

MILITARY LAW REVIEW

Volume 220

Summer 2014

THE SECRET TO MILITARY JUSTICE SUCCESS: MAXIMIZING EXPERIENCE

MAJOR JEFFREY A. GILBERG*

“Insanity is repeating the same mistakes and expecting different results.”¹

I. Introduction

Despite the best efforts at all echelons of the Judge Advocate General’s (JAG) Corps, the Army’s military justice system *continues* to suffer from a lack of litigation experience.² Army prosecutors and defense counsel are routinely sent into court with little meaningful

* Judge Advocate, U.S. Army. Presently assigned as Brigade Judge Advocate, 1st Sustainment Brigade, 1st Infantry Division, Fort Riley, Kansas. LL.M., 2014, The Judge Advocate General’s School, U.S. Army, Charlottesville, Virginia; J.D., 2004, University of Maryland School of Law; Bachelor of Arts, 2000, Bowdoin College. Previous assignments include Military District of Washington, 2005–008 (Administrative Law Attorney, 2005–2006; Trial Counsel, 2006–2008); Aberdeen Proving Ground, 2008–2010 (Defense Counsel); and, Fort Drum, 2010–2013 (Special Victim Prosecutor). Member of the bars of Massachusetts, Maryland, the District of Columbia, The Court of Appeals for the Armed Forces, and the United States Supreme Court. This article was submitted in partial completion of the Master of Laws requirements of the 62nd Judge Advocate Officer Graduate Course.

¹ Narcotics Anonymous World Service Conference Literature Sub-Committee 11 (Nov. 1981). Interestingly, this quotation has often been misattributed to Albert Einstein. See Michael Becker, *Einstein on Misattribution: ‘I probably didn’t say that,’* BECKER’S ONLINE J. (Nov. 13, 2012) [hereinafter Narcotics Anonymous], available at <http://www.news.hypercrit.net/2012/11/13/einstein-on-misattribution-i-probably-didnt-say-that/> (analyzing and presenting the possible actual sources for this quotation, to include Narcotics Anonymous literature).

² See Major Derrick W. Grace, *Sharpening the Quill and Sword: Maximizing Experience in Military Justice*, ARMY LAW., Dec. 2010, at 24 (“The Army’s military justice system suffers from a lack of experienced practitioners.”).

experience and without the benefit of a seasoned practitioner to guide them through the process.³ This lack of experience often results in substandard litigation and poor professional development of junior judge advocates. The Army JAG Corps' failure to adequately address this problem has exacerbated the issue by creating a perpetual cycle of inexperienced supervisors advising inexperienced litigators on how to try very serious cases.

None of these assertions are novel.⁴ In fact, the list of individuals who previously have written or spoken on this topic is both long and distinguished.⁵ However, while many identify the lack of litigation experience in the Army JAG Corps as the problem, very few have offered a way to address it. Further, even the ones who have—their proposed solutions are general, lacking any meaningful specificity. This article builds on the ideas of others and picks up where they left off—by combining their ideas with several best practices into one specific and detailed plan to implement immediately.

³ See *id.* at 31 (pointing out that “[o]ften, young, untested counsel in the Army are assigned cases with little or no supervision or their supervisors lack the time and experience to provide mentorship”).

⁴ See, e.g., *id.* See also Major Nathan J. Bankson, *A Justice Manager's Guide to Navigating High Profile Cases*, ARMY LAW., July 2012, at 4; Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1 (1998); Major David L. Hayden, Major Willis C. Hunter & Major Donna L. Wilkins, *Training Trial and Defense Counsel: An Approach for Supervisors*, ARMY LAW., Mar. 1994, at 21; Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 1975 MIL. L. REV. 579 (1975); Lieutenant Colonel Gary J. Holland, *Tips and Observations from the Trial Bench*, ARMY LAW., Jan. 1993, at 9; Major Fansu Ku, *From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 MIL. L. REV. 49 (2009); Major Stephen J. McManus, *TRIALS: Advocacy Training for Courts-Martial*, 35 REP. 16, no. 3 (2008); Lieutenant Colonel Edye U. Moran, *A View from the Bench: The Guilty Plea—Traps for New Counsel*, ARMY LAW., Nov. 2008, at 61; Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15; Colonel Joe P. Peck, *Critique of Counsel Subsequent to Trial*, 15 A.F. L. REV. 163 (1973); Colonel Charles N. Pede, *Military Justice, The Judge Advocate and the 21st Century*, ARMY LAW., Apr. 2011, at 32; Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, Heritage Foundation, Special Report from the Douglas & Sarah Allison Ctr. for Foreign Pol'y Stud., no. 149, Nov. 6, 2013, available at <http://report.heritage.org/sr149>.

⁵ See e.g., Grace, *supra* note 2; Bankson, *supra* note 4; Cooke, *supra* note 4; Hayden, Hunter & Wilkins, *supra* note 4; Hodson, *supra* note 4; Holland, *supra* note 4; Ku, *supra* note 4; McManus, *supra* note 4; Moran, *supra* note 4; Morris, *supra* note 4; Peck, *supra* note 4; Pede *supra* note 4; Stimson, *supra* note 4.

As a part of this article, this author conducted a two-part anonymous survey.⁶ Part One captured a snapshot of the Army JAG Corps' military justice proficiency by surveying *all* personnel then-occupying military justice litigation positions.⁷ Part Two of the survey obtained impressions—both positive and negative—of the Army's special victim prosecutor (SVP) program by surveying (1) SVPs (past and present); (2) those judge advocates who have ever tried a contested case with a SVP; (3) experienced court reporters (CRs); (4) current military judges (MJs); (5) regional defense counsel (RDCs); (6) chiefs of justice (COJs); and (7) senior defense counsel (SDCs).⁸ While Part One substantiates the problem of litigation inexperience in the Army's current military justice practice, Part Two emphasizes the benefit of pairing experienced litigators with junior counsel in real cases.

This article first identifies and substantiates the problem of inexperience in the Army's military justice system. Second, it discusses the SVP program as a successful Army initiative already in place that effectively utilizes litigation experience. Third, by building upon the success of the SVP model, as well as the ideas and observations of others, this article proposes a detailed plan that directly addresses and solves the problem of litigation inexperience in the JAG Corps.

⁶ Major Jeffrey A. Gilberg, *Criminal Law Survey (2014)* [hereinafter *Gilberg Survey*] (on file with author). The survey was anonymous, meaning that all survey responses have been coded numerically so that nobody other than this author can attribute any comment to any particular person. To the extent that a specific comment is referenced in this article, such reference is merely to that code, rather than to a name. Additionally, responses are also designated by position. Specifically, chiefs of justice are designated as COJ; regional defense counsel are designated as RDC; senior defense counsel are designated as SDC; special victim prosecutors are designated as SVP; trial counsel are designated as TC; and, court reporters are designated as CR. Therefore, as an example, a comment made by the 117th trial counsel would be cited as TC117. Additionally, when referencing any of the anonymous survey responses in this article, the male pronouns (e.g., he, him) are used over the corresponding female pronouns (e.g., she, her). However, use of the male pronoun thus does not mean that the referenced survey response was provided by a male. Similarly, whenever a survey response references another individual (e.g., an SVP with whom the survey respondent has worked), that other individual is also referenced as a male (e.g., he, him). Again, this does not mean that the referenced individual is actually a male. This choice was made to make the article easier to read by avoiding the use of the terms "he/she" and "him/her."

⁷ *Id.* For purposes of this article, military justice litigation positions are those positions that are actively involved with prosecuting or defending courts-martial, to include COJs, SDCs, TCs, DCs, and SVPs.

⁸ *Id.*

This plan realigns the Army's geographical jurisdiction, creates new supervisory positions while redefining those that already exist, alters the current military justice additional skill identifier (ASI) system, and codes certain positions with clearly defined prerequisites as part of a newly established military justice career track. None of these proposed changes, by themselves, are original.⁹ However, as a whole, this plan offers a new and comprehensive approach to solving the Army JAG Corps' very old problem of inexperience. Together, all of these changes would better utilize the litigation experience within the Corps, while simultaneously improving the development of junior judge advocates, the quality of the Army's litigation practice, and the degree of justice delivered to all.

As Brigadier General John S. Cooke, who was then serving as the Commander of the United States Legal Services Agency, once remarked, the Army's military justice system is fair and works "very well" even though it may not always get the positive recognition that it deserves.¹⁰ Nonetheless, he also recognized that the system is not perfect; therefore, "we can never stop looking for ways to improve it."¹¹ One of those imperfections continues to be the lack of litigation experience of judge advocates engaged in military justice practice. In order to properly address this problem, systemic changes that maximize the litigation expertise of the Army's law firm are necessary.¹²

II. The Problem: A Lack of Military Justice Litigation Experience

For decades, the Army's military justice system has been plagued by a lack of litigation experience. Over the years, many have identified the problem. For example, in 1973, Major General Kenneth J. Hodson, then serving as Chief Judge of the United States Court of Military Review, recognized that each of the services are always searching "for ways to

⁹ Donald Rumsfeld, the two-time former U.S. Secretary of Defense, once admitted that he was not sure if he had ever had a "truly original thought" in his entire life. DONALD RUMSFELD, RUMSFELD'S RULES: LEADERSHIP LESSONS IN BUSINESS, POLITICS, WAR, AND LIFE, at xii (2013). While Rumsfeld's admission may be an exaggeration, it nonetheless highlights an important point; logical solutions often originate in the best practices of others, building upon their ideas. The plan proposed in this article is no different.

¹⁰ Cooke, *supra* note 4, at 11–12. Brigadier General Cooke retired in 1998 as a brigadier general.

¹¹ *Id.*

¹² *See id.* at 3 (stating that there is a "necessity for military justice to change if it is to survive and thrive").

provide more independent, more experienced prosecutors and defense counsel.”¹³ Yet, despite these efforts, there remained “a need to improve the experience of counsel for both sides.”¹⁴

In the 1990s, several judge advocates continued to recognize the problem of litigation inexperience. In 1993, then Lieutenant Colonel Gary J. Holland, who at the time was serving as a military judge at Fort Stewart, cited frequent counsel rotations within Staff Judge Advocate (SJA) offices and “the waning number of courts-martial” as two explanations of why trial counsel (TCs) and defense counsel (DCs) are unable to gain meaningful litigation experience.¹⁵ This, he argued, “can be upsetting not only to counsel, but also to military judges.”¹⁶

In 1994, then Major Lawrence J. Morris, the Deputy Staff Judge Advocate at the 3d Infantry Division, substantiated Lieutenant Colonel Holland’s claim that the Army’s caseload was waning by examining the number of Army courts-martial each year between 1980 and 1992.¹⁷ Major Morris determined that there was a 69% drop during that timeframe.¹⁸ He concluded that this drop, along with a slight increase in the overall size of the JAG Corps, “translate[d] into a Corps with markedly less trial experience.”¹⁹ As fewer cases meant fewer opportunities for judge advocates to learn from experience, Major Morris argued that the problem would only worsen because supervisors and trainers tasked with mentoring junior judge advocates would gradually possess less trial experience to draw upon and share with their

¹³ Hodson, *supra* note 4, at 604. Prior to serving as the Chief Judge of the U.S. Court of Military Review (from 1971 to 1974) Major General Hodson served as The Judge Advocate General (TJAG) of the U.S. Army Judge Advocate General’s (JAG) Corps (as 27th TJAG from 1967 to 1971). Major General Hodson retired in 1974 as a major general.

¹⁴ *Id.* See also Peck, *supra* note 4, at 163 (noting that the inexperienced are assisting each other, which often “multiplies the frequency of errors”).

¹⁵ Holland, *supra* note 4, at 9. Lieutenant Colonel Holland retired as a colonel.

¹⁶ *Id.* See also Major Matthew McDonald, *A View from the Bench: “You Don’t Know What You Don’t Know,”* ARMY LAW., July 2010, at 38, 39 (stating that it should not be incumbent upon the military judge “to catch the mistakes” of counsel). Major McDonald remains on active duty and has since been promoted to lieutenant colonel.

¹⁷ Morris, *supra* note 4, at 15. Major Morris retired as a colonel.

¹⁸ *Id.* (noting that the number of total courts-martial went from 5,803 in 1980 to 1,778 in 1992).

¹⁹ *Id.*

subordinates.²⁰ Regardless, the decreasing number of cases was becoming particularly problematic because—as Brigadier General Cooke remarked in 1998—it forced supervisors to throw inexperienced litigators “into the deep end of the pool before they [were] really good swimmers.”²¹

Over the past few years, many have continued to examine the Army’s lack of litigation experience. In 2009, then Major Fansu Ku, the COJ for the 101st Airborne Division, discussed military justice experience in the context of the trial judiciary and the selection of MJs.²² She wrote that the “trial experience level of many [j]udge [a]dvocates has gone down over the years, especially with a high operational tempo and the increasing emphasis on other areas of practice.”²³ Major Ku asserted there are many judge advocates who simply do not know how “to effectively practice military justice.”²⁴

In 2010, then Major E. John Gregory, serving as a professor at the United States Military Academy, emphasized how much of a difference military justice experience can make in a deployed environment.²⁵ However, he found “the vastly different levels of military justice experience among the TCs” to be a cause for concern.²⁶ He argued that

²⁰ *Id.* See also Hayden, Hunter & Wilkins, *supra* note 4, at 21 (stating that “new trial and defense counsel will not have the benefit of their supervisors’ experience to the same extent that their predecessors had”).

²¹ Cooke, *supra* note 4, at 13. Reduced caseloads have similarly affected the other services as well. See McManus, *supra* note 4, at 16 (observing that the decreasing number of courts-martial has contributed “to an overall decrease in litigation experience”).

²² Ku, *supra* note 4. Major Ku remains on active duty and has since been promoted to lieutenant colonel. Since publishing her article, she has served as a Deputy Staff Judge Advocate (DSJA) in Afghanistan, a military judge in the Army’s first judicial circuit, and is currently the Chief of the Defense Counsel Assistance Program (DCAP). E-mail from Lieutenant Colonel Fansu Ku, to Major Jeffrey A. Gilberg (Feb. 6, 2014, 14:59 EST) (on file with author).

²³ Ku, *supra* note 4, at 75.

²⁴ *Id.* at 81 (“[T]he supposition that all [j]udge [a]dvocates know how to effectively practice military justice may no longer be valid.”).

²⁵ Major E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, ARMY LAW., Jan. 2012, at 6, 8. Major Gregory remains on active duty and has since been promoted to lieutenant colonel. E-mail from Lieutenant Colonel E. John Gregory, to Major Jeffrey A. Gilberg (Mar. 13, 2014, 19:22 EST) (on file with author).

²⁶ Gregory, *supra* note 25, at 8.

providing necessary training for inexperienced counsel is a challenging endeavor.²⁷

And, in 2012, Major Nathan J. Bankson, who was then serving in the Litigation Division at Fort Belvoir, emphasized the importance of leveraging litigation experience in high-profile cases.²⁸ In that context, Major Bankson discussed the perceived and actual lack of litigation experience of both trial and defense counsel as well as the need to identify and use experienced practitioners to assist those inexperienced counsel develop their advocacy skills.²⁹ To improve the quality of the Army's litigation in high-profile cases and the consistency with which these cases are disposed, he advocated for more training so that when such a case arises, a local, experienced attorney would be available to litigate it.³⁰

However, Major Derrick Grace's 2009 anonymous criminal law survey of judge advocates then serving in military justice positions was the first real attempt to substantiate the Army's problem of inexperience with quantifiable data.³¹ His survey was distributed to all SDCs and COJs, as well as to the judge advocates serving under their supervision.³² It asked each respondent to provide details with respect to their military justice litigation experience (i.e., number of courts-martial litigated, number of contested cases, amount of time spent in a criminal law position).³³ As a result of Major Grace's efforts, 107 judge advocates then serving in military justice positions participated in the survey.³⁴ The results substantiated what many had been saying for years—that the

²⁷ *Id.* at 8–9.

²⁸ Bankson, *supra* note 4, at 4. Major Bankson remains a major serving on active duty in the Litigation Division at Fort Belvoir, Virginia. E-mail from Major Nathan Bankson, to Major Jeffrey A. Gilberg (Feb. 6, 2014, 09:52 EST) (on file with author).

²⁹ Bankson, *supra* note 4, at 7, 11.

³⁰ *Id.* at 26.

³¹ Grace, *supra* note 2, at 24. Major Grace remains a major serving on active duty. Since the publication of his article, Major Grace has served as the Assistant Executive Officer at The Judge Advocate General's Legal Center and School (TJAGLCS), a SDC in Afghanistan, and the COJ at Fort Bliss, Texas. E-mail from Major Derrick W. Grace, to Major Jeffrey A. Gilberg (Feb. 6, 2014, 09:56 EST) (on file with author).

³² Grace, *supra* note 2, at 24 n.3.

³³ *Id.* app.

³⁴ Of the 107 survey respondents, 32 were TCs, 10 were senior trial counsel (STCs), 21 were COJs, 21 were SDCs, 21 were DCs, and 2 were not in any of the categories listed above. E-mail from Major Derrick W. Grace, to Major Jeffrey A. Gilberg (Nov. 1, 2013, 11:00 EST) (on file with author) [hereinafter Grace e-mail].

Army's military justice system "suffers from a lack of experienced practitioners."³⁵

Overall, Major Grace's survey revealed that 41.7% of his survey respondents had tried 10 or fewer total cases and 74.5% had tried 10 or fewer contested courts-martial.³⁶ Broken down further, 66.7% of the responding TCs (including senior trial counsel (STCs)) had tried 10 or fewer total cases and 89.7% of the participants had tried 10 or fewer contested courts-martial.³⁷ As Major Grace noted, the experience on the defense bar was not much better.³⁸ Of the 21 DCs who provided data, 85.7% of them had tried 10 or fewer contested courts-martial.³⁹

Equally alarming as the lack of TC and DC experience was that of their supervisors. Only 38.9% of the responding COJs had tried more than 10 contested cases.⁴⁰ And, while 55% of SDCs had tried more than 10 contested cases, the effect was the same—in 2009, it appeared to be a

³⁵ Grace, *supra* note 2, at 24. The author obtained the raw data from Major Grace's Survey, which was compiled in a Microsoft Excel spreadsheet, via e-mail. Grace e-mail, *supra* note 34. The percentages that are referenced in this article that pertain to Major Grace's Survey were determined by examining this raw data, rather than simply citing the percentages that Major Grace selected for inclusion in his article. This author wished to quantify the survey results in a slightly different way than the manner chosen by Major Grace for his article. It is important to note that the raw data provided by Major Grace includes the responses received from 105 judge advocates, rather than the 107 referenced in Major Grace's final article. This is due to Major Grace receiving responses from two judge advocates who either did not provide their position or the position was outside the focus of Major Grace's analysis. Therefore, although their responses could not be used for the raw data, their experience warranted inclusion in his article. Additionally, some of those 105 judge advocates chose to not respond to all of the questions posed by his survey. For example, only 103 of 105 provided a figure as to how many total cases they had litigated; only 98 of 105 provided data as to how many contested cases they had litigated; and, only 94 of 105 provided data as to how much time they had served in military justice positions during their respective JAG Corps careers. Due to all of the factors described above, the percentages referenced in this article may not perfectly match the percentages referenced in Major Grace's published article.

³⁶ See generally Major Derrick W. Grace, Criminal Law Survey (2009) [hereinafter Grace Survey] (on file with author). Although the conventional rule is to spell out numbers zero to ninety-nine in text and footnotes, this author has elected not to do so in many sections of this paper. This choice was made to make those sections easier to read.

³⁷ *Id.*

³⁸ Grace, *supra* note 2, at 26.

³⁹ Grace Survey, *supra* note 36.

⁴⁰ *Id.*

luck of the draw whether any particular TC or DC had access to a mentor with any meaningful experience.⁴¹

Despite Major Grace's efforts to not only identify the problem but to also quantify it with real data, the problem persisted. Perhaps his survey was ignored because it only represented a small sample of those personnel then serving in military justice positions. Perhaps some believed that if the sample size were larger, the data would reveal more litigation experience than Major Grace's survey exposed. If such doubters do exist, they are mistaken.

To confirm and further substantiate the problem of litigation inexperience, this author conducted a similar survey.⁴² However, unlike Major Grace's survey, which considered the responses of a select few, the survey underlying the findings in this article was designed to account for the litigation experience of *all* personnel currently serving in a military justice litigation position—specifically, *all* COJs, SDCs, TCs, DCs, and SVPs.⁴³

To do so, it was first necessary to determine exactly how many individuals were serving in those positions. By coordinating with the Trial Counsel Assistance Program (TCAP) and the Defense Counsel Assistance Program (DCAP), this author learned that there are currently 48 COJs, 34 SDCs, and 23 SVPs serving at installations around the world.⁴⁴ Second, those 48 COJs supervise a total of 230 TCs while those 34 SDCs supervise a total of 110 DCs.⁴⁵ Thus, at the time of the survey

⁴¹ *Id.* See also Grace, *supra* note 2, at 26 (“The fact that a STC at one post has prosecuted more than thirty cases does not assist the TC at a different post whose STC has little experience and whose COJ is at [ILE] for three months.”); Peck, *supra* note 4, at 163 (concluding that many counsel are unprepared to litigate because they lack an experienced counsel “from whom they can seek guidance and assistance”).

⁴² See generally Gilberg Survey, *supra* note 6.

⁴³ *Id.*

⁴⁴ After coordinating with the Trial Counsel Assistance Program (TCAP) and the Defense Counsel Assistance Program (DCAP), the accuracy of those lists was confirmed and/or adjusted by directly contacting the individual judge advocates listed through the spring of 2014.

⁴⁵ See generally Gilberg Survey, *supra* note 6. This was determined by asking each COJ and SDC how many counsel they supervise and adding all of their respective responses together. *Id.* See Appendix A (Distributed Surveys).

in early 2014, 445 active duty Army judge advocates were serving in military justice litigation positions.⁴⁶

Next, in order to obtain a snapshot of the military justice experience possessed by *all* 445 of these judge advocates, SVP, COJ, and SDC survey participants were asked to report back on the total number of courts-martial they have litigated, how many of those cases were contested, how many of them were in front of a panel, and how many total months of their JAG Corps careers they have spent serving in military justice positions.⁴⁷ Additionally, COJs and SDCs were asked to do the same for the counsel they supervise by polling them individually.⁴⁸ Thus, the survey sought to obtain the experiential data of all 230 TCs and all 110 DCs.⁴⁹ The survey was successful in achieving 100% participation, meaning that *every* current SVP, COJ, and SDC responded, thereby providing a complete indication of the Army JAG Corps' current military justice experience, as represented by the litigation statistics personally provided by the 445 judge advocates currently serving in military justice litigation positions.⁵⁰

The results are troubling. On average, the 445 judge advocates currently serving in the JAG Corps' military justice litigation positions have tried 16.9 total courts-martial; of those, 7.3 are contested courts-martial and 4.5 are panel cases.⁵¹ Moreover, 48.5% (compared to 41.7% in the Grace Survey⁵²) of survey respondents have tried 10 or fewer total cases and 78.0% (compared to 74.5% in the Grace Survey⁵³) have tried 10 or fewer contested courts-martial.⁵⁴ Broken down further, 71.7% (compared to 66.7% in the Grace Survey⁵⁵) of responding TCs have tried

⁴⁶ *See generally id.* This number was determined by adding the total number of SVPs (23), COJs (48), SDCs (34), TCs (230), DCs (110) to reach the combined total of 445. Additionally, five RDCs also participated in this survey; however, for purposes of this article, those positions, while in the military justice arena, are not considered *litigation* positions.

⁴⁷ *See id.* *See* Appendix A (Distributed Surveys).

⁴⁸ *Id.*

⁴⁹ *See generally id.*

⁵⁰ *Id.*

⁵¹ *Id.* Even more troubling is that the median for these values (total courts-martial, contested courts-martial, panel cases) reflect an even lower level of experience. *Id.*

⁵² Grace Survey, *supra* note 36.

⁵³ *Id.*

⁵⁴ Gilberg Survey, *supra* note 6.

⁵⁵ Grace Survey, *supra* note 36.

10 or fewer total cases and 89.0% (compared to 89.7% in the Grace Survey) of them have tried 10 or fewer contested courts-martial.⁵⁶

Once again, similar to Major Grace's findings, this survey also revealed that the experience on the defense bar—although better—remains below what it ought to be.⁵⁷ While the 230 TCs average 7.4 total courts-martial (of those, 3.2 are contested courts-martial and 2.0 are panel cases), the 110 responding DCs average 18.3 total courts-martial (of those, 7.7 are contested courts-martial and 4.6 are panel cases).⁵⁸ Despite the average DC possessing more than double the experience of the average TC, the numbers remain below the level of experience an accused should be provided. Of the 110 DCs, 72.7% (compared to 85.7% in the Grace Survey) of them had tried 10 or fewer contested courts-martial.⁵⁹ Simply stated, an accused whose professional and personal livelihood is on the line at court-martial should be afforded legal representation with more experience than this.

