

**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, 2016 to September 30, 2017**

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**Section 1**

**Joint Annual Report of the Code Committee**

## **Section 1**

### **Joint Annual Report of the Code Committee Pursuant to the Uniform Code of Military Justice**

**October 1, 2016 to September 30, 2017**

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 Dean Lisa Schenck and Mr. James E. McPherson, 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 convened on Tuesday, March 7, 2017, 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.

Then-Chief Judge Erdmann commented that the 2017 meeting of the Code Committee was likely the final or penultimate meeting due to the enactment of the Military Justice Act of 2016 (MJA). Because the MJA has not been implemented as of 7 March 2017, the Code Committee met as usual. Then-Chief Judge Erdmann noted that, although the Committee does not know when the MJA will be implemented, it will certainly be within the next two years.

Colonel Huygen offered an amendment to the 2016 draft minutes concerning the Air Force's implementation of a case management system. Colonel Huygen noted that the Air Force already has an automated case management system. In FY16 and FY17, the Air Force will continue to research and develop the next generation of this system. There was a motion to approve the minutes as amended. All members voted in favor of the motion, and the motion passed.

Lieutenant Alexandra Nica, JAGC, USN, Executive Secretary of the Joint Service Committee on Military Justice (JSC), provided a briefing on the work of the JSC. LT Nica noted that much of her brief would focus significantly on the accomplishments and hard work of Major Harlye Carlton, USMC, and her team before the Navy took over JSC leadership.

LT Nica explained that, in addition to the normal work of the JSC, a massive effort has been concentrated toward issuing implementation guidance, rules and regulation, MREs, and conforming changes regarding the MJA.

The JSC's personnel changes primarily consisted of a switch to Navy

leadership and increased hours in order to prepare for and implement the MJA. LT Nica expressed gratitude to Captain Warren A. Record, JAGC, USN, and Mr. James Martinson for their leadership among the Navy personnel and civilian working group, respectively. The JSC is a collateral billet for personnel. However, since the MJA was enacted, working group meetings have increased from twice per month to approximately seven meetings per month and voting group meetings have increased from once per month to twice or more per month.

The administrative matters portion of LT Nica's briefing primarily involved the work of the predecessor group chaired by Colonel William N. Pigott, Jr., USMC. Administrative changes included the production of updated internal SOPs, a draft DoD instruction, and improved public transparency through a public site allowing submissions directly to the JSC via email. Additionally, the JSC has worked with Defense Digital Services to create the new Electronic Manual for Courts-Martial, which will allow the JSC to easily and more efficiently edit the MCM as changes occur.

Since the 2016 meeting of the Code Committee, the President issued EO 13730, incorporating the results of the calendar year 2015 annual review on 15 May 2016, and EO 13740, incorporating changes in the law since 2012. On 29 November 2016, the JSC published proposed MCM amendments and executive summaries, holding a public hearing for commentary on 15 December 2016. The commentary period closed in January 2017, and the JSC is now working to adjudicate comments to best integrate them with the MJA.

Notable changes include:

RCM 104(b)(1)(B) is amended to include civilian counsel in the class of victims' counsel. There is also discussion to include Navy and Marine Corps terms for Victims' Legal Counsel.

RCM 601(d)(2)(B) is amended to specifically refer to the requirement for pretrial advice received pursuant to Article 34.

RCM 701(g)(2) is amended to instruct when a military judge must seal materials.

RCM 704(c), (c)(1), and (e) are amended to allow—subject to service regulations—general court-martial convening authorities to delegate the authority to grant immunity to special court-martial convening authorities.

RCM 704(c)(1) and (2) are amended to reference the complete chapter in the United States Code covering grants of immunities.

RCM 1103(b) is amended to eliminate the difference between general and special courts-martial with respect to verbatim transcripts.

RCM 1103A is amended to clarify procedures for examining and disclosing sealed material throughout the court-martial and post-trial review process.

MRE 311(c)(4) and (d)(5)(A) are amended to permit admission of otherwise unlawfully obtained evidence if the official seeking the evidence acted on reasonable reliance on binding precedent valid at the time (the good faith exception from *Davis v. United States*, 564 U.S. 229, (2011)).

MRE 505(l) and 506(m) are amended to account for in camera reviews and to conform with amendments to RCM 701(g)(2).

MRE 513 and 514 are amended to refer practitioners to RCM 701(g)(2) and 1103A.

The JSC also received public and service commentary—mostly regarding RCM 1103A—which is currently being adjudicated. Additionally, the Judicial Proceedings Panel (JPP) has shown interest and conducted meetings with respect to changes in RCM 1103A; the JSC has provided public comments to the JPP in an effort to ensure transparency.

LT Nica noted that, given the complexity of commentary and overhaul from the MJA, the JSC has voted to make holistic changes: instead of an EO for year-end review and another implementing changes from the MJA, the JSC has elected to provide to the public and services one new product—the entire Manual for Courts-Martial—hopefully in Spring 2017.

Several supplemental and regulatory materials have been published to accompany the 2012 Manual for Courts-Martial. From March to November 2016, the Federal Register published JSC-submitted, DoD General Counsel-approved supplemental materials to accompany the 2012 Manual for Courts-Martial as amended by EOs 13643, 13669, 13696, and 13730. In December 2016, the Federal Register announced the publication of the Manual for Courts-Martial, 2016 Edition, and amendments that were made to the preface, table of contents, appendices, and index. This required the JSC to review all the aforementioned supplementary materials. On 16 August 2016, in response to EO 13730, the JSC delivered a letter to the Judge Advocates General of each service branch regarding Court of Criminal Appeals Rules of Procedure, Rule 20 regarding petitions for extraordinary relief answer and reply.

LT Nica also briefed the committee on the following JSC studies:

- Sentencing Interim Working Guidance Group. The Sentencing Interim Working Guidance Group has been drafting sentencing parameters and criteria in anticipation of the Senate version of the MJA. On 20 September 2016, the Group turned in its draft parameters and criteria; the MJA bill was enacted without any requirement for sentencing parameters or criteria.

- Mental Health Report. Mental Health Report 1 was aimed at studying the optimal balance between victim privacy interests, law enforcement, and due process interests of accused service members. It is also concerned with studying the potential benefits of uniform guidance for the release of mental health information and records. The Report was submitted 28 April 2016, after which DoD OGC submitted a follow-on information request regarding requests for mental health records and recommendations as to what best practices should be implemented. The JSC reported back to DoD on 22 December 2016.
- Victim Collateral Misconduct in Sexual Assault Cases Subcommittee Report. This subcommittee was tasked, in response to Response Systems Panel (RSP) Recommendation 60, to review issues related to collateral misconduct in sexual assault cases, notably the appropriateness of automatic immunity for alleged victims of sexual assault for lower level collateral misconduct. The report recommended granting delegation authority to the convening authority for general courts-martial to allow special court-martial convening authorities to grant immunity. This language was a proposed addition to R.C.M. 704. The report also includes discussion encouraging the expediting of immunity requests for collateral misconduct in sexual assault cases. This language was incorporated into a Discussion to R.C.M. 704. The convening authorities retain discretion over whether to grant immunity. During LT Nica's briefing on this subject, Judge Stucky and Judge Ryan expressed concern with RSP's initial recommendation that the JSC consider automatic grants of immunity for lower level collateral misconduct in sexual assault cases. No automatic grant of immunity was adopted.
- Proposed Amendment to RCM 1103A allowing Defense Advisory Committee on the Investigation, Prosecution, and Defense of Sexual Assault (DACIPAD) to access sealed information. The JSC was tasked by DoD OGC to provide a proposed amendment to RCM 1103A allowing DACIPAD to access sealed information. However, the JSC voting group decided that there were significant privacy concerns attached to DACIPAD's access to sealed material. Additionally, DACIPAD's first meeting revealed that DACIPAD had no expectation or need to review sealed materials. DoD OGC approved JSC's determination that DACIPAD should not access sealed materials. Dean Schenck expressed concern that DACIPAD will be called to review cases in which it cannot view sealed material related to the case. This issue may be revisited if DACIPAD identifies such a need and requests access to these materials.

## Implementation of the 2016 Military Justice Act

LT Nica noted that implementation of the Military Justice Act of 2016 has taken up a great deal of JSC's time. The working group and voting group's meetings have accelerated: three-to-four hour meetings have turned into eight hour meetings and the number of meetings has increased to several times per month, if not weekly. Once voted and approved, the MCM will be formatted for publication on the Federal Register via a notice and direction to go to a website. The entire MCM will be on the site for comment. There will be no separate calls for proposals this year, as the JSC has elected to take the holistic approach and make one release with the new MCM. Because Army Publishing Division can no longer be used, future MCMs will be released electronically; there will, however, be hardcopy manuals published and made available for the Manual for Courts-Martial, 2016 Edition.

### **Briefings from the services:**

#### **Army**

Major General Thomas E. Ayres, representing the Judge Advocate General of the Army, began by comparing the Army's three primary activities from last year and describing how one of the three has changed. Last year the Army was: 1) fighting a counterinsurgency and counterterrorism threat in Iraq, Syria, and Afghanistan; 2) preparing for future conflicts against near-peer competitors, and 3) downsizing. While the first two endeavors remain, the Army is now growing instead of downsizing. Last year, active duty personnel decreased from 490,000 to 475,000 (the smallest force since WWII), but have now increased to 496,000. The Army JAG Corps has increased from a previous low of 1,803 to 1,819 active duty, with expected growth in the coming year. The JAG reserve component is up to 1,814 in the National Guard and 891 U.S. Army Reserve.

