

LAW ANALYSIS

Army and Air Force JAG Corps Need Career Litigators Now

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The Army and Air Force vehemently oppose developing career prosecutors and criminal defense attorneys in their respective Judge Advocate General's Corps, a position that confounds professional attorneys not only in their sister service—the Navy—but also across the vast civilian profession that includes district attorney and public defender offices.

Given the compelling case against their position, it is increasingly difficult to understand their reason for refusing to institute career litigation tracks for their respective JAG Corps. Now Congress may force them to do so via a bipartisan amendment to the National Defense Authorization Act. It's about time, and something I have advocated for since 2013 in our major study entitled "Sexual Assault in the Military: Understanding the Problem and How to fix it."

Now is the perfect time to force this change, as Congress is also considering reasonable next steps in the ongoing professionalization of the military justice system because of the Military Justice Act of 2016.

In life, experience matters, and there is no substitute for experience. In the military, it takes years to develop young enlisted personnel and young officers into competent, experienced leaders in their occupational specialty. Occasional exposure to a variety of tasks, settings, and conditions educates young and/or inexperienced persons to the fact that being very good at something takes consistent, repeated experience to fully understand not only the variations in a field but the full range of depth and technical and procedural skills one must muster to be truly effective.

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Think of the years it takes to develop an experienced military pilot, SEAL, infantrymen, submariner, intelligence officer, or the like. Intelligent, patriotic young men and women who join the military, and finish their military schooling, are, by definition, not experienced professionals. They are beginners just starting out in their new career and they will need years of experience to be truly top notch professionals.

This is all the more true when it comes to litigation. There is no amount of training, book learning, or conversations over coffee that can overcome lack of real experience in a courtroom handling real, contested cases as a prosecutor or defense attorney. That is why, for decades, district attorney offices, along with public defender offices, have methodically developed young attorneys over the course of their career so that they can eventually handle the most complex cases. Inexperienced attorneys try misdemeanor cases for years until they are deemed ready for lower level felony cases. Eventually, once they gain enough experience and proven competence, they graduate to the most complex criminal cases, where the stakes are the highest for the defendants and victims alike.

A Stark Contrast of Experience

If you want to know how bad it is in the Army and Air Force, compare their experience with that of a typical career civilian prosecutor.

Let's look at one prosecutor's career path in the San Diego District Attorney's Office—an office of over 300 prosecutors, and considered to be one of the best offices in the country.

Before joining the office, Lynn served for one year as a deputy district attorney in another California county. During that year, she issued or rejected over 500 cases, and made daily appearances in court. No JAG has issued or rejected over 500 cases in a year, nor have they made courtroom appearances for an entire year.

During her first three years as a misdemeanor prosecutor, she prosecuted over 100 jury trials, and handled hundreds of guilty pleas.

No JAG has tried 100 jury trials because JAGs aren't in court every day, there is a lower volume of cases in the military, and there are no career litigation tracks (with the exception of the Navy's relatively new track).

When her supervisors were satisfied that she was ready to handle felony matters, she spent six months in felony motions, writing and arguing motions relating to search and seizure, speedy trial, and appellate issues. She was then transferred to the felony preliminary hearing team where she prepared and appeared in court on several hundred preliminary hearings for crimes ranging from theft, to drug sales, to driving under the influence and causing injury.

After she had been a deputy district attorney for approximately four years, she was permitted to try felony criminal trials starting first with minor possession of drug charges and working her way up to serious assault cases. She was not assigned cases with serious issues, until she had proven herself capable of handling less serious felonies. Even when she was first assigned the more serious issue cases, they were by no means "high profile" or involving the most innocent of victims. For instance, her first homicide involved two gang members involved in a "shoot-out" with one another. Every civilian witness was uncooperative, high on drugs, or a combination of both. No family members attended the trial, and the decedent's family never contacted her or returned her calls.

At year six in her career, Lynn was assigned to the Family Protection Division where she prosecuted lower level felony domestic violence, child abuse, and molestation cases. Only after she proved that she could work effectively with law enforcement, and communicate effectively with the victims, families, case workers, doctors and therapists, was she permitted to try child molestation cases in which the penalty was "life," along with murder prosecutions of both domestic violence victims and children.

In year seven she began receiving high profile cases with media coverage and high stakes outcomes. She tried to verdict over 25 child molestation cases and an equal number of serious domestic violence cases, though she reviewed hundreds of each,

issuing and rejecting as needed. She also took to verdict three adult homicides, including one of the only true, cold case, “no-body” murders in San Diego county, and one baby homicide. She handled several more, but most plead to “life” punishments.