Also, just as Major Grace's Survey exposed in 2009, the survey for this article also uncovered an alarming lack of experience possessed by military justice supervisors.⁶⁰ While the 48 COJs average 29.0 total courts-martial (11.6 contests and 8.1 panel cases), the 34 SDCs average a comparable 31.8 total courts-martial (11.4 contests and 7.0 panel cases).⁶¹ Moreover, only 39.6% (compared to 38.9% in the Grace Survey⁶²) of the responding COJs have tried more than 10 contested cases.⁶³ Similarly, 55.8% (compared to 45% in the Grace Survey⁶⁴) of SDCs have tried 10 or fewer contested cases.⁶⁵ Regardless, the effect is the same; in 2014, just as was the case in 2009, it is a luck of the draw whether any particular TC or DC has access to a supervisor with any meaningful experience (See Table 1, Average and Median of Courts-Martial Litigated and Time in Military Justice.)⁶⁶

⁵⁶ Gilberg Survey, *supra* note 6.

⁵⁷ *See generally id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See generally id.*

⁶¹ *Id.* Once again, the median for these values reflect an even lower level of experience.

⁶² Grace Survey, *supra* note 36.

⁶³ Gilberg Survey, *supra* note 6.

⁶⁴ Grace Survey, *supra* note 36.

⁶⁵ Gilberg Survey, *supra* note 6.

⁶⁶ *See id.* SDC4 (cautioning that “most Chiefs of Justice have no idea what they are doing”).

Position	Total Cases Average / Median	Total Contested Cases Average / Median	Total Panel Cases Average / Median	Total Months in Military Justice Average / Median
230 TCs	7.42 / 5	3.2 / 1	2.0 / 1	13.16 / 11
48 COJs	29.0 / 23	11.6 / 8	8.1 / 6	45 / 45
110 DCs	18.3 / 16.5	7.7 / 7	4.6 / 3	25.9 / 26
34 SDCs	31.8 / 30	11.4 / 10	7.0 / 6	45.5 / 40
23 SVPs	58.7 / 50	30.8 / 25	20.2 / 15	71.5 / 72
Total (445)	16.9 / 10	7.3 / 4	4.5 / 2	25.2 / 18

Table 1. Average and Median of Courts-Martial Litigated and Time in Military Justice

The survey's findings expose two major concerns. First, the quality of the case presented suffers when it is litigated by junior counsel as opposed to experienced practitioners.⁶⁷ This is unfair to the Soldier accused of a crime as well as to the government, which deserves justice and accountability. Second, since there is a shortage of supervisory litigation experience, new counsel are deprived of quality on-the-job professional development that they otherwise would have received had their supervisors possessed meaningful litigation experience to pass along.⁶⁸

The 2014 case of *United States v. Hornback* highlights these concerns.⁶⁹ In that case, the Court of Appeals for the Armed Forces granted review to consider whether the TC had committed prosecutorial misconduct in a case involving drug use.⁷⁰ Overall, the military judge called at least six 39a sessions outside the presence of the members and sustained at least seven defense objections—most of which related to the TC's misunderstanding and disregard of Military Rule of Evidence (MRE) 404b.⁷¹ As the majority opinion summarized, the TC was unable “to either understand or abide by the military judge’s ruling and

⁶⁷ See, e.g., *United States v. Hornback*, 73 M.J. 155 (C.A.A.F. 2014) (providing an example of just how detrimental it can be to send an inexperienced practitioner into court alone).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 156.

⁷¹ *Id.* at 156–59.

instruction during the two-and-a-half day trial on the merits.”⁷² Judge Baker’s dissent pointed out that there were “eighteen instances of impermissible evidence coming before the members.”⁷³

Perhaps the most troubling aspect of this case was identified by Judge Ohlson in his dissent.⁷⁴ He wrote that “[t]he nagging—if unspoken—question in this case is, ‘where was the chief of justice?’”⁷⁵ Judge Ohlson also emphasized that the “trial counsel appeared to be not only ‘inexperienced’ but also ‘unsupervised.’”⁷⁶ Moreover, as he appropriately concluded, “the responsibility to protect a servicemember’s constitutional right to a fair trial does not rest solely with the lone trial counsel advocating in the courtroom; it extends to the chief of justice and to other supervisory officers as well.”⁷⁷ Although this case was affirmed, it nonetheless represents how a trial counsel’s inexperience, combined with a lack of meaningful supervisory guidance, can result in litigation disaster.⁷⁸

III. Solving the Problem by Leveraging Litigation Experience

The best way to compensate for this lack of military justice experience is by pairing junior TCs and DCs with a more seasoned litigator as co-counsel in actual cases.⁷⁹ This would enable junior counsel to gain experience under the watchful eye of an experienced practitioner.⁸⁰ Not only would this enhance the junior judge advocate’s military justice professional development, but it would also maintain the

⁷² *Id.* at 160.

⁷³ *Id.* at 162.

⁷⁴ *Id.* at 164–65.

⁷⁵ *Id.* at 165 n.1.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *See id.*

⁷⁹ *See Morris, supra* note 4, at 36 (stating that one way to “exploit the experience” is to second-chair cases); *Bankson, supra* note 4, at 12 (suggesting that “more experienced counsel can coach, train and mentor the junior counsel as they work on the case together”).

⁸⁰ *See Peck, supra* note 4, at 163 (encouraging counsel to “keep an inquisitive mind and not be ashamed to ask for suggestions and guidance from more experienced counsel”); Colonel Dennis F. Coupe & Major Charles E. Trant, *The Role of Chiefs of Military Justice as Coaches of Trial*, ARMY LAW., Aug. 1987, at 5, 9 (stressing that “[c]onstructive post-trial critiques immediately after trial, with followup after reading the record of trial, stretch the trial experience into a learning continuum”).

integrity of the case.⁸¹ In fact, some of the sister services have already launched litigation programs that seek to provide on-the-job professional development to junior judge advocates while also litigating a high-quality case.

In 1972, the Air Force (AF) created the STC program to identify “its best and most experienced litigators to serve as STCs and try the toughest cases.”⁸² These cases include sexual assault, child abuse, and homicides.⁸³ Currently, there are 18 AF STCs who are hand-selected litigators stationed across the United States, Europe, and Asia.⁸⁴ The program has been “integrated into the fabric of [AF] military justice”⁸⁵ and is utilized by AF SJAs from the investigation stage all the way through trial to maximize the quality of the government’s case.⁸⁶ With an experienced litigator available to SJAs, cases are litigated and litigated well.⁸⁷

Lieutenant Colonel Brian M. Thompson, who currently manages the AF STC program, reports that the AF’s overall conviction rate in sexual assault cases last year was 20% higher when a qualified STC was detailed to the case.⁸⁸ But, most importantly, these 18 STCs also approach each case as an opportunity to teach, train, and develop the junior judge advocate sitting with them at counsel table.⁸⁹ As Lieutenant Colonel Thompson points out, STCs are typically teamed with a judge

⁸¹ See Coupe & Trant, *supra* note 80, at 11 (concluding that quality coaching “will result in cases being tried more effectively and professionally”).

⁸² Major Brian M. Thompson, Fact Sheet: Senior Trial Counsel . . . The Air Force “Special Victims Unit” (Feb. 20, 2013) [hereinafter AF STC Fact Sheet] (on file with author). Major Thompson remains on active duty in the Air Force and has since been promoted to lieutenant colonel.

⁸³ *Id.*

⁸⁴ E-mail from Lieutenant Colonel Brian M. Thompson, to Major Jeffrey A. Gilberg (Feb. 18, 2014, 11:50 EST) (on file with author).

⁸⁵ AF STC Fact Sheet, *supra* note 82. The O-6 Chief of the AF Government Trial and Appellate Counsel Division supervises the program through the O-5 Chief Senior Trial Counsel (CSTCs), who provides mentoring, feedback, and detailing decisions to STCs while also maintaining an active caseload (12 to 15 courts-martial per year). Major Brian M. Thompson, Fact Sheet: The Air Force “Special Victims Unit”—Current Structure In Detail (Feb. 20, 2013) [hereinafter AF SVU Fact Sheet] (on file with author).

⁸⁶ AF STC Fact Sheet, *supra* note 82.

⁸⁷ E-mail from Lieutenant Colonel Brian M. Thompson, to Major Jeffrey A. Gilberg (Feb. 17, 2014, 12:21 EST) (on file with author).

⁸⁸ *Id.* (stating that the AF sexual assault conviction rate is 67% when an appropriately qualified STC is detailed to the case, versus 47% when one is not).

⁸⁹ *Id.*

advocate “who has less than two year[s]’ experience and likely has prosecuted fewer than five courts-martial.”⁹⁰ This, he argues, benefits the junior TCs by providing them “one-on-one attention from seasoned [judge advocates], who review and supervise their work during the cauldron of actual courts-martial.”⁹¹ As such, the AF has succeeded in implementing a prosecution program that not only results in quality cases litigated by experienced counsel, but also provides effective military justice professional development to inexperienced counsel, thereby developing “the next generation of [AF] litigators.”⁹²

Similarly, the United States Marine Corps (USMC) carefully details TCs and DCs to courts-martial so that appropriate and qualified individuals litigate cases.⁹³ Marine Corps judge advocates may be detailed as a TC, ATC, DC, and ADC by their commanding officer, OIC, or designee.⁹⁴ Further, detailing TCs must be based upon the perspective, “experience, qualifications, and other traditional officer duties” of the counsel being considered.⁹⁵ Likewise, detailing defense counsel, which rests with the Chief Defense Counsel (CDC), also considers the perspective experience of counsel.⁹⁶

However, striving to produce well-litigated cases by detailing competent litigators is only half of the USMC objective; it is also USMC policy to detail ATCs and ADCs to litigate these cases with an assigned first chair.⁹⁷ Similar to the AF’s STC program, the USMC’s detailing policy also strives to present well-litigated cases while also utilizing real cases as training opportunities to teach, train, and mentor co-counsel.⁹⁸

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ U.S. MARINE CORPS, ORDER P5800.16A, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION paras. 1204, 2006 (31 Aug. 1999) (C7, 10 Feb. 2014) [hereinafter LEGADMINMAN].

⁹⁴ *Id.*

⁹⁵ *Id.* para. 1204(2)(b).

⁹⁶ *Id.* paras. 2006(1)–(2).

⁹⁷ *See id.* (“The detailing of assistant defense counsel to contested and/or complex cases is encouraged.”).

⁹⁸ *See* U.S. MARINE CORPS, MARINE CORPS MILITARY JUSTICE REPORT FISCAL YEAR 2013, at 9 (6 Mar. 2014) (stating that the USMC provides “mentorship and on-the-job training offered by the [regional trial counsel] and other experienced judge advocates”) [hereinafter USMC REPORT].

Like the Marines and the AF, the Army has launched an initiative of its own that seeks to exploit the litigation experience within its Corps. In January 2009, “the Secretary of the Army directed the creation of 15 [SVP] authorizations.”⁹⁹ These SVPs, from lieutenant colonel to captain, are to “focus exclusively on litigation and training during 3-year tours—with an emphasis on sexual assault.”¹⁰⁰ In May 2011, the SVP program was expanded to a total of 23 SVPs.¹⁰¹ Because of the sensitive and emotional demands of the position, only those individuals “with the right trial skills and people skills” are selected to serve as SVPs.¹⁰² The SVPs are regional positions that—although assigned to the United States Army Legal Services Agency (USALSA) at Fort Belvoir, Virginia—are physically dispersed with duty at various installations across the Army to serve not only that installation but also their entire respective geographic area of responsibility (AOR).¹⁰³

An SVP’s mission is twofold.¹⁰⁴ First, it is “to develop and litigate special victim cases within their geographic [AOR].”¹⁰⁵ SVPs should be detailed to prosecute sexual assault cases and family violence cases and must be consulted in *every* sexual assault and special victim case in their respective jurisdictions.¹⁰⁶ Second, the SVPs’ mission is to develop, implement, and execute sexual assault and family violence training programs for investigators and TCs in their respective AORs.¹⁰⁷ This twofold mission of litigation and training is managed by TCAP, which requires each SVP to regularly coordinate and report on the number and status of each pending case within their jurisdictions.¹⁰⁸

⁹⁹ Major General Scott C. Black, *Special Victim Prosecutors and Highly Qualified Experts in Military Justice*, TJAG SENDS, Jan. 2009 [hereinafter SVP Program Announcement].

¹⁰⁰ *Id.*

¹⁰¹ Lieutenant General Dana K. Chipman, *Expansion of Special Victim Prosecutor Program*, TJAG SENDS, May 26, 2011 [hereinafter SVP Expansion Announcement].

¹⁰² *Id.*

¹⁰³ Policy Memorandum 14-06, Office of The Judge Advocate General, U.S. Dep’t of Army, subject: Special Victim Prosecutors—POLICY MEMORANDUM 14-06 para. 4. (22 Jan. 2014) [hereinafter SVP Policy Memorandum]. An SVP’s rating chain includes both an installation and an OTJAG-level supervisor. *Id.* para. 5.

¹⁰⁴ *Id.* para. 3.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* paras. 7b-c.

¹⁰⁷ *Id.* para. 3b.

¹⁰⁸ *Id.* para. 3d. The SVPs comply with this requirement by updating the online SVP database as well as submitting a case tracker and significant action slide each month to the Chief of TCAP. Telephone Interview with Lieutenant Colonel Alex Pickands, Chief, TCAP (Mar. 12, 2014) [hereinafter Pickands Interview].

Similar to the AF's STC Program and the USMC's detailing policies, the Army's SVP program also successfully leverages litigation experience by pairing seasoned practitioners with junior counsel in real cases.¹⁰⁹ Each case is a valuable training opportunity for an inexperienced attorney to learn from a battle-tested litigator.¹¹⁰ For example, as one current SVP noted, a substantial amount of his time is spent "teaching TCs a great deal about how to be a TC."¹¹¹ A former SVP noted that at trial, he would take the time to explain to the TC everything they were doing and also why they were doing it.¹¹² Another former SVP revealed that on cases in which he was detailed in front of the bar, "the TCs received scores of hours of one-on-one live advice, assistance, collaboration, and strategy."¹¹³ These efforts were and continue to be instrumental in TC development.

The SVP program demonstrates that pairing seasoned litigators with new counsel both greatly enhances the professional development of those new counsel and also improves the quality of the case presented. Lieutenant Colonel Alex Pickands, who previously served as SVP at Fort Hood and currently manages the SVP program as Chief of TCAP, reports that "SVPs have significantly increased the quality of our litigation practice."¹¹⁴ Additionally, one current SVP described an important motion session during which the TC became flustered, leaned over, and whispered "Sir, you've got this right? Because I am way out of my league here."¹¹⁵ The SVP was able to step in and provide the appropriate response, which the MJ later acknowledged had assisted him in issuing the appropriate ruling.¹¹⁶ Although the primary motivation behind the SVP program's creation may not have been to pair experienced litigators with junior counsel on real cases, it has nonetheless become a convenient side-benefit of the program.

¹⁰⁹ Pickands Interview, *supra* note 108.

¹¹⁰ See Gilberg Survey, *supra* note 6, SVP24 ("Every case was a training opportunity.").

¹¹¹ *Id.* SVP7.

¹¹² *Id.* SVP31 ("[A]t trial I have the opportunity to talk through everything we are doing, tell the [TC] what I am doing and why, and allow the [TC] to reflect on it."). See also *id.* SVP9 (reporting that he "always made the TC 1st chair and made him or her do just a little bit more than they were comfortable with"), SVP14 (observing that "there is no substitute for actually getting your hands dirty and showing co-counsel, up close, some of the techniques and strategies that are useful in prosecuting a special victim case").

¹¹³ *Id.* SVP35.

¹¹⁴ Pickands Interview, *supra* note 108.

¹¹⁵ Gilberg Survey, *supra* note 6, SVP8.

¹¹⁶ *Id.*

IV. A Success Story: The Army's Special Victim Prosecutor (SVP) Program

In theory, using real cases and experienced practitioners is an effective way to develop the Army's next generation of litigators. But, how can we be sure? Although the SVP program is still relatively new and but a small part of the Army's military justice practice, it nonetheless provides an opportunity to examine whether pairing experienced practitioners with junior counsel *actually* accomplishes this objective—namely, presenting better litigated cases while also successfully developing the Army's next wave of experienced advocates.

To do so, Part Two of this article's survey was designed to obtain impressions—both positive and negative—of the SVP program by surveying SVPs (past and present); TCs (past and present) who have ever tried a contested case with an SVP; experienced CRs; and, current MJs, COJs, RDCs, and SDCs.¹¹⁷ In particular, the survey sought feedback pertaining to the program's impact on case presentation, victim care, and the professional development of junior judge advocates.¹¹⁸ Additionally, the survey asked respondents to provide identifiable strengths and weaknesses of the program.¹¹⁹ The end result was a survey that obtained specific commentary from 269 individuals that have directly experienced the SVP program.¹²⁰ The results reveal that the SVP program has enjoyed considerable success in improving the quality of the Army's prosecution while simultaneously mentoring junior judge advocates simply by pairing them with experienced litigators as co-counsel in real cases.¹²¹

A. Valuable Professional Development

Of the 269 survey participants, 264 were asked whether SVPs positively contribute to the military justice professional development of junior judge advocates by sitting with them at counsel table in contested

¹¹⁷ See Appendix A (Distributed Surveys).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See generally Gilberg Survey, *supra* note 6. This 269 total comprised of 42 COJs, 33 SDCs, 25 Court Reporters (CRs), 8 MJs, 5 RDCs, 35 SVPs, and 121 TCs—past and present—who have ever tried a contested case with an SVP. *Id.*

¹²¹ See *Pede*, *supra* note 4, at 36 (reporting that initial reviews of the SVP program “have been universally positive”).

cases.¹²² While 240 (90.9%) of them answered “yes,” only 24 (9.1%) answered “no.”¹²³ Interestingly, positive responses were common not only among SVPs,¹²⁴ but also among COJs and SDCs. (See Table 2, Whether SVPs Positively Contribute to the Professional Development of Junior Judge Advocates.)¹²⁵

Position (Number of Responses)	Responded Yes	Responded Yes/No	Total of Yes and Yes/No Responses	Responded No
TC Responses (121)	93 (76.9%)	12 (9.9%)	105 (86.8%)	16 (13.2%)
COJ Responses (42)	35 (83.3%)	7 (16.7%)	42 (100%)	0 (0%)
SVP Responses (35)	32 (91.4%)	3 (8.6%)	35 (100%)	0 (0%)
SDC Responses (33)	17 (51.5%)	12 (36.4%)	29 (87.9%)	4 (12.1%)
CR Responses (25)	17 (68%)	4 (16%)	21 (84%)	4 (16%)
MJ Responses (8)	4 (50%)	4 (50%)	8 (100%)	0 (0%)
Total (264)	198	42	240	24
Percentage	75%	15.9%	90.9%	9.1%

Table 2. Whether SVPs Positively Contribute to the Professional Development of Junior Judge Advocates

¹²² Gilberg Survey, *supra* note 6. The five RDCs who participated in this survey were not asked the question. See Appendix A (Distributed Surveys).

¹²³ Gilberg Survey, *supra* note 6. It is important to acknowledge that of those 240 survey respondents that answered “yes,” 42 of them noted that they have also observed cases where the SVP’s contribution to the professional development of the junior judge advocate sitting with them at trial was less than what it could have been. *Id.* Of the 24 survey respondents that answered “no” to the question of whether SVPs contribute to the military justice development of junior judge advocates, 11 complained that the SVP was not sufficiently qualified, 10 of them critiqued the SVP’s lack of involvement in the case, and 7 criticized the SVP for not sharing the case enough at trial. *Id.* Additionally, 6 commented that the SVP was not interested in teaching the TC. *Id.*

¹²⁴ See, e.g., *id.* SVP1 (“I’ve tried to take on a mentorship role to empower them to take ownership of their cases . . .”), SVP11 (describing himself as a “teaching SVP” who is there to assist TCs in every aspect of their work), SVP24 (characterizing every case as “a training opportunity”).

¹²⁵ See generally *id.*

For example, several COJs remarked that SVPs give TCs “an example of what right looked like.”¹²⁶ Another COJ noted that their SVP guides TCs “through the process from the preferral to the end of the case, no matter the outcome.”¹²⁷ Many COJs described SVP contributions to TC professional development as “invaluable”¹²⁸ or “indispensable.”¹²⁹ As one COJ concluded, “the professional development for the junior counsel was exponentially greater” when an SVP was detailed to the case as co-counsel.¹³⁰

Even members of the defense bar have noticed the positive contributions that SVPs often make towards the professional development of junior judge advocates. One SDC acknowledged that “[t]he SVP’s participation has been essential in every court-martial I have ever been a part of.”¹³¹ Another SDC observed that “there was always a line in the hallway outside the SVP’s office because junior attorneys wanted his advice on the best way to do things at court-martial.”¹³² Other SDCs praised the SVPs’ active role at trial,¹³³ interest in educating junior TCs,¹³⁴ and their contributions to TC preparedness and presentation.¹³⁵ As one SDC put it, it is difficult to “see how the SVP’s presence can be anything other than an advancement of professional development of the TC.”¹³⁶

¹²⁶ *Id.* COJ5 (“The SVP provided an example of what right looked like for the TC, and guided the TC through the challenging parts of the case.”), COJ12 (“[H]aving an experienced litigator assisting during the trial showed the TCs ‘what right looks like’ and provided experience to draw from at future trials.”).

¹²⁷ *Id.* COJ16.

¹²⁸ *Id.* COJ7 (characterizing the SVP as “invaluable”), COJ30 (noting that the SVP has been an “invaluable asset” that “helps to develop the TC not only with the nuances of navigating the complex development/changes in Art[icle] 120 over the last 6 y[ea]rs, but also helps them to understand the court-martial process as a whole”), COJ35 (commenting that their SVP was “invaluable,” serving as “a rock that counsel have relied upon”).

¹²⁹ *Id.* COJ6 (describing the SVP as an “indispensable asset” in mentoring and coaching junior TCs).

¹³⁰ *Id.* COJ1.

¹³¹ *Id.* SDC2.

¹³² *Id.* SDC5. This SDC even went as far to analogize this scene to that of “a frenzy of baby piglets trying to get to the teat of knowledge.” *Id.*

¹³³ *Id.* SDC22 (noting that the SVP’s “[o]n the spot guidance and corrections were evident”).

¹³⁴ *Id.* SDC27 (stating that the SVP “was helpful and worked through solutions with the trial counsel instead of just telling them what to do”).

¹³⁵ *Id.* SDC7 (“I have no doubt that the SVP contributed significantly to the TC’s level of preparedness and presentation.”).

¹³⁶ *Id.* SDC19.

Perhaps the best way to determine whether SVPs have actually contributed to TC professional development is to ask those TCs themselves.¹³⁷ In order to do so, this author first asked all past and present SVPs to provide a list of those TCs with whom they have prosecuted a contested case during their tenure as an SVP.¹³⁸ After identifying those TCs (past and present), an anonymous survey was sent to all of them.¹³⁹ In total, 121 of them responded, thereby providing impressions of the SVP program from the perspective of TCs who actually prosecuted a contested case with an SVP sitting next to them at trial.¹⁴⁰

Of the 121 TCs responding to the survey, 105 of them (86.8%) recognized that their experience of prosecuting a case with an SVP positively contributed to their own military justice professional development.¹⁴¹ In contrast, only 16 of them (13.2%) believed that working alongside an SVP did not contribute to their professional development.¹⁴² Even more telling was that many of the responding TCs were overwhelmingly passionate about their positive SVP experiences. One TC noted that “[my SVP] did more for my professional development as a young attorney than anyone else. . . . [He] taught me everything.”¹⁴³ Another TC acknowledged that “[w]ithout [my SVP], I wouldn’t be nearly where I am in my litigation and advocacy development.”¹⁴⁴ While some TCs have described their co-counsel SVP as “paramount,”¹⁴⁵ “instrumental,”¹⁴⁶ “integral,”¹⁴⁷ and “essential”¹⁴⁸ to

¹³⁷ In one survey response, an SVP encouraged this author to ask the TCs with whom he worked to obtain more accurate information since, in his view, those TCs “are strong willed enough” to provide an honest assessment of the SVP’s contribution. *Id.* SVP6.

¹³⁸ See Appendix A (Distributed Surveys).

¹³⁹ *Id.*

¹⁴⁰ See generally Gilberg survey, *supra* note 6.

¹⁴¹ *Id.* It is important to acknowledge that of those 105 survey respondents, 12 of them noted that the SVP program’s overall impact upon their professional development was less than what it could have been. *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* TC74. See also *id.* TC41 (“If I had to pinpoint one person who developed me the most as a litigator, it would have to be this SVP.”), TC51 (“If it wasn’t for our SVP, I would have been lost.”).

¹⁴⁴ *Id.* TC84. See also *id.* TC54 (“I grew leaps and bounds thanks to the participation of the SVP.”), TC96 (volunteering that “the SVP was the first lawyer to really mentor me on how to try a case and make me feel confident in the product”).

