

ANNUAL REPORT  
SUBMITTED TO THE  
COMMITTEES ON ARMED SERVICES  
Of the  
United States Senate  
and the  
United States House of Representatives  
And to the  
SECRETARY OF DEFENSE,  
SECRETARY OF HOMELAND SECURITY,  
And the  
SECRETARIES OF THE  
ARMY, NAVY AND AIR FORCE  
PURSUANT TO THE  
UNIFORM CODE OF MILITARY JUSTICE  
For the Period  
October 1, 2012 to September 30, 2013

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**SECTION 1**

**JOINT ANNUAL REPORT OF THE CODE COMMITTEE**

**JOINT ANNUAL REPORT OF THE  
CODE COMMITTEE PURSUANT TO THE  
UNIFORM CODE OF MILITARY JUSTICE**

**October 1, 2012 to September 30, 2013**

The Judges of the United States Court of Appeals for the Armed Forces, the Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, the Staff Judge Advocate to the Commandant of the Marine Corps, and Professor Charles J. Dunlap, Jr., and Professor Keith M. Harrison, Public Members appointed by the Secretary of Defense, submit their annual report on the operation of the Uniform Code of Military Justice (UCMJ) pursuant to Article 146, UCMJ, Title 10, United States Code, § 946.

The Code Committee met on March 5, 2013, to consider matters pertaining to the administration of military justice. The meeting was open to the public and was previously announced by notices in the Federal Register and on the Court's website.

After approving the minutes of the 2012 Code Committee meeting, Major Daniel Mamber, U.S. Air Force, a member of the Joint Service Committee on Military Justice (JSC) Working Group, provided a report on the work of the Committee. Major Mamber provided an update for the 2011 Executive Order, which had not yet been signed. This order had contained changes to Military Rules of Evidence (MRE) 505 and 412. Due to concerns raised about the changes to these Rules, the changes were removed from the proposed Executive Order. The Department of Justice (DoJ), the Central Intelligence Agency (CIA), and the Prosecution Office for Military Commissions expressed two concerns with the changes to MRE 505. The first was with the wording as to who would be authorized to grant permission to declassify information for use at courts-martial. The Joint Service Committee had suggested this be conferred on an Agency Head or Designee. DoJ, CIA, and the Prosecution Office for Military Commissions preferred that it be a "knowledgeable U.S. Official." The second concern involved the proffer from defense counsel for the use of classified material at court-martial. The agencies believed this would be inconsistent with the Classified Information Procedures Act and the MCRE. The JSC accepted the second objection.

As for MRE 412, the JSC proposed removing the portion of MRE 412(c)(3) relating to the victim's privacy concern to comply with the Court's decisions in United States v. Gaddis and United

States v. Ellerbrock. The National Security Staff expressed concern that this action would be problematic with victim's rights advocates, so the JSC will continue work on re-drafting both Rules.

Regarding the proposed 2012 Executive Order, Major Mamber stated that the public comment phase was complete and that the proposal was sent to the Department of Defense for review. The proposal contains the following changes to the Manual for Courts-Martial (MCM): 1) completion of the listing of maximum punishments in Part IV for Articles 120, 120(b), and 120(c); 2) amendment of Appendix 12 of the MCM to comport with Articles 120(b) and (c); 3) modification of Part IV, MCM, to include the elements test contained in United States v. Jones; 4) incorporation of a new Appendix 12A containing an index of lesser-included offenses; 5) inclusion of a new animal abuse offense under Article 134; 6) amendment of Rule for Courts-Martial (RCM) 307 to state that the terminal element in Article 134 offenses be expressly alleged in the specification; 7) clarification of the rule on unreasonable multiplication of charges; 8) establishment of a rule requiring that a copy of the record of trial be provided to sexual assault victims; 9) amendment of RCMs 209 and 809 to comply with changes in the contempt power of a court-martial; and 10) amendment of RCMs 405 and 703 to account for the new power of an Article 32 investigating officer to issue a subpoena duces tecum.

Major Mamber also stated that the Department of Defense General Counsel's Office was looking into why all of the rights afforded to crime victims under the Crime Victims Act were not included in Department of Defense Directive 1030.1. He also said that after the Secretary of Defense received a letter from the House Committee on Armed Services stating that the military justice system was not properly responding to the issue of sexual assault in the military, the Secretary directed the JSC to compare the military justice system's response with that of civilian jurisdictions in what is now referred to as the Sexual Assault Comparative Study Group.

On a separate topic, the JSC was asked to study a proposal for the adoption of a hazing statute in the UCMJ. Following the study, the JSC recommended that hazing be charged under existing offenses under Article 134, with added guidance in Part IV.

Colonel David Dales, U.S. Air Force, Chair of the JSC, then briefed the Code Committee on the matters the JSC would be addressing in 2013. The first was the Air Force initiative

involving Special Victims Counsel. The General Counsel, Department of Defense, requested the JSC to review this initiative and whether it should be expanded to all of the services. The JSC will also study the following proposals: 1) substitution of the appellate courts for the President for approving death sentences; 2) replacement of sodomy with forcible sodomy as an aggravating factor in capital sentencing; 3) amendment of Article 112 to include ingestion of drugs as a basis for drunk driving; 4) allowing the court reporter to authenticate the record of trial in a general court-martial acquittal; 5) allowing trial counsel to file an appeal of the decision of the military judge to compel production of a defense witness; 6) requiring the consent of the holder of a privilege to disclose privileged information; and 7) specifically stating that the Health Insurance Portability and Accountability Act is not under the control of the government.

Each of the services submitted a report to the Code Committee. For the Air Force, Lieutenant General Harding reported that there had been a 10 percent reduction in court-martial processing times, and an increase in the number of appellate judges on the Court of Criminal Appeals. He added that the Air Force had trained 60 officers to act as special victims counsel.

In the Navy, Vice Admiral DeRenzi stated that the number of general courts-martial had increased, but that the number of cases in other forums had decreased. She also said the Navy had re-aligned the Naval Legal Service Command by shifting the legal assistance function from Naval Legal Service Offices to Regional Legal Service Offices to enhance litigation training in the defense service offices and to address the increased complexity of cases being tried.

For the Army, Major General Tate said that the Army had increased the number of special victim prosecutors, improved capabilities for cases involving special victims in sexual assault cases, and increased training for such cases for both prosecutors and defense counsel.

In the Marine Corps, Major General Ary said that in the area of sexual assault cases, the way the services execute the system of adjudicating the cases involves the breadth and depth of the experience of trial and defense counsel, consideration of the victims and the victims' bar, and the limited talent pool in an area of increased complexity and scrutiny. He added that the Staff Judge Advocate to the Commandant was given Article 6

authority to conduct inspections of the system, and that the number of Marine Corps judge advocates increased from 435 to 569.

For the Coast Guard, Rear Admiral Kenney stated the experience was the same as the Navy's with more sexual assault cases. The two foundational areas of expertise for Coast Guard judge advocates were operational law and military justice. The Coast Guard continues to participate with the Navy in the provision of defense services.

Professor Dunlap expressed concerns with the impact of budget problems on training and the provision of legal services, the change in the maximum punishment for sexual assault, the politicization of such cases, the lack of a Department of Defense Law of War Manual, the report that most of the individuals who experienced unwanted sexual contact were males, and the lack of information on the prosecution of those cases. Additional concerns were referred to the JSC for study.

Separate reports of the United States Court of Appeals for the Armed Forces and the individual Armed Forces address further items of special interest to the Committees on Armed Services of the United States Senate and the United States House of Representatives, as well as the Secretaries of Defense, Homeland Security, Army, Navy, and Air Force.

James E. Baker  
Chief Judge

Charles E. "Chip" Erdmann  
Associate Judge

Scott W. Stucky  
Associate Judge

Margaret A. Ryan  
Associate Judge

Lieutenant General Flora D. Darpino, USA  
Judge Advocate General of the Army

Vice Admiral Nanette M. DeRenzi, JAGC, USN  
The Judge Advocate General of the Navy

Lieutenant General Richard C. Harding, USAF  
The Judge Advocate General of the Air Force

Rear Admiral Frederick J. Kenney, USCG  
The Judge Advocate General of the Coast Guard

Major General Vaughn Ary, USMC  
Staff Judge Advocate to the Commandant of the Marine Corps

Professor Charles J. Dunlap, Jr.  
Public Member

Professor Keith M. Harrison  
Public Member



SECTION 2

REPORT OF THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

**REPORT OF THE UNITED STATES  
COURT OF APPEALS FOR THE ARMED FORCES**

**September 1, 2012 to August 31, 2013**

The Judges of the United States Court of Appeals for the Armed Forces submit their annual report on the administration of the Court and military justice during the September 2012 Term of Court to the Committees on Armed Services of the United States Senate and the United States House of Representatives, and to the Secretaries of Defense, Homeland Security, Army, Navy, and Air Force in accordance with Article 146, Uniform Code of Military Justice, Title 10, United States Code, § 946.

**THE BUSINESS OF THE COURT**

The filing and disposition of cases are set forth in the attached statistical report and graphs for the period from September 1, 2012 to August 31, 2013. Additional information pertaining to specific opinions is available from the Court's published opinions and Daily Journal. Other dispositions may be found in the Court's official reports, the Military Justice Reporter, and on the Court's web site. The Court's web site also contains a consolidated digest of past opinions of the Court, information on the Court's history and jurisdiction, the Rules of Practice and Procedure, previous Annual Reports, a schedule of upcoming hearings, audio recordings of past hearings, and information on clerkship opportunities, bar admission, electronic filing, and the Court's library.

During the September 2012 Term of Court, the Court again met its goal of issuing opinions in all cases heard during the Term prior to the end of the Term. An informal summary of selected decisions prepared by the Court's staff is set forth in Appendix A.

**RULES OF PRACTICE AND PROCEDURE**

No changes to the Court's Rules of Practice and Procedure were made during the September 2012 Term of Court.

**BAR OF THE COURT**

During the September 2012 Term, 233 attorneys were admitted to practice before the Court, bringing the cumulative total of admissions to the Bar of the Court to 36,016.

## **JUDICIAL OUTREACH**

In furtherance of a practice established in 1987, the Court scheduled special sessions and heard oral arguments outside its permanent courthouse in Washington, D.C., during the September 2012 Term of Court. This practice, known as "Project Outreach," was developed as part of a public awareness program to demonstrate the operation of a Federal Court of Appeals, and the military's criminal justice system. The Court conducted hearings during this period, with the consent of the parties, and in conjunction with the Office of the Staff Judge Advocate at Fort Sill, at the University of Oklahoma School of Law, Norman, Oklahoma, and, in conjunction with the Offices of the Staff Judge Advocate at Davis-Monthan Air Force Base, Luke Air Force Base, and Fort Huachuca, at the University of Arizona James E. Rogers College of Law, Tucson, Arizona, and at the United States Naval Academy, Annapolis, Maryland. In addition, the Judges of the Court participated in a variety of professional training, speaking and educational endeavors on military installations, at law schools and before professional groups.

## **CONTINUING LEGAL EDUCATION CONFERENCE**

The Court reluctantly cancelled its annual Continuing Legal Education Conference. This CLE conference is designed to help judge advocates fulfill their CLE requirements for maintaining good standing in their state bars in a cost effective manner while addressing topics relevant to military law. For example, at this year's conference, the Chairman of the Joint Chiefs of Staff was scheduled to speak on the subject of sexual assault and the military. However, as a result of budget constraints related to sequestration, the military services determined that they were not in a position to commit to military attendance at the conference.

James E. Baker  
Chief Judge

Charles E. "Chip" Erdmann  
Associate Judge

Scott W. Stucky  
Associate Judge

Margaret A. Ryan  
Associate Judge

## **APPENDIX A - SELECTED DECISIONS**

This appendix contains an informal staff summary of selected decisions of the September 2012 Term of Court. A full list and summary of the cases decided by the Court, including any related concurrences and dissents, during the Term can be found on the Court's website.

*Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012), holding that the removal of the military judge based on the appearance of bias in an ongoing general court-martial was required where the military judge had the accused, a practicing Muslim, removed from the courtroom because of his beard, then ordered that the accused's beard be forcibly removed, even though there was no command action requiring the removal of the beard or evidence that the beard materially interfered with the proceedings, and the military judge and his family had been present on the base the day of the underlying shooting incident.

*United States v. Spicer*, 71 M.J. 470 (C.A.A.F. 2013), holding that the accused's false statements to civilian law enforcement officials were not "official" within the meaning of Article 107, UCMJ, where the statements were not made in the line of duty, did not bear a clear and direct relationship to the accused's official duties, and the civilian officials were not conducting any military function.

*United States v. Cote*, 72 M.J. 41 (C.A.A.F. 2013), holding that the Government's violation of a search warrant's 90-day time limitation for conducting an offsite search was more than a *de minimis* violation of the warrant and resulted in an unreasonable search.

*United States v. Tearman*, 72 M.J. 54 (C.A.A.F. 2013), holding that chain of custody documents and internal review worksheets contained in a drug testing report were nontestimonial for purposes of the Confrontation Clause, but that any error in their admission into evidence was harmless beyond a reasonable doubt in this case.

*United States v. Bowersox*, 72 M.J. 71 (C.A.A.F. 2013), holding that 18 U.S.C. § 1466A(b)(1), which bars the possession of any visual depiction of a minor engaging in sexually explicit conduct, did not require proof that the depiction represent a real minor, and that the accused did not have a First Amendment privacy interest that permitted him to possess obscenity in the privacy of his shared barracks room.

*United States v. Irizarry*, 72 M.J. 100 (C.A.A.F. 2013), holding that the accused's command representatives did not violate his Fourth Amendment rights when they entered his off-base apartment without a warrant at the request of his landlord after he stopped paying rent, the landlord discovered unsanitary conditions in the apartment, and where the command representatives did not enter for law enforcement purposes.

*United States v. Riley*, 72 M.J. 115 (C.A.A.F. 2013), holding that sex offender registration was not a collateral consequence of the accused's guilty plea, and that the military judge abused his discretion when he accepted the guilty plea without questioning the defense counsel to ensure the accused knew of the sex offender registration consequences.

*Center for Constitutional Rights et al. v. United States and Colonel Denise Lind, Military Judge*, 72 M.J. 126 (C.A.A.F. 2013), holding that the United States Court of Appeals for the Armed Forces lacked jurisdiction under the All Writs Act to compel a military judge of a court-martial to grant public access to documents filed in the court-martial.

*United States v. Caldwell*, 72 M.J. 137 (C.A.A.F. 2013), holding that the accused's bona fide suicide attempt was not conduct prejudicial to good order and discipline under Article 134, UCMJ, and his statements at the guilty plea inquiry did not establish service discrediting conduct under the general article.

*United States v. Goings*, 72 M.J. 202 (C.A.A.F. 2013), holding that Article 134, UCMJ, was not unconstitutional as applied to the accused who was charged with committing indecent acts with another where the trier of fact determined that the charged conduct was prejudicial to good order and discipline in the armed forces and service discrediting, and the accused was not prejudiced by the Government's failure to allege the terminal element when charging him under the general article.

*United States v. Castellano*, 72 M.J. 217 (C.A.A.F. 2013), holding that the *Marcum* factors, removing sexual activity from the scope of private, consensual sexual activities between adults, must be determined by the trier of fact.

*United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013), holding that the Court of Criminal Appeals had discretion to order a sentencing rehearing due to the absence of a defense sentencing exhibit from the record of trial, where the record

included a verbatim transcript, and the Court was not required to affirm a sentence no greater than that which could be approved if there was not a verbatim transcript; and, the Government's failure to allege the terminal element in a charge under the general article prejudiced the accused's substantial right to notice of the charge against him, even where the evidence was sufficient to prove that his conduct violated the general article when the Government failed to allege the terminal element, mention it during trial, or put on evidence of it, and the accused did not defend against it.

*United States v. Kelly*, 72 M.J. 237 (C.A.A.F. 2013), holding that the search of the accused's personal laptop computer following his medical evacuation from Iraq was not a valid inspection or inventory and constituted an unreasonable search.

*United States v. Hutchins*, 72 M.J. 294 (C.A.A.F. 2013), holding that a request from investigators to the accused for his consent to search his belongings, after accused invoked his right to an attorney, reinitiated communication with the accused in violation of his Fifth Amendment rights, and the use of the accused's statement at his court-martial was not harmless.

*United States v. Brown*, 72 M.J. 359 (C.A.A.F. 2013), holding that the military judge did not abuse his discretion by allowing a support person to accompany a 17-year old witness to the witness stand in a rape prosecution.

*LRM v. Kastenber*, 72 M.J. 364 (C.A.A.F. 2013), holding that an alleged victim had the right to present facts and legal argument through special victims counsel at evidentiary hearings in the court-martial of another service member regarding the admissibility of evidence of the alleged victim's sexual behavior or sexual disposition, and that the Court of Criminal Appeals erred in its determination that it lacked jurisdiction over a petition for extraordinary relief from the military judge's ruling precluding the alleged victim from presenting facts and legal argument.

**USCAAF STATISTICAL REPORT  
SEPTEMBER 2012 TERM OF COURT**

**CUMULATIVE SUMMARY**

CUMULATIVE PENDING SEPTEMBER 1, 2012

Master Docket . . . . .	23
Petition Docket . . . . .	69
Miscellaneous Docket. . . . .	<u>4</u>
TOTAL . . . . .	96

CUMULATIVE FILINGS

Master Docket . . . . .	117
Petition Docket . . . . .	806
Miscellaneous Docket. . . . .	<u>41</u>
TOTAL . . . . .	964

CUMULATIVE DISPOSITIONS

Master Docket . . . . .	112
Petition Docket . . . . .	744
Miscellaneous Docket. . . . .	<u>44</u>
TOTAL . . . . .	900

CUMULATIVE PENDING SEPTEMBER 1, 2013

Master Docket . . . . .	28
Petition Docket . . . . .	131
Miscellaneous Docket. . . . .	<u>1</u>
TOTAL . . . . .	160

**OPINION SUMMARY**

<u>CATEGORY</u>	<u>SIGNED</u>	<u>PER CURIAM</u>	<u>MEM/ORDER</u>	<u>TOTAL</u>
Master Docket . . . . .	33	4	75	112
Petition Docket . . . . .	0	0	744	744
Miscellaneous Docket	<u>1</u>	<u>1</u>	<u>42</u>	<u>44</u>
TOTAL	34	5	861	900

**MEMORANDUM/ORDER SUMMARY**

Orders

Denying petitions for grant of review . . . . .	635
Petitions dismissed . . . . .	3
Granting withdrawal of petition for grant of Review . . . . .	3
Granting petitions for grant of review with briefs . . . . .	31
without briefs . . . . .	31
Granting petitions for grant of review and affirming the decision of the lower court .	17
Granting petitions for grant of review and affirming in part and reversing in part . .	15
Granting petitions for grant of review and remanding . . . . .	11
Deciding previously granted cases (trailer cases) . . . . .	27
Denying petitions for extraordinary relief and writ-appeal petitions . . . . .	28
Granting petitions for extraordinary relief and writ-appeal petitions . . . . .	2
Granting withdrawal of petitions for extraordinary relief and writ-appeal petitions . . . . .	5
Dismissing petitions for extraordinary relief and writ-appeal petitions . . . . .	9
Granting motions . . . . .	449
Denying motions . . . . .	85
Deciding granted cases . . . . .	<u>1</u>
Total . . . . .	1,352

**MASTER DOCKET SUMMARY**

PENDING AT BEGINNING OF TERM . . . . . 23

FILINGS

Petitions granted from the Petition Docket . .	105
Certificates filed . . . . .	11
Mandatory appeals filed. . . . .	1
Remanded/Returned cases. . . . .	<u>0</u>
TOTAL . . . . .	117



DISPOSITIONS

Decisions affirmed . . . . .	59
Reversed in whole or in part . . . . .	52
Granted petitions vacated . . . . .	0
Certificate Dismissed . . . . .	<u>1</u>
TOTAL . . . . .	112

PENDING AT END OF TERM

Awaiting briefs . . . . .	7
Awaiting oral argument . . . . .	9
Awaiting lead case decision (trailer cases) . . . . .	12
Awaiting final action . . . . .	<u>0</u>
TOTAL . . . . .	28

**PETITION DOCKET SUMMARY**

PENDING AT BEGINNING OF TERM . . . . . 69

FILINGS

Petitions for grant of review filed . . . . .	806
Petitions for new trial filed . . . . .	0
Returned cases . . . . .	<u>0</u>
TOTAL . . . . .	806

DISPOSITIONS

Petitions for grant of review denied . . . . .	635
Petitions for grant of review granted . . . . .	103
Petitions for grant of review withdrawn . . . . .	3
Petitions for grant of review dismissed . . . . .	<u>3</u>
TOTAL . . . . .	744

PENDING AT END OF TERM

Awaiting pleadings . . . . .	32
Awaiting Central Legal Staff review . . . . .	47
Awaiting final action . . . . .	<u>52</u>
TOTAL . . . . .	131

**MISCELLANEOUS DOCKET SUMMARY**

PENDING AT BEGINNING OF TERM . . . . . 4

FILINGS

Writ appeals sought . . . . .	21
Writs of habeas corpus sought . . . . .	6
Writs of error coram nobis sought . . . . .	5
Other extraordinary relief sought . . . . .	9
TOTAL . . . . .	41

DISPOSITIONS

Petitions or appeals denied . . . . .	28
Petitions or appeals granted . . . . .	2
Petitions or appeals dismissed . . . . .	9
Petitions or appeals withdrawn . . . . .	5
TOTAL . . . . .	44

PENDING AT END OF TERM

Awaiting briefs . . . . .	0
Awaiting staff review . . . . .	0
Awaiting final action . . . . .	1
TOTAL . . . . .	1

**PETITIONS FOR RECONSIDERATION**

ALL CASES

DISPOSITIONS

Begin Pending	0	Denied	18
Filed	20	Granted	0
TOTAL	20	Dismissed	1
End Pending	1	TOTAL	19

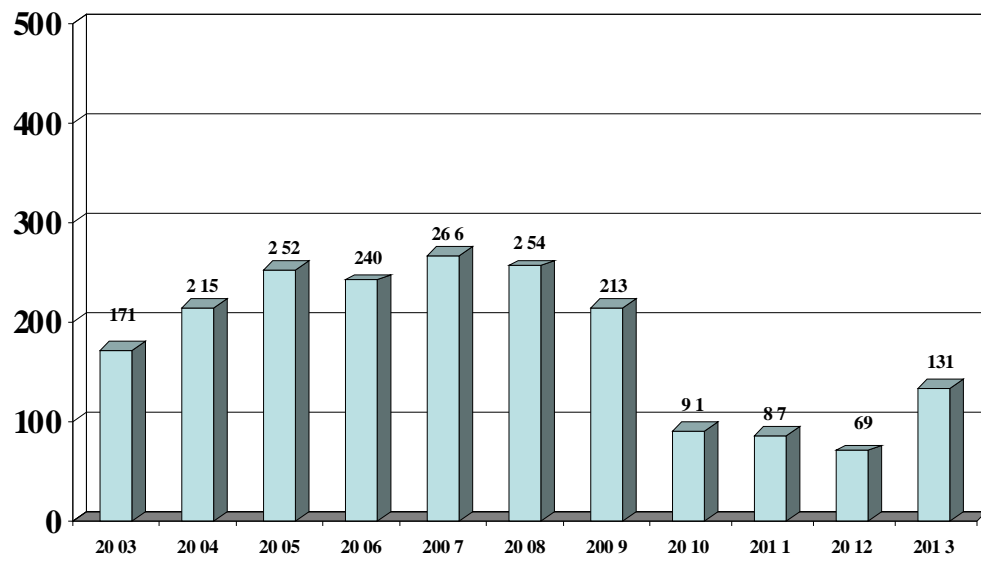
**MOTIONS**

ALL MOTIONS

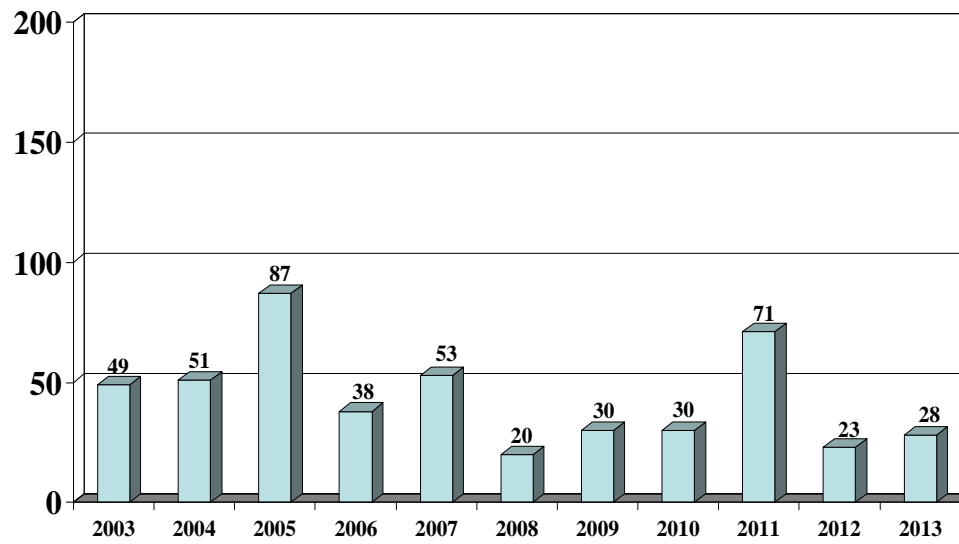
DISPOSITIONS

Begin Pending	6	Granted	449
Filed	548	Denied	85
TOTAL	554	Dismissed	1
End Pending	19	TOTAL	535

