

## Military Justice, the Judge Advocate and the 21st Century

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### The Spotlight

A decade into the 21st century, the world is still sorting out what it means to be 21. In the middle of this frenetic, post-Cold War, global coming of age, our military justice system, like our Army, shares center stage. No news cycle is complete without coverage somewhere of a Soldier, scarred by war, engaging in “disquieting behavior.”

Soldier misdeeds and the prosecutions that follow reliably consume the headlines and sustain online blogs. Whether it is the Wikileaks revelation *du jour*, the heinous shootings at Fort Hood, the macabre allegations of Afghan murders being tried at Fort Lewis, the Army physician refusing to deploy and contesting the Commander-in-Chief’s birth credentials, or the abuse of detainees at Abu Ghraib, military misconduct is guaranteed to monopolize headlines and generate tumult within the Pentagon and on Capitol Hill.

News coverage is invariably followed by calls for action. The predictable refrain that follows often includes tales of the “enemy within our ranks,” command failures, or over-medication, among others. When the critics are not advocating for more prosecutions or greater “accountability,” they argue just as vehemently that we prosecute too much or that we prosecute the wrong things or the wrong people.<sup>1</sup>

This intense focus on military justice places great demands on judge advocates (JA), but with proper training, mentorship, and access to superior resources, JAs can excel in this challenging environment. To do so, JAs must take a proactive approach to professional development if they wish to improve their knowledge of the law and their skills as advocates. While leaders bear some responsibility for encouraging training, JAs must ultimately own their careers and assume responsibility for their personal development as military justice practitioners.

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<sup>1</sup> Representative Jane Harman, D-California, actually opined that the Army propagates a culture of rape. Such mischaracterizations are a disservice to those in uniform, both male and female alike. Jane Harman, *Rapists in the Ranks*, L.A. TIMES, Mar. 31, 2008, available at <http://www.latimes.com/news/print/edition/asection/la-oe-harman31mar31.0,3129956.story>. See also Jane Harman, *Stopping Rape in Military Must Be a Priority*, THE HILL, Sept. 30, 2008, available at [http://www.house.gov/list/hearing/ca36\\_harman/9\\_30Hill.shtml](http://www.house.gov/list/hearing/ca36_harman/9_30Hill.shtml). Equally curious are a number of well-meaning but ultimately misinformed supporters of ten Soldiers who were convicted of, among other crimes, murdering out of combat detainees. The general theme is either that the victims (in most cases detainees) were terrorists anyway or that more senior co-accused or leaders were more responsible, among other arguments. SOLDIERS FOR JUSTICE.COM, <http://soldiersforjusticeandpeace.com/leavenworth-10> (last visited Mar. 16, 2011).

The strategies, tools, and resources outlined below are designed to assist JAs in building a strong foundation in the only core competency required by statute of the Judge Advocate General’s (JAG) Corps: military justice.<sup>2</sup> Establishing a culture of training is essential to developing competent and capable JAs, and the JAG Corps offers multiple local and external opportunities to train military justice practitioners. Additionally, the Office of The Judge Advocate General (OTJAG) has introduced several tools—including Military Justice Online (MJO), the improved Military Justice Report, skill identifiers, and the Trial Advocate Tracking System (TATS)—to aid in the practice of military justice. The Trial Counsel Assistance Program (TCAP), the Defense Counsel Assistance Program (DCAP), the JA Resource Library, and Highly Qualified Experts (HQE)—are also available to JAs with specific questions on the law or trial strategy.

In sum, to meet the demands of the 21st century, JAs must achieve and maintain proficiency in military justice by trying cases, aggressively training, and leveraging the multitude of resources offered by the Corps.

### The Lion’s Share

Despite harsh criticism of the Army and highly publicized stories of Soldier misconduct circulated in the press, the real story is one of a superbly disciplined Army, led by equally superb leaders. Indeed, for every incident of Soldier misconduct, there are countless American men and women, “*the lion’s share*,” who selflessly wear our nation’s uniform and do our nation’s bidding with little fanfare or debate, utterly free of “disquieting behavior.”

