital court-martial is defined as a case which remained death eligible upon the conclusion of the evidence on sentencing.

<sup>8</sup> Colonel Dwight Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 2 (2006). Colonel Sullivan provides an extensive study of capital litigation in the military. In his study, Colonel Sullivan highlights that the exact number of capital courts-martial cannot be easily ascertained due to the lack of uniformity in record keeping by the services and the occasions when convening authorities inadvertently refer cases as capital. Nonetheless, he estimates that there were forty-seven capital courts-martial between 1984 and Fall 2006. Since 2006, there have been two new capital courts-martial—*United States v. Martinez* and *United States v. Hennis*—and one retrial—*United States v. Walker*. Thus, counting the retrial in *United States v. Walker*, there have been fifty capital courts-martial between 1984 and the publication of this article. (Also, the cases of *United States v. Murphy* and *United States v. Quintanilla* were initially set for a capital resentencing hearing, but both accused entered into pre-sentencing agreements which resulted in non-capital resentencing hearings. Furthermore, in the full capital rehearing in *United States v. Kreutzer*, the accused agreed to plead guilty in exchange for a non-capital referral. Since these three rehearings do not fit the definition of a capital court-martial, they were not included in the above total).

<sup>9</sup> *Loving v. United States*, 62 M.J. 235, 236 (C.A.A.F. 2005) (recognizing that the unique severity of a death sentence infuses the legal process with special protections that ensure a fair and reliable trial); Symposium, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118–19 (2004) (examining the Supreme Court's application of a heightened standard with respect to capital trials and how this standard is infused into the jury process).

<sup>10</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004 (2008) [hereinafter MCM].

<sup>11</sup> *Id.* R.C.M. 1004(a)(2).

1004(c) existed;<sup>12</sup> (3) find that any extenuating or mitigating circumstances are substantially outweighed by the evidence in aggravation;<sup>13</sup> and (4) vote for a death sentence.<sup>14</sup> Thus, counsel has four distinct and crucial opportunities to convince at least one member not to vote for death. The effectiveness of this argument is largely dependent on the skill and knowledge of counsel.

Competent counsel must remain abreast of evolving capital case law and contest every legal claim that may ultimately be meritorious. Pretrial motions filed in these cases can be two to four times the number filed in non-capital cases.<sup>15</sup> Additionally, many of the issues counsel face are unique to capital defense, and even seasoned litigators may not be adequately prepared to try capital cases.<sup>16</sup> More significantly, a capital defense not only requires a rigorous examination and investigation of the underlying crime, but in the case of sentencing, it requires an even greater undertaking to develop a mitigation case. This includes the daunting task of conducting an extensive and probing life history investigation of the accused. Under RCM 1004(b)(3), counsel has very wide latitude in preparing a sentencing case. This “imposes a greater burden to discover, investigate, analyze, evaluate, and present extenuating and mitigating evidence on behalf of a client facing a capital sentence.”<sup>17</sup> Simply put, with such extraordinary stakes at issue, the defense counsel’s effort must also be extraordinary.

This article advocates for the adoption of a learned counsel requirement.<sup>18</sup> Part II of this article provides an overview of the learned counsel requirement in both federal and state jurisdictions, and under the recently-enacted MCA. Part III argues in favor of adopting a similar requirement in the military and offers a proposed amendment to the Uniform Code of Military Justice (UCMJ).

## II. Overview of Standards for Appointment of Capital Counsel

### A. American Bar Association Guidelines

In 1989, the American Bar Association published *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines), which was revised in 2003.<sup>19</sup> The ABA Guidelines sprouted from a growing recognition that many capital defendants were receiving inadequate representation.<sup>20</sup> Their overall objective was to “set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation . . . .”<sup>21</sup>

With respect to learned counsel, the ABA’s 2003 revised guidelines require that an accused in a capital case be represented by no fewer than two counsel who meet specific qualifications.<sup>22</sup> The 2003 guidelines take a functional approach and look to the quality of counsel’s representation,<sup>23</sup> while the 1989 version focused on the amount of experience. Further, the commentary to Rule 5.1 of the revised 2003 edition points out that a counsel with

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<sup>19</sup> AMERICAN BAR ASS’N GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003) [hereinafter ABA GUIDELINES]. Since their publication, the ABA Guidelines have been widely accepted as the standard of performance for counsel in a death penalty case. As an example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), the Supreme Court used the ABA Guidelines to determine the reasonableness of counsel’s performance and the prevailing professional norms in defending a death penalty case. Recently, the Court noted in the case *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009), that the ABA Guidelines are not “inexorable commands” but are a helpful guide in determining what is the professional norms in defending a capital case.

<sup>20</sup> *Id.* Commentary to Guideline 1.1 (outlining a number of instances of counsel’s inadequate performance).

<sup>21</sup> *Id.* Guideline 1.1(A).

<sup>22</sup> *Id.* Guidelines 4.1, 5.1.

<sup>23</sup> Those qualifications listed in Guideline 5.1 include:

- substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, 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, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
- skill in the investigation, preparation, and presentation of mitigating evidence; and
- skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

*Id.* Guideline 5.1(B)(2).

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<sup>12</sup> *Id.* R.C.M. 1004(b)(4)(A).

<sup>13</sup> *Id.* R.C.M. 1004(b)(7).

<sup>14</sup> *Id.* R.C.M. 1004(b)(7) (referring to unanimity requirement for a death sentence found in R.C.M. 1006(d)(4)).

<sup>15</sup> 1 MOLLY TREADWAY JOHNSON & LAURAL L. HOOPER, FED. JUD. CTR., RESOURCE GUIDE FOR MANAGING CAPITAL CASES: FEDERAL DEATH PENALTY TRIALS 3 (2004).

<sup>16</sup> SUBCOMM. ON FED. DEATH PENALTY CASES, JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION § 1C (May 1998) [hereinafter SPENCER COMMITTEE REPORT].

<sup>17</sup> *United States v. Kreutzer*, 59 M.J. 773, 783 (A. Ct. Crim. App. 2004) (quoting *Wiggins v. Smith*, 539 U.S. 510 (2003) and citing *United States v. Murphy*, 50 M.J. 4, 14–15 (1998)).

