

Sharpening the Quill and Sword: Maximizing Experience in Military Justice

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“Military justice is our statutory mission and at the core of a disciplined fighting force. We must do it right and we must do it well.”

—Lieutenant General Scott C. Black¹

I. Introduction

The Army’s military justice (MJ) system suffers from a lack of experienced practitioners. While senior leaders have initiated some programs to solve this problem, the programs are inadequate to completely address the dilemma.³ The future health and success of the Army’s MJ system depends on placing it in the hands of intelligent, experienced, and knowledgeable personnel. In performing its statutory mission of MJ,⁴ the Army Judge Advocate General’s Corps (JAG Corps) faces many challenges. Senior leaders must weigh the importance of all JAG Corps supported missions in deciding how to deploy resources and personnel. This article discusses whether the Army JAG Corps is poised for MJ success and recommends systemic changes to provide improved military justice to the Army and its Soldiers.

The Army’s modularization and the recurring deployments since 2002 present new problems and exacerbate old ones with the administration of MJ, to include a lack of experienced judge advocates (JA) in MJ positions.⁵ Beginning in 2008, the JAG Corps made major

changes to address some perceived deficiencies in the administration of justice.⁶ Other services have also recognized the need for more experienced JAs in MJ positions and addressed this problem. For example, both the Navy and Air Force decided to implement a MJ career track.⁷ To fortify its MJ system, the Army hired special victims prosecutors (SVP) and highly qualified experts (HQE), as well as implementing additional skill identifiers (ASI). This article will look at these programs and will propose some minor changes to the current system that will help it continue to meet and exceed the JAG Corps’ statutory mission. Among these proposals are changes to the ASI program to better capture the MJ experience of JAs for use in the assignments process, coding of MJ positions, changes to post-trial administration, and adding a regional military justice practitioner.

II. A Lack of Experience in Military Justice

“The only source of knowledge is experience.”⁸

—Albert Einstein

The biggest problem the MJ system faces is a lack of experience across the spectrum of MJ positions.⁹ The best way for advocates to excel in MJ is to spend time in court prosecuting or defending cases.¹⁰ Army JAs do not possess the experience required to be good litigators.¹¹ They simply

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¹ Major General Scott C. Black, *Changes in Military Justice*, TJAG SENDS, Apr. 2008 [hereinafter MJ Message]. Major General Black retired as a lieutenant general.

³ For this article, the author surveyed personnel then-occupying military justice (MJ) positions by sending the survey attached to the article as an appendix to all Senior Defense Counsel and Chiefs of Justice and asked them to complete the survey and supply it to their JAs as well. The survey provides a snapshot of personnel practicing military law in the positions of trial counsel, defense counsel, senior trial counsel, senior defense counsel, and chiefs of MJ. The survey intended to identify the experience level of these personnel as well as their interest in MJ. The survey also requested comments on the MJ system. The 107 anonymous responses were only identified by an assigned survey number. Major Derrick W. Grace, Criminal Law Survey (2009) [hereinafter Criminal Law Survey] (on file with author). Survey Respondent Number 22 states, “[a]lthough the JAG Corps of late seems to want to emphasize improvement in the quality of MJ product, I’ve seen no perceptible change in the quality. I have been a trial litigator as a CPT for nearly 5 years, and the quality of work product has declined over that period of time.”

⁴ 10 U.S.C. § 827 (2006).

⁵ See discussion, *infra* Part II. Criminal Law Survey, *supra* note 2, Survey No. 45. (“Our MJ system has gone through quite a lot of changes over the past few years with modularization of brigade combat teams (BCTs) and the quality of work by trial counsel’s has plummeted.”)

⁶ See U.S. DEP’T OF NAVY, JAG INSTR. 1150.2, MILITARY JUSTICE LITIGATION CAREER TRACK (3 May 2007) [hereinafter JAGINSTR 1150.2]. JAGINSTR 1150.2 has been superseded by U.S. Dep’t of Navy, JAG Instr. 1150.2A, *Military Justice Litigation Career Track*. U.S. DEP’T OF NAVY, JAG INSTR. 1150.2A, MILITARY JUSTICE LITIGATION CAREER TRACK (17 June 2009) [hereinafter JAGINSTR 1150.2A].

⁷ See JAGINSTR 1150.2, *supra* note 5. The Navy implemented its program in 2007. The Air Force did not initiate its MJ track as of November 2010. While this article does not address the efficacy of a MJ career track in the Army, the Navy JAG career plan is informative and is discussed in detail in Part III.

⁸ http://km.nasa.gov/whatis/KM_Quotes.html (Feb. 3, 2011).

⁹ See generally Criminal Law Survey, *supra* note 2.

¹⁰ See generally *id.* Survey respondent number 67 states, “I believe litigation is an art which must be practiced in order to be improved. It often takes years to become a truly great litigator.” *Id.*

¹¹ See generally *id.* Survey respondent number 88 reveals, “[Trial counsel] are not getting a great deal of trial experience and therefore end up promoting out of a job without having become well versed in MJ.” *Id.*

do not have enough time in the courtroom; therefore MJ is lacking and is having difficulty achieving fundamental success in its mission.¹² While part of the problem is caused by deployments, much of the problem is systemic.

The Army is an “up or out” organization.¹³ The JAG Corps leadership, including promotion boards, expects JAs to have a certain range of experience prior to promotion to the next level.¹⁴ Specifically, they expect JAs experience to be broad and not necessarily deep.¹⁵ They are to be generalists instead of specialists. Unfortunately for the junior litigator (and the MJ system), this often means that once the trial counsel (TC) obtains a minimum level of experience and proficiency, the Army assigns them to another position so they can begin to obtain a base knowledge of another area of the law.¹⁶ Also, it means that JAs without MJ experience are at times placed in senior litigation positions in order to

¹² See generally *id.* Survey respondent number 95 admits, “I find that the JAG Corps does all it can to train us as litigators, but you can’t substitute training for courtroom experience.” *Id.*

¹³ Colonel Chris Robertson & Lieutenant Colonel Sophie Gainey, *Getting Off the Treadmill of Time*, MIL. REV., Nov.–Dec. 2009, 104–105.

¹⁴ Criminal Law Survey, *supra* note 2, Survey No. 94 (“I have worked almost exclusively in MJ. I have been told numerous times by O-6 assignment officers and SJAs, that I am limiting my promotion chances because I have “too much” MJ experience. I have made a personal choice to take the risk. I would rather retire as an O-4 than work in other areas of military law.”).

¹⁵ See generally *id.* Many respondents revealed that senior JAs told them that they needed to take assignments outside MJ in order to become a well-rounded JA instead of a specialist. See also *id.* Survey respondent number 83 states, “[c]urrently many JAs are responsible to be a mile wide and an inch deep on legal knowledge covering all legal disciplines.”). Department of the Army Memorandum 600-2 does address this issue stating that

specialists are required in such areas as acquisition law, international law, labor law, criminal law, medical law, environmental law, or claims. It is vital to the Army that the JAGC have these specialists as well as generalists. In order to develop JAGC officers with the requisite experience to assume senior positions advising the executive leadership of the Army and DOD in specialized areas of the law, it is not unusual for the JAGC to assign officers to successive assignments in the same or similar specialty.