¹⁴⁵ See, e.g., *id.* TC46 (acknowledging that “the SVP was/is paramount to my development”).

¹⁴⁶ See, e.g., *id.* TC13 (crediting the SVP’s involvement as “instrumental in my professional development.”).

their military justice professional development, others have qualified their SVPs' contributions as "vital,"¹⁴⁹ "phenomenal,"¹⁵⁰ "indispensable,"¹⁵¹ and "immensely helpful."¹⁵² As one TC put it, "[h]aving such an experienced attorney sit with me on the contested case made that trial the single best learning experience I've had as a TC."¹⁵³

B. Competent Case Presentation

With respect to case presentation, 264 of the 269 survey participants were asked whether SVPs positively contribute to the quality of the case that is presented at trial.¹⁵⁴ While 241 (91.2%) answered "yes," only 23 (8.7%) answered "no."¹⁵⁵ Once again, positive responses were common not only among SVPs,¹⁵⁶ but also from COJs and SDCs. (See Table 3, Whether SVPs Positively Contribute to the Quality of the Case Presented at Trial.)¹⁵⁷

¹⁴⁷ See, e.g., *id.* TC52 (noting that the SVP "was integral in my preparation").

¹⁴⁸ See, e.g., *id.* TC109 (writing that "having an SVP at the table was essential to my military justice professional development").

¹⁴⁹ See, e.g., *id.* TC68 (labeling the SVP as "vital to my professional development").

¹⁵⁰ See, e.g., *id.* TC16 (describing an SVP as "a phenomenal legal resource, but more importantly, a great officer and person").

¹⁵¹ See, e.g., *id.* TC44 (writing that the SVP's assistance was "indispensable on a very difficult case").

¹⁵² See, e.g., *id.* TC67 ("The SVP's participation contributed to my [military justice] professional development immensely.").

¹⁵³ *Id.* TC47. See also *id.* TC28 ("The SVP's involvement throughout trial preparation opened my eyes to considerations I would not have otherwise made.").

¹⁵⁴ See Appendix A (Distributed Surveys). The five RDCs that participated in this survey were not asked this question. *Id.*

¹⁵⁵ Gilberg Survey, *supra* note 6. It is important to acknowledge that of those 241 survey respondents that answered "yes," 37 of them also noted that in at least one case, the SVP's contribution to the quality of the case was less than what it could have been. *Id.* Of the 23 survey respondents who answered "no," 14 of them cited the SVP's busy workload as the reason, whereas 8 of them believe that the SVP(s) they worked with were not sufficiently qualified. *Id.*

¹⁵⁶ See e.g., *id.* SVP6 ("I believe almost no child case would have gone forward or had the minor victim testify if it wasn't for the SVP [p]rogram."), SVP18 (reflecting that a few cases were put "in the win column that perhaps should not have been all because we had the better more logically sound theory"), SVP24 (asserting that "[o]n at least one case I'm convinced that my being on the case was the difference between an acquittal and a conviction"), SVP25 (recalling one case in which important evidence would not have been admitted but for the SVP's presence), SVP29 (estimating that "[i]n approximately one-third of [his] cases, [he] uncovered a victim or victims that law enforcement had never found").

¹⁵⁷ See generally *id.*

Position (Number of Responses)	Responded Yes	Responded Yes/No	Total of Yes and Yes/No Responses	Responded No
TC Responses (121)	98 (81.0%)	8 (6.6%)	106 (87.6%)	15 (12.4%)
COJ Responses (42)	30 (71.4%)	11 (26.2%)	41 (97.6%)	1 (2.4%)
SVP Responses (35)	32 (91.4%)	2 (5.7%)	34 (97.1%)	1 (2.9%)
SDC Responses (33)	22 (66.7%)	8 (24.2%)	30 (90.9%)	3 (9.1%)
CR Responses (25)	19 (76%)	3 (12%)	22 (88%)	3 (12%)
MJ Responses (8)	3 (37.5%)	5 (62.5%)	8 (100%)	0 (0%)
Total (264)	204	37	241	23
Percentage	77.3%	14.0%	91.2%	8.7%

Table 3. Whether SVPs Positively Contribute to the Quality of the Case Presented at Trial

Several COJs commented that SVPs often fill an important void created by their TCs' lack of litigation experience.¹⁵⁸ As Major Bankson wrote, “[SJAs] and COJs should expect their new [TCs] to know little to nothing about military justice practice.”¹⁵⁹ In fact, of the 121 responding TCs, 93 of them (76.9%) had not litigated more than three contested courts-martial at the time of the case that they prosecuted with an SVP;¹⁶⁰ 42 of them (34.7%) had *never* litigated a contest prior to their case with the SVP.¹⁶¹ As one COJ remarked, the SVP “helped ensure our trials move[d] efficiently and our panels [were] able to focus on the evidence being presented.”¹⁶² Another COJ noted that the SVP improved the quality of the case by closing “all the rabbit holes that the defense could

¹⁵⁸ See, e.g., *id.* COJ14 (commenting that TCs “generally have little experience, and having a more experienced litigator in the courtroom is essential”), COJ17 (noting that the SVP’s experience “was evident during the trial in almost every imaginable event one would expect a junior TC to stumble over”).

¹⁵⁹ Bankson, *supra* note 4, at 11.

¹⁶⁰ Gilberg Survey, *supra* note 6.

¹⁶¹ *Id.*

¹⁶² *Id.* COJ34.

try to use for reasonable doubt.”¹⁶³ As one COJ concluded, “there is simply no way that a prosecutor with over 100 trials cannot enhance the value of the prosecution of the case.”¹⁶⁴

Once again, even members of the defense bar have noticed the positive impact that SVPs often make upon the quality of the case presentation. For example, one SDC acknowledged that “[t]ypically, contested cases without the SVP are not prepared or presented as well.”¹⁶⁵ As another SDC strongly asserted, “100%, beyond any shadow of a doubt, SVP participation improved the quality of the case presented at trial.”¹⁶⁶ Other SDCs noted that SVPs improve the case by avoiding “needless presentation of additional witnesses,”¹⁶⁷ assisting TCs “work through difficult issues as they occur in court,”¹⁶⁸ effectively using instructions to present their cases,¹⁶⁹ and coming up with “creative ideas the TCs probably would not have identified.”¹⁷⁰ As one SDC commented, “[i]t is nearly impossible to argue that placing a more experienced prosecutor . . . as a government counsel doesn’t contribute to the quality of the government case.”¹⁷¹

With respect to the 121 TCs responding to the survey, 106 of them (87.6%) recognized that the SVP positively contributed to the quality of the case.¹⁷² In contrast, only 15 (12.4%) reported that the SVP did not improve the quality of the case.¹⁷³ Just as was the case with the previous question, TCs were again overwhelmingly passionate about their positive SVP experiences. One TC noted, “I am not sure we would have obtained the same outcome without the SVP’s help.”¹⁷⁴ Another TC admitted that without the SVP, the case “would have been very, very

¹⁶³ *Id.* COJ47.

¹⁶⁴ *Id.* COJ31. *See also id.* COJ8 (asserting that “the SVP’s familiarity with the same experts/issues contributed greatly to the presentation of the government’s case”).

¹⁶⁵ *Id.* SDC9.

¹⁶⁶ *Id.* SDC5.

¹⁶⁷ *Id.* SDC2 (finding that “the SVPs have streamlined [g]overnment cases and avoided what would have otherwise been a needless presentation of additional witnesses”).

¹⁶⁸ *Id.* SDC33.

¹⁶⁹ *Id.* SDC16.

¹⁷⁰ *Id.* SDC19.

¹⁷¹ *Id.* SDC6.

¹⁷² *Id.* It is important to acknowledge that of those 106 survey respondents, 8 of them also noted that the SVP’s contribution to the quality of the case that was presented at trial was less than what it could have been. *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* TC16. *See also id.* TC33 (“I am 100% positive that the case would have been lost but for the SVP.”), TC88 (wondering what would have happened without the SVP).

ugly.”¹⁷⁵ Some TCs even commented on specific skills SVPs brought to trial that improved the quality of the case. These skills included effectively cross-examining an expert witness,¹⁷⁶ delivering a powerful closing argument,¹⁷⁷ quickly and correctly applying the rules of evidence,¹⁷⁸ and presenting the evidence in an orderly and logical manner.¹⁷⁹ As one TC put it, “[f]rom pre-trial preparation . . . to actual execution in the courtroom, the quality of the [court-martial] was far better with the SVP’s participation.”¹⁸⁰

C. Strengths and Weaknesses of the SVP Program

The survey also attempted to identify recognizable strengths and weaknesses of the SVP program by polling COJs, SDCs, experienced CRs, MJs, and RDCs.¹⁸¹ These questions were designed to provide respondents with the freedom to share whatever thoughts they might have related to the SVP program—good or bad. Overall, 42 COJs, 33 SDCs, 25 CRs, 8 MJs, and 5 RDCs responded, thereby providing 113 total responses to these questions.¹⁸² While some of the responses provided a single strength and/or weakness, others provided many.¹⁸³

¹⁷⁵ *Id.* TC24.

¹⁷⁶ *Id.* TC34 (noting that in the bridge-the-gap session that followed the trial, the military judge commented that he had “never seen a more effective cross of the defense expert forensic psychiatrist” as the SVP had done in that case). *See also id.* TC108 (admitting that without the SVP, “the use of [the government’s] experts would have been far less effective”).

¹⁷⁷ *Id.* TC43 (crediting the SVP’s skill in closing argument with “singlehandedly” winning one of his cases). *See also id.* TC35 (noting that the SVP’s closing argument “without a doubt put the nail in the coffin and solidified the guilty verdict”).

¹⁷⁸ *Id.* TC3 (acknowledging that “the SVP’s handle on the rules of evidence contributed a great deal to allowing the government to get into evidence material that otherwise might have been left out, and to stop defense from entering into evidence improper evidence”).

¹⁷⁹ *Id.* TC4 (praising the SVP for developing and executing “a coherent presentation . . . of the case”).

¹⁸⁰ *Id.* TC30. *See also id.* TC59 (stating that “at trial, our SVP was one of the best litigators I have seen”).

¹⁸¹ *See* Appendix A (Distributed Surveys).

¹⁸² *See generally* Gilberg Survey, *supra* note 6.

¹⁸³ *Id.*

With respect to the program's recognizable strengths, 70.8% of survey respondents identified the experience that SVPs bring as one of the program's biggest strengths.¹⁸⁴ Providing junior judge advocates with needed military justice assistance and mentorship (referenced by 40.7% of survey respondents),¹⁸⁵ increasing the likelihood that cases are disposed of appropriately (referenced by 27.4% of survey respondents),¹⁸⁶ and improving victim care (16.8% of survey respondents)¹⁸⁷ were other strengths of the SVP program that were frequently identified. (See Table 4, Frequently Identified Strengths of the SVP Program.)¹⁸⁸

Frequently Identified Strength	COJs	SDCs	CRs	MJs	RDCs	Total	Percentage
Adds Valuable Experience / Expertise	32	27	12	6	3	80	70.8%
Provides Quality Mentorship / Guidance	22	11	7	4	2	46	40.7%
Helps dispose of cases professionally, appropriately, and competently	11	11	4	3	2	31	27.4%

¹⁸⁴ See, e.g., *id.* COJ7 (“The strength of the SVP program is the institutional knowledge and subject matter expertise [SVPs] bring to the process.”), SDC20 (noting that “having someone who has looked at a number of cases and tried a number of contested courts-martial is the SVP [p]rogram’s greatest strength”), CR13 (commenting that one of the program’s strengths is that “[e]xperienced litigators are in the courtroom assisting the junior litigators”).

¹⁸⁵ See, e.g., *id.* COJ37 (“The TCs like having a seasoned, experienced litigator assist them, especially with issue spotting, making charging decisions, and developing themes for sentencing.”), SDC1 (stating that “[m]any SVPs are quality litigators that can be a tremendous asset to new TCs”), CR22 (observing that SVPs mentor trial counsel by sharing sensitive cases).

¹⁸⁶ See, e.g., *id.* COJ15 (stating that the “harmonizing disposition of cases across the Army” is a strength of the SVP program), SDC15 (observing that “the SVP program allows an experienced litigator to provide an honest assessment of the strengths and weaknesses of a case”), CR13 (finding that “[c]ases are cleaner and flow easier, from start to finish”).

¹⁸⁷ See, e.g., *id.* COJ14 (commenting that the SVP program gives victims “more confidence in the system”), SDC7 (noting that a principle strength of the SVP program is that it “prioritizes taking care of victims”), CR4 (asserting that “[t]he additional body to work with that victim is a huge asset”).

¹⁸⁸ See generally *id.*

Contributes to better victim care	6	2	11	0	0	19	16.8%
Provides a needed focus to sexual assault in the military	7	4	2	1	0	14	12.4%
Helps retain quality judge advocates by allowing them to remain in the courtroom	2	4	0	1	3	10	8.9%
SVP Selection	2	1	1	1	0	5	4.4%
Undecided / Unsure	0	0	4	0	0	4	3.5%
Continuity	3	0	0	0	0	3	2.7%
There are none	0	1	1	0	0	2	1.8%

Table 4. Frequently Identified Strengths of the SVP Program

On the flip side, 27.4% of survey respondents identified the SVP's busy workload as one of the program's biggest weaknesses.¹⁸⁹ On a similar note, 15.0% of the respondents commented that there are not enough SVPs.¹⁹⁰ Losing sight of justice (21.2%),¹⁹¹ a lack of local SVP accountability and/or program management (15.0%),¹⁹² poor selection of SVPs (15.9%),¹⁹³ ambiguity as to the SVP's actual role (9.7%),¹⁹⁴ and

¹⁸⁹ See, e.g., *id.* COJ11 (observing that SVPs are often “so over-extended that it’s hard for them to keep a hand in everything”), SDC23 (stating that SVPs “are so busy that they cannot get involved in cases early”), CR8 (asserting that “some SVPs have way too much on their plate”).

¹⁹⁰ See, e.g., *id.* COJ22 (noting that there are “not enough [SVPs] to go around”), SDC29 (observing that SVPs “are spread thin”), CR7 (“I don’t believe there are enough SVPs out there to handle the caseload.”).

¹⁹¹ See, e.g., *id.* SDC24 (remarking that the attitude some SVPs bring “is not simply one of zealously seeking justice but rather one of being on a mission from God”), CR16 (noting that some SVPs are becoming too personally involved with cases and are “[losing] sight of what is important in the case”).

¹⁹² See, e.g., *id.* COJ3 (frustrated by his inability to detail the SVP to anything outside the program), COJ13 (“[SVPs] aren’t accountable to the chain of command, so when the results aren’t what was hoped for, the very junior TC is held to task, and perhaps didn’t understand the trial strategies that got to a particular endstate.”).

¹⁹³ See, e.g., *id.* COJ27 (commenting that “many of the SVPs are not as experienced as I feel they should be”), SDC7 (“One weakness I see with the SVP program is that it does not always recruit experienced prosecutors, especially in smaller jurisdictions.”), CR8 (observing that some SVPs “still have issues with basics such as proper demeanor and appearance in court, how to properly enunciate when arguing, coordinating evidence in

providing an unfair advantage to the government (8.9%)¹⁹⁵ were other frequently identified weaknesses.¹⁹⁶ Additionally, 20.4% of survey respondents believe that in many cases, an SVP may actually stunt TC development by not allowing that TC to do enough at trial. (See Table 5, Frequently Identified Weaknesses of the SVP Program.)¹⁹⁷

Frequently Identified Weakness	COJs	SDCs	CRs	MJs	RDCs	Total	Percentage
SVPs are too busy to work on the case from beginning to end as a co-counsel should	16	7	7	0	5	31	27.4%
Some prosecutors are losing sight of justice (e.g., win at all cost attitude, taking undeserving cases to trial, succumbing to political pressure)	0	16	4	2	2	24	21.2%
Detrimental to TC professional development (e.g. deprives TCs of needed trial experience)	8	9	3	1	2	23	20.4%
SVP Selection	7	5	2	2	1	18	15.9%
There are not enough SVPs	9	1	4	2	1	17	15.0%
Management / Detailing / Local Unaccountable	12	3	1	1	0	17	15.0%
Lack of universal standard of what an SVP is suppose to do / Role Ambiguity	5	4	0	2	0	11	9.7%
Unfair to Defense	2	6	1	0	1	10	8.9%
There are no weaknesses	4	2	2	0	0	8	7.1%
Undecided / Unsure	0	0	4	0	0	4	3.5%

Table 5. Frequently Identified Weaknesses of the SVP Program

Despite the identified weaknesses, the data suggests that the SVP program has been largely successful, particularly when it functions as it

advance with the court reporters, not placing their hands in their pockets, properly arguing before a panel . . . et cetera”).

¹⁹⁴ See, e.g., *id.* COJ10 (opining that “SVPs consistently give TCs wrong information about the SVP’s role, which means the SVP is not actually doing what they are supposed to, and the TC is just utterly confused”), SDC6 (citing “role confusion” as a program weakness).

¹⁹⁵ See, e.g., *id.* COJ4 (asking why there aren’t any “special defense attorneys” to represent the accused in these cases), SDC5 (arguing that “[a]dding the SVP only stacks the deck further against the accused”), CR9 (advocating “that TDS should have somewhat of a parallel organization”).

¹⁹⁶ See generally *id.*

¹⁹⁷ See, e.g., *id.* COJ12 (cautioning that the “[a]ggressive handling of cases results in the potential for SVPs to take over a case, which results in TCs not obtaining the necessary experience to grow”), SDC13 (finding that some SVPs “try to immerse themselves too much into every case rather than work to coach, teach and mentor junior TCs”), CR21 (stressing that in some cases, TC development is a casualty of “SVP takeover”).

should. As the vast majority of the survey responses illustrate, detailing experienced litigators to these cases does wonders not only for the quality of the case that is presented at trial, but also for the military justice professional development of the junior judge advocate detailed as co-counsel.¹⁹⁸ The program is at its best when the SVP is able to work side-by-side with his detailed junior co-counsel, from the very beginning of the case all the way through to its conclusion.¹⁹⁹ When this happens, not only does the quality of the case improve, but it also develops the next generation of Army practitioners.²⁰⁰ As one current COJ related about his supporting SVP, he “not only gives [us] fish but [he also] teaches [us how] to fish.”²⁰¹

The main problem with the SVP model—as it is currently set up—is that there are far too many special victim cases in which this does not happen.²⁰² There are simply not enough SVPs to staff every special victim case in this manner.²⁰³ Put another way, many special victim cases go to trial without a detailed SVP at counsel table. Additionally, all of the *non-special* victim cases (e.g., larceny, fraud, AWOL) are completely ignored.²⁰⁴ As a result, inexperienced litigators continue to handle serious cases without the benefit of a seasoned practitioner to assist them; the problem of inexperience lives on.

To fully capitalize on all of the SVP program’s strengths, the SVP model should be expanded to cover the Army’s *entire* litigation practice, thereby guaranteeing that an experienced litigator is detailed to every single contested case—on both sides of the aisle—available to work that case from its inception to its conclusion. This would maximize the litigation experience of our law firm, result in better litigated cases, and facilitate a better tomorrow for the JAG Corps by molding future military justice practitioners.²⁰⁵

¹⁹⁸ See generally *id.*

¹⁹⁹ *Id.* COJ13 (remarking that “[i]f the SVP digs deep, then I think it’s a great value added”), COJ14 (finding that “when the SVP is easily available for in-person help, it contributes greatly”).

²⁰⁰ See generally *id.*

²⁰¹ See, e.g., *id.* COJ16.

²⁰² See *id.* SVP6 (admitting that he did have to “quit a few cases”).

²⁰³ See, e.g., *id.* COJ20 (describing the recurring problem of SVPs not being involved in cases early or often enough and then “swooping in at the 11th hour acting like the ‘good idea fairy’ and sharp-shooting the case”).

²⁰⁴ See *id.* TC39 (stating that “[a]s a TC it would have been helpful on any case to have an experienced litigator assisting”).

²⁰⁵ See *id.* TC38 (noting that “the newbie TC today may be the SVP tomorrow”).

V. A Proposed Plan: Building upon the Successful SVP Model

In order to address the problem of inexperience within the Army's *entire* military justice practice, substantial systemic changes should be made that build upon the success of the SVP model. First, the Army's criminal litigation program should be restructured to guarantee that both the government and the defense have an experienced litigator detailed to every single contested case.²⁰⁶ This entails realigning the Army's geographical jurisdiction (regionalizing it), creating new supervisory positions, and redefining those that already exist. Second, the responsibilities of each of those litigation positions must be clearly defined and communicated to all. Third, the current military justice ASI system should be adjusted. Fourth, certain positions should be coded with established prerequisites as part of a newly established military justice career track. All of these changes, together, would maximize the litigation experience of the Corps, while simultaneously improving the development of junior judge advocates, the quality of litigation practice, and the degree of justice delivered to all—in *every single case*.

A. Regionalize the Army's Entire Criminal Litigation Practice

Currently, Trial Defense Service (TDS), the SVP program, and the trial judiciary all operate under a regional framework. Yet, each entity has elected to divide the Army's geographical jurisdiction in different ways. While the trial judiciary is divided into five judicial circuits,²⁰⁷ TDS is divided into nine regions²⁰⁸ and the SVP program is organized into 23 AORs.²⁰⁹ Despite all three organizations prosecuting, defending, and adjudging cases that originate from the same place, each has independently organized itself in a different way. This is confusing and creates the appearance that the Army, as a whole, is disorganized in its criminal litigation practice. To address this issue, the Army's

²⁰⁶ The idea that every contested case should be litigated by an experienced counsel is not novel. *See, e.g.*, McDonald, *supra* note 16, at 40 (stating that many trial issues could be resolved by “greater involvement by first-line supervisors”); Grace, *supra* note 2, at 31 (stressing that detailing an experienced litigator to every contested case would provide junior counsel “with quality supervision sitting right next to them in court”).

²⁰⁷ U.S. ARMY TRIAL JUDICIARY, <https://www.jagcnet.army.mil/USATJ#> (last visited Mar. 19, 2014).

²⁰⁸ U.S. ARMY TRIAL DEFENSE SERV., <https://www.jagcnet.army.mil/8525781C0048C0D5> (last visited Mar. 19, 2014).

²⁰⁹ SVP Expansion Announcement, *supra* note 101.

jurisdiction should be restructured so that the trial judiciary, TDS, and the government are all universally organized within the same geographical alignment.

To various degrees, the Navy and Marines have already transitioned to a regionally structured litigation practice; the Army should follow suit. For example, in October 2010,²¹⁰ the Navy established a centralized TCAP and divided the world into nine prosecutorial regions—each one consisting of a Region Legal Service Office (RLSO).²¹¹ The RLSOs are staffed with an O-6 Commanding Officer, O-5/O-4 Senior Trial Counsel (STC), O-4/O-3 Core Trial Counsel, O-3/O-2 first-tour judge advocates, and paralegal support.²¹² While the Commanding Officer “provides oversight and review of major case issues,”²¹³ the STC serves as a “military justice manager and liaison with other prosecution and law enforcement entities.”²¹⁴ The Core Trial Counsel is responsible for prosecuting and investigating specific cases²¹⁵ and the first-tour judge advocates assist in case development, legal research, and major processes to include discovery and the victim witness advocacy program.²¹⁶

Similarly, on 1 October 2012, the Marines launched a new regional model, which divides the USMC legal community into four geographic regions—each one consisting of a Legal Services Support Section (LSSS) and several subordinate Legal Services Support Teams (LSST).²¹⁷ The four LSSSs and nine subordinate LSSTs were established “to provide legal services, in garrison, beyond the organic capability of a command’s cognizant SJA.”²¹⁸ Each LSSS, co-located

²¹⁰ E-mail from Teresa Scalzo, to Major Jeffrey A. Gilberg (Jan. 29, 2014, 17:26 EST) (on file with author).

²¹¹ PowerPoint Presentation of Commander Aaron C. Rugh, on Navy Prosecution Regions slide 1 (Oct. 10, 2013) [hereinafter Navy Prosecution Regions] (on file with author). The nine regions are: Mid-Atlantic, Naval District of Washington, Southeast, Midwest, Northwest, Southwest, Hawaii, Japan, EURAFSWA. *Id.*

²¹² *Id.* slide 2.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ PowerPoint Presentation of Major Mark D. Sameit, on Commandant of Marine Corps directed reorganization of USMC legal community slides 1–2 (Oct. 10, 2013) [hereinafter USMC Legal Community] (on file with author). The four regions are: the National Capital Region, East, West, and Pacific. *Id.* slide 1.