While forces have increased, the numbers of courts-martial have slightly decreased from 826 to 795, consisting of 558 general courts-martial and 237 special courts-martial. The Army has continued to focus on sexual assault through the use of Special Victims Counsel (SVC), growing from 23 to a total of 46 authorizations. The Army also added 23 Special Victims Prosecutors as well as 23 Special Victim Witness Liaisons. The Army has refined their SVC from 138 to 90 active duty SVC, with 221 Army Reserve and National Guard SVC, representing a total of 958 clients.

Major General Ayres noted that the Army's other initiatives focus on transparency and efficient training to adapt to the MJA. The Army is seeking to increase transparency by requesting that external entities evaluate individual military justice training within the Army. Major General Ayres also explained that the Army is developing its operational planning team into a training team which would travel to various installations and provide training on the MJA, with an emphasis on post-trial changes.



## **Navy**

On behalf of Vice Admiral James W. Crawford III, the Judge Advocate General of the Navy, Colonel Daniel Lecce, USMC, Assistant Judge Advocate General for Military Justice, delivered a brief focused on the current state of the Navy, courts-martial and post-trial review numbers, and military justice developments.

The Navy currently holds a force of 323,000 active duty sailors, 108,000 reserve sailors, 912 active duty JAG officers, 395 reserve JAG officers, and 515 active duty legalmen. This year the Navy had 123 general courts-martial, up from 118 last year. Special courts-martial, however, decreased to 135 this year from 157 last year. Summary courts-martial also decreased to 30 this year from 32 last year. Post-trial review of general courts-martial has remained fairly steady, increasing from 195 to 197 while reviews of special courts-martial have increased from 160 to 184. There were 22 Article 69 reviews.

Colonel Lecce dedicated a significant portion of his briefing to outlining the Navy's developments in military justice. The Navy currently has 77 military justice litigation career track JAG officers, 63 of whom are billeted in jobs specifically coded for military justice litigation career track officers. The Navy also maintains a special victims investigation and prosecution capability comprised of specially-trained prosecutors and defense counsel, with Commander and Lieutenant Commander senior trial counsel selected by VADM Crawford. Colonel Lecce noted that almost all the aforementioned counsel have LLMs in trial advocacy.

Colonel Lecce went on to remark that the Navy has enhanced its Trial Counsel Assistance Program (TCAP) and its Defense Counsel Assistance Program (DCAP). TCAP is being run by a Navy Captain military justice career track expert, assisted by a GS-15 expert deputy with extensive experience in child sexual abuse case-handling. DCAP's director is career track-qualified and holds an LLM in litigation and dispute resolution; another highly qualified expert has been hired and is due onboard in the coming months.

The Navy's Defense Services Organization (DSO) also continues to grow stronger. The Navy has added defense legal service specialist positions that have become integral to DSO. These defense legal specialists can conduct investigations independent of military criminal investigative organizations and are located at major personnel and fleet concentration areas.

The Navy's Victims' Legal Counsel (VLC) program has remained robust and growing, currently consisting of 32 JAG officers and 10 administrative support personnel. This year, 16 Navy VLC's participated in 892 military justice administrative proceedings and conducted 543 outreach briefs. The VLC program has expanded to cover child victims assaulted by active duty service members; training has also been expanded to cover appellate matters.

## **Air Force**

Colonel Julie Huygen, Chief of the Military Justice Division at the Air Force Legal Operations Agency, representing Lieutenant General Chris Burne, Judge

Advocate General of the Air Force, focused her briefing on highlights from fiscal year 2016, including a completed circuit alignment and continuing efforts to increase transparency.

Colonel Huygen noted that, by 30 September 2016, the Air Force had 1,278 active duty JAG officers supported by 829 paralegals and 906 Department of the Air Force civilian employees; 389 paralegals and 971 Air Force JAG officers were serving in a reserve capacity. In 2015-2016, the Air Force received authorizations to handle an increased workload with regard to sexual assault response, including an expansion of eligibility for SVC services. In 2016, the Air Force filled some of the additional authorizations, adding 6 senior trial counsel for a total of 24 filled authorizations. These filled authorizations include 11 qualified special victims unit senior trial counsel. The Air Force added senior defense counsel—tasked with supervising and mentoring 84 area defense counsel and 74 defense paralegals across the Air Force—to increase from 19 to 21 senior defense counsel. Finally, 21 authorizations for special victims paralegals were filled. In sum, the Air Force has 46 special victims paralegals, 50 SVC, and 6 senior SVC across 42 installations worldwide.

Colonel Huygen described the Air Force's completed circuit alignment, which established five geographic circuit offices located at:

1. Joint Base San Antonio-Randolph (TX)
2. Joint Base Langley-Eustis (VA)
3. Travis AFB (CA)
4. Kadena Air Base (Japan)
5. Ramstein Air Base (Germany)

Each base has been allocated senior litigators and military judges to increase efficiency, promote civility, and maximize training. Training volume and efficiency have increased since the circuit alignment. Senior trial counsel at these offices provided over 2,000 hours of training for junior trial counsel, and Joint Base Andrews hosted the first circuit annual training in August 2016. The Air Force also relocated enlisted court reporters at the circuit offices in order to improve efficiency of docketing for courts-martial across the Air Force.

The Air Force continues to increase transparency to the public at large as well as to service members. The main tool being used to accomplish this goal is a public website with increased functional utility. The website provides automated docketing information with a worldwide schedule of general and special courts-martial, regardless of location. An automated trial results function has been added to post trial results within 24 hours of their validation; this system seeks to promote transparency but is also careful to maintain and protect the privacy interests of airmen acquitted of some or all of the offenses for which they are tried. The Air Force will also continue to publish monthly trial results with information on the effect of pretrial agreements and is currently working toward incorporating those effects into its automated reporting system.

## **Coast Guard**

Rear Admiral Steven J. Andersen, Judge Advocate General of the Coast Guard, briefed the Committee on the current state of Coast Guard military justice. The Coast Guard remains relatively stable, with a personnel force just over 40,000 strong, including 7,000 reservists. The Coast Guard saw a slight increase in Judge Advocates this year, up to 223 active duty Judge Advocates, approximately 25% of whom are currently serving out of specialty; this includes four Judge Advocate flag officers not serving in a legal capacity. The increase in personnel has mainly stemmed from efforts to consolidate prosecution efforts in Norfolk and Alameda, where the Coast Guard is working to station two full-time prosecutors handling serious misconduct. This year also saw an increase in Judge Advocates detailed to the Navy serving as defense counsel at DSO. The Coast Guard has 107 civilian attorneys as well.

RDML Andersen noted that, over the past few years, the Coast Guard has enjoyed a steady case load. With regard to sexual assault cases, criminal investigations—and resulting trials—are trending downward.

At the end of RDML Andersen's brief, Chief Judge Erdmann asked if the Coast Guard was continuing to use Navy judges on its courts. RDML Andersen responded that the Coast Guard is moving from one to three full-time trial judges, but still receives judges from other branches of service. While the Coast Guard will continue to maintain collateral duty judges, those individuals will begin to shift to a magistrate function, eventually preparing to serve as full-time trial judges.

## **Marine Corps:**

Major General John R. Ewers Jr., Staff Judge Advocate to the Commandant of the Marine Corps, briefed the Committee on the state of the Marine Corps military justice year-in-review. General courts-martial have increased, and the small number of special courts-martial has decreased; there has, however, been an increase in pending courts-martial. The Marine Corps' military justice "triad" consists of 80 trial counsel, 70 defense counsel, and 18 VLC. Trial counsel is supported by TCAP and defense counsel is supported by DCAP, while obtaining an appellate capability for VLC—representing all victims, not just of sexual assault—is still a goal. General Ewers described the Marine Corps' main challenge as maintaining and enhancing capability without the ability to increase representatives. The Marine Corps will attempt to accomplish this goal through innovation, including imported expertise from highly-qualified experts, playbooks, checklists, competition, and other measures simulating trial. The Marine Corps does not have a plan to move to a military justice track.

Separate reports of the United States Court of Appeals for the Armed Forces and the individual services 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.

Scott W. Stucky  
Chief Judge

Margaret A. Ryan  
Judge

Kevin A. Ohlson  
Judge

John E. Sparks  
Judge

Major General Thomas E. Ayres, U.S. Army  
Representing the Judge Advocate General of the Army

Major General John R. Ewers, Jr., U.S. Marine Corps  
Staff Judge Advocate to the Commandant of the Marine Corps

Rear Admiral Steven J. Andersen, U.S. Coast Guard  
Judge Advocate General of the Coast Guard

Colonel Daniel J. Lecce, U.S. Marine Corps  
Representing the Judge Advocate General of the Navy

Colonel Julie J.R. Huygen, U.S. Air Force  
Representing the Judge Advocate General of the Air Force

Dean Lisa M. Schenck  
Public Member

Mr. James E. McPherson  
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**

**October 1, 2016 to September 30, 2017**

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 October 2016 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 (UCMJ), Title 10, United States Code, § 946.

Chief Judge Charles E. “Chip” Erdmann completed his 15-year term on July 31, 2017, passing the gavel to Chief Judge Scott W. Stucky in a ceremonial session held on May 24, 2017. During the same session, the Court honored the service of the long-serving Clerk of the Court, Mr. William A. DeCicco, on the occasion of his retirement. With the completion of now-Senior Judge Erdmann’s term, the Court was reduced to four Judges at the end of this Term of Court.