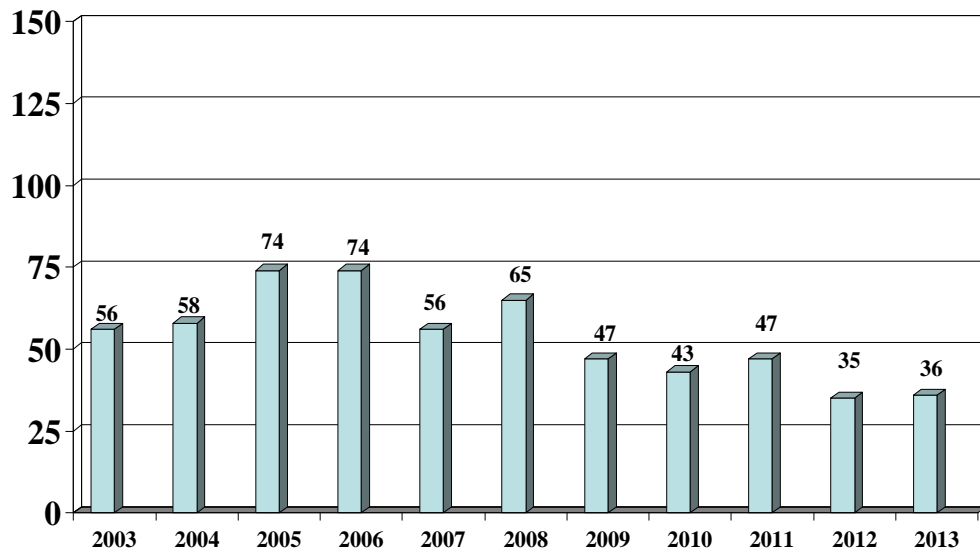
## Petition Docket Term End Pending



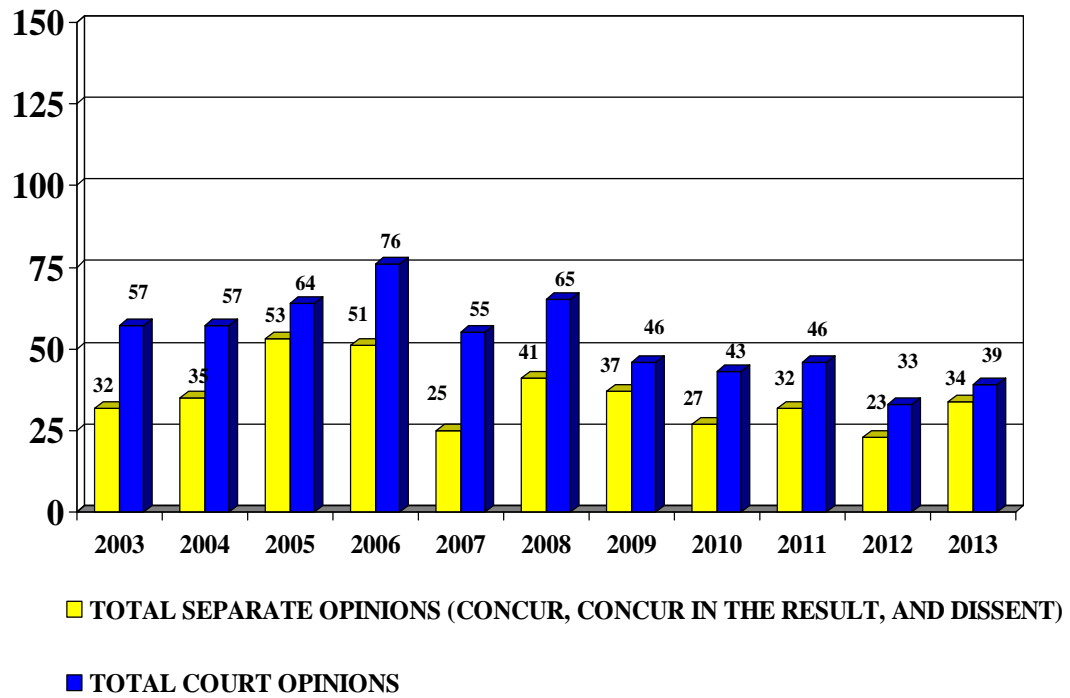
## Master Docket Term End Pending



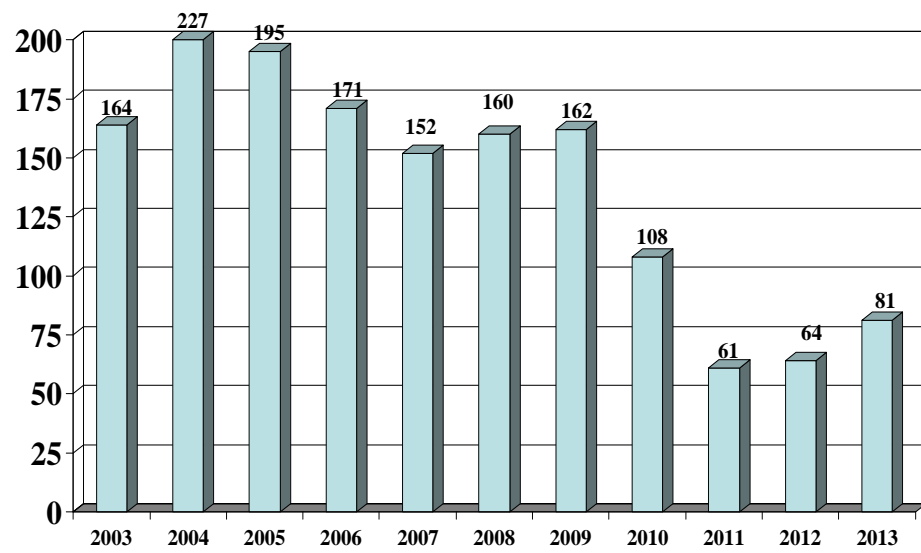
## Oral Arguments Per Year



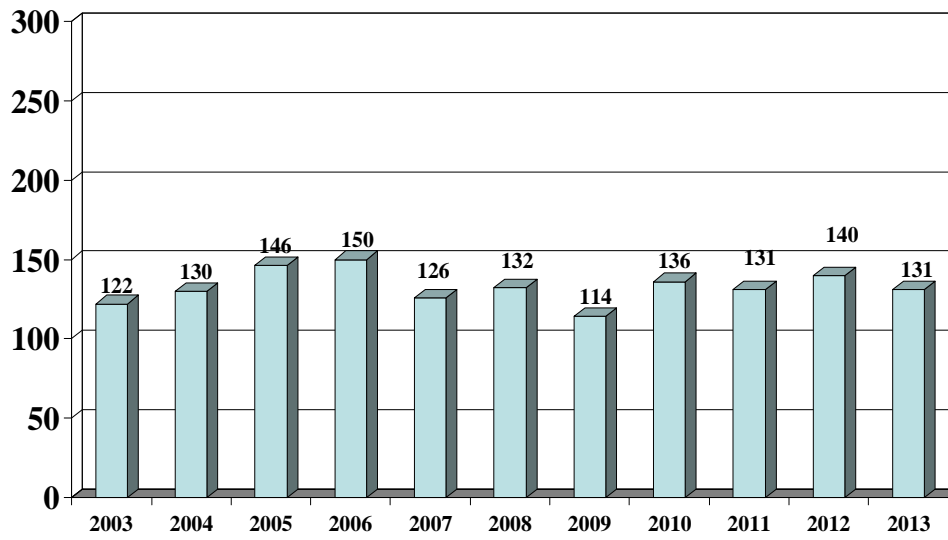
## Total Opinions Per Year



## Days from Petition Filing to Grant

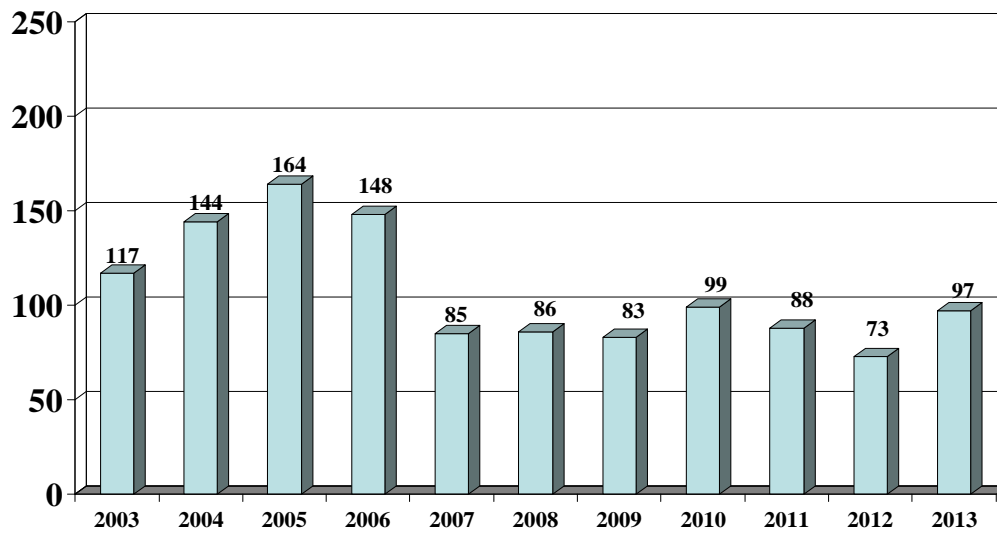


## Days from Petition Grant to Oral Argument

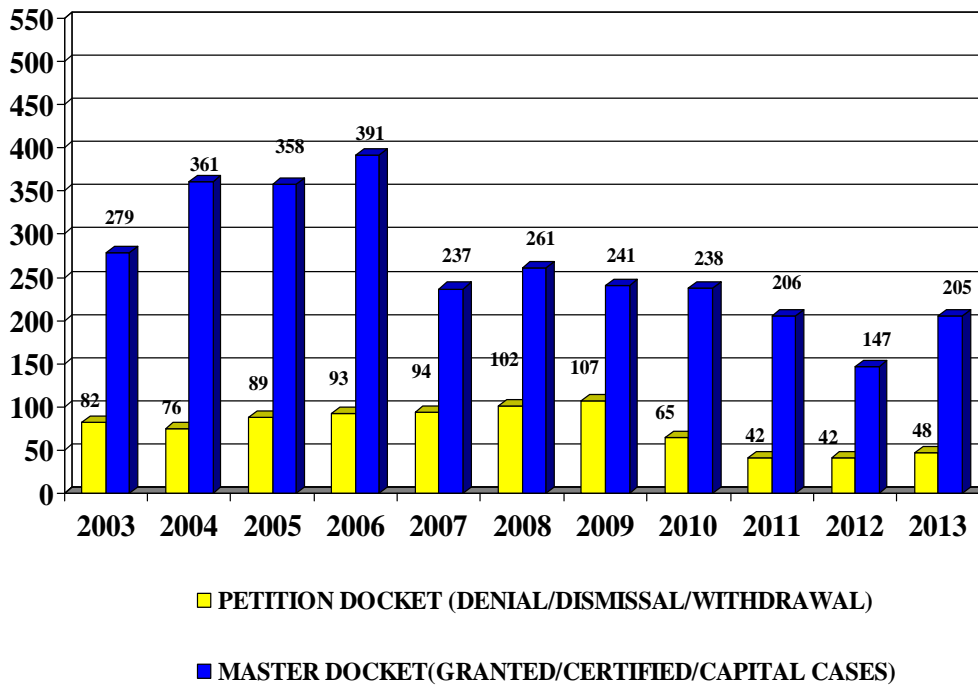




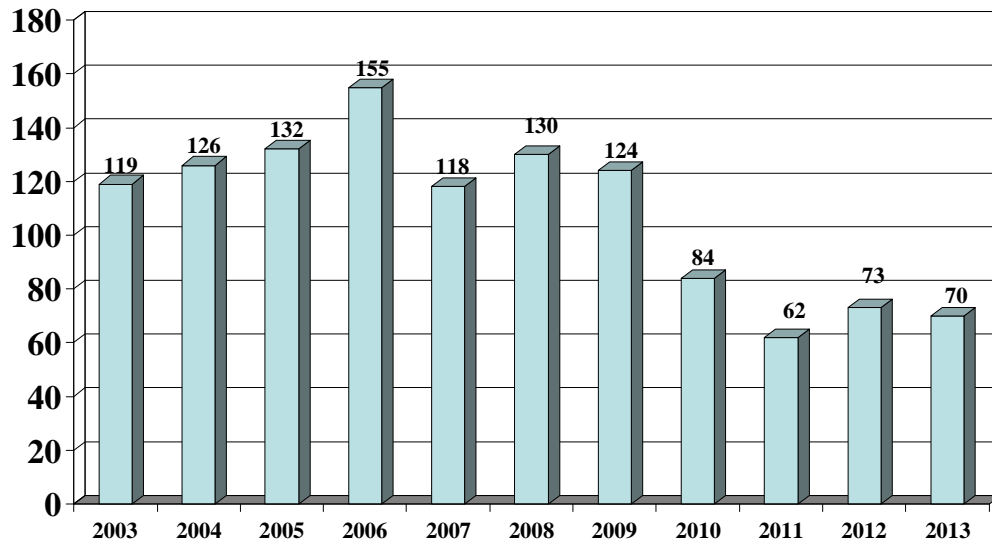
## Days from Oral Argument to Final Decision



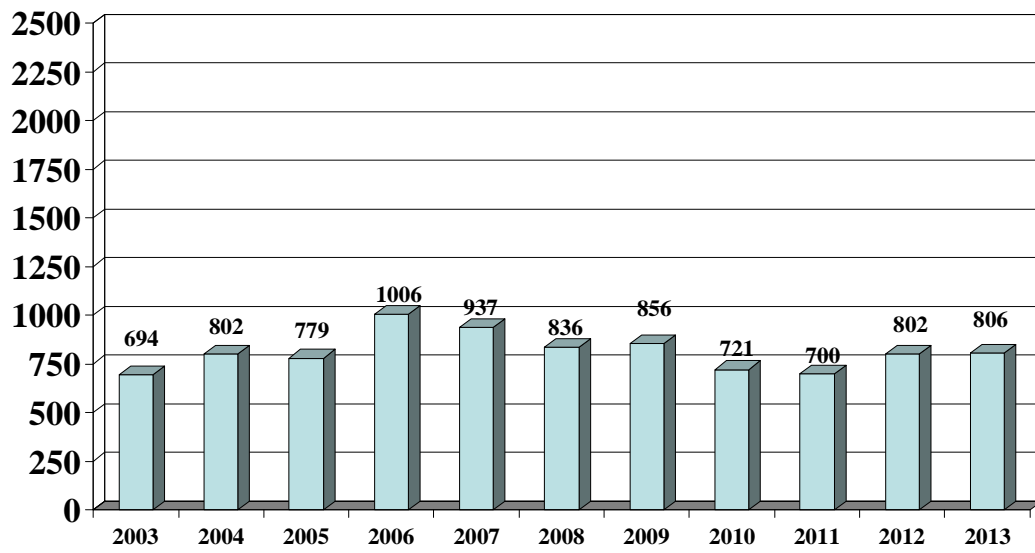
## Days from Petition Filing to Final Decision



## Days from Filing to Final Decision in All Cases



## Total Petitions Filed Per Year



**SECTION 3**

**REPORT OF THE JUDGE ADVOCATE OF THE ARMY**

**REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY  
OCTOBER 1, 2012 TO SEPTEMBER 30, 2013**

In fiscal year 2013 (FY13), The Judge Advocate General (TJAG) advised Army leadership on significant issues pertaining to military justice, to include high visibility cases and investigations. The Office of The Judge Advocate General (OTJAG) continued to implement programs improving both the administration of military justice and advocacy skills of military justice practitioners. In furtherance of TJAG's duties under Article 6(a), Uniform Code of Military Justice (UCMJ), TJAG and senior leaders in the Judge Advocate General's Corps (JAGC) visited more than 26 installations and commands in the United States and overseas, to include forward areas, discussing military justice issues with commanders and their respective Staff Judge Advocates (SJAs). The JAGC remains committed to sustaining excellence in the practice of military justice through a variety of initiatives and programs.

**OTJAG CRIMINAL LAW DIVISION**

The OTJAG, Criminal Law Division (CLD) has two primary missions. First, the CLD advises TJAG on military justice policy, legislation, opinions, and related criminal law actions. Specific responsibilities include: promulgating military justice regulations; reviewing other Army Regulations for legal sufficiency; providing legal opinions to the Army Staff related to military justice matters; producing and updating military justice publications to include the Manual for Courts-Martial (Manual); conducting statistical analysis and evaluation of trends that affect military justice within the Army; providing legal advice on military corrections issues, the Army drug testing program, sexual assault and victim assistance policies, and federal prosecutions; representing the Army on the Joint Service Committee (JSC) on Military Justice; responding to congressional inquiries and requests under the Freedom of Information Act; and conducting reviews of court-martial cases under Article 69 of the UCMJ to ascertain legal sufficiency and sentence appropriateness and to identify issues that may require corrective action by TJAG.

Second, the CLD provides comprehensive policy guidance and resources to military justice practitioners in the field, which includes a special emphasis on training (including training related to sexual assault litigation) and programs designed to guarantee long term military justice proficiency across all

grades. The Criminal Law Division facilitates the active integration and synchronization of training by coordinating quarterly training and budget meetings with the Corps' key training arms: Trial and Defense Counsel Assistance Programs (TCAP and DCAP) and The Judge Advocate General Legal Center and School (TJAGLCS). The CLD manages software initiatives for JAGC-wide application and facilitates active information flow to and from the field using web-based media.

On July 30, 2012, the Secretary of Defense created the Defense Legal Policy Board (DLPB) as a civilian advisory committee to review incidents of U.S. military-caused death, injury, or abuse of non-combatants in Iraq and Afghanistan since 2001. The DLPB's mandate was to assess whether certain reforms are necessary and to evaluate generally how allegations are reported, investigated, and disposed of within the military. The DLPB issued a report of its findings and recommendations in May 30, 2013. The CLD provided two judge advocates to support the DLPB process, served as the Army representative to the DLPB, and was primarily responsible for gathering information and witnesses in response to the DLPB's requests.

Traditionally-reported CLD actions for the last three fiscal years are listed below. Article 69, UCMJ and other reviews decreased in FY13 due to other mission requirements (e.g., support to DLPB and sexual assault initiatives).

	<u>FY11</u>	<u>FY12</u>	<u>FY13</u>
Congressional and other inquiries	139	150	195
Officer Dismissals	21	16	27
Article 69 and other reviews	130	40	38
Freedom of Information/Privacy Act	45	11	14

Now in its third full year, the Special Victim Prosecutor (SVP) program has 23 attorney positions, all of which were filled in the summer of 2013. Special Victim Prosecutors continue to assist in the enhancement of the level of trial advocacy in special victim cases throughout the Army. The Army also began efforts to formalize a Special Victim Capability to further enhance our ability to prosecute sexual assault cases. The Special Victim Capability was subsequently codified in the FY13 National Defense Authorization Act (NDAA). The Special Victim Capability teams will be made up of SVPs, Criminal Investigation Division Sexual Assault Investigators (SAI), Victim Witness Liaisons (VWL), and dedicated paralegals. The Special Victim Capability will work cooperatively to ensure

thorough, professional investigations and prosecutions, while providing compassionate and immediate assistance to victims.

The Criminal Law Division conducts a bi-annual Criminal Law Synchronization Meeting with key criminal law stakeholders such as TJAGLCS, TCAP, DCAP, Defense Appellate Division, Government Appellate Division, and the U.S. Army Trial Judiciary. These synchronization meetings were invaluable in bringing the JAGC criminal law leaders together - not only to coordinate criminal law training across the JAGC, but also to discuss new criminal law initiatives that could improve and sustain the practice of military justice in the Army. Synchronization provides unity of effort and situational awareness on all criminal law training across multiple venues - civilian and military - allowing trial advocates to more easily plan for their attendance at military justice training events.

In June 2011, TJAG reviewed and revised the Military Justice Additional Skill Identifier program (ASI). The purpose of the program is to help identify and sustain expertise and to assist in the selection of personnel for key military justice positions. To date, 1005 judge advocates have been awarded skill identifiers: 558 basic, 226 senior, 145 expert, and 76 master skill.

The Air Force chaired the Joint Services Committee (JSC) in FY12. On May 15, 2013, the President signed Executive Order 13643 implementing the 2013 Amendments to the Manual for Courts-Martial (MCM). The Executive Order completely replaced part III (Military Rules of Evidence) of the MCM, and it added maximum punishments for new Articles 120, 120b and 123c in Part IV of the MCM. The Military Rules of Evidence (MRE) were amended to conform with the Federal Rules of Evidence (FRE). In June 2013, the JSC submitted a comprehensive draft Executive Order to the Department of Defense for approval by the President. The draft Executive Order contains elements, explanations, lesser included offenses, and sample specifications for Articles 120, 120b and 120c; amendments to Articles 47, 48, 54, and 79; amendments to Rules for Court-Martial (RCM) 201, 307, 405, 703, 906, 907, 916, 920, 1003, 1005, 1104, 1105, 1106, 1107, 1307; amendments to Appendix 12; and proposed RCM 1105A and Appendix 12A. As of January 2014, the proposed Executive Order has yet to be approved.

The JSC is planning to reprint the Manual for Courts-Martial (MCM) in early 2015 to capture: the revised MRE; new



Articles 120, 120b, and 120c; and all related conforming changes as well as mandated changes in the new FY14 NDAA.

The JAGC Information Technology Division (ITD) continued to improve military justice web-based programs this year. At the forefront of these improvements is Military Justice Online (MJO), which allows end-users to generate military justice actions for courts-martial, non-judicial punishment, administrative separations, and administrative reprimands. In 2013, MJO's capabilities were further expanded with the addition of MJO Courts for the Trial Defense Service. With the addition of the ability to create automated customizable reports, trial counsel and paralegals can now reduce the time spent in creating reports and focus on advocacy. The ITD, CLD, and the Knowledge Management (KM) Division engaged in a sustained effort to increase MJO use through on-site training and integration into officer and enlisted training doctrine. The ITD also trained more than 200 personnel at several locations and worked closely with TJAGLCS, the Non Commissioned Officer Association (NCOA), and Training and Doctrine Command (TRADOC) personnel to ensure MJO training is fully integrated in the institutional learning environment. Seeking to improve training initiatives, the MJO team conducted the first Army JAGC-wide web-based training in September 2013.

The Trial Advocates Tracking System (TATS), a web-based database that tracks the number of active trial and defense counsel, grew to 956 judge advocates. The TATS provides key data on the experience and training of trial advocates and helps in assessing military justice assignments, personnel management, and required training. Using TATS as a database, CLD fully implemented the Trial Advocate Resource Library (TARL), which includes basic criminal practice and military justice reference books that are key to the development and growth of young advocates. First-time trial counsel, defense counsel, and SVPs are eligible to receive the TARL. For FY13, 163 hard copies and 395 electronic books have been distributed.

In 2011, an additional officer was attached to CLD from KM. The KM mission is to promote an integrated JAGC approach to identifying, retrieving, evaluating, and sharing the Corps' tacit and explicit knowledge assets to meet mission objectives. The CLD KM attorney oversees the addition of discussion and documents to the milBook website and acts as a liaison between CLD, the field, and the KM Division. In 2013, CLD stood up an inclusive document library on JAGCNET and linked it to milBook. The Criminal Law milBook group jumped in membership between

December 1, 2012 and November 30, 2013 from 642 to 1,484 members.

Judge advocates, civilian attorneys, paralegals, and legal administrators from around the world use the milBook Criminal Law group to ask questions about interpreting case law and strategy, and it allows them to post documents that they feel may be helpful to their fellow judge advocates. MilBook was also used to facilitate a Direct Connect Online (DCO) conversation between TJAG and SJAs across the Army. The CLD milBook page has also sparked interest in and helped to develop a separate TCAP group that has blossomed in recent months.

### **THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL (TJAGLCS)**

The cornerstone mission of the Criminal Law Department of TJAGLCS in Charlottesville, Virginia is to develop, improve, and sustain excellence in the practice of military criminal law. The need to hone these skills in the context of a joint, expeditionary force at war is paramount and occupies center stage in all curriculum review. Instruction touches a wide range of subjects from substantive criminal law to technical litigation skills, and is fully integrated into the overall JAGC-wide developmental cycle for military justice practice. At the same time, our professors provide critical reach-back capability for military justice practitioners of all services.

The department teaches a variety of courses to multiple student cohorts that include all services and international students as well. These courses include initial-entry judge advocates in the Officer Basic Course (OBC); newly-assigned trial advocates in the Intermediate Trial Advocacy Course (ITAC); mid-level judge advocates in the Graduate Course, the Military Justice Managers Course, the Judge Advocate Officer Advanced Course (JAOAC) for USAR and NG judge advocates, and Advanced Trial Communication Course; senior judge advocates in the Military Judge Course; commanders and senior non-commissioned officers in the Command Sergeant Major Legal Orientation, the Senior Officer Legal Orientation Course (SOLO); and the General Officer Legal Orientation Course (GOLO). Except for the GOLO course, which is provided individually to General Officers, all courses are taught using a sexual assault fact pattern and are synchronized with other JAGC training agencies.

This past year, the department added a new course to its curriculum: the Special Victim Counsel Course. This course is

a one-week annual course designed to educate counsel in preparation to serve as certified Special Victim Counsel. This course provides students with a basic overview of the policies and procedures of the Special Victim Counsel Program as well as teaches students basic legal skills they will need to serve as a Special Victim Counsel. Students learn approaches to working with crime victims (specifically, sexual assault victims), the impacts of crime on victims, how to talk with sexual assault victims, relations with law enforcement and medical professionals, professional responsibility and scope of representation, sexual offenses under the UCMJ, victim programs and services, representing victims in courts-martial proceedings, MREs, privileges, post-trial procedures, corrections, clemency, and parole. The course capstone is a scenario-driven practicum where students address issues while serving as Special Victim Counsel for a hypothetical victim. The department also executed a distance learning iteration of the Special Victim Counsel Course and established an on-line Special Victim Counsel resource site. Additionally, the department played a critical role in the development of the Special Victim Counsel Handbook and other materials for the Special Victim Counsel Program.

The department presented the Forty-First Kenneth J. Hodson Lecture in Criminal Law and hosted U.S. Representative Loretta Sanchez (D-CA) as the guest speaker. The department also continued its robust digital outreach program by establishing and maintaining a sexual assault resource site for SJAs, increasing the volume of scholarly posts on the department's blog ("31(b)log"), providing live remote classes to the field via DCO, and exploring the migration of the department's comprehensive deskbook to a more responsive and versatile, universally accessible, and user friendly on-line wiki format.

## **U.S. ARMY JUDICIARY**

### **U.S. Army Court of Criminal Appeals/Office of the Clerk of Court**

The Office of the Clerk of Court receives records of trial for review by the U.S. Army Court of Criminal Appeals (ACCA) under Article 66, UCMJ, appeals under Article 62, UCMJ, and Petitions for Extraordinary Relief. More than 600 records of trial and over 2,400 motions and briefs were referred to one of the three judicial panels comprising ACCA for judicial review. The Office of the Clerk of Court served ACCA decisions upon all personnel not in confinement and coordinated with military

confinement facilities for service of confined Soldiers. The office closed over 700 courts-martial cases in the past year.

In FY13, ACCA received 551 records for review pursuant to Article 66, UCMJ. The average processing time for those courts-martial from sentencing to convening authority action was 185 days. In 157 of those cases, initial action was completed by the convening authority within the 120 days prescribed by *United States v Moreno*. Four hundred sixty-nine of the records were received by ACCA within 30 days of convening authority action.

The Army's superior court rendered an initial decision in 607 case in FY 13, with an average processing time of 325 days from receipt of the record of trial by the clerk of court to decision by ACCA. Of the 607 decisions, 524 were rendered within the 18-month period prescribed by *United States v Moreno*. There were no court-martial convictions reversed due to command influence, denial of the right to a speedy review, lost records, or other administrative deficiencies. No provision of the UCMJ or MCM was held unconstitutional by ACCA.

The U.S. Army Court of Criminal Appeals operates a website at [www.jagcnet.army.mil/acca](http://www.jagcnet.army.mil/acca). The ACCA's published and unpublished memorandum opinions are publicly available on the website. In FY13, the office uploaded more than 240 opinions and decisions to the website. Additional publicly available information includes application materials for admission to the bar at ACCA; Rules of Court; oral argument schedules; and the procedures for making a Freedom of Information Act (FOIA) or Privacy Act (PA) request from ACCA. The website also includes a "FOIA Reading Room" containing frequently requested documents from some of the Army's higher-profile court-martial cases.

The Clerk of Court is the custodian of the Army's permanent court-martial records (general courts-martial and those special courts-martial resulting in an approved punitive discharge) dating from 1977. Inquiries about current and previous courts-martial are received from federal and state investigative agencies; local law enforcement offices; sex offender registration databases; media and news organizations; military historians; veterans; and Soldiers previously convicted at court-martial. Additionally, because the Brady Bill requires the processing of handgun permit applications within three working days, many expedited requests are received from the Federal Bureau of Investigation's National Instant Background Check System.

Summary of information requests to ACCA for the last three fiscal years:

	<u>FY 11</u>	<u>FY12</u>	<u>FY13</u>
Freedom of Information Act	725	297	430
Privacy Act	122	113	99
Certified Copies of Convictions	91	75	170
<u>Requests from Federal Agencies</u>	<u>112</u>	<u>245</u>	<u>105</u>
Total Number of Requests	1,050	730	804

The Office of the Clerk of Court also provides assistance to overseas court-martial jurisdictions in processing requests for non-DOD civilians to travel overseas to testify at trials. This includes making travel arrangements, assisting with requests for expedited passport processing, and issuing invitational travel orders. In FY13, the office provided assistance to nine civilian witnesses.

The office's Management and Program Analyst continued to provide vital support to the Office of the Clerk of Court, OTJAG, and other organizations and individuals. Using the Army Court-Martial Information System (ACMIS), the office designed, developed, and released nearly 400 timely and accurate reports in response to requestors both inside and outside the Department of Defense.

The office's two full-time civilian attorneys, in addition to supervising the office staff, provide daily guidance on post-trial processing matters to Army installations worldwide. This includes telephonic and email consultation on the contents of promulgating orders and convening authority actions following courts-martial.

The Office of the Clerk of Court is also responsible for processing applications for admission to the ACCA bar both for military and civilian counsel. In FY13, the office admitted thirty new counsel. The office also maintains accurate records of attorney disciplinary actions.

Finally, the Office of the Clerk of Court provided instruction to legal non-commissioned officers (NCOs), warrant officers, and those individuals attending military justice courses at TJAGLCS, as well as training for newly assigned SJAs.

## Trial Judiciary

The 1090 courts-martial tried in FY13 reflect slight decrease in total numbers of cases, returning to roughly the same number as tried in FY11. However, as indicated in last year's report, raw numbers tell only part of the story, as the percentage of contested cases, the percentage of panel cases, the length of time in trial and the length of time in motions all continue to increase.

Fiscal Year 2013 also saw an unprecedented number of high-profile cases brought to conclusion by military judges in the US Army Trial Judiciary, including *U.S. v. Manning*, *U.S. v. Hasan*, *U.S. v. Bales*, and *U.S. v. Russell*.

Army trial judges - both active and reserve component - continued to preside over cases in deployed environments, with 17 general and special courts-martial tried in Kuwait and Afghanistan in this period, resulting in a grand total of over 969 cases tried in a combat theater of operations since May 2003.

The Trial Judiciary continued its ongoing effort to keep current DA Pamphlet 27-9, *Military Judges' Benchbook* (Benchbook), which is used by all Services, approving nine changes to that publication addressing:

- (1) Non-forcible sodomy after *U.S. v. Castellano*, 72 M.J. 217 (C.A.A.F. 2013);
- (2) False official statement after *U.S. v. Spicer*, 71 M.J. 470 (C.A.A.F. 2013) and *United States v. Capel*, 71 M.J. 485 (C.A.A.F. 2013); and
- (3) Changes addressing both the 2013 Executive Order and the Army's implementation of the Special Victims Counsel program.

A constantly updated version of the Benchbook, along with links to the electronic version of that updated Benchbook, court dockets, other judiciary related documents and resource materials, can be found on the Trial Judiciary homepage at [www.jagcnet.army.mil/USATJ#](http://www.jagcnet.army.mil/USATJ#).

Military judges continued playing an active role in their military and civilian communities, speaking to grade and high school audiences, local bar associations and civic

organizations, law school classes and state bar continuing legal education courses. Other notable achievements by the Trial Judiciary included:

\*The 56th Military Judge Course graduated 59 Army, Navy, Marine Corps, Air Force and Coast Guard students in May and invested them as new military judges. The 56th Military Judge Course also included a judge from Israel and a judge from Pakistan.

\*Colonel Michael Nelson mobilized and deployed to Kuwait from December 2012 to May 2013, presiding as a military judge over courts-martial convened throughout Afghanistan and Kuwait. Colonel Nelson was the last full-time military judge stationed in the Army Southwest Asia (SWA) Area of Responsibility (AOR). Since then, military judges from Germany have deployed four times to try cases in Kuwait and Afghanistan.

#### **U.S. ARMY TRIAL DEFENSE SERVICE**

In FY 13, approximately 480 active and Reserve Component (RC) judge advocates were serving in the U.S. Army Trial Defense Service (TDS) worldwide, including 155 on active duty; 200 assigned to one of three Legal Operations Detachments-Trial Defense (LOD-TD); and 127 in the Army National Guard. The TDS provides high quality, professional defense services to Soldiers across the Army. Their counsel are stationed at 52 active duty installations worldwide and 105 reserve locations.

The Trial Defense Service detailed one or more counsel to every Army special and general courts-martial referred in FY13, defending Soldiers facing the entire range of allegations under the UCMJ. In addition, TDS counsel assisted Soldiers facing other military justice related adverse administrative actions. The caseloads were as follows this year:

General and Special Courts-Martial:	975
Administrative Boards:	1604
Nonjudicial Punishment:	29594
Military Justice Consultations:	20193

The Trial Defense Service provided defense services to Army personnel deployed to the United States Central Command (CENTCOM) AOR. The TDS CENTCOM Region has four field offices: one at Camp Arifjan, Kuwait and three in Afghanistan at Bagram

Airfield, Camp Phoenix (Kabul), and Kandahar Airfield. The Regional Defense Counsel is an active duty lieutenant colonel who serves as the senior supervisory TDS attorney in CENTCOM. He is co-located with the Bagram Airfield field office.

In FY13, the Defense Counsel Advocacy Program (DCAP) staffed by four judge advocates and two civilian Senior Counsel/Trainers, continued to provide timely and exceptional training and advice to TDS counsel worldwide. Through the use of joint training with the TCAP, they organized and taught four Advanced Trial Communications Courses, the Sexual Assault Trial Advocacy Course (SATAC), and the Joint Advocacy Seminar.

The DCAP also published a revised Defense Counsel (DC) 101 Deskbook and distributed it to all newly assigned TDS counsel at six DC 101 training events conducted in the United States, Germany, and Korea. The DCAP also developed a DC 201 Deskbook to address more advanced subjects and distributed it to all assigned TDS counsel. Furthermore, DCAP organized and taught five Annual and Regional TDS training events and facilitated attendance by TDS counsel at non-DOD courses in areas such as sexual assault and capital litigation.

In FY13, the DCAP received over two thousand inquiries from defense counsel in the form of emails, phone calls, and in-person inquiries during training events. The DCAP provided assistance to defense counsel in the field that included researching case law, answering specific questions, and providing sample motions, expert requests, and other trial documents that might be helpful in the defense of the case. The DCAP further ensured that TDS counsel were kept abreast of all major developments through a series of updates called "DCAP Alerts" and "DCAP Sends." Moreover, DCAP's website and the KM milBook website allowed free flowing discussions and collaboration among counsel on critical issues. Finally, the DCAP also worked with the Defense Appellate Division to assist TDS counsel in the preparation and filing of extraordinary writs before the ACCA and United States Court of Appeals for the Armed Forces (CAAF).

The Trial Defense Service personnel in the Army Reserve are assigned to three separate units. The 22d Legal Operations Detachment (LOD) (TDS), headquartered in San Antonio, Texas, consists of 66 judge advocates, one warrant officer, and 19 enlisted paralegals. The 22d LOD (TDS) area of responsibility includes the majority of states west of the Mississippi River along with Guam, Hawaii and Alaska. In 2013, the 22d LOD (TDS)



mobilized 14 judge advocates and three paralegals for service in the Continental United States (CONUS), Europe, and CENTCOM. In addition, it represented over 1,500 Reserve Component Soldiers facing military justice and adverse administrative actions. This included 450 board advisements and 300 Article 15, UCMJ advisements.