U.S. DEP’T OF ARMY, MEMORANDUM 600-2, POLICIES AND PROCEDURES FOR ACTIVE-DUTY LIST OFFICER SELECTION BOARDS app. H-4 (25 Sept. 2006).

¹⁶ Telephone Interview with Lieutenant Colonel Mark D. Maxwell, Chief, Active Component Career Mgmt. Branch, Pers., Pol’y, & Training Org. (Jan. 12, 2010) [hereinafter Maxwell Interview]. See also Criminal Law Survey, *supra* note 2, Survey No. 24 (“I’ve been through 17 TCs in my first year and a half as Chief (of MJ). . . . Yet, I have 2 potential capital cases and another homicide. . . . Some of my most talented folks spent 6 months in the office, got up to speed, and then deployed.”). See also Criminal Law Survey, *supra* note 2, Survey No. 41 (“The JAG Corps places a lot of emphasis on getting experience in broad areas. Almost every other lawyer outside the Army specializes in certain areas. This is because specialization and experience generally equates to better results for clients. The Army’s focus on generalization seems to me more likely to result in the opposite.”).

obtain their “MJ time.”¹⁷ There is no substitute for experience when it comes to litigating cases, but the current system is not set up for that purpose.¹⁸ The survey conducted for this paper of current MJ practitioners substantiates that military TC and defense counsel (DC) suffer from a lack of experience.¹⁹ Of the survey respondents, 53% of TCs tried less than ten total cases; 78% prosecuted less than five contested courts-martial.²⁰

Deployments exacerbate this lack of experience.²¹ For the past eight years, deployments in support of Operation Enduring Freedom and Operation Iraqi Freedom have lasted between twelve to fifteen months. Prior to the deployment, the brigade TC must attend field training as the operational law attorney, a time when cases are either neglected, given highly-favorable deals, otherwise disposed of, or passed off to another trial counsel.²² Traditionally, the training and leave takes the TC away from their cases for more than two months in approximately a four month period.²³ Upon redeployment, almost a month is taken up with reintegration

¹⁷ See generally Criminal Law Survey, *supra* note 2. Survey respondent number 57 states, “[i]n the field we are seeing COJ, DSJA, SJA, RDC and SDC with insufficient experience to train and mentor counsel.” *Id.*

¹⁸ See generally *id.* Survey respondent number 3 states:

[i]t is frustrating for an STC to constantly have a revolving door of TCs. It takes nearly two years for the average TC to get a sufficient number of CMs under his belt to even call himself proficient, let alone an “expert.” Our CMs are very visible to the public . . . and we routinely throw the young and inexperienced into the fire and hope it all works out.

See also *id.* Survey respondent number 68 states, “The Army’s emphasis on young attorneys also creates a system where everyone is always in the initial learning process. This is extremely inefficient and unfair to the public.” *Id.* When asked about the Special Victim Prosecutor Program, Lieutenant General Scott Black stated that “[u]ntil now Army JAG Corps lawyers have been generalists not specialists. . . . ‘We train everybody to a baseline level for prosecution purposes, and that includes sexual assault cases.’” Stars and Stripes.com, Army names special prosecutors for assault cases, <http://www.stripes.com/articleprint.asp?section=104&article=60280> (last visited Jan. 27, 2011).

¹⁹ See generally Criminal Law Survey, *supra* note 1. More than sixty-two percent of trial counsel surveyed have less than one year in MJ. Only six percent have more than two years.

²⁰ See *id.*

²¹ See *infra*. See also Criminal Law Survey, *supra* note 2, Survey No. 1 (“Constant deployments lessen court room time which should be a concern.”); Survey No. 38 (stating that because he deployed while a trial counsel, “I’m now in TDS and playing catch-up. I’m miles behind where I could have been if I had been able to ‘track’ in Criminal Law and not been shifted around so much.”).

²² Interview with Major John J. Merriam, Student, The Judge Advocate Legal Ctr. & Sch., in Charlottesville, Va. (18 Feb. 2010). [hereinafter Merriam Interview]. Major Merriam deployed for twelve months to Iraq as a brigade trial counsel from 2003–2004. He was also the Officer in Charge of the Ansbach, Germany Law Center from 2007–2009.

²³ *Id.*

and leave. The Judge Advocate General (TJAG) stated that JAs normally will serve in a TC position for eighteen to twenty-four months.²⁴ If that is the case, then a TC who deploys will only serve approximately three to nine months as a full-time TC outside of a deployed environment.

Deployments affect the litigation experience of a TC.²⁵ The JA's primary duty is no longer that of prosecutor.²⁶ The number of jobs the JA takes on are increased exponentially including international law, operational law, claims, and legal assistance.²⁷ Of the survey respondents (government and defense), 42% stated that while deployed in a MJ position they tried three or fewer cases; 75% tried less than six.²⁸ This is far less than the average litigator would try in garrison.²⁹

It is not just trial counsels who lack experience. Defense counsels are also green. Forty-three percent of defense counsels responding to the survey have less than one year of MJ experience; 39% have tried fewer than five total courts-martial; and 62% have less than five contested cases (81% have less than 10).³⁰

Senior trial counsels (STC), senior defense counsels (SDC), and chiefs of military justice (COJ) possess much more experience, on average, than the TC and DC, but even their statistical data is troublesome. Seventy percent of STCs have less than ten contested courts-martial and 30% have less than two years MJ experience; 22% have less than five contested cases; and 44% have less than ten contested cases. Eleven percent of SDCs have less than one year total MJ experience; 11% have less than five contested cases; and 55% have less than ten contested courts-martial.³¹

The numbers on the high-end are encouraging. Sixty percent of STCs and 55% of both SDCs and COJs have

²⁴ Policy Memorandum 08-1, Office of The Judge Advocate General, U.S. Dep't of Army, subject: Location, Supervision, Evaluation, and Assignment of Judge Advocates in Brigade Combat Teams—POLICY MEMORANDUM 08-1 para. 7 (21 July 2008) [hereinafter BCT Policy Memo].

²⁵ Criminal Law Survey, *supra* note 2, Survey No. 33 (“[W]ith so few cases being tried by TCs while deployed, serving 12 months as a TC in a deployed environment is not producing enough litigation experience to justify the job title. So while these individuals may, on paper, look like an experienced MJ practitioner, the fact is something else entirely.”). *See also id.* Survey No. 8. “Of the eight TCs I deployed this year, only one of them is actually trying cases.”

²⁶ Merriam Interview, *supra* note 21

²⁷ *See id.*

²⁸ *See generally* Criminal Law Survey, *supra* note 2. This number includes guilty pleas as well as contested courts-martial.

²⁹ *See id.*

³⁰ *See id.*

³¹ *See id.* Six percent of COJs have less than six months MJ experience

more than three years of MJ experience.³² However, experienced MJ practitioners in one place cannot make up for a shortfall elsewhere. 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 Intermediate Level Education/Advanced Operations and Warfighting Course (ILE/AOWC) for three months.

This demonstrated lack of experience leads to many problems: the same mistakes are made in the courtroom over and over; there is inadequate supervision of the trial and defense counsel; and there is inadequate training at the installation level.³³ There is no substitute for time in the courtroom and the current practitioners are not receiving this needed experience. One possible solution is to implement a MJ track similar to the Navy.