## **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 October 1, 2016 to September 30, 2017. 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 website. The Court’s website 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.

On October 2, 2015, the Court modified the Term of the Court to begin on October 1 of each year and to end on September 30 of the following calendar year. For last year’s report, this change resulted in a Term of Court spanning 13 months instead of 12 months. This report describes the Court’s first 12-month Term of Court under the modified schedule.

During the October 2016 Term of Court, the Court 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 is set forth in Appendix A.

## **RULES OF PRACTICE AND PROCEDURE**

During the October 2016 Term, the Court approved changes to Rules 3A(a) and 21(a) of the Court's Rules of Practice and Procedure. The changes to Rules 3A(a) and 21(a) were made to correspond with legislative changes to Senior Judge pay structure and to resolve tension between Rule 21(a) and Rule 21(e).

The changes to Rule 3A(a) regarding Senior Judge pay were approved to correspond to the 2017 National Defense Authorization Act (2017 NDAA). The 2017 NDAA amended Article 142(e)(2), UCMJ, to provide that, instead of stopping a Senior Judge's annuity while in active service, the Senior Judge performing judicial duties shall continue to receive the annuity in full, and also receive additional pay equal to the difference between the daily equivalent of the annual rate of pay provided for a Judge of the Court and the daily equivalent of retired pay of the Judge under Article 145, UCMJ.

The changes to Rule 21(a) were approved to settle tensions between Rule 21(a)'s mandate that good cause "must" be shown by an appellant and Rule 21(e)'s proviso that "no issue" petitions will be reviewed by the Court without waiting for an answer. The Rules Committee unanimously voted that the words "should appear" will replace "must appear" in Rule 21(a).

## **BAR OF THE COURT**

During the October 2016 Term, 157 attorneys were admitted to practice before the Court, bringing the cumulative total of admissions to the Bar of the Court to 36,941.

## **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 October 2016 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, at the University of Colorado Law School in Boulder, CO, Peterson Air Force Base in Colorado Springs, CO, Notre Dame Law School in South Bend, IN, and the Claude W. Pettit College of Law at Ohio Northern University in Ada, OH. 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 AND TRAINING PROGRAM**

On March 8 and 9, 2017, the Court held its Continuing Legal Education and Training Program at the American University Washington College of Law in Washington, D.C. The program opened with welcoming remarks from the Honorable Charles E. “Chip” Erdmann, then the Chief Judge, United States Court of Appeals for the Armed Forces. He preceded the following speakers: Colonel Frederic L. Borch III, U.S. Army (Retired), Regimental Historian and Archivist at the Judge Advocate General’s Legal Center and School; Emily Feltren, Director of Government Relations at the American Association of Law Libraries; Brenner M. Fissell, Affiliated Scholar at the Georgetown University Law Center and former clerk to current Chief Judge Scott W. Stucky, United States Court of Appeals for the Armed Forces; Alexander P. “Alex” Berrang, Assistant U.S. Attorney for the Eastern District of Virginia; The Honorable Scott W. Stucky, now the Chief Judge, United States Court of Appeals for the Armed Forces; a panel consisting of Andrew S. Efron, Senior Judge, United States Court of Appeals for the Armed Forces and Director, Military Justice Review Group, Dwight Sullivan, Senior Associate Deputy General Counsel (Military Justice and Personnel Policy) at the Department of Defense, and Captain Art Record, United States Navy, Judge Advocate General’s Corps; James Young, Commissioner for current Chief Judge Scott W. Stucky; Elizabeth L. “Liz” Lippy, Assistant Director of the Trial Advocacy Program at the American University Washington College of Law; and James E. Baker, Senior Judge, United States Court of Appeals for the Armed Forces and Visiting Professor at the Georgetown University Law Center.

Scott W. Stucky  
Chief Judge

Margaret A. Ryan  
Judge

Kevin A. Ohlson  
Judge

John E. Sparks, Jr.  
Judge



## **APPENDIX A – SELECTED DECISIONS**

This appendix contains an informal staff summary of selected decisions of the October 2016 Term of Court. A full list and summary of the cases decided by the Court during the Term, including any related concurrences and dissents, can be found on the Court’s website.

*United States v. Dalmazzi*, 76 M.J. 1 (C.A.A.F. 2016), holding that the issue of whether concurrent service by a military appellate judge on an Air Force Court of Criminal Appeals (AFCCA) panel and as a Judge on the United States Court of Military Commission Review (USCMCR) was constitutionally or statutorily prohibited was moot.

*Randolph v. HV and United States*, 76 M.J. 27 (C.A.A.F. 2017), dismissing the accused’s petition for review of the Coast Guard Court of Criminal Appeals’ decision granting mandamus relief to the alleged victim. The Court held that it lacked jurisdiction to consider the petition under either the UCMJ or the All Writs Act.

*United States v. Sager*, 76 M.J. 158 (C.A.A.F. 2017), holding that Article 120(d)’s prohibition of sexual contact with someone who is “asleep, unconscious, or otherwise unaware” creates three separate theories of criminal liability.

*United States v. Ortiz*, 76 M.J. 189 (C.A.A.F. 2017), holding that a military appellate judge’s appointment to the USCMCR did not terminate his military commission, and did not prohibit the military appellate judge’s service on the AFCCA panel that decided appellant’s case; and that the Appointments Clause of the Constitution did not prohibit his continued service as an appellate military judge.

*United States v. Haverty*, 76 M.J. 199 (C.A.A.F. 2017), holding that, to violate Article 92, UCMJ, proscribing the violation of, or failure to obey, “any lawful general order or regulation,” to wit, an Army Regulation prohibiting hazing, the accused must consciously disregard a known risk that the hazing conduct is cruel, abusive, oppressive, or harmful, therefore requiring a *mens rea* of recklessness; and that the military judge’s failure to instruct on *mens rea*, particularly the requirement that the accused acted with recklessness, was prejudicial and amounted to plain error.

*United States v. Hukill*, 76 M.J. 210 (C.A.A.F. 2017), holding that evidence of one charged and contested offense may not be used as propensity evidence for another separate charged offense; and that admitting such evidence was error which was not harmless beyond a reasonable doubt.

*United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017), holding that alleged unlawful command influence—where the Chief of Staff of the Air Force advised the convening authority that, unless he retired, he would be fired—did not prejudice the accused, but that, where an objective and disinterested observer with knowledge of the case would harbor significant doubts about the fairness of the proceedings, the

appearance of unlawful command influence required reversal of the findings and sentence without prejudice.

*United States v. Oliver*, 76 M.J. 271 (C.A.A.F. 2017), holding that trial defense counsel's affirmative response of no objection to the military judge's consideration of wrongful sexual contact as a lesser included offense of abusive sexual contact was a forfeiture, not a waiver, of the right to argue against such consideration on appeal; and that, though the military judge erred in considering wrongful sexual contact as a lesser included offense of abusive sexual contact, such consideration was not plain error where the accused suffered no prejudice.

*United States v. Shea*, 76 M.J. 277 (C.A.A.F. 2017), holding that the accused did not have a right, on remand from this Court, to a panel composed of the same appellate judges who originally reviewed his case; and that the accused did not meet his burden to show some evidence of apparent unlawful command influence.

*United States v. Cooley*, 75 M.J. 247 (C.A.A.F. 2016), holding that the charge of sexual abuse of a child was without legal basis where a change to the specification of the charge was major, the accused objected to the change, and the charge was not preferred again after the change; and that the accused was not required to make a separate showing of prejudice, overruling *United States v. Sullivan*, 42 M.J. 360 (C.A.A.F. 1995), *United States v. Smith*, 49 M.J. 269 (C.A.A.F. 1998), *United States v. Brown*, 34 M.J. 105 (C.M.A. 1992), and *United States v. Johnson*, 12 C.M.A. 710, 31 C.M.R. 296 (1962); and that a new Article 134, UCMJ, charge for making a statement to a child that was of a nature to bring discredit upon the armed forces failed to state an offense.

*United States v. Comisso*, 76 M.J. 315 (C.A.A.F. 2017), holding that three panel members inaccurately answered material questions during voir dire and subsequently failed to correct them during the court-martial; that the accused would have otherwise had a valid basis for challenging those three members for cause; and that a post-trial hearing to determine the accuracy of these panel members' answers during voir dire failed to adequately remedy the members' dishonesty and potential for the accused to issue a challenge for implied bias.

*United States v. Ramos*, 76 M.J. 372 (C.A.A.F. 2017), holding that special agents had a duty to provide an Article 31(b), UCMJ, rights warning to a servicemember before continuing to ask questions regarding his wife's marijuana growing business once the agents began to suspect that the servicemember's involvement violated provisions of the UCMJ; and that the subsequent use of the unwarned statements of the accused in response to those questions as the basis for his conviction of making a false official statement prejudiced the accused's substantial rights.

*United States v. Gurczynski*, 76 M.J. 381 (C.A.A.F. 2017), holding that the search of a portable hard drive was not constitutionally reasonable and that the military judge did not abuse his discretion in suppressing evidence of an offense not named in

the warrant as outside the warrant's scope.

*United States v. Forrester*, 76 M.J. 389 (C.A.A.F. 2017), holding that the accused's conviction and sentencing for four specifications of possession of child pornography was not multiplicitous in violation of the Double Jeopardy Clause where each conviction involved the same images, but each specification involved possession taking place on four separate and distinct electronic devices.

