Volume 226 Issue 4 2018

ACADEMIC JOURNAL 27-100-226-4

Military Law Review

Articles

MILITARY LAW REVIEW

VOLUME 226 • 2018

Academic Journal 27-100-226-4

Military Law Review

Volume 226 **Issue 4** **2018**

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Articles

Headquarters, Department of the Army, Washington,

D.C. Academic Journal No. 27-100-226-4, 2018

Military Law Review
Volume 226
Issue 4

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CITATION: This issue of the *Military Law Review* may be cited as 226 MIL. L. REV. page number (2018).

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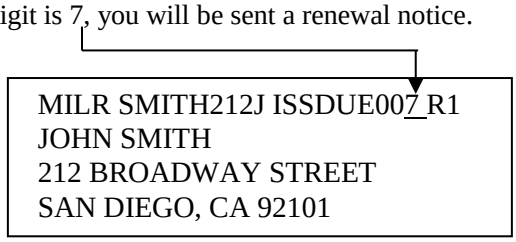

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MILITARY LAW REVIEW

Volume 226
Issue 4

DRONE INTERDICTION: USE OF FORCE AS A COUNTERMEASURE AGAINST UNMANNED VEHICLES AT SEA

LIEUTENANT COMMANDER PATRICK O. JACKSON*

With all due respect . . . I will blow you out of the sky.[1]

I. Introduction: The Need for a Counter to Drones Operating Without Due Regard

Ever since the days of canvas sails and cannon fire, one of the primary missions of the U.S. Navy has been to maintain the freedom of the seas.[2] To enforce and defend that freedom, the U.S. Navy is sworn to "fly, sail and operate wherever international law allows."[3] But the rise of

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[1] OUTBREAK (Warner Bros. Pictures 1995) (Major General McClintock (Donald Sutherland) threatening Colonel Daniels (Dustin Hoffman)).

[2] U.S. NAVY, MISSION STATEMENT, https://www.navy.com/about/mission.1.html (last visited Mar. 21, 2019); *see also*, 10 U.S.C. § 5062 (2018).

[3] *See, e.g.*, David Brunnstrom, *Carter Says U.S. Will Sail, Fly and Operate Wherever International Law Allows*, REUTERS, (Oct. 13, 2015, 3:52 PM),

drones[4] and their lack of due regard for other vessels and aircraft[5] is making this an increasingly dangerous mission for the U.S. Navy.

Imagine that you are on a U.S. Navy aircraft carrier in the Persian Gulf. Shortly after transiting the Strait of Hormuz,[6] the carrier resumes normal peacetime flight operations. Suddenly, watchstanders spot an Iranian Shahed 129 drone[7] off the port side of the carrier. Within the open water Exclusive Economic Zones (EEZ)[8] of the Persian Gulf, the Iranian drone enjoys the same high seas freedoms, including overflight, that the aircraft carrier and its military aircraft do.[9] As the crew watches, the drone moves within four nautical miles (NM) of the ship and begins to shadow its every move, presumably gathering intelligence on naval flight operations. Radio transmissions directing the drone to depart go

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https://www.reuters.com/article/us-usa-australia-southchinasea-carter/carter-says-u-s-will-sail-fly-and-operate-wherever-international-law-allows-idUSKCN0S72MG20151013 (quoting Hon. Ashton Carter, former Sec'y of Def.).

[4] A "drone" is a remotely-controlled or semi-autonomous unmanned vehicle, generally used by a State government in a national or military context. *See Drone*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/drone (last visited Mar. 21, 2019); *Drone*, OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/drone (last visited Mar. 21, 2019); *Drone*, DICTIONARY.COM, http://www.dictionary.com/browse/drone (last visited Mar. 21, 2019). For the purposes of this article, "drone" and "unmanned vehicle" will be used interchangeably.

[5] International law requires that all states and vessels act with due regard for the safety and navigational rights of other states and vessels. *See* discussion *infra* Section II.

[6] The Strait of Hormuz is an international strait traversing the territorial seas of Iran and Oman, and providing the only link between the Persian Gulf and the open ocean. Due to the high volume of oil and other commercial shipments that transit the strait each, year, the Strait of Hormuz is one of the most important international straits and geopolitical chokepoints in the world. *See* Alexandra Roman & Encyclopedia of Earth Administration, *Strait of Hormuz*, THE ENCYCLOPEDIA OF EARTH, https://editors.eol.org/eoearth/wiki/Strait_of_Hormuz (last visited Mar. 21, 2019).

[7] The Shahed 129 is a large, Iranian-made, medium-altitude, long-range reconnaissance and light-attack unmanned aerial vehicle (UAV) that bears a similar design to the Israeli Hermes 450 and British Watchkeeper UAVs. *HESA Shahed 129 (Eye-Witness)*, MILITARY FACTORY, https://www.militaryfactory.com/aircraft/detail.asp?aircraft_id=1330 (last visited Mar. 21, 2019).

[8] An "Exclusive Economic Zone" (EEZ) is an area beyond and adjacent to the territorial sea of a coastal State, extending out up to 200 nautical miles from the coast, in which the coastal State has sovereign rights over the exploring, exploiting, conserving, and managing of natural resources. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, arts. 55-58 [hereinafter UNCLOS]. In an EEZ all other high seas freedoms, such as navigation and overflight, are available to foreign States. *Id.*

[9] U.S. DEP'T OF NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 1.3.4. (Aug. 2017) [hereinafter COMMANDER'S HANDBOOK].

unanswered and generate no responding action. The drone neither takes any hostile actions nor exhibits any indicators of hostile intent,[10] but its presence inside the "stack"[11] violates its obligation under international law to act with due regard for the safety and navigational rights of others. More importantly, not only is the drone impeding the carrier's operations, it poses a significant danger to the lives of the Sailors and Airmen aboard the ship and its associated aircraft. In this gray area, the carrier commander must be able to avail him or herself of self-help countermeasures to protect the ship, including using force against the drone to "blow [it] out of the sky."[12]

From the Strait of Hormuz to the South China Sea, U.S. warships face situations like the hypothetical above with increasing frequency and frustration, and will continue to do so. The advent of drones may be revolutionizing warfare, particularly the U.S. approach to warfare, but the United States no longer enjoys a monopoly on the use of unmanned systems.[13] More than thirty nations possess, or are developing, armed drones, and dozens more, including some non-State actors, possess unarmed reconnaissance drones.[14] Thus far, responsible nations like the United States operate their drones with due regard for the safety of navigation of other craft.[15] Yet as drone proliferation continues, more

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[10] "Hostile intent" is the threat of the imminent attack or other use of force against the United States, U.S. forces, or other designated persons or property. JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 106 (Feb. 2019) [hereinafter DOD DICTIONARY]. The imminence of a potential attack is based on an assessment of all facts known to U.S. forces at the time and may be made at any level. COMMANDER'S HANDBOOK, *supra* note 9, para. 4.4.3.5. Commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. *Id.* para. 4.4.3.2.

[11] A "stack" is an overhead holding pattern utilized during carrier flight operations. The stack extends up to five nautical miles (NM) from the port side of a carrier and extends upwards from 2,000 feet above surface level. The presence of any uncontrolled air traffic within the stack is inherently dangerous. U.S. DEP'T OF NAVY, CHIEF OF NAVAL AIR TRAINING, MANUAL P-816, FLIGHT TRAINING INSTRUCTION, CV PROCEDURES (UMFO), T-45C para. 204 (28 Jan. 2014).

[12] OUTBREAK, *supra* note 1.

[13] Elisa Catalano Ewers et al., *Drone Proliferation: Policy Choices for the Trump Administration*, CTR. FOR NEW AM. SEC. 2 (2017), http://drones.cnas.org/wp-content/uploads/2017/06/CNASReport-DroneProliferation-Final.pdf.

[14] *Id.* at 4.

[15] *See* U.S. DEP'T OF DEF., INSTR. 4540.01, USE OF INTERNATIONAL AIRSPACE BY U.S. MILITARY AIRCRAFT AND FOR MISSILE AND PROJECTILE FIRINGS para. 3.d., glossary (2 June 2015) (C1, 22 May 2017) [hereinafter DODI 4540.01]. By including unmanned aircraft in its definition of "military aircraft," the U.S. Department of Defense (DoD)

and more U.S. naval commanders will find themselves in a gray area where action is needed to counter an adversary drone's failure to act with due regard for the navigation and safety of other vessels and aircraft. However, in that situation, traditional self-defense is not warranted under international law because there has been no armed attack or demonstrated hostile intent. Inaction or acquiescence is not the answer. If "the history of warfare [is] a struggle between measures and countermeasures,"[16] then an appropriate countermeasure is needed.

In such situations, necessity and common sense dictate that the ship use an appropriate level of force to counter the safety threat posed by the drone. Yet for most of the last century, international law disfavored the use of forcible countermeasures[17] against an offending State.[18] How then can the naval commander justify taking an action to protect the aircraft carrier in the hypothetical example above? By examining the nature of unmanned vehicles, how international law applies to such vessels vis-à-vis the obligation of due regard, and the character of acceptable uses of force not rising to the level of an "armed attack," this article shows that international law must, and in fact already does, permit necessary and proportional forcible countermeasures. "The only thing necessary for the triumph of evil is for good men to do nothing."[19] So long as the intended countermeasures pose no threat to human life or the sovereignty of a foreign State, then a U.S. commander is free to employ forcible countermeasures to safeguard U.S. ships from the danger posed by a drone that, while not engaged in a hostile act or exhibiting indicators of hostile intent, is nevertheless failing to act with due regard by interfering

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requires that all DoD drones comply with the same international legal requirements as traditional, manned military aircraft, such as exercising due regard for other aircraft.

[16] Hon. Ashton B. Carter & William J. Perry with David Aidekman, *Countering Asymmetric Threats*, *in* PREVENTATIVE DEFENSE PROJECT, KEEPING THE EDGE: MANAGING DEFENSE FOR THE FUTURE 121 (Hon. Ashton B. Carter & John P. White eds., 2000).

[17] The United States considers countermeasures to be acts taken against a party outside of an armed conflict that would otherwise by unlawful in order to persuade that party to cease violating the law. *See* U.S. DEPT. OF DEF., DOD LAW OF WAR MANUAL paras. 18.18.1, 18.18.1.1. (May 2016) [hereinafter LAW OF WAR MANUAL].

[18] Shane Darcy, *Retaliation and Reprisal*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 891 (Marc Weller ed., 2015) (stating "the prohibition of . . . forcible countermeasures had 'acquired the status of a customary international law.'").

[19] Dan Colman, *"The Only Thing Necessary for the Triumph of Evil is for Good Men to Do Nothing."—Edmund Burke*, OPEN CULTURE (Mar. 13, 2016), http://www.openculture.com/2016/03/edmund-burkeon-in-action.html.

with naval operations and posing a danger to safety, navigation, and the lives of U.S. Sailors and Airmen.

II. The Universal Obligation to Act with Due Regard

From a historic, common-sense standpoint, it is obvious that vessels in peacetime maritime encounters should act with due regard to each other's safety and navigation in order to avoid collisions and other mishaps. At a macro-level under international law, a State is to have due regard to the rights, duties, and freedoms of other states when it exercises its own rights, duties, and freedoms.[20] Yet "due regard" is an "elusive" phrase that is not clearly defined in international law.[21] Nevertheless, "due regard" is a firm requirement under the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS),[22] the United Nations Convention on the Law of the Sea (UNCLOS),[23] and other sources of international law.[24]

A. Due Regard Under the COLREGS

Under the COLREGS, which predates UNCLOS, "due regard" applies at the level of individual vessels. For instance, all vessels are required to exhibit due regard to the observance of "good seamanship"[25]

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[20] *See, e.g.*, UNCLOS, *supra* note 8, arts. 2, 39, 56, 58, 87, 234.

[21] M.H. Belsky et al., *Due Regard*, *in* DEFINITIONS FOR THE LAW OF THE SEA: TERMS NOT DEFINED BY THE 1982 CONVENTION 187 (George K. Walker ed., 2011).

[22] *See* Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16 [hereinafter COLREGS]. Unlike UNCLOS, the United States is a signatory of the COLREGS and implements its own domestic navigation policy in accordance with the COLREGS. *See* U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 16672.2D, NAVIGATION RULES: INTERNATIONAL – INLAND (24 Dec. 1981).

[23] UNCLOS, *supra* note 8, arts. 2, 39, 56, 58, 87, 234. Although the United States has not signed or ratified UNCLOS, it complies with most provisions therein as binding customary international law (CIL). *See The Convention on the Law of the Sea*, U.S NAVY JUDGE ADVOCATE GENERAL'S CORPS, http://www.jag.navy.mil/organization/code_10_law_of_the_sea.htm (last visited Mar. 21, 2019).

[24] *See, e.g.*, Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

[25] Though not defined in the COLREGS, "seamanship" is defined as "the art or skill of handling, working, and navigating a ship." *Seamanship*, MERRIAM-WEBSTER

when taking action to avoid collisions between vessels.[26] In practice, this means that all vessels shall, in order to not impede the passage of another vessel, take early action to allow sufficient sea-room for the safe passage of the other vessel.[27] Of particular importance to the U.S. Navy, this includes a requirement for other vessels to keep out of the way of "a vessel restricted in her ability to manoeuvre (sic),"[28] such as vessels engaged in the launch or recovery of aircraft.[29] Vessels and their owners, masters, and crews are accountable for any neglect to comply with this basic requirement for due regard to all dangers of navigation and collision, or to any other ordinary practice of seamanship.[30]

This obligation applies to U.S. naval vessels the same as any other vessels. Though there are situations where the COLREGS require a vessel not to impede the passage or safe passage of another vessel, e.g., "a vessel restricted in her ability to manoeuvre,"[31] such provisions do not give an absolute right to navigation at the expense of other vessels. All vessels, to include warships and other military vessels, are required to affirmatively take action to avoid collision.[32] Even if another vessel ignores its own obligations under the COLREGS, an affected vessel remains obligated, if the circumstances of the case permit, to comply with the rules and exercise due regard for the danger of collision.[33] This obligation is clear when applied to finite encounters between only two vessels, such as a U.S. warship altering course to avoid a commercial container ship. Yet at some point, when a vessel poses a continuing, or repeat, danger to navigation, such as the threat posed the unmanned aerial vehicle (UAV) in the above hypothetical, relying solely on the obligation of due regard under the COLREGS may not be appropriate, particularly when dealing with State vessels.