The 154th LOD (TDS) covers the Southeast, and Lower Mississippi River Valley and Puerto Rico. The 154th LOD (TDS), headquartered in Alexandria, Virginia, is comprised of 72 judge advocates, 24 enlisted paralegals and one warrant officer. In 2013, the 154th LOD (TDS) mobilized 15 judge advocates and six paralegals for service in CONUS, Europe, and CENTCOM. Additionally, the 154th LOD (TDS) represented over 1,600 reserve component Soldiers facing military justice and adverse administrative actions, handled approximately 200 administrative board actions, supported four Defense Institute of International Legal Studies (DIILS) missions to various foreign countries, and represented five active component Soldiers facing courts-martial.

The 16th LOD (TDS) covers the Northeast and Midwest. Headquartered at Fort Hamilton, New York, it is comprised of 62 judge advocates, 15 enlisted paralegals, and one warrant officer. In 2013, the 16th LOD (TDS) mobilized 12 Soldiers for service in CONUS and CENTCOM. In addition, the 16th LOD (TDS) represented eight active component Soldiers facing courts-martial, appeared in 70 administrative separation board hearings, and closed, resolved or had dismissed 320 cases.

The Army National Guard (ARNG) TDS consists of 127 judge advocates, one civilian legal administrator, and 42 enlisted paralegals stationed in 47 states and territories. The ARNG TDS supports all 54 of the states, territories, and the District of Columbia. In 2013, state courts-martial continued at a modest pace with four states conducting a total of eight general courts-martial (GCM) and three special courts-martial (SPCM). Seven of the eight GCMs and one SPCM resulted in acquittals, were withdrawn after defense motions, or were overturned on appeal. In addition, considerable success at administrative boards resulted in several states reviewing and improving government process and practice. The ARNG TDS hosted 7 major training events, including four Consolidated Regional Training events, two DC 101 courses, and the first Defense Paralegal (DP)101 course, training a total of 186 attendees. The DCAP provided outstanding instruction at the DC/DP 101 events. The

ARNG TDS counsel represented nearly 3,300 ARNG Soldiers and deployed two TDS paralegal NCOs to the CENTCOM AOR.

### **GOVERNMENT APPELLATE DIVISION**

The U.S. Army Government Appellate Division (GAD), with 23 active duty and four Individual Mobilization Augmentee military attorneys, represents the United States before ACCA, CAAF, and the U.S. Supreme Court in appeals by Soldiers convicted at courts-martial with an adjudged sentence of either a punitive discharge or confinement for one year or more. The GAD also represents the United States before ACCA, CAAF, and the U.S. Supreme Court in government appeals from courts-martial and petitions for extraordinary relief. Additionally, GAD oversees the operations of the TCAP.

In FY13, GAD filed 636 briefs at ACCA and 481 responses to petitions for grant of review and 29 briefs at CAAF. The GAD appellate attorneys argued 29 cases before ACCA and 16 cases before CAAF.

As part of CAAF's Project Outreach, GAD argued one case in the civilian community at the University of Arizona. Funding reduced the number of Project Outreach arguments from four in 2012 to one in 2013. Outreach arguments are important in displaying our military justice system to largely civilian audiences. The argument at the University of Arizona was well received by a large audience.

The Trial Counsel Assistance Program continued its mission to assist prosecutors in the field. In 2013, this encompassed TCAP's traditional activities such as publishing a quarterly newsletter, distributing a "TCAP Express" memorandum to inform and advise the field on breaking law and issues, responding to legal questions to the field, and conducting training events at both specific installations and at centralized locations. This year's training events consisted of seven outreach programs at Army installations world-wide, two regional conferences, and sixteen specialty courses (e.g. advanced advocacy, child crimes, and forensics). As in 2012, training was focused on prosecuting sexual assault and domestic violence. Several of the courses were co-hosted with the DCAP.

The Trial Counsel Assistance Program continued the quarterly iterations of the New Prosecutor Course/Effective Strategies for Sexual Assault Prosecution (NPC/ESSAP), a five-

day course focused equally on the fundamentals of military justice and prosecution of sexual assaults. The course is held quarterly to ensure that all new trial counsel attend within their first six months of becoming a trial counsel. Additionally, NPC/ESSAP prepares new counsel for the ITAC course taught at the Legal Center and School. The first half of the NPC focuses on ensuring that new trial counsel have a rudimentary grasp of how (technically and tactically) they should move cases through the military justice process. The second three-day block focuses on investigations, charging decisions, and interaction with victims in sexual assault cases.

There continued to be requests from the field for direct TCAP assistance, including assisting in the prosecution of several high profile cases. The support varied from providing a Highly Qualified Expert (HQE) to assist with trial (from behind the bar), to assigning a TCAP judge advocate as lead counsel.

#### **DEFENSE APPELLATE DIVISION**

The Defense Appellate Division (DAD) represents individuals (Soldiers, Civilians, and USDB inmates) who are convicted by courts-martial and whose approved sentence includes either a punitive discharge or confinement for one year or more. The DAD counsel represent these individuals at ACCA, CAAF, and the U.S. Supreme Court. The DAD counsel also provide assistance and representation in interlocutory appeals and extraordinary writs.

The staff consists of 21 active component judge advocates, four civilian paralegals, and one noncommissioned officer serving three branches, including the newly created Defense Complex and Capital Litigation Branch (DCCAT). As in past years, reserve component judge advocates continued to provide critical support including one mobilized reserve attorney serving in the division. The DAD is fortunate to have ten Drilling Individual Mobilization Augmentee (DIMA) judge advocates. Our two capital litigation DIMA attorneys provide critical expertise and assistance in capital litigation. The DAD counsel currently represents two Soldiers sentenced to death.

There were over 530 new cases received this year and 668 briefs were filed with ACCA. Of those ACCA filings, approximately 45% raised substantive assignments of error. The DAD attorneys also filed over 700 briefs with CAAF, 30% of which raised substantive assignments of error. Oral arguments were

made in 45 cases (27 cases before ACCA and 18 before CAAF). At the time of this report, DAD had 200 cases awaiting filing at ACCA. The DAD counsel argued several cases of note including:

*United States v. Kelly*, 72 M.J. 237 (2013): CAAF heard oral argument at the University of Arizona Rogers College of Law as part of "Project Outreach." The DAD counsel argued that the government violated Staff Sergeant (SSG) Kelly's Fourth Amendment rights when it searched the files of SSG Kelly's personal laptop computer after he was wounded on the battlefield in Iraq and evacuated to the United States for medical treatment. In a unanimous opinion, CAAF held that the government's search for "gore," "inappropriate," and "porn" was not an *inventory* under Mil. R. Evid. 313(c), because it was a specific search for contraband and the government did not have a legitimate interest to invade SSG Kelly's reasonable expectation of privacy. The CAAF also held that the government search was not a military *inspection* under Mil. R. Evid. 313(b), because it was not authorized by a commander with the proper authority and it was not conducted to ensure military fitness. Thus, the search violated SSG Kelly's Fourth Amendment right to be free of unreasonable searches and seizures.

*United States v. Jasper*, 72 M.J. 276 (2013): A court-martial panel convicted Sergeant Jasper of several incidents of sexual abuse and sentenced him to twenty-three years confinement. However, CAAF found that the military judge erred in preventing a pastor from revealing that the alleged victim had admitted to him that she made up the incidents to get attention. Prior to trial, the pastor was asked by the prosecutor to disclose conversations that he had with her. The victim authorized the pastor to disclose her communications to the prosecutor. CAAF held that there is no "knowing" requirement in Military Rule of Evidence 510(a), and that preventing SGT Jasper from cross-examining the victim about the fabrication and presenting the testimony of the pastor violated SGT Jasper's constitutional right to cross-examination and to present a defense.

## LITIGATION DIVISION

Civil lawsuits involving military justice matters are relatively few but remain an important part of the Litigation Division's practice. Most suits are brought by former Soldiers seeking collateral review of military court-martial proceedings pursuant to a petition for writ of habeas corpus in federal district court. The following cases highlight the types of issues handled by the Army's Litigation Division:

*Center for Constitutional Rights, et al. v. Lind, et al.* (D. Md.). On May 22, 2013, a number of individuals and advocacy groups, including the Center for Constitutional Rights, Julian Assange, and various media organizations, filed suit in U.S. District Court for the District of Maryland requesting preliminary injunctive relief against the Army. Citing the First Amendment, plaintiffs sought public access to all briefs, orders, and other papers filed in the court-martial of Private First Class (PFC) Bradley Manning. Plaintiffs also sought release of transcripts and audio recordings of the proceedings, including access to RCM 802 conferences. Plaintiffs previously initiated a similar suit in the military appellate courts, but CAAF dismissed plaintiffs' case for lack of jurisdiction in April 2013. During the June 17, 2013 oral argument in Baltimore, MD, the district court inquired as to why it should collaterally interfere in an ongoing court-martial and whether plaintiffs' claims were mooted by the Army's current and prospective document release activity. On June 19, 2013, the court issued its ruling and denied plaintiffs' motion for preliminary injunction. Although the court found it had jurisdiction to hear the case and that plaintiffs' claims were not moot, the court determined that plaintiffs could not establish irreparable harm because the Army had not only already released the documents sought but also had expressed its willingness to release trial documents prospectively. In essence, the court found that the Army's document release procedures, and its commitment to conduct a reasonably transparent criminal trial, were not inconsistent with First Amendment principles. Because plaintiffs could not demonstrate irreparable harm or a likelihood of success on the merits, the court denied plaintiffs' motion for preliminary injunction. The court's opinion also expressed a general disinclination to have a federal

district court interfere unnecessarily with a criminal trial conducted by a coordinate military trial court.

*Gray v. James W. Gray, Commandant, USDB* (D. Kan.). In November 2008, Ronald Gray filed a motion in the U.S. District Court for the District of Kansas requesting an order staying his execution, originally scheduled for December 10, 2008, pending final resolution of federal habeas corpus proceedings. In 1988, Gray was convicted at a general court-martial of the premeditated murder of two women, the attempted premeditated murder of a third woman, the rape and sodomy of the women, and burglary and larceny of property of another person. Two of the three women were Soldiers. He was sentenced to death. The military appellate courts affirmed the court-martial conviction. In 2001, the U.S. Supreme Court denied Gray's petition for writ of certiorari, and his request for rehearing. In July 2008, the President approved the death sentence. In August 2008, the Secretary of the Army signed the Execution Order directing that Gray be executed. In November 2008, the U.S. District Court for the District of Kansas ordered a stay of execution. In April 2009, Gray filed a petition for writ of habeas corpus. The government filed its answer. The court subsequently granted petitioner's request for appointment of additional counsel and additional time to respond to the government's answer. In December 2009, Gray filed a response which raised three additional claims concerning denial of access to materials the Army provided to the President, mental competence at trial and on appeal, and lack of military jurisdiction over a peacetime murder in the United States. In September 2010, the court ruled that Gray may present the additional claims. In February 2011, Gray filed a Petition for Extraordinary Relief in the Nature of a Writ of Coram Nobis with ACCA. The ACCA denied relief noting that it lacked jurisdiction. The CAAF denied Gray's writ appeal, without prejudice, leaving the door open for Gray to again raise the issue after his habeas proceedings. After filing three consecutive requests for an extension to file his traverse, Gray filed his reply on November 1, 2012, which completed the briefings in the case. The court's decision is pending.

The following are a group of *Bivens* cases from alleged sexual assault victims who contend that their Constitutional rights were violated when senior DOD, DA, and other military

officials failed to create, institute, and administer adequate sexual assault/harassment policies and procedures continue:

In *Cioca, et al. v. Rumsfeld and Gates* (E.D.Va. & 4th Cir.), 29 plaintiffs brought suit against Secretary Rumsfeld (and later amended to include Secretary Gates) alleging that their Constitutional rights were violated when they were allegedly sexually assaulted while on active duty in the U.S. Army, Navy, Air Force, Marines, or Coast Guard. Filed in early 2011, the District Court dismissed the case in December 2011. Citing the "special factors" language of *Bivens*, the court found plaintiff's allegations directly implicated the military's disciplinary system and, thus, were the province of the elected branches of government and not the judiciary. On July 22, 2013, the Fourth Circuit Court of Appeal, as the first appellate court to address the issue, upheld the lower court's dismissal in the *Cioca* case. The Fourth Circuit issued its mandate on August 14, 2013. Plaintiffs' time to file a writ of certiorari has expired.

In *Marquet v. McHugh et al.* (S.D.N.Y.), filed April 2012, a former USMA cadet who asserts she was raped by a fellow cadet, alleged that former Secretary of Defense Gates, Secretary of the Army McHugh, and former Academy Superintendent Lieutenant General (LTG) Hagenbeck violated her First, Fifth, and Seventh Amendment rights by creating and maintaining an environment at West Point that allowed sexual assault and retaliation for reporting sexual assault to be committed without punishment. On September 11, 2013, the Court granted the Government's motion to dismiss, referring to the Fourth Circuit decision in *Cioca* holding that Plaintiff's claims were barred under the line of cases that applies *Feres* to *Bivens* claims. Plaintiffs timely appealed, and the parties are waiting for the scheduling order.

In *Doe v. Hagenbeck et al.* (S.D.N.Y.), filed April 2013, a former USMA cadet asserts she was raped by a fellow cadet, and alleges under *Bivens* that former Academy Superintendent LTG Hagenbeck and former Commandant of Cadets Major General (MG) Rapp violated her Fifth Amendment rights by creating and maintaining an environment at West Point that permitted and encouraged sexual assault and sexual harassment. Unlike others in

this series of similar lawsuits, plaintiff further alleges a number of common law torts under the Federal Tort Claims Act (FTCA) and also demands compensation under the Little Tucker Act. Following the Court's August 15, 2013 protective order allowing the plaintiff to proceed under a pseudonym, plaintiff timely filed an amended complaint. On September 20 2013, the government filed a motion to dismiss. Plaintiff's brief in opposition was filed on October 16, 2013. The government's reply brief was filed on December 9, 2013 and oral argument was held on December 16, 2013.

### **OTJAG INTERNATIONAL AND OPERATIONAL LAW DIVISION**

In FY13, the mission and programs of the OTJAG International and Operational Law Division (IOLD) supported the military justice system across three lines of effort: preventing law of war violations, preparing judge advocates and paralegals to administer military justice in deployed environments, and strengthening partner nation military justice systems to produce highly disciplined, effective coalitions for future military operations.

As part of the Army's implementation of the Department of Defense (DOD) Law of War Program, IOLD aimed to prevent violations of the law of war by Army personnel by evaluating all new weapons for compliance with international law; reviewing all operation and concept plans and rules of engagement for compliance with domestic and international law; and preparing directives, policies, instructions, and training materials to ensure that Army personnel understand the principles and rules of the law of war. When Army personnel were alleged to have violated the law of war, the IOLD supported the reporting, investigation, and prosecution of the allegations.

To prepare judge advocates and paralegals of all military Services for upcoming operational deployments to Afghanistan and other overseas locations, IOLD conducted three Judge Advocate General's Pre-Deployment Training sessions (JPTs). The curriculum for each week-long JPT included several military justice classes, which provided an overview of general military justice topics, as well as detailed instruction on the unique aspects and logistical challenges of administering military justice in a deployed environment. The JPT instructors included judge advocates and paralegals with recent deployment experience and a Senior Trial Attorney from the Department of Justice,



Human Rights and Special Prosecution Section, who provided a class on the application of the Military Extraterritorial Jurisdiction Act (MEJA).

In order to build strong, disciplined coalitions for future military operations, TJAG and other JAGC senior leaders participated in numerous legal engagements with their counterparts from partner nations, including Brazil, Chile, Peru, Italy, Great Britain, Japan, South Korea, Thailand, Tanzania, and Israel. Engagement discussions centered on lessons learned regarding the most effective practices for the administration of military justice and the role of military justice in strengthening the rule of law in society. A standard component of senior legal engagements conducted in the United States included visits to the Fort Belvoir Office of the Staff Judge Advocate, the USATDS, ACCA, and the U.S. Supreme Court, to provide a comprehensive overview of the military justice system throughout all pre-trial, trial, and appellate stages. In a separate program, IOLD judge advocates provided human rights and military justice training for foreign legal officers, sponsored by the Defense Institute for International Legal Studies, in various countries across South America, Africa, Europe, and Asia.

#### **PERSONNEL, PLANS, AND TRAINING**

On September 30, 2013, the Army's end-strength was 532,413 Army Soldiers on active duty, including Active Guard and Reserve (AGR) and mobilized Soldiers, compared to 667,839 at the end of FY12. The attorney strength of the Active Army (AA) JAGC at the end of 2013 was 1,970 (including general officers). This total does not include 88 officers attending law school while participating in the Funded Legal Education Program (FLEP). The FY13 end-strength of 1,970 compares with an end-strength of 1,974 in FY12. The diverse composition of our FY13 AA attorney population included 133 African-Americans, 52 Hispanics, 102 Asians and Native Americans, and 510 women.

The grade distribution of the Corps' AA attorneys for FY13 was 8 general officers authorized (five filling JAGC authorizations, two serving in Military Occupational Specialties (MOS) coded positions (the Legal Counsel to the Chairman of the Joint Chiefs of Staff and the Chief Prosecutor for the Commissions), and an eighth general officer (mobilized reservist) serving in a branch immaterial billet - Commander, Rule of Law Field Force - Afghanistan), 149 colonels, 246

lieutenant colonels, 498 majors, and 1,069 captains. An additional 103 warrant officers, 562 civilian attorneys, and 1,626 enlisted paralegals supported legal operations worldwide.

The attorney strength of the United States Army Reserve (USAR) JAGC at the end of FY13 was 1,826 (which includes officers serving in Troop Program Units, the DIMA Program, the Individual Ready Reserve, and the Active Guard & Reserves) and the attorney strength of the Army National Guard at the end of FY13 was 869. At the end of FY13, over 348 Army JAGC personnel (officer and enlisted, AA and RC) were deployed in operations in Afghanistan, Bosnia, Cuba, Kosovo, Egypt, Honduras, Israel, Iraq, Kuwait, Qatar, Djibouti and elsewhere across Africa.

In FY13, the JAGC continued its efforts to improve the quality of practice in complex cases, to include capital cases, national security cases, sexual assault cases, and military commissions proceedings. As discussed above, many of these efforts involved TCAP and DCAP, which provided personnel and expert advice to assist with numerous high profile trials. Along with the Legal Center and School, TCAP and DCAP were instrumental in capturing and disseminating lessons learned from these cases throughout the Corps. In addition, the SVP program continued to build the Army's capability to prosecute sexual assault offenses and provide support to victims.

Although my tenure as TJAG began toward the end of the last fiscal year, my interactions with senior commanders and JAGC leaders since that time, along with my previous service, have led me to conclude that the JAGC is currently resourced to perform its military justice functions in a fair and effective manner. We will continue to closely monitor both DOD-directed manpower reduction initiatives and emerging requirements, including those imposed by recent amendments to the UCMJ, to ensure that the JAGC retains the resources it needs to provide the gold-standard military justice system the Army demands and its Soldiers deserve.



FLORA D. DARPINO  
Lieutenant General, US Army  
The Judge Advocate General

**APPENDIX - U.S. ARMY MILITARY JUSTICE STATISTICS**

**PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)**

TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
GENERAL	714	642	72	-1.5%
BCD SPECIAL [A]	373	347	26	-19.8%
NON-BCD SPECIAL	3	0	0	N/A
SUMMARY	380	[G]	[G]	-24.5%
OVERALL RATE OF INCREASE (+)/DECREASE (-) OVER LAST REPORT				-11.6%

Report Period: FISCAL YEAR 2013

**PART 2 – DISCHARGES APPROVED [B]**

GENERAL COURTS-MARTIAL ( CA LEVEL)			
NUMBER OF DISHONORABLE DISCHARGES (+ dismissals)		80 (+13)	
NUMBER OF BAD-CONDUCT DISCHARGES		263	
SPECIAL COURTS-MARTIAL			
NUMBER OF BAD-CONDUCT DISCHARGES		182	

**PART 3 – RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG**

FOR REVIEW UNDER ARTICLE 66 – GENERAL COURTS-MARTIAL	371
FOR REVIEW UNDER ARTICLE 66 – BCD SPECIAL COURTS-MARTIAL	180
FOR EXAMINATION UNDER ARTICLE 69 – GENERAL COURTS-MARTIAL	244

TOTAL ON HAND BEGINNING OF PERIOD		155 [C]
GENERAL COURTS-MARTIAL	[D]	
BCD SPECIAL COURTS-MARTIAL	[D]	
REFERRED FOR REVIEW		664 [C]
GENERAL COURTS-MARTIAL		
BCD SPECIAL COURTS-MARTIAL		
TOTAL CASES REVIEWED		684 [E]
GENERAL COURTS-MARTIAL		
BCD SPECIAL COURTS-MARTIAL		
TOTAL PENDING AT CLOSE OF PERIOD		135 [C]
GENERAL COURTS-MARTIAL		
BCD SPECIAL COURTS-MARTIAL		
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		+21.9%

**PART 4 – WORKLOAD OF THE U.S. ARMY COURT OF CRIMINAL APPEALS**

**PART 5 – APPELLATE COUNSEL REQUESTS BEFORE**

**U.S. ARMY COURT OF CRIMINAL APPEALS (CCA)**

NUMBER	624
PERCENTAGE	93.98%

**PART 6 - ACTIONS OF THE U.S. COURT OF APPEALS FOR THE ARMED FORCES  
(CAAF)**

PERCENTAGE OF CCA-REVIEWED CASES FORWARDED TO CAAF	441 of 684	64.47%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		-13.27%
PERCENTAGE OF TOTAL PETITIONS GRANTED	36 of 462	7.79%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		-72.43%
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY USACCA		5.26%
RATE OF INCREASE (+)/DECREASE (-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		-74.34%

**APPENDIX - U.S. ARMY MILITARY JUSTICE STATISTICS - CONT'D**

<b>PART 7 – APPLICATIONS FOR RELIEF UNDER ARTICLE 69, UCMJ</b>		
TOTAL PENDING BEGINNING OF PERIOD		1
RECEIVED		12
DISPOSED OF		7
GRANTED	0	
DENIED	7	
NO JURISDICTION	0	
WITHDRAWN	0	
TOTAL PENDING AT END OF PERIOD		6
<b>PART 8 – ORGANIZATION OF COURTS</b>		
TRIALS BY MILITARY JUDGE ALONE		
GENERAL COURTS-MARTIAL		520
SPECIAL COURTS-MARTIAL		329
TRIALS BY MILITARY JUDGE WITH MEMBERS		
GENERAL COURTS-MARTIAL		194
SPECIAL COURTS-MARTIAL		46
<b>PART 9 – COMPLAINTS UNDER ARTICLE 138, UCMJ</b>		
NUMBER OF COMPLAINTS		
<b>PART 10 – STRENGTH</b>		
AVERAGE ACTIVE DUTY STRENGTH		530506 [F]
<b>PART 11 – NONJUDICIAL PUNISHMENT (ARTICLE 15, UCMJ)</b>		
NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED		42407
RATE PER 1,000		79.94
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD		+26.46%

**EXPLANATORY NOTES**

- [A] Cases convened by GCM convening authority.
- [B] Based on records of trial received in FY for appellate review.
- [C] Includes only cases briefed and at issue.
- [D] No reason for distinguishing; GCM and BCD SPCM are not tracked separately.
- [E] Includes Article 62 appeals, All Writs Act cases, and appeals withdrawn.
- [F] This number includes only Active Component Soldiers and does not include USAR, National Guard or AGR personnel.
- [G] SCM convictions and acquittals are not tracked.

**SECTION 4**

**REPORT OF THE JUDGE ADVOCATE GENERAL OF THE NAVY**

**ANNUAL REPORT OF THE JUDGE ADVOCATE GENERAL OF THE NAVY**

**OCTOBER 1, 2012 TO SEPTEMBER 30, 2013**

**SUPERVISION OF THE ADMINISTRATION OF  
MILITARY JUSTICE**

**JUDGE ADVOCATE GENERAL**

The Judge Advocate General (JAG) co-chairs the Military Justice Oversight Council with the Staff Judge Advocate to the Commandant of the Marine Corps. This council meets quarterly and also includes Commander, Naval Legal Service Command (CNLSC), the Deputy Judge Advocate General for Reserve Affairs and Operations, the Deputy Staff Judge Advocate to the Commandant of the Marine Corps, the Chief Judge of the Navy, the Assistant Judge Advocate General for Military Justice, the Assistant Judge Advocate General for Operations and Management, and the Deputy Director, Judge Advocate Division, for Community Development Strategy & Plans.

During the reporting period, the JAG and CNLSC regularly inspected U.S. Navy legal offices in the United States, Europe, and the Pacific in order to supervise the administration of military justice in accordance with the requirement of Article 6(a), Uniform Code of Military Justice (UCMJ). These inspections, conducted by subject matter experts, examined the full range of military justice processes.

**ASSISTANT JUDGE ADVOCATE GENERAL, MILITARY JUSTICE (AJAG-MJ)**

The AJAG-MJ advises the JAG in the performance of statutory military justice duties. Additionally, the AJAG-MJ serves as a member of the Office of the Judge Advocate General (OJAG) Ethics Committee, the Judicial Screening Board, the Military Justice Oversight Council, and oversees OJAG's Military Justice Division (Code 20) and National Security Litigation Division (Code 30). The AJAG-MJ is dual-hatted as the Officer in Charge of the Navy-Marine Corps Appellate Review Activity (OIC, NAMARA - Code 04). In this capacity, the AJAG-MJ oversees the Administrative Support Division (Code 40), Appellate Defense Division (Code 45), and Appellate Government Division (Code 46). The AJAG-MJ is responsible for disposition of all records of trial in

accordance with statutory and regulatory requirements, as well as applicable appellate court rules of practice and procedure.

### **CRIMINAL LAW DIVISION (CODE 20)**

Organization. During the reporting period, Code 20 was staffed by nine active duty judge advocates, one reservist on one-year orders, one Highly Qualified Expert (HQE), three civilian staff members, and an eight-member reserve unit.

Mission. Code 20 coordinates military justice policy within the Department of the Navy (DON), drafts legal and policy advice for the JAG on military justice matters, and reviews all legislative and regulatory proposals affecting military justice. The Division staffs amendments to military justice provisions in the Manual of the Judge Advocate General (JAG Manual) and all regulations implementing or affecting the Uniform Code of Military Justice (UCMJ). The Division monitors all decisions of military appellate courts; tracks the status of military justice cases; provides legal and policy opinions; staffs requests for JAG certification of cases for review by the U.S. Court of Appeals for the Armed Forces (CAAF); and, facilitates Department of Justice (DOJ) processing of executive pardon requests involving military convictions. Code 20 staffs requests for Secretarial designation of general, special, and summary court-martial convening authorities, coordinates court orders and warrants of attachment, and coordinates with DOJ to approve grants of immunity and orders for civilian witnesses to testify at trial by court-martial. Finally, Code 20 provides a representative to the Secretary of the Navy Clemency and Parole Board; provides legal opinions to the Board for Correction of Naval Records upon request; provides informal advice for Navy and Marine Corps judge advocates practicing military justice; processes all Article 69, 73, and 74(b) UCMJ reviews and requests; and acts as the initial denial authority on all Freedom of Information Act (FOIA)/Privacy Act (PA) requests for information pertaining to courts-martial.

The Code 20 Division Director serves as Commander, Naval Legal Service Command's (CNLSC) Special Assistant for Military Justice and advises CNLSC on policies, plans, resources and procedures affecting NLSC's military justice mission.

The Code 20 Division Director serves as the Navy's Representative to the Joint Service Committee (JSC) for Military Justice and functions as the Navy's voting group member at

regular meetings of the JSC. The JSC is the principal vehicle for staffing amendments to the UCMJ and Manual for Courts-Martial (MCM). The JSC's 2013 Annual Review of the MCM was completed in accordance with the President's requirement, and two Executive Orders were drafted and submitted for the President's approval and signature.

The Code 20 Division Director was assigned by the Secretary of Defense to serve as the Service Advisor to the Defense Legal Policy Board (DLPB). The Board is a federal advisory committee that provides the Secretary of Defense independent, informed advice, opinions, and recommendations concerning legal and legal policy matters within the Department of Defense. Code 20 participated in several hearings and responded to numerous requests for information from the Subcommittee reviewing Military Justice in Combat Zones. The Subcommittee and the DLPB completed their report and endorsement on Military Justice in Combat Zones this year.

Code 20 also staffed requests for information from the U.S. Commission on Civil Rights in support of its 2013 Statutory Enforcement Report on Sexual Assault in the Military and supported the testimony of the JAG before the Commission.

Code 20 responded to numerous Congressional requests for information, provided technical assistance in drafting legislation and drafted and reviewed senior leadership testimony before the Senate Armed Services Committee and Personnel Subcommittee.

The Director of Code 20 serves as the Navy point of contact for requests for information and testimony before the Response Systems Panel on Adult Sexual Assault Crimes (RSP). The RSP was created by section 576 of the Fiscal Year 2013 (FY13) National Defense Authorization Act (NDAA) to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under Article 120 of the UCMJ. The RSP is to develop recommendations regarding how to improve the effectiveness of such systems.

Code 20 was instrumental in the development of DoD and Navy's Special Victims Capability (SVC), as required by section 573 of the FY13 NDAA. Although final implementation of SVC was not required at the close of FY13, to ensure training of key stakeholders, Code 20 worked with OJAG's Technology, Operations and Plans Division (Code 67) to hold the inaugural SVC course



with over 260 First Tour Judge Advocates (FTJAs), Legalmen, Sexual Assault and Response Coordinators (SARCs), and the Navy's newly hired civilian Victim Advocates (VAs) participating.

Code 20 personnel continued to be instrumental in the development and delivery of Fleet-wide training initiatives on sexual assault prevention and response (SAPR), to include SAPR-L (Leadership); SAPR-F (Fleet); SAPR-DEP (Delayed Entry Program); SAPR-SD (Stand-Down); and SAPR-C (Civilian). Focusing on the themes of awareness and courage, the training used a dramatization followed by a facilitated discussion to engage all service members in educational, face-to-face conversations about sexual assault.

Further, as part of the SAPR Cross Functional Team (CFT), Code 20 personnel met monthly with Navy's major stakeholders to discuss SAPR related developments across the Fleet.

Code 20 also facilitated the development of the Defense Sexual Assault Incident Database, which came online in 2013. This comprehensive database will be operated by Commander, Navy Installations Command (CNIC) and will allow more accurate tracking and reporting of sexual assault incidents.

Improving the quality and increasing the availability of military justice and trial advocacy training was a cornerstone of the JAG's agenda for FY13. Code 20 played an important role in enhancing and centralizing military justice and trial advocacy training for the prosecution and defense bars (Navy, Marine Corps, and Coast Guard). Part of this effort included seeking to use external funding sources, including DoD SAPRO funding, to maximize training opportunities. However, due to Congressional Continuing Resolutions, Service restrictions on conference attendance, and sequestration, external funding from DoD did not materialize. As a result, some planned military justice courses were curtailed and others were offered online in lieu of in-person training.