*United States v. Mitchell*, 76 M.J. 413 (C.A.A.F. 2017), holding that asking the accused, without counsel, for his phone's passcode violated the accused's Fifth Amendment right against self-incrimination; and that evidence derived from the Fifth Amendment violation must be suppressed; but that the phone itself should not have been suppressed.

**USCAAF STATISTICAL REPORT  
OCTOBER 2016 TERM OF COURT**

**CUMULATIVE SUMMARY**

CUMULATIVE PENDING OCTOBER 1, 2016

Master Docket	30
Petition Docket	72
Miscellaneous Docket	<u>3</u>
TOTAL	105

CUMULATIVE FILINGS

Master Docket	267
Petition Docket	587
Miscellaneous Docket	<u>17</u>
TOTAL	871

CUMULATIVE DISPOSITIONS

Master Docket	257
Petition Docket	588
Miscellaneous Docket	<u>14</u>
TOTAL	859

CUMULATIVE PENDING OCTOBER 1, 2017

Master Docket	40
Petition Docket	71
Miscellaneous Docket	<u>6</u>
TOTAL	117

**OPINION SUMMARY**

<u>CATEGORY</u>	<u>SIGNED</u>	<u>PER CURIAM</u>	<u>MEM/ORDER</u>	<u>TOTAL</u>
Master Docket	39	1	217	257
Petition Docket	0	1	587	588
Miscellaneous Docket	<u>0</u>	<u>0</u>	<u>14</u>	<u>14</u>
TOTAL	39	2	818	859

## MASTER DOCKET SUMMARY

PENDING AT BEGINNING OF TERM	30
FILINGS	
Petition granted from the Petition Docket	258
Certificates filed	8
Mandatory appeals filed	1
Remanded/Returned cases	<u>0</u>
TOTAL	267
DISPOSITIONS	
Affirmed	215
Reversed in whole or in part	42
Certificates dismissed	<u>0</u>
TOTAL	257
PENDING AT END OF TERM	
Awaiting briefs	12
Awaiting oral argument	18
Awaiting lead case decision (trailer cases)	5
Awaiting final action	<u>5</u>
TOTAL	40

## PETITION DOCKET SUMMARY

PENDING AT BEGINNING OF TERM	72
FILINGS	
Petitions for grant of review filed	585
Petitions for new trial filed	2
Returned cases	<u>0</u>
TOTAL	587
DISPOSITIONS	
Petitions for grant of review denied	328
Petitions for grant of review granted	252
Petitions for grant of review withdrawn	2
Petitions for grant of review dismissed	<u>6</u>
TOTAL	588

PENDING AT END OF TERM

Awaiting pleadings	22
Awaiting staff review	13
Awaiting final action	<u>36</u>
TOTAL	71

**MISCELLANEOUS DOCKET SUMMARY**

PENDING AT BEGINNING OF TERM 3

FILINGS

Writ appeals sought	5
Writs of habeas corpus sought	3
Writs of coram nobis sought	2
Other extraordinary relief sought	<u>7</u>
TOTAL	17

DISPOSITIONS

Petitions or appeals denied	12
Petitions or appeals granted	0
Petitions or appeals dismissed	1
Petitions or appeals withdrawn	<u>1</u>
TOTAL	14

PENDING AT END OF TERM

Awaiting briefs	0
Awaiting staff review	2
Awaiting final action	<u>4</u>
TOTAL	6

**PETITIONS FOR RECONSIDERATION**

**ALL CASES**

Begin pending      4  
Filed                23  
TOTAL                27

**DISPOSITIONS**

Denied            19  
Granted            6  
Dismissed        0  
TOTAL              25

End Pending        2

**MOTIONS**

**ALL MOTIONS**

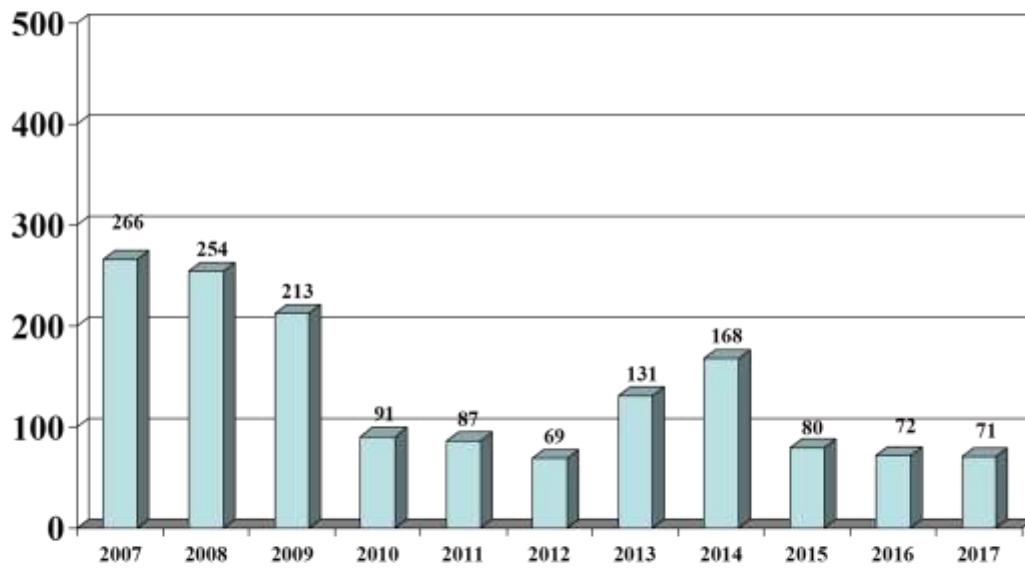
Begin pending      5  
Filed                408  
TOTAL                413

**DISPOSITIONS**

Granted            347  
Denied              64  
Dismissed        0  
TOTAL              411