<sup>18</sup> A 2002 law review article outlined a similar argument for a specialized cadre of attorneys to handle capital cases. See Major Mary M. Foreman, *Military Capital Litigation: Meeting the Heightened Standards of United States v. Curtis*, 174 MIL. L. REV. 1 (2002).

considerable experience in death penalty cases, but whose past performance in those cases was inadequate, should not be assigned to represent capital defendants.<sup>24</sup> A notable example of this type is the famous “sleeping lawyer” of Texas who slept through major parts of a capital trial. Prior to his in-court slumber, he had tried a number of capital cases.<sup>25</sup>

In the military, the ABA *Guidelines* have not been formally adopted. The Court of Appeals for the Armed Forces declined to mandate their adoption. In *United States v. Loving*, the court stated that it will not involve itself in the “internal personnel management of the military services.”<sup>26</sup> Of note, the major appellate decisions that have dealt with this issue occurred prior to the publication of the revised 2003 edition.<sup>27</sup> Further, the 1989 edition of the ABA *Guidelines* allowed for such exceptions as may be appropriate for the military; however, the revised 2003 edition specifically states that its guidance should apply to the military.<sup>28</sup>

#### B. Learned Counsel Provision in Federal Court: 18 U.S.C. § 3005

Since the First Judiciary Act of 1789, federal law has required the assignment of a “learned” counsel in capital cases.<sup>29</sup> Presently, under 18 U.S.C. § 3005, which was promulgated in 1994, a defendant in federal court accused of treason or other capital crime shall be represented by two counsel “of whom at least [one] shall be learned in the law applicable to capital cases.”<sup>30</sup> According to the *Guide to Judiciary Policy*, the term learned counsel under § 3005 means counsel with

distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals or post-conviction review that, in combination

with co-counsel, will assure high quality representation.<sup>31</sup>

A federal defendant is assigned learned counsel promptly upon indictment and, in most cases, prior to the United States filing a formal Notice of Intent to Seek the Death Penalty under 18 U.S.C. § 3593(a) and (b), which is a prerequisite for imposing the death penalty. Consequently, this often means that a federal defendant has the luxury of learned counsel at the very beginning of a capital case.<sup>32</sup> The advantage to this arrangement is that learned counsel can play an important role in convincing the Government not to pursue the death penalty.<sup>33</sup> Furthermore, even after the Government has decided not to seek the death penalty, it is not uncommon for learned counsel to remain on the case.<sup>34</sup>

Interestingly, § 3005 requires the appointment of at least two counsel. This requirement is consistent with the ABA *Guidelines*, yet the statute differs from the ABA *Guidelines* because it only requires that one of the counsel be learned in capital law.<sup>35</sup> Also, under the *Guide to Judiciary Policy*, assigned counsel can request the appointment of additional counsel to assist in the capital defense. These “associate” counsel are appointed under the proviso that they reduce the total cost of representation.

In addition to the two appointed attorneys, defendants are commonly assigned both a mitigation specialist and an investigator. For example, in the federal case against Ahmed Ghaliani, a former Guantanamo Bay Detainee facing a non-capital military commission, the court assigned two counsel—one learned—and authorized three hundred hours for a mitigation specialist and one hundred hours for an investigator.<sup>36</sup> Notably, the funding for these positions was granted immediately after arraignment upon request from the defense counsel and prior to the Government’s decision on whether to seek the death penalty.<sup>37</sup>

The establishment of this learned counsel position has produced marked improvement in the quality of legal representation and to the overall production of a capital trial. In 1998, a review of the federal death penalty system by a subcommittee of the Judicial Conference of the United States Committee on Defender Services (the “Spencer Committee”) highlighted the importance of the learned

<sup>24</sup> *Id.*

<sup>25</sup> *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).

<sup>26</sup> 41 M.J. 213, 300 (1994).

<sup>27</sup> However, appellate counsel raised this issue in a summary assignment of error in *United States v. Walker*, 66 M.J. 721, 769 (N-M. Ct. Crim. App. 2008), and the court summarily disposed of this issue. Moreover, Walker’s previous court-martial occurred in 1993; as a result, the 1989 guidelines would have been relevant to his case. *Walker*, 66 M.J. at 721. *See generally* Bobby v. Van Hook, 130 S. Ct. 13 (2009).

<sup>28</sup> ABA GUIDELINES, *supra* note 19, at 1.

<sup>29</sup> 1 Stat 118 (1790); SPENCER COMMITTEE REPORT, *supra* note 16, § C1.

<sup>30</sup> Prior to 1994, the statute merely required counsel “learned in the law.” 18 U.S.C. § 3005 (1948).

<sup>31</sup> GUIDE TO JUDICIARY POLICY, app. 6A, 1(b) (2010).

<sup>32</sup> JOHNSON & HOOPER, *supra* note 15, at 9.

<sup>33</sup> *See* Affidavit of Kevin McNally, Federal Death Penalty Resource Counsel 2 (2002), available at [http://www.capdefnet.org/pdf\\_library/CJA\\_3005\\_2.pdf](http://www.capdefnet.org/pdf_library/CJA_3005_2.pdf).

<sup>34</sup> *See, e.g., In re Sterling-Suarez*, 306 F.3d 1170 (1st Cir. 2002).

<sup>35</sup> *See* 18 U.S.C. § 3005 (2006).

<sup>36</sup> *Ex parte* Order, Case No. 1:98-cr-01023, Document No. 748 (June 25, 2009).

<sup>37</sup> *Id.*

counsel position.<sup>38</sup> The committee interviewed a number of judges and lawyers who worked in capital litigation and noted the following:

In interviews, judges and lawyers attested to the importance of the statutory learned counsel requirement. A number of judges, particularly those with experience reviewing state death penalty trials in federal habeas corpus proceedings underscored the importance of “doing it right the first time,” i.e., minimizing time-consuming post-conviction proceedings by assuring high quality representation in federal death penalty cases at the trial level. Similarly, a former Florida Attorney General testified before an American Bar Association Task Force studying representation in state death penalty cases that, “[b]eyond peradventure, better representation at trial and on appeal will benefit all concerned.”<sup>39</sup>

The Spencer Committee also noted that judges have routinely commented that the quality of representation by these learned counsel is higher than the ordinary standard of practice in other federal cases.<sup>40</sup>

Recently, an update to the Spencer Committee report was completed and published this year.<sup>41</sup> Despite the passage of time between the update and the initial Spencer Committee report, the update stated that much of the Spencer Committee report remains as relevant now as it was in 1998, including the need for high standards for appointed counsel.<sup>42</sup> The update highlights that “the first responsibility . . . in a federal death penalty case is to appoint experienced, well trained, and dedicated defense counsel who will provide high quality legal representation.”<sup>43</sup> More specifically, the update affirms that the learned counsel requirement under federal law demands a higher degree of training and experience than that normally required.<sup>44</sup> Moreover, the purpose of this heightened standard is to “ensure that

representation in federal death penalty cases is both cost-effective and commensurate with the complexity and high stakes of the litigation.”<sup>45</sup> Lastly, the update goes on to define what is meant by the term counsel with “distinguished prior experience.”