B. Due Regard Under UNCLOS

DICTIONARY, https://www.merriam-webster.com/dictionary/seamanship (last visited Mar. 21, 2019).

[26] COLREGS, *supra* note 22, r. 8(a).

[27] *Id.* r. 8(e).

[28] *Id.* r. 18.

[29] *Id.* r. 3.

[30] *Id.* r. 2.

[31] *Id.* r. 18.

[32] *Id.* r. 7.

[33] *See id.* r. 8.

For at-sea interactions and issues between States, UNCLOS expanded on the precept of due regard. As a basic tenet of relations between sovereign States, UNCLOS requires that each State should fulfill its obligations in good faith and exercise its rights and freedoms in such a manner that does not constitute an "abuse of right."[34] In thirteen instances throughout the text of UNCLOS, this tenet translates to a requirement to act in due regard to the rights and/or interests of other States.[35] Such respect for the right of other States to make use of the seas is an outgrowth of the traditional freedom of the seas that governed the "law of the high seas" for centuries prior to the development of UNCLOS.[36] Just as "freedom of the sea" traditionally meant freedom of navigation, [37] the substantive uses of "due regard" by UNCLOS principally require due regard for safety and navigation, and for the rights and duties of other States.[38]

Yet similar to the COLREGS, the drafters of UNCLOS declined to provide a clear definition of what it means to have "due regard." Subsequent interpretations by international courts provide intentionally vague, situation-specific definitions that rest on the circumstances and the nature of the rights affected.[39] Due regard is, in effect, a balancing test of the concurrent respective rights between States.[40] It does not require due regard by one State while allowing the other to do as it wishes; "the extent of the regard required by the Convention will depend upon the nature [and importance] of the rights held . . ., the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [other State], and the availability of alternative

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[34] UNCLOS, *supra* note 8, art. 300.
[35] *Id.* arts. 27, 39, 56, 58, 60, 66, 79, 87, 142, 148, 234, 267.
[36] ARND BERNAERTS, BERNAERTS' GUIDE TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 117 (Trafford Pub. 2006) (1988) [hereinafter BERNAERTS' GUIDE].
[37] *Id.*
[38] *See, e.g.*, UNCLOS, *supra* note 8, arts. 27, 39, 56, 58, 60, 87.
[39] *See* South China Sea (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award, ¶ 741-43 (Perm. Ct. Arb. 2016), https://www.pcacases.com/web/sendAttach/2086 (unanimously holding that China acted without due regard for the Philippines' rights under UNCLOS, but without addressing certain key aspects of the controversy, i.e., ownership of specific features in the Spratly Islands); Chagos Marine Protected Area (Mauritius v. U.K.), Case No. 2011-03, PCA Case Repository, Award, ¶ 519 (Perm. Ct. Arb. 2015), https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf (holding that the ordinary meaning of 'due regard' calls for the [first state] to have such regard for the rights of [the second state] as is called for by the circumstances and by the nature of those rights," but without formulating a universal rule of conduct).
[40] *See* Chagos Marine Protected Area, *supra* note 39, ¶ 518-19.

approaches."[41] This is illustrated by the reciprocal obligations of due regard between coastal and foreign States when a vessel conducts innocent or transit passage.[42]

In addition, UNCLOS recognizes the inherent dangers of the sea by requiring due regard for safety and navigation outside of any implied balancing test between the competing rights and interests discussed above. In Article 21, UNCLOS requires ships conducting innocent passage through the territorial sea of another State to comply with "*all generally accepted international regulations relating to the prevention of collisions at sea*."[43] Moreover, Article 39 specifically requires ships transiting an international strait to comply with generally accepted international regulations, procedures and practices for safety at sea, *including the International Regulations for Preventing Collisions at Sea*."[44]

This emphasis on due regard and incorporation of the COLREGs highlights the universal nature of the international requirement, arising by treaty and as part of customary international law (CIL), to exercise due regard in ensuring the safe passage of vessels and in actively avoiding all dangers of navigation and collision. Lack of due regard is a threat, and failing to comply with this obligation, whether negligently, recklessly, or by design, constitutes an internationally wrongful act and a breach of international law.[45]

III. The Rise of Drone Warfare

Warfare conducted by remotely-controlled devices or semi-autonomous robots was once the exclusive province of science fiction writers and conspiracy theorists. But, over the course of the last several decades that fiction became a reality, and drone warfare is now poised to be a cornerstone of 21st century combat operations. Concomitant with that new status is the need to define the legal parameters within which drones must operate. Drones, both UAVs and unmanned maritime systems (UMS), like any other vessel or craft at sea, must comply with

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[41] *Id.* ¶ 519.
[42] *See* UNCLOS, *supra* note 8, arts. 56, 58.
[43] UNCLOS, *supra* note 8, art. 21 (emphasis added).
[44] UNCLOS, *supra* note 8, art. 39 (emphasis added).
[45] *See* U.N. OFF. OF LEGAL AFF., MATERIALS ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, at 97-103, ST/LEG/SER.B/25 (2012).

the international obligation to act with due regard for the safety and navigation of other craft.[46]

A. A Brief History of Unmanned Vehicles in Combat

Since the dawn of aerial warfare, mankind has sought increasingly innovative ways to expand the range, use, and lethality of remotely-operated munitions and devices.[47] Even before the advent of winged aircraft, one of the earliest examples of unmanned "vehicles" in combat is the mid-19th century use by the Austrian military of explosive-laden balloons that were controlled by timed fuses.[48] As far back as World War I various States began experimenting with small, radio-controlled aircraft that were essentially flying bombs,[49] or that were designed for target practice.[50] Reusable remotely-operated reconnaissance aircraft began to appear during the Cold War and on the battlefields of Vietnam.[51] During the 1991 Gulf War, U.S. naval forces utilized remotely-piloted reconnaissance aircraft to help ensure accurate naval bombardment of entrenched Iraqi targets.[52] This famously lead to several Iraqi combatants surrendering to one of the drones launched from

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[46] Under U.S. law and regulation, all naval ships, craft, and aircraft, to include unmanned maritime systems (UMS) and unmanned aerial vehicles (UAVs), must "diligently observe" the COLREGs. *See* COMMANDER'S HANDBOOK, *supra* note 9, para. 2.9.1; DODI 4540.01, *supra* note 15, para. 3.D; U.S. DEP'T OF NAVY, U.S. NAVY REGULATIONS, 1990, art. 1139 (14 Sept. 1990) [hereinafter NAVREGS].

[47] *See* Jack Miller, *Strategic Significance of Drone Operations for Warfare*, E-INTERNATIONAL RELATIONS STUDENTS (Aug. 19, 2013), http://www.e-ir.info/2013/08/19/strategic-significance-of-drone-operations-for-warfare/.

[48] *Id.*

[49] These early flying bombs included the U.S. Navy's "aerial torpedoes" and the U.S. Army's "Kettering Bug," both of which were designed to fly a preset course and distance before falling/flying into the target. *Id.*; *see also* IWM Staff, *A Brief History of Drones*, IMPERIAL WAR MUSEUM (Jan. 30, 2018), http://www.iwm.org.uk/history/a-brief-history-of-drones.

[50] *A Brief History of Drones*, *supra* note 49. Of note, one alleged source for the origin of the term "drone" is the radio-controlled aircraft known as the DH.82B Queen Bee, which the United Kingdom developed in 1935 to be used as targets for training purposes. *Id.*

[51] Miller, *supra* note 47; JOHN DAVID BLOM, U.S. ARMY COMBINED ARMS CENTER, OCCASIONAL PAPER 37, UNMANNED AERIAL SYSTEMS: A HISTORICAL PERSPECTIVE, 58-66 (Sept. 2010), http://usacac.army.mil/cac2/cgsc/carl/download/csipubs/OP37.pdf.

[52] Tyler Rogoway, *Battleships Pulled Off the Biggest Ruse of Operation Desert Storm 25 Years Ago*, FOXTROT ALPHA (Jan. 20, 2016), https://foxtrotalpha.jalopnik.com/battleships-pulled-off-the-biggest-ruse-of-operation-de-1754104974.

the battleship USS Wisconsin (BB-64), a first in the history or warfare.[53] Yet, it is the massive expansion of offensive drone operations in the conflicts following the September 11, 2001, terrorist attacks that refined and established drone warfare as a fixture of future conflicts.[54] Instead of merely conducting reconnaissance of enemy positions, for the first time, drones were used in lieu of conventional military forces to conduct armed attacks against military targets.[55]

B. Use and Status of Modern Drones

With the United States at the forefront of drone use and tactics,[56] unmanned vehicles completed the transition from remotely-piloted bombs to short-range, reusable surveillance aircraft, and finally to semi-autonomous unmanned vehicles used to target and strike enemy combatants from thousands of miles away. Modern drones are highly versatile; drones can be used for kinetic strikes, intelligence, surveillance, reconnaissance, targeting, search and rescue, and transportation of supplies.[57] Yet, like any other revolution in warfare and military technology, e.g., bomber aircraft, submarines, nuclear weapons, etc., international law has lagged behind the advent of drone warfare and has been slow to adapt to this advanced technology.[58]

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[53] Rogoway, *supra* note 52; Ted Shelsby, *Iraqi Soldiers Surrender to AAIs Drones*, BALTIMORE SUN (Mar. 2, 1991), http://articles.baltimoresun.com/1991-03-02/business/1991061100_1_rpv-aai-drones.

[54] *See* Rick Stella, *From Cyberwarfare to Drones, the Future of Conflict is Electronic*, DIGITAL TRENDS (Aug. 29, 2016, 3:00 AM), https://www.digitaltrends.com/features/dt10-from-cyberwarfare-to-drones-the-future-of-conflict-is-electronic/; Miller, supra note 47.

[55] *See, e.g.*, Fred Kaplan, *The First Drone Strike*, SLATE (Sept. 14, 2016, 7:45 AM), http://www.slate.com/articles/news_and_politics/the_next_20/2016/09/a_history_of_the_armed_drone.html (describing the history of U.S. drones and the first military drone strike conducted in November 2001 against senior Al-Qaeda commanders in Afghanistan).

[56] *See* Kelley Sayler et al., *Global Perspectives: A Drone Saturated Future*, CTR. FOR NEW AM. SEC. (2018), http://drones.cnas.org/wp-content/uploads/2016/05/Global-Perspectives-Proliferated-Drones.pdf.

[57] Vivek Sehrawat, *Legal Status of Drones Under LOAC and International Law*, 5 PENN. ST. J.L. & INT'L AFF. 164, 166 (2017).

[58] *See, e.g.*, Ewers, *supra* note 13, at 14; Rosa Brooks, *Drones and the International Rule of Law*, 28 J. ETHICS & INT'L AFF. 83, 99 (2014); Nicholas Clayton, *How Russia and Georgia's "Little War" Started a Drone Arms Race*, GLOBALPOST (Oct. 23, 2012, 10:15 AM), https://www.pri.org/stories/2012-10-23/how-russia-and-georgias-little-war-started-drone-arms-race.

For UAVs, the lack of international regulations is largely immaterial. While there is no universal international legal definition of "aircraft,"[59] conventional domestic definitions of "aircraft" are generally broad enough to include all forms of UAVs.[60] Moreover, major military powers and drone operators such as the United States, United Kingdom, and Germany have specifically designated their UAVs as Military Aircraft,[61] an international legal term of art denoting that subset of state-operated aircraft that are used for military purposes.[62] Though they are neither universal nor binding, several recent international agreements, such as the Code for Unplanned Encounters (CUES) at Sea that was signed by the United States and twenty other nations, specifically define UAVs as military aircraft.[63] Consequently, there appears to be emerging CIL[64] treating UAVs operated by the military as Military Aircraft. With this designation, all manner of existing international legal regimes applying to State and Military Aircraft would apply to UAVs regardless of a UAV-specific treaty requiring such application.

In contradistinction, UMS[65] present unique challenges in understanding the application of existing law.[66] Not only do unmanned

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[59] Neither the Chicago Convention, U.N. Charter, UNCLOS, nor any other binding international agreement contain a provision defining "aircraft."

[60] *See* 14 C.F.R. § 1.1 (1962) (in which the U.S. Federal Aviation Administration defines "aircraft" as "a device that is used or intended to be used for flight in the air").

[61] *See* DoDI 4540.01, *supra* note 15, glossary; GER. MINISTRY OF DEF., JOINT SERVICE REGULATION 15/2, LAW OF ARMED CONFLICT MANUAL sec. 1102 (1 May 2013); U.K. MINISTRY OF DEF., JOINT DOCTRINE PUB. 0-30.2, UNMANNED AIRCRAFT SYSTEMS para. 4.11 (12 Sept. 2017).

[62] The Chicago Convention, the seminal international aviation agreement, refers to military, police, and customs aircraft as subsets of State Aircraft, all of which are excluded from application of the Convention aside from the requirement to "have due regard for the safety of navigation and civil aircraft." Chicago Convention, *supra* note 24, art. 3.

[63] Western Pacific Naval Symposium, Code for Unplanned Encounters at Sea, Version 1.0, ¶ 1.3.5, Apr. 22, 2014, http://www.jag.navy.mil/distrib/instructions/CUES_2014.pdf.

[64] "Customary international law comes into being when there is 'evidence of a general practice [between States] accepted as law'. . . ." YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 87 (3d ed. 2001) (quoting the Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 3 Bevans 1179, 59 Stat. 1055, T.S. No. 993).

