

APPENDIX B

DEPARTMENT OF THE NAVY
U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON NAVY YARD
716 SICARD STREET SE SUITE 1000
WASHINGTON, DC 20374-5047

IN REPLY REFER TO

5800
Ser 07/072
3 Oct 2003



Mr. William A. DeCicco
Clerk of Court
United States Court of Appeals for the Armed Forces
450 E Street, N.W.
Washington, D.C. 20442-0001

Ref: USCA Dkt. No. 03-8014/NA

Dear Mr. DeCicco:

On August 5, 2003, the United States Court of Appeals for the Armed Forces (CAAF), acting upon a Petition for Extraordinary Relief filed personally by Chief Fire Controlman Salvador Diaz, U.S. Navy, granted the petition by remanding the case to the Navy-Marine Corps Court of Criminal Appeals (NMCCA). In that decision the NMCCA was ordered to "expeditiously review the processing and status of Petitioner's Article 66 appeal." The NMCCA was also ordered to "take appropriate action to ensure that Petitioner receives the rights he is entitled to under Article 66 and Article 70, and issue orders as are necessary to ensure timely filing of an Assignment of Errors (sic) and Brief on behalf of Petitioner and the timely filing of an Answer . . . on behalf of the Government." In compliance with that order the NMCCA has filed a Response to Court Order concerning the referenced case.

In addition to ordering the NMCCA to report to the CAAF concerning issues related to the referenced case, the CAAF Order of August 5th also ordered the NMCCA to report to CAAF concerning "other appellants awaiting appellate review." The Order directed the NMCCA to report back to the CAAF within 60 days, detailing the "steps taken to comply with the provisions" of CAAF's decision in the Diaz case concerning totally unrelated cases pending Article 66, UCMJ, review before the NMCCA.

In compliance with the Order of the CAAF to the NMCCA to report the steps taken to ensure timely appellate review in these totally unrelated cases, the following information is provided:

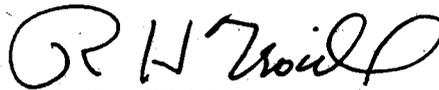
1. The judges of the NMCCA met in Chambers to discuss NMCCA policies concerning Motions for Enlargement of Time to file pleadings before the NMCCA. The focus of this discussion was whether the NMCCA should require more information from counsel before deciding to grant such a motion. The resulting decision was to consider each motion on a case-by-case basis, requesting additional information when deemed warranted.
2. The Chief Judge, NMCCA, met with the Directors of the Appellate Government and Defense Divisions, Navy-Marine Corps Appellate Review Activity, and the Assistant Judge Advocate General of the Navy for Military Justice (AJAG), to consider the procedures utilized by the Appellate Divisions to review cases awaiting action within their respective appellate divisions. After noting that their counsel carry heavy caseloads and work extremely hard to meet their obligations to clients, both the Division Directors represented that their counsel consider whether an appellant is still serving confinement when prioritizing cases. The Director, Appellate Defense Division, also asserted that his counsel seek to establish direct communication with each client concerning the status of their case shortly after the case is docketed, despite the fact that Navy and Marine Corps appellants routinely execute a power of attorney to their appellate defense counsel.
3. The Chief Judge invited the Judge Advocate General to address steps the Navy was taking in light of the *Diaz* decision. Enclosure 1. In response, on September 19, 2003, the AJAG, forwarded Enclosure 2 to the NMCCA. By separate correspondence, the AJAG provided a list of all appellants awaiting Article 66, UCMJ, review, who are currently confined, detailing their release dates.

4. Appellate defense counsel are now regularly indicating in their Motions for Enlargement of Time information concerning their client's confinement status and whether the client concurs in the request for more time.

5. The court has been informed that the Marine Corps has agreed to assign two Reserve judges and two Reserve commissioners to support the court.

The court will continue to closely monitor the progress of all cases awaiting appellate review, providing direction when necessary and relief when warranted.

Sincerely yours,



R.H. TROIDL
Clerk of Court

Enclosures



DEPARTMENT OF THE NAVY
U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON NAVY YARD
716 SICARD STREET SE SUITE 1000
WASHINGTON, DC 20374-5047

IN REPLY REFER TO

5800
Ser 07/065
27 Aug 2003

From: Chief Judge, Navy-Marine Corps Court of Criminal Appeals
To: Judge Advocate General
Subj: APPELLATE PROCESSING OF COURTS-MARTIAL PURSUANT TO ARTICLE 66, UCMJ
Ref: (a) *Diaz v. Judge Advocate General*, __ M.J. __, No. 03-8014 (C.A.A.F. Aug. 5, 2003)
(b) *United States v. Brunson*, __ M.J. __, No. 03-0297 (C.A.A.F. Aug. 14, 2003)
Encl: (1) Chart of Cases Decided by Service for Fiscal Years 1997 through 2002
(2) Chart of Cases Pending Appellate Review, Calendar 1999 through 2002 and 2003 Year to Date
(3) Chart of Cases Pending Appellate Review for Calendar Years 2000 through 2003
(4) Charts of Cases Pending In-Panel Over 6 and 12 Months for Calendar Years 2000 through 2003