[It] contemplates excellence, not simply prior experience, at the relevant stage of proceedings . . . . It is expected that a lawyer appointed as “learned counsel” for trial previously will have tried a capital case through the penalty phase, whether in state or federal court, and will have done so with distinction. Excellence in general criminal defense will not suffice because the preparation of a death penalty case requires knowledge, skills, abilities which even the most seasoned lawyers will not possess if they lack capital experience.<sup>46</sup>

### C. State Standards for Appointment of Learned Counsel

Thirty-five states authorize the death penalty.<sup>47</sup> Of those thirty-five states, at least twenty-seven have set out in a statute, court rules, or procedures outlined by the indigent defense service (IDS) provider, specific qualifications for counsel handling capital cases at the trial, appellate, or post conviction stages.<sup>48</sup>

Similar to the 1989 ABA *Guidelines*, most of the states focus on the amount of counsel’s experience. The most common minimum experience requirement is five years; however, some states require as little as three years. California requires the most experience, with at least ten years.<sup>49</sup> In addition to the required years of experience, counsel must have tried a minimum number of cases. For example, Florida requires counsel to have tried a minimum of nine complex cases.<sup>50</sup>

Also, many of the states require counsel to have specific trial experience. Idaho requires that counsel have experience in “the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic

<sup>38</sup> SPENCER COMMITTEE REPORT, *supra* note 16. The Spencer Committee was a subcommittee formed in 1997 to report on issues related to the appointment of counsel in federal death cases. The recommendations in the committee’s report were eventually adopted by the Judicial Conference.

<sup>39</sup> *Id.* § 1C.

<sup>40</sup> *Id.*

<sup>41</sup> JOHN B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES: UPDATE ON THE COST, QUALITY, AND AVAILABILITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES (2010) [hereinafter UPDATE TO THE SPENCER COMMITTEE REPORT].

<sup>42</sup> *Id.* at xii.

<sup>43</sup> *Id.* at 91.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 92.

<sup>47</sup> The states that still authorize the death penalty are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Illinois, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

<sup>48</sup> *See infra* App.

<sup>49</sup> CAL. R. CRIM. P. 4.117(d).

<sup>50</sup> FLA. R. CRIM. P. 3.112(f).

evidence . . . .”<sup>51</sup> Texas requires qualified counsel to have trial experience in the specialized areas of death penalty cases, such as the use of and challenges to mental health or forensic expert witnesses, and investigation and presentation of mitigation evidence at a capital sentencing hearing.<sup>52</sup> Lastly, many states require counsel to have a minimum amount of current education or training in capital litigation.<sup>53</sup>

Furthermore, in keeping with the ABA *Guidelines*, a number of states require that a capital defendant be represented by at least two counsel. For example, Arkansas, Georgia, Indiana, Idaho,<sup>54</sup> Louisiana, Missouri, Ohio, South Carolina, Tennessee, Utah, Virginia, and Washington all have provisions that call for the appointment of two counsel.<sup>55</sup> These states separate counsel into the categories of lead and associate counsel. Logically, the qualifications for lead counsel are more exacting than for associate counsel. However, the qualifications for associate counsel can also be quite extensive. In California, for example, associate counsel must have at least three years of experience, must have tried a minimum of ten felony cases or five felony cases and one murder case, must have experience in the use of expert witnesses and evidence, and must have obtained a minimum amount of continuing legal education in capital defense.<sup>56</sup>

The learned counsel requirement is not just a product of states with a robust death penalty practice. Of the twenty seven states with this requirement, seven have a death row population of eleven or fewer inmates: Colorado (3), Connecticut (10), Kansas (10), Montana (2), Nebraska (11), Utah (10), and Washington (9).<sup>57</sup> These “small” states have a death row population similar to that of the military.<sup>58</sup> Although the number of death row inmates does not show how many capital prosecutions were sought, it does infer that these states prosecute relatively few capital cases. For instance,

- Colorado had 6 active cases in 2008 in which the district attorney sought the death penalty;<sup>59</sup> however, from 2002 to 2006, it had no death penalty prosecutions.<sup>60</sup>
- Connecticut prosecuted 166 cases between 1971 and 2003 that involved a capital felony; 60 led to a conviction, and 25 had a capital sentencing hearing.<sup>61</sup>
- Kansas prosecuted 77 cases that included capital charges from 1994 to 2008; 25 of those cases went to trial and 12 resulted in a death sentence.<sup>62</sup>
- Washington State had 79 death penalty cases from 1981 to 2006, and 30 death sentences were adjudged.<sup>63</sup>

In comparison, the military prosecuted fifty capital court-martial from 1984 to the present.<sup>64</sup>

A further look into the capital system of Washington State illustrates why a jurisdiction with few capital trials still requires the appointment of learned counsel.<sup>65</sup> Since 1981,<sup>66</sup> there have been seventy-nine capital trials in Washington and only thirty death sentences. The appellate history of these thirty death sentence cases has been dismal, however. According to a 2006 report by the Washington State Bar Association, twenty-three of the thirty cases have completed their appellate review at the time of the report.<sup>67</sup> Out of

<sup>59</sup> Alan Prendergast, *Arapahoe County DA Charges Death-Penalty Fees to the State*, DENVER WESTWARD NEWS, Feb. 26, 2008, available at <http://www.westword.com/2008-02-28/news/jeffco-da-charges-death-penalty-fee-to-the-state/full>.

<sup>60</sup> Prior to 2002, Colorado had a three-judge panel sentence defendants in capital cases. *See id.* This type of sentencing scheme was held to be unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>61</sup> CONNECTICUT COMMISSION ON THE DEATH PENALTY, COMMISSION ON THE DEATH PENALTY: STUDY PURSUANT TO PUBLIC ACT NO. 01-151, 17-18 (2003).

<sup>62</sup> Kansas Facts, KAN. COAL. AGAINST THE DEATH PENALTY, [http://www.kscadp.org/kansas\\_facts.htm](http://www.kscadp.org/kansas_facts.htm) (last visited Dec. 13, 2010).

<sup>63</sup> WASHINGTON STATE BAR ASS’N, FINAL REPORT OF THE DEATH PENALTY SUBCOMMITTEE OF THE COMMITTEE ON PUBLIC DEFENSE 6-7 (Dec. 2006).

<sup>64</sup> *See* sources cited *supra* note 8 and accompanying text..