[65] U.S. DEP'T OF DEF., UNMANNED SYSTEMS INTEGRATED ROADMAP, FY 2013-2038 para. 1.3.3 (Dec. 2013) [hereinafter ROADMAP] ("Unmanned maritime systems (UMS) comprise unmanned maritime vehicles (UMVs), which include both unmanned surface vehicles (USVs) and unmanned undersea vehicles (UUVs), all necessary support components, and the fully integrated sensors and payload necessary to accomplish the required missions.").

surface vehicles (USV) and unmanned underwater vehicles (UUV) execute the same wide variety of functions that their UAV cousins perform, but they must do so while facing "a unique challenge that other unmanned vehicles do not: the ocean."[67] As a result, UMS generally "need to be [more] autonomous, [better] able to withstand the rigors of the marine environment, and be among the most power-efficient vehicles designed."[68] Moreover, as seaborne devices and/or craft to which the law of the sea may apply, "the status of these systems is an important question, for it entails important rights and obligations."[69] Yet, at present, there are no UMS-specific international laws or treaties governing the status, design, or use of USVs and UUVs. Additionally, unlike UAVs, there is no international consensus on whether or not military UMS should be considered warships (i.e., the functional maritime equivalent of Military Aircraft), which would impose certain rights and responsibilities that come with such designation.[70] This absence of applicable, UMS-specific law is glaring considering the significant use of UMS in future maritime security operations and naval warfare.[71]

However, that is not to say international law is wholly inapplicable to UMS; "despite the novelty of UMSs, states must apply the existing law to them in good faith."[72] There are basic requirements for all vessels that UMS must meet, such as the obligation to act with due regard.

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[66] *See* Michael N. Schmitt & David S. Goddard, *International Law and the Military Use of Unmanned Maritime Systems*, 98 INT'L REV. RED CROSS 567, 567-69 (2016).

[67] Skyler Frink, *SPECIAL REPORT: UUVs Rise to the Surface*, MIL. AND AEROSPACE ELECTRONICS (July 1, 2012), http://www.militaryaerospace.com/articles/print/volume-23/issue-07/special-report/uuvs-rise-to-the-surface.html.

[68] *Id.*

[69] Schmitt, *supra* note 66, at 592.

[70] *Id.* at 575. The major impediments to designation as warship are the requirements under the Hague Convention and UNCLOS that a warship be commanded by a commissioned officer and manned by a crew under armed forces discipline. Though there is no consensus on whether it is permissible for a warship to be commanded and crewed remotely, U.S. policy appears to support such a possibility, even if no U.S. drone has been so designated. Regardless, whether UMS actually can or should meet the specific requirements to be considered a warship is outside the scope of this article. So long as UMS meet the lower, foundational requirements to be considered vessels, existing international law will still impose basic maritime rights and obligations. For more information on this topic, *see* Andrea M. Logan, *Human-Machine Teaming at Sea: A Model for Unmanned Maritime Systems and the Use of Force* (2016) (unpublished LL.M. research paper, Judge Advocate General's Legal Center and School) (on file with U.S Dep't of the Navy Off. of Strategy and Innovation).

[71] Schmitt, *supra* note 66, at 567.

[72] *Id.* at 592.

C. Drones Must Act with Due Regard

The obligation to exercise due regard, and any resulting accountability for failure to comply, applies to drones the same as it does to any other vessel above, on, or below the surface of the ocean. Qualification as a vessel is an important distinction that provides certain navigational rights and obligations that are different than those provided to aircraft and non-vessels, e.g., torpedoes, navigational buoys, etc.[73] Yet UNCLOS, the seminal legal regime governing navigational rights and responsibilities of ships at sea, does not define the terms "ship" or "vessel," which it uses interchangeably.[74] In interpreting such an undefined term, it is acceptable to leave such a definition up to previously established definitions arising from other international laws and regulations, such as the COLREGS.[75] The COLREGS broadly define "vessel" to include "every description of water craft, including non-displacement craft, [wing-in-ground] craft and seaplanes, used or capable of being used as a means of transportation on water."[76]

USVs and UUVs, regardless of how they are controlled or piloted, are water craft that fall within this broad definition of vessel under the COLREGS. The problem is that this is an emerging area of law and there is no international consensus on this point yet. There is obviously disagreement in the field, as at least one author questioned whether USVs and UUVs are vessels as they are not currently used as transportation in the traditional sense.[77] However, every UMS transports some form of weapons system, sensor array, or other equipment that is utilized to complete its mission. The more generally supported viewpoint is that UMS are "vessels" and that the legal regimes of UNCLOS and the COLREGs provide an adequate and existing legal framework for UMS during peacetime military operations.[78]

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[73] *Id.* at 575-76.
[74] *Id*. at 577.
[75] BERNAERTS' GUIDE, *supra* note 36, at 118.
[76] COLREGS, *supra* note 22, r. 3.
[77] *See* Commander Andrew H. Henderson, *Murky Waters: The Legal Status of Unmanned Undersea Vehicles*, 53 NAVAL L. REV. 55 (2006).
[78] *See, e.g.*, Rob McLaughlin, *Unmanned Naval Vehicles at Sea: USVs, UUVs, and the Adequacy of the Law*, J. L. INFO. & SCI. 6 (2012) (arguing that the general principles of

Additionally, U.S. policy appears to agree with this viewpoint, as it defines USVs as "water craft" and UUVs as "underwater craft."[79] Although these terms do not have independent legal significance under any treaty or CIL, the United States asserts that USVs and UUVs enjoy sovereign immunity and possess the same navigational rights of other exclusively state-owned and operated ships and submarines under the law of the sea.[80] Consequently, under the American view and the predominant international view, international navigational rights and obligations for vessels, to include the obligation of due regard arising from the COLREGS and UNCLOS, apply to UMS.

Similarly, UAVs are military aircraft[81] that are considered to be "State Aircraft" within the meaning of the Convention on International Civil Aviation of 1944 (Chicago Convention).[82] While the Chicago Convention does not specifically apply to State Aircraft,[83] it does establish that State and Military Aircraft must have due regard for the safety of navigation of other aircraft.[84] Moreover, as Military Aircraft, UAVs retain sovereign immunity and overflight rights under customary international law, as reflected in UNCLOS, for peacetime military operations.[85] Accordingly, they have similar rights and obligations under UNCLOS and the COLREGS as UMS do.

Therefore, the mandate of due regard from the COLREGS and UNCLOS applies to aerial and maritime drones exactly the same as it applies to any other vessel or aircraft. As a result, if these drones violate

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UNCLOS are currently sufficient to provide the required level of governance over the use of unmanned vehicles in the context of maritime operations); Jane G. Dalton, *Future Navies—Present Issues*, NAVAL WAR C. REV. Winter 2006, at 17 (concluding that unmanned systems should be treated like their manned counterparts under UNCLOS and the COLREGS).

[79] COMMANDER'S HANDBOOK, *supra* note 9, paras. 2.3.4-2.3.5.

[80] *Id.* paras. 2.3.6, 2.5.2.5.

[81] DoDI 4540.01, *supra* note 15, glossary; COMMANDER'S HANDBOOK, *supra* note 9, para. 2.4.4.

[82] COMMANDER'S HANDBOOK, *supra* note 9, paras. 2.4.2-2.4.3.

[83] Chicago Convention, *supra* note 24, art. 3

[84] Dep't of State Airgram CA-8085, 13 Feb. 1964 (*quoting* U.S. Inter-Agency Group on International Aviation (IGIA) Doc. 88/1/1C, MS, Dep't of State, file POL 31 U.S., *reprinted in* 9 DIG. INT'L L. 430-31 (Marjorie M. Whiteman ed. 1973)) (describing the U.S. position on the applicability of Article 3 of the Chicago Convention to military aircraft).

[85] COMMANDER'S HANDBOOK, *supra* note 9, para. 2.4.4; LAW OF WAR MANUAL, *supra* note 17, para. 14.3.3.1.

international law and endanger U.S. ships, the United States is entitled to take appropriate defensive countermeasures in response.

IV. Countermeasures and the Use of Force at Sea

In the not too distant past, war was viewed as an inherent right of the state, and states could resort to war for any reason at all, to include reprisal for perceived violations of international law,[86] the precursor to reprisal actions as they are known today.[87] This changed as a result of the horrors of two world wars during the first half of the twentieth century. By international agreement, the United Nations (U.N.) Charter foremost among them, and by the continuing evolution of CIL, there is now a general prohibition on the use of force between states.[88] This general prohibition does not distinguish between conflicts on land and those at sea. As the San Remo Manual[89] clearly states, "[t]he parties to an armed conflict at sea are bound by the principles and rules of

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[86] DINSTEIN, *supra* note 64, at 71 (citing H.W. BRIGGS THE LAW OF NATIONS 976 (2d ed. 1952)).

[87] Today, reprisal actions have been broken up into countermeasures that may be taken in times of peace, and belligerent reprisals, which are forceful reprisals occurring in during an armed conflict. *See* INT'L LAW COMM'N, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, WITH COMMENTARIES, arts. 49-52 (2012); Rep. of the Int'l Law Comm'n on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 75 (2001) [hereinafter Draft Articles on State Responsibility]; *see also*, COMMANDER'S HANDBOOK, *supra* note 9, para. 6.2.4 ("A belligerent reprisal is an enforcement measure under the law of armed conflict consisting of an act that would otherwise be unlawful but which is justified as a response to the previous unlawful acts of an enemy. The sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the law of armed conflict in the future. Reprisals may be taken against enemy armed forces, enemy civilians other than those in occupied territory, and enemy property.").

[88] DINSTEIN, *supra* note 64, at 78-105; U.N. Charter art. 2, ¶ 4.

[89] Authored by a panel of experts under the aegis of the International Institute of Humanitarian Law, the San Remo Manual on International Law Applicable to Armed Conflicts at Sea is a summary and restatement of the various international laws applicable to armed conflicts at sea. While it primarily addresses existing laws, it also includes some provisions addressing more recent developments. *San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994*, INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/ihl/INTRO/560?OpenDocument (last visited Mar. 26, 2019).

international humanitarian law from the moment armed force is used."[90] Thus, the general prohibition against the use of force between and, more importantly, the exceptions to that general rule, apply at sea the same as they do on land and in the air.

A. Traditional Uses of Force—Belligerent Actions and Self-Defense

In keeping with the contemporary CIL prohibition against aggressive uses of force, the U.N. Charter and UNCLOS both require that states "refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the principles of international law embodied in the Charter of the United Nations."[91] The two clear exceptions to this prohibition on the use of force are belligerent uses of force authorized by the United Nations Security Council "to maintain or restore international peace and security," and states exercising their inherent rights of self-defense.[92] Both exceptions place the participants in a state of armed conflict, which is not addressed by UNCLOS, but is governed by CIL and various international agreements, such as Hague and Geneva Conventions.[93] Nevertheless, the contemporary principles of self-defense and other relevant law of armed conflict provisions continue to apply equally at sea despite the omission from UNCLOS.[94]

Self-defense is, at its core, a high-level exercise in forcible self-help by a state.[95] This application of lawful force as a remedy when the state's rights have been violated by unlawful force "is and always has been one of the hallmarks of international law.[96] Thus, even outside of a U.N. Security Council (UNSC) Resolution authorizing an offensive use

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[90] SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, 12 JUNE 1994, INT'L COMM. RED CROSS ¶ 1 (1994), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/5B310CC97F166BE3C12563F6005E3E09/FULLTEXT/IHL-89-EN.pdf [hereinafter SAN REMO MANUAL].

[91] U.N. Charter art. 2, ¶ 4; UNCLOS, *supra* note 8, art. 301.

[92] U.N. Charter arts. 42, 51. Self-defense is an "inherent" right in that it is inextricably linked with the sovereignty of a state, can arguably be traced back to principles of natural law, and is one of the oldest pre-existing rights under CIL. DINSTEIN, *supra* note 64, at 163-65.

[93] *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, *reprinted in* THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 100-28 (J.B. Scott ed., 1915).

[94] *See* SAN REMO MANUAL, *supra* note 90, ¶ 4.

[95] DINSTEIN, *supra* note 64, at 159.

[96] *Id.*

of force, it is undisputed that a state may use the necessary[97] and proportional[98] force required to repel any attack against it at sea and to restore its national security.[99] In fact, U.S. naval commanders are directly obligated to take necessary and proportional actions to safeguard their ship and crew.[100] The extent to which defensive action may be taken "depends upon the intensity and scale of the armed attack . . . and *the gravity of the threat posed*."[101] While the right to use force in self-defense is clear, these references to "intensity," "scale," and "gravity" illustrate that CIL recognizes there are inherent differences in the degree of force and danger from which a state may have to take action to defend itself at sea.[102]

B. Other Permissible Uses of Force at Sea—Law Enforcement Activities

Additionally, there are other situations where a state may be permitted to use force against a foreign or state-less vessel, principally during law enforcement operations.[103] "Navies and coast guards around the world may use force . . . if necessary for law enforcement in waters

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[97] Necessity "exists when a hostile act occurs or when a force demonstrates hostile intent. When such conditions exist, use of force in self-defense is authorized. . . ." CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE, encl. A, para. 4.a.(2) (13 June 2005) [hereinafter SROE/SRUF].

[98] Proportional force is that level of force "sufficient to respond decisively to hostile acts or demonstrations of hostile intent. Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required." *Id.* at encl. A, para. 4.a.(3).

[99] SAN REMO MANUAL, *supra* note 90, ¶ 4.

[100] SROE/SRUF, *supra* note 97, para. 6.b.(1); NAVREGS, *supra* note 46, arts. 0807, 0820.

[101] SAN REMO MANUAL, *supra* note 90, ¶ 5 (emphasis added).