Despite the lack of external funding, Code 20 continued to identify and centralize requirements for military justice litigation and trial advocacy training. Code 20 led the Litigation Training Coordination Council (LTCC) and coordinated with the Naval Justice School (NJS) to develop new curricula. Code 20's attorneys also provided trial advocacy, military justice, sexual assault, and child sexual abuse litigation training to various audiences on request.

Code 20 also continued to assist in the implementation of the Secretary of Defense's requirement to withhold the initial disposition authority (IDA) for allegations of rape, sexual assault, forcible sodomy, and attempts to commit these offenses, to those officers who are Special Court-Martial Convening Authorities in the rank of captain or colonel or above. Additionally, Code 20 provided advice on the implementation of the Expedited Transfer policy for alleged victims of sexual assault and provided input on a number of legislative proposals affecting military justice or sexual assault prevention and response.

Code 20 participated in the ongoing development of the Naval Justice Information System (NJIS). This involved regular participation in the NJIS Board of Governance and various technical working groups. When implemented, this comprehensive system will manage cases at all phases and will be used to integrate law enforcement, investigations, and corrections, as well as command and judicial actions.

Finally, during the reporting period, Code 20 reviewed 24 records of trial under Article 69(a), UCMJ; 8 records under Article 69(b), UCMJ; and 1 petition under Article 73, UCMJ.

#### **ADMINISTRATIVE SUPPORT DIVISION (CODE 40)**

Organization. During the reporting period, Code 40 was staffed with one officer, two civilians and eight enlisted Marine Corps staff members.

Mission. Code 40 provides administrative and logistical support services to NAMARA and the Navy-Marine Corps Court of Criminal Appeals (NMCCA). Code 40 personnel review for completeness all records of trial forwarded to the NAMARA for appellate review pursuant to Articles 66 and 69, UCMJ; promulgate decisions of the NMCCA in accordance with the JAG Manual and the MCM; manage the OJAG court-martial central filing system, including original records of trial maintained at NAMARA; manage and retrieve archived records of trial stored at the Federal Records Center in Suitland, Maryland; and administer all NMCCA and CAAF mandates and judgments on remand back to commands worldwide for corrective action. During FY13, Code 40 reviewed and examined 520 records of trial for completeness prior to forwarding the records for appellate review pursuant to Articles 66 and 69, UCMJ.

**APPELLATE DEFENSE DIVISION (CODE 45)**

Organization. During the reporting period, Code 45 was staffed with 10 active-duty Navy and Marine Corps judge advocates, 1 civilian attorney, and 4 civilian support personnel. Code 45 was also supported by 20 Navy and Marine Corps Reserve judge advocates.

Mission. Code 45 represents Navy and Marine Corps appellants before the NMCCA, CAAF, and the U.S. Supreme Court. Code 45 provides advice and support to Navy and Marine Corps trial defense counsel around the world. Code 45's experienced appellate attorneys respond to short-fused questions from trial defense counsel and assist in preparing and filing extraordinary writs before the NMCCA and CAAF. In coordination with the Defense Counsel Assistance Program (DCAP), Code 45 also provides training on recent appellate developments and important trial issues, and advises on specific cases in litigation.

In FY13, 437 new cases were docketed at the NMCCA and received in Code 45. Code 45 filed 374 initial pleadings with 15 oral arguments at the NMCCA. The initial pleadings include 143 briefs (this includes summary assignments), 226 merit submissions, and 5 summary assignments. A total of 90 supplemental briefs to petitions were filed at the CAAF, resulting in 13 full briefs and 9 oral arguments. Table 1 pertains.

**TABLE 1**

<b>NMCCA</b>	<b>FY09</b>	<b>FY10</b>	<b>FY11</b>	<b>FY12</b>	<b>FY13</b>
Briefs Filed	173	159	161	191	143
Total Cases Filed	831	744	531	488	374
Oral Arguments	14	15	20	19	15
<b>CAAF</b>					
Petitions with Supplemental Briefs Filed	96	69	81	117	90
Briefs Filed	31	21	20	19	13
Oral Arguments	23	11	7	12	9
<b>U.S. Supreme Court Petitions</b>	5	6	2	3	2

## **APPELLATE GOVERNMENT DIVISION (CODE 46)**

Organization. During the reporting period, Code 46 was staffed with ten active-duty judge advocates, one civilian attorney, and two civilian administrative employees. Twelve Reserve judge advocates based out of Minneapolis, Minnesota augmented Code 46, contributing an average of three briefs per month.

Mission. In accordance with Article 70, UCMJ, Code 46's primary mission is to represent the United States before the NMCCA and CAAF. Additionally, in coordination with the Navy and Marine Corps Trial Counsel Assistance Programs (TCAP), Code 46 provides support to staff judge advocates (SJAs), review officers, and trial counsel throughout the Navy and Marine Corps on pretrial, court-martial, and post-trial matters.

Code 46 provides direct legal services to Marine and Navy judge advocates around the world, responding to hundreds of questions from the field on trial and appeal matters. Code 46 helps ensure the uniformity and consonance of legal positions taken by the United States before trial and appellate courts. Code 46 augments its delivery of legal advice to trial counsel through a robust working relationship with TCAP. Code 46's relationship with Service TCAP representatives helps ensure that important issues are not waived or surrendered for appellate litigation purposes by inconsistent or inaccurate positions by trial counsel. This coordination also facilitates improved communication between trial and appellate counsel and provides for closer coordination during government interlocutory appeals.

A summary of FY13 appellate activity is provided in Table 2. "Briefs Filed" includes Government briefs, answers to supplements, and supplemental briefs. "Other Pleadings" includes responses to extraordinary writs, motion responses, responses to Court Orders, and Petitions for Reconsideration. The number of NMCCA briefs filed by the Government decreased to 152 in FY13, and other filings to the NMCCA remained constant at 439 in FY13.

**TABLE 2**

	<b>FY08</b>	<b>FY09</b>	<b>FY10</b>	<b>FY11</b>	<b>FY12</b>	<b>FY13</b>
<b>NMCCA</b>						
Briefs Filed	232	154	163	188	198	152
Other Pleadings	340	313	373	144	439	439
Oral Arguments	6	14	15	20	19	15
<b>CAAF</b>						
Briefs Filed	37	28	24	22	24	9
Other Pleadings	146	60	102	70	111	98
Oral Arguments	32	23	11	7	12	11

Code 46 filed five Article 62 appeals<sup>1</sup>, an uptick from FY12. Prior years saw eight in FY07, 11 in FY08, nine in FY09, three in FY10, and two in FY11. Code 46's practice at CAAF included significant military justice matters: *United States v. Tearman* (Crawford-type testimonial hearsay); *United States v. Hutchins* (Edwards/Bradshaw prophylactic rule); *United States v. Caldwell* (bona fide suicide attempt's viability as an offense under the UCMJ); *United States v. Castellano* (whether judge, or members, decide the Marcum/Lawrence factors); *United States v. Solomon* (prior acquittal's bearing on Mil. R. Evid. 414 evidence); *United States v. Salyer* (unlawful command influence resulting in recusal of military judge). Code 46 certified only one case, *United States v. Porter*, which was decided without argument *per curiam*. Code 46 assisted in trial-level litigation of complex appellate issues, including the appellate remand in *United States v. Kish*, dealing with alleged judicial bias, at the Marine Corps' Legal Service Support Section (LSSS)-National Capital Region.

Several cases involved allegations of sexual misconduct, although the misconduct was not a significant factor in the appellate litigation. In *Salyer*, the appellant was convicted of possession of child pornography; however, his conviction was set aside by CAAF with prejudice based on the Government's unlawful command influence in accessing the trial judge's official personnel record. In *U.S. v. Brown*, CAAF found the military judge properly allowed a non-coaching victim advocate to sit

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<sup>1</sup> An appeal under Article 62, UCMJ allows the United States to appeal a military judge's ruling that terminates proceedings with respect to a charge or specification or excludes evidence that constitutes substantial proof of a fact material to the proceeding.

next to a testifying minor victim of sexual abuse. In *Castellano*, CAAF found that when sodomy is charged under the UCMJ, "statute saving" factors of *Lawrence v. Texas* and *United States v. Marcum* must be found, beyond a reasonable doubt, by the trier of fact – not the military judge – in order to have a legally supportable conviction. In *Solomon*, CAAF set aside an abusive sexual contact conviction after finding that a military judge erred in admitting prior sexual misconduct evidence without balancing, and instructing the members on, the alibi evidence and acquittal for that prior misconduct. In *U.S. v. Altier*, CAAF decided that a rehearing sentence including 30 days of confinement was not in excess of or more severe than a punitive discharge. In *U.S. v. Wilkins*, CAAF found that the appellant was properly convicted of abusive sexual contact as a lesser included offense of aggravated sexual assault where the appellant suffered no prejudice and did not challenge the charge at trial.

At the NMCCA, two sex crimes cases stand out. In *U.S. v. Lawanson*, the NMCCA dismissed a conviction of rape and aggravated sexual assault because, under the NMCCA's reading of the record, the Navy had fully discharged the appellant. And in *U.S. v. Boyer*, a case involving charges of sodomy and indecent liberties with a child, the NMCCA set aside the convictions after finding that the trial counsel had committed reversible prosecutorial misconduct.

Code 46's training to trial counsel in the field continued during the reporting period. At NJS' invitation, Code 46 produced several recorded and live broadcast courses, including "Protecting the Record," and several blocks for the Litigating Complex Cases course including "Ex Writs, DuBays, Remands, and Articles 62s," "Motions Practice," and "Guilty Pleas." Code 46 also instructed trial counsel on how to protect the record, and on the fundamental areas of intersection between trial, post-trial processing, and appellate review at the SJA Course at NJS and the Trial Counsel Orientation Course. These outreach sessions were indispensable in increasing awareness of the points of failure in trial practice that are entirely preventable with proactive collaboration between trial and appellate attorneys.

Continuing its efforts to work hand-in-hand with other appellate organizations, Code 46 jointly mooted CAAF cases with Coast Guard appellate counsel, and was well represented at the American Bar Association's (ABA) National Appellate Advocacy Competition, where its attorneys served as moot court judges for

multiple rounds of the regional competition. Code 46's Appellate Government Counsel participated in an intensive appellate advocacy training program that included attendance at the ABA's Appellate Judges' Education Institute and Appellate Lawyers Annual Practice Institute, Bryan Garner's Legal Research and Writing Seminar, and the Judge Advocate Association's Appellate Advocacy Symposium. Internally, Code 46 developed a 10-week, intensive, introductory course to quickly acquaint new appellate government counsel with the fundamentals of appellate practice. Finally, as a result of Code 46's initiative, most of the Services' appellate government counsel were brought together at the Washington Navy Yard for a two-day intensive Joint Government Appellate Training, focused on training both new and experienced appellate counsel, replete with experienced guest speakers from the Department of Justice and George Washington University Law School. These efforts help ensure competent and consistent representation of the United States by appellate government counsel before the service courts, the Court of Appeals for the Armed Forces, and the Supreme Court, and help ensure the interests of all Services are taken into consideration in all pleadings on behalf of the United States.

During FY13, the Division continued to expand the DON's electronic record of trial program, which at year's end included Camp Pendleton, Norfolk Naval Station, Camp Lejeune, and Marine Corps Base Hawaii. As the field activities and the Division, in coordination with NMCCA, expand their technological capabilities, the intent is to migrate all installations to processing a majority of their courts-martial electronically.

**ASSISTANT JUDGE ADVOCATE GENERAL, CHIEF JUDGE, DEPARTMENT  
OF THE NAVY (CJDON)**

The CJDON (AJAG 05) is the senior supervisory jurist in the DON, overseeing the trial and appellate judiciaries. The CJDON serves as the Rules Counsel for the judiciaries and the community sponsor for the Navy JAG Corps' Military Justice Litigation Career Track (MJLCT). The CJDON is selected by a competitive flag selection board and serves for three years, with appointment as the Assistant Judge Advocate General of the Navy in the third year of service. The CJDON is eligible to retire in the grade of rear admiral (lower half).

**THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
(NMCCA)**

The NMCCA is responsible for all cases referred under UCMJ Articles 62(b), 66(b), 69(d), and 73. The NMCCA may also entertain petitions for extraordinary relief. During FY13, the NMCCA was comprised of eight appellate judges, five from the Navy and three from the Marine Corps. Of these eight judges, four also serve on the United States Court of Military Commission Review (USCMCR), one of whom serves as the Chief Judge of USCMCR. The NMCCA was also supported by six Navy Reserve and three Marine Corps Reserve appellate judges.

The NMCCA hosted its third annual Judicial Training course in FY13. In past years, the course brought distinguished practitioners and professors to the NMCCA for two days to train active duty, Reserve and civilian personnel. However, due to fiscal constraints, the FY13 course relied exclusively on in-house talent rather than outside experts, with topics being taught by members of the appellate judiciary, its support staff, and the CJDON.

The NMCCA continues to maintain a website at <http://www.jag.navy.mil/nmcca.htm>, where the NMCCA's published and unpublished opinions are available for download. In addition, the NMCCA maintains audio files from past oral arguments and a docket for upcoming oral arguments. Application for admission to the NMCCA bar and rules of the court are available on the site.

The NMCCA was supported by four Navy and Marine Corps junior officer law clerks and a mid-grade officer senior law clerk. The clerks provide valuable legal and administrative support to the appellate judiciary and gain valuable legal analysis and writing experience to inform their later appellate and trial practices.

**NAVY-MARINE CORPS TRIAL JUDICIARY (CODE 52)**

The Navy-Marine Corps Trial Judiciary (NMCTJ) is a unified trial judiciary that has as its core mission the task of detailing certified and trained military judges to all Navy and



Marine Corps general and special courts-martial. The NMCTJ is organized into eight judicial circuits worldwide and is supported by Naval Reserve and Marine Corps Reserve Individual Mobilization Augmentees. During FY13, the NMCTJ was comprised of 24 active-duty and 17 Reserve judges. The previously gapped judge billet at Parris Island, SC, was filled by LtCol David Jones, USMC, during July 2013.

The NMCTJ provided comprehensive and timely judicial services to Navy fleet and shore activities and Marine Corps forces in the United States and abroad. Further, due to the changeover in judges within the U.S. Coast Guard, the NMCTJ provided judges for U.S. Coast Guard courts-martial. In addition to presiding over regularly referred courts-martial, the NMCTJ judges presided over numerous high-profile sexual assault cases and Dubai Hearings, and junior judges served as Investigating Officers at Article 32 hearings. The NMCTJ also has two trial judges assigned and available for any forthcoming Military Commission cases.

FY13 closed with the NMCTJ presiding over 291 General and 879 Special courts-martial, for a total of 1,170 cases. 720 cases were tried to verdict, resulting in 629 convictions and 91 acquittals. There were 266 contested trials and 450 cases that reached resolution prior to trial.

The 2013 Joint Military Judges Annual Training was canceled due to budgets cuts, Service restrictions on conference attendance, and sequestration. In order to overcome the training deficit, the NMCTJ partnered with The National Judicial College (NJC), University of Nevada, to conduct live WebCast Continuing Legal Education (CLE) for all members of the trial judiciary on Sexual Assault and Hearsay in Military Law by Professor Jules Epstein; Military Rules of Evidence: 412, 413 and 414 by the Honorable David Shakes; Daubert in the Military Sexual Assault Case by the Honorable Douglas J. Miles; Introduction of Expert Testimony to Explain Victim Behavior by Jennifer Gentile Long; and Voir Dire in Military Sexual Assault Cases by Professor Jules Epstein. All members of the trial judiciary participate in these classes, which will be completed during FY 14. Successful completion of NJC curriculum leads to a professional certificate, and potentially a Master's or doctorate degree.

During FY13, the NMCTJ realigned geographic areas of responsibility within the Circuits in order to reduce travel costs and improve Judicial services to the Region Legal Service

Offices (RLSOs) and LSSSs. A significant cost savings was achieved by using video teleconferencing technology for arraignments and motions for courts-martial at distant locations.

The NMCTJ judges also provided military justice training at various levels, including the Defense Institute of International Legal Studies, Navy-Marine Corps Senior Officers Courses, Legal Officer Courses, Naval Justice School Basic Lawyer Courses, the Army Judge Advocate General's Legal Center and School's Military Judges Course, and other in-service courses. Throughout all judicial circuits, the NMCTJ performed an active role in mentoring judge advocates through formal and informal training sessions.

### **NAVAL LEGAL SERVICE COMMAND (NLSC)**

CNLSC also serves as the Deputy Judge Advocate General of the Navy.

In FY13, NLSC was comprised of 415 judge advocates, one Civil Engineer Corps officer, four Limited Duty (Law) officers, 160 Legalmen, and 211 civilians. NLSC provided a wide range of legal services to afloat and ashore commands, active-duty naval personnel, family members, retirees, and eligible beneficiaries from the other Services at 99 offices worldwide.

In order to more adequately meet the demand for legal services in the Fleet, on October 1, 2012, NLSC executed a major realignment, disestablishing all eight Naval Legal Service Offices. The Legal Assistance function was realigned to the nine Region Legal Service Offices and four new Defense Service Offices were established to provide defense and personal representation services to service members, including representation at courts-martial and administrative boards. Defense counsel also provide other representational services, including advice on non-judicial punishment and adverse personnel actions.

Additionally, as part of the realignment, all new judge advocates receive two years of comprehensive training in prosecuting and defending cases, providing legal assistance, and advising Navy commands. First tour judge advocates (FTJAs) are required to complete Professional Development Standards at their first duty station, following completion of the Basic Lawyer Course at Naval Justice School. These Standards facilitate the development of subject matter expertise so that our judge

advocates are fully equipped to operate effectively in their follow-on assignments, including supporting criminal litigation, providing command services, and providing legal assistance to Sailors and their families. Mid-level officers are assigned as Professional Development Officers (PDOs) to manage and track judge advocate training. FTJAs have reading and writing requirements, as well as knowledge assessments performed by PDOs and senior leadership.

Starting in May 2013, NLSC transitioned to the new military justice Case Management System (CMS) to comply with a Congressional mandate that DON implement a single court-martial tracking system by July 1, 2013. Working closely with the Office of the Staff Judge Advocate to the Commandant of the Marine Corps, combined Navy and Marine Corps training teams visited each RLSO headquarters and trained local CMS administrators and functional users. All commands completed the transition to CMS as of June 17, 2013.

NLSC provided legal advice, services, and training to the Fleet through 13 commands: four Defense Service Offices, which provided defense and personal representation; and, nine RLSOs, which provided prosecution, command services, and legal assistance. From these commands, NLSC provided counsel for court-martial prosecution and defense, administrative boards, physical evaluation boards, legal assistance, and legal advice to local commanders and their staffs.

During FY13, NLSC provided counsel for 120 general courts-martial, 171 special courts-martial (to findings), and 1,077 administrative boards. NLSC personnel also provided 11,403 command services, 10,039 personal representation services, and saw 38,012 legal assistance clients. NLSC continued to be the primary source for personnel to meet the JAG Corps' Individual Augmentation (IA) requirements and provided two-thirds of the personnel requirements in support of Overseas Contingency Operations. During FY13, 15 judge advocates and four Legalmen from NLSC deployed to Djibouti and Afghanistan in direct support of operations.

#### **DEFENSE COUNSEL ASSISTANCE PROGRAM**

The Defense Counsel Assistance Program (DCAP) is aligned under NLSC and reports to the Chief of Staff, Defense Service Offices. The Director is an active duty Navy O-6 select MJLCT designated Expert and former military judge who is co-located

with DSO West in San Diego. The Deputy Director is an active-duty Navy O-4 MJLCT designated Specialist co-located with the Navy's Appellate Defense Division in Washington, D.C. In December 2012, the Navy hired a DCAP Highly Qualified Expert (HQE) in sexual assault and complex litigation. DCAP's HQE is a retired Marine Corps judge advocate and former military judge who has practiced criminal law for over three decades.

DCAP's mission is to provide assistance to Navy, Marine Corps, and Coast Guard defense counsel throughout the Fleet, offering advice and technical expertise on all issues relevant to military justice and adverse personnel actions. DCAP offers assistance during every phase of court-martial litigation, including initial case analysis, evidentiary issues, motions practice, litigation and trial advocacy, and post-trial processing.

DCAP personnel are members of the Navy's defense bar and are authorized to consult with detailed counsel on a confidential and privileged basis. DCAP assistance includes developing case strategies, drafting motions for appropriate relief, crafting arguments for motion sessions, developing investigations, conducting discovery, facilitating requests for witnesses and expert assistants, developing voir dire strategies and questions, assisting with complex legal research, preparing clients and witnesses for testimony, and helping counsel prepare opening statements, closing arguments, direct and cross-examination, and with post-trial matters. DCAP also frequently consults with defense counsel on professional responsibility and ethics issues.

In conjunction with NJS, DCAP coordinates and provides timely, relevant and effective training for DSO personnel. The DCAP Director is a member of the Litigation Training Coordination Council which plans comprehensive training for military litigators of all experience levels. In FY13, DCAP provided a Basic Trial Advocacy course, two Defense Counsel Orientation courses, and a week-long course on defending service members accused of sexual assault. DCAP also provides ongoing training to current and prospective defense counsel worldwide, through on-site command visits and online technologies. In FY13, DCAP provided sexual assault and trial advocacy training during site visits to Washington, DC; San Diego, CA; Bremerton, WA; Norfolk, VA; Jacksonville, FL; Pensacola, FL; Naples, Italy; and, Yokosuka, Japan. In addition, DCAP has created a library of relevant continuing legal education and regularly publishes updates and guidance to defense counsel through written DCAP

Advisories. In an effort to maintain a worldwide defense bar, DCAP maintains a SharePoint site, providing defense counsel with resources such as a motions bank, an expert witness database, and an online discussion forum.

Finally, DCAP sends Defense Mobile Training Teams (DMTTs) to each DSO at least twice yearly to work closely with the command and individual counsel, with a focus on practical issues in defense work and trial advocacy based on current or recent case scenarios.

### **TRIAL COUNSEL ASSISTANCE PROGRAM**

TCAP is aligned under NLSC and reports to the Chief of Staff, Region Legal Service Offices (COS-RLSO). TCAP is directed by a Navy O-5, an MJLCT designated Expert who previously served as a military judge, Naval Legal Service Office Commanding Officer, an Executive Officer and Senior Defense Counsel during the Trial Defense Command pilot program, a Senior Trial Counsel and an Assistant Senior Defense Counsel. The Deputy Director is a GS-15 civilian who specializes in sexual assault prosecution and victims' rights. A former state prosecutor with extensive experience, she served as the Director of the National Center for the Prosecution of Violence Against Women and is a noted author in the field. She led efforts to enhance Sexual Assault Prevention and Response policies and training, improve the Victim and Witness Assistance Program, and was engaged in numerous initiatives involving sexual assault litigation training and evaluation. The Assistant Director is a senior O-4 MJLCT designated Specialist I who has completed tours as a defense counsel, prosecutor, carrier SJA, and NJS instructor, and received an LL.M. in Litigation from the George Washington University Law School. In May 2013, the Navy hired an HQE to work with TCAP. The HQE has 17 years of experience, most notably as a civilian prosecutor specializing in crimes against children and as an instructor and course coordinator for the National District Attorneys Association.

TCAP's mission is to provide advice, assistance, support, resources and training for Navy trial counsel worldwide. The program supports and enhances the proficiency of the Navy prosecution bar, providing experienced reach-back and technical expertise. TCAP provides a full spectrum of advice and serves as a resource for trial counsel in the field through every phase of trial, including pretrial investigation, court-martial litigation and post-trial processing. TCAP counsel regularly

assist and advise trial counsel on all aspects of prosecution, including drafting charges, trial preparation and motions practice, discovery issues, securing and preparing expert witnesses, devising trial strategy, and professional responsibility issues. TCAP collaboratively engages trial counsel in the field with regular case review conferences. Likewise, TCAP coordinates with Code 46 (Appellate Government) to ensure court-martial prosecutions are effectively postured to withstand appellate review.

When requested, TCAP provides more in-depth case assistance. For example, TCAP counsel have been detailed as trial counsel and assistant trial counsel when an advanced level of proficiency is demanded. In the past year, the TCAP Director served as trial counsel in the prosecution of a Naval Academy instructor for sexual assault of a student, and the Assistant Director served as trial counsel in a high-profile sexual assault case.

TCAP is also responsible for monitoring all high-visibility cases. The Director of TCAP monitors the relative experience levels of trial counsel through on-site, periodic observations of Navy judge advocates in the performance of their prosecution functions, and provides recommendations for improvement as well as resource recommendations to COS-RLSO as necessary.

In addition to case assistance and advice, TCAP provides resources to assist trial counsel. TCAP maintains an online repository of useful resources such as sample motions and responses, foundation questions, articles and manuals on prosecution, case disposition tracking, and an expert witness database. TCAP has expanded its expert witness database to ensure the ability of trial counsel to secure experts in all disciplines for the government and defense. The TCAP website also has a trial counsel discussion board that enables real-time response to demands from the field and leverages enterprise knowledge for remote offices. TCAP monitors questions and responds to postings on the site and ensures that trial counsel are aware of all available resources. The discussion board also facilitates a closer prosecution bar by enabling discussions between trial counsel worldwide.

Finally, TCAP plays a significant role in trial counsel training. TCAP partners with NJS and Code 20 in the development of litigation training for trial counsel. TCAP personnel routinely serve as instructors on a variety of courses at the NJS schoolhouse, online, and in-person at offices worldwide.

TCAP coordinated the planning and execution of Prosecuting Alcohol Facilitated Sexual Assault (PAFSA) course, an advanced trial advocacy course. TCAP also provided targeted on-site mobile training teams to all nine RLSOs which focused on trial advocacy and prosecution of special victims offenses, as well as on-site case consultation and assistance.

#### **VICTIMS' LEGAL COUNSEL PROGRAM**

On August 14, 2013, the Secretary of Defense, in an effort to improve victims support in sexual assault cases, directed the Secretaries of the Military Departments to establish a victim's advocacy program best suited for that Service to provide legal advice and representation to victims throughout the justice process. The Secretary of Defense further directed each Service to establish initial victim advocacy operating capability not later than November 1, 2013, with full operating capability by January 1, 2014. On August 15, 2013, the Vice Chief of Naval Operations established the Navy's Victims' Legal Counsel Program under the purview of the Judge Advocate General.

The Navy Victims' Legal Counsel (VLC) Program consists of 29 specially-trained and certified, independent judge advocates detailed to provide legal support to eligible victims of sexual assault. The initial contingent of VLC is comprised of 11 reservists and 18 active duty judge advocates aided by ten administrative support personnel. Four lieutenant commanders are assigned to Norfolk, San Diego, Mayport and Pearl Harbor to serve as VLC and to provide expertise, leadership and mentorship to junior VLC. The VLC Program operates under an independent chain of command, reporting to CNLSC through an experienced O-6 VLC Chief of Staff.

The primary mission of the VLC Program is to provide legal advice, assistance and when appropriate, advocacy for Navy sexual assault victims. Navy VLC will help protect victims' rights through the investigative and adjudicative stages of the military justice process. Specifically, VLC will explain the investigative and military justice processes to their clients, advocate for victim's rights and interests, and, when appropriate, appear in official proceedings on the victim's behalf. They will advise victims on rights afforded under the Victim Witness Assistance Program, advise on medical support including emotional and mental health counseling, assist with personal civil legal matters, work with SARCs and VAs to assist with military protective orders and restraining orders, and

accompany the victim to investigative interviews and court proceedings if requested by the victim.

The goal of the VLC Program is to complement the care and support Navy sexual assault victims already receive through SARCs and VAs by providing legal counsel and assistance following reports of sexual assault. VLC will be assigned regionally to maximize availability of counsel where needed most. Navy VLC serve every geographic region, including the United States, Europe, the Pacific, and the Middle East.

### **NAVAL JUSTICE SCHOOL (NJS)**

Organization. NJS is an echelon three command reporting to CNLSC. The main NJS facility is located in Newport, Rhode Island. Teaching detachments are based in San Diego, California, and Norfolk, Virginia (both significant Fleet concentration areas). A two-person branch office is located at the U.S. Army's The Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Virginia.

Mission. NJS provides legal training to officers, enlisted and civilians from all of the Sea Services, including basic legal training for Navy, Marine Corps and Coast Guard judge advocates and Legalmen. NJS's mission is to oversee formal training of Sea Service judge advocates and paralegals to ensure their career-long professional development and readiness, to provide comprehensive formal training to all Sea Service judge advocates and other legal personnel in order to promote justice and ensure the delivery of quality legal advice and other services to the commander, to train commanders and senior officers in the practical aspects of military law to enable them to perform their command and staff duties, and to train other personnel to assist in the sound administration of military justice.

In FY13, NJS provided instruction to more than 13,000 students worldwide, including more than 3,000 students in in-resident courses ranging in length from 1 day to 13 weeks.

In addition to teaching NJS courses, NJS instructors taught military justice, administrative law, and operational law to other commands on board Naval Station Newport including the Naval War College, Command Leadership School, Officer Development School, Senior Enlisted Academy, Surface Warfare



Officers School, Officer Candidate School, and Limited Duty/Chief Warrant Officer Indoctrination School.

Academic Programs. NJS has eight "core" courses that include training in military justice:

1. Basic Lawyer Course (BLC). This ten-week course, offered three times annually, provides accession training for all judge advocates in the Navy, Marine Corps, and Coast Guard. The course includes extensive training in military justice and court-martial advocacy, as well as training in legal assistance, administrative law, standards of conduct, and operational law. Teaching methods include lecture, seminar, and practical exercises. Upon graduation, judge advocates are certified per Article 27(b), UCMJ. In FY13, 134 student judge advocates graduated from the BLC.

2. Legalman (LN) Accession Course. This 11-week course, offered twice in FY13, trains Navy enlisted personnel selected for conversion to the LN rating. In addition to military-specific training in military justice, court reporting, administrative investigations, and administrative separations, the LN Accession curriculum also includes four college-level courses taught by NJS officer instructors. These courses are: Ethics, Legal Research and Writing I, Introduction to Law, and Emerging Legal Technologies. Graduates of the LN Accession Course receive ten ABA-approved credits towards a paralegal degree or certificate in partnership with Roger Williams University. In FY13, 45 LNs graduated from the LN Accession Course.

3. Basic Legal Services Specialist Course. This 11-week course, offered three times annually, provides accession-level training to junior enlisted Marines seeking the Military Occupational Specialty of Marine Corps Legal Services Specialist. Curriculum consists of training in military justice, post-trial review, and legal administration. In FY13, 81 enlisted Marines graduated from this course.

4. Legal Services Court Reporter Course. This 13-week course, offered twice annually, provides court reporter training to Legal Services Specialists, grades E-3 to E-7, seeking the Military Occupational Specialty of Marine Corps Legal Services Court Reporter. The curriculum consists of court reporter training in closed-mask capture of legal proceedings at 225 words per minute, court-reporting grammar and punctuation, speech-recognition technology, digital recording software, and

the production of verbatim and summarized courts-martial records of proceedings. In FY13, 13 enlisted Marines graduated from this course.