²¹⁸ Marine Administrative Message, 416/12, 011520Z Aug 12, Commandant, Marine Corps, subject: Provision of Legal Services Support para. 3A [hereinafter MARADMIN 416/12].

with a Marine Corps Installation (MCI) headquarters,²¹⁹ “consist[s] of an administrative support office, a regional trial counsel office, a regional defense counsel office, a regional post-trial review office, and a regional civil law office.”²²⁰ The subordinate LSSTs include “a trial counsel office, a defense services office, an administrative law office, and a legal assistance office.”²²¹

Each trial counsel office is “task-organized for specific cases” and “supported by experienced prosecutors, embedded criminal investigators, admin[istrative] support, and civilian Highly Qualified Experts (HQE).”²²² Each trial counsel office also maintains a special victim capability, guaranteeing that experienced and qualified counsel are detailed to every complex case.²²³ Under this model, command services are separated from command advice.²²⁴ Additionally, the chain of command for the LSSSs and subordinate LSSTs is “separate from, and independent of, the respective MCI SJA.”²²⁵ Although the SJA to the Commandant provides “functional supervision” over the LSSSs and LSSTs, the direction and control of the individual judge advocates’ performance rests with the LSSS and LSST OICs.²²⁶ The “exercise [of] exclusive detailing authority for all judge advocates . . . to courts-martial” remains with the LSSS OICs.²²⁷

The respective regional models implemented by the Navy and the Marines have been effective in ensuring that litigation experience is geographically dispersed to consistently assist junior judge advocates,

²¹⁹ *Id.* para. 3D. The Legal Services Support Sections (LSSS) regional offices are located at MCB Camp Butler (Pacific), MCN Camp Lejeune (East), MCB Camp Pendleton (West), and MCN Quantico (National Capital Region). *Id.*

²²⁰ *Id.*

²²¹ *Id.* para. 3E. The nine permanent (LSSTs) are located at MCB Camp Butler (Camp Foster), MCB Hawaii (Kaneohe Bay), MCB Camp Lejeune, MCAS Cherry Point, MCRD Parris Island, MCB Camp Pendleton, MCAS Miramar, MCAGCC Twenty Nine Palms, and MCB Quantico. *Id.*

²²² USMC Legal Community, *supra* note 217, slides 1–2.

²²³ *Id.* slide 1.

²²⁴ *Id.*

²²⁵ MARADMIN 416/12, *supra* note 218, para. 3F. The chain of command runs from the LSST OIC, up through the LSSS OIC and the respective regional MCI SJA with the OICs of the LSSSs and LSSTs exercising “direction and control over their sections and teams.” *Id.*

²²⁶ *Id.* para. 3G.

²²⁷ *Id.* para. 3L.

wherever they may be assigned.²²⁸ Commander Aaron R. Rugh, who currently serves as the Chief of the Navy’s TCAP, notes that the Navy’s regional organization “support[s] the Navy line community.”²²⁹ Similarly, Major General V. A. Ary, who currently serves as SJA to the Commandant of the Marine Corps, acknowledges that the regional “restructuring of the Marine Corps legal community . . . ensure[s] that [the USMC is] well-placed to confront the new military justice landscape.”²³⁰

The Army should borrow from these initiatives and launch a geographical realignment of its own. Using the trial judiciary’s circuit approach as a starting point, the Army should divide its world-wide jurisdiction into five judicial circuits, several of which would be subdivided, totaling 11 different geographical regions. This proposed realignment would enable a more consistent disbursement of the Army JAG Corps’ litigation expertise around the world to minimize the risk of junior judge advocates trying cases without meaningful mentorship. (See Figure 1, Proposed Military Justice Regional Alignment.)²³¹

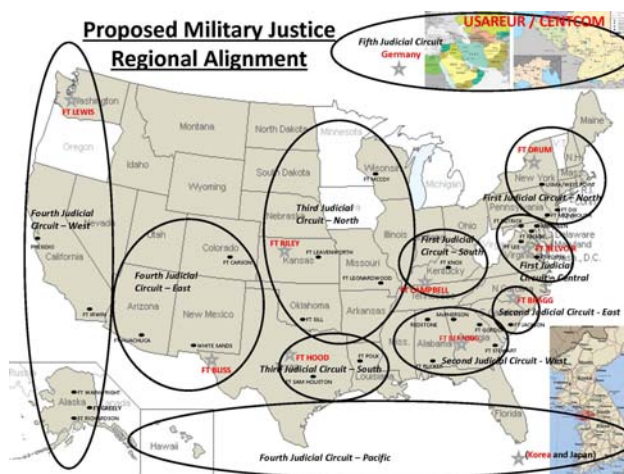


Figure 1. Proposed Military Justice Regional Alignment

²²⁸ E-mail from Commander Aaron R. Rugh, to Major Jeffrey A. Gilberg (Mar. 11, 2014, 14:59 EST) (on file with author).

²²⁹ *Id.*

²³⁰ Memorandum from Staff Judge Advocate, to the Commandant of the Marine Corps, to Commandant of the Marine Corps (6 Mar. 2014), *included in USMC REPORT, supra* note 98.

²³¹ See Appendix B (Proposed Military Justice Regional Alignment).

1. *Restructure the Army's Prosecution Program*

The Army's prosecution program should be restructured such that the entire program runs through TCAP—similar to how the SVP program currently operates. TCAP, which began operating in August of 1982, was created “to provide advice to and training for trial counsel, or military prosecutors, with the goal of improving the quality of advocacy on behalf of the government.”²³² It was envisioned that TCAP would provide regional TC training, assist with difficult cases, advise on administrative problems, and answer TC questions.²³³ Today, over 30 years later, TCAP continues to train and assist TCs stationed around the world, serving as a TC's primary source of advice outside his OSJA.²³⁴

Under this proposed plan, TCAP would maintain its dual mission of litigation and training. The Chief of TCAP²³⁵ would be responsible for overseeing all Army prosecutions in the 11 regions. The Deputy of TCAP²³⁶ would report to the Chief of TCAP and be responsible for scheduling, organizing, and executing all military justice training administered to TCs worldwide. Four TCAP Training Officers²³⁷ would be assigned to assist the Deputy of TCAP in accomplishing the training mission.

Each region would have a Chief Prosecutor (CP)²³⁸ and several SVPs²³⁹ and STCs,²⁴⁰ all of whom would be assigned to TCAP with duty at various installations around the world.²⁴¹ In total, there would be 23

²³² Major Percival Park, *The Army Judge Advocate General's Corps, 1975–1982*, 96 MIL. L. REV. 5, 34 (1982).

²³³ *Id.*

²³⁴ *Id.* See also Pickands Interview, *supra* note 108.

²³⁵ The Chief of TCAP would ordinarily hold the rank of colonel.

²³⁶ The Deputy of TCAP would ordinarily hold the rank of lieutenant colonel.

²³⁷ The TCAP Training Officers would ordinarily hold the rank of major or captain.

²³⁸ The Chief Prosecutors (CPs) would ordinarily hold the rank of lieutenant colonel.

²³⁹ The SVPs would ordinarily hold the rank of major. See Gilberg Survey, *supra* note 6, TC84 (“I think SVPs should be MAJs with a particular level of experience”), SDC20 (observing many times where a captain SVP was challenged to explain things in greater detail to senior officers because “even though the words may be the same, if he was a [major], there would be a lot more credibility behind his statements without having to explain his level of trial experience”).

²⁴⁰ The STCs would ordinarily hold the rank of captain.

²⁴¹ Every position that operates under the TCAP umbrella would officially be assigned to the U.S. Legal Services Agency (USALSA).

SVPs and 23 STCs dispersed throughout the Army worldwide (See Figure 2, Proposed Government Litigation Model.)²⁴²

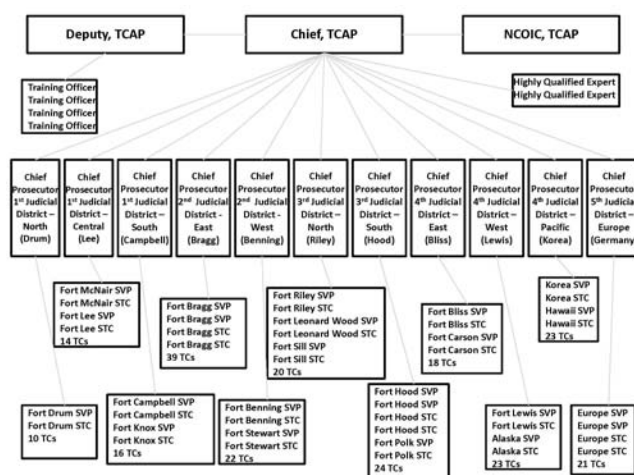


Figure 2. Proposed Government Litigation Model

The 11 CPs—similar to the Navy’s 9 RLSO’s Commanding Officers, the Marines’ LSSS OICs, and the AF’s CSTCs—would oversee all prosecution within their region, report all of the region’s significant activities to the Chief of TCAP, and prosecute high-profile cases.²⁴³ As a part of their supervisory responsibilities, CPs would guide, mentor, and rate all of the prosecutors (SVPs, STCs, and TCs) within their region. A CP’s rating chain would include the SJA from the local installation at which he works and the Chief of TCAP. Additionally, as a default, the SJA’s detailing authority would be delegated to the CP—similar to the Marines’ LSSS OIC’s detailing authority—but with consultation from the servicing COJ.²⁴⁴

²⁴² There would also be at least two Highly Qualified Experts (HQEs) assigned to TCAP to assist with its dual mission. The HQEs would continue to be utilized as they are now—as both case consultants and conference instructors. See Appendix C (Proposed Government and Defense Litigation Models).

²⁴³ Creating a regional litigation position is not a new idea. See, e.g., Grace, *supra* note 2, at 24 (proposing that the Army should add a regional military justice practitioner).

²⁴⁴ Of course, the SJA would always be free to deviate from this default. But, unless the SJA affirmatively does so in a particular case, such detailing decisions would normally be made by CPs, with consultation and input from the COJ. This is similar to how many offices already function with the COJ handling most detailing decisions.

Under this proposed model, the government would continue to utilize the 23 SVPs in a similar manner to how they are utilized now. The SVPs would continue to be responsible for overseeing, monitoring, tracking, and reporting every special victim case within their respective AOR. They would personally prosecute (along with a local TC) every contested special victim court-martial within their region and consult on all other special victim cases (stepping aside for another local TC to sit at counsel table on a guilty plea).

In the event that an SVP is unable to sit on a contested special victim case within his region, either due to a scheduling conflict or some other reason, that SVP would notify the Chief of TCAP (through the CP) as soon as the conflict is identified and one of the other 23 SVPs or 11 CPs would be detailed to prosecute that case in the conflicted SVP's place.²⁴⁵ The goal would be to have *every* contested special victim case prosecuted by either a SVP or CP.²⁴⁶ The SVP's rating chain would include their CP, the SJA from the local installation at which he works, and the Chief of TCAP.

Additionally, under this proposed reorganization, the government would appoint 23 STCs and co-locate them with the 23 SVPs. Similar to SVPs, each STC would be responsible for overseeing, monitoring, tracking, and reporting all *non*-special victim cases within their respective AORs. They would personally prosecute (along with a local TC) every contested *non*-special victim court-martial within their region and consult on all other *non*-special victim cases (stepping aside for another local TC to sit at counsel table on a guilty plea). Also, STCs would be available to backfill SVP responsibilities and assist with special victim cases when circumstances dictated such a necessity.

In the event that an STC is unable to sit on a contested *non*-special victim case within his region, either due to a scheduling conflict or some other reason, that STC would notify the Chief of TCAP (through the CP) as soon as the conflict is identified and one of the other 23 STCs or CPs would be detailed to prosecute that case in the conflicted STC's place.²⁴⁷

²⁴⁵ The Chief of TCAP would assist the CP with the logistics of ensuring that an attorney is available to be detailed in the conflicted SVP's place.

²⁴⁶ In the event that there is not an SVP or a CP available, the Chief of TCAP would make one of the STCs or TCAP Training Officers available to the CP to detail to the case in the conflicted SVP's place.

²⁴⁷ The Chief of TCAP would assist the CP with the logistics of ensuring that an attorney is available to be detailed in the conflicted STC's place.

The goal would be for *every* contested *non*-special victim case to be prosecuted by either a STC or CP.²⁴⁸ These STCs would be rated by their CP and the SJA from the local installation at which he works. As mentioned above, one critique of the SVP program is that it fails to address all of the cases that do not involve a “special victim.”²⁴⁹ This plan addresses that critique by providing an experienced litigator for *every* kind of case.

Under this model, COJs and TCs would continue to be assigned locally to support the local installation at which they are assigned; COJs would maintain responsibility for post-trial, CG actions, paralegal support, and TC training,²⁵⁰ while also consulting with the CP on detailing decisions. Moreover, TCs would continue to advise the chain of command on all military justice issues and serve as co-counsel on all courts-martial originating from their jurisdiction. While the COJs’ rating chain would not include the CP (or anyone else assigned to TCAP), the TCs’ rating chain would; specifically, it would include the COJ, CP, and SJA.

Under this prosecutorial framework, *every* contested court-martial would be prosecuted by a local TC and an experienced litigator (either a CP, SVP, STC, or TCAP Training Officer). Every case would be used as a training opportunity to develop junior counsel while maintaining the integrity of a quality prosecution. Each TC would receive quality on-the-job litigation mentorship that would greatly contribute to their military justice professional development.

²⁴⁸ In the event that there is not an STC or a CP available, the Chief of TCAP would make one of the SVPs or TCAP Training Officers available to the CP to detail to the case in the conflicted SVP’s place.

²⁴⁹ See, e.g., Gilberg Survey, *supra* note 6, COJ32 (identifying one of the weaknesses of the SVP program as the SVP’s “inability to assist in depth on non-victim cases”), SDC12 (suggesting that “it would be nice to have an experienced prosecutor on staff for all types of cases”), SDC34 (asking why we need an expert for cases with victims “but not for other complex cases, such as BAH fraud?”).

²⁵⁰ The COJs should utilize the CPs, SVPs, and STCs as instructors when designing, scheduling, and executing local TC training. See Lieutenant Colonel Maureen A. Kohn, *Special Victim Units—Not a Prosecution Program but a Justice Program*, ARMY LAW., Mar. 2010, at 68, 73 (encouraging SVPs to work closely with COJs “because part of the SVP’s role is to mentor and guide the trial counsel”); Hayden, Hunter & Williams, *supra* note 4, 29 (noting that “[r]egularly scheduled in-house training is another important tool that the supervisor can use to enhance the advocacy skills of assigned counsel”).

2. Restructure the Army's Criminal Defense Program

As Major Morris once wrote, “[i]t is in the interests of justice, and therefore the government’s interests for the Trial Defense Service (TDS) to thrive.”²⁵¹ Established in November of 1980,²⁵² TDS’s mission is to “[p]rovide competent/ethical defense counsel services for Army personnel, whenever required by law or regulation and authorized by The Judge Advocate General (TJAG).”²⁵³ In order to “thrive” in its pursuit of this mission, TDS must be afforded resources that are comparable to those provided to the government.²⁵⁴ Not only does this include access to adequate training and support, but also systemic litigation expertise available to guide DCs in providing quality representation to their clients. Therefore, the proposed plan is designed to provide TDS with an equivalent level of litigation expertise as that afforded to the government.

Similar to how the Army’s prosecution program would run, the Army’s criminal defense program would run through DCAP.²⁵⁵ And, similar to TCAP, DCAP would also operate under a dual mission of litigation and training. The Chief of DCAP²⁵⁶ would be responsible for overseeing all of the Army’s criminal defense cases in the 11 regions. The Deputy of DCAP²⁵⁷ would report to the Chief of DCAP and be responsible for scheduling, organizing, and executing all military justice training administered to Army DCs worldwide. Four DCAP Training Officers²⁵⁸ would be assigned to assist the Deputy of DCAP in completing DCAP’s training mission.

Additionally, DCAP’s regional alignment would be consistent with that of the trial judiciary and the government. Accordingly, instead of

²⁵¹ Morris, *supra* note 4, at 42.

²⁵² Lieutenant Colonel R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, ARMY LAW., Mar. 2001, at 1, 2.

²⁵³ U.S. ARMY TRIAL DEFENSE SERVICE STANDARD OPERATING PROCEDURES para. 1-3 (5 Aug. 2013).

²⁵⁴ See Lieutenant Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4, 27 (1983) (recognizing previous efforts “to equalize trial and defense counsel in terms of experience and support”); Masterton, *supra* note 252, at 29 (emphasizing that “[t]o be effective, TDS attorneys must have proper resources and training”).

²⁵⁵ Every position that operates under the DCAP umbrella would officially be assigned to the United States Army Trial Defense Service (USATDS).

²⁵⁶ The Chief of DCAP would ordinarily hold the rank of colonel.

²⁵⁷ The Deputy of DCAP would ordinarily hold the rank of lieutenant colonel.

²⁵⁸ The DCAP Training Officers would ordinarily hold the rank of major or captain.

nine regions, there would be 11. Similar to the current organization, each region would have a RDC, responsible for supervising all of the DCs within their jurisdiction.²⁵⁹ Under this proposed reorganization, RDCs would hold exclusive, non-delegable detailing authority to ensure that every contested court-martial within his region has an experienced litigator. Additionally, RDCs would also prosecute high-profile cases—spending more time in the courtroom than they do under the current TDS model. They would be rated by the Chief of DCAP and the Chief of TDS.

Under this proposed plan, there would be 46 SDCs, dispersed around the world, to ensure that DCAP has a comparable level of experience to draw upon when detailing counsel to contested courts-martial.²⁶⁰ Similar to how the government would utilize SVPs and STCs, DCAP would utilize SDCs as a valuable source of litigation experience. (See Figure 3, Proposed Defense Litigation Model.)²⁶¹

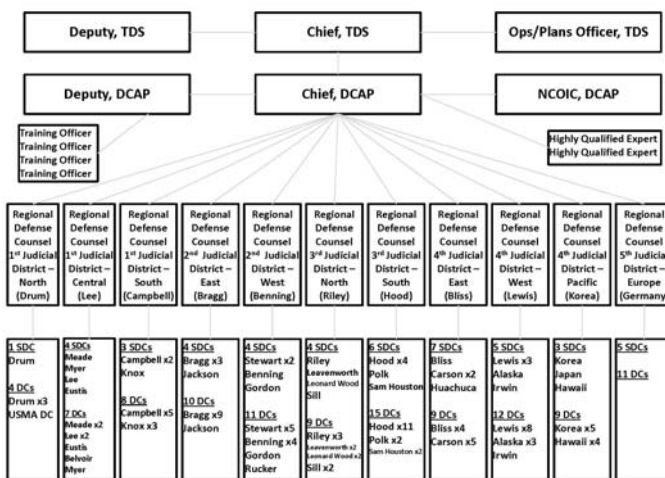


Figure 3. Proposed Defense Litigation Model

The SDCs would monitor, track, and report on all courts-martial within their respective AORs.²⁶² They would personally litigate (along

²⁵⁹ The RDCs would ordinarily hold the rank of lieutenant colonel.

²⁶⁰ While half of the SDCs would ordinarily hold the rank of major, the other half would ordinarily hold the rank of captain.

²⁶¹ See Appendix C (Proposed Government and Defense Litigation Models).

²⁶² Once a case has been preferred, the appropriate SDC would be responsible for tracking it.

with a DC) every contested court-martial within their AOR. As Lieutenant Colonel R. Peter Masterton, who at the time was serving as RDC in Germany, once wrote, “[r]epresenting clients at courts-martial is the most important part of the TDS mission.”²⁶³ As such, Soldiers facing court-martial rely upon TDS to meet their need for a “well-trained defense attorney.”²⁶⁴ Just as the government would be equipped with experienced SVPs and STCs to sit on all contested cases, TDS would be outfitted with experienced SDCs to do the same.

In the event that an SDC is unable to sit on a contested case within his AOR, either due to a client conflict, current workload, or some other reason, that SDC would notify the Chief of DCAP (through the RDC) as soon as the conflict is identified and one of the other 46 SDCs, 11 RDCs, or 4 DCAP Training Officers would be detailed to defend that case in the conflicted SDC’s place.²⁶⁵ The RDCs would be responsible for keeping the respective court-martial workloads of their SDCs balanced and proportionate, thereby asking the Chief of DCAP for help when workloads grow too large. The goal would be to have *every* contested case defended by either a SDC or RDC—along with a junior DC. The SDCs would ordinarily be rated by their RDC and the Chief of DCAP.

B. Working Together: Understanding the Responsibilities of Each Position

In order for the proposed system to succeed, it is crucial—particularly for the government—for everyone to know exactly how each position fits in the Army’s overall litigation scheme. To facilitate this important understanding, the responsibilities of each position must be clearly defined and communicated to all. Specifically, the following four principles should be firmly established, distributed in a clear policy, and strictly followed.

²⁶³ Masterton, *supra* note 252, at 16. Lieutenant Colonel Masterton retired as a colonel.

²⁶⁴ *Id.*

²⁶⁵ The Chief of DCAP would assist the RDC with the logistics of ensuring that a qualified attorney is available to be detailed in the conflicted SDC’s place.

1. *Legal Ownership of the Case Remains with the SJA*

The SJAs must continue to own the cases.²⁶⁶ The CPs, SVPs, and STCs should be viewed as SJA assets to assist in the appropriate disposition of every case.²⁶⁷ A default system should be established in which the SJA utilizes, relies upon, and trusts the experience and expertise of his CP to oversee all of the office's cases—similar to how many SJAs currently trust their COJ to do the same. However, having the CP asset to lean on should not excuse the SJA from knowing about each case and intervening on certain decisions, when appropriate.²⁶⁸ All CPs must understand that there may be times when the SJA overrules a strategic or tactical decision that he wanted to make. In those instances, CPs must remember that since the SJA is ultimately responsible for the case, it is the SJA who gets to make the final call.²⁶⁹

On a related note, TCs would continue to be viewed as a dual asset—both to the OSJA in which he works and also to the unit that he advises. The TCs would continue to serve as a legal advisor to the chain of command, assisting them in making decisions on case disposition. However, prior to advising the command on a particular case, junior TCs should consult their experienced co-counsel, COJ, and CP. Ideally, the prosecution team should already have an “office position” as to the recommended course of action prior to the TC advising the command. Although this much coordination may seem burdensome to TCs, it is extremely beneficial to the case for all government attorneys to be on the same page as early in the case as possible (and certainly prior to advising the chain of command). Moreover, this is already the way it successfully works when an effective SVP is involved.²⁷⁰

²⁶⁶ See Gregory, *supra* note 25, at 17 (“It is therefore imperative that a specific TC and a specific OSJA take ownership of the case.”).

²⁶⁷ See Gilberg Survey, *supra* note 6, COJ30 (highlighting the importance of SVPs being an “asset of the SJA and the COJ”).

²⁶⁸ Cooke, *supra* note 4, at 28 (writing that “[m]ore attention also needs to be paid to the role and responsibility of staff judge advocates”).

²⁶⁹ Peck, *supra* note 4, at 163 (stressing the importance of seeking SJA guidance when appropriate).

²⁷⁰ See, e.g., Gilberg Survey, *supra* note 6, SVP7 (describing the assistance that he provides as encouraging the TCs “to own the case” and helping them with complicated areas without taking the case away from them).

2. *The Two-Counsel, 50-50 Cooperation Model*

Two counsel—no more, no less—should ordinarily be detailed to every case and function as co-counsel.²⁷¹ Functioning as co-counsel should *never* mean that one attorney does all the work and the other attorney just sits next to them in the courtroom.²⁷² This general rule ought to apply to guilty pleas and contests. For all contested cases, one of those counsel would be an experienced litigator²⁷³ and one of them would be a locally assigned TC or DC. The two of them would function as a *team*, each performing approximately half of the work while regularly keeping the other up-to-date. This two-counsel, 50-50 cooperation model would apply to both the government and the defense.

The experienced litigator would utilize the case as a training opportunity to teach, mentor, and guide the locally assigned counsel through the procedural and substantive challenges of litigating a contested court-martial—much like many SVPs do in our current practice. This cooperation, which requires frequent communication between the experienced litigator and the local counsel, *must* start at the pre-preferral investigative stage and continue all the way through to the end of trial.²⁷⁴ This means working on the case in some way *every* day.²⁷⁵ Learning how to properly prepare a case for trial—whether as a prosecutor or a defense counsel—may be the most important litigation skill set to master.²⁷⁶ As Lieutenant Colonel Masterton noted, “[m]ost

²⁷¹ Morris, *supra* note 4, at 26 (“Too few courts-martial occur for counsel to acquire enough experience by only trying cases solo.”); Gregory, *supra* note 25, at 25 n.117 (asserting that in many cases, detailing too many counsel often results in a loss of unity of effort). *See also* Gilberg Survey, *supra* note 6, CR21 (observing multiple cases in which the quality of the case presentation suffered “because there were too many counsel at the government’s table”).

²⁷² *See* Gilberg Survey, *supra* note 6, SVPI (advocating that TCs should be encouraged to “take ownership of their cases”).

²⁷³ For the government, this means either a CP, SVP, STC, or TCAP Training Officer. For the defense, this means either a RDC, SDC, or DCAP Training Officer.

²⁷⁴ *See* Kohn, *supra* note 250, at 76 (emphasizing that “[t]eamwork is the key element in sexual assault investigations and prosecutions”).

²⁷⁵ *See* Morris, *supra* note 4, at 28 (stressing that “[c]ounsel literally should touch every case every day”).