[102] *See* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 4, 191-92 (Nov. 6) (implying that the actions of Iran were not sufficiently grave to constitute armed attacks for which the United States could invoke self-defense); S.C. Res. 1368 (Sept. 12, 2001) (recognizing the inherent rights of individual and collective self-defense, and calling on all States to take action to suppress the future threat of terrorist acts); Enzo Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures*, 12 EUR. J. INT'L L. 889, 890-92 (2001) (noting that like self-defense, the doctrine of proportionality may limit a victim State's countermeasures based on the nature and severity of another State's wrongful actions).

[103] *See* George Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?*, 39 NAVAL WAR C. REV. 69 (May/June 1986), *reprinted in Use of Force Law*, 68 INT'L L. STUD. SER. U.S. NAVAL WAR C. 313, 332 (1995).

and for crimes over which they have enforcement jurisdiction." [104] Within internal and territorial waters, the ability to enforce domestic law is well-defined. [105] Yet even outside of a state's territorial seas, jurisdiction and authority may exist to use force to combat certain offenses by private entities and potentially even state actors, e.g., piracy and proliferation of weapons of mass destruction.[106] In this context, the use of force in a law enforcement action is separate and distinguishable from the "armed force" referred to in the U.N. Charter;[107] while it is to be avoided to the extent possible, it is permissible so long as it is "reasonable and necessary under the circumstances." [108] Specific international rules concerning the permissible uses of force in law enforcement actions are broad,[109] but such uses of force include warning shots, disabling fire, stopping and boarding a ship, conducting searches, and arresting or seizing a ship and its crew.[110] Although the legal basis for these actions stems from different authority, e.g., international laws against piracy,[111] it is clear that there are incidents where force can be used outside the contexts of self-defense or armed conflict. Provided a given use of force is necessary and reasonable, i.e., proportional, "the ability to use force when needed to enforce international rights and compel compliance with lawful orders of a state is essential" to maintaining freedom of the seas.[112]

C. Countermeasures—More Than "Mere Pacific Reprisals"

In the same vein, legitimate self-help by a state to another state's violations of international law may include countermeasures taken in reprisal.[113]

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[104] *Id*. at 337.
[105] *Id*.
[106] *Id*. at 338-339; *see also* Craig H. Allen, *Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives*, 81 NAVAL WAR C. REV. 77 (2006).
[107] Allen, *supra* note 106, at 89; U.N. Charter arts. 2 ¶ 4, 41.
[108] M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 2 ITLOS Rep. 4, 41.
[109] Rachel Canty, *Developing Use of Force Doctrine: A Legal Case Study of the Coast Guard's Airborne Use of Force*, 31 U. MIAMI INTER-AM. L. REV. 357, 371 (2000).
[110] *See* Allen, *supra* note 106, at 96-108.
[111] UNCLOS, *supra* note 8, arts. 100-07, 110.
[112] Canty, *supra* note 109, at 371.
[113] *See* DINSTEIN, *supra* note 64, at 160.

1. The Traditional View of Peaceful Countermeasures

Such self-help is a necessary component of international law because of the frequently criticized weakness of other international mechanisms for enforcement.[114] For instance, repeatedly the UNSC has shown reluctance and incapability to take timely, definitive action in response to an act of aggression by one member state against another.[115] In the absence or inability of international bodies to take action, individual states must be able to take action to compel compliance with international law.

Today, the terms "reprisal" and "belligerent reprisal" refer to actions taken in the course of an armed conflict, "countermeasures" are acts taken against a party outside of an armed conflict that would otherwise be unlawful in order to persuade that party to cease violating the law.[116] In order to be justifiable, a countermeasure must meet certain conditions.[117] In particular, such acts must rationally relate to the injury suffered, taking into account the gravity of the internationally wrongful act and the rights affected.[118] "Judicial decisions, State practice and doctrine confirm the proposition that [non-forcible] countermeasures meeting certain substantive and procedural conditions may be legitimate."[119]

2. The Need for, and Permissibility of, Forcible Countermeasures

But, can a state take forcible countermeasures in response to a use of force or other belligerent act that falls short of being a full, armed attack? If an "armed attack" means "a use of force causing human casualties or

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[114] *See* Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 RECUEIL DES COURS 9, 19 (1997); Josef Mrazek, *Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law*, 27 CAN. Y.B. INT'L L. 81, 99 (1990); *see also* MATERIALS ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, *supra* note 45, at 304.

[115] DINSTEIN, *supra* note 64, at 188.

[116] LAW OF WAR MANUAL, *supra* note 17, paras. 18.18.1-18.18.1.1.

[117] *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 249 (June 27); *see also* Draft Articles on State Responsibility, *supra* note 82, at 68.

[118] Draft Articles on State Responsibility, *supra* note 87, art. 51.

[119] MATERIALS ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, *supra* note 45, at 150.

serious destruction of property,"[120] then recent history is replete with examples of belligerent actions and uses of force falling short of an armed attack that nevertheless violated international law and the rights of other States.[121] Many commentators argue, "[A]s a separate, although exceptional, means of the use of armed force, [self-help] has no support in contemporary international law."[122] Others argue that forcible countermeasures remain a part of CIL as a proportionate response to violations of international law not rising to the level of an armed attack for which traditional self-defense would be warranted.[123] Even the International Court of Justice (ICJ), the judicial organ of the U.N., vaguely "hinted at the existence of a residual right of forcible reprisals outside the U.N. Charter" in its Corfu Channel case.[124] While most academics and a cursory reading of the U.N. Charter support the former position, there are important exceptions that support the latter contention in favor of forcible countermeasures.

Notably, the 1986 ruling in the Case Concerning Military and Paramilitary Activities In and Against Nicaragua, the ICJ confirmed that although international law prohibits the use or threat of force between states that is supported by both treaty law (i.e., the U.N. Charter) and CIL, the general rule allows certain exceptions.[125] In that case,

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[120] DINSTEIN, *supra* note 64, at 174.

[121] *See e.g.*, Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT'L L. 421, 423 (2011) (noting the difficulty in determining whether the Russian cyber-attack on Estonia and the Stuxnet virus used by the United States against Iran constitute uses of force under the U.N. Charter); Jane Perlez, *Beijing Exhibiting New Assertiveness in South China Sea*, N.Y. TIMES (May 31, 2012), http://www.nytimes.com/2012/06/01/world/asia/beijing-projects-power-in-strategic-south-china-sea.html (discussing China's seizure of Scarborough Shoal from the Philippines); SHIRLEY A. KAN ET AL., CONG. RESEARCH SERV., RL30946, CHINA-U.S. AIRCRAFT COLLISION INCIDENT OF APRIL 2001: ASSESSMENTS AND POLICY IMPLICATIONS 1-6 (2001) (discussing China's seizure of a U.S. EP-3 aircraft following a mid-air collision off the coast of Hainan Island).

[122] *See, e.g.*, Mrazek, *supra* note 114, at 99.

[123] *See* Nicholas Tsagourias, *Necessity and the Use of Force: A Special Regime*, 41 NETH. Y.B. INT'L L. 11 (2010); Michael A. Newton, *Reconsidering Reprisals*, 20 DUKE J. COMP. & INT'L L. 361 (2010); Philip Sutter, *The Continuing Role for Belligerent Reprisals*, J. CONFLICT & SEC. L., Spring 2008, at 93; Edward Kwakwa, *Belligerent Reprisals in the Law of Armed Conflict*, 27 STAN. J. INT'L L. 49 (1990).

[124] Tsagourias, *supra* note 123, at 25-26; *see also*, Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 34-35 (Apr. 9) (holding that the United Kingdom's clearance of naval mines in the Corfu Channel was an illegal violation of Albania's sovereignty, but without commenting on the legality or illegality of forcible reprisals and countermeasures that do not violate territorial sovereignty).

[125] Nicar. v. U.S., 1986 I.C.J. at 94-102.

Nicaragua brought proceedings in the ICJ against the United States[126] for its support of and assistance to the military and paramilitary activities of the contra rebels in and against Nicaragua in the early 1980s, which included laying naval mines to block Nicaraguan harbors.[127] The United States justified these actions as collective self-defense in response to Nicaragua's prior comparable provision of arms and other logistical support to guerillas in El Salvador.[128] While the ICJ ultimately found that the United States violated international law and the sovereignty of Nicaragua in several respects,[129] the Court made two key observations throughout the course of its opinion regarding uses of force and countermeasures.

First, it distinguishes between different levels of force, separating "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms" of force, aggression, and other acts for which self-defense under Article 51 of the U.N. Charter may not be appropriate.[130] The Court found that where sending regular military forces or irregular armed groups across an international border to carry out acts of armed force would constitute an "armed attack" justifying acts of self-defense, other activities like the provision of weapons, supplies, and logistical or other support would not constitute an armed attack, even if such acts were still considered to be a threat or use of force.[131] Under this reasoning, the United States was not entitled to exercise collective self-defense of El Salvador because Nicaragua's support for the El Salvadorian guerillas did not constitute an "armed

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[126] The United States objected to the ICJ's jurisdiction over the case, and refused to participate in the proceedings. *See id.* at 23-24; John Vinocur, *World Court Act to Overrule U.S. in Nicaragua Case*, N.Y. TIMES (Nov. 27, 1984), https://www.nytimes.com/1984/11/27/world/world-court-acts-to-overrule-us-in-nicaragua-case.html.

[127] Nicar. v. U.S., 1986 I.C.J. at 16, 20-22.

[128] *Id.* at 21.

[129] *Id.* at 123-24. However, the United States rejected the judgment, maintaining its stance that the case should not have been heard by the ICJ, and that Nicaraguan government was a puppet for the Union of Soviet Socialist Republics. Martin Cleaver & Mark Tran, *US Dismisses World Court Ruling on Contras*, THE GUARDIAN (June 28, 1986, 6:34 AM), https://www.theguardian.com/world/1986/jun/28/usa.marktran.

[130] Nicar. v. U.S., 1986 I.C.J. at 101.

[131] *Id.* at 103-04. However, this holding was not unanimous. At least one judge dissented, determining that Nicaragua's actions constituted an armed attack and that El Salvador was entitled to use force in self-defense, which would enable the United States to use force in collective self-defense of El Salvador. *Id.* at 352-74 (separate opinion by Schwebel, J.).

attack" that would trigger the right to self-defense.[132] Consequently, the United States' corresponding support for the contras, though not rising to the level of an armed attack under the same reasoning, violated the principles of non-intervention and non-use of force in international relations.[133]

Clearly, then, there exists a category of "less-grave" wrongful acts under international law that, despite violating international law, do not warrant acts of full, armed self-defense. This ludicrous discrepancy unacceptably leaves victim states in the vulnerable position of being unable to promptly respond to these wrongful acts, thereby encouraging further internationally wrongful acts by the offending state. If "violating the law of war, even in a manner it allows, is a repugnant act, yet an even more repugnant act is to allow an adversary to violate that same law with impunity."[134]

Second, the Court implies that that a state that suffers a use of force not rising to the level of an armed attack for self-defense purposes may take proportional countermeasures.[135] Specifically, the Court asked, and explicitly declined to definitively address, whether a state may "justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force."[136] However, the ICJ pointedly suggested that there might be "some right analogous to the right of . . . self-defence, one which might be resorted to in a case of intervention short of armed attack,"[137] and "carefully refrained from ruling out the possibility that such counter-measures may involve the use of force by the victim State."[138]

Essentially, the ICJ implies in the Nicaragua Case the existence of a right to employ legitimate countermeasures analogous to, but less serious than, a use of force in self-defense in response to a threat or use of force not constituting an armed attack, i.e., a use of force causing human casualties and/or serious destruction of property.[139] In fact, the

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132 *Id.* at 101-11.
133 *Id.* at 109-12.
134 Sutter, *supra* note 123, at 93.
135 Tsagourias, *supra* note 123, at 26.
136 Nicar. v. U.S., 1986 I.C.J. at 110.
137 *Id.*
138 DINSTEIN, *supra* note 64, at 174-175.
139 *Id.* at 174.

Nicaragua Case decision should be interpreted as "strongly suggest[ing] . . . that these counter-measures may include acts of force."[140]

This view is not an aberration. Despite academic treatises and non-binding international resolutions to the contrary,[141] state practice reaffirms the existence of countermeasures as a part of CIL.[142] Moreover, the concept appears in other ICJ cases. In the Oil Platforms Case,[143] the ICJ rejected Iranian claims that the United States breached a U.S.-Iran treaty by attacking an Iranian oil platform during the Tanker War[144] and allegedly disrupting commerce between the two countries.[145] However, the Court proceeded to unnecessarily analyze and determine that that U.S. attack did not constitute a valid exercise of self-defense.[146] Prior to the attack, Iranian forces located on the oil platforms at issue launched attacks against U.S. flagged vessels in the area.[147] Despite this provocation, the ICJ decided that the Iranian attacks did not constitute an "armed attack" justifying U.S. action in self-defense because the attacks were not of sufficient gravity to be an armed attack, and, allegedly, were not intentionally aimed at U.S. vessels.[148] This matter was so

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[140] John L. Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 35, 138 (1987).

[141] *See, e.g.*, G.A. Res. 3 314 (XXIX), Definition of Aggression (Dec. 14, 1974), G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24, 1970).

[142] Newton, *supra* note 123, at 362; Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 1 (1972) (arguing that the status of reprisals under the U.N. Charter may be de jure unlawful but de facto accepted practice by states).

[143] Iran v. U.S., 2003 I.C.J. at 161.

[144] The anti-shipping naval campaigns during the Iran-Iraq War (1980-1988) are known as the Tanker War. In response to Iraqi attacks on ships carrying Iranian military supplies and commercial exports, Iran began attacking commercial vessels belonging to countries that traded with Iraq. Due to these escalating attacks, Kuwait requested assistance from the United States, who reflagged Kuwaiti oil tankers, making them U.S. ships eligible for U.S. Navy escort, and provided general security for shipping to and from neutral Gulf countries. Subsequent missile and mine attacks on U.S. vessels prompted the United States to directly attack Iranian vessels, facilities, and oil platforms. Ronald O'Rourke, *The Tanker War*, U.S. NAVAL INST. (May 1988), https://www.usni.org/magazines/proceedings/1988-05/tanker-war. These retaliatory actions formed the basis of the Oil Platforms case. *See* Iran v. U.S., 2003 I.C.J. at 174-76.