In year 11 in her career, after she had tried approximately 150 jury trials, she began trying general homicides, developing an expertise in gross vehicular manslaughter. Lynn was also assigned the majority of the non-domestic violence, adult sexual assault cases.

She then became a supervisor to the misdemeanor trial team. There she supervised teams of new deputy district attorneys and taught and guided them through all aspects of misdemeanor case issuance, motions, trials, and appellate work.

After proving her leadership abilities with misdemeanor prosecutors, Lynn supervised the preliminary hearing team comprised of new deputy district attorneys handling preliminary hearings. While supervising, she continued to maintain a small caseload of one to two murder cases and three to four sexual assault cases and would try three to five cases per year.

And finally, in 2010, after 18 years as a deputy district attorney, she became a felony trial team leader, supervising the felony trial deputy district attorneys. During her career so far, Lynn has tried well over 150 jury trials, handled thousands of guilty pleas, and argued countless pre-trial and trial motions.

Lynn’s career—as impressive as it is—is typical for a large city professional prosecutor. There is no active duty JAG in the military today that has a quarter of the litigation experience of Lynn. Put another way, Lynn tried more contested cases in her first year than most JAGs try in their entire career.

Creating a New Litigation Track

After spending a number of years working through the issues of establishing a career litigation path, the Navy Judge Advocate General’s Corps implemented a career litigation track in 2007 for qualified Navy JAGs. They did so because they realized

that the old way of developing JAGs did not produce competent, experienced litigators.

Under the system today, 77 of the Navy's 879 active duty JAGs serve in the litigation career track and remain litigators throughout their entire careers and eventually compete to become a military judge. The benefits of the career litigation track include: prosecutorial and defense expertise; professional development and mentorship; a dedicated talent pipeline; better retention of talented and eager litigators. The net result is career litigators who make the Navy military justice system highly professional, competent, and eminently fair to victims and defendants alike.

The greater good is public confidence in the military justice system.

The Navy realized that the old way of developing JAGs—moving JAGs in and (mostly) out of the courtroom—was inconsistent with producing world class trial attorneys with requisite courtroom experience. Actual courtroom experience is a perishable skill. The longer a lawyer is *out* of the courtroom, the less effective he/she is *in* the courtroom. And the less effective senior officers are in leading junior litigators.

Army and Air Force JAG Out of Step With Legal Community

The Army and Air Force still move their JAGs in and (mostly) out of the courtroom early in their careers, and force young, inexperienced JAGs to try complex cases—cases that they (1) aren't qualified to handle and (2) no district attorney or public defender office would ever let their attorneys try at that stage in their careers. This in turn erodes the quality of justice for victims and defendants alike, and contributes to a loss in public confidence in the military justice system as a whole.

A Drastic Lack of Experience

According to a military law review article written by Army JAG Maj. Jeffrey A. Gilberg, half of Army military justice JAGs had tried 10 or few cases. This statistic included plea bargains—which in the civilian world doesn't count as "trial experience." A whopping 78 percent had tried 10 or fewer *contested* cases. Yet, the Army and Air

Force deems these JAGs “experienced,” forces them to try complex cases, and refuses to create a career litigation track.

Based on the same 2014 data, 72 percent of Army prosecutors had tried 10 or fewer cases (guilty pleas included), 89 percent had tried 10 or fewer contested cases, and, to underscore the fragility of the current Army system, only 40 percent of prosecution supervisors had tried more than 10 contested cases.

In any large district attorney or public defender office, a person with only 10 contested cases under her belt is called what she is: a misdemeanor or “baby trial attorney.” Yet, in the Army and Air Force, they are called experienced, or worse yet, “the boss.”

The Army and Air Force defend their systems by claiming that the Special Victim Prosecutor Program and their “broadly skilled” career model make up for the lack of actual contested trial experience or a career in the courtroom. They are wrong.

The Army Special Victim Prosecutor program only has 24 special victim prosecutors spread across the Army’s 21 largest installations across a JAG Corps of 1800 active duty JAGs. And the program, which has its strengths, does not cover non-special victim cases, many of which are quite serious. The Army’s “broadly skilled” career model is an excuse for not specializing in litigation, pure and simple. It thinks that its training and current systems are sufficient to meet the needs of the service.

The Army and Air Force are detached, or in denial regarding the need for career litigation track in their corps. They can, and must know what professionals in the civilian world do to develop career prosecutors and public defenders.

Career Path of Model Deputy Public Defender

Although each large public defender office in the country has a slightly different way to train and develop professional criminal defense attorneys, there are a lot of similarities between the offices. An overview of manner in which they train and develop professional, career criminal defense attorneys is instructive, as one is able to see a pattern of what could be considered best practices.