1. By reference (a), on 5 August 2003, the United States Court of Appeals for the Armed Forces (CAAF), acted upon a Petition for Extraordinary Relief filed personally by an appellant whose case is pending before this court for review pursuant to Article 66(c), UCMJ. In addition to granting the petitioner certain specific relief, our superior court provided the following:

It is further directed that within 60 days of the date of this opinion, the Navy-Marine Corps Court of Criminal Appeals shall submit a report to this Court which specifies the steps taken to comply with the provisions of this opinion in regard to **Petitioner and other appellants awaiting appellate review under Article 66 before the Navy-Marine Corps Court of Criminal Appeals.** (emphasis added).

2. Although this court is tasked with responding to CAAF, we are only one part of the Navy-Marine Corps appellate review process. The court does not control the number of military and civilian billets assigned to the court or to the four divisions within the Navy-Marine Corps Appellate Review Activity (NAMARA). Additionally, this court does not control the number of personnel (military and civilian) actually assigned to fill those billets. Although there is

Enclosure (1)

Subj: APPELLATE PROCESSING OF COURTS-MARTIAL PURSUANT TO
ARTICLE 66, UCMJ

a screening process in place for selecting judges to this court, the court has no control over the experience level and qualifications of judge advocates assigned as appellate counsel, or the length of their tours of duty.

3. The Navy and Marine Corps have a longstanding tradition of doing more with less. The personnel assigned to this court and NAMARA have lived up to that tradition to the best of their ability. As evidenced by enclosure (1), there has not been a year in recent memory when this court did not decide more cases than all of the other service courts combined, despite having fewer judges, fewer appellate counsel, and smaller support staffs than both the Army and Air Force courts. For a variety of reasons, doing more with less is simply not getting the job done for too many appellants and for the Government. Enclosure (2) reflects the dramatic increase in the number of cases pending appellate review since the end of CY-1999. Enclosure (3) reflects the distribution of the pending cases between the court and the Appellate Defense and Appellate Government Divisions. Additionally, the court expects to be faced with deciding three capital cases and the two Italian aircraft mishap cases over the next 12-18 months. Each of those cases will require a significant amount of judicial time that cannot be devoted to reducing the ever-growing backlog.

4. The court does not have statistics reflecting how many cases currently pending appellate pleadings were docketed over 6 months or 12 months ago. As reflected in enclosure (4), there are currently 53 cases which are fully briefed and have been awaiting judicial review for over 6 months and another 35 cases that have been awaiting judicial review for over one year. These figures do not compare favorably with ABA Appellate Standard 3.52, which calls for 75% of all appeals to intermediate appellate courts to be decided within 290 days of the notice of appeal, 95% of all such appeals to be decided within one year of the notice of appeal, and the remaining 5% to be decided as soon after one year as is possible. The Tenth Circuit¹ held that a delay of two years from notice of appeal to decision by the intermediate court is a presumptive denial of due process.

5. In light of the delays associated with this backlog, individual appellants may be found to have suffered violations of their due process rights. Navy-Marine Corps appellate counsel may, therefore, find themselves in ethical jeopardy due to circumstances largely beyond their control.

¹ *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994).

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ARTICLE 66, UCMJ

CAAF's recent decision in *Brunson*, reference (b), clearly indicates that CAAF will hold appellate counsel and their supervisors accountable for the processing of their cases. Of particular note, CAAF referenced a comment to Rule 1.3 of the American Bar Association's MODEL RULES OF PROFESSIONAL CONDUCT, which states "[a] lawyer's work load must be controlled so that each matter can be handled competently." Since the Government is tasked with operating the military justice system by statute and controls the appellate process in terms of manning and resources, delays in the process are attributable to the Government. See *United States ex rel. Green v. Washington*, 917 F.Supp. 1238, 1273 (N.D. Ill. 1996). A change in the process is urgently needed.

6. For this court's part, we are examining each step of our internal process for reviewing cases, along with the policies that we follow in granting counsel enlargements of time. In this regard, by separate correspondence, I am requesting that the Assistant Judge Advocate General for Military Justice provide this court with a list of all those appellants whose cases have been docketed with this court and who remain in confinement due to their court-martial sentence as of 1 September 2003, along with projected release dates.