[145] Iran v. U.S., 2003 I.C.J. at 218.

[146] *See id*. at 199; William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 295 (2004).

[147] Iran v. U.S., 2003 I.C.J. at 174-76.

[148] *Id.* at 186-199.

contentious that five separate ICJ judges questioned the decision to address the issue,[149] while one judge, Judge Simma expressly disagreed with the Court's conclusion.[150]

Referring to precedent from the Nicaragua Case, Judge Simma believed that the ICJ cannot have meant "proportionate counter-measures" to mean "mere pacific reprisals" by the victim.[151] He hints at the preposterousness of a victim of illegal actions not having "the right to resort to – strictly proportionate – defensive measures equally of a military nature."[152] Such a policy would further punish the victim of illegal actions, placing the onus on the victim state to accept current and potentially future instances of illegal actions by the offending state. Rather, Judge Simma "advocates a concept of defensive military action that falls short of 'full-scale self-defence.'"[153] He believes that CIL allows for a distinction for "hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defence expressly reserved in the United Nations Charter."[154] Herein lies the crux of the argument for forcible countermeasures against, for instance, dangerous and unsafe activity by foreign or unknown drones.

V. Targeting Drones: Forcible Defensive Countermeasures

In the hypothetical scenario at the beginning of this article, an enemy drone interferes with aircraft carrier flight operations, impeding its mission and endangering the ship, its aircraft, and crew. Unfortunately, this is an all-too-real occurrence. On 8 August 2017, an Iranian Sadegh-1 UAV[155] had engaged in an "unsafe and unprofessional" interaction

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[149] Taft, supra note 146, at 298 (citing the separate opinions of Judges Buergenthal, Higgins, Parra-Aranguren, Kooijmans, and Owada).

[150] Iran v. U.S., 2003 I.C.J. at 324-61 (separate opinion by Simma, J.). Dissenting opinions are an important feature of the ICJ, and have played a significant role in the subsequent development of international law. *See* R. P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 INT'L & COMP. L. Q. 788, 792-94 (1965).

[151] *Id.* at 332.

[152] *See id.* at 331.

[153] Darcy, *supra* note 18, at 891.

[154] Iran v. U.S., 2003 I.C.J. at 332 (separate opinion by Simma, J.).

[155] Small enough to fit on a basketball court, the Sadegh-1 is an Iranian unmanned combat aerial vehicle that is estimated to be capable of flying at supersonic speed and

with a U.S. F/A-18E Super Hornet.[156] While the jet was preparing to land on the USS Nimitz, and despite repeated radio calls to stay clear of flight operations, the Iranian UAV passed within 100 feet of the F/A-18E, forcing the jet to take evasive maneuvers to avoid collision.[157] Less than a week later, another Iranian UAV closed to within 1,000 feet of the USS Nimitz while it was engaged in night-time flight operations, and did so without utilizing standard, internationally-mandated navigation lights, which created a dangerous situation with a significant chance of collision.[158] All told, in 2017, there were over fourteen dangerous incidents like this with Iranian drones.[159] In each instance, not only did the Iranian drone violate international law by failing to act with due regard for navigational rights of the U.S. vessel, they created dangerous collision hazards that put U.S. personnel and property at risk.[160] U.S. commanders must be able to respond, and forcible countermeasures may be an appropriate response.

A. A Lack of Due Regard that Endangers Human Life is Akin to a Use or Threat of Force Not Constituting an Armed Attack that Nevertheless Warrants Countermeasures

Intentionally or recklessly crossing the bow of a moving ship, failing to make way for larger ships and ships conducting flight operations, buzzing within 100 feet of other aircraft and ships, and similar maneuvers are hazardous actions that show a clear disregard to the danger of navigation and collision, and pose a danger to all craft and

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altitudes of up to 25,000 feet. *See* Russ Curry, *Iran's Sadegh UCAV Armed with Air-to-Air Missiles*, UAS VISION.COM (Oct. 2, 2014), https://www.uasvision.com/2014/10/02/irans-sadegh-ucav-armed-with-air-to-air-missiles/; *Sadeq-1*, DEAGEL.COM, http://www.deagel.com/Support-Aircraft/Sadeq-1_a003113001.aspx (last visited Mar. 26, 2019).

156 Commander, U.S. Naval Forces Central Command Fifth Fleet Public Affairs, *Statement Regarding Iranian UAV Unsafe and Unprofessional Interaction with US Navy F/A-18E*, U.S. CENT. COMMAND (Aug. 8, 2017), http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/1271878/statement-regarding-iranian-uav-unsafe-and-unprofessional-interaction-with-us-n/ [hereinafter Fifth Fleet Statement].

157 *Id.*

158 Melissa Quinn, *Iranian Drone Conducts 'Unsafe Approach' of US Aircraft Carrier for the Second Time in a Week*, WASH. EXAMINER (Aug. 14, 2017, 12:33 PM), http://www.washingtonexaminer.com/iranian-drone-conducts-unsafe-approach-of-us-aircraft-carrier-for-the-second-time-in-a-week/article/2631448.

159 *See* Fifth Fleet Statement, *supra* note 156.

160 *See id.*

individuals involved.[161] It does not matter whether their acts are committed intentionally, recklessly, or as a matter of simple negligence.[162] Aside from violating principles of basic seamanship,[163] such actions are also violations of international law. When state aircraft and vessels undertake dangerous maneuvers that fail to exercise due regard for the safety and navigational rights of other craft on, above, or below the water, it violates UNCLOS, the COLREGS, the Chicago Convention, and other international agreements.[164] As discussed above, these laws apply equally to UAVs and UMS due to their respective statuses as State/Military Aircraft and vessels. Consequently, if a drone conducts dangerous operations like the ones described in the hypothetical and real-world examples above, this lack of due regard constitutes a violation of international law.

In considering the wide array of unlawful acts that are possible for one state to take against another, less-"grave" violations of maritime customs and laws, like the obligation of due regard, are unlikely to clearly constitute an armed attack by the state operating the drone. Nevertheless, these violations are acts akin to uses or threats of force that may warrant response under CIL as described by Judge Simma's opinion.[165] As noted above, the ICJ has held that otherwise non-violent provision of weapons, money, supplies, and logistical support to armed bands in another state, while not constituting an armed attack triggering the right of self-defense, may nevertheless be a "use of force of a lesser degree of gravity" that breaches the international prohibition against the use or threat of force between states.[166] This is because actions like

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[161] *See e.g.*, COLREGS, *supra* note 22, r. 7-21.

[162] Neither UNCLOS, the COLREGS, nor the Chicago Convention contain any provision that waives the requirement of due regard. *See* UNCLOS, *supra* note 8; COLREGS, *supra* note 22; Chicago Convention, *supra* note 24. Logically speaking, a vessel in distress that has no steering capability may be exempt from the requirement to operate with due regard for other vessels around it, but no provision is made for intentional, reckless, or negligent failures to do so. *See generally* UNCLOS, *supra* note 8; COLREGS, *supra* note 22; Chicago Convention, *supra* note 24.

[163] *Seamanship*, *supra* note 25.

[164] *See* UNCLOS, *supra* note 8, arts. 21, 39; COLREGS, *supra* note 22, r. 2; Chicago Convention, *supra* note 24, art. 3; Memorandum of Understanding Between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China Regarding the Rules of Behavior for Safety of Air and Maritime Encounters, U.S. DEP'T OF DEF. PUBLICATIONS (Nov. 10, 2014), http://archive.defense.gov/pubs/141112_MemorandumOfUnderstandingRegardingRules.pdf [hereinafter China-U.S. MOU].

[165] *See* Iran v. U.S., 2003 I.C.J. at 332 (separate opinion by Simma, J.).

[166] Nicar. v. U.S., 1986 I.C.J. at 127.

these, while not rising to a level that can be equated with an armed attack, still violate the general principle against the use of force, and are an unlawful intervention in the affairs of another state.[167] Unsafe and unprofessional drone operations should be viewed in the same context; while not grave enough to be an "armed attack," common sense and the evolving standards of warfare support the contention that such activity is akin to a use or threat of force because it interferes with the victim state's affairs (i.e., serves as an impediment to the ship's mission), jeopardizes its sovereign immune property, and endangers the lives of its personnel.

Consider the result of a pebble dropping into a pool of still water. The pebble does not merely break the surface and sink to the bottom without disturbing anything around it; the pebble creates a ripple on the surface of the water that spreads outward from the point of impact. Similarly, in real life, a drone does not pose a general danger that exists in a vacuum; it creates its own ripple effect on those vessels around it. When a drone fails to act with due regard for the safety and navigation of other vessels, its unsafe actions will force the victim vessels to take action to escape the threat. In the hypothetical, the presence of a foreign drone in the stack poses a danger to flight operations and the pilots involved, which may force the aircraft to cease operations or change course to steer away from the unsafe UAV.[168] In the real-world interaction between the Iranian QOM-1 and the U.S. F/A-18E, the "unsafe and unprofessional" lack of due regard exhibited by the Iranian drone forced the U.S. F/A-18E to take evasive action in order to avoid collision.[169] Most importantly, the dangerous drone activity is not a threat in and of itself, or simply because it threatens potentially extensive damage to other vessels and craft; it also poses a very real threat to the lives of the sailors and aviators involved. Accordingly, the dangerous lack of due regard by a drone that violates international law, impedes operations, and poses a danger to human life is analogous to a traditional use or threat of force.

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[167] *See id.* at 126-27.
[168] *See* discussion *supra* sec. I.
[169] *See* Fifth Fleet Statement, *supra* note 156.

B. Use of Force Against an Unmanned Drone is a Proportionate Countermeasure

Since dangerous drone activity in violation of international law is analogous to a use or threat of force short of an armed attack, the victim state must be able to employ proportionate, forcible countermeasures to safeguard its personnel and to deter future violations. To outright prohibit forcible countermeasures in all situations, as some in the international community seek to do, is an unnecessary restriction that controverts CIL[170] and "seriously thwarts" the "right of [a] victimized state to secure respect for its legal rights and interests. . . ."[171] Thus, prohibition creates an absurd catch-22;[172] limiting the use of forcible countermeasures places the onus on the victim state to either accept repeated violations of its rights and international law, thereby encouraging further violations and allowing the danger to its property and personnel to continue, or to commit its own violation of international law as it seeks to take defensive action.

Recall that countermeasures are acts taken against a party outside of an armed conflict that would otherwise be unlawful in order to persuade that party to cease violating the law.[173] The hypothetical and real-world examples above both involve an unmanned vehicle, outside of an armed conflict, acting in a manner that violates international law and poses a danger to personnel. Moreover, these violations of state rights and international law are a frequent occurrence by certain states.[174] In such a situation, the United States should be entitled to employ proportionate forcible countermeasures short of full self-defense to defend its property and personnel, and to dissuade the offending state from repeating such actions in the future. As forcible countermeasures are "analogous to the right of . . . self-defence,"[175] then the proposed countermeasures must comply with the same requirements of necessity and proportionality for

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[170] U.S. DEP'T OF ST., DRAFT ARTICLES ON STATE RESPONSIBILITY: COMMENTS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA March 1, 2001, at 6 (2001), https://www.state.gov/documents/organization/28993.pdf.

[171] Cannizzaro, *supra* note 102, at 908.

[172] Derived from the 1961 novel, Catch-22, by Joseph Heller, a "catch-22" is "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." *Catch-22*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/catch-22 (last visited Mar. 26, 2019).

[173] *See* DINSTEIN, *supra* note 64, at 160.

[174] *See* Fifth Fleet Statement, *supra* note 156.

[175] Nicar. v. U.S., 1986 I.C.J. at 110.

self-defense actions.[176] If a forcible countermeasure complies with these requirements, then a victim state would be acting within the ambit of traditional state practice, CIL, and ICJ judgments.

Necessity for forcible countermeasures is established in two ways. First, the victim state has an interest in taking action to counter the offending state's violations of international law and to deter future violations.[177] In an era of warfare that will increasingly rely on drones,[178] the knowledge that violations of international law by drones will be met with appropriate, forcible countermeasures will discourage such actions. Second, the victim state obviously has a significant interest in taking on-the-spot action to end the threat to its property and personnel, which, as noted by Judge Simma, may consist of defensive measures of a military nature.[179]

Proportionality is a higher bar to meet. The justification for forcible countermeasures "analogous to but short of self-defence" is another state's prior use or threat of force "less grave than an armed attack," i.e., "a use of force causing human casualties and/or serious destruction of property."[180] Just like traditional self-defense, proportionality does not limit the countermeasure to the exact manner and level of force used in the initial unlawful action by the offending state. Rather, proportionality permits the level of force needed to respond to, and effectively deal with, the threat or danger, which can be greater than the initial threat so long as the result is still roughly proportionate.[181] Hence, in response to a use or threat of force below the level of an armed attack, it would be grossly disproportionate to employ a forcible countermeasure so severe that it constitutes an armed attack itself. For instance, the hypothetical would likely fail the test of proportionality to launch a missile strike against the enemy drone's operators, home base, or mother ship, since the countermeasure would be a far more severe and direct use of force.

Targeting the drone itself, however, would be a proportional countermeasure. Use of force against the drone is directly related and

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176 DINSTEIN, *supra* note 64, at 197.
177 *See* Cannizzaro, *supra* note 102, at 894-95 (noting that the idea of countermeasures and their multi-functional character relates to the State's need to protect its legal rights and interests).
178 *See* discussion *supra* sec. II.B.
179 Iran v. U.S., 2003 I.C.J. at 331.
180 DINSTEIN, *supra* note 64, at 174.
181 *Id.* at 209.

responsive to the drone's unlawful actions. The result achieved, elimination of the drone and the threat it poses, is a relatively symmetric and balanced result compared to the dangerous, unlawful actions of the drone. Assuming the incident does not occur while exercising innocent passage through the territorial seas of the state operating the drone, then there is no violation of the territorial sovereignty or political independence of the offending state, further precluding any violation of the U.N. prohibition on the use of force.[182] Most importantly, by destroying a single, unmanned vehicle, the countermeasure avoids any civilian casualties or more significant destruction of property.[183] Consequently, the countermeasure is not "grave" enough to constitute an armed attack, and is arguably a lesser use of force compared to the threat to human life posed by a drone acting without due regard for safety and navigation rights. In this manner, the same unmanned nature of drones that makes states more likely to utilize them also weighs in favor of them being the lawful target for forcible countermeasures.