Our military justice system is not just about courts-martial or trying cases. It is about discipline: everything from a good “arse-chewing” to a capital murder case. When it is working properly—and it usually does—our system is the best in the world. Military justice is fundamentally about advising commanders on the innumerable options available to ensure good order and discipline. It is about understanding the Soldier-client and how to counsel Soldiers charged with an offense. It is about leveraging the immense experience and talents of our law firm and, when cases need to be tried, trying them well.

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<sup>2</sup> See, e.g., 10 U.S.C. §§ 807, 827 (2006).

The programs and initiatives outlined in this practice note are designed to cultivate broad-spectrum military justice proficiency over a career as a JA. These programs, therefore, must be understood by practitioners in order to be effective.

### **Catching Excellence—And Staying Out of the History Books**

The quality of our military justice must never be a creature of chance or “ad hockery.” Proficiency in military justice must be deliberately and relentlessly nurtured within our professional ranks. As Vince Lombardi once noted, “Perfection is not attainable, but if we chase perfection we can catch excellence.”<sup>3</sup>

A capable system of justice, therefore, is a deliberate choice. If we fail to make this choice and follow through with applied training and education, we will emerge like some of our allied armies—with systems of military justice that are in steep decline and which are only read about in the history books. Despite the glare of the spotlights, we want our system to be a matter of current event reporting.

### **Predicate for Understanding: Where We Were and Why It’s Different**

Other than our most senior leaders, all JAs today began the practice of military justice at a time when courts-martial rates began to drop steadily. A reduction in force following the Gulf War—the so-called peace dividend<sup>4</sup>—produced a corresponding drop in court-martial numbers and had a lasting impact on our practice. The rate of indiscipline and the annual number of cases entering our courtrooms has remained consistently lower—between 1100 and 1500 general and special courts combined per year, down from roughly 2200 in 1990.<sup>5</sup> Interestingly, the same number of active component trial and defense counsel—about 550 combined—are chasing these cases.

It is in this dynamic of fewer cases that our Corps has matured over the last fifteen years. As those who tried cases in an era of declining courts-martial have been promoted, they have steered even fewer cases as deputies and staff judge advocates (SJAs). A corresponding dissipation of experience with pretrial and post-trial best practices was inevitable, so it is no surprise that our overall processing

time for 50% fewer general and special courts has grown by 60% over the last twenty years.<sup>6</sup>

At the same time, modularity attenuated the mentorship paradigm that existed in the past. New counsel, especially trial counsel (TC), have been deprived of the synergy and immersion that used to be provided by a centralized military justice office, where young counsel could learn from and consult with their more experienced colleagues.<sup>7</sup> Modularity also further dispersed talent and, at least temporarily, diffused the focus on military justice, which was supplanted by operational issues. To many, operational law carried a greater sense of immediacy. Modularity also meant that field grade officers, who spent two to three years at a brigade combat team (BCT), did not have realistic opportunities to hold chief of justice or senior defense counsel billets—the critical, historic building blocks of proficiency. These dynamics, combined with an explosion in other practice areas—*e.g.*, detainee operations and rule of law—help to account for the decline in the historic volume of courts-martial, and the concomitant military justice immersion that we took for granted in our growth model for judge advocates.

### **The Strategic “So What”**

As practitioners, we must find ways to compensate for the military justice immersion lost as a result of modularity, war, and a reduced and reoriented fighting force. Make no mistake: nothing is broken. Our system is healthy. But we need not be sick to get better. We need not birth a crisis in competence just so that we can later identify a crisis and fix it. We must apply responsible, competence-sustaining programs and paradigms here and now to ensure future proficiency.

Our Corps’s leadership is steadfastly focused on maintaining a Corps of uncompromisingly capable counsel. This commitment is evident in a number of initiatives instituted over the last few years designed to focus JAs on military justice. The intent of these efforts is to sustain and improve an already capable bar.

The Judge Advocate General (TJAG) has set in place the following lines of effort to make each of us better military justice attorneys.

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<sup>3</sup> *Famous Quotes by Vince Lombardi*, VINCE LOMBARDI, [http://en.wikiquote.org/wiki/Vince\\_Lombardi](http://en.wikiquote.org/wiki/Vince_Lombardi) (last visited Mar. 16, 2011) (emphasis added).