<sup>65</sup> The author chose Washington State because it has comparable numbers to the military. For instance, in a twenty-five-year time period, Washington prosecuted seventy-nine death penalty cases. In a corresponding time period, the military tried fifty death penalty cases. There is close to a two-to-one difference, but there is also a severe population disparity between Washington (6.2 million) and the present day Active Duty military (1.4 million). With respect to actual death sentences imposed, both Washington and the military have similarly low rates: Washington 38% (30/79) and the military 32% (16/50). Moreover, both Washington and the military have similar reversal rates for capital cases, 83% (19/23) and 80% (8/10), respectively.

<sup>66</sup> The death penalty was re-instated in Washington in 1981. WASH. REV. CODE ch. 10.95 (1981).

<sup>67</sup> WASHINGTON STATE BAR ASS’N, *supra* note 63.

<sup>51</sup> ID. CRIM. R. 44.3.

<sup>52</sup> TEX. CODE OF CRIM. P. art. 26.052.

<sup>53</sup> *See, e.g.*, CAL. R. CRIM. P. 4.117(d)(6) (requiring the completion of at least fifteen hours of continuing legal education (CLE) in capital defense); FLA. R. CRIM. P. 3.112(f)(7) (requiring the completion of twelve hours of CLE in capital defense); TEX. CODE OF CRIM. P. art. 26.052(2)(G) (requiring participation in CLE in capital defense or other capital defense training).

<sup>54</sup> Idaho Criminal Rule 44.3 contains a unique provision that allows the court to appoint only one counsel if appropriate.

<sup>55</sup> *See infra* App.

<sup>56</sup> CAL. R. CRIM. P. 4.117(e).

<sup>57</sup> DEBORAH FINS, DEATH ROW U.S.A.: A QUARTERLY REPORT BY THE CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. 35-36 (WINTER 2010).

<sup>58</sup> There are currently six servicemembers with an adjudged death sentence: Kenneth Parker, Ronald Gray, Dwight Loving, Hasan Akbar, Andrew Witt and Timothy Hennis.

those twenty-three cases, nineteen (83%)<sup>68</sup> were reversed on appeal.<sup>69</sup>

The errors leading to reversal involved constitutional error (2), judicial error (9), prosecutorial misconduct (2), ineffective assistance of counsel (IAC) (5), and jury misconduct (1).<sup>70</sup> By the numbers, IAC accounts for a little over 26% of the reversals. Further, these instances of IAC occurred prior to the imposition of a learned counsel requirement in Washington. More importantly, the deficient performance by counsel demonstrates a serious lack of understanding of the area of capital defense. These deficiencies included failing to present mitigation evidence;<sup>71</sup> failing to conduct an adequate investigation into the facts of the crime or the defendant's life history;<sup>72</sup> failing to investigate the defendant's known mental and physical conditions;<sup>73</sup> and failing to pursue well-known legal defenses.<sup>74</sup> As noted above, these are all tasks that are mandated by the ABA *Guidelines* as basic to a capital defense.

Today, an indigent capital defendant in Washington must be represented by a qualified learned counsel. Rule 2 of the Washington Superior Court Special Proceeding Rules—Criminal (SPRC) sets out these qualifications.<sup>75</sup> The SPRC was adopted in 1997, and the “learned counsel” provision has been promoted as a way to improve quality representation and fairness in capital litigation.<sup>76</sup> Under SPRC 2, a capital defendant shall be represented at trial and on direct appeal by a minimum of two counsel. In addition, one counsel must be qualified to handle capital cases, but both counsel must have significant trial experience and be committed to quality representation appropriate to capital cases. Furthermore, SPRC 2 limits counsel's representation to only one trial-level death penalty case at a time. The rule reads, in part,

All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case. Both counsel at trial must have five years' experience in the practice of criminal law

be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case.<sup>77</sup>

Under SPRC 2, learned counsel is assigned once a person is charged with the capital offense and continues unless and until the prosecutor decides not to seek the death penalty.<sup>78</sup>

#### D. Military Commissions Act: Counsel Learned in Applicable Law

Under the Military Commissions Act, an “alien unprivileged enemy belligerent” facing capital punishment has the right to obtain the assistance of an experienced defense counsel learned in capital law. The exact language of the provision is as follows:

When any of the charges preferred against the accused are capital, to be represented before a military commission . . . to the greatest extent practicable, by at least one additional counsel who is learned in applicable law relating to capital cases and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense.<sup>79</sup>

Congress intended the learned counsel provision in the MCA to have the “meaning that is commonly attributed to the same words in section 3005 of title 18, United States Code.”<sup>80</sup> As stated in ILB, under § 3005, the term learned counsel has been defined as an attorney with distinguished prior experience in capital litigation.

Also, there are two aspects of this provision that are particularly noteworthy: (1) the right to learned counsel applies at “preference,” and (2) the appointment of a civilian, paid for by the Government, as learned counsel is authorized. The former provision is in keeping with the federal practice of appointing counsel prior to the decision on whether to seek the death penalty, but the latter provision is unprecedented, especially in light of the fact that at a court-martial a servicemember must provide civilian counsel at his own expense. This remarkable provision, which allows civilian counsel to be retained at government expense when a qualified military counsel cannot be detailed,

<sup>68</sup> *Id.* at 5.

<sup>69</sup> *Id.* The military has a similar reversal rate of 80% (8 out of 10). See *infra* Part III.A and n.87.

<sup>70</sup> *Id.*

<sup>71</sup> *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992).

<sup>72</sup> *Harris v. Wood*, 64 F.3d 1432 (9th Cir. 1995); *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999).

<sup>73</sup> *In re Brett*, 16 P.3d 601 (Wash. 2001).

<sup>74</sup> *Pirtle v. Morgan*, 313 F.3d 1160 (9th Cir. 2002).

<sup>75</sup> WASH. ST. CT. R. SPRC 2.

<sup>76</sup> WASHINGTON STATE BAR ASS'N, *supra* note 63, at 33.

<sup>77</sup> WASH. ST. CT. R. SPRC 2.

<sup>78</sup> *Id.*

<sup>79</sup> 10 U.S.C. § 949a(b)(2)(c)(ii) (2006).

<sup>80</sup> H.R. REP. NO. 111-288, AT 863 (2009) (Conf. Rep.).

underscores the point that Congress considers learned counsel indispensable to the defense of a capital case.

Recently, the Secretary of Defense has promulgated rules concerning the application of the learned counsel requirement.<sup>81</sup> For instance, under the Rules for Military Commission (R.M.C.), learned counsel is detailed upon the swearing of charges and when the government recommends that the charges be referred as capital.<sup>82</sup> Furthermore, the convening authority (CA) is prohibited from referring the charges as capital until learned counsel is detailed.<sup>83</sup> Taken together, these rules solidifies the Secretary's intent that learned counsel be assigned at the beginning of the capital case and that such counsel should have a role in making a case against a capital referral.