III. Navy Military Justice Career Track

The U.S. Navy recognized the need to develop a core group of individuals practiced in litigation. In September 2006, the Navy JAG Corps published its strategic vision for the next fifteen years stating:

To fulfill the *JAG Corps 2020* vision, the JAG Corps will create a career track enabling selected judge advocates to specialize in military justice litigation. This will improve the quality of military justice litigation by keeping experienced and effective counsel in the courtroom, providing expert supervision and mentoring for new counsel, and creating a cadre of qualified judge advocates to fill selected billets in the military justice system. Greater courtroom and appellate expertise will increase the efficiency with which courts-martial are conducted and reviewed. A robust community of military justice trial and appellate litigators will provide reach-back capability for both trial practitioners and staff judge advocates worldwide.³⁴

³² *See id.*

³³ *See id.* Survey respondent number 57 states, “[t]he Government has lost what were otherwise good cases by employing the “jack of all trades” track of growth for its officers and, even more profound, we’re seeing cases that lack credibility going forward because of a lack of experience in the justice shop.”); *see also id.* Survey respondent number 94 states, “[a]s an experienced DC, I routinely exploit the Government’s inexperience both in court and pretrial. This problem is only going to get worse.” *Id.*

³⁴ U.S. NAVY JUDGE ADVOCATE GENERAL’S CORPS, JAG CORPS 2020: NAVY JAG CORPS STRATEGIC PLAN 11 (Sept. 2006).

In May 2007, the Navy implemented this career track for its JAs and the Navy Judge Advocate General (Navy JAG) signed JAG Instruction 1150.2 “[t]o establish procedures for recruiting, identifying, selecting, retaining and promoting military justice litigation specialists and experts in the Navy Judge Advocate General’s (JAG) Corps.”³⁵

The Navy JAG stated that part of the “personnel strategy is to identify and cultivate critical skill sets” and that “[o]ne such skill set involves the litigation of complex criminal cases.”³⁶ He recognized that though “the number of courts-martial has decreased in recent years; the complexity of the cases has dramatically increased. The JAG Corps must identify those judge advocates with the requisite education, training, and aptitude to litigate complex cases and to continue to cultivate their development.”³⁷ Although the cases were becoming more difficult to try, both prosecution and defense, the skill level of the JAs on the cases were not increasing at the same pace.

The Navy leadership intended the MJ career track to increase “the litigation experience of a select number of military justice litigators.”³⁸ Increasing the MJ practitioner’s skill level would “maximize productivity” and allow the Navy to “realign resources to meet other Fleet legal requirements.”³⁹ People who know their jobs are able to do them quickly and expertly. This means that in theory the Navy requires fewer JAs to perform more and better quality work, which frees JAs, who would otherwise be working in MJ, to carry out other critical missions for the commands.

The first task in implementing the policy is to populate it. The Navy decided on a graduated, two-tiered qualification regime: specialist military justice litigation qualification (MJLQ) and expert MJLQ.⁴⁰ The specialist MJLQ is given to a judge advocate who has demonstrated

acceptable quantitative and qualitative experience in MJ litigation and requires involvement in at least five contested courts-martial.⁴¹ Once a JA receives the Specialist MJLQ she may apply for the EXPERT MJLQ after completing three-years in one or more required positions and at least 20 contested courts-martial.”⁴²

Once the officers are identified and properly classified, the next step is to detail the qualified officers into the appropriate billets. JAG Instruction 1150.2A lists “billets requiring significant military justice litigation experience [and] are designated by the JAG as requiring assignment of a judge advocate holding the MJLQ.”⁴³ There are more than fifty MJLQ required positions, all of which are in the grade of O-4 or higher.⁴⁴ Among these billets, originally eleven were for O-5 DC or TC billets and three O-6 DC billets.⁴⁵ The instruction recognizes that MJLQ qualified officers may need to serve in positions not requiring MJLQ and that non-MJLQ qualified officers may serve in required billets depending on “availability of MJLQ judge advocates, the needs of the Navy or the professional development of the individual judge advocate.”⁴⁶

JAG Instruction 1150.2A sets out a sample litigation career path.⁴⁷ This path recognizes the need for officers who are litigators to work primarily in litigation positions. “Developing and maintaining highly technical and perishable litigation skills requires progressive assignment to trial litigation billets and may limit the opportunity for assignment to sea duty or operational billets or reduce the variety of non-litigation billet assignments in a career.”⁴⁸

³⁵ JAGINSTR 1150.2, *supra* note 5, para. 1, at 1.

³⁶ *Id.* para. 3.a, at 1.

³⁷ JAGINST 1150.2, *supra* note 6, para. 2.a, at 1.

³⁸ JAGINSTR 1150.2, *supra* note 6, para. 3b, at 1.

³⁹ *Id.* para. 3.b, at 1. Survey respondent number 30 equated this with civilian district attorney’s offices saying:

While working as a DA we had a course of action for every single type of case, if you have a drug suppression hearing, here are the baseline questions you have to ask to be successful. We are never instructed about how to build a case. It is really a sink or swim environment, which is okay, but you never get comfortable doing your job and you don’t ever truly master your job without wasting plenty of man hours.

See also Criminal Law Survey, *supra* note 2.

⁴⁰ *See id.* para. 3.d, at 2. This is similar to the Army’s four-tier Additional Skill Identifier Program discussed *infra* Part IV.

⁴¹ *Id.*

⁴² *Id.* para. 4.a.(2)(a), at 4. At the time the Navy instituted the MJLQ, the Navy already had what it called Advanced Military Law (TriAd) Officers. These officers received a MJ litigation subspecialty code based on their completion of a Master of Laws (LL.M.) in Trial Advocacy. The Navy sent the TriAd Officers to a one-year, full-time civilian LL.M. Program accredited by the American Bar Association (ABA) to receive this degree. These officers received their Expert MJLQ automatically. The LL.M. Program in trial advocacy is still available to Navy JAs. Unlike the Navy system, no Army JAs are sent for an LL.M. in trial advocacy. E-mail from Yvonne Caron, Office of the Judge Advocate Gen., to Major Derrick Grace (25 Nov. 2009, 12:28 EST)

⁴³ JAGINSTR 1150.2A, *supra* note 5, para. 5.b, at 6. (list of required billets are in Enclosure 2).

⁴⁴ *See* JAGINSTR 1150.2, *supra* note 5, enclosure 2.

⁴⁵ *See* JAGINSTR 1150.2A, *supra* note 5, enclosure 2. JAGINSTR 1150.2A changed the title of these billets to Executive Officers of the Regional Legal Services Office (RLSO) and Naval Legal Services Office (NLSO), which are, essentially, the government and defense counsel offices for criminal litigation.

⁴⁶ *Id.* para. 5.b, at 6.

⁴⁷ *See id.* enclosure 4.