²⁷⁶ *See* Lieutenant Colonel James H. Kennedy, III, *Pragmatic Execution of Foundational Leadership*, 39 REP. no. 1, 4, 6 (2012) (“The most important and hardest part of being a successful military justice attorney: preparation.”).

cases are won by careful preparation before trial, not brilliant advocacy during trial.”²⁷⁷

For the government, the CP would decide whom to detail to the case—although, ordinarily it would be the local TC assigned to the jurisdiction from which the case arose and the geographically closest SVP or STC. In the event that the experienced counsel is unable to assume such an active and early role, he must inform his CP as soon as possible so that another experienced counsel may be detailed in his place immediately. Once a case changes from a contest to a guilty plea, the CP will ordinarily replace the experienced litigator with another local TC to provide that other junior TC with an opportunity to gain additional litigation experience.²⁷⁸ Even though the case has become a guilty plea, both detailed counsel should continue to work as a team, each performing their share of the work by dividing the labor evenly.

Similarly for the defense, the RDC would decide whom to detail to the case—although, ordinarily it would be the local DC who has established an attorney-client relationship and the geographically closest SDC. In the event that the identified SDC is unable to assume such an active and early role, he must inform his RDC as soon as possible so that another experienced counsel may be detailed in his place immediately (and preferably prior to establishing an attorney-client relationship).²⁷⁹ However, unlike the government, if a case changes from a contest to a guilty plea, the SDC may remain on the case, depending upon the circumstances.²⁸⁰

3. *Encouraged Discussion and Debate*

Healthy and intelligent debate should be encouraged among co-counsel. There will inevitably be times where co-counsel cannot agree

²⁷⁷ Masterton, *supra* note 252, at 22. See also McDonald, *supra* note 16, at 39 (suggesting that counsel can overcome basic mistakes with better trial preparation).

²⁷⁸ However, in certain cases, the experienced litigator would remain on the case even after the case has changed from a contest to a guilty plea. For example, an SVP or STC might remain on a guilty plea if the TC was new, continuity of victim care required it, or the SJA demanded it.

²⁷⁹ Masterton, *supra* note 252, at 7 (stressing that it is important to identify conflict cases as early as possible).

²⁸⁰ This is primarily due to the client dynamics making it more difficult for DCs to switch in and out of cases; they are not the “fungible” counsel that TCs are.

on a particular course of action. Such tactical and strategic disagreements are beneficial to the case and must not become personal. When a disagreement does occur, the two of them should first try to resolve the issue themselves. Ordinarily, the local TC/DC should defer to the experienced counsel's judgment.²⁸¹

On occasion, the local TC/DC may feel so strongly that he is unwilling to give in. When this happens, it is important for the experienced litigator to set the tone, ensure that the local TC/DC understands that the disagreement is not personal, and bring the issue to the CP/RDC, who would break the tie.²⁸² Once the CP/RDC makes the call, both counsel need to accept that decision, move on, and once again work as a team in their pursuit of justice.²⁸³

4. Results Do Not Define Success

A successful case is defined by the process that is employed, not the result that is achieved.²⁸⁴ All that should be expected of military justice litigators—government or defense—is their absolute best effort, from the very beginning of the case all the way through to the end of trial.²⁸⁵ At the end of every case, each TC and DC should be able to say, “I gave

²⁸¹ See Coupe & Trant, *supra* note 80, at 11 (emphasizing that an experienced practitioner can “raise pretrial and post-trial issues and offer suggestions on trial preparation that simply would not occur to new counsel”); McDonald, *supra* note 16, at 39 (“Counsel should not hesitate to seek the advice of more experienced practitioners and bounce ideas off more experienced litigators.”).

²⁸² See Captain Elizabeth Cameron Hernandez & Captain Jason M. Ferguson, *The Brady Bunch: An Examination of Disclosure Obligations in the Civilian Federal and Military Justice Systems*, 67 A.F. L. REV. 187, 237 (2011) (suggesting that counsel should “seek supervisory intervention” when appropriate). Of course, for certain disagreements among defense counsel, the tiebreaker could be the client as opposed to the RDC.

²⁸³ In the event that the RDC is unable to offer support, the DCs would seek guidance and support either from DCAP or another RDC designated by DCAP.

²⁸⁴ See, e.g., Morris, *supra* note 4, at 31 (“A scorecard filled with convictions is not necessarily a measure of success.”).

²⁸⁵ See Gilberg Survey, *supra* note 6, TC42 (recalling one case in which the victim was satisfied even though there was an acquittal “because of the great efforts” made by the prosecution team “to get justice for her”).

everything I had to this case.”²⁸⁶ When that statement is true for both sides, justice has been done—regardless of the result.²⁸⁷

C. Suggested Changes to the Current Military Justice ASI System

The JAG Corps must accurately identify experienced litigators to fill the positions that call for higher levels of mentorship in the courtroom. Amending the current ASI system is critical to accomplishing this goal. The present ASI system provides a solid foundation in quantifying an individual’s military justice experience, assisting in the assignments process, and encouraging junior judge advocates to seek military justice training and experience.²⁸⁸ However, the system has some flaws that must be addressed to maximize the value that it can bring to the JAG Corps in terms of identifying and tracking litigation experience.²⁸⁹

1. *The Current Military Justice ASI System*

On 21 July 2008, then Army TJAG Major General Scott C. Black implemented the ASIs in military justice.²⁹⁰ The policy, updated on 9 June 2011, “encourages Judge Advocates (JAs) to set goals to achieve greater skill in litigation and expertise in military justice.”²⁹¹ It

²⁸⁶ The criminal justice system works best when opposing sides are both competently represented. *See id.* SDC4 (admitting that he would “much rather deal [with] somebody on the other side who is competent”).

²⁸⁷ *See* Colonel Jeffery R. Nance, *A View from the Bench: So, You want to Be a Litigator?*, ARMY LAW., Nov. 2009, at 48, 56 (“The better we are at what we do, the more likely justice will be achieved in every case. That should be what we are all about.”); Kennedy, *supra* note 276, at 6 (suggesting that “[a] truly effective justice program requires all organizations involved, not just the legal office, to be fully proficient at their part in the process”).

²⁸⁸ Grace, *supra* note 2, at 31 (stating that the ASI is a “great start” in placing qualified practitioners in appropriate positions).

²⁸⁹ Proposing changes to the current ASI system is not a new idea. *See id.* at 31–32 (suggesting that certain changes should be made to the current ASI system so that its utility as an assignment tool would not be “useless”).

²⁹⁰ Policy Memorandum 08-2, Office of the Judge Advocate General, subject: Military Justice Additional Skill Identifiers (21 July 2008) [hereinafter TJAG Policy Memo 08-2]; Major General Scott C. Black, *Additional Skill Identifiers in Military Justice*, 37-17, TJAG SENDS, July 2008 [hereinafter TJAG SENDS 37-17]. Major General Black retired as a lieutenant general.

²⁹¹ Policy Memorandum 11-7, Office of the Judge Advocate General, subject: Military Justice Skill Identifiers, para. 2a (9 June 2011) [hereinafter TJAG Policy Memo 11-7].

establishes four levels of military justice proficiency and is “designed to encourage counsel to seek out litigation-related assignments to deepen their level of military justice training and expertise.”²⁹²

One of the objectives of the ASI initiative is to identify those individuals in the JAG Corps with extensive military justice experience.²⁹³ For purposes of ASI determination, military justice experience is defined as “time spent in attorney positions substantially devoted to the investigation, prosecution, or defense of potential violations of the UCMJ, or the management supervision, or appellate review thereof.”²⁹⁴ The four ASI levels are Basic, Senior, Expert, and Master.²⁹⁵ Each of the four ASI levels requires varying amounts of “schooling and either courtroom or justice management experience.”²⁹⁶

²⁹² *Id.* para. 2b. *See also* *Pede*, *supra* note 4, at 35 (suggesting that the ASI system is meant to “incentivize and motivate [judge advocates] to train and to seek jobs in [military justice]”).

²⁹³ JAGCNET, *Frequently Asked Questions on the Military Justice ASI Program*, <https://www.jagcnet.army.mil/> (last visited Mar. 26, 2014) [hereinafter ASI FAQ].

²⁹⁴ TJAG Policy Memo 11-7, *supra* note 291, para. 3; JAGCNET, *Implementing Guidance Military Justice Additional Skill Identifier Program* para. 5b, <https://www.jagcnet.army.mil/> (last visited Mar. 26, 2014) [hereinafter ASI Guidance].

²⁹⁵ TJAG Policy Memo 11-7, *supra* note 291, para. 2b; TJAG Sends 37-17, *supra* note 290.

²⁹⁶ TJAG Policy Memo 11-7, *supra* note 291, para. 4; TJAG Sends 37-17, *supra* note 290. The Basic (ASI 1) requires 18 months as a trial or defense counsel or the litigation of 15 courts-martial, three of which must have been contested; the Senior (ASI 2) requires 30 months of military justice experience or the litigation of at least 36 courts-martial, seven of which must have been contested; the Expert (ASI 3) requires at least 48 months of military justice experience or the litigation of at least 45 courts-martial, 12 of which must have been contested; and, the Master (ASI 4) requires 96 months of military justice experience or the litigation of at least 80 courts-martial, 18 of which must have been contested. *Id.* paras. 4a-d. Each ASI level also imposes educational requirements as well. For example, while the Basic (ASI 1) requires completion of the Judge Advocate Officer Basic Course, the Criminal Law Advocacy Course (CLAC), and a qualifying TCAP or DCAP training, the Senior (ASI 2) requires completion of two advanced military justice or litigation courses and a written recommendation from a qualifying military justice practitioner. *Id.* Further, the Expert (ASI 3) requires completion of the Judge Advocate Officer Graduate Course and a written recommendation from a qualifying military justice practitioner. *Id.* para. 4c. Although the Master does not require any additional schooling, it does impose the additional requirements of working in a qualifying supervisory position and a written recommendation from a qualifying military justice practitioner. *Id.* para. 4d. *See* Appendix D (Current and Proposed ASI Prerequisites).

Every judge advocate is expected, although not required, to certify their eligibility for the appropriate skill identifier.²⁹⁷ In order to be awarded a particular ASI, judge advocates must apply through the Office of the Judge Advocate General—Criminal Law Division (OTJAG-CLD).²⁹⁸ To apply, applicants must indicate the ASI level for which they are applying and submit supporting documentation, such as results of trial, award citations, or officer evaluation reports (OERs), to verify the purported level of experience.²⁹⁹ The application is located on JAGCNet and should be submitted by uploading all necessary documentation electronically.³⁰⁰

Once submitted, the Chief, OTJAG-CLD, forwards recommendations to the Chief, Personnel, Plans & Training Office (PPTO), who approves the recommendation for the particular ASI and subsequently adds that designation to the applicant's officer record brief (ORB).³⁰¹ The Chief of PPTO has the authority to waive any of the requirements within each ASI.³⁰² Although the ASIs are not prerequisites for any particular assignment, they were envisioned to assist in the assignment process.³⁰³

2. Proposed Changes to the Current Military Justice ASI System

There are three changes that should be made to the current ASI system in order to maximize the value it can bring to the JAG Corps' military justice practice. First, the metrics required for each military justice ASI level should be adjusted. Second, the application process should be simplified. Third, applying for a military justice ASI should be a mandatory annual requirement. Each of these changes, if implemented together, would substantially increase the ASI system's overall value to the JAG Corps in terms of identifying experienced military justice practitioners.

²⁹⁷ TJAG Policy Memo 11-7, *supra* note 291, para. 5a.

²⁹⁸ *Id.* paras. 3, 5c.

²⁹⁹ *Id.* para. 5a.

³⁰⁰ ASI Guidance, *supra* note 294, para. 5d.

³⁰¹ ASI FAQ, *supra* note 293.

³⁰² TJAG Policy Memo 11-7, *supra* note 291, para. 5b.

³⁰³ *Id.* para. 2c. *See also* ASI Guidance, *supra* note 294 (“ASIs will assist the Personnel, Plans, and Training Office (PPTO) in recommending qualified officers for certain jobs.”); Pede, *supra* note 4, at 35 (“As an added benefit, SIs aid in the assignment process by helping identify [a] DC or TC for a particular case or the next potential SDC, SVP, or COJ.”).

a. Adjust the ASI Metrics

As then Colonel Charles N. Pede stated while serving as Chief of the Criminal Law and Policy Division, the ASI utilizes “commonly understood measures and metrics of experience in military justice.”³⁰⁴ However, the current “measures and metrics” are skewed, resulting in the award of a higher ASI level to many judge advocates than is appropriate.³⁰⁵ In particular, the amount of time that one must serve in a military justice position to qualify for a specific ASI level should be higher if an applicant is to qualify for an ASI based solely upon that metric.

Currently, there are two ways that one can achieve a particular ASI level—the number of cases litigated or the number of months served in a military justice position. As should be the case with any quantifiable metric that allows for the achievement of a certain level in two alternative ways, the required criteria for each method should be equivalent to one another. For example, if one has qualified for an ASI 3 based upon the number of months served in a military justice position, he should—in most cases—also qualify for an ASI 3 based on the number of cases he has litigated. The same should also be true of the reverse. Of course, there may be occasions where one qualifies for a higher ASI level under one of the methods than the level he would otherwise achieve under the other method. But, if the criteria for each method of ASI achievement are equivalent, these occasions would be few and far between. And, to the extent that it does happen, there should be an equal number of counsel that qualify for a higher ASI under the number of months in military justice method as there would be counsel that qualify for a higher ASI based on the number of cases litigated method.

This is not the case under the current ASI system. As mentioned above, Part One of this article’s survey successfully obtained the litigation experience of all 445 active duty Army judge advocates currently serving in military justice litigation positions.³⁰⁶ It did so by asking all of them to provide the total number of courts-martial they have litigated, how many of those cases were contested, how many of them

³⁰⁴ Pede, *supra* note 4, at 35. Colonel Pede remains on active duty and has since been promoted to brigadier general.

³⁰⁵ In his 2010 article, Major Grace also criticized the ASI program, suggesting that as currently set up, it does not accurately capture the military justice expertise of Army attorneys. Grace, *supra* note 2, at 24.

³⁰⁶ See generally Gilberg Survey, *supra* note 6.

were in front of a panel, and how many total months of their JAG Corps careers they have spent serving in military justice positions.³⁰⁷ Additionally, the survey also received responses from five RDCs, thereby providing data for a total of 450 active duty judge advocates.³⁰⁸ From this data, this author was able to determine which ASI each of the 450 survey participants would qualify for under each method of ASI achievement (i.e., time in military justice vs. number of cases litigated).³⁰⁹

The results reveal that under the current ASI model, there are far too many judge advocates who qualify for a higher ASI under the time spent in military justice method than they would otherwise qualify for under the number of cases litigated method.³¹⁰ Specifically, of the 450 survey respondents, 160 (35.6%) of them fall into this category.³¹¹ In contrast, only 26 (5.8%) qualify for a higher ASI based upon the number of cases they have litigated.³¹² The remaining 264 (58.7%) would qualify for the same ASI regardless of which metric is used (i.e., time in military justice vs. number of cases litigated).³¹³

Even more troubling, there are 40 (8.9%) survey respondents who would actually qualify for an ASI *two* levels higher based upon the amount of time spent in military justice than the ASI level they would otherwise qualify for based upon the number of cases litigated.³¹⁴ On the flip side, only two (0.4%) would qualify for an ASI level two levels higher based upon the number of cases litigated than the ASI level they would otherwise qualify for based on the amount of time spent in military justice. (See Table 6, Current ASI System Analysis.)³¹⁵

³⁰⁷ See Appendix A (Distributed Surveys).

³⁰⁸ Gilberg Survey, *supra* note 6.

³⁰⁹ Of course, this exercise assumes that the applicants have met the training and other requirements of the applicable ASI.

³¹⁰ See generally, Gilberg Survey, *supra* note 6. See also *id.* TC15 (“Although I occupied the TC billet for a fairly lengthy time, due to deployment and a subsequent slow jurisdiction I did not have a lot of trial experience.”), COJ10 (emphasizing that “[d]oing something for years does not necessarily make one good at it”).

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* The results revealed that under the current ASI system, 15 would qualify for ASI 4, 57 would qualify for ASI 3, 78 would qualify for ASI 2, 106 would qualify for ASI 1, and 194 would not yet qualify for an ASI. *Id.*

³¹⁵ *Id.*

Position	# of counsel achieving a higher ASI under the # of months in military justice method	# of counsel achieving an ASI <i>two</i> levels higher under the # of months in military justice method	# of counsel achieving a higher ASI under the # of cases litigated method	# of counsel achieving an ASI <i>two</i> levels higher under the # of cases litigated method	# of counsel that would qualify for the same ASI under either method
SDCs / DCs (144)	67 (46.5%)	16 (11.1%)	12 (8.3%)	0 (0%)	65 (45.1%)
COJs / TCs (278)	80 (28.8%)	20 (7.2%)	9 (3.2%)	2 (0.7%)	189 (68.0%)
SVPs (23)	8 (34.8%)	4 (17.4%)	5 (21.7%)	0 (0%)	10 (43.5%)
RDCs (5)	5 (100%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
Total (450)	160	40	26	2	264
Percentage	35.6%	8.9%	5.8%	0.4%	58.7%

Table 6. Current ASI System Analysis

This is problematic as junior judge advocates often look to these individuals for advice as litigation experts simply because of the inflated ASI level they hold. To correct this problem, the requisite amount of time that one must serve in a military justice position to qualify for a particular ASI level should be higher to minimize the risk of inexperienced counsel achieving a higher ASI level than is appropriate.³¹⁶ Specifically, the amount of time in military justice required to qualify for a particular ASI should be increased from 18 to 24 months for ASI 1; from 30 to 48 months for ASI 2; and, from 48 to 72 months for ASI 3.³¹⁷ The requirements for ASI 4 should remain at 96 months (this would separate each ASI by 24-month increments).³¹⁸

Additionally, if an applicant is to be awarded an ASI based on the number of cases litigated, it should matter how many of those cases were tried before a military panel. Perhaps the current ASI model assumes that most contested cases are tried before a military panel. However, there is a growing trend of litigating a contested court-martial before a

³¹⁶ See Appendix D (Current and Proposed ASI Prerequisites).

³¹⁷ *Id.*

³¹⁸ *Id.*

military judge alone. In fact, the survey revealed that 201 (44.7%) of the 450 survey respondents have tried *multiple* contested cases before a military judge alone.³¹⁹ This number is remarkably large considering that 245 (54.4%) of the 450 respondents have tried five or fewer contested courts-martial in their entire career.³²⁰ Moreover, 178 (45.41%) of the 392 contested courts-martial that were tried in 2013 were tried before a military judge alone (as opposed to before a military panel).³²¹

As such, the ASI criteria should be expanded to include not only the total number of cases and total number of contested cases, but also the total number of *panel* cases litigated.³²² Specifically, ASI 1 should require 2 panel cases; ASI 2 should require four panel cases; ASI 3 should require 8 panel cases; and, ASI 4 should require 12 panel cases.³²³ As the logistical complexity of trying a case before a military panel cannot be overstated, those who understand those dynamics must be identified in the Army's ASI initiative. Interestingly, the Navy's Military Justice Litigation Qualification (MJLQ), which is their version of the Army's ASI, already accounts for the number of cases tried before a military panel.³²⁴ The Army should follow suit.

Finally, the ASI scale as a whole should be altered to ensure that the increased requirements for each ASI level are consistently gradual. For example, the total number of cases required for each ASI should be in 15-case increments (15 cases required for ASI 1, 30 cases for ASI 2, 45 cases for ASI 3, and 60 cases for ASI 4).³²⁵ Similarly, the total number of contested cases required for each ASI should be in 4-case increments (4 contests for ASI 1, 8 contests for ASI 2, 12 contests for ASI 3, and 16 contests for ASI 4).³²⁶ And, the total number of panel cases should be set

³¹⁹ Gilberg Survey, *supra* note 6.

³²⁰ *Id.*

³²¹ E-mail from Tony Pottinger, to Major Jeffrey A. Gilberg (Feb. 4, 2014, 15:14 EST) (on file with author) (hereinafter Pottinger e-mail).

³²² See Appendix D (Current and Proposed ASI Prerequisites).

³²³ *Id.*

³²⁴ U.S. DEP'T OF NAVY, JAGINST 1150.2C, OFFICE OF THE JUDGE ADVOCATE GENERAL, enclosure 2 (10 Sept. 2013) [hereinafter NAVY QUALIFICATION].

³²⁵ See Appendix D (Current and Proposed ASI Prerequisites). This changes the ASI 2 total case requirement from 36 to 30 cases and the ASI 4 total case requirement from 80 to 60.

³²⁶ This changes the contested case requirements of ASI 1, ASI 2, and ASI 4 from 3 to 4, 7 to 8, and 18 to 16, respectively.

at 2 for ASI 1, 4 for ASI 2, 8 for ASI 3, and 12 for ASI 4.³²⁷ This gradual model makes more sense and is easier for applicants to understand what is required to qualify for the next ASI level.

In order to test whether these proposed changes would *actually* address the problems identified above, this author examined the data provided by the 450 survey respondents and determined which ASI each of them would qualify for under the amended ASI system outlined above.³²⁸ The results of this analysis revealed that only 69 (15.3%)—compared to 160 (35.6%) under the current ASI system—would qualify for a higher ASI based upon the amount of time they have spent in military justice than the ASI they otherwise would qualify for based upon the number of cases they have litigated.³²⁹ In contrast, 70 (15.6%) counsel—compared to 26 (5.8%) under the current ASI system—would qualify for a higher ASI based upon the number of cases they have litigated.³³⁰ The number of counsel that would qualify for the same ASI level under either model would increase from 264 (58.7%) under the current ASI system to 310 (68.9%) under the proposed ASI system.³³¹ Finally, only 8 (1.8%) survey respondents—compared to 40 (8.9%) under the current ASI system—would qualify for an ASI level *two* levels higher based upon the amount of time spent in military justice than the ASI level they would otherwise qualify for based upon the number of cases litigated. (See Table 7, Proposed ASI System Analysis.)³³²

³²⁷ See Appendix D (Current and Proposed ASI Prerequisites).

³²⁸ Again, this exercise assumes that the applicants have met the training and other requirements of the applicable ASI.

³²⁹ See Gilberg Survey, *supra* note 6.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* The results revealed that under the proposed ASI system, 22 would qualify for ASI 4, 17 would qualify for ASI 3, 60 would qualify for ASI 2, 118 would qualify for ASI 1, and 233 would not yet qualify for an ASI. *Id.*

Position	# of counsel achieving a higher ASI under the # of months in military justice method	# of counsel achieving an ASI <i>two</i> levels higher under the # of months in military justice method	# of counsel achieving a higher ASI under the # of cases litigated method	# of counsel achieving an ASI <i>two</i> levels higher under the # of cases litigated method	# of counsel that would qualify for the same ASI under either method
SDCs/DCs (144)	31 (21.5%)	5 (3.5%)	34 (23.6%)	1 (0.7%)	79 (54.9%)
COJs / TCs (278)	31 (11.2%)	2 (0.7%)	25 (9.0%)	3 (1.1%)	222 (79.9%)
SVPs (23)	5 (21.7%)	1 (4.3%)	11 (47.8%)	3 (13.0%)	7 (30.4%)
RDCs (5)	3 (60%)	0 (0%)	0 (0%)	0 (0%)	2 (40%)
Total (450)	69	8	70	7	310
Percentage	15.3%	1.8%	15.6%	1.6%	68.9%

Table 7. Proposed ASI System Analysis

As these numbers illustrate, the amended ASI system proposed above goes a long way in minimizing the risk of a judge advocate being awarded a higher ASI level than is appropriate by establishing metrics of experience that are equivalent to one another. Once again, if the metrics established under either method are equivalent, a vast majority of counsel should qualify for the same ASI level under either method of achievement. Further, the number of counsel who qualify for a higher level under one of the methods should be about the same number of counsel who qualify for a higher level under the alternative method. With 310 (68.9%) of the 450 respondents qualifying for the same ASI level under either method, 69 (15.3%) of them qualifying for a higher ASI level under the time in military justice method, and 70 (15.6%) of them qualifying for a higher ASI level under the number of cases litigated, this goal is accomplished.³³³

³³³ *Id.*

b. Simplify the ASI Application Process

The second improvement to the ASI system, simplifying the application process, allows a judge advocate to more easily communicate his experience to OTJAG. Under the current ASI system, the application process is too burdensome and takes too long. Rather than requiring counsel to hunt down and upload supporting documentation that verifies their participation in every single case, the applicant should be permitted to write a memorandum that specifically details his experience. Applicants would write it themselves and sign it, thereby certifying that its contents are true and accurate to the best of their knowledge and belief.