<sup>4</sup> The Army was reduced from eighteen combat divisions to the current ten.

<sup>5</sup> See REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, OCTOBER 1, 2009 TO SEPTEMBER 30, 2010 (2010); REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, OCTOBER 1, 1989 TO SEPTEMBER 30, 1990 (1990).

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<sup>6</sup> Compare REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, OCTOBER 1, 2009 TO SEPTEMBER 30, 2010 (2010), with REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, OCTOBER 1, 1989 TO SEPTEMBER 30, 1990 (1990).

<sup>7</sup> A notable but perhaps unsurprising explosion in summary courts-martial has flowed from our BCT-centric Army.

## A Culture of Training

Excellence is not a creature of chance. It is the product of hard work.

A good result at trial, whether you are a defense counsel or a TC, is not the result of ad hockery. It is not the result of luck. Good results come from relentless and tireless anticipation, preparation, and aggressive, tenacious advocacy. Effective advocacy, in turn, derives from sustained training. Any “luck” that figures into the process is simply the residue of design.<sup>8</sup>

Training is non-negotiable. Local training programs in advocacy and substantive criminal law must be a fixture for Army JAs worldwide and at all stages of their careers. Attorneys that do not train are like infantrymen or tankers who do not go to the range or to gunnery. For JAs, the Judge Advocate General’s Legal Center and School (TJAGLCS), TCAP, and DCAP are a trove. Use them. The Judge Advocate General expects you to train, and your SJA, regional defense counsel and military judge will underwrite the training.

External training opportunities include institutional (TJAGLCS), field-focused (TCAP/DCAP), specialized (sexual assault and special victims prosecutor (SVP) focused), and civilian (National Advocacy Center—Trial Advocacy I & II) training. The Office of The Judge Advocate General and our military justice training programs (TCAP/DCAP) can assist you in locating opportunities and in creating your own training. The OTJAG website now contains a consolidated training calendar that can be used to ensure fully scoped training for counsel. Additionally, designate a TC or defense counsel (DC) to be the subject matter expert in your office on some aspect of crime or evidence. You decide, but be deliberate about it.<sup>9</sup>

Never find yourself thinking that you’re too busy to train, or worse, that since “Captain Jones is about to PCS, she’s not worth sending to training.” The tyranny of the urgent—meetings, BCT obligations or the like, and shortsightedness—must be deposed. Send the busy counsel, or the ‘soon to PCS counsel.’ You will make a wise investment not only in our trial counsel but in our Corps as well. Like the stock market, TJAG expects senior

practitioners to take the long view. Captain Jones will leverage the training in her next job.

Finally, OTJAG continues to identify gaps and seams in our training and is currently focused on ensuring we have cradle to grave training vehicles for all of our military justice practitioners. Accordingly, we recently initiated a “best practices” seminar for SJAs, who are often a number of years removed from the hands-on practice of military justice. This day-long “re-immersion” seminar is focused almost exclusively on tactics, techniques, and procedures for military justice. It covers everything from what an SJA should do with a referral packet to common issues in a record of trial. This is just one example of an identified gap, and TJAG’s desire to fill it.

## Military Justice Online

Military Justice Online is our law firm’s cradle-to-grave forum for “doing justice.” Fielded in 2009 as a work in progress, the Corps’ IT Division, and OTJAG Criminal Law Division intend to finish the court-martial module and a downrange, offline version of MJO in 2011.

- **Charter**—The program is not designed for Department of the Army (DA); it is intended for JAs at the brigade and general court-martial (GCM) levels. Attorneys downrange, where bandwidth is limited, must process an exception to policy with OTJAG.<sup>10</sup> Offices should also ensure that mobilized guard units and rear detachments continue to use MJO.
- **Usage Rates**—The Office of The Judge Advocate General tracks usage rates by GCM to determine where the challenges are. Because of low usage rates in some jurisdictions, OTJAG funded mobile training teams to promote greater use. If you need training, ask for it.
- **Defense counsel.** In the future, MJO will include material for DC, from discovery and witness requests, to motions, and offers to plead, to post-trial documents.