⁴⁸ *Id.* para.6, at 6. The Instruction again recognizes that the assignment of these officers in litigation billets may not always be for the good of the Navy or the officer. “All MJLQ judge advocates should occasionally be

In detailing officers to assignments, the effect that the assignment will have on promotion is a concern. Many Navy JAG Officers were concerned that the track would hurt their chances for promotion.⁴⁹ The JAG Instruction addresses these concerns by stating that “[t]he JAG will determine the anticipated needs for promotion of MJLQ judge advocates to fill primary military justice litigation billets and recommend language for inclusion in Secretary of the Navy selection board precepts.”⁵⁰ In the precept for Fiscal Year 2010 Lieutenant Commander Promotion Board, the Secretary of the Navy instructed that

In determining which officers are best and fully qualified, you shall favorably consider the Navy’s need for Litigation Experts and Specialists, giving equal weight to their contributions in military justice litigation that ordinarily would be given to other members of the JAG Corps community who have followed more traditional career paths. At this time, the needs of the Navy reflect a shortage of officers for senior leadership assignment in this area of expertise. In determining which officers are best and fully qualified for promotion, you shall favorably consider the Navy’s need for senior officers with proven expertise in this field.⁵¹

It is hard to imagine a stronger vote of confidence for the program than this language from the Secretary of the Navy. The next obvious question is: did this language in the Navy precept work, thereby alleviating the fear of some JAs that a career in MJ will harm their chances at promotion? Three MJLQ qualified individuals were in the zone for O-6; all were selected for promotion. Five MJLQ qualified individuals were in the zone for O-5; four of the five were selected for promotion.⁵²

detailed to billets outside the litigation career path to ensure a depth of experience beneficial to both the officer and the Navy.”

⁴⁹ Telephone Interview with Lieutenant Commander Jonathan Stephens, U.S. Navy Criminal Justice Pol’y Div. (Nov. 20, 2009) [hereinafter Stephens Interview]. Lieutenant Commander Stephens relayed that in numerous conversations with colleagues, they expressed reservations entering the career track because of a fear that they would not be promoted.

⁵⁰ JAGINSTR 1150.2A, *supra* note 5, at 7. A precept is the selection criteria that the Secretary of the Navy provides to the promotion board.

⁵¹ Memorandum, Sec’y of the Navy, to President, FY-10 Active-Duty Navy Lieutenant Commander Judge Advocate General’s Corps Promotion Selection Board para. 3c (8 May 2009).

⁵² Stephens Interview, *supra* note 48.

IV. Steps Taken to Strengthen the Army Military Justice System

The Army JAG Corps leadership also recognizes that stronger litigation skills and experience are vital to the practice of MJ. The JAG Corps Vision is “[o]ne team of proven professionals committed to justice, grounded in values, and dedicated to providing proactive legal support to the Army and the Joint Force.”⁵³ The June 2007 JAG Corps Strategic Plan identifies goals for officers to achieve proficiency in the core competencies.⁵⁴ One of the goals is to “[e]nsure that Military Justice practitioners adhere to the highest standards of professional excellence, and promote discipline and fairness.”⁵⁵

Following the 2007 Strategic Plan, the Army executed multiple changes to the MJ system. These changes include rescinding previous guidance which had placed the brigade “trial counsel” at the brigade instead of a consolidated MJ shop, instituting a MJ additional skill identifier and also initiated SVP/HQE positions.

A. Brigade Trial Counsel

The Army harmed its TCs when it sent them to the brigades as part of the Army transformation to a brigade-centric modular Army – an injury from which the JAGC is still trying to recover.⁵⁶ In January 2006, in an effort to support and adapt to the modular Army, TJAG signed Policy Memorandum 06-7, stating that the “BCT will include a Brigade Judge Advocate (BJA), normally a Major, and an Operational Law Judge Advocate (OPLAW JA), a Captain who assists with issues across all legal disciplines.”⁵⁷ The memorandum physically located both of these JAs at the brigade headquarters. Co-locating the JAs with the brigade promoted a close relationship between the JAs and the brigade staff; however, the staff judge advocate (SJA) and the COJ located away from the brigade lost oversight of these JAs. Shortly thereafter, the Personnel, Plans and

⁵³ See U.S. ARMY JUDGE ADVOCATE GENERAL’S CORPS, STRATEGIC PLAN I (June 2007) [hereinafter ARMY JAG CORPS STRATEGIC PLAN].

⁵⁴ *Id.* at 8 (“Our six core legal disciplines are Military Justice, International and Operational Law, Administrative and Civil Law, Contract and Fiscal Law, Legal Assistance, and Claims.”).

⁵⁵ *Id.*

⁵⁶ See Criminal Law Survey, *supra* note 2, Survey No. 45 (“This separation from the main MJ office takes a new TC away from a more watchful eye of an STC or COJ where ideas can be shared, progress monitored. Now, the TC is under only the supervision of the BJA and it is hit or miss as to how much MJ (sic) experience that individual has or time to properly mentor and guide.”); see also *id.* Survey respondent number 106 states, “having the Brigade Commander as the Senior Rater for a Trial Counsel poses some conflict of interest. It is okay for a Trial Counsel to be primarily responsible for the military justice of a particular Brigade, but the Trial Counsel should answer directly to the Division SJA.”

⁵⁷ BCT Policy Memo, *supra* note 23, para. 2c.

Training Office (PP&TO) renamed the OPLAW JA the “OPLAW/TRIAL COUNSEL” on his/her officer evaluation report (OER). “The addition of TRIAL COUNSEL to the title OPLAW JA recognizes that a significant portion of the subordinate JA’s duties encompass traditional Trial Counsel duties and that the OPLAW/TRIAL COUNSEL position satisfies a developmental assignment in the core competencies of military justice.”⁵⁸

In 2008, TJAG determined that physically locating the OPLAW/TRIAL COUNSEL at the brigade adversely affected the practice of MJ and implemented guidance withdrawing the physical location of that position from the brigade and placing it back with the local SJA office.⁵⁹ Despite this change, the brigade TCs continue to spend the vast majority of time at the brigade.⁶⁰ Further, PP&TO renamed the OPLAW JA/TRIAL COUNSEL position, this time to “Trial Counsel,” which “name change we will pursue in manning documents in order to emphasize the *primary mission of the BCT legal team*.”⁶¹ “These changes are directed at providing increased training and mentoring in MJ for BCT ‘Trial Counsel’ to secure the foundation of our practice of MJ and preserve the integrity of our statutory mission.”⁶² The BCT Trial Counsel’s main duty is once again MJ.⁶³ The Judge Advocate General recognized that the decentralization and vastly expanded role of the BCT TCs impaired their ability to perform in the MJ core competency. By renaming the BCT captains and pulling them back to a consolidated office where they can be mentored by more experienced MJ practitioners, TJAG attempted to improve the quality of MJ practice.

B. Additional Skill Identifier in Military Justice

In July 2008, the Army took another step to revamp and improve the administration of MJ by initiating a system to identify JAs with military justice experience with “a graduated set of additional skill identifiers (ASI) in military

⁵⁸ E-mail from Colonel Robert Burrell, Chief, Pers., Plans & Training Office (PP&TO), Policy Guidance on BCT Duty Title, to all Active Component, Reserve, and Nat’l Guard Members of The Judge Advocate General’s Corps (n.d.), [https://www.jagcnet2.army.mil/8525743C0053913C/0/E7EC0CA9F62C5DA0852573610046DC32/\\$file/BCT%20Duty%20Title%20Guidance.pdf](https://www.jagcnet2.army.mil/8525743C0053913C/0/E7EC0CA9F62C5DA0852573610046DC32/$file/BCT%20Duty%20Title%20Guidance.pdf) (last visited 20 Jan. 11) [hereinafter BCT Duty Title Policy]; and on file with author.