The memorandum would specify—by name—the cases that the applicant has litigated, a brief factual summary of the charges, which of those cases were guilty pleas, which were contests, which were tried before a military panel, a brief description of the role that he played in that case, and the result that was achieved. The memorandum would also specify the military justice positions that the applicant has held and the dates during which he served in those positions. Finally, the memorandum would detail the training events that the applicant attended, to include a sufficient description of the substance and length of the training as well as the extent of the applicant's participation. Additionally, for applicants with civilian litigation experience, such experience should also be included in the memorandum.³³⁴ In many ways, this memorandum would represent the military justice litigation résumé of its author.

Every judge advocate is an attorney, admitted to practice law by a particular state, and therefore bound by the rules of professional responsibility and legal ethics. As such, judge advocates ought to be trusted to tell the truth when documenting and certifying their experience. Nonetheless, to be vigilant in ensuring that accurate and complete information is presented in the self-certifying memorandum of experience, an applicant must obtain a supervisory endorsement. In order to obtain such an endorsement, the applicant must submit the memorandum to his rater, who would then review it and subsequently discuss it with the applicant (either in person or over the phone). The applicant's rater would not endorse the memorandum until he was

³³⁴ See, e.g., *id.* TC115 (suggesting that his previous civilian experience as an assistant district attorney helped make him a better Army litigator).

satisfied that the memorandum was accurate, complete, and in compliance with the required format.³³⁵ In the event that the applicant's rater was not satisfied, he would return it to the applicant to correct.

Additionally, the current online program should be modified so that applicants could self-certify by simply uploading their memorandum of experience and supervisory endorsement. Once an ASI candidate is able to do so, he should be able to self-certify that he has met the specific requirements for the ASI level for which he has applied. The OTJAG-CLD would then review and ratify those self-certifications, ensuring that the appropriate ASI level is reflected on that applicant's ORB. However, the ratification process would amount to nothing more than ensuring that the applicant's memorandum and endorsement were completed and uploaded—it would not entail any substantive review and would instead rely upon applicant and supervisory integrity.

Currently, the processing time for ASI 1 and ASI 2 applications is 30 to 60 days.³³⁶ For ASI 3 and ASI 4 applications, the processing time is 90 to 180 days.³³⁷ Because it takes so long to process these applications, the awarded ASI may no longer be an accurate indication of the applicant's experience by the time the application is approved. Putting the onus on the applicant to include all of their experience and on their supervisor to ensure that it is accurate, complete, and in compliance with the required format would substantially reduce the processing time for applications.³³⁸

c. Require Annual ASI Certification

Although highly encouraged and perhaps even expected, applying for an ASI is not currently required of all judge advocates. Under the current ASI system, as of 21 March 2014, there are 1,024 active duty

³³⁵ A sample memorandum would be available for all judge advocates to review in order to assist them.

³³⁶ E-mail from Master Sergeant Angela Jenkins, to Major Jeffrey A. Gilberg (Mar. 21, 2014, 15:30 EST) [hereinafter Jenkins e-mail] (on file with author).

³³⁷ *Id.*

³³⁸ Under the proposed simplified application process, letters of recommendation would no longer be required and waivers of any of the ASI level prerequisites would no longer be granted. Whether one achieves a particular ASI or not would be a simple question: either the applicant meets the experience and training requirements or not. With such a straightforward approach, it would no longer be necessary for such an involved and intricate approval process to exist.

Army judge advocates (51.2% of the JAG Corps) who have been awarded a military justice ASI.³³⁹ While this is a great start, it merely scratches the surface of what could be inventoried. Instead, ASI self-certification should be an annual requirement for *every* active duty Army attorney—much like the requirement for all judge advocates to self-certify that they are a member of a specific bar and in good standing to practice law in that state. This way, on an annual basis, JAG Corps leadership would have access to a current snapshot of the Corps' proficiency in military justice; as a Corps, we would know exactly how many of our attorneys are certified at each ASI level, *each year*. Furthermore, JAG Corps leadership would have the ability to review the specific military justice litigation experience of *any* single judge advocate simply by looking at the memorandum of experience for that particular individual.

Admittedly, implementing this requirement could be difficult. Many applicants—particularly those who have been serving in the JAG Corps for many years and perhaps not kept the best records—may have difficulty including all of their training and litigation experience in their memorandum. Perhaps the required format of the memorandum could be relaxed for those judge advocates who have been in the JAG Corps for more than four years.³⁴⁰

For example, rather than requiring these judge advocates to list *every* case they have ever litigated, they would be permitted to only list their top 5 to 10 most significant cases and estimate how many total cases they have litigated, how many of them were contested, and how many of them were before a military panel. However, for these individuals, an ASI would be awarded strictly based upon the amount of time the applicant has spent in military justice positions and not the number of cases that they have litigated (since those figures are merely estimates that are unverifiable).

³³⁹ Jenkins e-mail, *supra* note 336. There are 2000 active duty judge advocates in the U.S. Army JAG Corps. PowerPoint Presentation of Lieutenant Colonel Laura J. Calese, Field Grade Assignments Officer, Office of the Judge Advocate General, Personnel, Plans & Training Office, on 62nd Graduate Course Presentation slide 25 (Sept. 9, 2013) (on file with author) [hereinafter Calese Presentation].

³⁴⁰ The four-year threshold is suggested because that ordinarily would coincide with the length of time of one's first tour. Simply stated, with a little focus and effort, every first-tour judge advocate should be able to sit down and reconstruct the names and number of cases that he has litigated during that time.

Others might complain that completing this memorandum would be extremely time-consuming, especially for senior judge advocates doing so for the first time. However, the memorandum would be a working document that would be updated throughout one's career. Each year, all one has to do is add the experience they have gained and any military justice training they have attended in the past 12 months. In all likelihood, the applicant has probably already compiled this information when completing his evaluation support form. Long term, particularly for attorneys just now coming into the JAG Corps, the time that applicants must spend on the memorandum of experience would be marginal and far outweighed by the value that these memoranda would provide to JAG Corps leadership in the many years to come.

As then Colonel Pede once wrote, the ASI program helps JAG Corps leaders "make informed decisions."³⁴¹ Just imagine how much more informed those decisions could be if a detailed memorandum of litigation experience was available for leaders to review for *every* active duty judge advocate.

D. Code Certain Positions and Implement a Military Justice Career Track

The proposed military justice re-organization outlined above would be ineffective in detailing experienced judge advocates to contested cases unless specific measures are also put in place *guaranteeing* that those selected to serve as DCs, SDCs, RDCs, STCs, SVPs, CPs, MJJs, and TCAP/DCAP personnel are *actually* experienced military justice practitioners.³⁴² The best way to do so would be to code these positions with a prerequisite level of military justice experience, as established by the *amended* military justice ASI, and implement a military justice career track.³⁴³ The Navy has already injected such a measure into its military justice practice and the Army should follow its lead.

³⁴¹ Pede, *supra* note 4, at 35.

³⁴² Grace, *supra* note 2, at 31 (stressing the importance of assigning the right personnel to STC, SDC, and COJ positions).

³⁴³ The ideas of coding certain military justice positions with the ASI and implementing a military justice career track have been proposed before. *See, e.g., id.* at 26, 31 (suggesting that the Army implement a MJ career track similar to the Navy and use the ASI system to ensure that certain military justice practitioners have the necessary experience required of them); Cooke, *supra* note 4, at 29 ("One alternative may be specialization."); Ku, *supra* note 4, at 81 (arguing that military justice specialization

In recognition that the delivery of military justice is “both a core competency and primary mission of the JAG Corps,”³⁴⁴ the Navy created a Military Justice Litigation Career Track (MJLCT) to recruit, identify, select, and retain qualified military justice practitioners in the JAG Corps.³⁴⁵ To aid in this endeavor, the Navy also established the MJLQ, which is their method of quantifying and qualifying an individual’s litigation expertise.³⁴⁶ There are three MJLQs: Specialist I, Specialist II, and Expert.³⁴⁷

As a part of the MJLCT, the Navy JAG designated 53 billets as MJLQ-required.³⁴⁸ These positions are MJLQ-coded because they have been identified as positions that “necessitate a certain amount of military justice litigation experience.”³⁴⁹ In addition to the litigation expertise that each MJLQ judge advocate is expected to bring to these coded positions, they are also expected to mentor and train junior judge advocates with whom they work.³⁵⁰ In fact, the Navy has instructed that “training programs shall be an integral part of the MJLCT professional development along with the mentoring by senior MJLQ judge advocates in the courtroom.”³⁵¹

Similar to the Navy, the Army should designate certain billets as ASI-required.³⁵² Specifically, DCs should possess an ASI 1; STCs, TCAP/DCAP Training Officers, and 23 of the SDCs an ASI 2; SVPs and

would be “one huge step in the right direction”); Stimson, *supra* note 4 (arguing that establishing a military justice career track is “the best way to strengthen the military criminal justice system over the long term”).

³⁴⁴ NAVY QUALIFICATION, *supra* note 324, para. 3a(1).

³⁴⁵ *Id.* para. 1.

³⁴⁶ *Id.* paras. 1, 3a(4).

³⁴⁷ *Id.* paras. 3b, 3c, 3d. The Specialist I MJLQ requires four years in service and participation in ten panel cases, of which at least five must be as lead counsel; the Specialist II MJLQ requires ten years in service, of which at least three years must be in a MJLQ billet, and participation in 20 members cases, of which at least ten must be as lead counsel; the Expert MJLQ requires 16 years in service, of which at least eight years must be in a MJLQ billet, and participation in 40 members cases, of which at least 20 must be as lead counsel. *Id.*

³⁴⁸ *Id.* para. 3g(1), enclosure 7.

³⁴⁹ *Id.* para. 3g(1).

³⁵⁰ *Id.* para. 3i(2).

³⁵¹ *Id.*

³⁵² See Gilberg Survey, *supra* note 6, SDC7 (suggesting that “[a]n SVP candidate should satisfy baseline criteria for [numbers] of contested / panel cases before [being] admitted to the program”).

23 of the SDCs an ASI 3,³⁵³ and, CPs, RDCs, MJs, and TCAP/DCAP leadership an ASI 4.³⁵⁴ Neither the TCs nor the COJs would be coded positions.³⁵⁵ In total, 266 positions would be ASI-coded, with 102 of them at the ASI 3 or 4 levels. (See Table 8, Proposed Military Justice Position Coding.)³⁵⁶

ASI Prerequisite	Position and Quantity	Total
None	230 TCs, 48 COJs	278
ASI 1	110 DCs	110
ASI 2	23 SDCs, 23 STCs, 4 TCAP Training Officers, 4 DCAP Training Officers	54
ASI 3	23 SDCs, 23 SVPs	46
ASI 4	11 RDCs, 11 CPs, 27 MJs, 2 TCAP, 5 DCAP	56
Total Coded Positions	11 CPs, 23 SVPs, 23 STCs, 11 RDCs, 46 SDCs, 110 DCs 6 TCAP (Chief, Deputy, 4 Training Officers) 6 DCAP (Chief, Deputy, 4 Training Officers) 3 TDS (Chief, Deputy, Ops) 27 MJs	266

Table 8. Proposed Military Justice Position Coding

³⁵³ While the ASI prerequisite for half of the SDCs would be ASI 2, the ASI prerequisite for the other half would be ASI 3. This would provide DCAP with a comparable level of litigation experience to what the SVPs and STCs would collectively provide TCAP.

³⁵⁴ See Ku, *supra* note 4, at 75 (commenting that the trial experience requirement for military judges “is not high, and is in fact rather modest”).

³⁵⁵ The TCs would not be coded positions for obvious reasons—most are junior attorneys just starting their JAG Corps careers. However, the COJs would not be coded to allow those senior captains and junior majors, who have not yet had the opportunity to practice military justice, do so for purposes of following the traditional broadly skilled career path.

³⁵⁶ There would be 56 positions coded as ASI 4. Those 56 positions would be comprised of the 27 active duty MJs, Chief of TCAP, Deputy of TCAP, Chief of TDS, Deputy of TDS, Operations Officer for TDS, Chief of DCAP, Deputy of DCAP, the 11 CPs, and the 11 RDCs. There would be 46 positions coded as ASI 3 (the 23 SVPs and 23 of the SDCs). There would be 54 positions coded as ASI 2 (the remaining 23 SDCs, all 23 STCs, and the 8 TCAP/DCAP Training Officers). Finally, the 110 DCs would be coded as ASI 1 positions.

These pre-requisites should be enforced whenever possible and only in extraordinary circumstances should an exception ever be made.³⁵⁷ The Chief of PPTO would be the exception authority and would only be able to make such an exception with Chief, TCAP or Chief, DCAP concurrence.³⁵⁸ To assist these individuals in deciding whether to make an exception or not, the self-certifying memorandum of experience filed with the applicant's most recent ASI application would be accessible for review.

One possible concern associated with coding so many positions might be whether the JAG Corps has enough ASI-qualified judge advocates to fill these slots. If PPTO continues filling positions as it does now, this concern would be valid and *many* exceptions would have to be made.³⁵⁹ Currently, only 69 of the 110 DCs would qualify for at least an ASI 1 under the proposed ASI system.³⁶⁰ Of the 34 SDCs, only 20 of them would qualify for at least an ASI 2.³⁶¹ Of the 23 SVPs, only 17 would qualify for at least an ASI 3.³⁶² Therefore, it is true that the JAG Corps' current criminal litigation practice lacks the experience that the proposed plan would require. However, that does not mean that this military justice experience does not exist *outside* of the JAG Corps' current criminal litigation practice; to the contrary, it does.

³⁵⁷ Grace, *supra* note 2, at 32 (cautioning that the placement of inexperienced practitioners in senior litigation positions would harm the junior judge advocates under their supervision and the “[military justice] system as a whole”). One example of when an exception might be appropriate would be in the case of a judge advocate who has previous civilian litigation experience. This is why including such civilian experience in one's memorandum of experience would be important.

³⁵⁸ For example, if the prospective attorney being considered for a TCAP position does not meet the established prerequisite, both the Chief of PPTO and the Chief of TCAP must agree to waive that prerequisite before that attorney may be assigned to that position. Similarly, if the prospective attorney being considered for a DCAP position does not meet the established prerequisite, both the Chief of PPTO and the Chief of DCAP must agree to waive that prerequisite before that attorney may be assigned to that position.

³⁵⁹ Hayden, Hunter & Williams, *supra* note 4, at 21 (observing that “the first-level supervisory positions in the Army's criminal justice system are currently being filled by attorneys who have considerably less trial experience than their predecessors”).

³⁶⁰ Gilberg Survey, *supra* note 6. More specifically, 3 would qualify for an ASI 4, 0 would qualify for an ASI 3, 18 would qualify for an ASI 2, 48 would qualify for an ASI 1, and 41 would not yet qualify for any ASI. *Id.*

³⁶¹ *Id.* In particular, 2 would qualify for an ASI 4, 3 would qualify for an ASI 3, 15 would qualify for an ASI 2, 12 would qualify for an ASI 1, and 2 would not yet qualify for any ASI. *Id.*

³⁶² *Id.* More specifically, 11 would qualify for an ASI 4, 6 would qualify for an ASI 3, 5 would qualify for an ASI 2, and 1 would qualify for an ASI 1. *Id.*

As mentioned above, there are currently 1,024 judge advocates who have been awarded a military justice ASI under the current ASI system.³⁶³ More specifically, 569 hold an ASI 1; 238 hold an ASI 2; 145 hold an ASI 3; and, 72 hold an ASI 4.³⁶⁴ Additionally, there are many judge advocates in non-coded positions who would be qualified to fill a coded position in the future. For example, there are currently 49 TCs and 39 COJs who would qualify for at least an ASI 1 (under the proposed ASI system).³⁶⁵ Moreover, there are 26 current COJs qualifying for at least an ASI 2 (also under the proposed ASI system).³⁶⁶

All of these judge advocates represent a pool of attorneys who could fill these newly coded positions. The problem is that many of them are motivated to leave military justice and pursue other areas of the law because of the broadly skilled career model, motivated out of fear of being passed over for promotion.³⁶⁷ If these judge advocates were told that it is okay for them to remain in military justice, perhaps many of them would choose to do so.

In order to establish the capability to fill all of these positions with the appropriate ASI-coded personnel, a military justice career track should be implemented that both preserves the broadly skilled judge advocate model while also recognizing the need to maximize the Corps' military justice experience.³⁶⁸ On one hand, it is important to develop broadly skilled judge advocates who are equipped with the institutional knowledge necessary to succeed in the JAG Corps' most important leadership positions.³⁶⁹ Yet, on the other hand, military justice remains the JAG Corps' statutory mission—one that is completed with greater success when specialized expertise is utilized.³⁷⁰ While some may argue that these two concepts (broadly skilled versus specialization) cannot co-

³⁶³ Jenkins e-mail, *supra* note 336.

³⁶⁴ *Id.*

³⁶⁵ Gilberg Survey, *supra* note 6.

³⁶⁶ *Id.*

³⁶⁷ Ku, *supra* note 4, at 86 (acknowledging that there is “no systemic effort. . . to convince young [j]udge [a]dvocates that they can and should remain in military justice for a sufficient period of time with positive career implications”).

³⁶⁸ See Gilberg Survey, *supra* note 6, CR24 (suggesting that there should be a military justice specialty in the JAG Corps).

³⁶⁹ See Calese Presentation, *supra* note 339, slide 25 (identifying the need to develop “broadly skilled judge advocates” as a goal of the JAG Corps).

³⁷⁰ Kennedy, *supra* note 276, at 6 (“Military justice is job #1 for the JAG Corps.”); Coupe & Trant, *supra* note 80, at 5 (asserting that trial work is the “heart of our profession”).

exist, such a position ignores the evolving needs of the Army. A system that draws upon the benefits of both is required in order to maximize the overall legal proficiency of the Army's law firm.³⁷¹ The plan proposed in this article accomplishes this very goal.

Specifically, at any given time, there would be approximately 125 active duty judge advocates serving in the Army's Military Justice Career Track (AMJCT).³⁷² Any post-graduate course judge advocate may apply for selection into the AMJCT. An annual board would convene to determine which judge advocates are selected. From this pool of approximately 125 AMJCT personnel, PPTO would fill the 102 ASI 3 and 4 coded positions described above (i.e., MJs, TCAP/DCAP leadership, CPs, RDCs, SVPs, and half of the SDCs). The remaining 23 would be assigned to non-military justice assignments for what the Navy calls a "disassociated tour."³⁷³ All personnel on the AMJCT would, at some point in their respective careers, complete at least one disassociated tour.³⁷⁴ This will keep these judge advocates current on the overall mission of the JAG Corps, while adding to the institutional Army knowledge that they must draw upon when they inevitably return to a litigation position.³⁷⁵ Allowing judge advocates to serve a disassociated tour would also address the problem of "military justice burnout"—something that many Army litigators have experienced.

In order to encourage the Army's most highly qualified military justice practitioners to apply for the career track, some measure must be taken to ensure that those that are selected are not punished at promotion time for deviating from the broadly skilled judge advocate model.³⁷⁶ The Navy's career track includes language for inclusion in promotion board precepts so that board members might understand the importance of a

³⁷¹ See Gilberg Survey, *supra* note 6, CR6 (commenting that some attorneys are not cut out for the courtroom and "belong in legal assistance forever").

³⁷² See Grace, *supra* note 2, at 34 (stating that the JAG Corps "must maintain a core of seasoned [military justice] practitioners").

³⁷³ See Stimson, *supra* note 4, at 22.

³⁷⁴ No judge advocate should ever serve in more than three consecutive military justice billets.

³⁷⁵ Stimson, *supra* note 4, at 22 (advocating that the Navy's requirement of serving in a disassociated tour provides many benefits both to the individual involved and the JAG Corps as a whole).

³⁷⁶ See Gilberg Survey, *supra* note 6, COJ35 (suggesting that the JAG Corps must "make sure [SVPs] are taken care of as they exit the program").

judge advocate specializing in military justice practice.³⁷⁷ As Major Grace observes, “[i]t is hard to imagine a stronger vote of confidence.”³⁷⁸ The Army should follow suit.

The 125 judge advocates serving in the AMJCT would amount to a very small percentage (6.25%) of the active duty JAG Corps.³⁷⁹ Moreover, it is comparable to the 7.8% of the Navy’s active duty JAG Corps that are currently serving in its military justice career track.³⁸⁰ Designating such a small portion of the Army JAG Corps’ workforce as career military justice practitioners would hardly disrupt the overarching broadly skilled career model. However, it would do just enough to improve the quality of the Corps’ litigation while also better developing military justice expertise in *all* judge advocates.

With respect to the overwhelming majority of judge advocates who do follow the broadly skilled career model, it is especially important that the small amount of time they do spend in a military justice position is

³⁷⁷ Memorandum, Sec’y of the Navy, to Presidents, FY–15 Active-Duty Navy Captain Staff Corps Officers Promotion Selection Board para. 7c (24 Jan. 2014).

Military Justice Litigation Specialty. Military justice plays a critical role in the maintenance of good order and discipline and accountability in the Navy. The JAG Corps must maintain a cadre of specialized officers whose primary responsibility is to prosecute, defend, and judge criminal cases and military commissions. The officers who form this cadre are formally selected by a board and designated as being a member of the Military Justice Litigation Career Track. Once designated, officers within this career track normally spend significant portions of their careers within designated litigation billets. Developing and maintaining military justice litigation skills, which are perishable by nature, require progressive assignment to military justice litigation billets. These assignments may limit variety in billet history and the opportunity for assignment to sea duty, but are vitally important to the Navy’s mission. Currently, the needs of the Navy reflect a shortage of officers for senior leadership assignment in this area of expertise. In determining the best and fully qualified officers, you shall favorably consider valuable contributions made through superior performance in this specialty area.

Id.

³⁷⁸ Grace, *supra* note 2, at 28.

³⁷⁹ See Cales Presentation, *supra* note 339, slide 25 (stating that there are 2000 active duty judge advocates in the U.S. Army JAG Corps).

³⁸⁰ Of the 830 active duty Navy judge advocates, 65 of them are in the Navy’s military justice career track. Stimson, *supra* note 4, at 21.

meaningful. Ensuring that an experienced litigator is available to mentor them while they “do their justice time” would go a long way to *actually* contributing to a broadly skilled knowledge base within that particular attorney.

During a time when the military justice system is seemingly under attack by Congress and the public, it is important to examine the current system to ensure that the JAG Corps is truly doing the best that it can do.³⁸¹ As Major Ku has argued, “cultivating seasoned military justice practitioners in turn populates the military justice system with people who understand how the system operates and what it is designed to do.”³⁸² Although the current ASI system was not intended to “create a specialization in military justice,”³⁸³ perhaps it is time to revisit that position, but in a very limited manner.

VI. The Primary Benefits of the Proposed Plan

Above all else, the proposed plan would improve the Army’s military justice practice in four primary ways. First, it would enhance the military justice professional development provided to junior litigators in the Corps without compromising case quality. Second, it would provide a systemic capability to prosecute and defend high-profile cases. Third, the proposed plan would build upon the success of the SVP program by maximizing its strengths and addressing its weaknesses. Finally, it would continue to emphasize the importance of training, both locally and globally.

A. Simultaneously Improving Professional Development and Case Quality

The JAG Corps is confronted with competing interests in every case. On one hand, the professional development of junior judge advocates is crucial to the long-term success of our organization. And, as many have

³⁸¹ See *Pede*, *supra* note 4, at 32 (“News coverage is invariably followed by calls for action.”).

³⁸² *Ku*, *supra* note 4, at 81.

³⁸³ TJAG SENDS 37-17, *supra* note 290 (“These ASIs do not guarantee the right to remain in military justice throughout an officer’s career.”); ASI FAQ, *supra* note 293 (“Officers should and are expected to balance their experience in all of our core competencies.”).

said over the years, the best way for an inexperienced litigator to learn is by trying real cases.³⁸⁴ But, on the other hand, there is simply too much at stake to send brand new counsel into the courtroom by themselves.³⁸⁵ The proposed plan reconciles these two competing interests by allowing brand-new litigators to gain valuable litigation experience so long as they are accompanied into the courtroom by an experienced practitioner as their co-counsel. It also guarantees that this will happen in *every* contested case, thereby providing quality mentorship and supervision during an actual case while also maintaining the integrity of that case. Major Grace wrote that “[t]here is no substitute for time in the courtroom.”³⁸⁶ Yet, in reality, there is—it is time in the courtroom *with an experienced litigator*.³⁸⁷

Until the SVP program was implemented, there was no formal Army initiative that provided every new counsel local access to an experienced military justice practitioner.³⁸⁸ Although there have been COJs, SDCs, and RDCs for quite some time, it was simply the luck of the draw as to whether experienced litigators actually occupied those positions. As Part One of the survey illustrates, those positions are often filled with judge advocates that simply do not have enough experience to provide meaningful mentorship.³⁸⁹

³⁸⁴ Hayden, Hunter & Williams, *supra* note 4, at 28 (“The best way for inexperienced counsel to learn advocacy skills is to try cases.”); Grace, *supra* note 2, at 25 (“There is no substitute for experience when it comes to litigating cases.”); Holland, *supra* note 4, at 16 (“Undoubtedly, an attorney should gain experience in the courtroom.”); Stimson, *supra* note 4, at 13 (“There is no substitute for actual experience.”); Coupe & Trant, *supra* note 80, at 9 (arguing that “counsel probably receive their most significant training while actually preparing and trying real cases”).