## Military Justice Report

The Military Justice Report is the renamed and improved JAG-2 monthly report. It was created to respond to trend analysis at the local and DA level and to answer information requests from DA, the Office of the Secretary of

<sup>8</sup> This was a favorite expression of Colonel (Ret.) John M. Smith, who quoted Branch Rickey, the famous Major League Baseball figure. Colonel Smith served in a variety of important assignments throughout his career, inspiring judge advocates with his passion for the law and the rigor of his practice—and leaving nothing to chance. *Branch Rickey Quotes*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/quotes/quobr.shtml> (last visited Mar. 16, 2011).

<sup>9</sup> Office of The Judge Advocate General Consolidated Training Calendar, <https://www.jagcnet2.army.mil/8525744700446A95/0/AEE0473D39EB39BB852577C70064BD9D?opendocument&noly=1> (last visited Mar. 16, 2011).

<sup>10</sup> A memorandum template for a “Request for an Exception to Policy for Use of MJO” is available on JAGCNet at *Criminal Law*, JAGCNET, <https://www.jagcnet2.army.mil/8525744700446A95> (last visited Mar. 16, 2011).

Defense, and other branches of government. Once integrated into MJO, monthly reports of indiscipline should be easy to produce, because MJO automatically tracks all reprimands, nonjudicial punishment, and summary courts, among other actions. Staff judge advocates must verify and submit this report monthly.

### **Skill Identifiers**

The purpose of the skill identifier (SI) program is to (1) encourage recurrent justice experience in jobs over the course of a career—a sort of periodic rebluing<sup>11</sup>—and (2) to incentivize training.<sup>12</sup> The SI program is not a training waiver program. Instead, it is designed to incentivize and motivate JAs to train and to seek jobs in MJ. Indeed, since a judge advocate is never too busy to train, SI applications should never cite crushing workloads as a reason for a failure to meet a SI training gate – absent truly extraordinary circumstances.

As an added benefit, SIs aid in the assignment process by helping identify DC or TC for a particular case or the next potential SDC, SVP, or Chief of Justice (CoJ). When experience is needed, our SI program helps our leaders make informed decisions, with commonly understood measures and metrics of experience in military justice.

### **Trial Advocate Tracking System (TATS)**

How are potential CoJs, SDCs, SVPs, and trial advocates with special skills or training for a high profile case identified? How are participants selected for specialized, limited-seating training events? Before TATS, senior leaders making assignments simply called their buddies. Now, the Corps has a system that helps manage training and helps to identify JAs for special support to cases and assignments. The new tracking system also serves as the gateway to TJAG's trial advocate resource library, which means JAs who do not enroll do not receive the highly-sought "box of books" and reference material. Judge Advocates should update their profile on TATS regularly, especially after returning from training.

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<sup>11</sup> Rebluing is a process whereby gun metal is restored to its original finish and protected from rust—much as advocates are brought up to currency by periodic training and education.

<sup>12</sup> *Additional Skill Identifiers in Military Justice*, TJAG SENDS, vol. 37-17, July 2008; Policy Memorandum 08-2, Office of The Judge Advocate General, subject: Military Justice Additional Skill Identifiers (July 21, 2008).

### **JA Resource Library**

Despite the explosion of content for JAG University and the Tandberg system of "wired lawyering," books remain fundamental to the JA's practice of law. The JAG Corps has as much of an obligation to train you how to lawyer as you have a personal obligation to learn how to lawyer. Because there are many ways to learn the law, do not rely on one tool—for example, the Internet—to the exclusion of others, including books.

Books should remain central to your competence. The Judge Advocate General has dedicated the institution's time and money in a world of dwindling resources to printed resources, so you should take advantage of them. Also, take the time to read the letter that accompanies each book, as well as the introductions TJAG has written to the various resources.

### **Military Justice Policy**

In April 2008, TJAG published a key memorandum on military justice and the BCT.<sup>13</sup> This new policy began a steady and deliberate set of strategic initiatives by the senior uniformed lawyer in the Army that clearly set out how JAs would function in the new modular Army. The policy recognized that one size does not fit all, but it signaled what "right" looks like in rating schemes and duty locations.