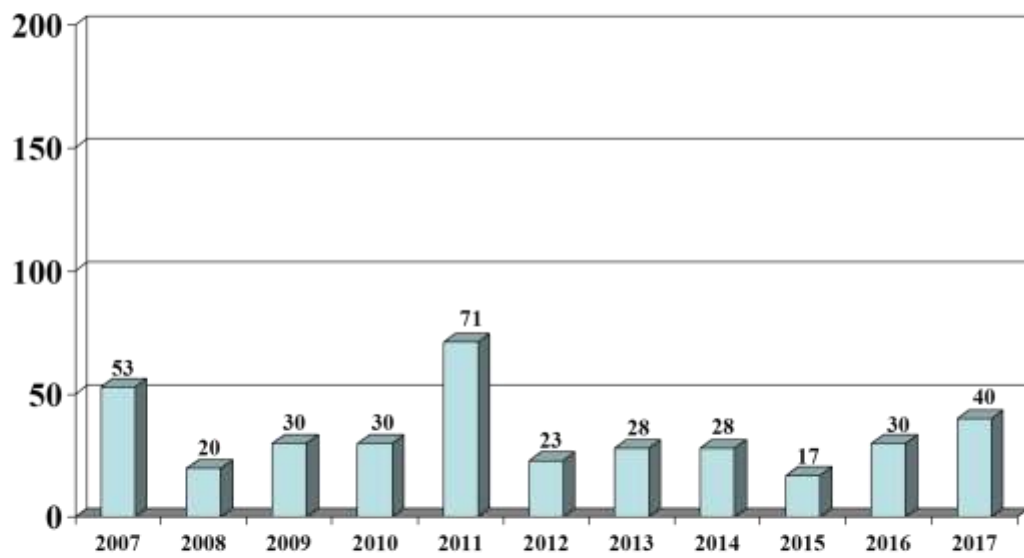
End Pending        2

## Petition Docket Term End Pending

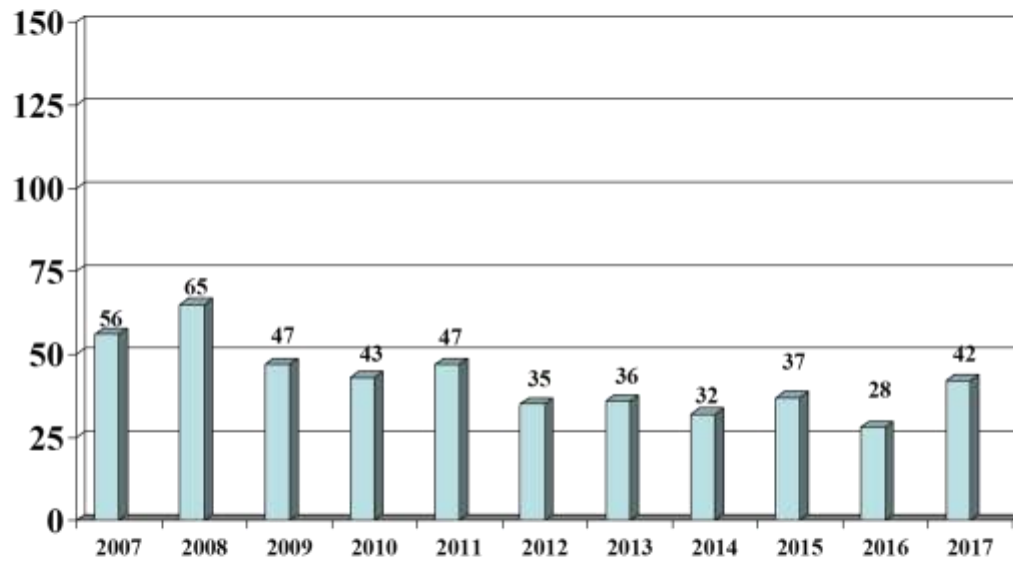




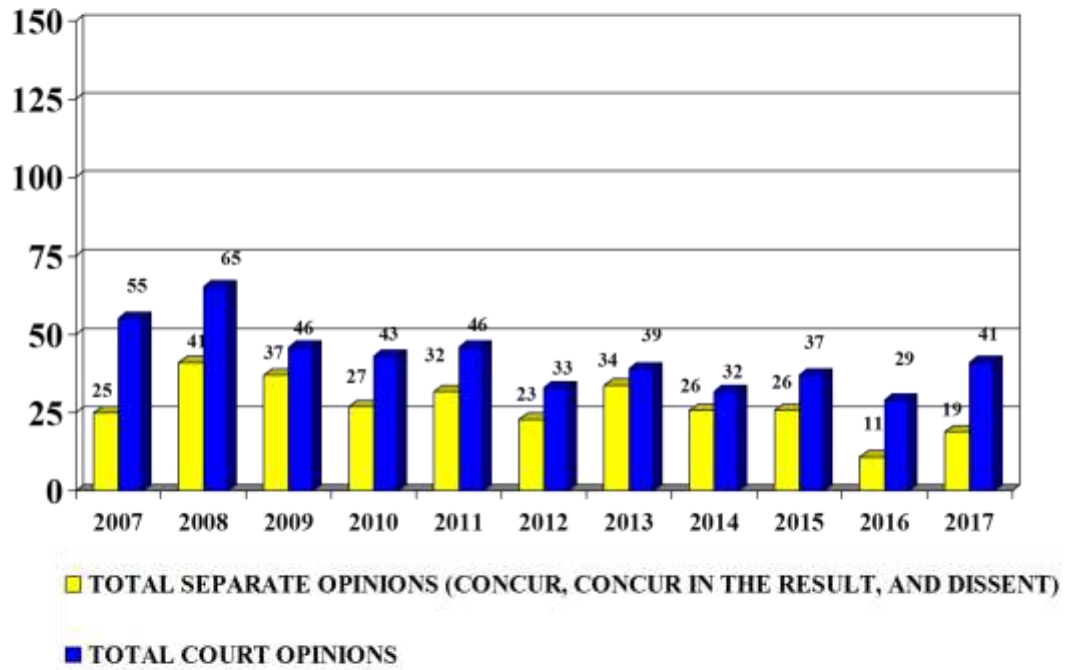
## Master Docket Term End Pending



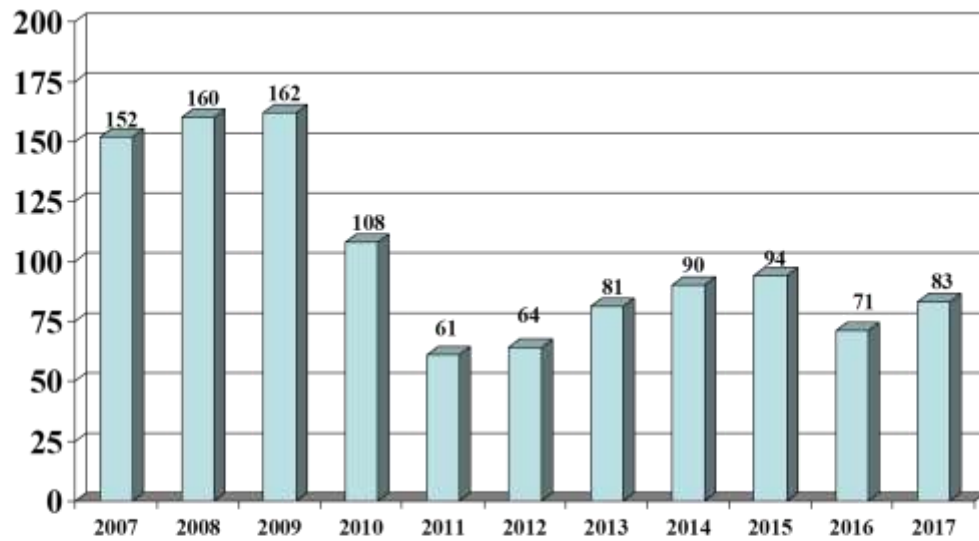
## Oral Arguments Per Year



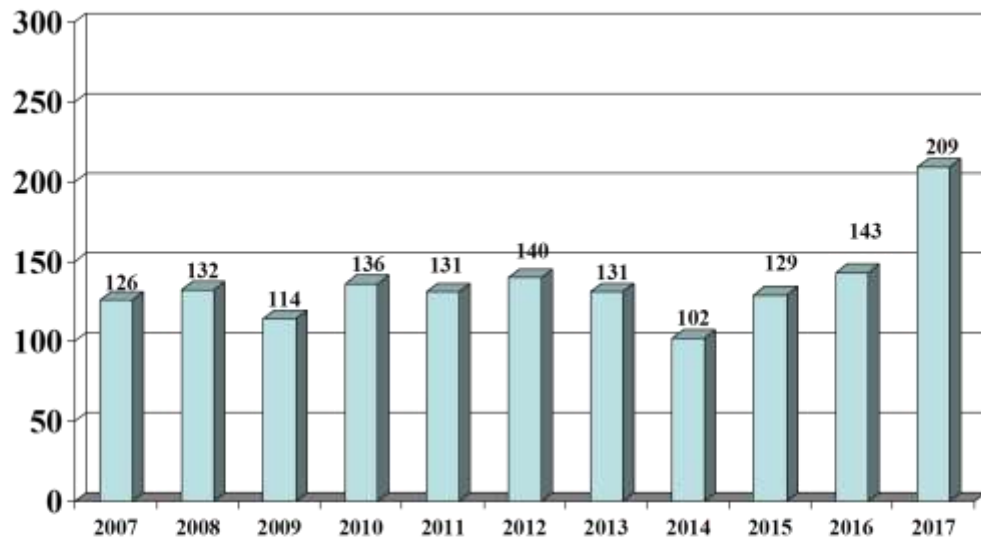
## Total Opinions Per Year



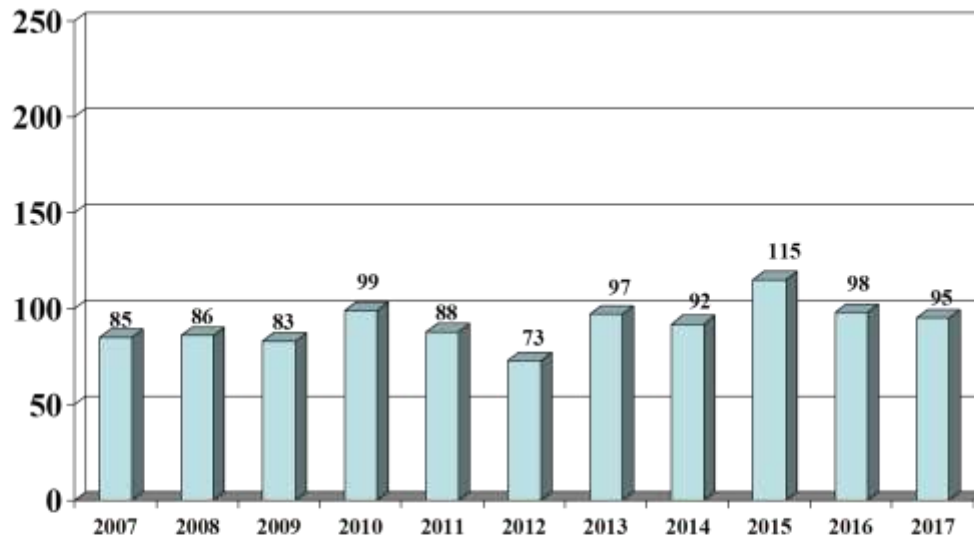
## Days from Petition Filing to Grant



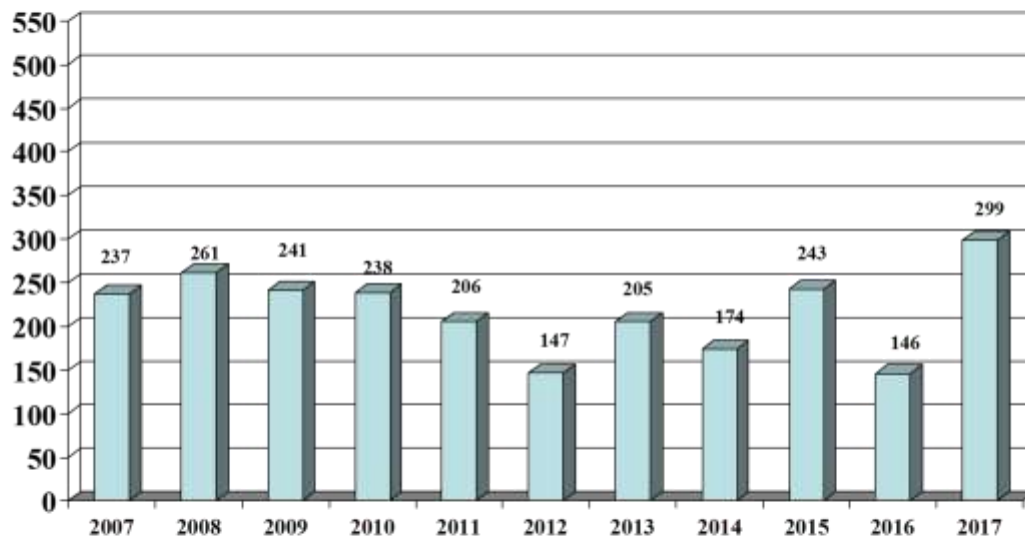
## Days from Petition Filing to Oral Argument