7. While the court can become marginally more efficient in how we process cases, we cannot become significantly more productive without the assignment of additional personnel to decide cases (judges) and provide research support (commissioners). Assuming that the caseload will remain about the same, I am confident that the court can, over time, make significant inroads in shortening the length of time required to issue opinions by continually manning the court with 12 active duty appellate judges and four full-time commissioners. The number of selected Reserve officers supporting the court should include eight judges and four commissioners. This would allow the court to maintain four full-time panels, each with a dedicated active duty commissioner, two dedicated Reserve judges, and one dedicated Reserve commissioner. I would gauge the need for any additional civilian support after the four panels begin to produce a steady volume of work. I recognize that increasing the court's manning will go against the recent personnel trend which has seen the number of judicial billets assigned to the court reduced from nine to eight and significant gaps in the assignment of replacement judges and commissioners. Without more judges and commissioners, however, based upon the number of cases requiring Article 66 review, the backlog of cases pending before the court will continue to grow.

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ARTICLE 66, UCMJ

8. With respect to those parts of the appellate review process outside of the court, I respectfully request that your staff review that process with a view toward identifying and resolving any inefficiency that may plague the system. Additionally, and I believe more importantly, I respectfully request that your staff review the process to determine the number of counsel that should be assigned for their caseload and collateral duties, so as to ensure that all cases are fully briefed to the court in an appropriate and timely manner. A comparison of the staffing and workload of the Navy-Marine Corps appellate divisions to the manning and relative workloads (vice productivity) of the Army and Air Force appellate divisions would be most instructive. I personally believe that a study, such as the one conducted by Whitley, Bradberry, Brown, would be helpful.

9. Finally, with respect to those parts of the appellate review process under your control, I respectfully request that your staff convey to this court information concerning "the steps taken to comply with the provisions of [the Diaz] opinion in regard to . . . **appellants awaiting appellate review under Article 66 before the Navy-Marine Corps Court of Criminal Appeals,**" so that we may include that information in the report we are required to submit to CAAF. Given the established due date and in order to allow sufficient time to incorporate the data into the report, a response is respectfully requested on or before 19 September 2003.