Additionally, if destruction of the enemy drone is a proportionate response, then lesser, non-kinetic countermeasures such as electronic warfare (EW) measures to disable or drive off the drone would also be permissible since they achieve the same desired result—elimination of the threat posed by the drone. This is in keeping with principles of effects-based targeting, where all possible means drawing from any available forces weapons and platforms are considered to achieve specific, desired effects.[184] If lesser, non-kinetic countermeasures would achieve the same result, i.e., end the dangerous actions of a drone, and time and circumstances permit, then such measures should be considered in keeping with traditional notions on escalation of force.[185] Similarly, if time and circumstances permit, commanders may attempt to de-escalate an encounter with an unprofessional and unsafe drone without use of

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[182] U.N. Charter art. 2 ¶ 4.

[183] As compared to manned aircraft, warships, tanks, and other military weapons/vehicles, drones are a comparatively cheap weapons system, making it an attractive, easy-to-use option for militaries around the world. *See* Wayne McLean, *Drones are Cheap, Soldiers are Not: A Cost-Benefit Analysis of War*, THE CONVERSATION (Jun. 25, 2014, 11:26 PM), http://theconversation.com/drones-are-cheap-soldiers-are-not-a-cost-benefit-analysis-of-war-27924.

[184] JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT DOCTRINE FOR TARGETING I-4 (17 Jan. 2002).

[185] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 89 (2015) [hereinafter OPERATIONAL LAW HANDBOOK].

countermeasures,[186] e.g., by changing course. This may especially be the case depending on the legal status of the seas the action takes place in.[187] However, this will be highly dependent on the specific circumstances, and commanders are *not* required to de-escalate a situation or attempt to use non-destructive measures as a precursor to use of more powerful measures.[188]

Additionally, EW measures may not be as quick or decisive in eliminating a drone threat as a traditional kinetic countermeasure that destroys the target drone. Also, EW measures may not eliminate the threat if such measures, even if disrupting its communications link with its controllers, leave the drone in an area where its mere presence poses a continuing danger to navigation, e.g., the stack in the hypothetical. Accordingly, where circumstances permit, a commander should consider non-kinetic measures against an illegal drone, but the commander is not required to exhaust such measures before resorting to a kinetic strike.

Thus, forcible, destructive action against an enemy drone that violates international law by failing to act with due regard for other aircraft and vessels, thereby endangering those other craft and their human crews, is a proportionate forcible countermeasure.

C. A Framework for Forcible Countermeasures

As unreasonable as it would be to completely prohibit forcible countermeasures falling short of actions taken in self-defense, as shown above, it would be inappropriate and intellectually dishonest to argue that forcible countermeasures, even if proportionate and necessary, are appropriate in all circumstances. Like any use of force, the specific facts of each situation and many other factors must be considered prior to authorizing the action.[189] In order to be feasible and defensible in real-world drone encounters, a framework is needed to delineate relative levels of forcible countermeasures that may be employed depending on the nature of threat, the area of the seas where the encounter occurs, and the degree of damage that the countermeasure will cause.

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[186] *Id.* at 84.

[187] *See* discussion, *infra* sec. V.C.

[188] OPERATIONAL LAW HANDBOOK, *supra* note 185, at 84, 89.

[189] *See* SROE/SRUF, *supra* note 97, encl. J, para. 2.b.(1)(c) (directing consideration of a number of potential tactical and strategic limitations on the use of force, such as U.S. policy, higher headquarters limitations, etc.).

1. Dangerous Violation of International Law

As discussed above, forcible countermeasures will not be permissible in all circumstances.[190] By their very nature, countermeasures, just like belligerent reprisals, are acts that would be unlawful but for their use in response to another state's prior violation of international law, and that are taken for the purpose of deterring future violations of international law.[191] Consequently, any use of countermeasures must be in response to a violation of international law.

Moreover, to specifically warrant a forcible countermeasure, regardless of the level of force to be used, that violation of international law must pose a life-threatening hazard to the safety of U.S. vessels or aircraft, and the lives of embarked Sailors and Airmen.[192] Mission impediment, e.g., obstructing intelligence collection or interfering with a freedom of navigation operation, is not enough. It is the grave danger to U.S. forces that is analogous to a use or threat of force short of an armed attack, which is what triggers a potential forcible countermeasure as a response short of self-defense.[193]

Therefore, to justify use of a forcible countermeasure, an offending state must commit a violation of international law that poses a life-threatening danger to U.S. forces.

2. Different Maritime Regimes Under the Law of the Sea

A foundational premise of the law of the sea is that the sovereignty of coastal states extends, under different legal classifications, beyond its land territory and internal waters.[194] Even if U.S. commanders encounter a life-threatening breach of international law that potentially warrants a forcible countermeasure, the location where the breach occurs will have a significant impact on whether forcible countermeasures may be used and the level of force involved. This is because the seas are nominally reserved for peaceful purposes, and states are obligated to avoid threats or uses of force against the sovereignty, territorial integrity, or political

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190 *See* discussion *supra* sections IV.C. and V.A.

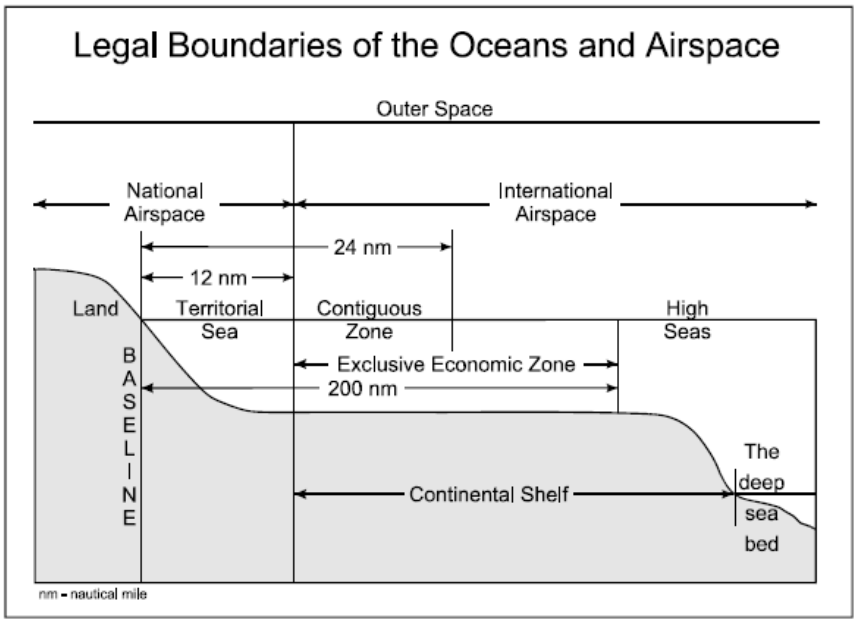
191 *See* LAW OF WAR MANUAL, *supra* note 17, paras. 18.18.1, 18.18.1.1; OPERATIONAL LAW HANDBOOK, *supra* note 185, at 30.

192 *See* discussion *supra* section V.A.

193 *Id*.

194 UNCLOS, *supra* note 8, arts. 2, 33, 55, 77.

independence of other states.[195] And as shown in the following chart, the closer a foreign state's vessel is to a coastal state, the greater the degree of control that the coastal state can generally exert over the surrounding area and the conduct of foreign craft therein,[196] and the greater the limitations on the foreign state vessel while transiting the coastal state's waters.[197]



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a. The High Seas and EEZs – Full Freedom of Navigation

Throughout the high seas,[199] commonly referred to as international waters, and any coastal states' EEZs,[200] the full panoply of navigational

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195 *Id.* arts. 19, 39, 88, 301.

196 *See id.* arts. 2, 33, 55.

197 For instance, while foreign ships may exercise full freedom of navigation in a coastal State's EEZ, those ships are specifically prohibited from launching and recovering aircraft while exercising innocent passage through the coastal State's territorial sea. *Id.* arts. 19, 58.

198 COMMANDER'S HANDBOOK, *supra* note 9, para. 1.3.1, Figure 1-1.

199 The high seas are "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." UNCLOS, *supra* note 8, art. 86. All states may use the high

rights are available to ships of all nationalities. This is known as the freedom of the high seas,[201] and it is part of what makes the world's oceans and the resources contained therein the "common heritage of mankind."[202] Even within an EEZ, although the cognizant coastal state retains sovereign rights of the resources within the EEZ, all other high seas freedoms, such as navigation and overflight, are available to foreign states. Although the high seas and EEZs are nominally "reserved for peaceful purposes," [203] which some states conservatively interpret by making excessive maritime claims that purport to regulate military activity of foreign states within such areas ,[204] it is broadly agreed upon that all states may conduct military operations in EEZs and on the high seas,[205] subject only to the requirement that they exercise due regard for the interests of other states.[206] Accordingly, a coastal state has little to no control over foreign military naval activity occurring on the high seas or an EEZ.[207]

b. Territorial Seas – Innocent Passage

A coastal state may exert significant control over its territorial seas, which is an area of sovereign territory extending up to a maximum of 12 NM from the coast.[208] Within a coastal state's territorial sea, foreign

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seas without restriction, and may exercise the freedoms of navigation and overflight. *Id.* art. 87.

[200] *See* UNCLOS, *supra* note 8.

[201] UNCLOS, *supra* note 8, art. 87.

[202] UNCLOS, *supra* note 8, arts.136, 137. Access to, and use of, the oceans is vital to life on Earth. Roughly seventy percent of the Earth's surface is covered by water and more than one third the total human population lives within 100 kilometers of an ocean. *Living Ocean*, NAT'L AERONAUTICS & SPACE AGENCY (NASA), https://science.nasa.gov/earth-science/oceanography/living-ocean (last visited Mar. 26, 2019).

[203] UNCLOS, *supra* note 8, preamble, art. 88.

[204] Some coastal states, such as China, claim that activity by foreign militaries in China's EEZ is prohibited without notification to, and permission from, the coastal State. *See Military Claims Reference Manual*, U.S. NAVY JAG CORPS, www.jag.navy.mil/organization/code_10_mcrm.htm (last visited Mar. 26, 2019).

[205] DINSTEIN, *supra* note 64, at 71; BERNAERTS' GUIDE, *supra* note 36, at 124.

[206] UNCLOS, supra note 8, art. 87.

[207] *See* BERNAERTS' GUIDE, *supra* note 36, at 124-125; *see also*, UNCLOS, *supra* note 8, art. 298 (exempting "disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" from jurisdiction of any court or tribunal convened under UNCLOS).

[208] UNCLOS, *supra* note 8, arts. 2-3.

vessels are subject to the coastal states laws, which gives the coastal state a vested interest in regulating the conduct of all ships therein.[209] Nevertheless, international law requires that coastal states "shall not hamper" foreign ships' passage through their territorial seas,[210] and particularly proscribes taking any action or impose any requirement that has the "practical effect of denying or impairing" the right of passage.[211] Under this regime, foreign states may traverse a coastal state's territorial sea by exercising the right of innocent passage,[212] or the right of transit passage through international straits.[213]

Both innocent passage and transit passage must be conducted continuously and expeditiously, and must refrain from "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State."[214] Innocent passage is particularly restrictive, and requires that foreign ships refrain a number of activities, including any exercise or practice with weapons of any kind, and the launching, landing, or taking on board of any aircraft or military device.[215] These restrictions are based on large part of the recognition that the territorial sea is the sovereign territory of the coastal state. A threat or use of force, or other provocative activity like those listed in Article 19,[216] may be deemed to be a threat to the territorial integrity and political independence of the coastal state itself.

c. International Straits and Designated Archipelagic Sea Lanes—Transit Passage

The independent legal regime of transit passage is different, and it occupies a place in between freedom of navigation and innocent

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[209] *See id.* art. 73.
[210] *Id.* arts. 24, 44.
[211] *See* UNCLOS, *supra* note 8, art. 24; *see also* UNCLOS, *supra* note 8, art. 44 (prohibiting suspension of transit passage).
[212] Ships of any state may traverse a coastal state's territorial seas, whether intending to stop at a port facility of the coastal state or not, provided that passage is continuous, expeditious, and is not prejudicial to the peace, good order or security of the coastal state. *Id.* arts. 18-19.
[213] The right of transit passage allows ships to traverse a coastal state's territorial sea if crossing between one part of the high seas or an EEZ and another part of the high seas or an EEZ. *Id.* art. 38.
[214] *Id.* arts. 19, 39.
[215] *Id.* art. 19.
[216] *Id.*

passage.[217] Though it also involves traversing a coastal state's territorial seas in a continuous and expeditious manner,[218] the limitations on transit are not as restrictive. A foreign state's ship must still avoid "any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait," but ships exercising transit passage through international straits are allowed to engage in activities that are "incident to their normal modes of continuous and expeditious transit."[219] The United States interprets this provision as allowing submarines to remain submerged during transit, and for aircraft carriers to conduct normal flight operations during the same.[220] In this fashion, although coastal states retain their normal sovereignty rights over the territorial seas comprising international straits,[221] international law acknowledges that there is a significant difference between transit through an international strait and mere innocent passage through a coastal state's territorial sea, and provides ships transiting international straits greater rights.[222]

3. Levels of Force and Destructiveness

Technologically advanced forces like the U.S. military have multiple responsive measures that may be used against an offending state's drone.[223] Electronic warfare measures can jam a drone's communications link with its operator, making the drone inoperable, and potentially making it automatically return to its home base.[224] It is even possible for EW measures to cause the destruction of a drone by accessing and disrupting internal processes.[225] Finally, a ship can take direct action to target and destroy an offending state's drone using

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[217] BERNAERTS' GUIDE, *supra* note 36, at 32.
[218] UNCLOS, *supra* note 8, art. 38.
[219] *Id.* art. 39.
[220] COMMANDER'S HANDBOOK, *supra* note 9, para. 2.5.3.2.
[221] UNCLOS, *supra* note 8, art. 34.
[222] *See* BERNAERTS' GUIDE, *supra* note 36, at 32.
[223] *See* Tung Yin, *Game of Drones: Defending Against Drone Terrorism*, 2 TEX. A&M L. REV. 635, 656 (2015); Mark Pomerleau, *How the Military is Defeating Drones*, C4ISRNET (Mar. 21, 2017), https://www.c4isrnet.com/unmanned/uas/2017/03/21/how-the-military-is-defeating-drones.
[224] Pomerleau, *supra* note 223.
[225] *See id.*

traditional kinetic weapons, or even directed energy weapons.[226] The U.S. Navy and other military entities are continuously seeking out new and better measures to counter enemy drones.[227] Yet the sophistication of a particular weapon or EW measure is not dispositive of its use as a countermeasure; the likely result of its utilization, i.e., how forceful or destructive it will be, is the measure that will impact its use. For instance, there may be situations where a forcible countermeasure is warranted, but where it would be a more appropriate level of force to employ EW measures to disrupt a drone's signal as opposed to obliterating the drone with a surface-to-air missile, thereby avoiding the destruction of another state's property and follow-on risk of escalation.