## Days from Oral Argument to Final Decision

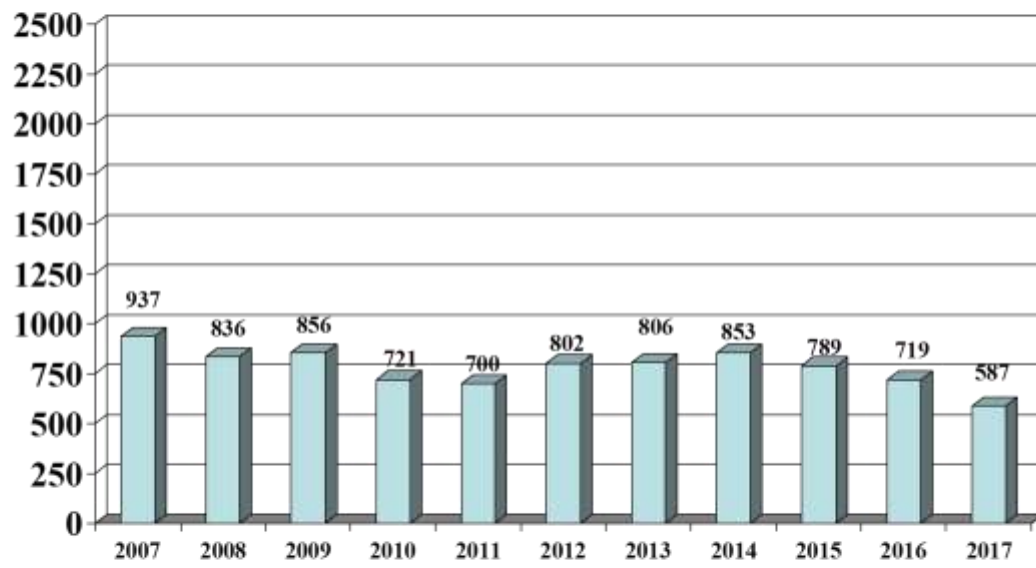


## Days from Petition Filing to Final Decision



■ MASTER DOCKET (GRANTED/CERTIFIED/CAPITAL CASES)

## Total Petitions Filed Per Year





### **Section 3**

## **Report of the Judge Advocate General of the Army**

## **REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY OCTOBER 1, 2016 TO SEPTEMBER 30, 2017**

In fiscal year 2017 (FY17), 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) conducted 16 visits to installations and commands in the United States and overseas to inspect the delivery of military justice support to commanders and Soldiers. 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 and practice. 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 (MCM); 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 domestic violence victim assistance policies, and federal prosecutions; representing the Army on the Joint Service Committee (JSC) on Military Justice; responding to inquiries from the President, Congress, Department of Defense (DoD) and the Army Staff; responding to inquiries under the Freedom of Information Act (FOIA); and conducting reviews of court-martial cases under Article 69 of the UCMJ to ascertain legal sufficiency, 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 worldwide across all grades. The CLD 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's 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. This allows not only the internal flow of information but also allows greater transparency as we post monthly court-martial results of trial in the FOIA Reading Room.

Traditionally reported CLD actions for the last three fiscal years are listed below.

	<u>FY15</u>	<u>FY16</u>	<u>FY17</u>
Congressional and other inquiries	120	148	158
Officer Dismissals	18	32	30
Article 69 and other reviews	68	137	72
Freedom of Information/Privacy Act Requests	16	23	20

The CLD chairs regular meetings of the Military Justice Initiatives Council (MJIC), with membership consisting of key stakeholder organizations within the Army JAGC (such as TJAGLCS, TCAP, DCAP, Defense Appellate Division (DAD), Government Appellate Division (GAD), and the U.S. Army Trial Judiciary) that deal with military justice matters. The MJIC's purpose is to examine key military justice issues, to reconcile points of view regarding those issues, and as appropriate, to propose feasible, achievable, and sustainable solutions. In FY17, some of the issues worked on included Additional Skill Identifiers (ASIs) and the Congressionally mandated Pilot Program, as well as the implementation within the Army JAGC of key provisions of the Military Justice Act of 2016 (MJA '16, see below for further discussion).

The Military Justice Additional Skill Identifier (ASI) program continues to grow. The purpose of the program is to help generate and sustain expertise, to provide incentives to attend training, and to assist in the selection of personnel for key military justice positions. To date, 1,684 judge advocates have been awarded skill identifiers: 833 basic, 545 senior, 214 expert, and 92 master military justice practitioners. Importantly during FY17, ASI applicants were instructed to ensure that required letters of recommendations had information that clearly indicated that applicants could demonstrate significant and substantial involvement in a number of courts-martial, with that involvement being detailed by the recommending official. This new requirement thus provides for a further qualitative dimension to the ASI program.

The CLD participates in inspections three times per year of the Forensic Drug Testing Laboratories at Fort Meade, MD and Tripler Army Medical Center, HI. These inspections are intended to ensure that the laboratory results are forensically acceptable and that the laboratories are following DoD and Army policy guidance. The CLD attorney participation is intended to assist in ensuring not only that the laboratory results are forensically acceptable (which protects both the government and the Soldier), but also to ensure that the results may be used in administrative and judicial proceedings if required.

The CLD actively supports the JSC mission with the Chief, CLD (O6) serving as a voting group member and the Chief, Policy Branch, CLD (O5) serving as a working group member. The CLD participated in the JSC drafting of one Proposed Executive Order (PEO). The PEO contained recommended amendments to Rules for Court-Martial (RCM) 104, 601, 701, 704, and 1103 and amendments to Military Rules of

Evidence (Mil. R. Evid.) 311, 505, 506, 513, and 514. Copies of PEOs and EOs are located on the JSC webpage at <http://jsc.defense.gov>. The JSC is currently revising the MCM to reflect all of the changes in the FY17 NDAA with a new edition printed for distribution prior to 1 January 2019.

On 29 August 2017, the DoD General Counsel authorized the formation of a JSC subcommittee to study and make recommendations concerning the implementation of the new Article 140a, UCMJ. Article 140a covers case management, data collection, and accessibility within the military justice system. The new JSC-140a subcommittee will provide its findings and recommendations to the JSC in July 2018 and is chaired by an O-5 from CLD.

The Military Justice Review Group (MJRG) continued to make recommended changes throughout this year. The JSC was intensely involved with reviewing, editing when necessary, and voting on those recommended changes. As a result of the MJRG and JSC efforts, the President will enact the MJA '16 when he signs the FY17 NDAA in the beginning of calendar year 2018 (CY18) when he signs the EO.

The MJA '16 represents the most significant changes to the UCMJ in more than 30 years. Significant changes include limited pre-referral authority for military judges; a new military judge alone special court-martial; fixed numbers of panel members, (4 for special courts-martial, 8 for general courts-martial, and 12 for capital cases); an increase to 3/4ths in the required number of votes for a guilty finding by members; an election by an accused convicted by members to be sentenced either by those members or by the military judge; a complete overhaul of the punitive articles, including five new punitive articles and a significant number of offenses moved from Article 134 to separate enumerated articles; a streamlined post-trial process; increased authority of military judges during post-trial; expanded appellate review for an accused; and many others.

In FY17, CLD supervised the creation of a Military Justice Legislation Training Team (MJLTT) to create training products and instruction on the MJA '16, to advise on policy changes required for MJA '16 implementation, as well as to assist in revising Army Regulations (ARs), DA PAMs, and requisite policies. The MJLTT will lead training seminars worldwide throughout CY18 on the revised UCMJ to ensure the JAGC is prepared to seamlessly transition to the amended UCMJ on the effective date of the MJA '16. The MJLTT consists of one O5, two O4s, and an E8, all of whom have extensive military justice experience.

In 2014, in accordance with FY13 NDAA Section 576(a)(1), the Secretary of Defense established the Judicial Proceedings Panel (JPP). The JPP's mandate was to conduct an independent review and assessment of judicial proceedings involving adult sexual assault and related offenses since the 2012 UCMJ amendments. In 2017, the JPP released six reports: 1) Military Defense Counsel Resources and Experience in Sexual Assault Cases, 2) Victims' Appellate Rights, 3) Sexual Assault Investigations in the Military, 4) Statistical Data Regarding Military Adjudication of Sexual Assault Offenses

for Fiscal Year 2015, 5) Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases, and 6) Final Report, which is a compilation of their earlier reports, was released in October. Finally, it released three subcommittee reports on Sexual Assault Investigations in the Military, Initial Disposition Withholding Authority, M.R.E. 412 & 513, and Training and Experience of Trial Counsel and SVCs/VLCs, Barriers to the Fair Administration of Military Justice in Sexual Assault Cases. The CLD provided one judge advocate that served as the Army representative to the JPP and who was primarily responsible for gathering information and witnesses in response to the JPP's requests.

In December, 2014, Congress directed the Secretary of Defense to establish the sixth congressionally mandated task force on sexual assault in the military since 2003. Section 546 of the National Defense Authorization Act for FY 152015 enacted the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD). (The DAC-IPAD was initially required to begin its work in September 2017, following the completion of the JPP term, however, in the following year Congress advanced the start date for the Committee, requiring it to be formed within 90 days of the enactment of the National Defense Authorization Act for FY 16). The authorizing legislation charges the Committee to execute three tasks over its five-year term: 1) Advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces; 2) Review, on an ongoing basis, cases involving allegations of sexual misconduct for purposes of providing advice to the Secretary of Defense; and 3) Submit an annual report to the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives no later than March 30 of each year. The DAC-IPAD held its first public meeting in January, 2017 and released its Initial Report just two months later to comply with its statutory requirements. The committee acknowledges the report has a very limited scope due to their brief existence at the time it was submitted. The CLD provides one judge advocate that serves as the Army representative to the DAC-IPAD and who is primarily responsible for gathering information and witnesses in response to the DAC-IPAD's requests.