⁵⁹ See BCT Policy Memo, *supra* note 23, para. 3.

⁶⁰ Telephone Interview with Major Matthew Calarco, Special Victim Prosecutor, Fort Campbell, Ky. (13 Jan. 2010); see also Telephone Interview with Captain Dan Kicza, Special Victim Prosecutor, Fort Carson, Colo. (8 Jan. 2010).

⁶¹ MJ Message, *supra* note 1 (emphasis added).

⁶² *Id.*

⁶³ See BCT Policy Memo, *supra* note 23, para. 2c.

justice.”⁶⁴ “The ASI program for military justice encourages Judge Advocates to set goals to achieve greater skill in litigation and expertise in military justice. It also allows our Corps to better train and challenge Judge Advocates throughout their careers to improve their military justice proficiency.”⁶⁵

The requirements necessary to qualify for an ASI are based on both MJ experience and education. In general, this “includes 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, i.e., trial counsel, defense counsel, chief of justice, senior defense counsel, military judge.”⁶⁶ While there are four ASI levels, this paper will only discuss the two affecting the JAs with the least amount of MJ experience.

The basic MJ practitioner (BMJP) ASI requires:

- (1) completion of the JA Officer Basic Course; (2) eighteen months as a trial or defense counsel *or* served as a trial or defense counsel in fifteen courts-martial (three of which must have been contested cases); (3) attendance at the TJAGLCS Criminal Law Advocacy Course . . . within six months of assuming duty as a trial or defense counsel; and (4) attendance at the TJAGLCS new developments course or TC or DC Assistance Program (TCAP, DCAP) training . . . within twelve months of assuming duty as a trial counsel.⁶⁷

⁶⁴ Major General Scott C. Black, *Additional Skill Identifiers in Military Justice*, TJAG SENDS, July 2008 [hereinafter ASI Message]. An additional skill identifier (ASI) is a code attached to the military occupational specialty (MOS) which “is used to identify additional skills possessed by personnel or required by a position.” The ASI program is similar to the Navy’s MJ Qualification; however,

it was different . . . in three important respects: (1) it does not include precept language designed to highlight the need for such qualified officers at promotion boards, and (2) there seemed to be less emphasis on the assignment of qualified officers into litigation billets as there is in the Navy, and (3) there are four levels instead of two.”

Posting of Jason Grover to CAAFlog, <http://caaflog.blogspot.com/2008/11/new-developments-course.html> (Nov. 8, 2008, 03:26 EST).

⁶⁵ Policy Memorandum 08-2, Office of The Judge Advocate Gen., U.S. Dep’t of Army, subject: Military Justice Additional Skill Identifiers—POLICY MEMORANDUM 08-2 (21 July 2008) [hereinafter ASI Policy Memo] (establishing four MJ ASIs: *Basic, Senior, Expert, and Master Military Justice Practitioners*).

⁶⁶ *Id.* para. 3. Upon request, “[d]uty as a Staff Judge Advocate, Brigade Judge Advocate, Command Judge Advocate, Officer in Charge, or Special Assistant United States Attorney may qualify.” *Id.*

⁶⁷ See *id.* para. 4a. See generally Criminal Law Survey, *supra* note 2 (demonstrating collective concern over the time requirement because of

The senior MJ practitioner (SMJP) ASI requires:

(1) BMJP ASI; (2) completion of the TJAGLCS Graduate Course with three elective hours in criminal law...; and (3) a total of twenty-four months MJ experience. . . , or served as a trial or defense counsel in thirty courts-martial (seven of which must have been contested cases). . . . This experience level would be typical of JA serving as a chief of MJ, a SDC, a branch chief at GAD or DAD, attorneys serving in the Trial Defense Service headquarters (TDS-HQ) or OTJAG-CLD, or a TJAGLCS Criminal Law Department Professor.⁶⁸

The ASIs are meant to “require progressive experience in MJ and litigation assignments and are designed to encourage counsel to seek out litigation-related assignments to deepen their level of MJ training and experience” and are structured to capture that experience and training.⁶⁹ They are built to “assist the Personnel, Plans, and Training Office (PP&TO) in recommending qualified officers for certain jobs” but are not “prerequisites for any duty assignment.”⁷⁰ The emphasis on placing ASI qualified individuals in higher positions in MJ is much weaker than the Navy’s guidance to place MJLQ JAs in required positions.⁷¹ Whether the ASI program as it currently stands meets its purpose or the needs of the Army is discussed in Section V of this article.

C. The Special Victim Prosecutor and Highly Qualified Expert Program

The SVP Program is another Army JAG Corps initiative aimed at placing experienced JAs in litigation positions with a special emphasis on training young JAs.⁷² The

deployments and class availability). If an ASI applicant can provide adequate evidence of deployment requirements, waivers are routinely granted for this requirement. See E-mail from Chief Warrant Officer Three William C. Woodward, Operations Officer, Office of the Judge Advocate Gen., Criminal Law Div., to Major Derrick W. Grace (Jan. 12, 2010, 12:19 EST) (on file with the author).

⁶⁸ See ASI Policy Memo, *supra* note 64, para. 4b.

⁶⁹ *Id.* para. 2c.

⁷⁰ *Id.*

⁷¹ See JAGINST 1150.2A, *supra* note 5. “Availability of MJLQ judge advocates, the needs of the Navy or the professional development of the individual judge advocate.”

⁷² See LIEUTENANT GENERAL SCOTT C. BLACK, THE JUDGE ADVOCATE GEN. OF THE ARMY, TJAG SENDS, SUBJECT: SPECIAL VICTIM PROSECUTORS AND HIGHLY QUALIFIED EXPERTS IN MJ (Jan. 2009) [hereinafter SVP Message].

To capitalize on these initiatives and resources, we will provide SJAs and RDCs a long-term training model, built around military and civilian training

implementation of this program is recognition that the average trial counsel does not have the skill level, resources, and experience to, adequately, approach and prosecute more complex cases. Sexual assault cases may not normally have complex fact patterns, but the nature of the crime, the sensitivity and history of the victim, and the preconceptions of the panel among other issues, make them difficult and more intricate to prosecute and defend.⁷³

This program created fifteen SVP authorizations as well as seven HQE.⁷⁴ The SVP positions are intended to be staffed by JA personnel ranging in rank from captain to lieutenant colonel “who will focus exclusively on litigation and training during three-year tours—with an emphasis on sexual assault.”⁷⁵ The HQE positions are to be staffed by civilian subject matter experts in the “fields of special victim and sexual assault prosecution and defense to augment our training base within TCAP, DCAP, and TJAGLCS.”⁷⁶

The SVPs operate in an interesting paradigm. They are stationed for a period of three years at major installations, but have geographic areas of responsibility, usually encompassing several posts.⁷⁷ While the SVP is an “important asset to the Office of the Staff Judge Advocate (OSJA) where they are located, SVP responsibilities transcend any one SJA or installation,” as such, the SVP is assigned to the U.S. Army Legal Services Agency (USALSA) and rated by a combination of local SJA offices and USALSA.⁷⁸ Meanwhile, the local SJA is charged with providing logistical support to the SVP “including but not limited to: paralegal, trial counsel, office space, and equipment.”⁷⁹

courses that will challenge not only our most junior, but also our most experience practitioners—on both sides of the bar. Led by our TJAGLCS faculty, in concert with TCAP, DCAP and permanent training relationships with premier civilian training venues, we will devote considerable resources to MJ training.