4. Implementing a U.S. Countermeasure Framework

By considering the nature of the threat posed by a dangerous drone encounter, balancing the rights and obligations of coastal states and foreign states based on the particular law of the sea regime, and contemplating the types of potential countermeasures and their relative levels of destructiveness, a naval commander can ascertain parameters for possible forcible countermeasures as detailed in the following chart and below text:

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[226] *Id.*; Off. Naval Res., *All Systems Go: Navy's Laser Weapon Ready for Summer Deployment*, U.S. NAVY (Apr. 7, 2014, 12:02 PM), https://www.navy.mil/submit/display.asp?story id=80172.

[227] *See* Yin, *supra* note 223, at 656-57. It is beyond the scope of this article to conduct an in-depth analysis of the various counter-drone methods and technologies.

<table>
<tr><th></th><th>Legal Regime</th><th>Navigational Regime</th><th>Countermeasures (CM) Permitted</th></tr>
<tr><td>1</td><td>Internal Waters</td><td>Consent</td><td>None</td></tr>
<tr><td rowspan="3">2</td><td rowspan="3">Territorial Seas
(≤ 12 NM)</td><td>Innocent Passage</td><td>None

(Any use of forcible CM while exercising Innocent Passage could constitute a use of force against the sovereignty and territorial integrity of the Coastal State)</td></tr>
<tr><td>Transit Passage</td><td rowspan="2">Electronic Warfare and other non-kinetic CM that disrupt or deter offending drones without physical damage

(Reduced sovereign rights for int’l straits and ASLs; treated more like the high seas than the territorial sea)</td></tr>
<tr><td>Archipelagic Sea Lanes (ASL) Passage</td></tr>
<tr><td>3</td><td>Contiguous Zone
(≤ 24 NM)</td><td rowspan="3">High Seas Freedoms</td><td rowspan="3">Full use of kinetic, directed energy, and other non-kinetic CM that result in destruction of offending drones</td></tr>
<tr><td>4</td><td>Exclusive Economic Zone (EEZ)
(≤ 200 NM)</td></tr>
<tr><td>5</td><td>High Seas
(≥ 200 NM)</td></tr>
</table>

a. No Countermeasures While Exercising Innocent Passage

Within the normal territorial sea of a coastal state, whether by invitation of the coastal state or through the exercise of innocent passage, forcible countermeasures against a drone or other vessel belonging to the coastal state are inadvisable as a matter of prudence. Although the obligation of due regard is a universal requirement that applies in all maritime areas,[228] and a drone’s failure to act with due regard is a

[228] UNCLOS specifically imposes the obligation of due regard in its Preamble and sections on the territorial sea, transit passage through international strait, the EEZ, and high seas, which covers all areas of the sea addressed by UNCLOS. *See* UNCLOS, *supra* note 8, preamble, arts. 39, 56, 58, 87. Moreover, the COLREGS requirement of due regard applies to “all vessels” transiting “the high seas and in all waters connected therewith navigable by seagoing vessels.” COLREGS, *supra* note 22, r. 1, 2.

violation of international law giving rise to the legal right to use forcible countermeasures, certain factors vitiate use of forcible countermeasures in the coastal state's territorial sea. First, a territorial sea is the sovereign territory of the coastal state;[229] any forcible countermeasure employed in the coastal state's territorial sea could be viewed as a violation of the territorial integrity and political independence of the coastal state itself, which would be a violation of international law,[230] and possibly an illegal armed attack triggering the coastal state's right of self-defense.[231] Second, the coastal state's rights to regulate conduct of ships at sea is greatest in this area, and the activities of foreign ships traversing the territorial sea by exercising innocent passage are heavily restricted.[232] This limited nature of operations that U.S. ships may conduct during innocent passage, e.g., no flight operations for an enemy drone to disrupt, make the need to use countermeasures less likely. Third, should forcible countermeasures be employed, this would violate our own obligation to refrain from any use of weapons or other acts "prejudicial to the peace, good order, and security of the coastal State."[233] Consequently, our ships' passage would no longer be innocent, entitling the coastal state to eject the ship from the territorial sea.[234]

However, this restriction on use of countermeasures in the territorial sea should not apply to third party drones operating in the territorial sea. In such a situation, employment of a forcible countermeasure against a third-party state to whom the drone belongs, rather than the coastal state itself, would obviate the aforementioned concerns. Additionally, a restriction on the use of countermeasures in the territorial would also not preclude actions taken in self-defense if the coastal state commits a use or threat of force that constitutes a hostile act or demonstrated hostile intent.[235]

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[229] UNCLOS, *supra* note 8, art. 2.
[230] Id. art. 19; U.N. Charter, art. 2.
[231] Absent legal justification, such as self-defense against an armed attack or countermeasures against acts falling short of an armed attack, a use of force in response to provocation by another state would be illegal. *See* Nicar. v. U.S., 1986 I.C.J. at 123-24; *see also* discussion *supra* sec. IV.C.2.
[232] *See* discussion *supra* sec. V.C.2.
[233] UNCLOS, *supra* note 8, art. 19.
[234] *Id.* art. 25.
[235] *See* U.N. Charter, art. 51; COMMANDER'S HANDBOOK, *supra* note 9, para. 4.4.

b. Non-Destructive Countermeasures in International Straits

Within international straits and archipelagic sea lanes, although the waters themselves are technically still part of the coastal state's territorial seas,[236] these waterway are addressed by separate legal regimes that provide greater rights to foreign ships transiting the area.[237] Moreover, coastal states are prohibited from suspending transit and must refrain from acts that have the practical impact of denying transit passage.[238] In this manner, UNCLOS treats international straits and archipelagic sea lanes more like the high seas than as part of the territorial sea. Consequently, foreign ships exercising transit passage may be permitted a greater degree of flexibility in responding to a dangerous violation of international law by a coastal state's drone.

To a degree, the concerns weighing against use of countermeasures in the territorial sea still apply. However, non-destructive forcible countermeasures that eliminate the threat posed by the drone without destroying the drone itself, such as use of EW to disrupt a drone's communications signal, would be appropriate responses to dangerous drone encounters in international and archipelagic straits. More importantly, use of non-destructive countermeasures avoids any potential violation of the territorial integrity or political independence of the coastal state. Such measures appropriately balance the naval commander's need to counter the direct threat posed by the drone and deter future violations of international law, with the due regard required for the coastal state's continuing, albeit reduced, right under international law to regulate that portion of its sovereign territory. As noted above, this would neither preclude the ability to use stronger, more-destructive forcible countermeasures against a third-party drone operating without due regard in international straits, nor would it impact the right to use force in self-defense against a hostile act or demonstrated hostile intent by the coastal state.

c. Full Spectrum of Countermeasures on the High Seas

Finally, full forcible countermeasures up to, and including, destruction of a dangerous drone are permissible on the high seas and in

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[236] UNCLOS, *supra* note 8, art. 34.
[237] *Compare* UNCLOS, *supra* note 8, art. 19, *and* UNCLOS, *supra* note 8, art. 39.
[238] *Id.* art. 44.

EEZs. No state can regulate or impede the rights of navigation and overflight in these areas;[239] any action by a state to do so through dangerous, harassing drone activity that violates international law can and should be met with full forcible countermeasures. There is also no requirement under the U.N. Charter, UNCLOS, or CIL requiring that lesser, non-destructive countermeasures be attempted first.[240] Lesser measures may not be successful, and even if successful, may leave an uncontrolled drone in a position that still poses a danger to safety and navigation. Absent the need to consider the territorial integrity or political independence of a coastal state, full forcible countermeasures that result in destruction of the offending drone are permissible.

VI. Conclusion

Despite the general international law disapprobation for armed countermeasures and the use or threat of force between states, forcible countermeasures are an important and necessary right under CIL. States and their naval commanders should, and are legally entitled to, employ appropriate forcible countermeasures analogous to, but falling short, of use of force in self-defense against dangerous violations of international law not acts not rising to the level of an armed attack. This is particularly important in the modern operating environments, where unmanned vehicles frequently violate international law with impunity and pose an increasing threat to the safety and navigation of naval forces. The United States should adopt and implement a countermeasure framework as described above to combat these dangerous violations by drones by utilizing proportionate defensive countermeasures up to, and including, blowing the drone out of the sky or water.

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[239] *See id.* arts. 58, 87.

[240] *See supra* notes 184-88 and accompanying text.

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

MAJOR RYAN T. YODER*

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.[1]

I. Introduction

"You're playing a very dangerous game."[2] 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).[3] 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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[1] United States v. Akbar, 74 M.J. 364, 418 (C.A.A.F. 2015) (Baker, C.J., dissenting).

[2] 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].

[3] *Id.* Another judge described the government's tactics as a "morbid game of chicken." *Id.* at 16:59.

ineffective.[4] 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."[5]

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.[6] 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."[7] Thus, the majority of CAAF judges shared one bellwether sentiment: "Can't the [Judge Advocate General of the Army] just fix *this*?"[8]

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.[9] 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.[10] Accordingly, each Service's TJAG is required to determine not only what learned counsel is, but also how to appoint them.[11]

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

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[4] United States v. Hennis, 77 M.J. 7 (C.A.A.F. 2017); Hennis Oral Argument, *supra* note 2, at 00:01-29:16.
[5] Hennis Oral Argument, *supra* note 2, at 19:35.
[6] *Hennis*, 77 M.J. at 7-10; Hennis Oral Argument, *supra* note 2, at 00:01-29:16.
[7] Hennis Oral Argument, *supra* note 2, at 23:45.
[8] *See id*. at 13:30-35 (emphasis added).
[9] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114- 328, §§ 5186, 5334, 130 Stat. 2000, 2902, 2936 (2016) [hereinafter MJA 2016]
[10] *See id.*
[11] *See id.*
[12] 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.
[13] *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.[14] However, according to CAAF, continuing business as usual is a "dangerous game."[15]

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.[16] 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.[17] Typically, a supervisory

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[14] 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).

[15] *See* Hennis Oral Argument, *supra* note 2, at 12:22.

[16] 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.

[17] *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.[18] If necessary, the chief of the defense service appoints counsel outside the region or from the reserves after solicitation.[19] 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.[20] An accused is also able to hire a civilian attorney or request individual counsel if reasonably available.[21] 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.[22]

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.[23] 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.[24]

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]."[25] 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.

[18] *See, e.g.*, AR 27-10, *supra* note 17, para. 6-3.

[19] *Id*. LTC Rosenblatt Interview, *supra* note 14 (noting appointment procedures).

[20] *See, e.g.*, AR 27-10, *supra* note 17, para. 6-3.

[21] *See id.*

[22] 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).

[23] *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.*

[24] *See* AR 27-10, *supra* note 17, Appendix C-3 (noting detailing authorities on appeal).

[25] *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.[26] To that end, the amended statutes specifically provide authority to hire or contract for a civilian who is "learned in the law."[27]

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.[28] In addition, the new RCM 502(d)(2)(C)(ii) defines learned counsel broadly,[29] with the exact language from Rules for Trial by Military Commissions.[30] 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.[31] 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."[32] 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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[26] MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 278 (Dec. 22, 2015) [hereinafter MJRG REPORT].
[27] *See* MJA 2016, *supra* note 9, §§ 5186, 5334.
[28] *See* New MCM, *supra* note 13, at 9942.
[29] 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.").
[30] *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.].
[31] COMMISSION REG., *supra* note 30, para. 9.1.b.1.C.
[32] *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[33]

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

This absence of qualifications and experience has been criticized by military practitioners and judges alike.[38] 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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[33] 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.

[34] *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).

[35] *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).

[36] *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.

[37] *See* UCMJ, arts. 27, 70 (1994).

[38] *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.[39] While CAAF has remained reluctant to interfere in what it has deemed "internal personnel management of the military,"[40] CAAF judges have negatively commented on the lack of both minimum qualifications and experience for counsel.[41]

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.[42] Critically, the Air Force,[43] Navy, and Marines,[44] mitigate this gulf of experience by employing civilian counsel with significant appellate experience, usually assigned to all capital or complex cases.[45] 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.[46] This has been due to the length of capital litigation, transition between trial and appeals, and the normal military

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[39] *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); Untied 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).

[40] *Loving*, 41 M.J. 213 at 300.

[41] *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.