The CLD is responsible for the revision and publication of AR 27-10, Legal Services, Military Justice. A current revision is underway to enact changes from the MJA '16 with a planned release to coincide with the new MCM. During this time period CLD also renegotiated a new Memorandum of Agreement with the Criminal Investigations Command.

In conjunction with instructors from TJAGLCS, TCAP and DCAP, the CLD accomplished the first major update of its trial advocacy training manual in 20 years. With this update, *The Advocacy Trainer* will be fully digitized by the beginning of CY18 and includes material reflecting trial practice in the 21<sup>st</sup> Century: a chapter on trial visuals and instruction on evidentiary foundations for such things as e-mails, Facebook pages, and tweets.

Finally, the CLD's Strategic Priorities Branch continued to work with large civilian

prosecutors' offices and other training organizations with a national footprint to observe and evaluate Army military justice training. These partnerships, with organizations such as the Cook County State's Attorney's Office in Chicago, the National Advocacy Center, and the National District Attorneys Association, allow Army training officers to emulate best practices from those trial practice instructors and enhance the instruction provided to our military justice practitioners. Without exception, all reviewers returned glowing evaluations of the training conducted.

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

The mission of the Department of Criminal Law (DCL) of TJAGLCS in Charlottesville, Virginia, is to develop, improve and sustain excellence in the practice of military criminal law. The need to hone military justice skills in today's joint, expeditionary force is paramount and is the primary focus of our curriculum. From substantive criminal law and theory to technical and practical litigation skills, the DCL continues to provide training and education to develop new advocates and sharpen seasoned advocates in the practice of military justice. Criminal Law professors also provide limited off-site instruction and critical reach-back capability for military justice practitioners of all Services.

The DCL provides a variety of courses to a varied audience including commanders, Judge Advocates, Sister Service Judge Advocates, and international students. Courses are designed for: initial-entry Judge Advocates in the Basic Course; new Trial Counsel, Defense Counsel and Special Victim Counsel (SVC) in the Intermediate Trial Advocacy Course (ITAC); mid-level Judge Advocates in the Graduate Course, the Military Justice Leaders Course, the Judge Advocate Officer Advanced Course, and the SVC Course; senior Judge Advocates in the Military Judge Course and the SJA Course; and commanders and senior non-commissioned officers in the Command Sergeant Major Legal Orientation, the Senior Officer Legal Orientation Course, Army Strategic Education Program (ASEP), and the General Officer Legal Orientation Course (GOLO). Except for the ASEP and GOLO course, which is provided individually to General Officers in a single day, all courses are taught using a sexual assault fact pattern and are synchronized with other JAGC training agencies.

The ITAC is an advocacy-centered course designed to be more challenging than the JAG Basic Course and serve as intermediate advocacy training. The ITAC builds on courses young advocates will have already received: the New Prosecutor Course (offered by TCAP), Defense Counsel 101 (offered by DCAP), and the SVC Course. Students learn how to conduct sophisticated case analysis of a sexual assault, conduct voir dire, prepare instructions, interview a sexual assault victim, interact with an SVC, conduct a direct and cross-examination of a sexual assault victim, interview and conduct direct examinations of expert witnesses, and use technology and demonstrative evidence in the opening statement and closing argument. This year the DCL further refined the course by developing and implementing live demonstrations of advocacy skills by the faculty. To add realism to the intensive training, students must interview

and cross-examine Forensic Psychologists, Digital Forensic Analysts, Toxicologists, and Sexual Assault Medical Forensic Examiners. Also, Judge Advocates who are attending the Graduate Course role-play the victim to provide ITAC students with the challenge of interviewing and interacting with a live victim. This demanding course is provided twice annually.

The DCL continued to develop and improve the SVC Certification (SVCC) Course, offering one SVC-Child Victim Course and two SVC Courses last year. As an outreach effort, the DCL sent two professors to present a block of instruction on the Army SVC training program at the National Crime Victim Law Institute at Lewis and Clark Law School. Through the Army SVC Program Manager, the DCL coordinates with and draws best practices from sister Services, which in turn enhances coordination and training in this burgeoning area of law. In cooperation with the SVC Program Manager's Officer, the DCL sent two professors to the Fort Bragg regional SVC training to bring back training topics for the SVCC Course and to understand the next level of SVC training.

The SVCC Course is part of the certification process before Judge Advocates are authorized to take clients. Students learn best practices for working with sexual assault victims, how trauma impacts crime victims, how to work with law enforcement and victim-care professionals, how to manage professional responsibility and scope of representation issues, and how to most effectively advocate for victims' rights while working with commanders and other participants in the military justice system. The SVCC Course includes a roundtable discussion where actual sexual assault victims discuss their experiences and the assistance they received from their SVC. There is also a practical exercise where students build rapport and perform a mock initial interview with a client-victim role-player. The SVCC Course is a prerequisite for the SVC-Child Victim Course which focuses on: how to communicate with children; how children process and discuss traumatic events; which experts are best suited to assist child victims; and services available for child victims. As victim rights and policy continue to develop, the DCL assists in the implementation and education of those policies and makes recommendations for policy changes and improvements to the SVC Program Manager.

The DCL presented the Forty-Fifth Kenneth J. Hodson Lecture in Criminal Law, hosting Dean Richard Rosen, Dean of Texas Tech Law School. The DCL continued outreach to the field by teaching at: the Army's Sexual Harassment and Assault Response Program Academy; the Staff Judge Advocate Best Practices Course; the Army Trial Judge Sexual Assault Training and four Reserve Component off-sites.

## **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. In FY 2017, 388 records of trial and over 1,300 motions and briefs were referred to one of the three judicial panels comprising the ACCA for judicial review. The average processing times for those courts-martial from sentencing to convening authority action was 158 days. In 158 of those cases, initial action was completed by the convening authority within the 120 days prescribed by *United States v. Moreno*. Three hundred thirty-two of the records were received by ACCA within 30 days of convening authority action.

The Army's superior court rendered an initial decision in 449 cases in FY17, with an average processing time of 316 days from receipt of the record of trial by the clerk of court to decision by ACCA. Of the 449 decisions, 397 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.

Working with the CLD, the Office of the Clerk of Court also processed 66 additional cases for examination under Article 69, UCMJ. The Office of the Clerk of Court served the ACCA decisions upon all personnel not in confinement and coordinated with military confinement facilities for service of confined Soldiers. The office closed 734 court-martial cases during the past year, prior to their retirement to the archives.

The court maintains a website at <https://www.jagcnet.army.mil/acca>. The court's published and unpublished memorandum opinions are publicly available on the website. In FY17, the office uploaded more than 200 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 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 arrive 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>FY15</u>	<u>FY16</u>	<u>FY17<sup>1</sup></u>
Freedom of Information Act	661	251	142
Privacy Act	210	562	192
Certified Copies of Convictions	75	108	629
<b>Total Number of Requests:</b>	<b>946</b>	<b>921</b>	<b>963</b>

During this time, the office’s FOIA team provided assistance to the Department of Justice, through the Army Litigation Division, in both civil and criminal litigation.

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.

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 350 timely and accurate reports in response to requestors both inside and outside the DoD.

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 FY 17, the office admitted forty-five new counsel. The office also maintains accurate records of attorney disciplinary actions.

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

## **Trial Judiciary**

There are 24 active duty and 22 reserve component military judges in the U.S. Army Trial Judiciary. The Chief Trial Judge, located at Fort Belvoir, Virginia, manages the Trial Judiciary, which consists of five circuits. Chief Circuit Judges supervise the circuit judges within each circuit. There are currently three judges stationed overseas, one in

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<sup>1</sup> While the overall number of information requests has remained relatively constant over the past three years, the change in distribution of these numbers by type of request is the result of adjustments in how the Army categorizes and tracks information requests in the Freedom of Information & Privacy Acts Case Tracking System (FACTS).

Korea and two in Germany.

Military judges primarily preside over trials by general and special court-martial. The percentage of contested cases and the complexity of these cases remains high, largely due to the increased number of sexual misconduct related prosecutions. In FY17, military judges of the U.S. Army Trial Judiciary presided over 678 courts-martial, a 15 percent decrease from FY16. Of the total cases tried in FY17, 203 were fully contested, 45 involved mixed pleas, 282 were guilty pleas, and the remainder were terminated prior to findings. Of the 530 cases in which findings were entered in FY17, 274 of them or 51.7 percent included sexual misconduct related offenses (Articles 120, 120b, and 120c).

The Trial Judiciary maintains and continuously updates DA Pamphlet 27-9, Military Judges' Benchbook (Benchbook), used by all Services, which contains trial scripts and pattern instructions for members. Changes to the Benchbook are approved by the Chief Trial Judge following review and comment by the Benchbook Committee and other stakeholders in the military justice community. In CY17, the Trial Judiciary considered 37 proposed changes to the Benchbook, approving 29 of them. A major revision of the Benchbook, necessitated by the Military Justice Act of 2016, is underway. An electronic version of the Benchbook, containing all approved changes to date, can be found on the Trial Judiciary website at [www.jagcnet.army.mil/USATJ](http://www.jagcnet.army.mil/USATJ). Court dockets and other judiciary related documents and resource materials are also located on the Trial Judiciary website.