### III. The Case for a Learned Counsel in the Military Justice System

#### A. Doing a Capital Court-Martial Right the First Time<sup>84</sup>

Capital courts-martial are rare in the military.<sup>85</sup> Ten cases in which the death sentence was approved by the convening authority have gone through direct review.<sup>86</sup> Astonishingly, of those ten cases, eight have been reversed on appeal.<sup>87</sup> An eighty percent reversal rate for death penalty cases is a signal that something is amiss, and a closer analysis of the cases that were reversed reveals that had learned counsel been detailed from the outset, many of the problems identified on appeal could have been avoided, to the benefit of all parties.

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<sup>81</sup> MANUAL FOR MILITARY COMMISSIONS, UNITED STATES, RULE FOR MILITARY COMMISSIONS (2010).

<sup>82</sup> *Id.* R.M.C. 307(d).

<sup>83</sup> *Id.* R.M.C. 601(d)(2).

<sup>84</sup> See, e.g., American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 63, 65, 69, 70 (1990) (highlighting an American Bar Association Task Force study on the death penalty system. The study promoted the assignment of qualified capital counsel as a way to ensure the streamline processing, reliability and fairness of a capital trial.).

<sup>85</sup> See Sullivan, *supra* note 8.

<sup>86</sup> See *id.* at 36 (noting that nine cases have gone through some form of direct review). Since 2006, one other case—*United States v. Walker*, 66 M.J. 721, 769 (N-M. Ct. Crim. App. 2008)—has gone through the first stage of direct review.

<sup>87</sup> The eight reversed cases were *United States v. Dock*, 35 M.J. 627 (A.C.M.R. 1992); *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998); *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997); *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998); *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997); *United States v. Kreutzer*, 59 M.J. 773 (A. Ct. Crim. App. 2004); *United States v. Quintanilla*, 60 M.J. 852 (N-M. Ct. Crim. App. 2005); *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008).

Three of the ten cases—*United States v. Kreutzer*,<sup>88</sup> *United States v. Curtis*,<sup>89</sup> and *United States v. Murphy*<sup>90</sup>—were reversed due to ineffective assistance of counsel. In each of these cases, defense counsel had no prior experience in capital litigation; however, defense counsel in both *Kreutzer*<sup>91</sup> and *Curtis*<sup>92</sup> were experienced litigators. Moreover, counsel's deficiency in these cases were in the investigation and handling of mitigation evidence. In *Kreutzer*, counsel failed to adequately investigate psychiatric and other mitigation evidence.<sup>93</sup> In *Curtis*, counsel was criticized for not fully developing the defendant's sentencing case.<sup>94</sup> In *Murphy*, counsel failed to conduct a proper mitigation investigation, to include a thorough examination of the defendant's mental health.<sup>95</sup>

The mitigation investigation and sentencing case is viewed as the most important and arduous portion in a death penalty case.<sup>96</sup> Counsel's duty to thoroughly investigate mitigation evidence is, therefore, an indispensable part of a capital defense.<sup>97</sup> This "requires extensive and generally unparalleled investigation into personal and family history."<sup>98</sup> Notably, the revised 2003 ABA *Guidelines* sets out a non-exhaustive list of items that counsel should explore for mitigation, to include medical history, cognitive impairments, substance abuse, alcohol and drug use, and neurological damage.<sup>99</sup> More specifically, the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*<sup>100</sup> provides recommendations for a mitigation investigation. According

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<sup>88</sup> 59 M.J. 773 (A. Ct. Crim. App. 2004).

<sup>89</sup> 44 M.J. 106 (C.A.A.F. 1996) (affirming the findings and sentence of death); *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997) (granting appellant's petition for reconsideration and setting aside the death sentence based on ineffective assistance of counsel claims); *United States v. Curtis*, 48 M.J. 331 (C.A.A.F. 1997) (denying the Government's petition to reconsider the court's prior ruling to set aside the sentence); *United States v. Curtis*, 52 M.J. 166 (C.A.A.F. 1999) (affirming the lower court's decision to reassess appellant's sentence to life).

<sup>90</sup> 50 M.J. 4 (C.A.A.F. 1998).

<sup>91</sup> *Kreutzer*, 59 M.J. 773, at 808–16.

<sup>92</sup> *Curtis*, 44 M.J. 106, at 124 (noting that one defense counsel had tried over one hundred contested general courts-martial).

<sup>93</sup> *Kreutzer*, 59 M.J. at 773, 783.

<sup>94</sup> *Curtis*, 48 M.J. 331.

<sup>95</sup> *Murphy*, 50 M.J. 4, at 15.

<sup>96</sup> Russell Stetler, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 at R. 5.1, 10.1 (2008).

<sup>97</sup> See *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (noting that the ABA *Guidelines* emphasizes counsel's important role in providing mitigation evidence in death cases).

<sup>98</sup> Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION, Jan./Feb. 1999, at 35.

<sup>99</sup> Stetler, *supra* note 96, R. 5.1, 10.1.

<sup>100</sup> *Id.*

to these guidelines, part of this investigation should include an examination of

medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.<sup>101</sup>

With this in mind, learned counsel would have identified the areas in mitigation that should have been explored, thus averting the reversible errors made in the cases discussed earlier.

Second, two pervading factors may account for the high reversal rate in the military: (1) “the military judge’s and/or counsel’s apparent unfamiliarity with death penalty practice”<sup>102</sup> and (2) the military’s “death is different” jurisprudence, which in practice translates into a more exacting appellate standard in death penalty cases.<sup>103</sup> For instance, errors made in non-capital cases that would not be grounds for reversal can nevertheless be deemed reversible error in a death penalty case.<sup>104</sup> A learned counsel requirement would greatly ameliorate these two factors, which strongly contribute to the high reversal rate, and result in substantially greater judicial efficiency. The appellate history demonstrates that it takes experienced counsel—who sometimes become experienced military judges—to successfully maneuver through a capital case without committing reversible error.

### *I. Cost*

Capital trials are time consuming and costly. From a purely practical standpoint, this is a compelling reason for doing it right the first time. In the context of the court-

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<sup>101</sup> *Id.*

<sup>102</sup> Sullivan, *supra* note 8, at 47.

<sup>103</sup> *Id.* at 48–49.