Id.

⁷³ Trial Counsel Assistance Program Conference, Garmisch, Germany, June 2006. See also Criminal Law Survey, *supra* note 1 (noting in multiple responses that the SVP program is geared solely toward the Government).

⁷⁴ See SVP Message, *supra* note 72.

⁷⁵ *Id.* The Fort Bragg SVP was removed from his SVP duties and assigned to assist in the prosecution of a capital case scheduled to last eight weeks. Telephone Interview with Major Robert Stelle, Fort Bragg Special Victim Prosecutor (Feb. 26, 2010).

⁷⁶ SVP Message, *supra* note 72. The Defense Counsel Assistant Program was to receive assistance from the Highly Qualified Expert Program.

⁷⁷ Policy Memorandum 09-3, Office of the Judge Advocate General, U.S. Dep’t of Army, subject: Special Victim Prosecutors—POLICY MEMORANDUM 09-3, para. 3 (29 May 2009) [hereinafter SVP Policy Memo]. These areas of responsibility are identified by PP&TO in conjunction with the Office of the Judge Advocate General, Criminal Law Division.

⁷⁸ *Id.* para. 5.

⁷⁹ *Id.* para. 9a.

The SVP mission is three-fold. The first and primary mission of the SVP is litigation.⁸⁰ “The SVP will be detailed to every sexual assault . . . case within their area of responsibility. The SVP, in coordination with the Chief of Military Justice, will determine whether additional trial counsel should be detailed to a particular case and which counsel will sit first chair on the case.”⁸¹ “Secondary to their primary mission, SVPs will develop a sexual assault and family violence training program for the investigators and trial counsel in the area of responsibility.”⁸² The third area of emphasis is establishing “Special Victims Units (SVUs) at the installations in their area of responsibility, if practicable.”⁸³ Many civilian jurisdictions have a self-contained unit for sexual assault investigation and prosecution.⁸⁴ While the SVP program addresses the need for experienced JAs in sexual assault cases, it does not address the fact that seasoned JAs are needed across the board.

V. Suggested Changes

A. Training

The Judge Advocate General identified training and leader development as crucial to a JA’s ability to provide legal support to the Army.⁸⁵ Trial work offers the best training and development opportunity in military justice; there is no substitute for real work on real cases.⁸⁶ The Army must “[t]rain smart.”⁸⁷ Often, young, untested counsel in the Army are assigned cases with little or no supervision or their superiors lack the time and experience to provide mentorship.⁸⁸ While this practice may give junior JAs trial

⁸⁰ See *id.* para. 7.

⁸¹ *Id.* para. 9b.

⁸² *Id.* para. 7b.

⁸³ *Id.* para. 9c.

⁸⁴ Fifth Nat’l Sexual Assault Response Team Training Conf. at Seattle, Wash. (May 27–29, 2009).

⁸⁵ See Memorandum from Major General Scott C. Black, The Judge Advocate Gen., to Judge Advocate Senior Leaders, subject: Training Guidance FY 2009, para. 4 (30 Oct. 2008) [hereinafter 2009 Training Memo].

⁸⁶ See generally Criminal Law Survey, *supra* note 2, Survey No. 24 (“Regardless of the amount of training, nothing, I repeat, nothing, can substitute live in-court experience. In order to get better at trying cases, you must try cases, period. The best way to sharpen the Corps trial litigation skills is to keep counsel in their positions for extended periods of time so they can actually try cases.”).

⁸⁷ 2009 Training Memo, *supra* note 85, para. 3b.

⁸⁸ Criminal Law Survey, *supra* note 2, Survey No. 94 (“The JAGC is failing the Army, commanders, and Soldiers. TC, DC and most Field Grade JAs are shamefully inexperienced in MJ. Right now, I know of several RDCs and SDCs who HAVE NEVER TRIED A CASE, but are expected to train

experience, it does not make them better litigators. The JAG Corps must provide TCs with sufficient mentorship to ensure they do not spend unnecessary time learning and preparing for cases and to ensure that their output is not substandard.”⁸⁹

In order to avoid poor or improper training, the Army needs to place experienced litigators on all contested courts-martial. Such a proactive stance provides junior TCs with quality supervision sitting right next to them in court. To effectuate this course of action and maximize the courtroom training of its people, the Army must do two things. First, as discussed previously, simply because a JA has been in a TC duty position for eighteen to twenty-four months, does not necessarily indicate that he possesses a basic knowledge of MJ; therefore, if a JA is deployed during his stint as TC or his litigation experience is minimized for another reason, the length of time he is in the TC position should be extended.⁹⁰ Second, the Army must ensure that the personnel assigned to STC, SDC, and COJ positions have the requisite qualifications for that position using the ASI.

B. Additional Skill Identifier

The ASI is a great start in ensuring qualified practitioners are in positions that require at least a minimal amount of experience; however, to be effective, the Army must right-size the program. The qualifications for the SMJP must be changed to adequately account for pre-graduate course JAs with significant litigation experience. The ASI has the potential to identify those JAs with both experience and interest in MJ. It goes beyond the JA’s duty title and looks at their experience level in an effort to recognize these individuals. According to one survey respondent “[r]ight now, individuals nearing 100 courts-martial are considered ‘basic’ because they have not gone to the graduate course, where an officer with half [that amount] is considered more of an expert after acquiring 3 credit hours of criminal law in the graduate course.”⁹¹ The system fails to address one of

and advise brand new counsel.”); *id.* Survey No. 17 (“[t]here is a lack of available, experienced trial lawyers to mentor junior trial lawyers.”).

⁸⁹ See also *id.* Survey No. 30; *id.* Survey 68 (“The Army’s system of allowing people fresh out of law school to operate as the primary felony litigators, who are led by Senior Trial Counsels 3 years out of law school, is ridiculous.”).

⁹⁰ *Id.* Survey No. 24 (“the best way to sharpen the Corps litigation skills is to keep counsel in their positions for extended periods of time so they can actually try cases.”).

⁹¹ *Id.* Survey No. 57 (The Graduate Course has more than three credit hours devoted to criminal law. The SMJP requires three additional elective credits above the plenary instruction on MJ.). At the time of the survey, only eight JAs out of 107 possessed an approved ASI above Basic Military Justice Practitioner; 67% possessed no current ASI. Many ASI requests were pending and multiple respondents expressed doubt that the ASI would be useful in its current format.

the main difficulties the Army faces in manning its MJ positions: a shortfall in majors.