³⁸⁵ See Holland, *supra* note 4, at 16 (maintaining that the military justice system “cannot afford to allow counsel to perform alone without ensuring that they are trained properly”).

³⁸⁶ Grace, *supra* note 2, at 26.

³⁸⁷ See Morris, *supra* note 4, at 15 (asserting that counsel learn even more from their mistakes “when those mistakes are filtered and interpreted by someone who not only can diagnose the error but also can talk them through solutions and alternative approaches to future cases”). See also Gilberg Survey, *supra* note 6, SVP12 (stressing that “[i]t’s the note-passing and whispering at the table that help spur-of-the-moment decisions happen and change the course of trials”).

³⁸⁸ See Pede, *supra* note 4, at 33 (discussing the benefit afforded to TCs that are able to “learn from and consult with their more experienced colleagues”).

³⁸⁹ See generally Gilberg Survey, *supra* note 6.

Although the SVP model has begun to correct this problem, it is not sufficiently staffed to do so in every case.³⁹⁰ Due to the number of special victim cases and the impossibility of an SVP being in two places at one time, there remain far too many cases where new counsel are sent into the courtroom without an experienced practitioner by their side.³⁹¹ By expanding the SVP program, creating a CP, and redefining what it means to be an RDC, SDC, and STC, the Corps would be able to guarantee every TC and DC local access to quality mentorship and litigation expertise in every single contested case, regardless of where in the world they are assigned. No longer would such access be luck of the draw.

Moreover, the concept of the experienced litigator stepping aside once a case changes from a contested court-martial to a guilty plea cannot be understated. Not only does it allow the junior practitioner to assume more responsibility in a lower threat environment, but it also allows a *second* junior practitioner to sit at counsel table in the experienced litigator's place to gain valuable courtroom experience. Even though the case is no longer contested, it nonetheless offers the attorneys involved an excellent opportunity to improve their advocacy skills in a real case. As then Lieutenant Colonel Edye U. Moran, who served as a military judge in the 2d Judicial Circuit, once wrote, learning how to properly prepare for a guilty plea "should speed the transition from inexperienced counsel to polished litigator."³⁹²

B. Providing a Systemic Capability to Prosecute and Defend High-Profile Cases

High-profile cases are generally those cases that are likely to receive substantial media attention and significant public interest.³⁹³ One of the problems with the Army's current litigation framework is that there is no

³⁹⁰ See, e.g., *id.* COJ7 (stressing that there are not enough SVPs), RDC5 (concluding that "[s]ome jurisdictions need more SVPs to cover the case load").

³⁹¹ See, e.g., *id.* TC14 (stating that the SVP "was not available to sit for the trial"), TC39 (noting that his SVP was "way too busy to assist on every 120 case"), COJ11 (observing that due to the SVP's busy workload, "it's hard for them to keep a hand in everything").

³⁹² Moran, *supra* note 4, at 66. Lieutenant Colonel Moran has since been promoted to colonel and currently serves as an Army Reserve military judge with the 150th Legal Operations Detachment (LOD). ARMY KNOWLEDGE ONLINE, <https://www.us.army.mil/suite/designer> (last visited Mar. 13, 2014).

³⁹³ Bankson, *supra* note 4, at 5 (defining high-profile cases as "those cases receiving significant and persistent media attention").

systemic capability to handle high-profile cases.³⁹⁴ As Major Bankson wrote, there is a “gap in the Army’s military justice practice in the field of high-profile cases.”³⁹⁵ Whenever a high-profile case emerges, it is incumbent upon the office that owns that case to deal with it.³⁹⁶ In some cases, SJAs ask for help.³⁹⁷ In other cases, the “our problem, our case, our work” mentality prevails.³⁹⁸ Either way, the Army suffers.³⁹⁹

If an Office of the Staff Judge Advocate (OSJA) does ask for help, the quality of that case usually benefits as an experienced litigator is brought in to prosecute it. However, that benefit is often achieved at the expense of other offices and other missions. For example, in the case against Major Malik N. Hasan at Fort Hood, Texas, the assignments of at least two officers were amended so that they could assist with the case and at least three offices were affected.⁴⁰⁰ Moreover, in the case against Brigadier General Jeffrey A. Sinclair at Fort Bragg, North Carolina, one officer’s PCS was delayed by almost a year and another officer was taken off a scheduled deployment.⁴⁰¹

In contrast, when an OSJA does not ask for help, it is often one of the local TCs who is detailed to prosecute the case as either lead or co-counsel. When this happens, other assignments may be preserved and other offices left intact, but the quality of the case often suffers. As Major Grace wrote, “the average trial counsel does not have the skill level, resources, and experience to adequately approach and prosecute more complex cases.”⁴⁰²

³⁹⁴ *Id.* at 7 (arguing that “the Army needs to address systematic shortcomings in managing high-profile cases”).

³⁹⁵ *Id.* at 4.

³⁹⁶ *Id.* at 6 (stressing that “[t]he decisions on how to manage high-profile cases are largely left to each [Office of the Staff Judge Advocate] (OSJA)”).

³⁹⁷ *See id.* at 11, 12, 19 (stating that in many cases OSJAs have turned to outside resources, leveraged “outside talent,” and put together specialized teams to try high-profile cases).

³⁹⁸ *Id.* at 6 (recognizing that because there is no plan, the various OSJA approaches vary).

³⁹⁹ *Id.* (concluding that because the various OSJA approaches differ, the results that are achieved in these cases also vary).

⁴⁰⁰ Grace, *supra* note 2, at 33.

⁴⁰¹ E-mail from Lieutenant Colonel Will Helixon, to Major Jeffrey A. Gilberg (Jan. 30, 2014, 10:18 EST) (on file with author).

⁴⁰² Grace, *supra* note 2, at 30.

The proposed model would provide both the government and the defense with the systemic capability to litigate complex, high-profile cases—wherever they may arise—without having to disrupt other offices and other personnel assignments. One of the responsibilities of the CPs would be to identify those cases that arise within their respective AORs that may generate media attention or significant public interest. When those cases are identified, CPs would report them to the Chief of TCAP. At that point, the Chief of TCAP would examine the case and decide whether it warrants inclusion on the government's list of pending high-profile cases. If it does, the Chief of TCAP would ordinarily detail one of the 11 CPs to handle the case along with another experienced practitioner (either a second CP, SVP, STC, or TCAP Training Officer).

Similarly, whenever an RDC identifies a high-profile case that arises within his AOR, he must report that case to the Chief of DCAP, who would then examine the case and decide whether it warrants inclusion on the defense's list of pending high-profile cases. If it does, the Chief of DCAP would ordinarily detail one of the 11 RDCs to handle the case along with another experienced practitioner (either a second RDC, SDC, or a DCAP Training Officer).

In essence, the proposed litigation model would provide the Chiefs of TCAP and DCAP a pool of experienced practitioners to choose from to handle high-profile cases, whenever and wherever they may arise. Specifically, with 11 CPs and 11 RDCs to consider, the Chiefs of TCAP and DCAP would have systemic expertise to draw upon to assign a litigation expert to serve as lead counsel in these cases. And, based upon the degree of public interest that the case may receive, the Chiefs of TCAP and DCAP would each be empowered to detail a second CP or RDC to the case in the event that he feels it is warranted. With 61 experienced litigators to choose from, the Chiefs of TCAP and DCAP would never again have to ask for help outside of their allocated resources to prosecute or defend high-profile cases.⁴⁰³ Similar to the Navy's MJLCT, which enables "the highest quality of representation in complex criminal litigation,"⁴⁰⁴ this proposed plan would provide the Army with a mechanism to do the same.

⁴⁰³ The government would have 11 CPs, 23 SVPs, 23 STCs, and 4 TCAP Training Officers to choose from. Similarly, the defense would have 11 RDCs, 46 SDCs, and 4 DCAP Training Officers to choose from.

⁴⁰⁴ NAVY QUALIFICATION, *supra* note 324, para. 3a(1).

C. Building upon the Current Systemic Special Victim Case Capability

As already discussed above, the SVP program is an excellent start to providing the Army with a systemic special victim case capability. It assists in mentoring the next generation of Army litigators while also preserving the integrity of those cases. Moreover, the program also improves the quality of care provided to the victims of these crimes.

Of the 269 (Part Two) survey participants, 198 were asked whether SVPs positively contribute to the quality of victim care.⁴⁰⁵ While 166 (83.8%) of them answered “yes,” only 32 (16.2%) answered “no.”⁴⁰⁶ Interestingly, positive responses were common not only among SVPs, but also among COJs and TCs. (See Table 9, Whether SVPs Positively Contribute to Victim Care.)⁴⁰⁷

⁴⁰⁵ Gilberg Survey, *supra* note 6. Of the 198, 42 of them were COJs, 35 of them were SVPs, and 121 were TCs (past and present) who prosecuted a contested case with an SVP as co-counsel. *Id.*

⁴⁰⁶ *Id.* It is important to acknowledge that of those 166 survey respondents answering “yes,” 28 of them noted that they have also observed cases where the SVP’s contribution to the quality of victim care was less than what it could have been. *Id.* Of the 32 survey respondents that answered “no” to the question of whether SVPs contributed to the quality of victim care, most of them explained that it did not have anything to do with the SVP’s ability. *Id.* For example, 15 explained that it was the TC who served as the primary contact for the victim; 12 clarified that the SVP’s remote geographic location interfered with the quality of care provided; and, 19 reported that the SVP was either too busy or too late to become involved in the case. *Id.* In fact, only 7 of the 32 answering “no” to this question complained of the SVP’s competency in one way or another. *Id.*

⁴⁰⁷ *See, e.g., id.* SVP6 (relating that in one case, the victim e-mailed the prosecutors “I don’t know how I can ever thank you for everything you’ve done for me”), SVP11 (describing positive feedback that he received from numerous victims indicating that they were “very pleased” with the way they were guided through the legal process by the prosecution), SVP30 (indicating that due to the inexperience of TCs, SVPs assume the role of educating TCs just how important it is to keep victims informed on a regular basis).

Position (Number of Responses)	Responded Yes	Responded Yes/No	Total of Yes and Yes/No Responses	Responded No
TC Responses (121)	81 (66.9%)	15 (12.4)	96 (79.3%)	25 (20.7%)
COJ Responses (42)	28 (66.7%)	10 (23.8%)	38 (90.5%)	4 (9.5%)
SVP Responses (35)	29 (82.9%)	3 (8.6%)	32 (91.4%)	3 (8.6%)
Total (198)	138	28	166	32
Percentage	69.7%	14.1%	83.8%	16.2%

Table 9. Whether SVPs Positively Contribute to Victim Care

For example, one COJ remarked that “SVPs are good at ‘sheltering’ victims in tough cases . . . and building rapport with those victims who are hostile to the [g]overnment.”⁴⁰⁸ Another COJ noted that their SVP guides the TC in keeping victims “informed about and engaged in the court-martial process.”⁴⁰⁹ As one COJ concluded, it is “unequivocal” that SVPs contribute to better victim care.⁴¹⁰

Perhaps more indicative of whether SVPs positively contribute to victim care are the responses of the TCs who actually sat with them during a contested case. For example, one TC noted that “the SVP’s participation . . . gave the victim a greater level of comfort and confidence in the process.”⁴¹¹ Another TC acknowledged that the SVP’s “ability to relate to victims allowed our office to connect to [them] in a way that I do not believe would have been possible without [him].”⁴¹² While some TCs have described their co-counsel SVP as “compassionate,”⁴¹³ “invested,”⁴¹⁴ and “comforting,”⁴¹⁵ others have

⁴⁰⁸ *Id.* COJ37. *See also id.* COJ1 (stating that “[t]he SVP made it a point to act as a protector and advocate for the victim”).

⁴⁰⁹ *Id.* COJ34.

⁴¹⁰ *Id.* COJ31. *See also id.* COJ47 (relating that the SVP in his jurisdiction is so effective in dealing with victims that he is known as the “victim whisperer”).

⁴¹¹ *Id.* TC94.

⁴¹² *Id.* TC63.

⁴¹³ *Id.* TC8.

⁴¹⁴ *Id.* TC15.

⁴¹⁵ *Id.* TC26.

qualified the SVPs' contributions to victim care as "top notch,"⁴¹⁶ instrumental,⁴¹⁷ and "essential."⁴¹⁸ As one TC put it, "I have definitely modeled my behavior off of the SVPs who looked and felt like they were taking the time to care about victims."⁴¹⁹

However, as Part Two of this article's survey also demonstrates, the SVP program is not without flaws. First, as discussed above, many of the SVPs' workloads are too great, causing them to pick and choose which cases deserve more of their time, or worse yet, neglect some of their cases altogether, thereby leaving a junior practitioner to prosecute the case alone.⁴²⁰ In fact, of the 234 (non-SVP) survey respondents who provided their impressions of the SVP program, 53 of them (22.7%) remarked that SVPs were too busy and 55 (23.5%) commented that SVPs were not available to work on cases from the beginning of the case all the way through to the end of trial—as a co-counsel should.⁴²¹ Similarly, 19 respondents (8.1%) believe that there are not enough SVPs to cover the busy workload.⁴²² As one SDC commented, "from what I saw of our SVP's travel schedule, it was like he was deployed while living at home."⁴²³

Under the current system, each SVP attempts to handle as many cases as their professional capacity will allow. This forces each SVP to make a difficult decision. Either he can pick and choose which cases to work on wholeheartedly and which cases to pass along to the local OSJA, or he can work on *every* special victim case in his AOR, contributing a little to each of those cases but never really becoming

⁴¹⁶ *Id.* TC35.

⁴¹⁷ *Id.* TC45, TC47, TC77.

⁴¹⁸ *Id.* TC109.

⁴¹⁹ *Id.* TC37. *See also id.* TC53 ("At times, I would become frustrated with the victim . . . I couldn't understand her decisions or her comments about the case. . . . The SVP consistently put me back on the tracks and helped me understand her state of mind and helped me encourage her to testify, which she did, resulting in a conviction to an Art[icle] 120 offense. A non-SVP co-counsel doesn't do that.").

⁴²⁰ *See generally id.* Although circumstances often require an inexperienced counsel to go into court alone, it is something that the Army should try its best to avoid. *See id.* SDC5 (stating that putting justice in the hands of a novice TC when an SVP is available "would be like the Miami Heat sitting LeBron James on the bench in the playoffs just so that Larry Drew can get experience").

⁴²¹ *See, e.g., id.* COJ 40 (reporting that their SVP only sits on cases about half the time because he "has to take care of other jurisdictions"). *See also id.* COJ6 (asserting that SVPs "are at their best as trainers working informally with local counsel on cases").

⁴²² *Id.*

⁴²³ *Id.* SDC20.

completely engaged in any of them.⁴²⁴ Whatever decision the SVP makes, the Army suffers. If the former approach is taken, many contested cases will go to trial without having the benefit of an SVP detailed to the case. If the latter approach is taken, TCs are deprived of meaningful mentorship that an SVP could provide by walking them through every step of the case.

The proposed plan addresses this flaw by creating a larger pool of experienced litigators to handle important cases and also directing that these experienced litigators generally only sit on contested cases. Last year, there were 252 contested special victim cases.⁴²⁵ Instead of 23 SVPs attempting to handle all 252 of these cases (in addition to reviewing and consulting on *all* other special victim cases within their respective AORs), the Chief of TCAP would have 11 CPs, 23 STCs, and four TCAP Training Officers at his disposal to bridge the gap. This way, an experienced litigator would be available to assist the local TC wholeheartedly, from the very beginning of the case, all the way through to the end of trial, *in every case*. No longer would triaging cases be necessary.⁴²⁶

Second, while the survey illustrates that by and large the right people are chosen for this important job,⁴²⁷ anecdotal evidence suggests that this does not happen all the time. For example, 30 (12.8%) out of the 234 non-SVP survey respondents commented that the right people are not always selected to serve as an SVP.⁴²⁸ While one TC described his SVP as “lazy and uninformed,”⁴²⁹ another TC reported that the SVP’s contributions at trial “were embarrassing.”⁴³⁰ On a similar note, 28

⁴²⁴ See *id.* TC65 (describing his experience of litigating a case with an SVP as “what I imagine playing with Kobe Bryant would be like. We had greater successes than we would have had otherwise, but he was not interested in sharing the ball.”).

⁴²⁵ Pottinger e-mail, *supra* note 321.

⁴²⁶ Last year there were 392 contested courts-martial, which, if split proportionately among all SVPs and STCs, would average 8.5 contested cases each year per counsel. *Id.* Although this is a healthy case load—particularly in light of all the other SVP/STC responsibilities such as reviewing every case in their AOR, providing local training, assisting with TCAP training while TDY, etc.—it is manageable and realistic.

⁴²⁷ Gilberg Survey, *supra* note 6, SDC2 (writing that “[f]rom what I have seen, the SVP program is staffed by the JAGC’s most skilled and experienced litigators”), COJ22 (describing SVP selection as one of the program’s strengths), CR8 (noting that the selection is focused “on finding the best litigators possible”).

⁴²⁸ *Id.*

⁴²⁹ *Id.* TC57.

⁴³⁰ *Id.* TC90. See also *id.* CR2 (describing an SVP’s performance at trial as “horrible”).

(12.0%) specifically commented that a given SVP's contributions depend on the SVP.⁴³¹ Additionally, 28 (12.0%) commented that some SVPs are losing sight of their primary purpose—to do what they can to ensure that justice is done.⁴³² Regardless, there are many who believe—as one COJ put it—that “the selection process for SVPs seems to have some bugs in it.”⁴³³ An RDC agreed, suggesting that the program “needs a better vetting process.”⁴³⁴

The proposed plan addresses this by altering the manner in which SVPs are selected and adjusting the criteria used in the selection process. All 23 of the SVP billets would be coded as ASI 3 positions—meaning that nobody would be selected to serve as an SVP unless they have achieved an ASI 3. Moreover, since the 23 SVP billets would be filled from the newly established AMJCT, only those officers that have been previously selected by the annual board for inclusion in the AMJCT would even be eligible to serve as an SVP. Combining the experiential requirements imposed by the ASI 3 prerequisites, the human discretion exercised by the AMJCT annual board, and the specific personnel judgment provided by PPTO when filling these assignments, only the best and brightest would pass through. The proposed plan would also ensure that similar care is applied to the selection of all military justice litigation positions—especially those that are a part of the AMJCT.

Third, some of the survey respondents expressed concern about the unfair advantage that the SVP program may provide to the government over the defense.⁴³⁵ In fact, 10 (8.9%) of the 113 survey respondents that were asked to identify weaknesses of the SVP program remarked that the program is unfair to the defense because it provides a specially trained

⁴³¹ See, e.g., *id.* TC41 (distinguishing the quality of two SVPs by describing one as setting him up for failure and crediting another with making him the litigator that he is today), CR6 (characterizing the two SVPs that he has observed as “polar opposites”), RDC5 (declaring that “not all SVPs are created equal”).

⁴³² See, e.g., *id.* COJ4 (stating that some SVPs were “overzealous and seemed to just seek convictions”), SDC1 (suggesting that SVPs sometimes become so invested in getting a conviction that “they lose sight of whether justice is really being done”), CR16 (finding that some SVPs become too personally involved with the victims and “lose sight of what is important in the case”).

⁴³³ *Id.* COJ11. See also *id.* COJ27 (asserting that many SVPs are not as experienced as they should be).

⁴³⁴ *Id.* RDC5.

⁴³⁵ See generally *id.*

expert to litigate special victim cases without doing the same for the defense.⁴³⁶

First, it is questionable whether the SVP program does anything more than provide a balance that previously did not exist. Overall, the litigation experience of DCs is more than double that possessed by TCs.⁴³⁷ More specifically, the average DC has litigated 18.3 total courts-martial, with 7.7 of them contested and 4.6 of them in front of a military panel.⁴³⁸ In contrast, the average TC has only litigated 7.4 total courts-martial, with 3.2 of them being contested and 2.0 of them being in front of a military panel.⁴³⁹ Of course, this makes sense as most TCs are brand new and most DCs have previously served in a military justice position.⁴⁴⁰ Moreover, after factoring in the experience of SDCs, the discrepancy in experience between those who try cases for the defense and those who do so for the government (prior to the SVP program) was even greater—the averages for the defense jump to 21.5 total courts-martial, 8.6 contests, and 5.2 panel cases per DC.⁴⁴¹ Adding an experienced SVP to the prosecution merely minimizes the significant advantage that the defense previously enjoyed over the government.

Nonetheless, to the extent that the SVP program does provide the government with an unfair advantage over the defense, the proposed plan addresses this concern by redefining what it means to be an SDC. Similar to how the government would utilize its 23 SVPs and 23 STCs, the defense would utilize its 46 SDCs in the same way—by detailing them to *all* contested cases. Just as SVPs and STCs would use real cases as training opportunities to teach and mentor junior TCs, SDCs would do the same for DCs. Furthermore, just as the STCs and SVPs would be coded as ASI 2 and ASI 3 positions respectively, the SDC billets would be coded similarly, with half of them as ASI 2 positions and the other half as ASI 3 positions. Finally, just as the SVP positions would be filled by judge advocates in the AMJCT, the 23 SDC positions coded as ASI 3

⁴³⁶ *Id.* See, e.g., *id.* COJ14 (complaining that it is “fundamentally unfair to provide specialized, experienced prosecutors to the government, but nothing analogous to the defense”), SDC5 (arguing that “adding the SVP only stacks the deck further against the accused”), CR9 (suggesting that TDS “should have somewhat of a parallel organization”).

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ See generally *id.*

⁴⁴¹ *Id.*

billets would be as well. Thus, the proposed plan would provide the defense with a framework that mirrors that of the government, providing it with a comparable and equivalent level of expertise to draw upon when detailing counsel to cases.⁴⁴²

D. Enhancing Military Justice Training

As then Colonel Pede once wrote, “establishing a culture of training is essential to developing competent and capable [judge advocates].”⁴⁴³ Lieutenant Colonel Holland adds, “counsel cannot be expected to learn everything they need to know from law school classes or the Judge Advocate General’s Officer Basic Course.”⁴⁴⁴ While it is true—as much of this article emphasizes—that the best way for counsel to learn is to spend time in court litigating real cases,⁴⁴⁵ it is undeniable just how big a role regular military justice training can play in the development of junior judge advocates.⁴⁴⁶ As AF Lieutenant Colonel James H. Kennedy, III, has analogized, “we can best improve our skills by demonstrating the same dedication to training and practice [that is] displayed by professional athletes.”⁴⁴⁷

Fortunately, TCAP and DCAP have long recognized the importance of training in the context of military justice. For example, four times each year, TCAP offers a New Prosecutor Course (NPC), which junior litigators attend during the same week as Effective Strategies for Sexual Assault Prosecution (ESSAP).⁴⁴⁸ Together, both of these conferences provide new TCs with a six-day interactive training event to aid their transition into the demanding world of military justice.⁴⁴⁹ Similarly,

⁴⁴² See *id.* SDC33 (suggesting that the government and the defense should each have regional litigators to consult on difficult cases and “be detailed to cases that require specialized expertise”).

⁴⁴³ Pede, *supra* note 4, at 32.

⁴⁴⁴ Holland, *supra* note 4, at 16.

⁴⁴⁵ Grace, *supra* note 2, at 31 (“Trial work offers the best training and development opportunity in military justice; there is no substitute for real work in real cases.”).

⁴⁴⁶ Major Jay Thoman, *Advancing Advocacy*, ARMY LAW., Sept. 2011, at 35 (emphasizing that “teaching trial advocacy is one of the most critical duties of a supervising attorney in the trial arena”).

⁴⁴⁷ Kennedy, *supra* note 276, at 6; Hayden, Hunter & Williams, *supra* note 4, at 31 (asserting that “advocacy skills only improve through practice and dedication”).

⁴⁴⁸ E-mail from Lieutenant Colonel Alex Pickands, to Major Jeffrey A. Gilberg (Mar. 21, 2014, 12:41 EST) (on file with author).

⁴⁴⁹ *Id.*

DCAP conducts regular regional training to improve the quality of representation that Army DCs provide for their clients worldwide.⁴⁵⁰ Moreover, while the Judge Advocate General's Legal Center and School (TJAGLCS) provides advocacy training to both new and intermediate litigators,⁴⁵¹ TCAP and DCAP co-sponsor the Sexual Assault Training Advocacy Course (SATAC), which is designed to improve the advocacy skills of more experienced litigators in sexual assault cases.⁴⁵² As Charles D. Stimson, who currently serves as Deputy Chief Trial Judge of the Navy-Marine Corps Trial Judiciary (Reserves), has recently recognized, "the services have committed themselves to litigation training."⁴⁵³

The proposed plan would continue this commitment by providing both sides of the aisle with an experienced litigator (i.e., the Deputies of TCAP and DCAP), who would be responsible for scheduling, developing, and executing regular military justice training for TCs and DCs alike. Additionally, both TCAP and DCAP would have four Training Officers to assist their respective Deputies with this important endeavor. Since the TCAP/DCAP Training Officers would be coded as ASI 2 positions, both TCAP and DCAP would have appropriately qualified instructors at its disposal.