<sup>104</sup> *Id.* at 49–50 (noting that in *Thomas* and *Simoy*, the military judge’s failure to instruct the members to vote for the lightest sentence first was reversible error, but in the non-death penalty case of *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986), the same error was not found to warrant appellate relief).

martial, the true cost of a trial is hidden by the fact that counsel and many of the expert consultants—e.g., psychiatrists, criminal investigators—are already government employees. Also, the cost of a trial depends on the tightness of the convening authority’s purse strings or the rulings of the military judge. A death case can be done on the cheap, but the relevant inquiry is the cost of doing a capital court-martial right the first time. A look at the relative cost in time and money of both state and federal prosecutions reveals that capital cases require considerably more money and time than non-capital prosecutions.

In the federal system, a capital trial can cost up to seven times more than a non-capital trial.<sup>105</sup> According to the update to the Spencer Committee report, the median amount for a capital trial, to include both pleas and contested cases, was \$353,185.<sup>106</sup> In contested cases, the median amount increased to \$465,602.<sup>107</sup> Interestingly, the update noted that the overall cost of conducting a capital trial increased in states that had little experience in these cases and decreased in states with a robust death penalty practice; however, the update added that additional study was needed in order to determine the cause of this correlation.<sup>108</sup>

In state courts, there is also a considerable increase in cost for capital trials. In Maryland, a study by the Urban Institute reported that the cost to adjudicate a capital-eligible case in which the death penalty is ultimately awarded is \$1.7 million.<sup>109</sup> The report further noted that the cost to imprison an inmate during the adjudication process—the trial and the state and federal appellate stages—is \$1.3 million.<sup>110</sup> According to the Urban Institute study, the cost to try a capital case is roughly \$1.9 million more than the cost of a non-capital case.<sup>111</sup> In Washington State, seeking the death penalty can increase the total cost of trial by as much as \$400,000.<sup>112</sup> Similarly, a 2003 study by the Kansas State Legislature revealed that the median cost for a case in which the death penalty is sought is \$1.2 million, compared to an estimated cost of \$740,000 for cases in which the death penalty was not sought.<sup>113</sup>

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<sup>105</sup> SPENCER COMMITTEE REPORT, *supra* note 16, at 23–24

<sup>106</sup> UPDATE TO THE SPENCER COMMITTEE REPORT, *supra* note 41, at 24–25.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 50–56.

<sup>109</sup> URBAN INSTITUTE JUSTICE POL’Y CTR., THE COST OF THE DEATH PENALTY IN MARYLAND 2–3 (2008).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> WASHINGTON STATE BAR ASS’N, *supra* note 63, at 14–19.

<sup>113</sup> DEATH PENALTY INFO. CTR., PERFORMANCE AUDIT REPORT: COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS 12 (2003).

In addition to dollar amounts, capital cases require more time to adjudicate. In the federal system, trial attorneys spent a median of 2,014 hours preparing for a death penalty case, or roughly 4.6 times more hours than for a non-authorized capital offense trial.<sup>114</sup> The median attorney hours increase to 2,746 hours for contested capital trials.<sup>115</sup> Also, on average, it takes 26.8 months for a capital defendant to go from indictment to trial.<sup>116</sup>

Capital courts-martial require a similarly increased expenditure of time. Examination of the five most recent capital courts-martial tried—the cases of Sergeant Hasan Akbar, Airman Andrew Witt, Airman Calvin Hill, Staff Sergeant Alberto Martinez, and Master Sergeant Timothy Hennis—reveals that the time between charging and the conclusion of trial took an average of 27.8 months—*Akbar* (25); *Witt* (15); *Hill* (15), *Martinez* (41) and *Hennis* (43).<sup>117</sup> Both the *Hill* and *Martinez* capital courts-martial ended in acquittals. The *Akbar* and *Witt* cases are still at the first stage of appeal with their service courts, and their current lengths of adjudication are four years. Thus, it remains to be seen whether these cases will be in keeping with the eight and a half year average time it takes for military capital cases to go from sentencing to resolution on direct review.<sup>118</sup>

Some may argue that the learned counsel requirement would not be practical or cost-effective given the infrequency of capital courts-martial. However, this reasoning ignores several factors. First, the learned counsel requirement is grounded in the principle that an accused facing the death penalty should be guaranteed high-quality representation, a consideration that is subordinate to cost. From an efficiency standpoint, the appellate record vividly demonstrates that time and resources can be saved in great quantity when cases are tried competently the first time.<sup>119</sup> To put it another way, the cost of trying even infrequent capital cases without learned counsel is much higher than enforcing the proposed standard. Indeed, as noted in Part II,

<sup>114</sup> UPDATE TO THE SPENCER COMMITTEE REPORT, *supra* note 41, at 29.

<sup>115</sup> *Id.*

<sup>116</sup> Kevin McNally, Director, Federal Death Penalty Resource Counsel Project, Declaration of Kevin McNally Regarding Pre-trial Preparation Time (Mar. 11, 2009), available at [http://www.capdefnet.org/fdprc/pubmenu.aspx?menu\\_id=98&folder\\_id=2496](http://www.capdefnet.org/fdprc/pubmenu.aspx?menu_id=98&folder_id=2496). The Federal Death Penalty Resource Counsel Project “maintains a comprehensive list of federal death penalty prosecutions and detailed information regarding district court practices in these cases.” *Id.* The information it compiles “has been relied upon by the Administrative Office of the United States Courts, by the Federal Judicial Center and by various federal district courts.” *Id.*

<sup>117</sup> Recently, the accused in *United States v. Walker* had his death sentence set aside and was partially retried at a capital court-martial in 2010, roughly eighteen years after the crime was committed. Given that this case was a partial retrial of the original court-martial, it was excluded from the calculation.

<sup>118</sup> Sullivan, *supra* note 8, at 41.

<sup>119</sup> See CAL. R. OF CRIM. P. 4.117 (“These minimum qualifications [for learned counsel] are designed to promote adequate representation in death penalty cases and to avoid unnecessary delay and expense . . .”).

even states with few capital cases have decided that implementing a learned counsel requirement is important. Lastly, even though capital military commissions are rarer than capital courts-martial,<sup>120</sup> Congress has deemed it appropriate to allocate resources to fund learned counsel.