At the outset, it is important to note that there is no central national training organization for public defender offices like district attorneys have. Prosecutors have the National District Attorney's Association and the National Association of Prosecuting Attorneys, each of which offers professional training on a host of topics for prosecutors, including military prosecutors. That said, the National Association of Criminal Defense Lawyers offers top notch courses to criminal defense attorneys, including public defenders and JAGs.

New public defenders, in large offices, are put through an in-house course of training that lasts from one to three weeks. This is defense attorney-specific training, taught by seasoned defense attorneys. It is aimed at supplementing the attorney's education, and focusing on all aspects of the law, evidence, procedure, and practice as it relates to misdemeanor practice.

This basic training in large public defender and district attorney offices is in sharp contrast to the training JAGs receive in their basic lawyer course. Basic military lawyer courses, which range from nine weeks in the Navy to 10 weeks in the Army and Air Force, are generic courses, aimed at familiarizing all JAGs with any number of subjects—including wills and powers of attorney, legal assistance, fiscal law, claims, administrative law, international and operational law, and criminal law. Those student JAGs slated to become prosecutors or defense attorneys receive the same generic course work, from the same instructors. All new JAGs are trained in the same class room, together. The course material is not assembled and taught by seasoned defense attorneys exclusively for new defense attorneys, or seasoned prosecutors exclusively for new prosecutors. Thus, these new attorneys, who are about to be thrust into contested courts-martial in a matter of weeks, are not even given the benefit of defense/prosecution-specific training.

Topics during the indoctrination course for the San Diego/Bronx Public Defender course include: criminal law, evidence, criminal procedure, trial advocacy, motions, forensic evidence, and more.

Training Is Key

This training is vital, as it orients new criminal defense attorneys to the law, issues, cases, and practice pointers from seasoned counsel before they ever step into the

courtroom. In addition to classroom work, these beginner courses typically include mock courtroom exercises, such as direct exam of witnesses, cross-examination of witnesses, opening statement, and closing argument. Best practices include the videotaping of these mock exercises, and then critique by senior attorneys in the office.

To their credit, the JAG schools videotape new counsel during mock courtroom exercises. Yet the critique of counsel, arguably the most important learning tool, is conducted by instructors who (for the most part) teach basic trial advocacy teaching points, rather than defense or prosecutor-specific training. JAG instructors do this because they are ordered not to come across to students as a “defense-oriented” or “prosecution-oriented” instructor.

Of course, that is exactly what new defense counsel desperately needs—defense-oriented advice from experienced, career defense attorneys. And that is exactly what new prosecutors desperately need—prosecution-oriented advice from experienced, career prosecutors.

After successful completion of new attorney training, new public defenders are then typically sent to a misdemeanor trial rotation. During that rotation, which varies in length, but can last from one to three years depending on the office, new public defenders are assigned the entire range of misdemeanor cases. Those cases typically include:

- driving under the influence
- other traffic infractions including reckless driving and driving with a suspended license
- petty theft
- domestic violence
- assault and/or battery
- simple possession of marijuana and some other controlled dangerous substances

- passing bad checks
- simple fraud
- prostitution
- public intoxication
- disorderly conduct
- trespass
- vandalism

Learning how to defend these types of cases takes time. Learning how to interview witnesses, and how to work with investigators (if you even have access to one), and how to cross-examine police officers (a key skill for criminal defense attorneys) takes time. Working with your client, and exercising client control, yet, protecting his right to make key decisions in his case takes time.

And because it takes time and experience, including trying cases before juries, the model public defender office requires counsel to prove themselves before moving them on to complicated misdemeanor or low level felony cases. Many offices require new counsel, either before or after a misdemeanor trial rotation, to defend juveniles in juvenile court. There, counsel defend juveniles of everything from simple assault to attempted murder, getting experience with more serious crimes but not serious sentence exposure, as juveniles typically can only be sentenced to juvenile hall until their 21st birthday.

The concept of dwell time—spending time in one area before moving on to the next—is not unique to large city public defender offices. For example, in Virginia, new public defenders are typically responsible for a misdemeanor caseload, and are not allowed to move onto felonies until their office gives them permission to advance.

The University of Virginia Law School handbook warns potential applicants that “felony cases are often the cases which draw attorneys to this work in the first place

and even the most active misdemeanor practice can become stultifying after a year or two.” Stultifying or not, the professionals know that it takes a busy year or more to experience the entire range of experiences necessary in the world of misdemeanors before one is truly prepared to handle more complicated crimes.