[42] *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).

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

[44] *See id*. at 58 (noting Code 45 was staffed with one civilian attorney).

[45] *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).

[46] *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.[47] 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.[48] This practice has drawn significant criticism from practitioners and judges.[49] However, in spite of this criticism, the problem persists, primarily on appeal.[50]

Further, due to the lack of availability of learned counsel, some military services have assigned one capital defense attorney to multiple cases on appeal,[51] 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.[52] 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.[53] Thus, different learned counsel for each capital appellant may be necessary to avoid conflicts of interest.[54]

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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[47] *See Loving*, 41 M.J. at 320 (Wiss, J., dissenting).

[48] *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.*

[49] *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.

[50] *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).

[51] *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).

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

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

[54] See id.

like the federal system.[55] 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."[56] 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.[57] 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.[58]

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.[59] There are two main ways to be appointed learned counsel.[60] First, a federal public defender may be detailed by the district's chief federal defender and is then appointed by the judge.[61]

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[55] *See* MJRG REPORT, *supra* note 26, at 278.
[56] *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.").
[57] *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).
[58] *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).
[59] 18 U.S.C. § 3006A (2010).
[60] *See* 18 U.S.C. § 3006A; *Defender Services*, U.S. COURTS, http://www.uscourts.gov/services-forms/defender-services (last visited Mar. 19, 2019).
[61] *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."[62] Namely, a list of qualifying attorneys are maintained by the appointing court, clerk, or designee.[63] 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.[64] 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.[65]

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.[66] Partly due to mandatory guidelines,[67] 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."[68] These qualifications also help to ensure a fair process and focuses litigation, which may result in shorter trials and direct appeals.[69] 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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[62] *See id*; *see also* 18 U.S.C. § 3006A.

[63] *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).

[64] *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].

[65] *Id*. at § 630.

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

[67] JUDICIAL GUIDE, *supra* note 64, § 620.

[68] TEN PRINCIPLES, *supra* note 66, Principle 6.

[69] *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.[70] 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.[71]

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 capitally qualified counsel as soon as possible.[72] Second, judicial appointment and funding creates an appearance of lack of independence from the government.[73] 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.[74]

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.[75] More importantly, unlike Article III judges, military judges lack plenary power over collateral, purely administrative issues unrelated to a specific court-martial.[76] Thus,

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[70] *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].

[71] *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].

[72] *See* TEN PRINCIPLES, *supra* note 66, Principle 3; STANDARDS FOR ASSIGNED COUNSEL, *supra* note 70, Standard 2.5.

[73] *See* TEN PRINCIPLES, *supra* note 66, Principle 1; STANDARDS FOR ASSIGNED COUNSEL, *supra* note 70, Standard 2.2.

[74] TEN PRINCIPLES, *supra* note 66, Principle 1; *see* STANDARDS FOR ASSIGNED COUNSEL, *supra* note 70, Standard 2.2.

[75] 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).

[76] *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.[77]

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.[78] 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.[79]

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.[80] 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.[81] While some states utilize different systems by county, others have a statewide system.[82] In many states, these pools of private attorneys are managed by a state office

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[77] *See id.*
[78] *See* Sullivan, *supra* note 34, at 47; Reyes, *supra* note 34.
[79] *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).
[80] *See infra* Appendix A.
[81] *See infra* Appendix A.
[82] *See infra* Appendix A.

separate from the judiciary and are often employed when conflicts arise.[83] 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.[84] Additionally, many of these states authorize agencies to maintain a list or pool of qualified attorneys to utilize as they see fit.[85] For example, in North Carolina, the Office of Indigent Defense Services (IDS) assigns counsel to indigent capital defendants at every stage of litigation.[86] 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.[87] 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.[88] 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.[89] 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.[90] Thus, these modified public defender systems alleviate all of the aforementioned ills suffered by the federal and military

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[83] *See infra* Appendix A.
[84] *See infra* Appendix A.
[85] *See infra* Appendix A.
[86] 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.
[87] *Id.*
[88] N.C. GEN. STAT. § 7A-498.4 (2001).
[89] *See, e.g.*, AR 27-10, *supra* note 17, para. 28-6.
[90] *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,[91] 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.[92] This may be problematic because military defense services generally do not have internal budgets large enough or internal authorities to contract counsel.[93] 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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[91] *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).

[92] *See, e.g.*, N.C. GEN. STAT. § 7A-498.4 (2001).

[93] 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.[94] However, unlike the federal system, the Office of the Chief Defender (OCD) determines whether an attorney qualifies as a learned counsel.[95] 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.[96] If counsel can be selected from within the Chief Defender's office, then that attorney is appointed.[97] However, if the Chief Defender determines outside counsel is required, a funding request is forwarded to the convening authority.[98] If the request is "reasonable," the convening authority "shall" approve the appropriate funding and execute the contract action.[99] 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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[94] 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.*

[95] COMMISSION REG., *supra* note 30, para. 9.1.

[96] *Id.*

[97] *Id.*

[98] *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).

[99] *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.[100]

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.[101] Like in *Hennis*, these arguments may include that the defense counsel is unqualified or that the government is systemically withholding adequate counsel.[102] 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.[103] 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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[100] *See* TEN PRINCIPLES, *supra* note 66.

[101] *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).

[102] *See Hennis*, 77 M.J. at 7.

[103] *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.[104] 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.[105] 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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[104] *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).

[105] 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.[106] 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.[107] 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[108] 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.[109] However, the military services have a robust source of active, reserve, and civilian personnel outside the defense services who could be appointed.[110] 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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[106] COMMISSION REG., *supra* note 30, para. 9.1 b.1.C.ii.

[107] 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.

[108] 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.

[109] *See* COMMISSION REG., *supra* note 30, para. 9.1.

[110] *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,[111] 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.[112] 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.[113] 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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[111] For example in the Army, this could be monitored by the Personnel, Plans, and Training Office in the Office of the Judge Advocate General.

[112] 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).

[113] 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.[114] Sergeant X is a Haitian citizen applying for naturalization as a U.S. citizen and his entire family is in Haiti.[115] A TDS attorney, Captain (CPT) A, a first tour officer having represented clients in five contested courts-martial sees SGT X for suspect rights.[116] CPT A informs his senior defense counsel (SDC) of his client's situation.[117] The SDC, understanding this may qualify as a capital offense, informs his regional defense counsel and immediately calls the operations officer at TDS.[118]

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.[119] In the interim, the Chief, TDS, discusses the case directly with CPT A, obtaining client confidential information relevant to appointment.[120] Upon receipt of the eligible attorney list, the Chief reviews the outside civilian counsel list, eligible attorney list, and internal TDS manning.[121] 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.[122] 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.[123]

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[114] 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).

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

[116] Qualifications are relevant for case-specific appointment of counsel. *See infra* Appendix B, paras. 28-5a, 28-8a.

[117] *See* AR 27-10, *supra* note 17, para. 6-3f.

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

[119] *See infra* Appendix B, para. 28-5c(2)i.

[120] *See infra* Appendix B, para. 28-5c(2)ii.

[121] *See infra* Appendix B, para. 28-5c(2)ii.

[122] *See infra* Appendix B, para. 28-5c, 28-6a.

[123] *See infra* Appendix B, para. 28-5c(2)iv.

In the meantime, SGT X and SSG Y are arrested by Criminal Investigations Command (CID).[124] Having anticipating 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.[125] 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.[126] 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.[127] The appointing authority reviews the lists and finds the appointment of learned counsel from within TDS and the eligible attorney list is impracticable.[128] 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.[129]

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.[130] The request indicates that the outside attorney will be paid commensurate with the federal rate of $185 per hour.[131]

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

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[124] This likely triggers the forty-five day timeline to appoint learned counsel. *See infra* Appendix B. para. 28-5c(2)v.
[125] *See infra* Appendix B, para. 28-5c(1).
[126] *See infra* Appendix B, para. 28-6a(2).
[127] *See infra* Appendix B, para. 28-6a(3).
[128] *See infra* Appendix B, para. 28-5c(2)iii.
[129] *See infra* Appendix B, para. 28-5c(2)iii.
[130] *See infra* Appendix B, paras. 28-5c(2)iii, 28-7.
[131] *See infra* Appendix B, para. 28-7h.
[132] *See infra* Appendix B, paras. 28-5c(2)iii, 28-7.

reimbursement and the contracting process is initiated by TDS.[133] 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.[134] After referral, the military judge reviews any subsequent request for funding of learned counsel for reasonableness and validates the documentation.[135] Afterward, it is forwarded to the contracting authority for TDS.[136]

Both capital litigation teams remain appointed for the duration of the case.[137] However, SGT X becomes no longer entitled to learned counsel on appeal after he pleads guilty in exchange for a non-capital referral.[138] 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.[139] 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.[140]

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.[141] 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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[133] *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.*
[134] *See infra* Appendix B, para. 28-5c(2)vi.
[135] *See infra* Appendix B, para. 28-7h.
[136] *See infra* Appendix B, para. 28-5c(2).
[137] *See infra* Appendix B, para. 28-8a.
[138] *See infra* Appendix B, para. 28-6a(1).
[139] *See infra* Appendix B, para. 28-6b(2).
[140] *See infra* Appendix B, para. 28-6a.
[141] *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.[142] 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.[143] 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.[144]

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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[142] *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 (discussing Army pilot program which may increase focus on litigation skills).

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

[144] *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.[145] Additionally, capital trials are expensive.[146] For example, the median cost for attorney's fees in fully tried federal capital cases in 2010 was $465,602.[147] Rates are continuing to increase.[148] 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.[149] As long as there are neither conflicts nor workload concerns, one learned counsel could serve as learned counsel on multiple trials.[150] 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.[151] 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.[152]

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[145] *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.*

[146] *See* DEFENDER SERVICES REPORT, *supra* note 71, at 27.

[147] *See* Reyes, *supra* note 34, at 12.

[148] JUDICIAL GUIDE, *supra* note 64, § 630 (setting a table of increasing rates).

[149] *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*].

[150] *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.

[151] *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).

[152] *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,[153] 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,[154] 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.[155] However, the annual budget for the Special Victim's Counsel Program is over ten times larger with a budget of $25 million.[156] 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.[157] Most strikingly, the cost of implementation of the proposed system is approximately .0003% of the 2017 DoD Budget.[158] 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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[153] 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).

[154] *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).

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

[156] Consolidated Appropriations Act 2017, Pub. L. No: 115-31, § 8059; 131 Stat. 135, 261 (2017).

[157] *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.

[158] *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.[159] 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."[160] Thus, the proposed system may allow the services to win both the battle and the war.

[159] *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.

[160] 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 capitally qualified counsel?**
AL	Section 13A-5-54 (2008) of the Code of Alabama. Office of Indigent Defense Service Admin Rule ALABAMA DEPARTMENT 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 DEPARTMENT 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 http://www.apdc.myarkansas.net/news/posts/initial-rule/

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 https://dpa.ky.gov/who_we_are/Education/Pages/Capital-Defense-Institute.aspx;	Department of Public Advocacy has adopted 2003 ABA Standards. See https://dpa.ky.gov/who_we_are/Education/Pages/Capital-Defense-Institute.aspx;	Department of Public Advocacy has adopted 2003 ABA Standards. See https://dpa.ky.gov/who_we_are/Education/Pages/Capital-Defense-Institute.aspx;	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 INSTATE 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, http://lpdb.la.gov/Serving%20The%20Public/Programs/Regional%20Capital%20Conflict%20Panels.php

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 http://www.ospd.ms.gov/REPORTS/OSPD%20Report%20of%20Activities%20and%20Expenditures%20July%201,%202016%20-%20June%2030,%202017.pdf
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 https://c.ymcdn.com/sites/www.nebar.com/resource/resmgr/MJC/MJIC-2004IndigDefenSys.pdf).
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, https://www.nh.gov/judicialcouncil/documents/capital-post-conviction-counsel.pdf)	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, https://www.nh.gov/judicialcouncil/documents/private-bar-2014.pdf.
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. http://www.ncids.org/Rules%20&%20Procedures/IDS%20Rules/IDS%20Rules%20Part%202.pdf
OH	Supreme Court Rules for Appointment of Counsel in Capital Cases (App. Coun.R) available at https://www.supremecourt.ohio.gov/Boards/capitalCases/	Supreme Court Rules for Appointment of Counsel in Capital Cases (App. Coun.R) available at https://www.supremecourt.ohio.gov/Boards/capitalCases/	None.	Supreme Court Rules	Yes. Managed by Commission on Appointment of Counsel in Capital Cases under Ohio Supreme Court. https://www.supremecourt.ohio.gov/Boards/capitalCases/

OK	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, https://www.ok.gov/OIDS/documents/ques_trl.pdf	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 Appellate Cases, https://www.ok.gov/OIDS/documents/ques_app.pdf	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 Appellate Cases, https://www.ok.gov/OIDS/documents/ques_app.pdf	Oklahoma Indigent Services Organization may set qualifications. See Okla. Stat. §§ 22-1355.1 through 22-1355.7	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. https://www.ok.gov/OIDS/documents/Annual%20Report%202017.pdf. In other 2 counties,
OR	2015 ORS 151.213 established Oregon Office of Public Defense Services and gives authority to set attorney qualifications. http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf	2015 ORS 151.213 established Oregon Office of Public Defense Services and gives authority to set attorney qualifications. http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf	2015 ORS 151.213 established Oregon Office of Public Defense Services and gives authority to set attorney qualifications. http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf	2015 ORS 151.213 established Oregon Office of Public Defense Services. http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf	Yes, appointed by judge. And public defenders. See Qualification Standards for Court Appointed Counsel http://www.oregon.gov/OPDS/docs/CBS/Attorney%20Qualification%20Standards%202016.pdf. County by county. 2015 ORS 151.010.

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 County 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 http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/?fa=atc_supreme_clerks.display&fileID=attorney

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 Supplementary 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.

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 remained 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 deter- mined 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 designess, 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, CQ, 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.