## 2. Acquittals: Current Trend or Outlier?

As noted above, two out of the five recent capital courts-martial ended in a finding of not guilty. More importantly, both accused were represented by military counsel.<sup>121</sup> This forty percent acquittal rate for recent capital cases may at first blush seem to undermine the argument for a learned counsel requirement. However, notwithstanding defense counsel’s outstanding performance in these cases, three factors should be considered. First, in the *Martinez* case, at least one of the counsel had some prior capital litigation experience at the appellate stage.<sup>122</sup> Second, the majority of specialized skill required in capital cases deals with the sentencing portion of the trial, and a number of the errors made in prior cases dealt with the mitigation evidence used in sentencing. Third, given the overall appellate history of capital cases, it is hard to conclude whether these two cases are simply outliers or evidence of a current trend. Notably, in 1988 the capital court-martial case of *United States v. Chrisco* ended in acquittal;<sup>123</sup> however, after *Chrisco*, death sentences were overturned on appeal in a number of other capital courts-martial.<sup>124</sup>

<sup>120</sup> During and after WWII, however, a number of military commissions sentenced defendants to death. See, e.g., *Hirota v. MacArthur*, 338 U.S. 197 (1948); *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946)

<sup>121</sup> The case of *United States v. Walker* is another notable exception in which the accused was represented solely by military counsel and received outstanding representation. Although, the accused was convicted of multiple murders, he was sentenced to life. In determining a proper conclusion to make from this result, we must consider a crucial factor: military counsel were very experienced and highly esteemed counsel, but in addition, they had extensive prior experience in death penalty litigation and received training specifically in the area of capital defense

<sup>122</sup> See *United States v. Kreutzer*, 59 M.J. 773 (A. Ct. Crim App. 2004) (defense counsel for Sergeant Martinez was appellate counsel in this capital appeal).

<sup>123</sup> *United States v. Chrisco*, No. 880382 (V Corps, U.S. Army-Europe, W. Ger. 4 Feb. 1988) (resulting in total acquittal) (record of trial on file at Washington Nat’l Records Ctr., Suitland, Md.).

<sup>124</sup> See *United States v. Dock*, 35 M.J. 627 (A.C.M.R. 1992); *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998); *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997); *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998); *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997); *United States v. Kreutzer*, 59 M.J. 773 (A. Ct. Crim. App. 2004); *United States v. Quintanilla*, 60 M.J. 852 (N-M. Ct. Crim. App. 2005); *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008).

Arguably, the military could and has provided experienced counsel to a capital defendant, but absent a learned counsel requirement the quality of a servicemember's representation is left to chance. The ultimate goal in a learned counsel requirement is to ensure that future servicemembers facing a similar predicament as Staff Sergeant Martinez or Airman Hill will be guaranteed high-quality legal representation required for capital cases, regardless of circumstances.

## B. Proposal for a Learned Counsel Requirement

In considering what type of learned counsel requirement to apply in the military, we must take into consideration the unique nature of the military and the fact that our legal system is not directly analogous to either state or federal practice. With this in mind, a learned counsel requirement that would best fit in the military would (1) be statutorily based, (2) apply the functional approach to qualifications, (3) apply at preferral of charges, and (4) include exceptions that take into consideration situations where the convening authority does not intend to seek the death penalty.

### 1. Statutorily Based

As outlined above, the federal or state jurisdictions with standards for capital counsel implement them through either (1) statute, (2) court rules, or (3) guidelines established by the state IDS provider. In the military, trial and appellate courts do not establish general procedural rules; therefore, court-mandated learned counsel is not feasible. As for the IDS option, since there is no centralized IDS provider in the military, each individual service Secretary or Judge Advocate General would have to adopt a provision and then set guidelines, but absent a uniform agreement by the services, such a system may lead to disparate and unequal representation. One solution would be to amend the UCMJ to include the learned counsel requirement. In addition to uniformity, an amendment would serve two purposes. First, it would establish the minimum standard for counsel in a capital case. Second, it would guarantee that any future servicemembers facing the death penalty would receive such representation.

### 2. Functional Approach

The federal system and the revised ABA guidelines focus on whether counsel can provide "high quality" representation. This functional approach is better situated for the military rather than the quantitative approach that many states have adopted. The quantity of counsel's experience does not necessarily entail quality. More specifically, it may be difficult for a judge advocate (JA) to amass a certain number of tried cases, given the constant change in duty stations and the fact that the number of courts-martial tried largely depends on the activity at the

trial office. As such, the functional approach widens the field for potential qualified counsel.

Also, like the requirement under § 3005 and the MCA, counsel should have actual experience in defending capital cases in order to qualify as learned counsel. In practice, it may be difficult to detail such counsel given the limited amount of capital courts-martial; however, in cases in which qualified military counsel cannot be detailed, qualified civilian counsel should be funded. This practice is authorized under the MCA for alien unprivileged enemy belligerents facing capital military commissions and should also be approved for servicemembers.

Thus, the proposed language for the minimum qualifications of capital defense counsel is as follows:

the accused shall be represented by counsel with distinguished experience in the specialized practice of capital representation and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense .

### 3. Application at Preferral

One important aspect of the requirement is that it would apply upon preferral of capital offenses. This would assure the detailing of learned counsel prior to the Article 32, UCMJ, investigation.<sup>125</sup>

The Article 32, UCMJ, investigation is an important stage at a prospective capital court-martial. At this hearing, the defendant has an opportunity to cross examine the Government's witnesses and submit mitigation evidence.<sup>126</sup> The appointment of learned counsel at preferral and prior to the Article 32, UCMJ, investigation would allow counsel to take full advantage of the opportunity to make a case against a capital referral, or at least begin the critical task of assembling a sentencing case. This requirement would be in keeping with current and recommended practice.<sup>127</sup> In the federal system, learned counsel play a key role in presenting mitigation evidence to the Government prior to the decision to seek the death penalty,<sup>128</sup> and under the revised ABA guidelines, learned counsel's designated function is to establish the defense team from its conception and to present

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<sup>125</sup> See generally UCMJ art. 32 (2008).

<sup>126</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405 (2008) [hereinafter MCM].

<sup>127</sup> See DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-10.120 (2009) (providing that counsel has an opportunity to meet with the Government and present mitigation evidence prior to any decision to pursue the death penalty).

<sup>128</sup> *Id.*

mitigating evidence to the decision making authority as to whether to proceed with capital punishment.<sup>129</sup> Moreover, under the revised guidelines, counsel are required to begin assembling their mitigation case as soon as practicable.<sup>130</sup>

#### 4. Exception

In order to take into account the specific procedures of military practice and to address some arguments against the learned counsel requirement, there should be an exception for cases in which the CA has no intention of seeking the death penalty. For example, a major argument against imposing the learned counsel requirement is that it will lead to unintended consequences and an over-application. More specifically, the death penalty is authorized for fourteen offenses, albeit some only during a time of war.<sup>131</sup> Furthermore, in many situations where capital offenses are preferred, the convening authority has no intention of referring the cases as capital. Lastly, Article 120, UCMJ<sup>132</sup>—the offense of rape and rape against a child—is a capital offense; however, the legitimacy of this authorized punishment has been questioned as unconstitutional<sup>133</sup> and, in practice, these cases are generally never referred as capital. These concerns are legitimate, and the proposed amendment would include an exception for situations in which the CA declines to refer the charges as capital under any circumstance. This exception would take effect when the CA notifies the accused of this intent. More importantly, this notice is not evidence of the CA's intent to refer charges. Second, in light of the constitutional questions surrounding Article 120, UCMJ, offenses and the volume of such cases in the military, the CA can easily resolve the learned counsel issue by providing the accused notice of his intent not to seek the death penalty upon referral of the Article 120, UCMJ, charge.