The Dade County Public Defender’s Office trains attorneys with less than two years of experience in the County Court Division, where there is an emphasis on training and education. “Where possible, the Training Attorney should second chair trials, to permit the lawyer to learn by performance and observation.” In Alameda County, California, public defenders are assigned to felony cases by the end of their third year. Contrast that with JAG attorneys who are forced to defend serious felony cases, oftentimes in their first few months on the job, and certainly in their first year or two.

In the San Diego County Public Defender’s Office, one of the finest in the country, new attorneys are assigned to a misdemeanor caseload, and only when they have “demonstrated trial proficiency and good legal skills” are they allowed to take on felony cases. Young, inexperienced public defenders can count on hundreds of guilty pleas, dozens of motions and contested trials, and years in court before being eligible for promotion to lower level felony cases.

Similarly in Santa Clara County, entry-level attorneys are assigned misdemeanors until they have proven themselves capable of handling a more complex caseload.

Many public defender offices have mentor programs in which new lawyers are paired with more experienced public defenders. In addition, public defenders are encouraged to participate in continuing legal education and training programs. For example, the Defender Association of Philadelphia’s New Attorney Training Program is a year-long program that combines lectures with hands on, supervised courtroom experience and independent courtroom experience.

Each JAG Corps has adopted a modified mentoring program, and has started to require some attorneys, when practicable, to second chair a felony case before being assigned as lead counsel.

But those practices, employed for decades in the civilian sector and considered best practice, are employed in a haphazard manner in the Army and Air Force JAG Corps, and are certainly not widely practiced. But mentoring is not a substitute for actual courtroom experience; a fact well known in the legal community, but lost on the Army and Air Force.

Career Path of a Model Prosecutor

Unlike in the JAG corps, where first-year prosecutors are forced to try any case—including rape cases—the model district attorney’s office—like the New York County District Attorney’s Office—has a career path in which litigators gain experience on small cases and eventually progress to larger cases. In many of the district attorney’s offices, new attorneys are given a misdemeanor caseload to gain sufficient experience before they are allowed to work the more complex felony cases.

For example, in the Suffolk County District Attorney’s Office, entry-level attorneys start with misdemeanors and violation offenses in the District Court Bureau. Some assistant district attorneys will handle their misdemeanors in the Domestic Violence Unit. When an assistant district attorney has sufficient trial experience, he will move to the Case Advisory Bureau, where he will be able to try felony cases. After that, an assistant district attorney will move on to a division of the office where he will gain specialized skills.

None of the JAG Corps have a career path like this—not even the Navy.

In sharp contrast to many district attorneys’ offices, many Army and Air Force JAGs’ litigation experience is half or one-third over after a year in a military courtroom.

The United States Attorney’s Office for the Southern District of Florida—like in all 94 U.S. attorney’s offices—requires entry-level and experienced prosecutors to attend in house training on a “wide variety of substantive and procedural legal issues.”

The San Diego District Attorney’s Office, considered one of the best in the country, has over 300 deputy district attorneys and 900 employees. There are dozens of

career prosecutors in the office, each of whom took essentially the same path during their career.

The Way Forward

The military justice system is unique, and for good reason. It is designed to enable commanders to enforce good order and discipline in the armed forces. It enables those commanders to carry out orders from civilian leaders. It is designed, in essence, to allow our military to win wars.

Fortunately, we do not have the volume of crimes in the military that the civilian world experiences. District attorney and public defender offices recruit, hire, and train attorneys for a career in litigation, as they must.

The military services can, and must, learn from litigation best practices. Gone are the days when the judge advocate general of a service can ignore the realities of complex litigation, and ignore the fact that best practices demands—and has for decades—the cultivation of career prosecutors and criminal defense attorneys to handle the most complex criminal trials.

Nor can the judge advocate general seriously argue—against all facts—that the delivery of professional, experienced litigation services (prosecution and defense) can be accomplished by moving JAGs in and out of litigation jobs over the course of their career.

The Army and Air Force must adapt to the times. They are decades behind their civilian counterparts, and almost a decade behind the Navy, whose career track is just starting to show promise. Old habits die hard. The Army will say that it can't establish a career track because it won't work with its current brigade combat structure. But function—career litigation experience, developed over a 20-year career—is much more important than form. And the same goes for the Air Force.

And if the Army and Air Force aren't willing to adopt career litigation tracks for their JAGs, Congress has an obligation to require them to do so.

The JAG Corps sole statutory responsibility is to provide a fully functioning military justice system. A fully functioning system of criminal justice includes career prosecutors and defense, and military judges.

Public confidence in the military justice system—an all-important and critical component—will inevitably increase once all the services establish career litigation tracks for JAGs.



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