5. Senior Officer Course in Military Justice and Civil Law (SOC). This three-day course is designed for commanding officers, executive officers, and officers in charge and is open to other officers in grades O-4 and above with NJS approval. The SOC trains officers in the execution of the legal responsibilities of command with instruction in military justice (including sexual assault case disposition), administrative law, and civil law. In FY13, NJS provided 38 offerings of the SOC in Newport, San Diego, Norfolk, Camp Pendleton, Camp Lejeune, Parris Island, Quantico, and Pensacola. Per NAVADMIN 302/12, this course is mandatory for O-6 Navy officers en route to command. In FY13, 1,090 senior officers graduated from the SOC.

6. Legal Officer Course (LOC). This three-week course prepares non-lawyer Legal Officers to perform a host of military law functions in commands not large enough to warrant assignment of a judge advocate. In FY13, NJS provided 17 offerings of the LOC in San Diego and Norfolk. In FY13, 481 officers graduated from the LOC.

7. Legal Clerk Course (LCC). Legal Clerks are typically assigned to assist non-lawyer Legal Officers within a command as a collateral duty. This two-week course provides training in the preparation of legal forms and reports, service record entries, nonjudicial punishment, and court-martial procedures. In FY13, NJS provided 17 offerings of the LCC in San Diego and Norfolk, graduating 369 legal clerks.

8. Senior Enlisted Leadership Course in Military Justice and Civil Law (SELC). This three-day course provides senior enlisted leaders of all services training in a wide range of military law with primary focus on military justice matters. In FY13, NJS provided 10 offerings of the SELC in San Diego and Norfolk, graduating 257 senior enlisted.

Continuing Legal Education. In addition to the "core" courses, NJS provided 21 in-resident specialty courses, many of which are pre-approved for continuing legal education (CLE) credit from state bar associations. Many of these courses focus on military justice. In FY13, these resident courses reached more than 550 legal professionals.

The semi-annual Trial Counsel and Defense Counsel Orientation courses teach Navy and Marine Corps counsel how to

effectively prepare, manage, and try cases from the investigation stage through sentencing, with a particular focus on the practical aspects of defense and prosecution. The Basic Trial Advocacy Course is designed to develop important trial advocacy skills in judge advocates in their first trial billets and in judge advocates transitioning to trial billets from non-trial billets.

NJS also offers specialized instruction focused on sexual assault litigation. Prosecuting Alcohol-Facilitated Sexual Assaults (PAFSA) is a week-long course that has been taught in conjunction with AEQUITAS, the Prosecutor's Resource on Violence Against Women. The course focuses on substantive aspects of prosecuting alcohol-facilitated sexual assaults and includes small-group practical exercises to hone skills such as conducting direct and cross examinations of sexual assault nurse examiners, toxicologists, victims, and the accused. Defending Sexual Assault Cases (DSAC) is a week-long course that provides training on sexual assault litigation for defense counsel. DSAC is taught in conjunction with the Center for American and International Law in Plano, Texas.

NJS also continues to provide Basic and Advanced SJA Courses. The SJA courses incorporate military justice training relevant to SJAs including search and seizure, investigations, charging, preferral, convening courts, referral, the Victim-Witness Assistance Program, Sexual Assault-Initial Disposition Authority (SA-IDA), and post-trial processing.

Legalman Paralegal Education Program (LPEP). Begun in 2010, LPEP is a government-funded education program leading to an Associates of Science degree in Paralegal Studies. The program is mandatory for all LNs in order to meet minimum occupational standards for the LN rating. Following completion of the LN Accession course, students normally complete a semester of in-resident courses with Roger Williams University (RWU) before checking into their first permanent duty station. Upon checking in, they normally participate in distance learning with RWU until completing the degree requirements. In FY13, 57 students attended LPEP as in-resident students, and an additional 158 students were enrolled in the distance learning option.

Online Legal Education. In FY13, NJS entered into a partnership with TJAGLCS to expand the scope and reach of legal education for the Sea Services. Since that time, the Online Legal Education department at NJS has been offering

opportunities via Defense Connect Online (DCO) and the Blackboard learning management system. These systems are accessible 24/7 and offer on-demand training and education as well as points of contact for feedback and instructor interaction. NJS has continued to offer DCO webcasts on emerging legal issues including, most recently, 7 sessions addressing same-sex partner benefits with more than 1,000 participants.

In addition, NJS partnered with TJAGLCS to start offering full courses online via Blackboard. Dubbed "NJS Online," military practitioners now have worldwide access to specialty courses. These courses range from on-demand short courses covering specific topics to multi-week courses on large practice areas such as post-trial processing, ethics, and law of the sea. Instructors deliver training using a variety of online teaching tools, including assigned readings, recorded videos, live interactive sessions using DCO, discussion boards, practical assignments, and knowledge checks. In FY13, NJS Online provided more than 10,000 hours of instruction to more than 2,000 students worldwide.

NJS Online has provided a valuable tool for practitioners around the globe by offering timely and relevant training in a fiscally-constrained environment. For example, this adaptive platform and approach enabled NJS to bring together existing products to produce a training module on Sexual Assault Prevention and Response (SAPR) for judge advocates in less than 12 hours and to deliver the training to judge advocates as effectively and efficiently as possible.

SAPR-JAGC is mandatory JAGC-wide online training to inform attorneys, LNs, and other paralegals about the SAPR Accountability Line of Effort and to ensure a JAGC community baseline of knowledge on recent updates to the SAPR program; Article 120, UCMJ; the Military Rules of Evidence relevant to sexual assault cases; victims' rights and services; and professional responsibility issues in sexual assault cases.

Publications. NJS publishes one edition of the Naval Law Review annually. NJS also publishes a course catalog, the USN/USMC Commander's Quick Reference Handbook for Legal Issues (Quickman), as well as various study guides in support of its academic programs.

Coordination. Through the Interservice Legal Education

Review Committee (ISLERC), Commanding Officer, NJS, the Dean of Students for TJAGLCS, and the Commandant, Air Force Judge Advocate General's School normally meet semi-annually to discuss new initiatives and opportunities for cross-training and to increase cooperation and efficiency in the training of legal personnel within the Department of Defense. Due to fiscal constraints, one meeting in FY13 was held via video teleconference.

## **NAVY ACTIVITIES AND ADDITIONAL INFORMATION**

### **1. Military Justice Litigation Career Track (MJLCT)**

In 2007, to improve the overall quality of Navy court-martial litigation, the JAG Corps established the MJLCT. The MJLCT is a career track for judge advocates with demonstrated military justice knowledge and advocacy skills. The track combines continued courtroom experience, training and education, with oversight by and access to senior, seasoned litigation mentors to help judge advocates develop the skills needed to become preeminent trial lawyers. Military Justice Litigation Qualified (MJLQ) officers are detailed to lead trial and defense departments at each of our nine RLSOs and four DSOs, which provide Navy prosecutors and defense counsel, respectively. These officers provide proven experience in the courtroom, personally conducting, adjudicating, or overseeing litigation in sexual assault and other complex cases.

At the close of FY13, there were 65 Navy MJLCT officers, of which 45 were filling the 53 MJLCT-designated billets. Additional officers are serving in billets at the Office of Military Commissions, on board aircraft carriers, at the Naval Justice School, in the newly-created VLC positions, and attending post-graduate school to obtain Master's of Law degrees in Trial Advocacy. The "billet-fill rate" has held relatively stable for the last two years.

The promotion rate for MJLCT officers continues to be monitored, and the in-zone MJLCT officers were selected for promotion by the FY14 promotion selection boards at a rate comparable to or better than the overall in-zone selection rate. The FY14 O-6, O-5 and O-4 promotion selection boards selected five of the six MJLCT officers in-zone for promotion.

MJLQ recognizes judge advocates with demonstrated abilities in the areas of military justice knowledge and advocacy skills.

SPECIALIST I MJLQ is the entry point for the MJLCT. A judge advocate may be qualified as SPECIALIST I after demonstrating military justice litigation proficiency and MJLCT potential. Candidates will normally be eligible for SPECIALIST I after their fourth year of active duty.

Following SPECIALIST I qualification, a judge advocate may qualify as SPECIALIST II after obtaining sufficient additional qualitative and quantitative military justice litigation experience as well as professional development as a naval officer. Candidates will normally be eligible for SPECIALIST II after their tenth year of active duty.

Following SPECIALIST II qualification, a judge advocate may qualify as EXPERT after obtaining significant additional quantitative and qualitative military justice litigation experience as well as demonstrated leadership of junior judge advocates. For this reason, EXPERT is ordinarily reserved for those judge advocates who have reached the senior-most MJLCT positions. Candidates will normally be eligible for EXPERT after their sixteenth year of active duty.

SPECIALIST II and EXPERT MJLQ are community management tools to guide the detailing, training, and professional development needs of MJLQ judge advocates and ensure the community maintains its ability to execute this core function across the community billet structure. Senior MJLQ judge advocates, in coordination with the Assistant Judge Advocate General (Chief Judge, Department of the Navy), who serves as the MJLCT community sponsor, seek to provide all MJLQ judge advocates with training and duty assignment opportunities that facilitate their professional development within the MJLCT, the JAG Corps, and the Navy.

Military justice litigation proficiency warranting qualification includes significant quantitative and qualitative criminal courtroom litigation experience and demonstrated proficiency in military justice procedure. As judge advocates seek MJLCT advancement, they will be required to demonstrate increased courtroom experience, continued growth in litigation leadership, and familiarity with the broader mission of the Navy. MJLQ judge advocates are encouraged to explore the wide variety of naval experiences that contribute to the development of a broad understanding of the duties of judge advocates, and to seek out detailing to non-litigation billets even after MJLQ. Accordingly, applicants for EXPERT MJLQ should generally have

served at least two years in a non-litigation billet prior to their application for qualification.

## 2. Sexual Assault Initiatives

The Navy has implemented a multi-faceted approach to address sexual assault awareness and training, prevention, victim response, and investigation and accountability. Navy and Marine Corps judge advocates were integral in all levels of sexual assault prevention and response initiatives. Two principal lines of effort were Fleet-wide training and optimizing litigation capability.

When a sexual assault occurs, the DON is dedicated to ensuring the victim receives full-spectrum and timely support to include medical treatment, counseling, and legal assistance. With implementation of a new DoD Inspector General policy in January 2013, NCIS began investigating all reports of sexual assault to include contact offenses. In FY13, Navy continued to implement the Sexual Assault Initial Disposition Authority (SA-IDA) policy, which withholds initial disposition authority for all penetration offenses to the O-6 special court-martial convening authority level. Additionally, the Navy continued to execute the Expedited Transfer policy for victims of sexual assault and implemented the First Flag face-to-face reporting requirement on command climate 30 days following a report of sexual assault.

The Navy hired 66 credentialed SARCs and 66 full-time professional, credentialed VAs. They work with specially-trained NCIS investigators and trial counsel to form the core of our Special Victim Capability. They will also work with VLC to improve and enhance victim care, confidence, and participation in the investigation and adjudication of sexual assault cases.

The Navy is also in the process of hiring 22 Deployed Resiliency Counselors (DRC) to serve on every Aircraft Carrier (CVN) and Big Deck Amphib (LHD). The DRCs will be licensed counselors and will also be fully trained and certified as SARCs. The DRC will provide individual counseling on various 21st Century Sailor initiatives such as stress, suicide prevention and sexual assault. They will liaise with the homeport SARC to ensure continuity of victim care. They will augment the more than 4,000 active-duty command victim advocates.

As discussed in greater detail above, the Navy is in the process of establishing the Congressionally-mandated Special Victim Capability to enhance the investigation and prosecution of special victims' cases and the Navy has implemented its VLC program to provide eligible victims of sexual assault with legal support and representation.

The initiatives above are only a few of many that the Navy undertook in FY13 to address the issue of sexual assault. Other initiatives include the establishment of Fleet SAPR officers, ensuring Sexual Assault Forensic Examination (SAFE) Kits and qualified medical personnel at all Navy Medical Treatment Facilities, and the centralized publication of results of court-martial to increase transparency of the military justice system.

3. Synthetic Drugs. To help detect and prevent the alarming trend of synthetic compound abuse by service members, the Navy continued random urine testing for synthetic compounds, including spice and similar products throughout 2013. In January of 2013, random testing shifted from non-DoD labs to the Armed Forces Medical Examiners System (AFMES) and in December 2013 testing began in the normal drug testing system at Navy Drug Screening Laboratories (NDSLs). For the tests conducted at AFMES, Commanders still could not take disciplinary or adverse administrative action against a service member based solely on a positive urinalysis result; however, based on DoD policy, commanders could use the positive results to initiate an investigation, and the results of the investigation could be used as evidence in disciplinary or adverse administrative actions. There are no limitations on the use of positive test results from current testing at the NDSLs for adverse disciplinary or administrative purposes. The new testing at NDSLs only tests those Spice compounds designated as controlled substances under the Controlled Substances Act. Because Spice usage is not limited to these compounds, prevalence testing, command directed and probable cause testing, and investigative testing requested by Military Criminal Investigative Organizations will continue to be conducted at AFMES.

#### 4. Additional Information

##### a. Compliance With Processing Time Goals

In FY13, no Navy case was dismissed on speedy trial grounds. 15 Navy cases exceeded 120 days from sentencing to convening authority's (CA) action (*Moreno* 1 guideline). Delay in these cases was primarily due to voluminous records of trial as well



as defense requests for extensions in submitting matters in clemency. No Navy cases exceeded 30 days from date of CA's action to docketing at NMCCA (*Moreno* 2 guideline). Neither NMCCA nor CAAF granted relief in any Navy or Marine Corps case for unreasonable post-trial delay. Furthermore, no NMCCA cases exceeded the *Moreno* 3 guideline of 18 months from docketing to decision.

b. Circumstances Surrounding Cases In Which Court-Martial Convictions Were Reversed As A Result Of Unlawful Command Influence (UCI), Or Denial Of The Right To A Speedy Review, Or Otherwise Due To Loss Of Records Of Trial Or Other Administrative Deficiencies

There was one DON appellate case in which a conviction was reversed based on UCI, *U.S. v. Salyer* (72 M.J. 415 (CAAF 2013)). No other cases were reversed due to UCI, denial of the right to a speedy review, or loss of records of trial or other administrative deficiencies.

In *U.S. v. Salyer*, the CAAF held that the appearance of UCI was raised where the government sought, through inappropriate means, disqualification of a military judge (MJ) because it did not agree with his ruling. The Court found that an objective, disinterested observer, fully informed of the facts and circumstances, might well be left with the impression that the prosecution had the power to manipulate which MJ presided in a given case depending on whether the MJ was viewed as favorable or unfavorable to the prosecution's cause based on the government's access to an MJ's personnel file and through access to the MJ's chain of command. The Court further held that the Government did not meet its burden of demonstrating that the case proceeded free from the appearance of unlawful influence. Holding that any remedy short of dismissal with prejudice would effectively validate the government's actions, CAAF reversed NMCCA's decision affirming appellant's conviction and dismissed the finding of guilty and the sentence with prejudice.

c. Cases In Which A Provision Of The UCMJ Was Held Unconstitutional

There was one DON appellate case which held that the now-superseded Article 120 was unconstitutional as applied. In *U.S. v. Oakley* (2013 CCA LEXIS 245 (NMCCA 2013)), the service member was convicted of aggravated sexual assault and indecent acts in violation of UCMJ Article 120. The defense objected that the military judge's instruction to the members rendered Article 120

unconstitutional as applied, and any distinction between the concepts of evidence of consent and the affirmative defense of consent was confusing to the members. Because consent was a defense to all the charged offenses, the error was not harmless beyond a reasonable doubt, and could have contributed to the appellant's convictions. The findings and sentence were set aside, and a rehearing authorized. The instructions to the court members resulted in an unconstitutional burden shift as to the issue of consent, which could have been prejudicial.

d. Developments In Appellate Case Law Relating To  
Courts-Martial Involving Allegations Of Sexual Misconduct

CAAF

In *U.S. v. Brown*, No. 13-0244/NA, CAAF found the military judge properly allowed a non-coaching victim advocate to sit next to a testifying minor victim of sexual abuse.

In *U.S. v. Castellano*, No. 12-0684/MC, CAAF found that when sodomy is charged under the UCMJ, "statute saving" factors of *Lawrence v. Texas* and *United States v. Marcum* must be found, beyond a reasonable doubt, by the trier of fact – not the military judge – in order to have a legally supportable conviction.

In *U.S. v. Solomon*, No. 13-0025/MC, CAAF set aside an abusive sexual contact conviction after finding that the military judge erred admitting prior sexual misconduct evidence without balancing, and instructing the members on, the alibi evidence and acquittal for that prior misconduct.

In *U.S. v. Wilkins*, No. 11-0486/NA, CAAF, interpreting the now-superseded version of Article 120, found that the appellant was properly convicted of abusive sexual contact as a lesser included offense of aggravated sexual assault, where the appellant suffered no prejudice and did not challenge the charge at trial. (The definition of "sexual act" has been amended in the most recent revision to Article 120 to include penetration of the "vulva or anus or mouth").

In *U.S. v. Medina* (72 M.J. 148) CAAF held that the accused's guilty plea to consensual sodomy was improvident because the military judge did not ensure that the accused understood the reasons why his sexual activity was not afforded protection under *Lawrence v. Texas* and *U.S. v. Marcum*.

## NMCCA

In *U.S. v. Schaleger*, the military judge ruled that the maximum punishment authorized for two specifications of sexual assault under the recently amended Articles 120(b)(2) and 120(b)(3)(A) was limited to the jurisdictional maximum of a summary court-martial. NMCCA overturned the ruling in *U.S. v. Booker*, NMCCA 201300325. Article 120 did not specify the maximum punishment for the offenses, but authorized punishment "as a court-martial may direct." Prior to 15 May 2013, the Manual for Courts-Martial (MCM) had not been amended to establish the maximum punishment for sexual assault. On that date, the *Schaleger* issue was mooted when the executive order revising the MCM was signed.

### e. Issues Associated With Implementing Recent, Legislatively Directed Changes To The UCMJ Or The Manual For Courts-Martial

Sec. 541 of the FY12 NDAA made significant changes to Article 120 UCMJ (Rape and Sexual Assault), and added Article 120(b) (Rape and sexual assault of a child) and Article 120(c) (Other sexual misconduct). While the effective date of these offenses was June 28, 2012, there was no prescribed maximum punishment for them until May 15, 2013 when the President signed Executive Order (EO) 13643. The eleven-month period left trial counsel opining on the maximum punishment for sexual assaults, and trial counsel had to oppose defense arguments that the maximum punishment for these offenses was the statutory maximum for a summary court-martial (30 days confinement and no punitive discharge). While the summary court-martial argument was generally dismissed by most trial courts, it did reach the appellate courts on at least one occasion (*U.S. v. Booker*, NMCCA 201300325). Two EOs are still pending approval and signature including the Part IV MCM guidance for Article 120.

### f. Measures Implemented By Each Armed Force To Ensure The Ability Of Judge Advocates To Competently Participate As Trial And Defense Counsel In, And Preside As Military Judges Over, Capital Cases, National Security Cases, Sexual Assault Cases, And Proceedings Of Military Commissions

## Diversity of Skills

Our MJLCT career litigation attorneys rotate between prosecution, defense and judicial assignments. Many MJLQ officers also serve as military and appellate judges, giving

them a unique perspective on how to formulate and articulate well-reasoned arguments when advising junior litigators. Likewise, having served as both trial and defense attorneys, our career litigators have a better understanding of the strengths and weaknesses of their cases. They are also detailed to other assignments, such as operational and staff judge advocate billets, to round out their experience in the fleet. As a result, our litigators understand the importance of each role in our military justice system - insight which serves our community well as these attorneys move into senior litigation positions and provide training and mentorship to junior officers.

MJLCT officers have reached the highest levels of leadership within the JAG Corps, to include positions as commanding officers, division directors, and one of our Assistant Judge Advocates General. MJLCT officers are heavily involved in the daily prosecution, defense and judgment of cases throughout the Service, and are serving at the Office of Military Commissions and as VLC as well. These officers continue to be detailed into repeated tours of litigation-intensive billets that will improve the effectiveness and efficiency of the court-martial process. Several of our MJLCT officers have tried more than 100 contested members cases, several more have tried more than 50 contested trials, and half of the community has tried at least 20 contested cases. The experience is drawn from work as prosecutors, defense counsel and trial judges, and some MJLCT officers have extensive contested case experience in all three areas of practice - prosecution, defense, and the judiciary. Some also have extensive appellate experience.

Almost a third of the MJLCT community has experience in areas of capital litigation, national security cases, and military commissions, and nearly every MJLCT officer has experience in litigating sexual assault cases. Each area of practice - prosecution, defense, and bench - currently has MJLCT members who have extensive experience in sexual assault, capital, classified, and commissions cases, and every practice area has ready access to these experts for support if the need arises.

#### Training and Education

Additionally, NJS provides judge advocates with tiered military justice training taught by active component judge advocates and supplemented by reserve judge advocates employed as local, state, and federal prosecutors. Training is

centrally-managed under the oversight of a Litigation Training Coordination Council comprised of two Assistant Judge Advocates General, military justice experts from the prosecution and defense, policy advisors, instructors, and senior judges. Course requirements are established by a board of advisors from the Navy, Marine Corps, and Coast Guard who have extensive experience in litigation and training.

In addition to basic and intermediate level trial advocacy courses, NJS, the Office of the Judge Advocate General's Criminal Law Division (Code 20), TCAP and DCAP coordinate specialized training for Navy trial and defense counsel on litigating complex sexual assault crimes, using resources such as the National District Attorneys Association (NDAA); the National Institute of Justice (NIJ), a Department of Justice (DOJ) agency established to help foster science-based criminal justice practice; AEquitas, the Prosecutor's Resource on Violence Against Women, a DOJ-funded resource created to provide prosecutors with support, training, mentorship, and resources to improve the quality of justice in sexual violence cases; the Center for American and International Law; and, the National Criminal Defense College.

Every year the JAG Corps sends mid-level career litigators to civilian post-graduate schools to earn a Master of Laws (LL.M.) in litigation or trial advocacy. Of the 65 career litigators in the MJLCT at the end of FY13, half have earned an LL.M. in trial advocacy.

OJAG's National Security Litigation Division (Code 30) provides blocks of instruction on National Security cases for the NJS Advanced Litigation Course, which also serves as plug-and-play blocks for additional courses. Code 30 is in the process of clarifying the effect of changes to Military Rule of Evidence 505 in the latest Executive Order, and Code 30 personnel served as moderator and a panelist for the National Security Case panel at the Army Intelligence Law Course at the U.S. Army Judge Advocate General's Legal Center and School. As a result of this participation, Code 30 was invited to further coordinate with Army G2 legal, U.S. Army Intelligence & Security Command, and the Office of the Under Secretary of Defense for Intelligence to create a joint National Security Litigation course. This effort is still in the planning stages but has been endorsed by the DoD General Counsel for Intelligence. Code 30 advised on 34 individual national security cases, provided ongoing advice and assistance to the Army trial team in the Bradley Manning court-martial, and continued to provide ad hoc

training and advice to staff judge advocates, trial counsel, and defense counsel working through cases that involve classified information. Code 30 continues to publish and update the only National Security Case primer in DoD, and maintains close contacts with Department of Justice National Security Division to facilitate cooperation between the Departments in all cases.

### Trial Counsel

Senior Trial Counsel (typically O-4 or above) are the nucleus of the Navy's SVC and are prepared to prosecute other complex cases including capital and national security cases. They are hand-selected by the Judge Advocate General to fill one of nine Senior Trial Counsel billets. All Senior Trial Counsel are military justice litigation qualified (MJLQ). Upon reporting, all Senior Trial Counsel complete a two week special victims investigation course and participate in additional specialized training including: litigating complex cases, prosecuting alcohol facilitated sexual assaults, TCAP targeted mobile training, and monthly online special victims offense or litigation training. All Senior Trial Counsel regularly provide information to TCAP on all pending felony level investigations and prosecutions. Additionally, uniformed members of TCAP may also be detailed to cases as necessary.

Sexual assault cases are typically detailed to "core attorneys" assigned to each RLSO. A RLSO core attorney is a judge advocate (O-3 or above) who has completed at least one full two-year tour as a First Tour Judge Advocate (FTJA) prior to assuming the duties of a prosecutor. All trial counsel are supervised by a Senior Trial Counsel, an Executive Officer (O-5 judge advocate), and a Commanding Officer (O-6 judge advocate) and have access to 24/7 support from TCAP.

Trial counsel receive military commission training from the Office of the Military Commissions once assigned to that office.

### Defense Counsel

In addition to basic judge advocate training received by trial counsel as well, Navy defense counsel receive Basic Trial Advocacy training and attend Defense Counsel Orientation prior to or shortly after arriving at a DSO to serve as a core defense counsel. The JAG Corps also funds several Defense Counsel to attend Defending Sexual Assault Cases, a weeklong course held once a year, with the intent for all defense counsel to attend early in their tour. Defending Sexual Assault Cases is a course

designed to deal with the legal issues and complexities involved in a sexual assault case and includes practical exercises along with lectures. Among the faculty are renowned evidence professors, experienced civilian defense attorneys, and expert witnesses. The course allows for fulsome discussion of issues that pervade the average sexual assault case and includes practical exercises focusing on the facts of an actual trial. Students are given extensive access to experienced practitioners and expert witnesses and frequently use this time to consult with other attorneys on themes and issues with their current cases. Defense counsel will attend this course within their first year of reporting. Defense counsel also may attend training in intermediate trial advocacy and litigating complex cases.

Additionally, DCAP sends Defense Mobile Training Teams (DMTTs) to each DSO at least twice yearly to work closely with the command and individual counsel, with a focus on practical issues in defense work and trial advocacy based on current or recent case scenarios.

Finally, resources permitting, Navy defense counsel have access to relevant legal seminars aimed at the criminal defense attorney. One such seminar is the week long "Zealous Advocacy in Sexual Assault and Child Victims Cases." Last year the Navy sent three defense counsel to this course. Capital Litigation training is provided by the National Legal Aid and Defender Association, which provides week long seminars on litigation and mitigation. Last year, the Navy sent one defense counsel to this course.

Sexual assault cases are typically detailed to "core attorneys" assigned to a Defense Service Office (DSO). A DSO core attorney is a judge advocate (O-3 or above), certified to practice by the Judge Advocate General in accordance with Article 27b, UCMJ, and a member in good standing with a state bar, that have completed at least one full tour prior to assuming the duties of a defense counsel. Detailing of counsel is within the discretion of the DSO Commanding Officer (O-6 judge advocate), who takes into consideration such matters as competence, experience and training, existing caseload, and availability of counsel, as well as case specifics and opportunities for training of counsel. A Commanding Officer may detail a second, more experienced counsel to a particular case in part to provide the opportunity for practical mentoring. Additionally, uniformed members of DCAP may also be detailed to cases.

Defense counsel receive military commission training from the Office of the Military Commissions once assigned to that office.

### Military Judges

The required courses for a trial judge's judicial education begin with the three-week Military Judge Course, provided by the TJAGLCS. This course provides the foundation and requirements for being certified as a military trial judge by the JAG and also the foundation that will enable a judge to begin duty on the bench. The course covers court-martial process, evidence, procedure, constitutional rights, judicial problem solving and judicial methodology. It includes demonstrations and practical exercises. Appellate judges attend the same school for certification as a trial military judge.

In prior years, all trial judges attended the Joint Military Judges' Annual Training (JMJAT). The 2013 course was postponed indefinitely due to the impact of sequestration and the continuing resolution. On odd years the training is held at the Air Force JAG School and on even years it is hosted by the NMCTJ in conjunction with the National Judicial College at Reno Nevada. JMJAT is the venue for continuing baseline education and training for all trial judges, and it is vehicle for discussing current topics of judicial training interest, such as the new Article 120, the impact of command influence in sexual assault cases, advanced evidence, sentencing methodology, and judicial ethics.

The NMCCA instituted a two-day, in-house annual training course three years ago to provide a venue for continuing education for active and Reserve appellate judges. The course serves as training for newly assigned judges and a refresher for experienced judges. The course focuses on court processes, opinion writing, ethics, appellate burdens of proof and persuasion, and advanced evidence. The FY12 course focused on advanced evidence and judicial methodology. The FY13 course included a specific block of instruction and discussion on the evolution of Article 120. Appellate judges also attend the annual Fulton Appellate Judges conference, which is an inter-service, one-day event (the host rotates from service to service). The content focuses on both appellate judicial topics, and more broad issues of current interest in law and policy." Additional training through the New Appellate Judges Seminar hosted by New York University School of Law and the



Appellate Judges Education Institute hosted by Southern Methodist University School of Law are also available for NMCCA judges when funding permits, but it is not required for appellate judges.

The required continuing legal education (CLE) for trial judges, progresses each year with two courses per year, for the next three years. The NMCTJ judges use and attend the National Judicial College (NJC) because the NJC is the only fully-accredited University that presents an average of 30 to 40 judicially-oriented courses annually. These courses serve to broaden judicial experiences by exposing judges to judicial perspective from around the country which permit trial judges to explore the varying and complex dynamics of our justice system. This education is designed to enable judges to practice at a higher level than that provided by the basic judge education provided by the US Army. This training has and will continue to decrease the judge-induced error rate across the NMCTJ. The NJC's courses cover a multitude of current judicial topics ranging from judicial writing and advanced evidence, to handling capital cases and general jurisdiction. This CLE requirement is not imposed on the appellate judiciary, because members of the appellate court include judges who previously served as trial judges subject to this requirement, and because appellate review generally is bound by what has been presented in a record of trial rather than based in the independent training that is intended to assist trial judges in creating the records of trial that will later be reviewed on appeal.

In FY13, the Chief Judge of the NMCTJ arranged for development of a series of webinar sessions by the NJC for all trial and appellate judges, active and Reserve, covering topics encountered in sexual assault trials. The content includes the Military Rules of Evidence and Federal Rules of evidence governing the "rape shield law," MRE/FRE 412, as well as the rules governing the admissibility of prior sex offenses in sex offense trials - MRE/FREs 413 and 414, including the policy, cases, methods of proof, and foundational requirements. The courses also include common legal issues encountered by judges in trials involving sexual assault-type offenses; and, expert assistants and expert witnesses for the prosecution and defense, including the foundational requirements to obtain expert assistance, the different types of experts typically seen in sexual assault cases and the main issues that come with those experts, the foundational evidentiary requirements for expert testimony, including how the legal requirements for such evidence plays into the facts the proponent of the expert

desires the expert to discuss, and the use of experts in sexual assault cases to explain the effects of trauma on alleged victims.

Military judges receive specialized training in capital litigation, national security cases, sexual assault cases, and military commissions, some "just in time," and others as part of a CLE program. Legal education in areas encountered while litigating sexual assault cases is part of the initial pipeline training for every judge, and is picked up in various CLE programs after the initial training, both at the trial and the appellate level. Capital litigation courses for judges are available via the National Judicial College, and specialized training in classified information cases is available to judges just as it is for litigants. The judiciary currently holds a handful of practitioners who have tried classified information and national security cases, as well as officers with extensive experience in military commissions.

g. The Independent Views Of The Judge Advocates General And The Staff Judge Advocate To The Commandant Of The Marine Corps On The Sufficiency Of Resources Available Within Their Respective Armed Forces, Including Manpower, Funding, Training, And Officer And Enlisted Grade Structure, To Capably Perform Military Justice Functions

As of the date this report was submitted, the Navy judge advocate and enlisted communities were adequately resourced. However, budget reductions continue to cause challenges in funding training. In particular, a 30% reduction in the Navy's Centrally Managed Training Funding budget over the last two years has diminished training opportunities. Additionally, emerging requirements may affect this assessment. For example, during FY13, the new VLC program required an initial contingent of 30 Navy judge advocates. The Navy provided additional billets to meet VLC requirements and Reserve support was critical to initial program implementation; but the need for experienced counsel to immediately fill VLC program and supervisory billets nevertheless taxed the JAG Corps manpower. The adequacy of resources over the mid- and long-term is largely dependent on current or pending legislation that could place additional significant demands on judge advocate resources. For example, one proposal would create parallel systems of adjudication within the Services. The JAG will work with the Navy to ensure that the JAG Corps is adequately resourced to meet these challenges.