<sup>129</sup> ABA GUIDELINES, *supra* note 19, Guidelines 4.1 and 10.4.

<sup>130</sup> *Id.* Commentary to Guideline 10.7.

<sup>131</sup> See MCM, *supra* note 126, at A12-1 (maximum punishment chart). The fourteen capital offenses are Article 85 (Desertion in time of war); Article 90 (Assaulting, willfully, disobeying superior commissioned officer in time of war); Article 94 (Mutiny and Sedition); Article 99 (Misbehavior before enemy); Article 100 (Subordinate compelling surrender); Article 101 (Improper use of countersign); Article 102 (Forcing safeguard); Article 104 (Aiding the enemy); Article 106 (Spying); Article 106a (Espionage); Article 110 (Hazarding a vessel-willfully and wrongfully); Article 113 (Misbehavior of sentinel or lookout in a time of war); Article 118 (Murder-premeditated and during the commission of certain offenses); and Article 120 (Rape and Rape of a child);

<sup>132</sup> UCMJ art. 120 (2008).

<sup>133</sup> *Coker v. Georgia*, 433 U.S. 584 (1977) (unconstitutional to impose the death sentence for rape); *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (unconstitutional to impose the death sentence for the crime of raping a child); *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008) (clarifying that its holding applies to the context of civilian criminal laws and explaining that the questions of whether application of the Eighth Amendment would be different under military law was not before the Court).

#### 5. Proposed Language

§ 827. Art. 27 Detail of trial counsel and defense counsel

...

(d) When any of the charges preferred against the accused are capital offenses

(1) the accused shall be represented by counsel with distinguished prior experience in the specialized practice of capital representation and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense .

(2) the requirement under (d)(1) does not apply in cases in which the convening authority has provided notice to the accused of his intent not to seek the death penalty. Such notice does not constitute the convening authority's approval that the preferred charges be referred to a court-martial.

(3) the Secretary concerned shall prescribe regulations providing for the manner in which such counsel are detailed.

#### IV. Conclusion

Outside the military court-martial system, virtually all capital defendants—to include those in both state and federal jurisdictions, as well as, alien unprivileged enemy belligerents at military commissions—receive the benefit of learned counsel. These jurisdictions recognize that death penalty cases are fundamentally different in scope and complexity, and thus require defense counsel with specialized knowledge and experience. The appellate record of military courts-martial, with its eighty percent reversal rate for death penalty cases, likewise illustrates that such knowledge and experience is indispensable to the conduct of minimally-sufficient capital trials. Given that, the need for a learned counsel requirement in the military is as manifest as it is in our larger society. A learned counsel requirement would bring the standards of military capital courts-martial into line with what virtually all other authorities have deemed essential, and our bring servicemembers in from the cold.

## Appendix

### State-by-State listing of Standards for Appointment of Qualified Counsel

**Alabama**—Alabama Code §13A-5-54 requires that counsel have no less than five years' experience. **Arizona**—Arizona Revised Statutes §13-4041B allows for the appointment of one counsel at the post-conviction or appellate stage. **Arkansas**—Arkansas Public Defender Commission requires two qualified counsel. **California**—California Rules of Criminal Procedure 4.117 requires the appointment of a learned counsel, but allows for the appointment of a co-counsel. **Colorado**—Colorado Revised Statutes 16-12-205 allows for one or more counsel at post-conviction review. **Connecticut**—The Connecticut Public Defender Services Commission sets out standards for qualified counsel. **Florida**—Florida Rule for Criminal Procedure 3.112 requires one learned counsel. **Georgia**—The Supreme Court of Georgia Rules requires the appointment of at least two qualified counsel. **Idaho**—Idaho Criminal Rule 44.3 requires at least two qualified counsel, unless the judge deems otherwise. **Illinois**—Illinois Supreme Court Rule 714 requires the appointment of a learned counsel. **Indiana**—Indiana Criminal Procedure Rule 24 requires the appointment of two qualified counsel. **Kansas**—Kansas Statutes Annotated, Chapter 22-4505, requires the appointment of one or more counsel to represent the defendant on appeal. **Louisiana**—Louisiana Supreme Court Rule XXXI requires the appointment of two qualified counsel. **Missouri**—Missouri Supreme Court Rules 24.036(a) and 29.16(a) requires the appointment of two counsel when the defendant files a motion to set aside his death sentence. **Montana**—Under the Montana Code, Title 46, the Office of the Chief Public Defender is responsible for establishing procedures for assigning learned counsel to capital cases. **Nebraska**—The Nebraska Committee on Public Advocacy was created by statute to assist Nebraska counties with providing indigent defense services. The NCPA has set standards for appointment of learned counsel and requires that two qualified counsel be assigned at the trial and appellate level. **Nevada**—Nevada Supreme Court Rule 250(V)2 requires that lead counsel in a capital case have been an attorney for three years, tried five felony cases and have been counsel in one death case. **North Carolina**—Capital counsel standards are set by the Office of Indigent Defense Services. **Ohio**—Rule 20 of the Rules of Superintendence for the Courts require two qualified counsel. **Oklahoma**—Oklahoma Indigent Defense System provides qualified capital counsel to seventy-five counties in Oklahoma. This office has adopted the ABA Guidelines. **Oregon**—The Oregon Public Defense Service Commission Qualification Standards for Court-Appointed Counsel establishes standards for both lead and assistant defense counsel. **South Carolina**—South Carolina Code, Title 16-3-26, requires the appointment of two counsel to represent a defendant facing the death penalty for the offense of murder. **Tennessee**—Tennessee Supreme Court Rule 13-3 requires at least two attorneys. **Texas**—Texas Code of Criminal Procedure, Article 26.052, sets out the standards for learned counsel in both capital trials and appeals. **Utah**—Utah Criminal Procedure Rule 8 requires at least two attorneys. **Virginia**—Virginia Code §19.2-163.7 requires the appointment of two qualified counsel. **Washington**—Superior Court Special Proceeding Rules SPRC 2 allows for the appointment of two qualified counsel at the trial and on direct appeal.