The Army, like many organizations, relies on its senior officers to train and mentor subordinates. In MJ, the STC, SDC, and COJ are considered to be the training positions; therefore, the Army must place experienced people in these positions. While PP&TO does have this as a goal, it sometimes fails to meet its own standard.⁹² The ASI program presently has no way of identifying pre-graduate course officers with sufficient experience to fill these training positions. A JA's Officer Record Brief lists positions that the JA filled, but not the level of experience she received in those positions or her abilities. The JAG Corps is at approximately 69% strength for majors.⁹³ The supply of postgraduate majors is inadequate to fill positions requiring experienced MJ practitioners; therefore PP&TO must plug senior captains into these positions, but the current ASI system is unable to assist in identifying these JAs.

Even if a sufficient number of majors existed to fill these positions, the ASI would be inadequate. The time between the graduate course and the first look for lieutenant colonel (LTC) is approximately five years.⁹⁴ An officer completes only two or three post graduate course assignments in this period. A JA is ineligible to apply for the senior ASI until after the graduate course, so PP&TO cannot use the ASI for the first post-graduate course assignment. Since LTCs are not traditionally in litigation positions, this means that the ASI is only useful for one assignment in a JA's career. Since the ASI fails to adequately capture senior captains' experience and can only be used for one assignment as a major, it is nearly useless in its stated goal as a PP&TO manning tool. To be useful, a JA must qualify for a SMJP ASI prior to attendance at the graduate course.

C. Coding Senior Military Justice Positions

Senior MJ positions are not the place to learn justice. Junior officers depend on the JAs in these positions to answer questions quickly, knowledgeably, and helpfully;

⁹² Maxwell Interview, *supra* note 15. The author provided the Criminal Law Survey to all 2009–2010 Graduate Course attendees who were slated to take jobs in criminal law. Fifty percent had less than two years experience in criminal law; 25% had less than one year. Thirty percent had tried fewer than five contested cases.

⁹³ *Id.* See also Pers., Plans, & Training Office, AC 27 A/B Strength Report, Power Point Slide (2009) (on file with author).

⁹⁴ See Pers., Plans, and Training Office, JAGC FY10 0-5 Prom Plan, [https://www.jagcnet.army.mil/852574980060D3A9/0/AEA976677C9CD9C2852576BF0075F5FA/\\$file/O5%20Promotion%20Plan.pdf](https://www.jagcnet.army.mil/852574980060D3A9/0/AEA976677C9CD9C2852576BF0075F5FA/$file/O5%20Promotion%20Plan.pdf); OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. ARMY, JAG PUB 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY (2009–2010).

which does not always occur in practice.⁹⁵ Once the ASI is right-sized, it can be used in manning “coded” positions.⁹⁶ There are currently no “coded” billets for MJ, while there are for other specialties including contract law and language.⁹⁷ The STC positions should require at least a BMJP ASI; SDC and COJ positions should be “coded” for a SMJP ASI. While this may lock out JAs who have no MJ experience earlier in their careers through no fault of their own, these positions are not ones that should be used to gain experience. Placement of inexperienced JAs in these senior litigation positions harms junior litigators in particular and the MJ system as a whole.

D. Post-Trial

Junior JAs need experienced senior JAs to serve on cases with them. Since there are no real STC billets, often the STC has other duties including BJA or Special Assistant U.S. Attorney.⁹⁸ These can be and often are full time positions in their own right; therefore the STC cannot be in charge of all the training, the COJ must be free to assist. The STC should be used to second chair cases with junior officers to ensure they properly learn how to prosecute a case and to first chair more difficult or time consuming cases. In busy jurisdictions COJs are frequently so overwhelmed with post-trial and other commanding general (CG) actions; they rarely have time for training.⁹⁹ A system must be put into place that frees the STC to sit on cases with new TCs and handle the more complex cases and the COJs to train their junior JAs as well as preparing and reviewing all MJ CG actions.¹⁰⁰ One way to accomplish this is to move the responsibility of post-trial.

⁹⁵ Criminal Law Survey, *supra* note 2, Survey No. 33 (“If nothing else, it [a criminal law career track] would stem the flow of people being placed in STC/CoJ positions that don't actually have any MJ experience (or at best, minimal experience). When TCs have to mentor Senior TCs or CoJs, there is a problem.”).

⁹⁶ A coded position is one in which a JA must meet certain prerequisites before filling the position.

⁹⁷ Maxwell Interview, *supra* note 15.

⁹⁸ Chief Warrant Officer Three Rob T. Stone, The Judge Advocate Gen. Legal Ctr. & School, Address to the Military Operations Class of the 58th Graduate Course at The Judge Advocate Gen.'s Legal Ctr. & Sch. (Jan. 5, 2010). See also generally Criminal Law Survey, *supra* note 1 (Many STCs expressed that other duties interfered with their ability to adequately concentrate on training.).

⁹⁹ See Criminal Law Survey, *supra* note 2, Survey No. 94 (“We not only need a military justice career track, we also need to delineate between military justice managers and litigators—these are related but require different skill sets. Field grade officers should LEAD litigation teams, not just serve as an administrator ie chief of justice.”).

¹⁰⁰ See *id.* Survey No. 99. One survey respondent commented:

One thing that goes unmentioned is the huge onus on the more experienced folks to train the less experienced folks. I have a staff of 5 attorneys . . . only one came with trial experience . . . all of which are first term captains. That is a HUGE training

In the Navy and Marine Corps, once a case is prosecuted, the responsibility for post-trial is moved to the civil law section.¹⁰¹ Most post-trial processing has little to do with criminal law. It is more of an administrative and systemic function. For the benefit of the SJA, the accused, and the CG, the section reviewing the record for any alleged legal error should be unbiased. While this would create more work for the military and civil law division (MCD), the MCD would receive a post-trial paralegal and/or a civilian in most jurisdictions.

In an effort to alleviate some of the strain that moving post-trial would place on the MCD, warrant officers should be placed in charge of processing post-trial. Historically, legal administrator core functions included preparation of convening orders, promulgation orders, and records of trial.¹⁰² The Chief Warrant Officer of the Corps is pushing for a “renewed focus” on warrant officers’ traditional role in military justice.¹⁰³ This focus includes both training and workplace application.¹⁰⁴ Furthermore, the warrant officer normally controls the budget of the office, so he or she should be more active in the production of witnesses at trial. The prosecution of Hassan Akbar had a dedicated warrant officer to handle these types of issues.¹⁰⁵ Also, the Army is fielding two warrant officers at the large installations, which is precisely where they are most needed to take over the post-trial processing mission.¹⁰⁶

burden on me and I spend a lot [of] time doing it. They lack basic fundamental knowledge of how to move a case to conclusion. Once I get them trained up . . . they PCS or more to another assignment.

Id.

¹⁰¹ Interview with Major Winston McMillan, U.S. Marine Corps, in Charlottesville, Va. (Jan. 8, 2010).

¹⁰² Interview with Chief Warrant Officer Three Rob T. Stone, Combat Developer, The Judge Advocate Gen.’s Legal Ctr. & Sch., in Charlottesville, Va. (Jan. 14, 2010) [hereinafter Stone Interview].

¹⁰³ Chief Warrant Officer Five Richard Johnson, *From the Desk of the Warrant Officer of the Corps*, QUILL & SWORD, Jan. 2011, at 2 [hereinafter QUILL & SWORD].

¹⁰⁴ *See id.*

The foundation of an effective military justice office is a reliable system that manages timelines and processes, and ensures the generation of quality products. Legal Administrators, as managers of JAG Corps systems, should be involved. In addition, we are making adjustments to the Warrant Officer Basic and Advanced Courses to increase training of military justice.