## CONCLUSION

Military justice remained a principal focus of effort for the Navy in FY13. The aforementioned initiatives, particularly the NLSC reorganization, the establishment of SVC capability and the VLC program, the emphasis on training, and the development of common case-tracking systems, will optimize the Navy's military justice capabilities. We are committed to ensuring that our military justice system remains fair, effective and efficient. With significant developments on the horizon – including eliminating sexual assault in our ranks, addressing the problem of synthetic drug use, and developing case management and tracking systems – continued careful self-reflection and meaningful critique will remain priorities in FY14.

Nanette M. DeRenzi,  
Vice Admiral JAGC, USN  
The Judge Advocate General

## **MARINE CORPS ACTIVITIES**

### **STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS**

6 March 2014

In Fiscal Year 2013 (FY13), the Marine Corps legal community continued to face significant challenges in the military justice arena. Changes to the Uniform Code of Military Justice, combined with an increasing number of complex and contested cases, validated the 2012 restructuring of the Marine Corps legal community, which ensured that we were well-placed to confront the new military justice landscape. As the first full year of the Commandant-directed restructuring, FY13 saw the Marine Corps reap the benefits of the superior model for the provision of legal services to the Marine Corps.

In FY13, the Marine Corps legal community achieved another significant milestone with the passage of the FY13 National Defense Authorization Act (NDAA). For the first time, the statutory role of the Staff Judge Advocate to the Commandant of the Marine Corps was expanded beyond serving as a legal advisor to the Commandant. The Marine Corps now has a single officer responsible to the Commandant for the supervision of the uniformed Marine Corps legal community, further elevating our military justice practice.

In order to reinforce the successes of the last few years in improving our military justice practice, the Marine Corps needs to continually evaluate the training and assignment of judge advocates, as well as the number of billets available to support the military justice mission. Not only has the military justice practice increased in complexity, but the required number of well-trained and experienced judge advocates has increased. To continue the current high quality military justice support provided to commanders, Marines, Sailors, and victims, we must ensure that we are incentivizing our best judge advocates to remain on active duty. Likewise, we must explore realigning personnel and resources from specialized mission sets that do not require uniformed judge advocates to face the growing military justice mission.

Nevertheless, our work is not done. The Marine Corps legal community will continue to take the steps necessary to adapt to evolving requirements and to improve how we support our commanders and Marines in a fair and efficient military justice system.

Vaughn. A. ARY  
Major General, USMC  
Staff Judge Advocate  
to the Commandant

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## I. Introduction

Fiscal Year 2013 (FY13) marked a significant milestone for the Marine Corps legal community. The Secretary of the Navy initiated a number of reforms and in January 2013, the President signed the FY13 National Defense Authorization Act (NDAA) into law, expanding the statutory role of the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) beyond serving as a legal advisor to the Commandant of the Marine Corps (CMC).<sup>2</sup> The Marine Corps now has a Service-level legal billet with the statutory responsibility to supervise the entire Marine legal community. These new responsibilities will ensure stability, professionalism, and consistency in the provision of legal support, and especially military justice, throughout the Marine Corps.

The FY13 NDAA gave the SJA to CMC the authority to supervise the administration of military justice under Article 6 of the Uniform Code of Military Justice (UCMJ). During the year, the SJA to CMC conducted a robust inspection program, visiting three of the four Legal Services Support Sections (LSSS) with a team of inspectors to assess the efficiency and effectiveness of military justice services.

FY13 was also the first full operating year of the CMC-directed restructuring of the Marine Corps legal community. The restructuring centralized the provision of legal services, particularly military justice services, into four regional Legal Services Support Sections (LSSSs) to enable greater supervision, efficiencies, and individual proficiency. The regional LSSSs have the flexibility and capability to better address complex legal cases and ensure that the right judge advocate is assigned to the right case at the right time. The LSSSs made full use of the FY13 inventory of approximately 565 Marine Corps judge advocates to significantly improve the ability of the Marine Corps to provide consistent, high-quality legal services across the Marine Corps. However, continuing shortages in experienced, field grade judge advocates have placed a premium on our military justice supervisors and threaten the long-term success of the restructuring.

Another key development in the Marine Corps legal community during FY13 was the expansion of the Case Management System (CMS) to incorporate the Navy, creating a Department-wide case

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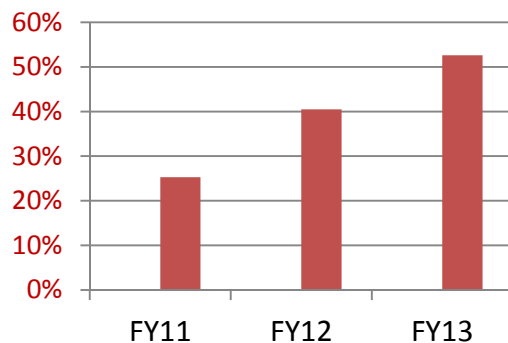
<sup>2</sup> The FY13 NDAA amended 10 U.S.C. §§ 806, 1044, 5041, and 5046.

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tracking system in compliance with a Congressional mandate.<sup>3</sup> CMS enables the Department to track cases in both Naval Services from "cradle to grave," giving the Judge Advocate General of the Navy and the SJA to CMC visibility on all cases within the Department's military justice system.

Through better organization, oversight, and case management technology, the Marine Corps legal community continues to elevate the practice of law, ensuring a consistently fair and efficient system of justice. While much has been accomplished, our work is not done. To further strengthen the institutional changes the Marine Corps legal community has made during FY13, the Marine Corps needs to adjust its incentives to retain field grade judge advocates, grow future field grade judge advocates, and better realign its legal resources to meet a changing and growing military justice mission.

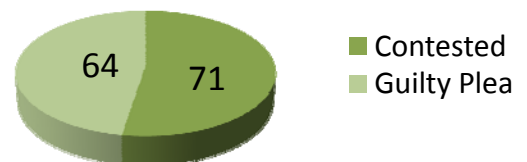
### II. Military Justice By the Numbers - Trends & Analysis



**Figure A. Percentage GCMs Contested FY11 - FY13**

During FY13, the Marine Corps continued to see a steady climb in the number of complex and contested cases.<sup>4</sup> Marine Corps judge advocates litigated 135 general courts-martial and 292 special courts-martial to completion. The total number of our most complex cases, general courts-martial, increased by over 11 percent compared to FY12, a significant growth in workload for military justice practitioners.

Compounding the increase in the number of complex cases was the fact that almost 48% of all general and special courts-martial were contested, and over 52% of general



**Figure B. FY 13 Contested GCMs**

<sup>3</sup> In Senate Report 112-26, which accompanied the FY12 NDAA, the Senate Armed Services Committee ordered the development of a single case tracking system within the Department of the Navy no later than 1 July 2013.

<sup>4</sup> For the purposes of this report, a FY13 "case" is an adjudicated general or special court-martial where the findings, in cases with an acquittal, or the original sentencing date, in cases with a conviction, occurred within FY 13.





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courts-martial were contested. This reflects a significant increase over FY12, where approximately 35% of all general and special courts-martial were contested (see Figure A and Figure B).



**Figure C. Contested Sexual Assault Prosecutions FY12 & FY13**

The strongest representation of these trends has been in the area of sexual assault litigation. Between FY12 and FY13, the number of sexual assault prosecutions doubled, while the number of contested sexual assault prosecutions increased by over 160% (see Figure C).

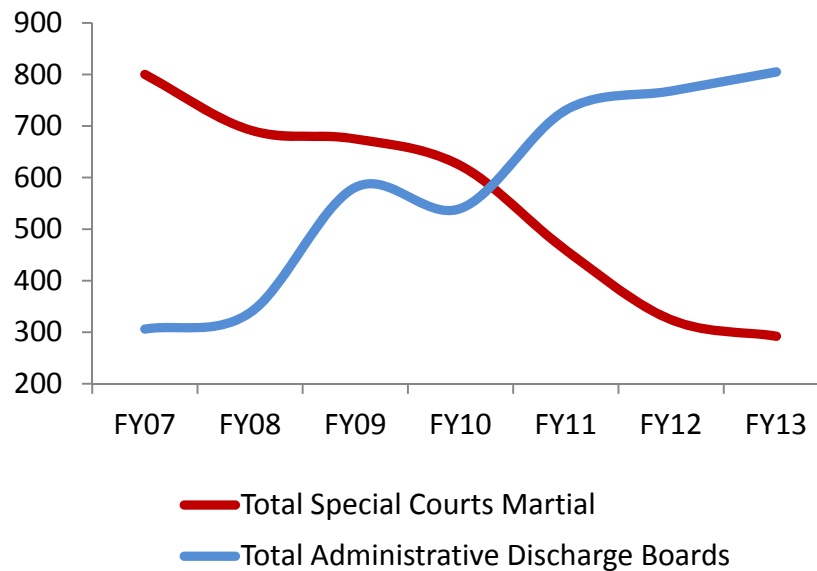
Over the past few years, the Marine Corps has seen an increase in the demand for experienced military justice practitioners and the

supervisors necessary to oversee these complex cases and ensure that individual cases continue to move through the system.

On the other hand, there continues to be a decrease in the number of special courts-martial. However, this decrease is misleading as the corresponding increase in administrative discharge boards more than makes up for the reduced special court-martial caseload. The number of administrative discharge boards supported by LSSSs has increased from 306 in FY08 to 805 in FY13, an increase of 163 percent (see Figure D). While many special courts-martial are uncontested, all administrative discharge boards are contested in some fashion. The result is a cumulative increase in workload for defense counsel and those trial counsel performing duties as a recorder.



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**Figure D. SPCMs and Admin Discharge Boards FY07 - FY13**

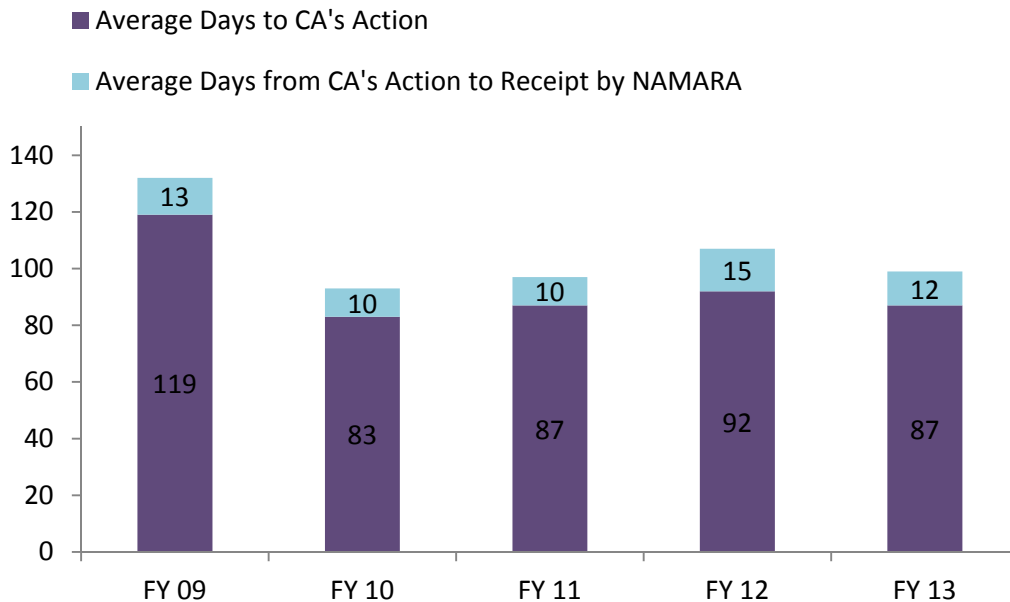
The steadily increasing number of cases resolved through administrative discharge boards and other non-judicial methods reflects the trend that commanders are seeking other means of handling misconduct, especially misdemeanor-level misconduct such as drug use and minor military offenses. Nevertheless, disposition of offenses through means other than special or general courts-martial requires case-work by military justice personnel, client representation by defense personnel, and military justice expertise and advice by staff judge advocates.

**III. Post-Trial Review and Appellate Decisions**

Through a combination of CMS and the professionalism of our judge advocates and legal services specialists, the Marine Corps has continued its excellent rate of compliance with post-trial processing time goals. During FY13, the Marine Corps also maintained an outstanding record during appellate review, having no convictions reversed as a result of a denial of the right to a speedy trial review or otherwise remitted due to loss of records of trial or other administrative deficiencies. However, one conviction was reversed as a result of unlawful command influence (UCI).



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**Figure E. Marine Corps Post-Trial Processing Times FY09 - FY13**

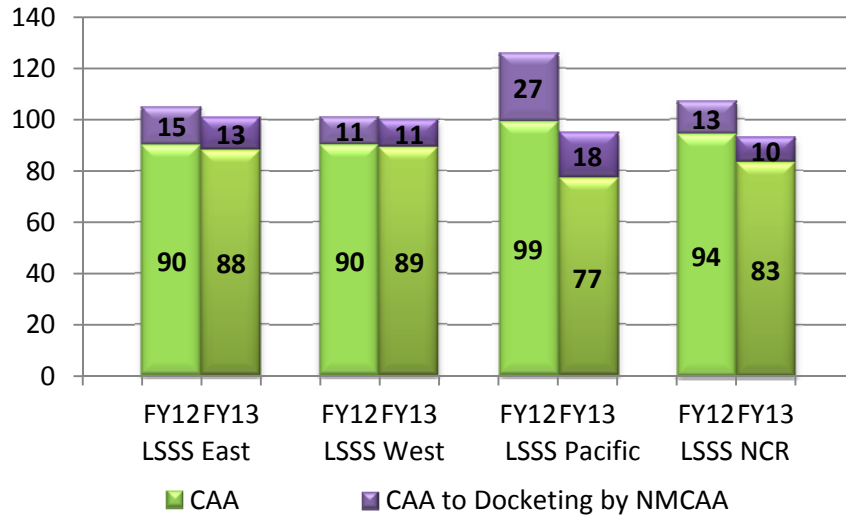
**A. Processing Time Goals**

In FY13, over 1000 general, special, and summary courts-martial warranted some form of post-trial review. *United States v. Moreno* sets standards for speedy post-trial processing of special and general courts-martial, requiring justification of post-trial processing that exceeds 120 days from the completion of trial to convening authority's action (CAA), or exceeds 30 days from CAA to docketing of the case with the Court of Criminal Appeals. In FY13, the Marine Corps averaged 87 days from the date of trial to CAA and 12 days from CAA to docketing of the case with the Navy-Marine Corps Court of Criminal Appeals (NAMARA) (see Figure E).

One area of significant improvement in post-trial processing continues to be court-reporter transcription times. Since many more cases are contested, and also more complex, there has been a significant rise in the average in-court hours spent on each case. Despite this growth, the average transcription time has decreased from 29 days to 27 days. The continuing decrease in transcription times, in the face of the increasing length and complexity of cases, reflects the significant improvements in training and equipment of Marine court reporters.



As indicated in Figure F, every LSSS in the Marine Corps, on average, not only met the Moreno requirements in FY13, but also improved upon their averages from the prior year. Despite increasing numbers of hours spent on the record, the vigilance of military justice supervisors at all levels, combined with additional oversight by Judge Advocate Division, has resulted in our improved post-trial processing times.



**Figure F. Post-Trial Processing Averages, in Days, By LSSS, FY12 - FY13**

*B. Reversal of Convictions for Denial of Speedy Post Trial Review, UCI, or other Administrative Deficiencies*

In FY13, the Marine Corps had no convictions reversed for a violation of the right to speedy post-trial review or for administrative deficiencies, a result of better oversight and tracking of cases. The Marine Corps did have one conviction reversed as a result of apparent UCI. Article 37 of the UCMJ prohibits those persons subject to the UCMJ from attempting to coerce or influence court-martial actions through unauthorized means. In FY13, the Court of Appeals for the Armed Forces (CAAF) set aside the findings and sentence in one general court-martial due to apparent UCI: *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013).

In *Salyer*, originally tried in 2011, a general court-martial convicted the accused, contrary to his pleas, of wrongful possession of child pornography in violation of Article 134, UCMJ, and sentenced him to confinement for two years,



## U.S. MARINE CORPS ANNUAL MILITARY JUSTICE REPORT FOR FISCAL YEAR 2013

forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. Early on in the case, one of the trial counsel suspected that the military judge originally detailed to the case had a personal bias that affected one of his rulings. In order to confirm the suspected bias, the trial counsel's superior, the military justice officer, accessed the military judge's personnel records. In addition, the officer-in-charge (OIC) of the law center handling the case telephoned the military judge's supervisor to apprise him of the pending challenge to the military judge. In that call, the OIC conveyed his dissatisfaction with one of the military judge's rulings. The military judge ultimately recused himself from the case. Upon review, CAAF held that, among other actions, accessing the military judge's personnel file and calling the military judge's supervisor amounted to apparent UCI and dismissed the findings and sentence with prejudice.

### IV. Complex Trial Practice

During FY13, the Marine Corps has taken great strides to ensure that judge advocates competently participate as trial and defense counsel in complex cases, including capital cases, national security cases, sexual assault cases, and military commissions. In 2012, the CMC directed a comprehensive restructuring of the Marine Corps legal community to provide for better supervision of the legal services mission. The legal restructuring, along with the 2011 establishment of the Defense Services Organization (DSO), the hiring of civilian Highly Qualified Experts (HQEs), the higher standards for detailing counsel to cases, and better training and advice from the Trial and Defense Counsel Assistance Programs has enabled the Marine Corps to put highly qualified, experienced counsel on complex cases. Nevertheless, the growing need for experienced military justice supervisors, coupled with the loss of field grade judge advocates, continues to present obstacles for the Marine Corps legal community.

#### A. Legal Restructuring & the DSO

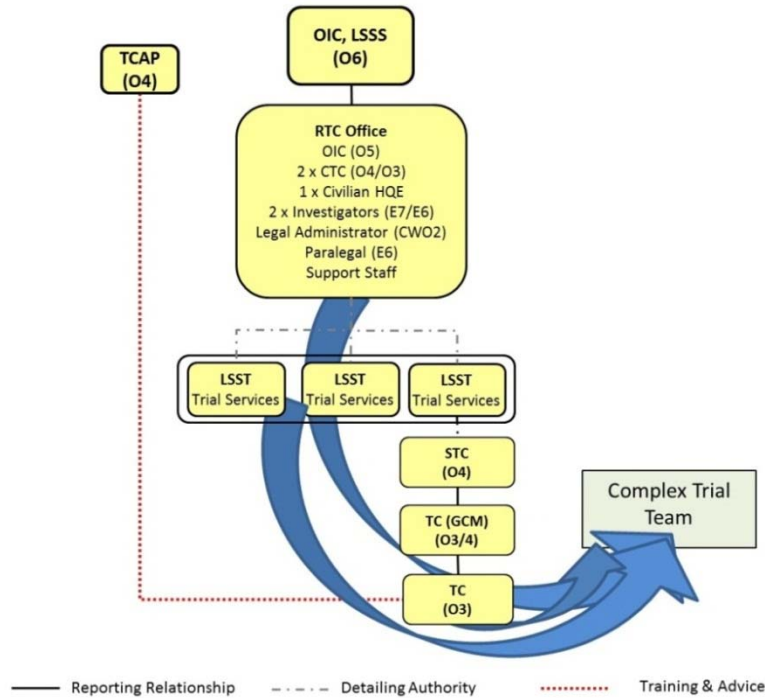
The restructuring of the Marine Corps legal community regionalized the delivery of the provision of legal services to ensure consistent, high quality support throughout the Marine Corps. It created four regional LSSSs and nine subordinate LSSTs. A colonel judge advocate is in charge of each regional LSSS. To lead each region's military justice effort, the restructuring created a regional trial counsel (RTC) billet,



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responsible to the LSSS Officer-in-Charge, that is filled with a lieutenant colonel judge advocate who has significant litigation experience, advanced education, and demonstrated ability to lead and mentor.

The RTC Office includes a number of trial support assets that allow the RTC to efficiently and effectively supervise the military justice mission and to form Complex Trial Teams (CTT), as required. Each RTC Office includes experienced complex trial counsel, a civilian HQE, military investigators, a legal administrator, a paralegal, and support staff. HQEs are civilian prosecutors with decades of criminal justice experience who provide



**Figure G. Military Justice Organization within LSSS**

consultation, case assessments, and training for Marine Corps trial counsel throughout the region.

As the officer primarily responsible for the military justice mission, the RTC has the authority to task-organize CTTs from any combination of trial services personnel within the region, thereby greatly increasing the experience and knowledge available for prosecuting complex cases. With an expert staff and regional detailing authority, the RTC can tailor a CTT to meet the needs of a particular case anywhere in the region, no matter how complex (see Figure G). This ability to rapidly task-organize a CTT also satisfies the FY13 NDAA requirements that each Service establish special victim capabilities (SVC) that include specially trained and selected investigators from NCIS, judge advocates, victim witness assistance personnel, and administrative paralegal support.

The Marine Corps DSO, established in 2011, foreshadowed the regional restructuring of trial services. The DSO is led by a



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colonel judge advocate, with an experienced lieutenant colonel regional defense counsel (RDC) for each region. The DSO is capable of task organization and resource sharing, similar to the RTC's abilities within his region. The organization of the DSO ensures high quality representation by defense counsel throughout the Marine Corps, including on complex cases.

The legal restructuring greatly increases the experience, training, and expertise available for prosecuting all cases. Along with the DSO, this new construct provides for better sharing of resources throughout the legal community and ensures that only the best-suited counsel handle cases, including complex ones, such as sexual assaults.

### *B. Detailing Counsel*

In July 2013, the Marine Corps updated the policy for detailing counsel in order to provide objective criteria to inform detailing decisions. Further, the Marine Corps developed new minimum qualifications for detailing counsel to special victim cases, including capital cases, national security cases, and sexual assault cases. The new standards assist the RTCs and RDCs in detailing the right counsel to the right cases.

Marine Administrative Message 336/13, "Detailing of Trial Counsel, Defense Counsel, and Article 32, UCMJ, Investigating Officers," updates and refines detailing standards to make sure that judge advocates who are detailed as trial counsel, defense counsel, and investigating officers under Article 32, UCMJ, possess the appropriate expertise to perform their duties. Detailing authorities must consider a number of factors when detailing counsel or investigating officers, including trial experience, education, training, and the individual characteristics of the case. Additionally, to ensure the highest quality prosecution, trial counsel prosecuting sexual assault cases must now consult the civilian HQEs resident in RTC offices.

For special victim cases, the Marine Corps developed new qualification criteria and detailing guidance. Prior to serving as a trial counsel on any special victim case, judge advocates must be certified in writing as "Special Victim Qualified Trial Counsel." This requires achieving specific training and performance milestones, including certification as a General Court-Martial Qualified Trial Counsel, experience as an assistant trial counsel in a contested court-martial involving a



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special victim, completion of an intermediate level trial advocacy training course for the prosecution of special victim cases, and demonstration to both the RTC and LSSS OIC that the counsel is prepared to try special victim cases.

These minimum qualification standards ensure that the trial counsel has the basic competence to try the case. Nevertheless, for this qualification system, as well as the regional supervisory model of the 2012 restructuring to operate as designed, these basically qualified trial counsel must have appropriate field grade supervision.

### *C. Training and Advice*

The Marine Corps continues to provide counsel with training and trial advice beyond the mentorship and on-the-job training offered by the RTC and other experienced judge advocates within the LSSS. Leading this training and advice effort are our HQEs. In FY13, the Marine Corps hired three HQEs, regionally located, to assist in the prosecution and defense of all complex cases, including sexual assaults. The HQEs are seasoned civilian prosecutors with significant experience in complex criminal litigation, to include successful trial-level work in sexual assault cases. Their primary job is to train counsel to prosecute and defend sexual assault cases by providing perspective, sharing best practices, and assisting with case preparation. Trial counsel are required to consult with their regional HQE within ten days of being detailed to any sexual assault case. Due to the success of the program, and the growing military justice requirements, the Marine Corps is working on plans to hire additional HQEs.

Additionally, the Marine Corps Trial Counsel Assistance Program (TCAP) and Defense Counsel Assistance Program (DCAP) provide training and advice by serving as centralized resources and helping to spread best practices from one region to another. TCAP and DCAP maintain restricted membership SharePoint sites, answer calls and e-mails for assistance, and provide information and advice regarding new legal developments, including updates to statutes and regulations. TCAP and DCAP also host training events that include lectures and practical exercises designed to develop and hone skill sets for counsel who handle complex cases.

In FY13, TCAP offered two week-long courses focused on the prosecution of sexual assault cases, attendance at which meets





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the training requirement to be awarded the qualification to prosecute special victim cases. The TCAP courses included training in building case theory, charging under Article 120, UCMJ, general trial advocacy skills, use of expert witnesses, victim support, and prosecutorial ethics. A mix of experienced experts provided the instruction, including senior judge advocates, district attorneys, and expert witnesses who frequently testify in sexual assault cases, such as computer forensic experts, forensic DNA analysts, toxicologists, and sexual assault nurse examiners. To ensure that trial counsel better represent the victims' interests when prosecuting cases, the Marine Corps also continued its partnership with the United States Department of Justice's Office for Victims of Crime (OVC). The OVC provided valuable financial support and information on current victims' rights laws and trends. Finally, TCAP offered two-day sexual assault short courses to supplement the week-long courses. These short courses had a heavier focus on issues relating to sexual assault cases, combined with instruction on trial advocacy.

In addition to supervision and mentorship by more experienced judge advocates, consultation with HQEs, formalized on-the-job training, classroom training, and centralized counsel assistance programs, trial or defense counsel assigned to complex cases can receive other specialized training. For example, for national security cases, the Department of the Navy has a National Security Litigation Division, Code 30, which provides individualized training and advice to all trial counsel prosecuting national security cases.

### **V. Views on the Sufficiency of Resources**

During FY13, the Marine Corps continued to experience an increase in the resource demands on its personnel and military justice system. New and expanding requirements, such as the Victims' Legal Counsel Organization (VLCO) and the Office of Military Commissions (OMC), combined with inventory control measures and the shrinking end-strength of the Marine Corps, placed a drain on field grade military justice supervisors. The impact of this drain has been magnified by the increase in the complexity and number of contested courts-martial, which require more experienced judge advocates. A deficit in field grade officers has the potential to offset the gains made in the quality of litigation we have seen won with the implementation of the regional supervisory model created by the 2012 restructuring.



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The quantity and quality of military justice supervisors are threatened by two force shaping initiatives and a diversion of those supervisors to billets not requiring uniformed judge advocates. In order to meet the growing demands for experienced military justice practitioners, from both new legal requirements and the increasing complexity of courts-marital, I have identified four measures that are necessary to provide the Marine Corps with sufficient personnel and experience to capably perform military justice functions.

### A. Eliminate Voluntary Separation Pay for Judge Advocates

The increasing demand for military justice supervisors is being undermined by the Marine Corps voluntary separation pay program (VSP). VSP pays eligible majors and major selects a significant sum of money to leave the Marine Corps. The payout to our experienced field grade leadership has ranged from over \$115,000 to over \$181,000. With this sum, and highly marketable skills, judge advocates are taking VSP in significant numbers.

VSP eligibility for judge advocates begins at the time when the Marine Corps needs them most: as they become qualified to fill trial leadership billets. Field grade officers are precisely the population required to prosecute, defend, and supervise complex cases, and to meet emerging requirements, such as the VLCO and the OMC, both of which also require experienced military justice practitioners. If judge advocates are removed from eligibility, it will help the Marine Corps retain the most qualified personnel to capably perform military justice functions.

### B. Fully Fund Judge Advocate Continuation Pay (Law School Education Debt Subsidy)

In the FY00 NDAA, Congress authorized the payment of continuation pay to judge advocates because of the very issue the Marine Corps faces today, the growing problem in recruiting and retaining judge advocates in the armed services. Currently, the Army, Navy, and Air Force all provide the maximum amount of \$60,000 under the statute, and eligibility extends to all officers who have completed their initial active duty service obligation. However, the Marine Corps, which titles its program the Law School Education Debt Subsidy (LSEDS), only provides \$50,000, and has indicated a desire to place a cap on the number of judge advocates eligible.



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Increasing the total LSEDS payment, and linking it to a six year service obligation, would enhance the ability of the Marine Corps to grow new field grade judge advocates. This would allow eligible judge advocates to handle their law school debts, which range from \$88,000 to \$215,000. A \$60,000 payment for a six-year commitment would also allow eligible judge advocates to remain on active-duty long enough to reach the field grade ranks. Unlike the Army and Air Force, the Marine Corps does not offer a student loan repayment program in addition to LSEDS. By offering LSEDS to all eligible judge advocates at the full amount of \$60,000, the Marine Corps can help reduce institutional risk for a relatively minor cost, ensuring that we are well-placed to meet the military justice challenges of the future.

### C. Realign Officer Structure to Uniformed Military Justice Requirements

In order to address the long term need for experienced military justice practitioners, certain missions currently filled by uniformed judge advocates need to be realigned to support the military justice mission. The most efficient way is to civilianize those supervisory legal billets that do not require a uniformed judge advocate by statute or regulation, require institutional memory, and require specialized knowledge and skills that are not organically developed. The uniformed structure supporting those civilianized billets can then be realigned to reinforce existing military justice capabilities.

Three particular mission sets with supervisory legal billets meet these criteria. First, the legal assistance practice concerns specialized, often State law specific, areas of law that the Marine Corps does not organically cultivate expertise in, such as family law, consumer law, and estate planning. As such, over the past decade, my predecessors and I have civilianized the supervision of the legal assistance practice in CONUS, while retaining captain judge advocates in the legal assistance attorney billets. This construct places junior judge advocates in a role that implements our statutory authority to provide legal assistance services, but under the guidance and supervision of a civilian expert well-versed in local State law and legal procedure. These junior judge advocates thus provide a superior level of practice, even as they garner experience that will serve them in future uniformed assignments.



## U. S. MARINE CORPS ANNUAL MILITARY JUSTICE REPORT FOR FISCAL YEAR 2013

Second, Disability Evaluation System (DES) counsel meet the criteria to be civilianized. The DES Counsel program requires specially trained and certified legal counsel to provide advice to wounded, ill, and injured service members during the Physical Disability Evaluation process. This is another area that is highly specialized, does not require a uniformed judge advocate, and civilianization would provide continuity and a skill set outside those maintained or trained to by our judge advocates. The Marine Corps is in the process of civilianizing these billets.

