

ISSUE BRIEF

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JAG Corps and Reforming the Military Justice System

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Tomorrow, the Senate Armed Services Committee will hold a hearing on the issue of sexual assaults in the military. Sexual assaults, including rape, are some of the most despicable crimes imaginable. It is indeed welcome news that Congress is paying attention to the military justice system and trying to make it work better, especially for victims. But the current proposals—all driven, quite correctly, by the fervent desire to categorically fix the problem—would not fix the problem completely. Some proposals may make matters worse.

To address a major part of the problem, Congress should fundamentally restructure a key aspect of the Judge Advocate General (JAG) corps. Congress should mandate the creation of career prosecutors and defense counsel within the respective services combined JAG corps. Unless and until that happens, many of the problems will persist.

JAG Corps vs. DA Offices. Why is there no “problem” with investigating and prosecuting sexual assault cases in the civilian criminal justice system? Because decades ago, professional, career prosecutors—especially those in large cities—realized that to confront specialized crimes (sex crimes, murder,

child abuse, fraud, etc.), they needed highly trained, experienced career prosecutors and investigators. To accomplish that goal, district attorney (DA) offices across the country established a career progression for their prosecutors. Young recruits begin their careers prosecuting misdemeanor cases, gradually taking on more serious cases, years later, as they gained experience and expertise.

In stark contrast, the military has no career prosecutor or defense counsel track. Each service recruits highly talented law graduates who have equal or superior qualifications to those hired by DA or public defender offices. But military lawyers act as litigators for only a fraction of their careers and thus never develop the depth of expertise or experience the volume of cases that their civilian counterparts experience.

In reality, a large majority of military prosecutors must “cut their teeth” on serious felony cases well before any would be ready to handle those cases. That is not fair to the attorneys—and especially not to the victims.

Most military cases reach plea bargains, just like cases in the civilian criminal justice system. Thus, the military prosecutor and defense counsel gets little actual contested jury trial experience compared to civilian prosecutors and is too quickly forced to take felony cases, including sex assault and rape cases.

In big-city DA offices, the most experienced prosecutors (those who try cases in specialized felony units) have tried hundreds of misdemeanors, taken thousands of guilty pleas, and tried over 100 felony jury trials. In the military, there are no prosecutors—not one—who have those numbers to their

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credit. That is not a criticism of the military prosecutor; that reality exists because of the low number of cases in the military justice system and the relatively short period of time that military lawyers act as prosecutors or defense counsel.

Building on the Progress Already Made. Over the years, the service judge advocates have tried to make up for this structural deficiency. Some services have hired a handful of career civilian prosecutors or established defense attorneys (“Highly Qualified Experts” or HQEs) to advise their inexperienced litigators on trial strategy and tactics. Hiring HQEs is commendable, but HQEs are civilians who are not certified or qualified to try cases under the current rules. Thus, hiring more HQEs is not the solution.

Each service has added an annual one-week prosecutor and defense counsel course to their school calendars, which some litigators are able to attend. But that is insufficient, especially as compared to the training and experience that career civilian litigators gain over a 20-plus-year career.

The services have all required all uniformed personnel to take annual mandatory general military training on the issue of sexual assault. That training is a necessary component to fixing the problem.

Furthermore, the services now allow for victims of sexual assault to report sex assaults in a manner that does not bring attention to themselves. That too is a welcome improvement, but in and of itself, it will not solve the problem.

The fact remains that today, the volume of cases in the military justice system have declined dramatically. Most cases result in guilty pleas, just like in the civilian sector. Last year, the Navy (318,999 on active duty) handled a 519 judge trials, including guilty pleas, and a mere 209 jury trials, to include pleas. This from a Navy JAG corps of 730 lawyers, 402 of whom are assigned to the Navy Legal Service Command—the command ultimately responsible for prosecution and defense.¹ Similarly, the Army (562,000 on active duty) tried only 725 felony cases, to include guilty pleas. This from an Army JAG corps of over 1,000 attorneys, some of whom are assigned to prosecute crimes.²

How to Restructure the JAG Corps to Produce Experienced Career Litigators. Congress should

look to best practices to solve this problem. Those best practices are not novel or new; they exist in the best DA and public defender offices in the country. Applying those best practices to the JAG corps and establishing a career professional litigator track within the uniformed services would solve a key problem associated with sexual assault cases—and for all other cases, for that matter.

Congress should require the services to do the following:

- Recruit talented law students who want to be a career prosecutor or defense counsel;
- Require the services to establish a career track for them and keep them in court for their entire careers;
- Develop prosecutor-specific and defense-specific training protocols throughout their 20-plus-year career;
- Cease co-training prosecutors with defense counsel;
- Design a viable 20-plus-year career path for JAG prosecutors and defense counsel that gives the best performers the opportunity to attain the rank of O-6 (colonel/captain); and
- Require that the service judge advocates send new prosecutors and defense counsel to larger commands first, where they will handle only misdemeanor cases for at least five years, including no felony cases that are referred to special courts-martial.

These structural changes are achievable without fundamentally altering the delivery of legal services to the armed forces. But it would require forethought and choices. There will be strong institutional push-back to these changes. Gone are the days when the military has the luxury of hiring JAG attorneys who are not specialists in one particular aspect of the law. While the rest of the American legal establishment has grown toward increased specialization, the JAG

1. The Code Committee, annual report submitted to the committees on armed services, from October 1, 2011, to September 30, 2012, pp. 52–85, <http://www.armfor.uscourts.gov/newcaaf/annual/FY12AnnualReport.pdf> (accessed June 3, 2013).

2. *Ibid.*, pp. 29–51.

corps has stubbornly clung on to the idea that military litigators can deliver world-class services to victims with the structural designs currently in place.

Victims Deserve Experienced Lawyers. These structural changes should be implemented with thought and care with due consideration to recruiting, retention, and careers of current JAGs. They should allow for promotion opportunities for career prosecutors and career defense counsel.

But all victims of crime, especially sexual assault victims, deserve the same level of experience and

professional development that exists in the best DA and public defender offices in the country. The nation owes them no less.

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