¹⁰⁵ Interview with Chief Warrant Officer Three Philip Kraemer, in Grafenwoehr, Ger. (2007).

¹⁰⁶ Stone Interview, *supra* note 102.

E. Regional Military Justice Practitioners

The SVP program recognizes the problem with the prosecution (and to some extent the defense) of complex cases, but sexual assault is not the only type of complex case.¹⁰⁷ The Army should form a regional military justice practitioner (RMJP) position at major installations with area jurisdictions, similar to the SVPs.¹⁰⁸ In this position, an experienced JA litigator would try complex cases which would alleviate current personnel and resource strains.¹⁰⁹ In the case against Major Malik N. Hasan, there is no RMJP as described above and no coded MJ billet. As a result, the Fort Hood COJ was placed on the case; the Deputy SJA of Fort Sill was moved from his assignment to Fort Hood; and a colonel who was in Iraq serving as the Executive Officer for the deputy commander for Multinational Forces – Iraq, was pulled out of his deployment.¹¹⁰ One case disrupted a deployment and three offices.¹¹¹ This is not an isolated incident in high profile cases.¹¹²

¹⁰⁷ *See* Dwight Sullivan, *Top 10 military justice stories of 2008*, CAAFLog, (Dec. 24, 2008), <http://www.caaflog.com/2008/12/24/top-10-military-justice-stories-of-2008-10-the-armys-adoption-of-military-justice-additional-skills-identifiers>. Sullivan postures:

But while the military justice system does an excellent job with run-of-the-mill cases, I’ve noticed over my roughly 21 years in the MJ system that it tends to do a poor job in the big cases. Consider, for example, that in 2 of the 10 military death penalty cases that have completed direct appeal under the current system, the death sentence was set aside because apparently no one in the courtroom knew – or could figure out – the proper instruction for voting on the sentence in a capital cases (sic). Or that another 4 of those 10 death sentences were reversed at least in part on IAC grounds. In all, 8 of the 10 have been reversed; the military justice system is batting the *Mendoza* line in capital cases on appeal.

Id.

¹⁰⁸ This is similar to the Air Force Senior Trial Counsel. The Army SVPs are also sometimes used in this manner. Telephonic interview with Major Robert Stelle, Fort Lewis Special Victim Prosecutor, Wash. (Feb. 2, 2011) [hereinafter Stelle interview].

¹⁰⁹ *See* Criminal Law Survey, *supra* note 2, Survey No. 2 (“We (the JAGC) most often do not leave attorneys in CL long enough to develop an expertise. Then, when we have a capital case or other complex litigation, we don’t have counsel in the office with the experience to handle them.”).

¹¹⁰ *See* Maxwell Interview, *supra* note 15.

¹¹¹ In the capital case against Staff Sergeant Alberto B. Martinez, two captains were moved from their duty assignments and a lieutenant colonel was TDY for approximately eight months in order to prosecute the case. Interview with Captain Evan Seamone, Editor, *Military Law Review*, in Charlottesville, Va. (Mar. 2, 2010).

¹¹² Some installations have formed complex or capital litigation cells to address complex cases. Stelle interview, *supra* note 108.

VI. Conclusion

It is true that Army JAs perform incredibly across the spectrum of missions they are asked to accomplish including military justice; however, it is military justice, which is the JAG Corps' only statutory mission. The JAG Corps has a duty to ensure that it provides the best service possible to the Army. It must maintain a core of seasoned MJ practitioners as well as training new JAs in litigation. Perhaps the best way to ensure that the JAG Corps is providing quality military justice counsel is to implement a military justice

career track similar to the Navy's. Short of a MJ career track, implementation of the relatively minor changes proposed in this article would improve greatly the quality of litigation by ensuring an identifiable stable of JAs experienced in MJ and placing these experienced and competent JAs in senior litigation positions. Moving post-trial responsibilities from the MJ shop and incorporating the warrant officer relieves some of the administrative burden from the senior JAs. This will, in turn, improve the training of junior JAs and the status of military justice in the eyes of the public, Soldiers, and combatant commanders.

Appendix

Please take a few minutes to fill out the survey below. My Graduate Course paper will discuss whether there should be a criminal law track in the Army. This survey is to gather data regarding the experiences of our Army criminal law personnel. Information provided, including any comments, will not be linked to any particular individual. You may send the completed questionnaire directly to me at derrick.grace@us.army.mil. Please complete the survey no later than 4 December 2009.

1. What is your current position?
 - Trial Counsel
 - Defense Counsel
 - Senior Trial Counsel
 - Senior Defense Counsel
 - Chief, Military Justice

2. How long have you been in this position
 - Less than 6 months
 - 6 months – 1 year
 - 1 year – 2 years
 - 2 years – 3 years
 - More than 3 years

3. What previous Military Justice positions have you held and how long were you in that position? (Please use the time periods from question 2)
 - Trial Counsel
 - Defense Counsel
 - Senior Trial Counsel
 - Senior Defense Counsel
 - Chief, Military Justice

4. Senior Trial Counsels or those who have been STCs – Is/was STC your only duty?

5. If not what is/was your other position or responsibility?

6. What is your current Army Skill Identifier level for Military Justice?

7. How many cases have you tried as a government counsel?
 - Less than 5
 - 5-10
 - 10-15
 - 15-20
 - 20-30
 - More than 30 (approximately how many _____)

8. How many cases have you tried as a defense counsel?
- _____ Less than 5
 _____ 5-10
 _____ 10-15
 _____ 15-20
 _____ 20-30
 _____ More than 30 (approximately how many _____)
9. Of the cases you tried how many were contested?
- _____ Less than 5
 _____ 5-10
 _____ 10-15
 _____ 15-20
 _____ More than 20 (approximately how many? _____)
10. Of the following types of crime, how many have you tried (contested only)?
- a. 1-3
 b. 3-6
 c. 6-10
 d. More than 10

Contested Only	Government	Defense
Child pornography		
Robbery		
Sexual assault/rape		
Aggravated Assault		
Manslaughter		
Murder		

11. Have you deployed in a criminal law position?
12. If so, how many cases did you try?
- _____ 0-3
 _____ 3-6
 _____ 6-10
 _____ More than 10
13. Please rank the following areas of military law from most interested (1) to least interested (5)
- _____ Military Justice
 _____ Administrative Law
 _____ Legal Assistance
 _____ International and Operational Law
 _____ Contract and Fiscal Law

14. Please use the scale below in answering the following questions.
- 1 = strongly agree; 2 = agree; 3 = neutral; 4 disagree 5 = strongly disagree.
- a. My primary interest is military justice.
- b. One of the reasons I joined the Army was to work in criminal law.
- c. I would be interested in a military justice career track.
- d. If possible, I would prosecute/defend as a Field Grade Officer.

- e. If there were more opportunities in criminal litigation at higher ranks, I would be more likely to stay in the Army.
 - f. It has been my experience that good litigators are leaving the Army because of the lack of litigation opportunities at senior ranks.
15. Please make any comments below regarding your experiences or observations regarding military justice. This is a blind study. No comments will be attributed to any individuals.