As AF Major Stephen J. McManus, then serving as the SJA at Grissom Air Reserve Base, noted, "the common denominators for all instructors include a love of litigation and an ability to teach important litigation skills to less experienced [judge advocates]."⁴⁵⁴ While the proposed plan sets TCAP/DCAP up for training success, it nonetheless remains crucial for PPTO to fill these important positions with individuals possessing this "love of litigation" and "ability to teach." After all, the TCAP/DCAP Deputies and Training Officers have the

⁴⁵⁰ E-mail from Lieutenant Colonel Fansu Ku, to Major Jeffrey A. Gilberg (Mar. 21, 2014, 12:39 EST) (on file with author) [hereinafter Ku e-mail]. Specifically, DCAP offers DC 101, a course designed to assist newly assigned TDS counsel, approximately five times each year. *Id.* DCAP also offers DC 201, which is a course designed to assist all TDS counsel, multiple times each year. *Id.*

⁴⁵¹ While the Judge Advocate Officer Basic Course provides advocacy training to brand new judge advocates, the Intermediate Trial Advocacy Course (ITAC) is targeted towards those litigators that have assumed TC/DC responsibilities within the past six months. E-mail from Major Jeremy Stephens, to Major Jeffrey A. Gilberg (Mar. 24, 2014, 11:07 EST) (on file with author).

⁴⁵² Ku e-mail, *supra* note 450.

⁴⁵³ Stimson, *supra* note 4, at 5.

⁴⁵⁴ McManus, *supra* note 4, at 17.

opportunity to impact the professional development of more junior judge advocates per year than perhaps any other Army attorney.

VII. Conclusion

H.F. “Sparky” Gierke, former Chief Judge of the United States Court of Appeals for the Armed Forces, noted that “a strength of our military justice system has been its capacity to change with the times.”⁴⁵⁵ And, the times have changed—the number of cases each year has dwindled, mission requirements are expanding, and the global and political landscape is constantly evolving.⁴⁵⁶ Moreover, today’s cases “are more complicated to prosecute and defend than in years past.”⁴⁵⁷ Meanwhile, the OTJAG Criminal Law Division “continues to look for ways to improve [judge advocate] practice.”⁴⁵⁸ The best way to “change with the times” and “improve judge advocate practice” would be to implement the systemic changes advocated in this article.

By realigning the Army’s geographical jurisdiction, creating new supervisory positions while redefining those that already exist, altering the current military justice ASI system, and coding certain positions as a part of a newly established military justice career track, the JAG Corps would set itself up for military justice success. Together, all of these changes provide better legal services to the Army and its Soldiers. It is time for the JAG Corps to once again demonstrate its “capacity to change with the times” by recognizing and addressing the lack of litigation experience within its military justice practice. As Colonel Nance, a military judge at the trial level, observed, “trial advocacy is not easy.”⁴⁵⁹ However, by implementing the proposed plan and maximizing the litigation experience of our law firm, we could make it *easier*. Why wouldn’t we? Anything else would be “insane.”⁴⁶⁰

⁴⁵⁵ H.F. “Sparky” Gierke, *The Thirty-Fifth Kenneth J. Hodson Lecture on Criminal Law*, 193 MIL. L. REV. 178, 181 (2007). Gierke also served as a judge advocate from 1967 to 1971, which included a year as a military judge. *Id.* See also Ku, *supra* note 4, at 87 (suggesting that “we need to continually examine how we carry out our statutory mission”).

⁴⁵⁶ See James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185 (2002) (concluding that “the American military justice system is not static or outdated; it is dynamic and evolving”).

⁴⁵⁷ Stimson, *supra* note 4, at 22.

⁴⁵⁸ Pede, *supra* note 4, at 36.

⁴⁵⁹ Nance, *supra* note 287, at 56.

⁴⁶⁰ See Narcotics Anonymous, *supra* note 1.

Appendix A

Survey—Special Victim Prosecutors

Please take a few minutes to fill out the survey below. This survey is to gather data regarding the experiences of our Special Victim Prosecutors (SVP), both past and present. Information provided, including any comments, will not be linked to any particular individual. You may type your responses directly on this survey, save as a new document, and email it to me at jeffrey.gilberg@us.army.mil.

1. When and where did you serve as an SVP?
2. Approximately how many total court-martial have you litigated (as either government or defense)?
 - a. Approximately how many of that total were contested cases?
 - b. Approximately how many of that total were panel cases?
3. Approximately how many total months of your JAG Corps career have you served in a military justice position (e.g., TC, COJ, SVP, DC, SDC, TCAP, DCAP, etc)?
4. For purposes of this question, please think about all of the contested cases that you have prosecuted as an SVP in which you sat at counsel table with a Trial Counsel (TC).
 - a. How many contested cases have you sat at counsel table as an SVP with a TC.
 - b. Please list the names of all TCs with whom you have sat at counsel table with in a contested case as an SVP.
 - c. Do you believe that your participation in the contested case contributed to that TC's military justice professional development more so or less so than if you were not detailed to the case? Please explain your answer by providing specific examples, if possible.

- d. Do you believe that your participation in the contested case contributed to the quality of care that was provided to the victim(s) in that case? Please explain your answer by providing specific examples, if possible.
- e. Do you believe that your participation in the contested case contributed to the quality of the case that was presented at trial? Please explain by providing specific examples, if possible.

Survey—Chiefs of Military Justice

Please take a few minutes to fill out the survey below. This survey is to gather data regarding the experiences of Chiefs of Military Justice (COJ) and Trial Counsel (TC). Information provided, including any comments, will not be linked to any particular individual. You may type your responses directly on this survey, save as a new document, and email it to jeffrey.gilberg@us.army.mil.

1. When and where have you served as a COJ?
2. Approximately how many total court-martial have you litigated (as either gov or defense)?
 - a. Approximately how many of that total were contested cases?
 - b. Approximately how many of that total were panel cases?
3. Approximately how many total months of your JAG Corps career have you served in a military justice position (e.g., TC, COJ, SVP, DC, SDC, TCAP, DCAP, etc)?
4. How many TCs do you supervise?
5. Please answer Questions #2, 2a, 2b, and 3 for each TC that you supervise. For purposes of this question, it is not necessary to include names. For example, if you supervise three (3) TCs, your answer might look like this:

TC #1: 22 cases; 6 contested; 5 panel; 26 months

TC #2: 8 cases; 2 contested; 1 panel; 8 months

TC #3: 5 cases; 2 contested; 1 panel; 6 months

6. For purposes of this question, please think about all of the contested cases that you have seen an SVP sit at counsel table with a Trial Counsel (TC).
- a. Do you believe that the SVP's participation in the contested case contributed to that TC's military justice professional development more so or less so than if that SVP was not detailed to the case? Explain your answer by providing specific examples, if possible.
 - b. Do you believe that the SVP's participation in the contested case contributed to the quality of care that was provided to the victim(s) in that case? Please explain your answer by providing specific examples, if possible.
 - c. Do you believe that the SVP's participation in the contested case contributed to the quality of the case that was presented at trial? Please explain by providing specific examples, if possible.
7. What do you view as the strengths of the SVP Program?
8. What do you view as the biggest weaknesses or problems with the SVP program?

Survey—Regional Defense Counsel

Please take a few minutes to fill out the survey below. This survey is to gather data regarding the litigation experience of Regional Defense Counsel and their observations of the SVP Program. Information provided, including any comments, will be anonymous meaning that they will not be linked to any particular individual. Please type your responses directly on this survey, save as a new document, and email it to jeffrey.gilberg@us.army.mil.

1. Approximately how many total court-martial have you litigated (as either government or defense) during your JAG Corps career?
Wild “Ballpark Guesses” are perfectly fine!
 - a. Approximately how many of that total were contested cases?
 - b. Approximately how many of that total were panel cases?
2. Approximately how many total months of your JAG Corps career have they served in a military justice position (e.g., TC, COJ, SVP, DC, SDC, TCAP, DCAP, MJ, RDC, etc)?
3. What do you view as the biggest strength of the SVP program?
4. What do you view as the biggest weakness of the SVP program?

Survey—Senior Defense Counsel

Please take a few minutes to fill out the survey below. This survey is to gather data regarding the experiences of Senior Defense Counsel (SDC) and Defense Counsel (DC). Information provided, including any comments, will not be linked to any particular individual. You may type your responses directly on this survey, save as a new document, and email it to jeffrey.gilberg@us.army.mil.

1. When and where have you served as a SDC?
2. Approximately how many total courts-martial have you litigated (as either government or defense)?
 - a. Approximately how many of that total were contested cases?
 - b. Approximately how many of that total were panel cases?
3. Approximately how many total months of your JAG Corps career have you served in a military justice position (e.g., TC, COJ, SVP, DC, SDC, TCAP, DCAP, etc)?
4. How many DCs do you supervise?

5. Please answer Questions #2, 2a, 2b, and 3 for each DC that you supervise. For purposes of this question, it is not necessary to include names. For example, if you supervise three (3) DCs, your answer might look like this:

DC #1: 22 cases; 6 contested; 5 panel; 26 months

DC #2: 8 cases; 2 contested; 1 panel; 8 months

DC #3: 5 cases; 2 contested; 1 panel; 6 months

6. For purposes of this question, please think about all of the contested cases that you have seen where an SVP sat at counsel table with a Trial Counsel (TC).

- a. Do you believe that the SVP's participation in the contested case contributed to that TC's military justice professional development more so or less so than if that SVP was not detailed to the case? Please explain your answer by providing specific examples, if possible.
- b. Do you believe that the SVP's participation in the contested case contributed to the quality of the case that was presented at trial? Please explain by providing specific examples, if possible.

7. For purposes of this question, please think about all of the contested cases that you have seen where an SVP did not sit at counsel table with a TC. These do not have to just be sex cases.

- a. What are the worst mistakes that you have seen a TC make in a case in which he/she did not have the benefit of an experienced litigator sitting with him/her?
- b. Do you believe that if that TC had an experienced litigator sitting with him/her at counsel table in those cases that he/she would have been less likely to make those mistakes? Why or why not?

8. What do you view as the strengths of the SVP Program?

9. What do you view as the biggest weaknesses or problems with the SVP program?

Survey—Trial Counsel

Please take a few minutes to fill out the survey below. This survey is to gather data regarding the experiences of Trial Counsel (TC) in contested cases in which a Special Victim Prosecutor (SVP) sat at counsel table. Information provided, including any comments, will not be linked to any particular individual. You may type your responses directly on this survey, save as a new document, and email it to jeffrey.gilberg@us.army.mil.

1. How many contested cases have you prosecuted with an SVP sitting with you at counsel table as your co-counsel?

2. At the time of each of each of the contested cases referenced in your response to Question #1, approximately how many contested cases had you litigated (either as government or defense) at that point in time? For example, let's say that you have prosecuted (3) three contested cases with an SVP. Your answer might look something like this:

“At the time of case #1, I had never litigated a contested court-martial before – that was my first one. At the time of case #2, I had previously litigated 3 other contested courts-martial – that was my fourth one. At the time of case #3, I had previously litigated 6 other contested courts-martial – that was my seventh one.”

3. For purposes of this question, please think only about the contested cases that you have prosecuted as a TC in which an SVP sat with you at counsel table.
 - a. Do you believe that the SVP's participation with you in these contested cases contributed to your military justice professional development more so or less so than if the SVP was not detailed to these cases? Please explain your answer by providing specific examples, if possible.

 - b. Do you believe that the SVP's participation with you in these contested cases contributed to the quality of care that was provided to the victim(s) in these cases? Please explain your answer by providing specific examples, if possible.

- c. Do you believe that the SVP's participation with you in these contested cases contributed to the quality of the case that was presented at trial? Please explain by providing specific examples, if possible.

Survey—Court Reporters

Please take a few minutes to fill out the survey below. This survey is to gather data regarding the observations of Court Reporters (CR) during contested cases. Information provided, including any comments, will be anonymous meaning that they will not be linked to any particular individual. You may type your responses directly on this survey, save as a new document, and email it to jeffrey.gilberg@us.army.mil.

1. How many total years have you served as a court reporter in the military?
2. Approximately how many total contested courts-martial have you reported?
 - a. Approximately how many of that total were panel cases?
 - b. Approximately how many of that total were cases on which an SVP sat at counsel table?
 - c. How many different SVPs have seen try a contested court-martial?
3. For purposes of this question, please think about all of the contested cases that you have seen where an SVP sat at counsel table with a Trial Counsel (TC).
 - a. Do you believe that the SVP's participation in the contested case contributed to that TC's military justice professional development more so or less so than if that SVP was not detailed to the case? Please explain your answer by providing specific examples, if possible.
 - b. Do you believe that the SVP's participation in the contested case contributed to the quality of the case that

was presented at trial? Please explain by providing specific examples, if possible.

4. For purposes of this question, please think about all of the contested cases that you have seen where an SVP did not sit at counsel table with a TC. **These do not have to just be sex cases.**
 - a. What are the worst mistakes that you have seen a TC make in a case in which he/she did not have the benefit of an experienced litigator sitting with him/her? Please list as many examples as you are willing.
 - b. Do you believe that if that TC had an experienced litigator sitting with him/her at counsel table in those cases that he/she would have been less likely to make those mistakes? Why or why not?
5. What do you view as the strengths of the SVP Program?
6. What do you view as the biggest weaknesses or problems with the SVP program?

Survey—Military Judges

Please take a few minutes to fill out the survey below. This survey is to gather data regarding the observations of Military Judges (MJ) during contested special victim cases. Information provided, including any comments, will be anonymous meaning that they will not be linked to any particular individual. Please type your responses directly on this survey, save as a new document, and email it to jeffrey.gilberg@us.army.mil.

1. Approximately how many months have you served as a Military Judge (MJ)?

Prior to becoming a MJ, approximately how many total courts-martial had you litigated (as either government or defense)?
“Ballpark Guesses” are perfectly fine!

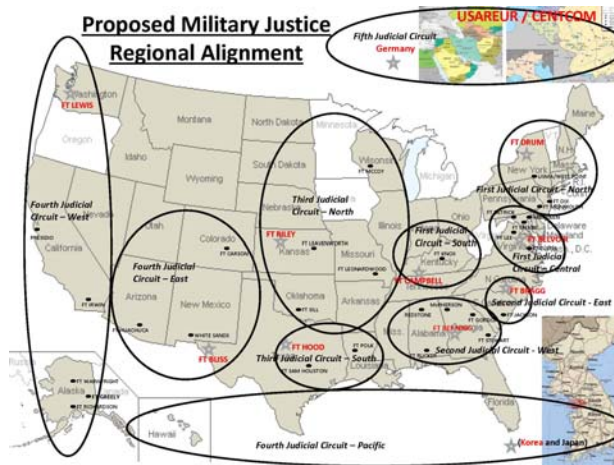
- a. Approximately how many of that total were contested cases?
 - b. Approximately how many of that total were panel cases?
2. Approximately how many total months of your JAG Corps career have you served in a military justice position (e.g., TC, COJ, SVP, DC, SDC, TCAP, DCAP, MJ, etc.)?
3. For purposes of this question, please think about all of the contested cases that you have presided over in which an SVP sat at counsel table with a Trial Counsel (TC).
 - a. Approximately how many contested cases have you presided over in which an SVP sat at counsel table with a TC?
 - b. Do you believe that the SVP's participation in these contested cases contributed to the military justice professional development of those TCs more so or less so than if the SVP was not detailed to the case? Please explain your answer by providing specific examples, if possible.
 - c. Do you believe that the SVP's participation in these contested cases contributed to the quality of the case that was presented at trial? Please explain by providing specific examples, if possible.
4. What do you view as the biggest strength of the SVP program?
5. What do you view as the biggest weakness of the SVP program?

Appendix B

Proposed Military Justice Regional Alignment—Installations by Circuit

Proposed Military Justice Regional Alignment – Installations by Circuit

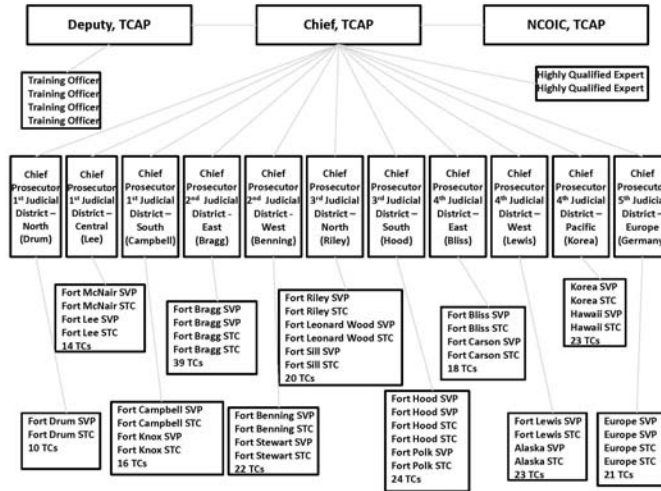
- First Judicial Circuit– North (Fort Drum, West Point, Fort Dix)
- First Judicial Circuit– Central (Aberdeen Proving Ground, Fort Detrick, Fort Meade, Fort McNair, Fort Myer, Fort Belvoir, Fort Lee, Fort Eustis, Military District of Washington)
- First Judicial Circuit– South (Fort Knox, Fort Campbell)
- Second Judicial Circuit– East (Fort Bragg, Fort Jackson)
- Second Judicial Circuit– West (Fort Gordon, Fort Stewart, Fort Benning, Fort McPherson, Fort Rucker, Redstone Arsenal)
- Third Judicial Circuit– North (Fort Riley, Fort Leavenworth, Fort Leonard Wood, Fort Sill, Fort McCoy)
- Third Judicial Circuit– South (Fort Hood, Fort Sam Houston, Fort Polk)
- Fourth Judicial Circuit– East (Fort Bliss, Fort Carson, Fort Huachuca, White Sands)
- Fourth Judicial Circuit– West (Fort Lewis, Presidio, Fort Irwin, Fort Wainwright, Fort Richardson, Fort Greely)
- Fourth Judicial Circuit– Pacific (Hawaii, Korea, Japan)
- Fifth Judicial Circuit– Europe (Germany, Italy)



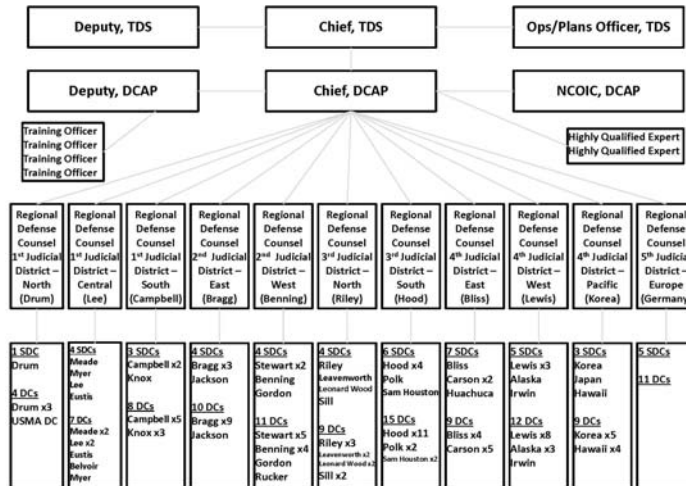
Appendix C

Propose Government and Defense Litigation Models

Proposed Government Litigation Model



Proposed Defense Litigation Model



Appendix D

Current ASI Prerequisites

<u>ASI 1</u> <u>BASIC MILITARY JUSTICE</u> <u>PRACTITIONER</u>	<u>ASI 2</u> <u>SENIOR MILITARY JUSTICE</u> <u>PRACTITIONER</u>	<u>ASI 3</u> <u>EXPERT MILITARY JUSTICE</u> <u>PRACTITIONER</u>	<u>ASI 4</u> <u>MASTER MILITARY JUSTICE</u> <u>PRACTITIONER</u>
<p>- Requirements:</p> <ol style="list-style-type: none"> 1. Basic Course Completion. 2. 18 months as a trial or defense counsel; OR 3. 15 courts-martial (including 3 contests). 3. CLAC within 6 months of assuming duty as a trial or defense counsel.² 4. New Developments; OR TCAP/DCAP training within 12 months of assuming duty as a trial or defense counsel.² <p>^aMilitary Justice Experience is time spent in attorney positions substantially devoted to the investigation, prosecution, or defense of potential violations of the UCMJ, or the management, supervision, or appellate review thereof. Time spent as a SJA DSJA, BJA, CJA, OIC, or SAUSA may qualify upon application through Chief, CLD to Chief, PPTO.</p> <p>² Chief, CLD may approve alternative training programs. Extensions for training requirements and waiver requests must be sent through Chief, CLD to Chief, PPTO.</p>	<p>- Requirements:</p> <ol style="list-style-type: none"> 1. ASI 1. 2. Two post-CLAC military justice advocacy courses.³ 3. 30 (total) months military justice experience (preferably serving as both a DC and TC); OR 36 (total) courts-martial (including 7 contests); OR 18 months military justice experience and 24 months experience as a litigation attorney in LITDIV, ELD, or KFLD. 4. Letter of recommendation.^b <p>^b Recommendation from an RDC, SJA, Appellate Military Judge, Military Judge, or the Chief DAD, GAD, TCAP, TDS-HQ, CLD, LITDIV, ELD, or KFLD.</p>	<p>- Requirements:</p> <ol style="list-style-type: none"> 1. ASI 2. 2. Graduate Course Completion.^c 3. 48 (total) months military justice experience (preferably serving as both a DC and TC); OR 45 (total) courts-martial (including 12 contests); OR 36 (total) months military justice experience and 30 (total) months experience as a litigation attorney in LITDIV, ELD, or KFLD. 4. Letter of recommendation.^b <p>^c Requires 3 Graduate Course elective credit hours in Criminal Law. Exceptions to policy may be granted on a case-by-case basis by the Chief of Criminal Law, Office of The Judge Advocate General. Reservists with an LL.M. in Criminal Law can apply for an exception to policy through Chief, CLD.</p>	<p>- Requirements:</p> <ol style="list-style-type: none"> 1. ASI 3. 2. 96 (total) months military justice experience (preferably serving as both a DC and TC); OR 80 (total) courts-martial (including 18 contested cases); 3. Served as RDC, Chief of Military Justice (Corps), Deputy Chief DAD/GAD, Chief DCAP/TCAP, Deputy Chief CLD/TDS-HQ, SJA,^d Military Judge, or TJAGLCS Criminal Law Professor.^e 4. Letter of recommendation.^b <p>^d Requires written verification that time spent in this position required a substantial amount of military justice involvement.</p> <p>^e Other military justice positions may qualify upon application through Chief, CLD to Chief, PPTO.</p>

Proposed ASI Prerequisites

<u>ASI 1</u> <u>BASIC MILITARY JUSTICE</u> <u>PRACTITIONERS</u>	<u>ASI 2</u> <u>SENIOR MILITARY JUSTICE</u> <u>PRACTITIONERS</u>	<u>ASI 3</u> <u>EXPERT MILITARY JUSTICE</u> <u>PRACTITIONERS</u>	<u>ASI 4</u> <u>MASTER MILITARY JUSTICE</u> <u>PRACTITIONERS</u>
<p>- Requirements</p> <ol style="list-style-type: none"> 1. Judge Advocate Officer Basic Course; 2. 24 months in a military justice position*; OR 15 courts-martial (including 4 contests and 2 panel cases); 3. Memorandum, signed by the applicant and endorsed by his/her rater, detailing how the experience pre-requisites are met. 4. Trial Advocacy Course; and, 5. TCAP or DCAP Training 	<p>- Requirements</p> <ol style="list-style-type: none"> 1. Satisfaction of all ASI 1 Requirements 2. Two Trial Advocacy Courses (in addition to the course that was completed to satisfy the ASI 1 requirement 3. 48 months in a military justice position*; OR 30 courts-martial (including 8 contests and 4 panel cases 4. Memorandum, signed by the applicant and endorsed by his/her rater, detailing how the experience pre-requisites are met. 	<p>- Requirements</p> <ol style="list-style-type: none"> 1. Satisfaction of all ASI 1 and 2 Requirements; 2. 72 months in a military justice position*; OR 45 courts-martial (including 12 contests and 8 panel cases) 3. Memorandum, signed by the applicant and endorsed by his/her rater, detailing how the experience pre-requisites are met. 4. Graduate Course Completion 	<p>- Requirements</p> <ol style="list-style-type: none"> 1. Satisfaction of all ASI 1, 2, and 3 Requirements; 2. 96 months in a military justice position*; OR 60 courts-martial (including 16 contests and 12 panel cases) 3. Memorandum, signed by the applicant and endorsed by his/her rater, detailing how the experience pre-requisites are met. <p>*Jobs that count towards any of the time in a military justice position requirement include TC, STC, DC, SDC, COJ, TCAP, DCAP, TDS, SVP, CP, GAD, DAD, RDC, MJ.</p>