Very respectfully,


C.W. Dorman

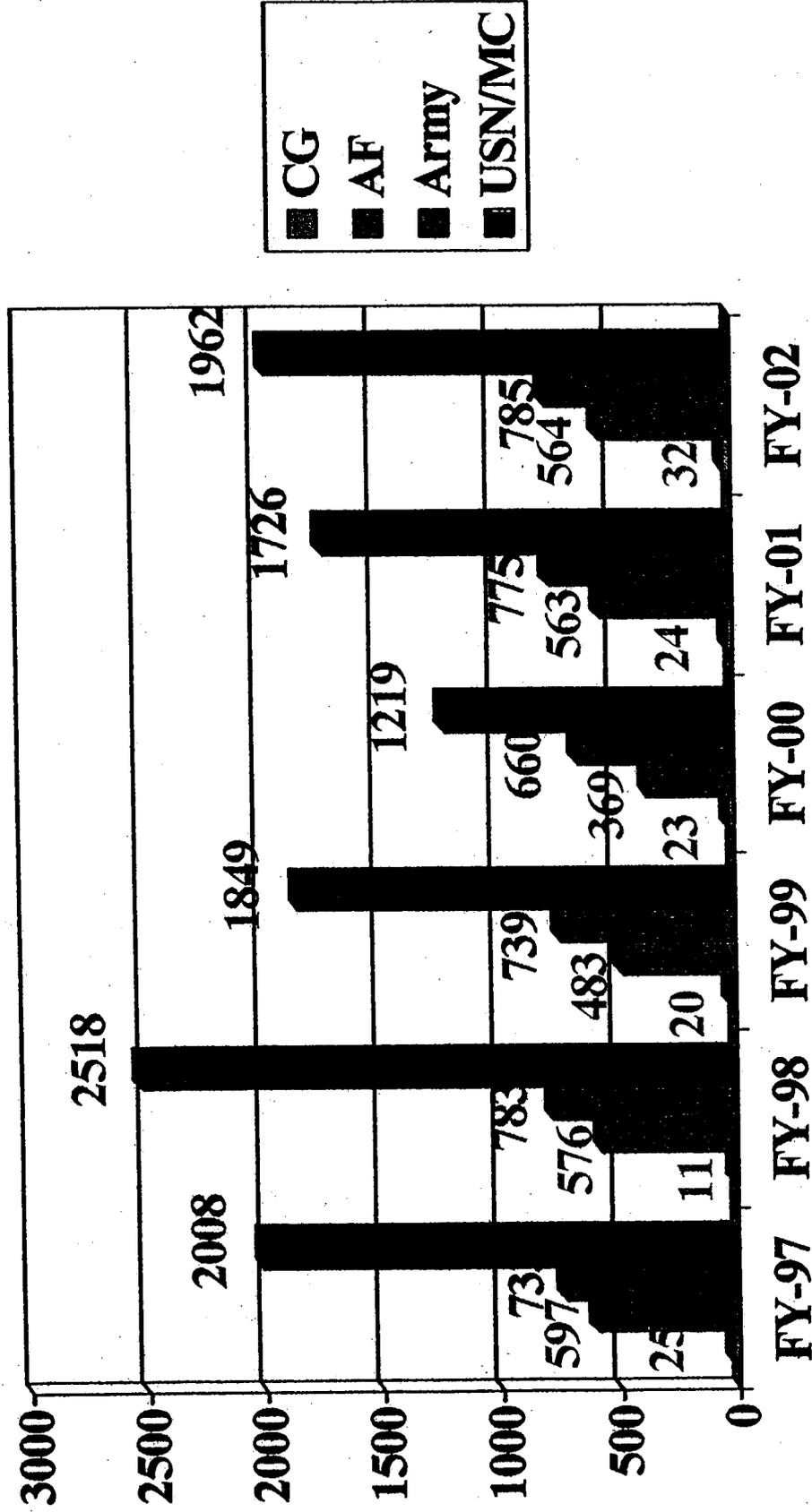
CCA Cases Decided

As Reported by CAAF

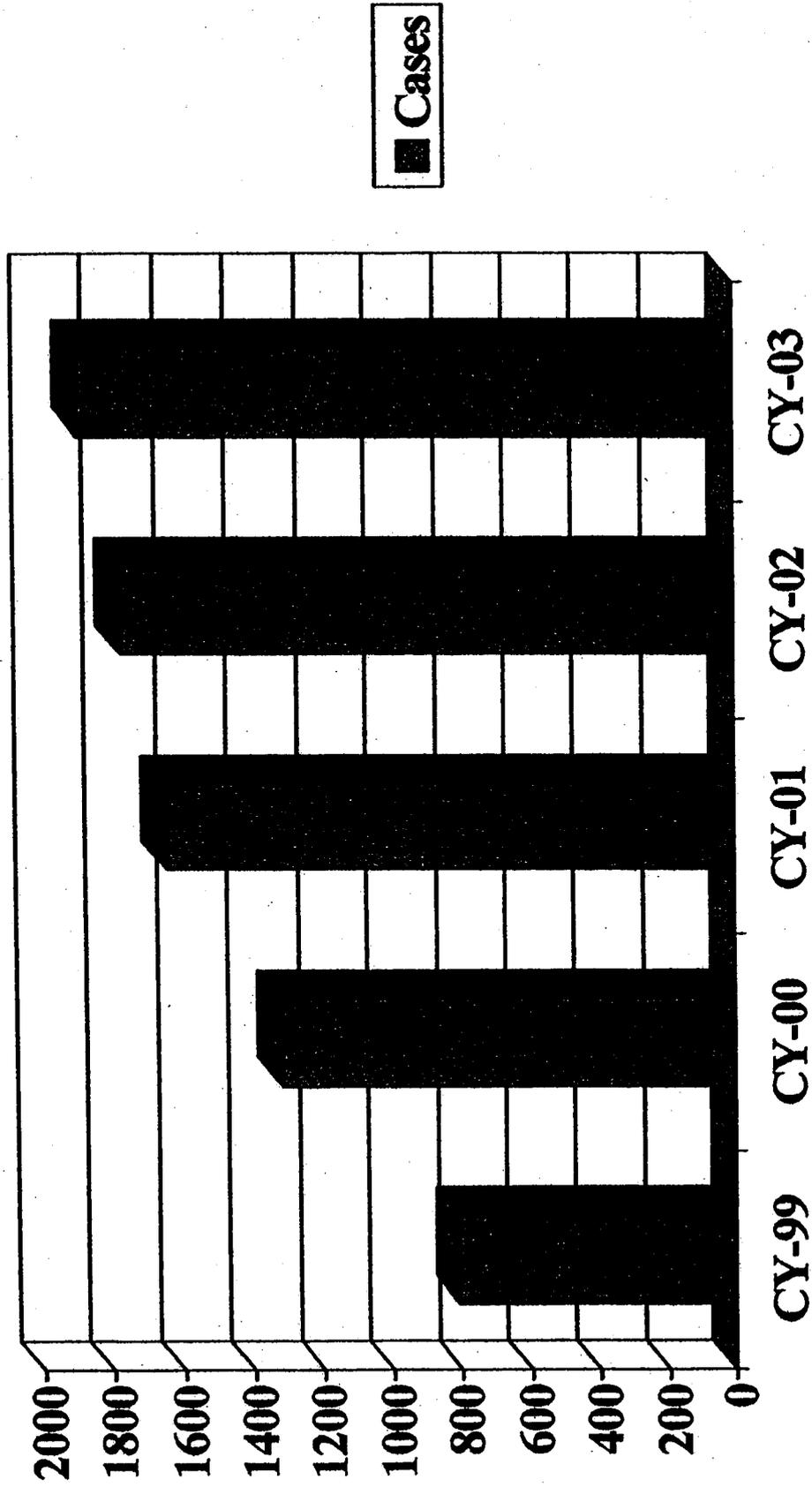
Total Cases for All Service Courts

FY-97- 3363 FY-98- 3888 FY-99- 3136

FY-00- 2271 FY-01- 3088 FY-02- 3307

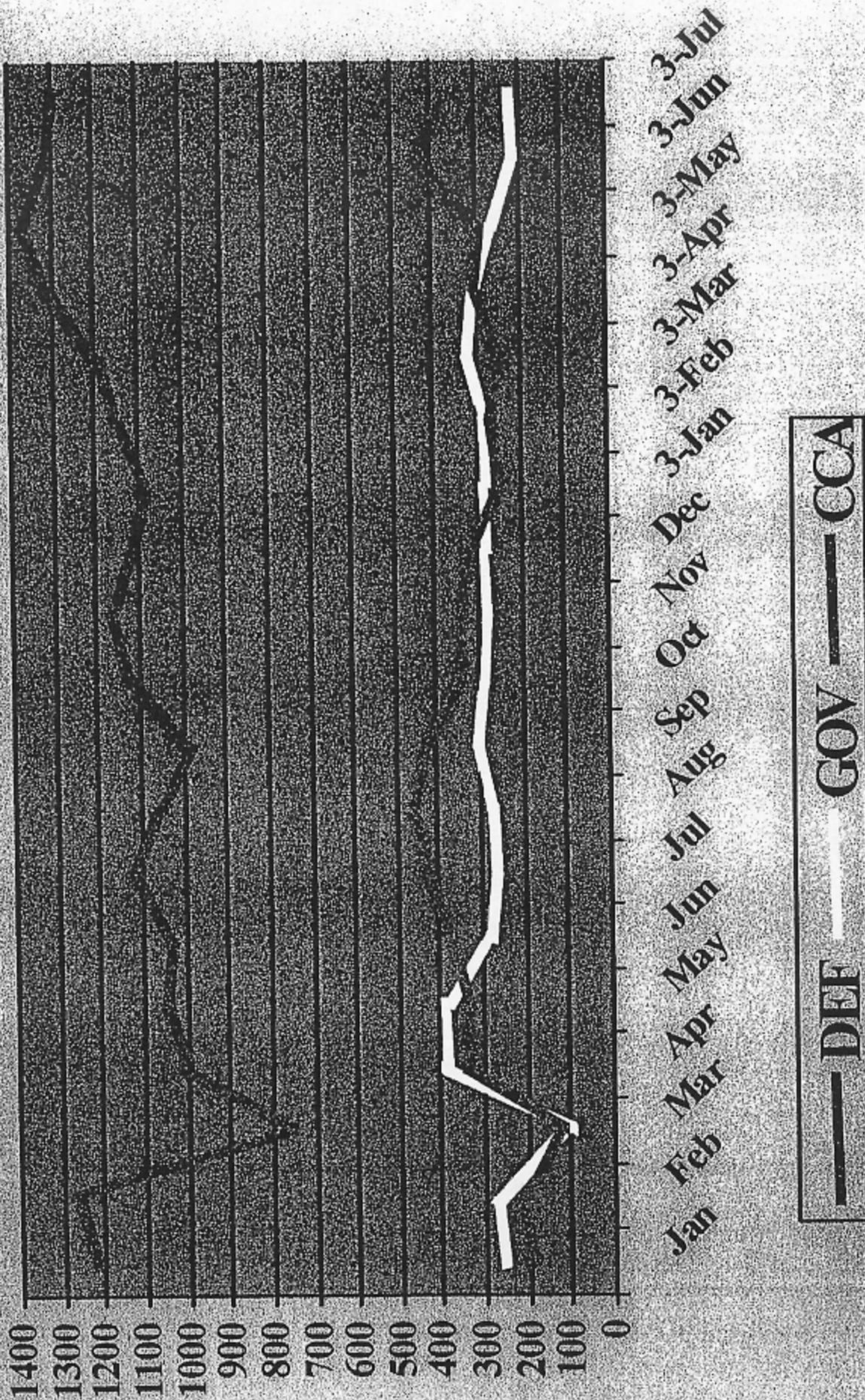


Cases Pending at the End of CY-1999-2002 and CY-2003 to 31 July



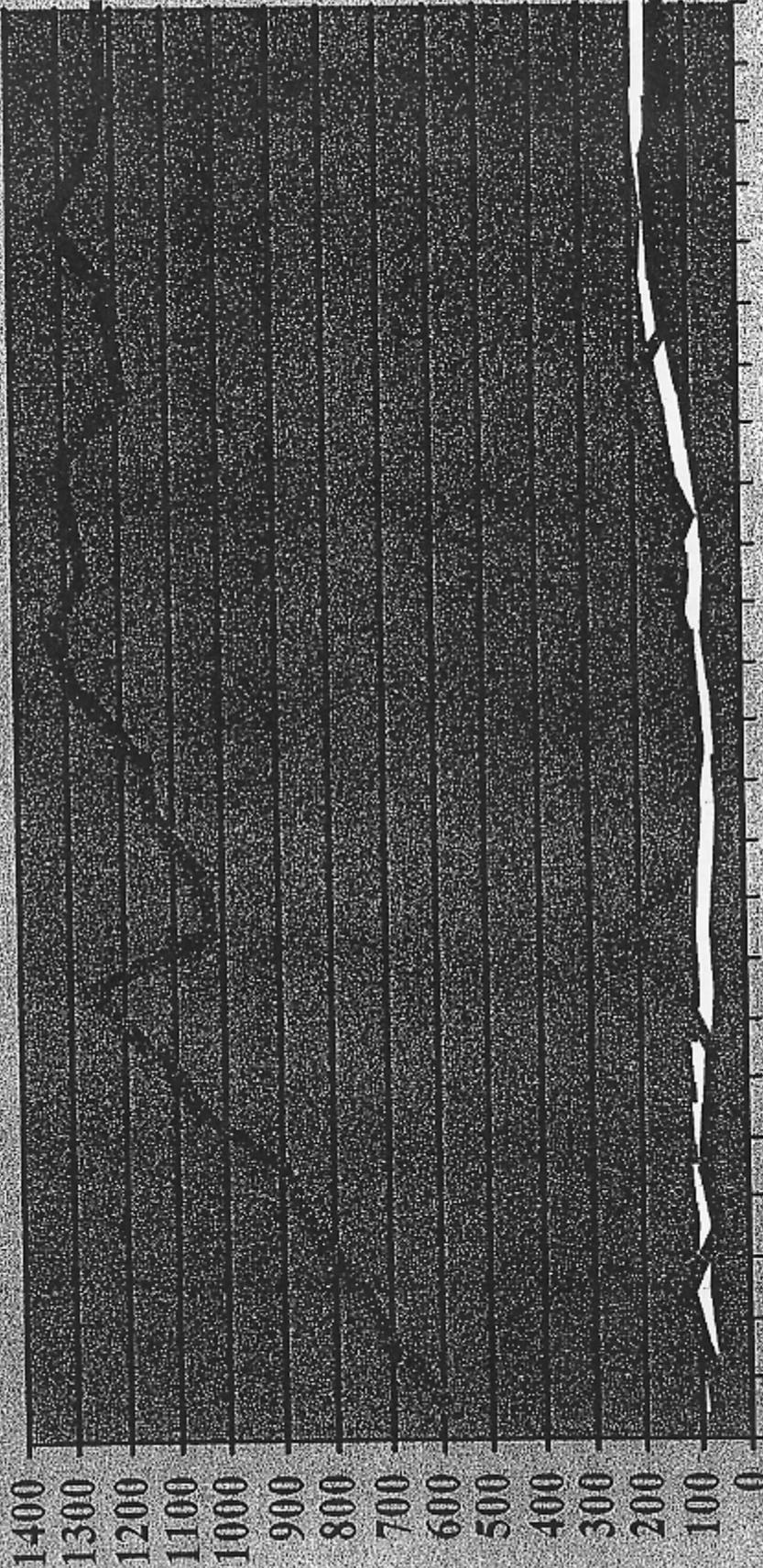
Monthly Cases Pending List

CY 02/03



Monthly Cases Pending List