The primary purpose of the policy is to ensure the JAG Corps maintains positive control and situational awareness over the delivery of legal services and how JAs develop as military attorneys. Just as infantrymen do not learn tactics from lawyers, TCs do not learn lawyering from infantrymen—e.g., company commanders, battalion or brigade combat team executive officers, or S3s. Certainly each can learn from the other—but not the basics of the profession. Thus, living and working together as professionals is key to basic lawyer competence in our Corps. The co-location of JAs in a coordinated legal office—and a rating scheme that ties JAs together—is essential. Additionally, changing the duty title of BCT counsel from the generic "OPLAW JA" to "Trial Counsel" restores the primacy of the military justice mission and signals to BCT JAs—and the brigade leaders they serve—the paramount nature of military justice.

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<sup>13</sup> TJAG SENDS, *Changes in Military Justice*, TJAG SENDS, vol. 37-16, Apr. 2008; Policy Memorandum 08-1, Office of The Judge Advocate General, U.S. Army, subject: Location, Supervision, Evaluation, and Assignment of Judge Advocates in Modular Force Brigade Combat Teams (Apr. 17, 2008).

In 2009, TJAG published the SVP/Highly Qualified Experts (HQE) policy memorandum.<sup>14</sup> This initiative, unprecedented in its scope, creates a centrally managed pool of litigators to invigorate trial practice, especially in special victim cases, worldwide. The first reviews of this program have been universally positive and mostly center on the SVPs' "in-court" abilities and their development of and partnership with other counsel and law enforcement, primarily the Criminal Investigation Division (CID). Leaders need to continue to leverage this program, constantly identify the next generation of SVPs, and support the incumbents as much as possible with logistical and paralegal support.

The HQEs represent a veritable gold mine for practitioners. Led by Mr. Larry Morris, the Chief of Trial Advocacy at OTJAG, HQEs seek to raise the bar on trial advocacy. Mr. Morris assists both government and defense practice to develop, implement, and assess training with a particular focus on sexual assault. His broad mission includes day-to-day interaction with TCAP and DCAP along with other HQEs. His contributions include work on specific cases to strategic initiatives at the DA level.

Mr. Keith Hodges and Mr. E.J. O'Brien serve our defense bar at DCAP, and Mr. Roger Canaff, Ms. Bridget Healy Ryan, and Ms. Sandy Tullius, with more than fifty years of prosecution experience among them, round out our TCAP expertise. These HQEs provide direct support to defense and government advocates. Additionally, Mr. Jim Clark, a career prosecutor from Connecticut, serves as the HQE for TJAGLCS, where he develops and delivers a focused curriculum on sexual assault and victims crimes to both JAs and commanders.

### Over the Military Justice Horizon

A steady focus on the fundamentals of military justice and our law firm's comprehensive, integrated, and

synchronized approach to proficiency are every JA's business. The Criminal Law Division continues to look for ways to improve JA practice. Some upcoming efforts include:

- Court-martial module and a downrange, offline version of MJO
- Courtroom building and renovation
- LLMs in advocacy and criminal law
- Trial document management software and trial presentation software
- Best practices in MJ seminar for SJAs
- Enlisted and court-reporter military justice training content and assignments
- Revisions to the *Manual for Courts-Martial (MCM)*, the Uniform Code of Military Justice (UCMJ), and Army Regulation 27-10
- Formal recognition of the best MJ shop in the Army
- Capital litigation study group
- Interactive sexual assault training disk for prosecutors

### Conclusion

It is an exciting time in military justice. Your Corps's leadership is steadfast in its focus and looks to you, the practitioner at the tip of the proverbial spear, to keep our justice system vibrant, healthy, and, above all, fair to everyone who is subject to it. We encourage you to tell your leadership where we can improve our system, whether it is a change to the *MCM* or the UCMJ, or the type of training you'd like to see. Make these initiatives your own, and stay focused on military justice.

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<sup>14</sup> *Special Victim Prosecutors and Highly Qualified Experts in Military Justice*, TJAG SENDS, vol. 37-18, Jan. 2009; Policy Memorandum 09-3, Office of The Judge Advocate General, U.S. Army, subject: Special Victim Prosecutors (May 29, 2009).