Finally, the Marine Corps currently employs over twenty judge advocates in billets relating to environmental, land use, and civilian personnel law, most of which are in the rank of major, the key supervisory military justice rank. Environmental, land use, and civilian personnel law are specialized areas of practice for which the Marine Corps does not organically cultivate expertise and which do not require a uniformed judge advocate by statute or regulation. These fields entail long-term issues that need sustained effort and institutional memory that must span decades. In addition, the majority of these billets require advanced degrees in areas of law outside the normal practice of uniformed judge advocates. Environmental, land use, and civilian personnel law billets are primarily, and appropriately, staffed by civilians. Making this change would not only improve the quality of environmental, land use, and civilian personnel law practice within the Marine Corps, but would also free more field grade officers for the military justice mission.

### D. Hire an Additional Highly Qualified Expert (HQE)

As the Marine Corps legal community seeks to further improve the quality of services provided in support of the growing military justice mission, we must also improve the training provided to our military justice supervisors. While the Marine Corps legal community's HQE program has proven to be a tremendous success at the regional level, our community needs uniform training standards, requirements, and programs. An HQE at the headquarters level, located within our TCAP office, would maintain contacts with professional legal training organizations and instructors throughout the country and develop a high-quality training program designed to ensure that our judge advocates receive the best training available. The continuity offered by a civilian HQE would allow the course program to



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develop between each course, adding and removing materials as the legal landscape continues to evolve.

Additionally, a TCAP HQE would teach regional military justice supervisors how to run a regional training program. An HQE would have the knowledge and continuity to develop and manage a specialized Service-level training program for RTCs and other regional military justice supervisors, teaching them how to deliver superior training on the prosecution of complex cases. A centralized program, with decentralized execution, reflects a fundamental Marine Corps precept and allows regional supervisors, who best know their subordinates, to tailor the training to their region, but under the supervision of a uniform Service-level program.

### **VI. Conclusion**

During FY13, the Marine Corps legal community embraced a steadfast commitment to continue elevating the practice of law. We are now better positioned than ever to provide superior, high-quality legal services. The FY13 NDAA's expansion of the statutory role of the SJA to CMC helped solidify the Marine Corps legal community's future by making a single officer responsible for managing and supervising the community. The ability to exercise functional supervision over legal personnel within our Corps, combined with the continuing successes of the restructuring, ensures that the right counsel is detailed to the right case every time and fosters the innovation necessary to maintain the improvements to our community. Going forward, eliminating Marine Corps judge advocates from VSP eligibility, fully funding LSEDS, and realigning structure to the military justice mission will better place the Marine Corps to prosecute, defend, and advise on complex cases. Nevertheless, despite the resourcing challenges that confront the Marine legal community, our continuing efforts to set standards, train to standards, and inspect to standards will promote accountability and guarantee continued outstanding legal support to commanders, Marines, Sailors, and their families for the foreseeable future.



**APPENDIX - U.S. NAVY/MARINE CORPS MILITARY JUSTICE STATISTICS**

Report Period: FY 2013

**PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)**

TYPE COURT	TRIED		CONVICTED		ACQUITTALS		RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
	USN	USMC	USN	USMC	USN	USMC	
GENERAL	121	135	103	115	18	20	-2%
BCD SPECIAL	172	292	159	252	13	40	+1%
NON-BCD SPECIAL	0	0	0	0	0	0	0
SUMMARY	31	526	30	522	1	4	-22%
OVERALL RATE OF INCREASE (+)/DECREASE (-) OVER LAST REPORT							-11%

**PART 2 – DISCHARGES APPROVED**

GENERAL COURTS-MARTIAL ( CA LEVEL ) NUMBER OF DISHONORABLE DISCHARGES	89	
NUMBER OF BAD-CONDUCT DISCHARGES	68	
SPECIAL COURTS-MARTIAL ( CA LEVEL ) NUMBER OF BAD-CONDUCT DISCHARGES	233	

**PART 3 – RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG**

FOR REVIEW UNDER ARTICLE 66 – GENERAL COURTS-MARTIAL	176	
FOR REVIEW UNDER ARTICLE 66 – BCD SPECIAL COURTS-MARTIAL	252	
FOR EXAMINATION UNDER ARTICLE 69 – GENERAL COURTS-MARTIAL	37	

**PART 4 – WORKLOAD OF THE U.S. NAVY-MARINE CORPS CRT OF CRIMINAL APPEALS**

TOTAL ON HAND BEGINNING OF PERIOD		179	
GENERAL COURTS-MARTIAL	102		
BCD SPECIAL COURTS-MARTIAL	77		
REFERRED FOR REVIEW		428	
GENERAL COURTS-MARTIAL	176		
BCD SPECIAL COURTS-MARTIAL	252		
TOTAL CASES REVIEWED		431	
GENERAL COURTS-MARTIAL	194		
BCD SPECIAL COURTS-MARTIAL	237		
TOTAL PENDING AT CLOSE OF PERIOD		187	
GENERAL COURTS-MARTIAL	102		
BCD SPECIAL COURTS-MARTIAL	85		
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		-20%	

**PART 5 – APPELLATE COUNSEL REQUESTS BEFORE**

**U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS (CCA)**

NUMBER	428	
PERCENTAGE	100%	

**PART 6 - ACTIONS OF THE U.S. COURT OF APPEALS FOR THE ARMED FORCES (CAAF)**

PERCENTAGE OF CCA-REVIEWED CASES FORWARDED TO CAAF (80)	18.5%	-----
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD	-2.5%	-----
PERCENTAGE OF TOTAL PETITIONS GRANTED (38)	47.5%	-----
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD	+7.5%	-----
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY CCA	8.8%	-----
RATE OF INCREASE (+)/DECREASE (-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD	-32%	-----

**APPENDIX - U.S. NAVY/MARINE CORPS MILITARY JUSTICE STATISTICS -  
CONT'D**

<b>PART 7 – APPLICATIONS FOR RELIEF UNDER ARTICLE 69, UCMJ</b>			
TOTAL PENDING BEGINNING OF PERIOD		8	
RECEIVED		53	
DISPOSED OF		30	
GRANTED	0		
DENIED	30		
NO JURISDICTION	0		
WITHDRAWN	0		
TOTAL PENDING AT END OF PERIOD		31	
<b>PART 8 – ORGANIZATION OF COURTS</b>			
TRIALS BY MILITARY JUDGE ALONE		500	
GENERAL COURTS-MARTIAL		144	
SPECIAL COURTS-MARTIAL		356	
TRIALS BY MILITARY JUDGE WITH MEMBERS		240	
GENERAL COURTS-MARTIAL		110	
SPECIAL COURTS-MARTIAL		130	
<b>PART 9 – COMPLAINTS UNDER ARTICLE 138, UCMJ</b>			
NUMBER OF COMPLAINTS		79	
<b>PART 10 – STRENGTH</b>			
AVERAGE ACTIVE DUTY STRENGTH		515,400	
<b>PART 11 – NONJUDICIAL PUNISHMENT (ARTICLE 15, UCMJ)</b>			
NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED		12,525	
RATE PER 1,000		24	
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD		-18%	

SECTION 5

REPORT OF THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE



**REPORT OF**  
**THE JUDGE ADVOCATE GENERAL**  
**OF THE UNITED STATES AIR FORCE**  
**OCTOBER 1, 2012 TO SEPTEMBER 30, 2013**

**THE AIR FORCE COURT OF CRIMINAL APPEALS**

The Air Force Court of Criminal Appeals (JAH) reviewed and issued opinions in 416 cases in fiscal year 2013. This represents more than a fifty percent increase in cases reviewed from the prior year. Faced with a rising appellate workload, The Judge Advocate General increased the Court's personnel strength in 2013 to nine active duty Judges, two reserve Judges, five Honors Clerks, and three paralegals, along with a Chief Commissioner and Clerk of the Court. The Court also saw a change in leadership with a new Chief Judge assuming lead over the largest Court in recent history. The inject of personnel and new business practices have enabled the Court to process cases at a faster pace while still maintaining the individual scrutiny required for each appellant. In addition to handling an increased appellate workload, the Court also issued an *en banc* opinion in the case of *United States v. Witt*, the first death penalty decision in over fifteen years and reduced its backlog of cases by over ninety percent.

No General or Special Court-Martial convictions were reversed by the Court as a result of command influence or denial of the right to a speedy review or otherwise remitted due to loss of records of trial or other administrative deficiencies. Neither did the Court find any provision of Title 10 to be unconstitutional.

The Court also addressed over twenty appeals under Article 62, UCMJ, and petitions for extraordinary relief under the All Writs Act, 28 U.S.C. § 1651. The Court held oral argument for ten cases, to include hearing oral argument at Willamette University College of Law pursuant to its "Project Outreach" program which is designed to educate civilian and military audiences about the military justice system.

In addition to reviewing Air Force courts-martial, three of the Court's appellate judges served on the United States Court

of Military Commission Review (USCMCR), bringing the Air Force representation on that Court back to three appellate judges after previously assigned judges retired. The USCMCR hears appeals of cases convened under the Military Commissions Act of 2009. The USCMCR not only hears cases with a finding of guilty from military tribunals at Guantanamo Bay, but also hears appeals on issues taken prior to and during trial.

Finally, the judges and attorney law clerks maintained dedication to community service by serving as judges at several local moot court competitions hosted by various organizations, such as the American Bar Association, National Bar Association, Federal Bar Association, Black Law Students Association, Phi Alpha Delta Law Fraternity and the Catholic University of America Columbus School of Law. Like the Outreach arguments and internship program, discussions with attendees at such venues furthered civilian education and understanding of military law and procedure.

### **TRIAL JUDICIARY**

The Air Force Trial Judiciary Directorate (JAT) is responsible for trying and docketing all Air Force general and special courts-martial and presiding over an array of federal hearings. The Directorate is staffed by twenty-one active-duty trial judges, four reserve trial judges, one noncommissioned officer, and one civilian employee. The office of the Chief Trial Judge is co-located with the Central Docketing Office at Joint Base Andrews, MD. Air Force trial judges serve within five regions and are dispersed at twelve geographically advantageous locations around the globe.

In Fiscal Year 2013, Air Force judges presided over 550 general and special courts-martial. Judges also served as investigating officers in complex and high-profile Article 32 investigations, as legal advisors for officer discharge boards, and in post-trial *DuBay* hearings, contingency confinement hearings, and competency hearings.

The Trial Judiciary also added three new judges to the Directorate. The manpower increase was driven by a proposal to have judges available to act as Article 32 investigating officers (IOs) in sexual assault cases. The previous year, there were nearly one hundred Article 32 investigations involving sexual assaults in the Air Force.

The Chief Regional Military Judge in Europe continued to cover courts-martial at deployed locations within the United States Central Command area of responsibility. Six of those trials took place at Bagram Air Base, AF. Currently, three Air Force trial judges are appointed for the military commissions in Guantanamo Bay, CU.

Air Force trial judges taught military justice in classrooms and courtrooms around the world. The Chief Trial Judge and Deputy Chief Trial Judge instructed new military judges at The Army Judge Advocate General's Legal Center and School in Charlottesville, VA. Air Force trial judges trained new judge advocates, trial and defense counsel, and staff judge advocates at the Air Force Judge Advocate General's School (AFJAGS), on Maxwell AFB, AL. Air Force trial judges also provided practical instruction at more than a dozen trial advocacy courses held throughout the world to enhance current and future practitioners' litigation skills.

Members of the Trial Judiciary continued to share their specialized knowledge and expertise in a wide variety of legal environments. Judges assigned to the Trial Judiciary conducted Environmental Impact Statement hearings involved in the stationing of aircraft in Florida and Alaska. Judges also published on a variety of topics that included Lt Col Joshua Kastenberg's article "Recent Proposals to Change the Traditional Military Retirement System to Mirror the Federal Service: Eroding Discipline and Civil Military Relations through Potentially Unlawful and Certainly Questionable Acts", and Lt Col Christopher M. Schumann's article, "View from the Bench: Leadership in the Courtroom."

#### **AIR FORCE JUDICIARY (JAJ)**

The Air Force Judiciary Directorate is responsible for the administration of military justice across the Air Force. JAJ advises The Judge Advocate General, the Chief of Staff of the Air Force, and the Secretary of the Air Force on military justice matters, works with the other uniformed services to propose legislation and modifications to executive orders pertaining to military justice, assists convening authorities and staff judge advocates in the field, and provides the highest quality defense services to Airmen worldwide. Through its enlisted court reporter program, the Directorate provides expeditionary court reporter support for all deployed courts, mishaps, and other investigations. The Directorate also

supervises the delivery of court reporter services worldwide for all in-garrison events and, through its file sharing program, optimizes the use of available civilian court reporter assets to transcribe past events.

The Directorate performs its mission through five divisions: the Government Trial and Appellate Counsel Division; the Appellate Defense Division; the Trial Defense Division; the Military Justice Division; and the Clemency, Corrections and Officer Review Division.

## **GOVERNMENT TRIAL AND APPELLATE COUNSEL DIVISION (JAJG)**

### APPELLATE GOVERNMENT COUNSEL

During this past year, eight active duty judge advocates, ten reserve judge advocates, and one civilian attorney vigorously represented the government in Article 66 and Article 67 appeals of Air Force courts-martial convictions. The Division also sought and obtained certification from TJAG in nine cases for United States Court of Appeals for the Armed Forces (USCAAF) review, and filed government appeals in five cases under Article 62, UCMJ, at the Air Force Court of Criminal Appeals (AFCCA). When appropriate, the Division also responded to petitions for extraordinary relief under the All Writs Act. The Division continued to vigorously defend the death sentence adjudged and approved in *United States v. Witt*, the Air Force's first death penalty case in nearly two decades.

Appellate government counsel zealously represented the government in oral arguments before USCAAF and AFCCA. Appellate government counsel contributed to Project Outreach, sponsored by USCAAF and AFCCA, by conducting oral arguments in cases before audiences at various law schools and military installations across the United States. These arguments helped educate attendees on the fairness and professionalism of the military justice system and provided excellent recruiting opportunities.

Counsel provided intense advocacy training and field support. Division counsel educated judge advocates and paralegals at Air Force training events such as Trial Advocacy Courses, the Military Justice Administration Course, The Judge Advocate General's Continuing Legal Education Course, and the Trial and Defense Advocacy Course, as well as other litigation and criminal investigation courses. The Division also created and posted comprehensive trial and appellate materials on the

JAJG Learning Center hosted on the AFJAGS CAPSIL online resource. Appellate counsel also published an electronic newsletter containing appellate updates along with timely and relevant articles for military justice practitioners at all levels.

Throughout the year, Division personnel continued to engage in a variety of activities designed to further the professionalism of military justice practice, particularly at the appellate level. The Division's counsel participated in events hosted by USCAAF. Appellate government counsel have actively built relationships with sister service counterparts through participation in quarterly meetings and regular consultation on matters of common interest to all the services. The Division also hosted one summer intern, a law student who had completed the second year of law school and expressed an interest in service as a judge advocate.

The Division receives crucial appellate counsel support from ten assigned reserve judge advocates, especially during manning shortages and caseload surges. They continue to provide superb support, greatly assisting the Division in carrying out its mission. In addition to preparing written briefs, two reserve counsel presented oral arguments during the fiscal year.

A summary of Air Force Appellate Government practice follows:

**AFCCA**

	<u>FY09</u>	<u>FY10</u>	<u>FY11</u>	<u>FY12</u>	<u>FY13</u>
Briefs Filed	156	123	144	233	188
Cases Argued	16	9	14	14	14

**USCAAF**

	<u>FY09</u>	<u>FY10</u>	<u>FY11</u>	<u>FY12</u>	<u>FY13</u>
Briefs Filed	23	28	29	36	30
Cases Argued	13	12	15	9	9

**SUPREME COURT**

	<u>FY09</u>	<u>FY10</u>	<u>FY11</u>	<u>FY12</u>	<u>FY13</u>
Petition/Waivers Filed	3	3	1	1	1
Briefs Filed	0	0	0	0	0

## SENIOR TRIAL COUNSEL (STC)

STCs are detailed to prosecute cases by the Division headquarters at Joint Base Andrews, MD, and their primary responsibility is to represent the government in the most complex, litigated general courts-martial. STCs prosecute approximately seventy to eighty percent of all Air Force general courts-martial and a higher percentage of the Air Force sexual-assault cases. They are also available for special courts-martial, discharge boards and other proceedings, as resources allow.

Personnel authorizations for the fiscal year included nineteen STCs at eight locations worldwide: six counsel at Joint Base Andrews, MD; two counsel each at Ramstein AB, DE; Joint Base Lewis-McChord, WA; Joint Base San Antonio-Randolph, TX; Nellis AFB, NV; Peterson AFB, CO; and Maxwell AFB, AL. Only one base remains a one-deep slot (Kadena AB, JP) and will likely remain into the foreseeable future. Summer rotations in 2013 saw the relocation of STC billets from Peterson AFB, CO, and the Scott AFB, IL, billet, which completed the Division's effort to consolidate STC billets.

In 2013, the STC program continued to solidify the changes of 2012, which saw the standup of the Air Force's first Special Victims Trial Capability (SVT), leveraging existing resources within the STC program with the designation of particularly experienced, qualified, and trained STCs as Special Victims Unit (SVU) prosecutors. The SVU prosecutors handle the most serious, most complicated, and highest-visibility sexual-assault cases in the Air Force. The SVU prosecutors, as well as all the STCs, are supported by the SVU's Chief of Policy & Coordination, who is the Division's focal point for issues related to sexual assault; an STC liaison with the Defense Computer Forensics Laboratory, who is the Air Force's legal expert on issues related to digital evidence; and a deep bench of experienced and motivated appellate attorneys who provide tremendous 24/7 reach back capability for litigation issues that arise in the field.

Additionally, in 2013, two STCs were selected for additional training and focus for cases involving (1) controlled substances and (2) financial crimes. These STCs are the primary prosecutors for courts-martial involving such issues and spend additional time providing consultation to requesting Wing and Numbered Air Force legal offices for issues related to these specialties.

In 2013, STCs again spent more than two thousand days on temporary duty away from their home stations, and represented the government in more than three hundred courts-martial and related proceedings. In July, six of the newer STCs took part in the first Advanced Sexual Assault Litigation Course (ASALC) at Maxwell AFB, AL, and three members of the Division's leadership attended as faculty. Immediately following ASALC, all of the STCs gathered at Maxwell AFB for the first STC-SVU Training Course, which replaces the annual STC Conference typically held at Joint Base Andrews, MD. At this revamped Training Course, the STCs received training specially tailored for the high-profile cases they try (e.g., media training) and enhanced peer-to-peer education in a variety of subject areas. STCs also attended training courses across the country, both military and civilian (particularly courses hosted by the National District Attorneys Association), and continued the valuable tradition of spending a week performing appellate work in our appellate office, which broadened their trial and appellate perspective and enhanced their litigation skills.

Finally, the Division, working closely with The Judge Advocate General's School, created a new sexual-assault training course to replace the five regional Trial Advocacy Conferences and to serve as a bridge between attendance at the Trial & Defense Advocacy and the Advanced Trial Advocacy Courses and ASALC. The Intermediate Sexual Assault Litigation Course (ISALC) is structured to provide a scalable course of instruction in areas specific to sexual-assault litigation. The first ISALC was conducted in conjunction with the Training by Reservists in Advocacy and Litigation Skills (TRIALS) program in Japan in September and offered a dozen AF and sister Service JAGs the opportunity to enhance their knowledge and trial skills under the tutelage of senior active duty and reserve JAGs (including the Division's leadership). Building on that success, future ISALCs (both in conjunction with the TRIALS program and separately) will occur at Maxwell AFB, AL, Joint Base San Antonio-Lackland, TX, Ramstein AB, DE, and Nellis AFB, NV.

#### **APPELLATE DEFENSE DIVISION (AJAJA)**

The Appellate Defense Division ended Fiscal Year 2013 with ten active duty judge advocates, seven reserve judge advocates, and three paralegals. The civilian attorney position vacated by the incumbent in July remained vacant due to the Air Force civilian hiring freeze. The Division moved its docket despite

rotating fifty percent of its military attorneys during the summer PCS cycle. As in past years, reserve component Judge Advocates continued to provide significant support, even though they experienced turnover at a similar rate as well.

Promoting timely appellate review remained a priority. The Division considerably reduced the number of cases pending initial briefing to the AFCCA. Between 1 October 2012 and 1 May 2013, that number was reduced to 107 before climbing back to 140 on 30 September 2013. During the same time period, the number of cases in which counsel moved for an enlargement of time to submit assignments of error remained fairly steady, increasing from twenty to twenty-three. At its peak, the Division had three cases pending initial filing with the Air Force Court of Criminal Appeals greater than one year after receipt of a record of trial; however, by year's end, there were no cases in this status.

JAJA advocacy contributed to several notable rulings from the appellate courts. In addition, JAJA helped clarify the rights of accused and impacted the practice of military justice at the trial level. In *United States v. Spicer*, 71 M.J. 470 (C.A.A.F. 2013) and *United States v. Capel*, 71 M.J. 485 (C.A.A.F. 2013), CAAF held that false statements made to civilian law enforcement were not "official statements" and dismissed the charges in both cases. In *United States v. Cote*, 72 M.J. 41 (C.A.A.F. 2013), CAAF held that the government's violation of a ninety-day time limit to search A1C Cote's electronic media was an unreasonable search. In *United States v. Tunstall*, 72 M.J. 191 (C.A.A.F. 2013), CAAF held that an indecent act is not a lesser included offense of aggravated sexual assault. In *United States v. Smith*, 2013 WL 3324231 (A.F.C.C.A.), AFCCA held that life without parole was too severe of a sentence under the circumstances and only approved a sentence of life with the possibility of parole.

The Appellate Defense Division continued to support trial defense counsel in the field through consultation, including in time-critical situations. Appellate defense counsel also responded, when appropriate, on petitions for extraordinary relief to the AFCCA under the All Writs Act. Appellate defense counsel also kept counsel in the field updated on new developments in military criminal law via appellate updates throughout the year. These appellate updates included briefings at multiple defense orientation courses conducted at The AFJAGS.



The following figures reflect the Division's workload over the past six fiscal years:

**AFCCA**

	<u>FY08</u>	<u>FY09</u>	<u>FY10</u>	<u>FY11</u>	<u>FY12</u>	<u>FY 13</u>
Briefs Filed	352	285	290	299	295	221
Cases Argued	14	16	4	9	12	10

**USCAAF**

	<u>FY08</u>	<u>FY09</u>	<u>FY10</u>	<u>FY11</u>	<u>FY12</u>	<u>FY 13</u>
Supplements to Petitions	293	336	204	160	220	257
Grant Briefs	15	12	18	11	12	5
Cases Argued	15	13	17	17	9	10

**SUPREME COURT**

	<u>FY08</u>	<u>FY09</u>	<u>FY10</u>	<u>FY11</u>	<u>FY12</u>	<u>FY13</u>
Petitions	4	3	2	1	1	1
Briefs in Opposition	0	0	0	0	0	0
Briefs on the Merits	0	0	0	0	0	0

Appellate defense counsel participated in Project Outreach, sponsored by USCAAF and AFCCA, by conducting oral arguments before external audiences with ties to the military and legal professions. The Project serves a dual-purpose as a recruiting tool while highlighting the fairness and professionalism of the military justice system. During the year, Outreach arguments were presented at the United States Naval Academy and the University Of Arkansas School Of Law.

**TRIAL DEFENSE DIVISION (JAJD)**

The Trial Defense Division is responsible for providing all defense services within the Air Force through its worldwide team of Area Defense Counsel (ADCs), Defense Paralegals (DPs), Senior Defense Counsel (SDCs), Chief Senior Defense Counsel (CSDCs), and Defense Paralegal Managers (DPMs). The Chief, JAJD, is assisted by a Deputy Chief, Policy and Training, and an Office Superintendent at Joint Base Andrews, MD.

During Fiscal Year 2013, the Division was staffed with eighty-five ADCs, which is one more billet than last year, thanks to the creation of an ADC billet at Joint Base San Antonio-Fort Sam Houston, Texas. The ADCs teamed with seventy-four base-level DPs stationed at sixty-nine bases worldwide. The Division also had nineteen SDCs and three CSDCs. Each CSDC

supervised six to seven SDCs, and a DPM was assigned to each of the three CSDCs. In 2013, one of these CSDC positions moved from Joint Base Andrews, MD, to Joint Base San Antonio-Randolph, TX, in an attempt to move senior leadership closer to those they lead and supervise. The SDCs were stationed at Joint Base Andrews, MD; Joint Base Langley-Eustis, VA; Joint Base Charleston, SC; Hurlburt Field, FL; Maxwell AFB, AL; Barksdale AFB, LA; Joint Base San Antonio-Randolph, TX; Sheppard AFB, TX; Tinker AFB, OK; Peterson AFB, CO; Offutt AFB, NE; Joint Base Lewis-McChord, WA; Travis AFB, CA; Nellis AFB, NV; Davis-Monthan AFB, AZ; Yokota AB, JP; Kadena AB, JA; RAF Lakenheath, UK; and Ramstein AB, DE. Each SDC was co-located with the ADC office at their respective location. Together, these 187 professionals provided defense services to more than 300,000 Airmen around the world.

The continuing success of the Air Force's ADC Program is largely attributable to its independence and its zealous personnel. To ensure the best representation for Air Force clients, training remains JAJD's top priority. Each SDC provided on-the-job training and mentoring to the ADCs in their charge on a continuing basis. Each CSDC, in turn, mentored the SDCs in their charge. Newly appointed ADCs and DPs received formal training at the combined Defense Orientation Course held at AFJAGS. SDCs attended a Division-run Leadership Course at Joint Base Andrews, MD. Defense personnel also attended Trial Advocacy Courses conducted at AFJAGS. Furthermore, the Division continues to send ADCs and SDCs to the Trial and Defense Advocacy Course and the Advanced Trial Advocacy Course at AFJAGS as appropriate.

Fiscal year 2013 saw JAJD engaged to an unprecedented degree with the congressionally mandated Response Systems to Adult Sexual Assault Crimes Panel (RSP). No fewer than 5 JAJD attorneys met with the RSP and its various subcommittees to educate the Panel on the role of Air Force Defense Counsel and explain, from a defense perspective, the differences between the civilian criminal systems and the Uniform Code of Military Justice. JAJD members met with the RSP and/or testified in hearings in Washington, DC; Austin, TX; and at Joint Base San Antonio-Lackland, TX.

Finally, JAJD underwent one additional significant structural change this year with the Office of Airmen's Counsel (OAC) at Joint Base San Antonio-Lackland, TX being realigned under the newly created Community Legal Services Directorate (AFLOA/CLS).

## **MILITARY JUSTICE DIVISION (JAJM)**

The Military Justice Division prepares opinions and policy positions for the Secretary of the Air Force, The Chief of Staff, and The Judge Advocate General. The Division also assembles reports on military justice issues requested by the White House, Congress, Department of Defense and the Air Staff. JAJM represents the Air Force on the DoD Joint Services Committee on Military Justice (JSC). The Division provides representatives to all inter-service activities involving military justice and support for the Article 146, UCMJ, Code Committee. JAJM serves as the action agency for the preparation of advisory opinions on military justice issues raised in applications submitted to the Air Force Board for Correction of Military Records (AFBCMR).

During the past fiscal year, JAJM provided 32 formal opinions concerning AFBCMR applications; received 35 inquiries in specific cases requiring formal written replies to senior officials, including the President and Members of Congress; and reviewed 55 records of trial for review under Article 69a, UCMJ, and one record under Article 69b, UCMJ.

The Division twice presented the annual Military Justice Administration Workshop at AFJAGS, a "back to basics" one-week workshop attended by both judge advocates and paralegals. Division personnel taught at an additional number of military justice related courses, to include Gateway—an intermediate judge advocate course for majors at Maxwell AFB, AL, the Sexual Assault Response Coordinator Course, the National Sexual Assault Course, and an American Bar Association Seminar on Sexual Assault prosecution. Division personnel also taught specific instruction on post-trial processing to one Numbered Air Force and two base legal offices, and numerous webcasts to the JAG Corps on the creation of Special Victims' Counsel (addressed below).

JAJM was also active in educating the Corps on new law and policy implemented during the year. Changes to hearings under Article 32 of the UCMJ, to include the requirement the investigating officer be a Judge Advocate in sexual assault cases (expanded to include all cases for Air Force hearings), and be senior to the accused were propagated and clarified by JAJM through online notifications and during live instruction given at the courses listed above. Additionally, JAJM instructed the Corps on the new Air Force requirement for

notification to the GCMCA within thirty days of disposition of sexual assault cases.

Within the JAG Corps, we witnessed the transformation of support to crime victims through the creation of a Special Victims' Counsel (SVC) Program. JAJM assisted in the creation of the original policy and design of the program and worked with AFJAGS to establish the SVC Course and initial training strategy. JAJM was also instrumental in developing programs to promote SVC collaboration and communication for those designated to fill these innovative and ground-breaking roles. Once the program had been established and was successfully running, the Special Victims' Counsel Division was separately established with Col Dawn Hankins as Chief, to take the reins and oversee the program's progression to maturity. The Special Victims' Counsel Division's successes are detailed below.

JAJM also supported the war effort in Fiscal Year 2013 by deploying one of our judge advocates to Afghanistan.

JAJM continued to coordinate military justice actions with high-level agencies, such as working closely with the Department of Justice on testimonial immunity requests for non-military witnesses and with the Office of the Secretary of the Air Force on officer requests to resign rather than face trial by court-martial. Division personnel were once again instrumental in drafting proposed changes to the Military Rules of Evidence and Rules for Courts-Martial for pending executive orders.

Division personnel served as the Air Force's action officers for all requests for information, documents, witnesses, and support to the Response Systems to Adult Sexual Assault Crimes Panel (RSP) created by the 2013 National Defense Authorization Act, Section 576. Division members coordinated the logistics and support to Air Force members who testified at public RSP hearings and before RSP subcommittees.

The Air Force lost a dear friend, colleague and mentor when JAJM's Associate Chief, Mr. Jim Russell, passed away unexpectedly on 3 March 2013. There are few in the Air Force JAG Family who were not touched by Jim's wisdom, guidance, and leadership.

## **CLEMENCY, CORRECTIONS AND OFFICER REVIEW DIVISION (JAJR)**

At the end of fiscal year 2013, 385 Air Force personnel were in confinement. Of those, 88 inmates were in long-term confinement at the United States Disciplinary Barracks, Fort Leavenworth, KS, and 66 were serving their sentence in the Federal Bureau of Prisons system. The number of Air Force members and former members on parole or Mandatory Supervised Release at the end of fiscal year 2013 was 99. In early 2013, the Secretary discontinued the in-residence Return to Duty Program.

During the reporting period, the JAJR reviewed sixteen Article 71, UCMJ, officer dismissal cases. As was recommended, the Secretary approved the dismissals in all cases. The Division also reviewed five enlisted cases for Secretarial clemency under Article 74, UCMJ. Of those, three contained circumstances so compelling that they were forwarded with recommendations of clemency, which the Secretary granted.