CY 00/01

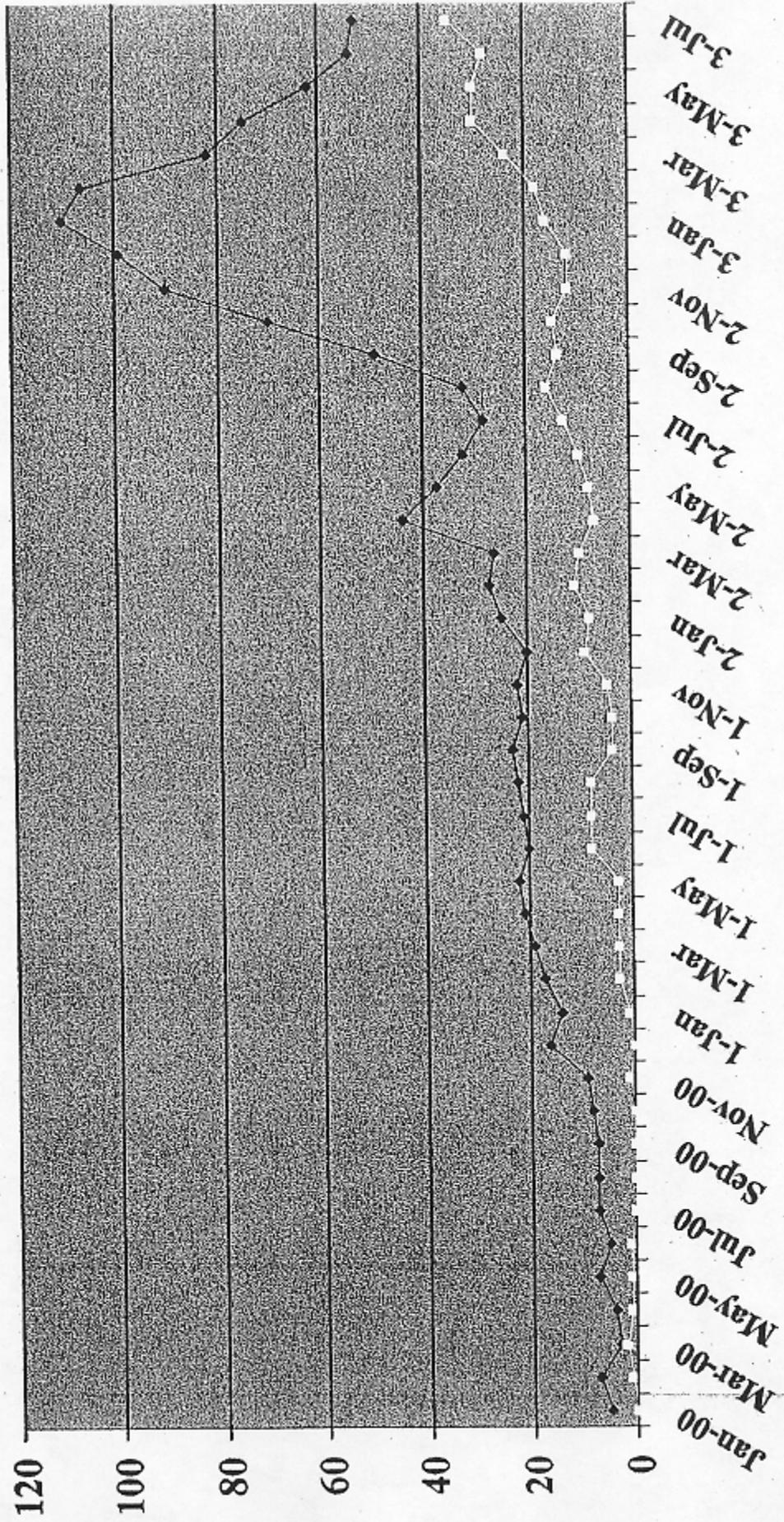


Jan-00 Feb-00 Mar-00 Apr-00 May-00 Jun-00 Jul-00 Aug-00 Sep-00 Oct-00 Nov-00 Dec-00 Jan-01 Feb-01 Mar-01 Apr-01 May-01 Jun-01 Jul-01 Aug-01 Sep-01 Oct-01 Nov-01 Dec-01

— DEF — GOV — CCA



◆ 6 Months 1 Year





DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS APPELLATE REVIEW ACTIVITY
WASHINGTON NAVY YARD
716 SICARD STREET SE SUITE 1000
WASHINGTON DC 20374-5047

IN REPLY REFER TO

5800
Ser 02/719
26 Sep 03

From: Judge Advocate General
To: Chief Judge, Navy-Marine Corps Court of Criminal Appeals

Subj: APPELLATE PROCESSING OF COURTS-MARTIAL PURSUANT TO ARTICLE 66,
UNIFORM CODE OF MILITARY JUSTICE (UCMJ)

Ref: (a) Your ltr 5800 Ser 07/065 of 27 Aug 03
(b) *Diaz v. Judge Advocate General of the Navy*, __ M.J. __, No. 03-8014
(C.A.A.F. Aug. 5, 2003)

Encl: (1) Navy JAG input to NMCCA

1. Reference (a) requested input for your report to the U.S. Court of Appeals for the Armed Forces (CAAF), per its decision at reference (b). Specifically, CAAF requested our "steps taken to comply with the provisions of [the *Diaz*] opinion in regard to . . . appellants awaiting appellate review under Article 66 before the Navy-Marine Corps Court of Criminal Appeals."

2. Enclosure (1) reflects our input to your request.

A handwritten signature in black ink, appearing to read "K. H. Winters", with a horizontal line extending to the right.