## **THE JUDGE ADVOCATE GENERAL'S SCHOOL (AFJAGS)**

AFJAGS is the educational arm of the JAG Corps. Located at Maxwell AFB, AL, the AFJAGS provided education and training in all aspects of military legal practice to attorneys and paralegals from all military services, other federal agencies, and several foreign countries. Military justice instruction included advocacy, administration, the rules of evidence, the rules of procedure, and sexual assault policy and response. AFJAGS faculty members also provided instruction on military justice for several schools and colleges throughout Air University, the Air Force's center for education, including Air Force ROTC detachments at universities throughout AL. During Fiscal Year 2013, AFJAGS instructed more than 16,000 students at these military institutions.

Additionally, AFJAGS published articles concerning military justice and other criminal justice issues in *The Reporter*, *The Air Force Law Review*, and *The Military Commander and the Law*. AFJAGS webcasts allow subject-matter experts to brief timely military justice topics to all base legal offices and defense offices. Recorded webcasts are available on CAPSIL, a web-based collaborative learning and management system administered by the AFJAGS and accessible to all members of the Air Force JAG Corps. AFJAGS has 41 web-based training modules on military justice topics.

Nearly 1,400 students attended in-residence courses in Fiscal Year 2013. Of those 58 courses, the following devoted substantial resources to military justice-related topics:

- Advanced Sexual Assault Litigation Course
- Advanced Trial Advocacy Course
- Article 32 Investigations Course
- Defense Orientation Course (for new ADCs and DPs)
- GATEWAY (the JAG Corps' advanced leadership course for field grade officers)
- Intermediate Sexual Assault Litigation Course (held regionally in the United States and overseas)
- Judge Advocate Staff Officer's Course
- Law Office Manager Course
- Military Justice Administration Course
- Paralegal Apprentice Course
- Paralegal Craftsman Course
- Special Victims' Counsel Course
- Staff Judge Advocate Course
- Trial and Defense Advocacy Course

In addition to the above courses, AFJAGS continued its administration of the TRIALS program - "Training by Reservists in Advocacy and Litigation Skills" - where teams of AFJAGS faculty, augmented by Reserve judge advocates, conduct regional courses in foundational advocacy skills. In FY2013, TRIALS programs were conducted at Fairchild AFB, WA; Washington, DC; Scott AFB, IL; Davis Monthan AFB, AZ; Tinker AFB, OK; and Travis AFB, CA. Travel and Reservist man-day restrictions, which were the result of ongoing sequestration of appropriations during much of FY2013, required cancellation of scheduled TRIALS programs at Los Angeles AFB, CA; Atlanta, GA; MacDill AFB, FL; and Joint Base Langley-Eustis, VA.

Aside from the cancelled TRIALS programs, sequestration also caused cancellation of other FY2013 courses devoted, at least in part, to instruction in military justice. These were the Joint Military Judges Annual Training (previously known as the Inter-service Military Judges Seminar), the Annual Survey of the Law (for Reserve and Air National Guard judge advocates), one offering of GATEWAY, and several offerings of the Intermediate Sexual Assault Litigation Course.

## **LEGAL INFORMATION SERVICES (JAS)**

During FY 2013, the Legal Information Services Directorate continued to develop new legal information technology (IT) tools and improve existing ones to better support military justice business processes throughout the Air Force.

As noted in last year's review, JAS, in concert with the advice and assistance of a professional IT project management contractor, identified requirements to fix the Automated Military Justice Analysis and Management System (AMJAMS) deficiencies and enhance commanders' abilities to maintain good order and discipline. Subject-matter experts from across AFJAG Corps, representing the Total Force and spanning all major commands, participated in multiple workshops focused on disciplinary processes critical to commanders, as well as litigation needs and appellate review processing. These various efforts ultimately resulted in a contractor-produced Software Requirements Specification document and Business Use Cases in early FY 2013 for future use in development of a request for proposals.

More recently this year, JAS, in collaboration with JAJM and JAZ, documented the business case analysis and substantiated the Program Objective Memorandum documentation to request development funding in the FY16 budget. The requirements and system design necessary to remedy AMJAMS's deficiencies support the use of a modular contracting methodology. If funding is secured and modular contracting acquisition utilized, the agile development of a disciplinary case management system in successive acquisitions of interoperable modules can occur, achieving the ultimate goal of enhancing the sight picture of commanders over all disciplinary matters.

The Air Force's establishment of the SVC program in early 2013 generated a need for a short-notice technology solution to assist this new program and its goal to support legal assistance requests from sexual assault victims. The office and program were set to go live on 28 January 2013, a date set by HAF and reported to Congress. As such, the SVC office needed an immediate means to track cases to create reports for TJAG, HAF, and ultimately Congress on the progress of the program. Because there was insufficient time to fully develop a stand-alone program from scratch or incorporate a new application within AMJAMS, JAS established a SharePoint site for the SVC office utilizing a "list" functionality with a special permission set to track SVC representation and assistance. The site went live

prior to the official start of the SVC program and the office was immediately able to use the data collected to provide reports to those interested in this new and high-visibility program and to demonstrate the program's effectiveness.

### **SPECIAL VICTIMS' COUNSEL DIVISION (CLSV)**

The Judge Advocate General stood up the SVC Program on 28 January 2013 as a pilot program for the Department of Defense (DoD) and as an important step forward in Air Force efforts to combat sexual assault and provide world class response capabilities to victims.

The objectives of the SVC Program are to provide support through independent representation; build and sustain victim resiliency; empower victims by enforcing their rights as a crime victim; and to increase the level of legal assistance provided to victims. An SVC's role includes advocacy to military justice actors, including commanders and convening authorities; attending interviews with investigators, trial counsel, and defense counsel; providing in-court representation as permitted by the Manual for Courts-Martial; advocacy to other Air Force and DoD agencies; and advocacy to civilian prosecutors and agencies.

Initially, sixty judge advocates were selected to serve as SVCs part time out of necessity to allow the Air Force to field the program quickly as a pilot program, while working towards the goal of establishing a structure for SVCs to represent victims full time under an independent organization in the JAG Corps. On 1 June 2013, the SVC Program stood up as an independent organization in AFLOA—the Special Victims' Counsel Division (CLSV) under the Community Legal Services Directorate (CLS). The Division is staffed with an O-6, projected GS-14 (currently filled by an O-4), and E-7. Twenty-four SVCs and ten Special Victims' Paralegals (SVP) were selected to serve in regional and satellite SVC offices at twenty-two locations worldwide.

Litigation over standing of victims and SVCs in courts-martial occurred during the first week of implementation. In *U.S. v. Daniels*, a court-martial for the alleged rape and sexual assault of A1C L.R.M., the military judge held that the SVC appointed to represent A1C L.R.M. would not be permitted to make any arguments before the court-martial, nor would the SVC be permitted to speak on behalf of A1C L.R.M. in hearings held



pursuant to MREs 412 ("rape shield") and 513 (psychotherapist-patient privilege).

After AFCCA declined to review *U.S. v. Daniels* (now *A1C L.R.M. v. Lt Col Kastenberg*), finding that they lacked jurisdiction, pursuant to UCMJ, Article 67(a)(2), TJAG certified to the United States Court of Appeals for the Armed Forces (USCAAF) three issues involving the appearance of SVCs in a court-martial hearing: 1) whether AFCCA erred by holding that it lacked jurisdiction to hear A1C L.R.M.'s petition for a writ; 2) whether the military judge erred by denying A1C L.R.M. the opportunity to be heard through counsel, thereby denying A1C L.R.M. due process under the MREs, the CVRA, and the United States Constitution; and 3) whether a writ should be issued. Oral argument was held on 11 June 2013.

On 18 July 2013, USCAAF ruled that "a reasonable opportunity to be heard at a hearing [under MREs 412 and 513] includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel. In the decision, CAAF also stated:

- The right to be heard through counsel is not absolute. A military judge has discretion under RCM 801, and may apply reasonable limitations, including restricting the victim or patient and their counsel to written submissions if reasonable to do so in context. If counsel indicates at a MRE 412 or 513 hearing that the victim's or patient's interests are entirely aligned with those of trial counsel, the opportunity to be heard could reasonably be further curtailed.
- MREs 412 and 513 do not create a right to legal representation for victims or patients who are not already represented by counsel.
- MREs 412 and 513 do not create a right for the victim or patient to appeal an adverse evidentiary ruling.

In just the first ten months of operation, 565 victims of sexual assault received SVC representation. That is compared to the 51 victims who sought legal assistance under the AF traditional legal assistance program in FY12. That steep increase from one type of legal support to another indicates that the robust and representational nature of SVC support is meeting a need of sexual assault victims that was previously

unaddressed. SVCs have attended 93 courts-martial, 92 Article 32 hearings, and over 700 interviews. SVCs have asserted victims' privacy rights; increased their voice in the military justice process by informing convening authorities of their preferences for prosecution or non-prosecution and submitting post-trial victim impact statements; addressed safety concerns; advocated for expedited transfers or alternate duty locations/working hours; assisted with collateral misconduct, and addressed workplace/unit concerns.

The feedback from victims represented by an SVC has been overwhelmingly positive. An impressive ninety-two percent of victims surveyed indicated they were "extremely satisfied" with their SVC's representation. Additionally, fifty-three percent of restricted report victims represented by an SVC have converted their restricted report to an unrestricted report. This is in comparison to thirteen percent in FY11 and fifteen percent in FY12 who converted prior to creation of the SVC Program.

On 14 August 2013, the SVC program lost its "pilot" designation when the Secretary of Defense (SecDef) directed each Service establish a special victim's advocacy program. This move was in part due to the overwhelming success of the Air Force SVC Program and the recognition that SVCs may help improve the trust and confidence of victims in the military justice system.

#### **PERSONNEL**

As of 30 September 2013, the Air Force Judge Advocate General's Corps had 1,285 judge advocates on active duty. Company grade officers (lieutenants and captains) made up approximately forty-nine percent of that number (628). Approximately twenty-four percent were majors (304) and approximately eighteen percent were lieutenant colonels (229). Colonels (120) and above, including one lieutenant general, one major general, and two brigadier generals, comprised approximately ten percent of the Corps. The Air Force Judge Advocate General's Corps Reserve included 896 Air Force Reserve IMA, Air Force Reserve unit-assigned, and Air National Guard judge advocates, of which twenty-two percent (200) were company grade officers and sixty-six percent (595) were field grade officers (majors and lieutenant colonels). The remaining eleven percent consisted of ninety-six colonels, four brigadier generals, and one major general.

A handwritten signature in black ink, appearing to read 'S. Lepper', with a stylized flourish at the end.

STEVEN J. LEPPER  
Major General, USAF  
Performing Duties of The Judge  
Advocate General, 10 USC § 8037

Period: Fiscal Year 2013				
<b>PART 1 - BASIC COURTS-MARTIAL STATUS (Persons)</b>				
TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE(+)/ DECREASE (-) OVER LAST REPORT
GENERAL	260	205	55	+42.86%
BCD SPECIAL	359	81	39	-8.36%
NON-BCD SPECIAL [A]		239		
SUMMARY	144	139	5	+2.86%
OVERALL RATE OF INCREASE ( + ) / DECREASE ( - ) OVER LAST REPORT				
<b>PART 2 - DISCHARGE APPROVED</b>				
GENERAL COURTS-MARTIAL (CA LEVEL)				
NUMBER OF DISHONORABLE DISCHARGES [B]			70	
NUMBER OF BAD CONDUCT DISCHARGES			76	
SPECIAL COURT-MARTIAL (CA LEVEL)				
NUMBER OF BAD CONDUCT DISCHARGES			81	
<b>PART 3 - RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG</b>				
FOR REVIEW UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL			143	
FOR REVIEW UNDER ARTICLE 66 - BCD SPECIAL COURTS-MARTIAL			76	
FOR EXAMINATION UNDER ARTICLE 69 - GENERAL COURTS-MARTIAL			55	
<b>PART 4 - WORK LOAD OF THE AIR FORCE COURT OF CRIMINAL APPEALS</b>				
TOTAL ON HAND BEGINNING OF PERIOD			320	
GENERAL COURTS-MARTIAL		217		
BCD SPECIAL COURTS-MARTIAL		99		
REFERRED FOR REVIEW			219	
GENERAL COURTS-MARTIAL		143		
BCD SPECIAL COURTS-MARTIAL		76		
TOTAL CASES REVIEWED			369	
GENERAL COURTS-MARTIAL		238		
BCD SPECIAL COURTS-MARTIAL		131		
TOTAL PENDING AT CLOSE OF PERIOD			229	
GENERAL COURTS-MARTIAL		158		
BCD SPECIAL COURTS-MARTIAL		71		
REVIEWED DURING LAST REPORTING PERIOD (369/539)				+23.63
<b>PART 5 - APPELLATE COUNSEL REQUESTS BEFORE THE AIR FORCE COURT OF CRIMINAL APPEALS</b>				
NUMBER	219/219			
PERCENTAGE	100.00%			
<b>PART 6 - U.S. COURT OF APPEALS FOR THE ARMED FORCES</b>				
PERCENTAGE OF AFCCA REVIEWED CASES FORWARDED TO USCAAF 248/369 [C]				67.21%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD				-26.25%
PERCENTAGE OF TOTAL PETITIONS GRANTED 49/369				13.28%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD				-1.53%
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY AFCCA 49/369				13.28%
RATE OF INCREASE ( + ) / DECREASE ( - ) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD				-0.57%

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<b>PART 7 - APPLICATIONS FOR RELIEF, ARTICLE 69</b>			
PENDING AT BEGINNING OF PERIOD		0	
RECEIVED		6	
DISPOSED OF		6	
GRANTED	0		
DENIED	6		
NO JURISDICTION	0		
WITHDRAWN	0		
TOTAL PENDING AT END OF PERIOD		0	
<b>PART 8 - ORGANIZATION OF COURT</b>			
TRIALS BY MILITARY JUDGE ALONE		286	
GENERAL COURTS-MARTIAL	103		
SPECIAL COURTS-MARTIAL	183		
TRIALS BY MILITARY JUDGE WITH MEMBERS		333	
GENERAL COURTS-MARTIAL	157		
SPECIAL COURTS-MARTIAL	176		
<b>PART 9 - COMPLAINTS UNDER ARTICLE 138</b>			
NUMBER OF COMPLAINTS	39		
<b>PART 10 - STRENGTH</b>			
AVERAGE ACTIVE DUTY STRENGTH	328,089		
<b>PART 11 - NONJUDICIAL PUNISHMENT (ARTICLE 15)</b>			
NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED		6,247	
RATE PER 1,000		19.04	
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD		-0.26	
<b>EXPLANATORY NOTES</b>			
[A] Of the 359 SPCMs tried, there were 81 convictions with a BCD adjudged, 239 convictions without a BCD adjudged, and 39 acquittals.			
[B] Includes 16 officer dismissals.			

SECTION 6

REPORT OF THE JUDGE ADVOCATE GENERAL OF THE COAST GUARD

## REPORT OF THE JUDGE ADVOCATE GENERAL OF THE U. S. COAST GUARD

October 1, 2012 to September 30, 2013

### PERSONNEL AND TRAINING

The Coast Guard has 193 officers designated as judge advocates serving on active duty. Coast Guard lawyers currently serving in legal billets outside the Coast Guard include the Staff Judge Advocate to NORTHCOM, the Staff Judge Advocate to Joint Interagency Task Force South, as well as senior staff attorneys (O-4 and O-5) assigned to NORTHCOM, AFRICOM, SOUTHCOM, PACOM, Naval War College, the Defense Institute of International Legal Studies, and the Naval Justice School. The Coast Guard will also detail a senior judge advocate to a one year fellowship in the Office of Legal Counsel to the Chairman of the Joint Chiefs of Staff in assignment year 2014. The Coast Guard also has several active duty judge advocates detailed to the Department of Justice, Department of State, and Department of Homeland Security.

Over forty judge advocates are currently assigned in non-legal "out-of-specialty" billets. They include the Deputy Commander for the Coast Guard's Atlantic Area (O-8), the Director of Governmental and Public Affairs (O-7), the Executive Assistant to the Commandant of the Coast Guard (O-7 select), and a Captain detailed to the Office of the Vice President. Other judge advocates in out-of-specialty assignments include command cadre of Coast Guard cutters, sectors, training centers, and support commands.

The Coast Guard employs ninety six civilian attorneys ranging from GS-13 to SES.

The Coast Guard sent attorneys to thirty different courses of instruction during fiscal year 2013, primarily at the various service JAG schools. Twenty-two Coast Guard officers are currently undergoing postgraduate studies to complete a JD degree and will be certified as judge advocates at the successful completion of their studies. One judge advocate is attending the Graduate Course at the United States Army Judge Advocate General's Legal Center and School and another is a fellow in the Center for Law and Military Operations at TJAGLCS. One senior judge advocate is attending a LLM program in national security law at George Washington University and one civilian attorney is attending an LLM program in environmental law at the

University of California, Berkeley (Boalt Hall). In addition, one judge advocate is attending a degree program at the School for National Security and Resource Strategy and one is attending a degree program at the Naval War College.

Thirty Coast Guard officers completed the Navy Basic Lawyer Course in Newport, Rhode Island. All have been or are in the process of being certified under Article 27(b), UCMJ.

#### **U. S. COAST GUARD COURT OF CRIMINAL APPEALS**

The judges on the U.S. Coast Guard Court of Criminal Appeals at the end of fiscal year 2013 were:

Chief Judge Lane I. McClelland  
Judge Patrick J. McGuire  
Judge John F. Havranek  
Judge Kathleen A. Duignan  
Judge Andrew Norris  
Judge Sean P. Gill (sworn in 8 May 2013)  
Judge John S. Luce (sworn in 8 May 2013)

Two judges departed the Court in fiscal year 2013; Judge Charlie M. Johnson (departed 6 September 2013) and Judge Brian T. McTague (departed 4 June 2013).

In addition to the decisional work of the Court, as reflected in the Appendix, the judges of the Court have been involved in various professional conferences, committees, and seminars during the past fiscal year.

#### **MILITARY JUSTICE ORGANIZATION**

Fourteen Staff Judge Advocates advise eighteen officers exercising general court-martial jurisdiction. Those fourteen SJAs as well as three additional independent duty SJAs at training centers advise approximately 350 officers exercising special court-martial jurisdiction. Responsibility for detailing trial and defense counsel to general and special courts-martial rests with the Chief, Office of Legal and Defense Services, a staff office reporting to the Deputy Judge Advocate General charged with providing defense and personal legal services to Coast Guard members. Pursuant to an inter-service memorandum of understanding, the U.S. Navy provides trial defense counsel for all Coast Guard courts-martial. In return, four Coast Guard



attorneys are assigned to full time duty, typically for one-year or two-year assignments, at one or more Navy Defense Service Offices or Regional Legal Service Offices.

The Coast Guard has one general court-martial judge and six collateral-duty special court-martial judges. The Chief Trial Judge details all military judges to Coast Guard courts-martial.

The Office of Military Justice at Coast Guard Headquarters is responsible for representing the United States in all court-martial appeals and providing support to staff judge advocates and trial counsel throughout the Coast Guard. The office is also responsible for developing military justice policy for the Coast Guard, including participation on the Joint Service Committee on Military Justice. Within the office, two officers, a LCDR (O-4) and a LT (O-3), are assigned primary duty as appellate government counsel.

Additionally, in fiscal year 2013, the Coast Guard created the Office of Special Victims' Counsel (SVC) to provide legal counsel to victims of sexual-related offenses. The intent of the SVC program is to provide additional resources to ensure victims of sexual assault understand their rights in the legal process and that those rights are observed. The Coast Guard directed additional funding and billets to support the program.

### **MILITARY JUSTICE STATISTICS**

**NOTE:** All statistics are based on the number of courts-martial records received and filed at Coast Guard Headquarters during fiscal year 2013 and, where indicated, records received during each of the four preceding fiscal years.

Fiscal Year	13	12	11	10	09
General Courts-Martial	09	14	06	12	12
Special Courts-Martial	14	14	32	20	19
Summary Courts-Martial	20	17	19	09	14
Total	43	45	57	41	45

### **ADDITIONAL MILITARY JUSTICE STATISTICS**

Appendix A contains the Coast Guard, Fiscal Year 2013 military justice statistics.

## **APPELLATE REVIEW PROCESS**

The service's goal is to ensure 100% compliance with post-trial processing timelines. In fiscal year 2013, the service fell short of that goal by one case. In that case, the Convening Authority took action 165 days after the sentence was announced, which is forty five days beyond the 120-day period prescribed for such action. Additionally, the case was docketed with the appellate court 133 days after action, which is 103 days beyond the 30-day prescribed period. All other cases docketed with the Court of Appeals in fiscal year 2013 were in compliance with post-trial processing times. The Coast Guard Court of Appeals met its goal of eighteen months or less between the time a case is docketed to the issuance of an opinion in each case decided in fiscal year 2013.

In fiscal year 2013, there were no court-martial convictions that were reversed as a result of command influence or denial of the right to a speedy review. However, there was one case in which the Coast Guard Court of Criminal Appeals provided relief due to untimely post-trial processing. In that case, which was docketed in fiscal year 2012, eighty seven days passed from the date of the convening authority's action until the time the case was docketed with the appellate court. The appellate court found no prejudice but, under *United States v. Tardiff*, affirmed only thirty of the sixty days of adjudged confinement. The findings were not affected.

There were no cases this fiscal year in which the Coast Guard Court of Criminal Appeals found a provision of the UCMJ unconstitutional.

## **MEASURES TO ENSURE COMPETENCY OF MILITARY JUSTICE PRACTICE**

The biggest challenge faced by the Coast Guard in developing and maintaining proficiency trying military justice cases is the small number of trials conducted service-wide in a given year. Usually there are between twenty five and forty courts-martial in the entire Coast Guard in a one-year period. The Coast Guard has taken several actions to provide additional exposure to trial work for our judge advocates.

First, the Coast Guard has a long standing Memorandum of Understanding with the Navy whereby the Navy provides defense counsel for Coast Guard courts-martial and in return the Coast Guard provides four judge advocates at locations around the

country to work for the Navy handling courts-martial of Coast Guard members, as well as members of the Navy and Marine Corps. These officers typically serve two year tours as defense counsel and leave those assignments with significant trial experience.

The Coast Guard has had arrangements with the Marine Corps at Camp Lejeune, Camp Pendleton, Marine Corps Base Quantico, and Marine Corps Base Hawaii where Coast Guard judge advocates work as trial counsel for Marine cases. While the tours typically last between three and six months, they do provide a solid foundation of trial experience. In addition, Coast Guard judge advocates have served as trial counsel for the U.S. Army Military District of Washington. This year, two judge advocates were assigned to Navy Regional Legal Service Office, Naval District of Washington, and one was assigned to Marine Corps Base Quantico.

The Coast Guard Legal Service Command (LSC), the only command in the service dedicated to the delivery of legal services, was created in 2009. Among the many responsibilities of this command, the LSC is the only legal office that has judge advocates serving full time as trial counsel (a total of five). In addition to their principal support to mission support commands served by LSC, they also support other staff judge advocates. Accordingly, those trial counsel are currently involved, in one capacity or another, in approximately eighty percent of the Coast Guard's courts-martial.

Finally, the Office of Military Justice provides technical support to staff judge advocates and trial counsel and has periodically participated in cases at the trial level.

In addition to military justice experience, many field legal office maintain active Special Assistant U.S. Attorney relationships with one or more U.S. Attorney offices that develop judge advocate trial and advocacy skills. Coast Guard SAUSAs generally prosecute felony cases arising out of Coast Guard operations. Four full-time SAUSAs in the Southern and Middle Districts of Florida, and the Central and Southern Districts of California focus on prosecution of drug smuggling cases, where the amounts seized in the drug cases are frequently measured in tons, and migrant smuggling cases. There are also many collateral duty SAUSA relationships around the country with Coast Guard judge advocates assisting in prosecution of not only drug and migrant smuggling cases, but other issues ranging from environmental crimes to seaman's manslaughter.

Training also forms an important part of the development and maintenance of trial expertise. Coast Guard judge advocates are trained initially with the Navy and Marine Corps at the Naval Justice School. We regularly participate in trial advocacy courses offered by the Army, Navy, and Air Force, to include specialized courses, most particularly those dealing with sexual assault. The Coast Guard has also sent judge advocates to courses sponsored by the Department of Justice National Advocacy Center and those offered by the National District Attorneys Association. The other armed forces permit the Coast Guard to make use of their Trial Counsel Assistance Program and Highly Qualified Experts that significantly add to the depth of knowledge and expertise available to Coast Guard trial counsel.

As noted above, except for the four judge advocates assigned to the Navy at any given time pursuant to our MOU, the Navy provides defense counsel for Coast Guard members being tried by court-martial.

The Coast Guard has one full time general court-martial judge, along with six collateral duty judges who hear only special courts-martial. Coast Guard judges are selected based on trial and staff judge advocate experience and attend initial training with all of the other services at the Military Judge Course at the Army's Judge Advocate General's Legal Center and School in Charlottesville, Virginia. Coast Guard judges also attend the annual Joint Military Judges training session. Several Coast Guard judges have also pursued individual courses as well as successful completion of certificates from the National Judicial College in Reno, Nevada.

To date the Coast Guard has not tried a national security case or case referred as capital. Were such a case to arise, the Coast Guard would request assistance from the other armed forces to do so.

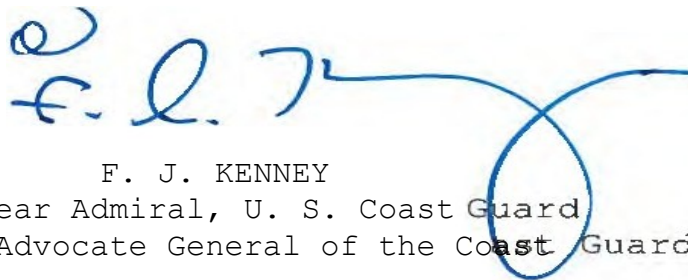
Sexual Assault cases occur in the Coast Guard and are a focus of training and experience efforts; most of the training and experience efforts outlined above are specifically designed to improve trial counsel knowledge and experience in sexual assault cases. With some exceptions, sexual assaults are the most significant crimes handled in the Coast Guard military justice system and the Coast Guard is dedicated to handling these cases well. The Office of Military Justice, which provides assistance to trial counsel, recently received approval to hire a civilian attorney (GS-15) with expertise in sexual assault prosecution to better enhance the service's ability to handle

complex sexual assault cases. Also, recent Sexual Assault Prevention and Response efforts have made more training funds available, not only to train judge advocates, but to allow them to work with other professionals to train all members of the Coast Guard in sexual assault prevention and appropriate response when it does happen.

The Coast Guard also provides training for civilian and enlisted legal support personnel to assist them in meeting legal technician and paralegal performance qualification standards prescribed by the Judge Advocate General.

#### **VIEWS OF THE JUDGE ADVOCATE GENERAL ON RESOURCES**

The Coast Guard has sufficient judge advocates with sufficient experience to competently perform its military justice responsibilities. The service consistently provides adequate resources to perform military justice functions. Attorneys are supported by civilians and enlisted personnel in the yeoman rating sufficient in number to support the mission. There are insufficient enlisted billets to support a separate legal rate, posing a challenge to ensure an experienced enlisted legal support cadre.



F. J. KENNEY  
Rear Admiral, U. S. Coast Guard  
Judge Advocate General of the Coast Guard

Appendix A: U. S. Coast Guard Courts-Martial/NJP Statistics for October 1, 2012 to September 30, 2013 (FY 2013)

**APPENDIX A: U.S. COAST GUARD MILITARY JUSTICE STATISTICS**

Report Period: 1 OCTOBER 2012- 30 SEPTEMBER 2013

**PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)**

TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
GENERAL	09	08	01	-35.7%
BCD SPECIAL	14	12	02	0%
NON-BCD SPECIAL	00	00	00	0%
SUMMARY	20	20	00	+17.6%
OVERALL RATE OF INCREASE (+)/DECREASE (-) OVER LAST REPORT				-4.4%

**PART 2 – DISCHARGES APPROVED**

GENERAL COURTS-MARTIAL NUMBER OF DISHONORABLE DISCHARGES	01	
NUMBER OF BAD-CONDUCT DISCHARGES	05	
SPECIAL COURTS-MARTIAL NUMBER OF BAD-CONDUCT DISCHARGES	06	

**PART 3 – RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG**

FOR REVIEW UNDER ARTICLE 66 – GENERAL COURTS-MARTIAL	03	
FOR REVIEW UNDER ARTICLE 66 – BCD SPECIAL COURTS-MARTIAL	05	
FOR EXAMINATION UNDER ARTICLE 69 – GENERAL COURTS-MARTIAL	01	

**PART 4 – WORKLOAD OF THE COAST GUARD COURT OF CRIMINAL APPEALS\***

TOTAL ON HAND BEGINNING OF PERIOD		18	
GENERAL COURTS-MARTIAL	12		
BCD SPECIAL COURTS-MARTIAL	06		
REFERRED FOR REVIEW		09	
GENERAL COURTS-MARTIAL	04		
BCD SPECIAL COURTS-MARTIAL	05		
TOTAL CASES REVIEWED		09	
GENERAL COURTS-MARTIAL	03		
BCD SPECIAL COURTS-MARTIAL	06		
TOTAL PENDING AT CLOSE OF PERIOD		13	
GENERAL COURTS-MARTIAL	08		
BCD SPECIAL COURTS-MARTIAL	05		
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		-52.6%	

**PART 5 – APPELLATE COUNSEL REQUESTS BEFORE**

**U.S. COAST GUARD COURT OF CRIMINAL APPEALS (CCA)**

NUMBER	19	
PERCENTAGE	100%	

**PART 6 – ACTIONS OF THE U.S. COURT OF APPEALS FOR THE ARMED FORCES  
(CAAF)**

PERCENTAGE OF CCA-REVIEWED CASES FORWARDED TO CAAF	3/16	18.8%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		+19%
PERCENTAGE OF TOTAL PETITIONS GRANTED	1/3	33.3%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		-
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY CGCCA	1/16	6.3%
RATE OF INCREASE (+)/DECREASE (-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		-

\* The Court also decided two Art. 62 appeals.

**U.S. COAST GUARD MILITARY JUSTICE STATISTICS - CONT'D**

<b>PART 7 – APPLICATIONS FOR RELIEF UNDER ARTICLE 69, UCMJ</b>			
TOTAL PENDING BEGINNING OF PERIOD		19	
RECEIVED		26	
DISPOSED OF		15	
GRANTED	1		
DENIED	14		
NO JURISDICTION	00		
WITHDRAWN	00		
TOTAL PENDING AT END OF PERIOD		30	
<b>PART 8 – ORGANIZATION OF COURTS</b>			
TRIALS BY MILITARY JUDGE ALONE		18	
GENERAL COURTS-MARTIAL		06	
SPECIAL COURTS-MARTIAL		12	
TRIALS BY MILITARY JUDGE WITH MEMBERS		05	
GENERAL COURTS-MARTIAL		03	
SPECIAL COURTS-MARTIAL		02	
<b>PART 9 – COMPLAINTS UNDER ARTICLE 138, UCMJ</b>			
NUMBER OF COMPLAINTS		08	
<b>PART 10 – STRENGTH</b>			
AVERAGE ACTIVE DUTY STRENGTH		40757	
<b>PART 11 – NONJUDICIAL PUNISHMENT (ARTICLE 15, UCMJ)</b>			
NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED		969	
RATE PER 1,000		23.8%	
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD		+5.3%	