K. H. WINTERS
By Direction

Enclosure (2)

Navy JAG Input to Navy Marine Court of Criminal Appeals

1. **Institutional Commitment.** As background, it is important to note that the Department of the Navy remains committed to ensuring appellants receive quality and timely appellate review pursuant to Article 66, UCMJ. Indeed, the Department commits substantial resources to this requirement -- to include first-rate centralized appellate review facilities at the Washington Navy Yard (though recently damaged by Hurricane Isabel).

2. **Framing the Challenge.** We continually review our processes, procedures, and staffing to fulfilling our appellate review requirements. We organize our assets in anticipation or response to the following two variables: total cases per year requiring appellate review and the complexity of those cases. While it is difficult to predict the *complexity* of cases per year, the total *numbers* of cases requiring review per year is typically about 2000. Numbers of complex cases -- generally defined as contested cases with large records of trial - fluctuate and we have to "surge" our staffing accordingly (as we are now doing).

3. **Staffing.** Staffing our appellate divisions with qualified counsel is fundamental in meeting our appellate review requirement. Our most recent staffing review indicated that we should increase the number of judge advocates in the Appellate Defense Division, as they are the Division tasked with examining all records of trial and filing initial pleadings in all cases that require Article 66, UCMJ, review. As of September 19, 2003, they had a backlog of 1099 cases, down from 1365 cases in May (the FY03 high), when they were staffed with 14 attorneys. There are now 18 judge advocates in Appellate Defense.

a. **Active Duty Judge Advocates.** We intend to increase our staffing at Appellate Defense Division to approximately 20 active duty judge advocates. Coupled with our Reserve support detailed below, we believe this number, coupled with an actual decrease in FY03 cases tried, will further reduce our backlog - specifically our high enlargement cases. Finally, we staff our Appellate Divisions with judge advocates who have at least one tour at a field command before performing appellate duties; this "experience factor" also contributes to our timeliness and quality goals.

b. **Reserve Judge Advocates.** The work of our Reserve judge advocates is essential in accomplishing our appellate review mission. Currently, we have four Reserve units with almost 40 members who work on appellate defense cases. To further reduce our backlog this summer, we arranged for three Reserve judge advocates to serve on extended Active Duty Special Work (ADSW) time periods to support the division. Eleven Naval Reserve counsel also volunteered to drill extra periods of annual training (AT) and active duty for training in order to assist Appellate Defense with lessening its caseload through the end of the fiscal year.

c. **Mobilization of a Capital Litigation Specialist.** Three capital cases are pending within NAMARA. Recognizing that capital cases involve specialized appellate issues, we activated a recognized expert (USMCR Lieutenant Colonel) in capital litigation. His training, oversight, and advice have paid enormous dividends in both substance and efficiency.

d. **Experienced Leadership.** In October 2003, a U.S. Navy Captain (select) with a strong

background in military justice and case management will assume duties as the Division Director, thereby increasing the experience level within the Division.

4. Internal Efficiencies. Other efforts to improve the timeliness of appellate review include the following:

a. **Training.** We continue our comprehensive effort to emphasize the importance of a timely review pursuant to Article 66, UCMJ. These include formalized training sessions at the highest levels of judge advocate leadership – to include the JAG training symposium in September 2003, a planned presentation at the Marine Corps SJA conference in October 2003, and re-emphasis at Marine Corps bi-annual commander's courses. In addition, every prospective commanding officer and executive officer of our Trial Service Office and Navy Legal Service Command is taken to the Navy Marine Corps Appellate Review Activity to observe the operational tempo, learn the processes and procedures, so that they can understand the importance of timely and accurate record of trial preparation. In August 2003, we conducted a record of trial preparation training symposium at NAMARA for selected commands in need of remediation. Lastly, although judge advocates are qualified and certified to practice before appellate courts, we also conduct internal appellate training and attend off-site appellate practice workshops as schedules permit.

b. **Case Tracking.** Identifying cases that have been tried, but where the command has not sent the record of trial to NAMARA, is an area where we have also been focusing our attention. NAMARA now coordinates with the trial judiciary to identify commands in this category, and takes action to ensure the record of trial is located and moving through the process.

c. **Early Check for Missing Documents.** We are also taking steps to ensure the court and counsel have complete records of trial that are ready for appellate review. Records are checked twice for completeness. First, the Administrative Division (Code 40) uses a detailed checklist to check the records of trial for missing documents and seeks to obtain them from the command. Next, when appellate defense counsel receive the records, they check again for missing documents so that these documents may be obtained right away and will not delay the substantive review of the case. The combined efforts of Codes 40 and 45 have paid enormous dividends in case processing.

d. **Prioritization of Cases.** Appellate Defense has also focused on the way they prioritize cases – with confinement, pleas, and length of time from the date sentence was adjudged being the key variables.