The Trial Judiciary conducts an annual Military Judges' Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. The three-week course is a certification course for judge advocates of all Services – Army, Navy, Marine Corps, Air Force, and Coast Guard – prior to assignment as military judges. The course also typically includes select international students. In FY17, 49 judge advocates and four international students attended the 60th Military Judges' Course, which was held from 17 April to 5 May 2017. Fourteen active duty and reserve component Army judge advocates graduated and were invested as new military trial judges.

Military judges gathered twice this year for training. All military judges attended the Joint Military Judges' Annual Training at MacDill Air Force Base in Tampa, Florida and the Trial Judiciary Sexual Assault Training at Fort Belvoir, Virginia. The Trial Judiciary was also fortunate to be able to send several military judges to courses at the National Judicial College, to include the "Handling Capital Cases" course.

The Trial Judiciary continues to provide military judges to serve as judges with the Military Commissions Trial Judiciary. There are currently three Army military judges serving on the Military Commissions Trial Judiciary, one of whom acts as the Chief Judge.

There was one cross-service detailing of an Army military judge during FY17. An Army military judge was detailed to preside in the capital sentence rehearing in *United*

*States v. Witt*, an Air Force court-martial.

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

In FY17, approximately 460 Active and Reserve Component (RC) judge advocates were serving in the U.S. Army Trial Defense Service (TDS) worldwide, including 141 on active duty; 183 assigned to one of three Army Reserve (USAR) TDS Legal Operations Detachments (LOD) and 140 in the Army National Guard (ARNG). The TDS provides high quality, professional defense services to Soldiers across the Army. Counsel assigned to the TDS are stationed at 42 active duty installations worldwide and approximately 100 reserve component locations, though their oversight and supervision is independent from local commanders and Staff Judge Advocate offices. The Chief, TDS, exercises centralized supervision over all TDS-assigned counsel from the Office of the Chief, TDS at Fort Belvoir, Virginia.

The TDS details one or more counsel to zealously represent Soldiers at Army special and general courts-martial. In addition, TDS counsel assist Soldiers facing other military justice related adverse administrative actions such as separation proceedings and memoranda of reprimand rebuttals.

The FY16 and FY17 active duty caseload were as follows:

	<u>FY16</u>	<u>FY17</u>
General and Special Courts-Martial:	896	526
Administrative Boards:	1,194	984
Nonjudicial Punishment:	24,686	22,865
Military Justice Consultations:	30,003	33,167

The TDS provided defense services to Army personnel deployed worldwide, including Iraq, Afghanistan, Kuwait, and Qatar. Personnel in these areas are supported out of field offices in Afghanistan and Kuwait, with defense counsel traveling into Iraq and other theaters as needed.

The USAR TDS personnel are divided among three separate units. The 22d LOD, headquartered in San Antonio, Texas, has an area of responsibility that includes all states west of the Mississippi River, along with the Republic of Korea and U.S. territories in the Pacific Command Area of Responsibility. The 154th LOD, headquartered in Alexandria, Virginia, covers the U.S. Southeast, Lower Mississippi River Valley, and Puerto Rico. The 16th LOD, headquartered in Fort Hamilton, New York, covers the U.S. Northeast, Midwest, and Germany.

The ARNG TDS, headquartered in Arlington, Virginia, consists of approximately 140 judge advocates, one legal administrator, and 78 enlisted paralegals stationed in 50 states, the District of Columbia, and three territories. The Office of the Chief, ARNG

TDS in Arlington, Virginia, provides the technical supervision, management, direction, and legal defense training for all ANRG TDS while in Title 32 status.

The Defense Counsel Assistance Program (DCAP) is the training branch of TDS. In FY17, DCAP was staffed with four judge advocates and two civilian Senior Counsel/Trainers, who provided training and advice to TDS counsel worldwide. This fiscal year's training events consisted of five iterations of Defense Counsel (DC) 101, a three-day course that provides critical instruction to newly-assigned DC and paralegals on all aspects of client representation with an emphasis on professional responsibility and complex issues arising in sexual assault cases. Furthermore, all DC and paralegals attended one of five DC 201 courses to receive training on new developments in military justice, with a focus on sexual assault litigation. Regional DC and senior DC from the Active, Reserve, and National Guard also gathered to receive instruction on their duties as leaders in TDS at Sexual Assault Leader Training (SALT). Additionally, DCAP and TCAP jointly organized and taught four Advanced Trial Advocacy Courses, the Sexual Assault Trial Advocacy Course, and the Expert Symposium.

In FY17, DCAP received over one thousand inquiries from DC via emails, phone calls, and in-person inquiries during training events. DCAP provided assistance to DC in the field that included researching case law, answering case specific questions, and providing sample motions, expert requests, and other trial documents that might be helpful in the defense of the case. Moreover, DCAP's website and the Knowledge Management Milbook website allowed free flowing discussions and collaboration among counsel on critical issues. Finally, DCAP also worked with DAD to assist TDS counsel in the preparation and filing of extraordinary writs before the Army Court of Criminal Appeals (ACCA) and the Court of Appeals for the Armed Forces (CAAF).

In addition to providing training and advice, DCAP published the seventh Edition of DC 101 Deskbook and distributed it to all newly-assigned DC. DCAP is in the process of updating the DC 201 Deskbook, with an eye toward releasing it at the end of FY17, in order to coincide with substantial changes the Manual for Courts-Martial that will go into effect in FY18. Additionally, DCAP prepared and disseminated ten "DCAP Sends" information papers, which quickly explained important new developments in military justice to DC. DCAP also participated in the development of the new online advocacy trainer for use by all counsel in the JAG Corps, in coordination with OTJAG Criminal Law Division and the Trial Counsel Assistance Program.

## **GOVERNMENT APPELLATE DIVISION**

The Government Appellate Division (GAD), with 16 active duty and 10 reserve component military appellate attorneys, represents the United States before ACCA, CAAF, and the US 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 those fora in

government appeals from courts-martial and petitions for extraordinary relief. Additionally, GAD oversees the operations of the Trial Counsel Assistance Program (TCAP).

In FY17, GAD filed 430 briefs at ACCA, which included 231 assignment of error responses, 13 specified issue briefs, 16 supplemental briefs, three government appeals, and answers to three extraordinary writ petitions. It filed 386 responses to petitions for grant of review at CAAF, 8 of those briefs, and 33 other briefs, including 21 final briefs, four responses to extraordinary writs, five briefs in support of TJAG Certificates for Review, one petition for reconsideration, and two Amicus Curiae briefs. The GAD appellate attorneys argued 29 cases before ACCA and 18 cases before CAAF.

In FY17, TCAP continued to perform its three primary missions. First, TCAP delivered continuing legal education and specialized training to Army trial counsel and government paralegals worldwide. Second, TCAP provided direct prosecutorial assistance to SJA offices on many of the Army's most complex and/or high-profile cases. Finally, TCAP also managed the operations of the Special Victim Prosecution (SVP), Special Victim Noncommissioned Officer (SVN), and Special Victim Witness Liaison (SVWL) programs.

The cadre of TCAP trainers, including five military attorneys, three civilian Special Victim Litigation Experts, a part-time senior paralegal noncommissioned officer, and a Special Victim Witness Liaison program manager, developed and delivered 30 training events for trial counsel and government paralegals worldwide. This year's training events consisted of 22 specialty courses, including: the New Prosecutors Course; the Military Institute for the Prosecution of Sexual Violence; Crime Lab Forensic Training; Child Forensic Interviewing; Prosecuting the Online Exploitation of Children; Expert Symposium; Child Abuse Prosecutor's Course; Senior Trial Counsel Course; Sexual Assault Trial Advocacy Course; Special Victim Prosecutor Course; Special Victim Prosecutor Noncommissioned Officer Course; and, the Special Victim Witness Liaison Course. The TCAP Team also traveled to 15 Army installations to conduct two to three day outreach training events, as well as three, week-long, regional training events overseas.

Many of this year's training events focused on trial advocacy skills and prosecuting sexual assault and domestic violence cases. Specifically, TCAP presented five iterations of the Trial Counsel Course (TCC), formerly known as the New Prosecutor Course (NPC) and three iterations of the Military Institute for the Prosecution of Sexual Violence Course (MIPSV). TCC is a five-day course focused on the fundamentals of military justice using a sexual assault fact pattern. MIPSV provides further specialty training on sexual assault and domestic violence. Following attendance at TCC, MIPSV, and the Intermediate Trial Advocacy Course (ITAC) taught at TJACLCS, counsel with 18 months or more of court-martial practice are qualified to attend the joint TCAP/DCAP/SVC capstone training event - the Sexual Assault Trial Advocacy Course (SATAC). The SATAC is a two-week trial advocacy course focusing on the

fundamentals of trial advocacy in the context of litigating special victim cases. This year's SATAC included lectures, break-out sessions, and numerous advocacy exercises; it was conducted jointly with both DCAP and the SVC program office.

In support of its mission to assist prosecutors in the field, TCAP also provided expert military counsel to prosecute many of the Army's most complex and/or high-profile cases, and provided direct expert assistance and consultation through its three civilian Special Victim Litigation Experts (SVLEs). The TCAP also continued its traditional information-sharing and collaboration activities such as publishing regular issues of its "TCAP Express" newsletter to inform and advise the field on new legal developments and issues, compiling and distributing a resource disk of useful templates, resources and tools, as well as responding in real time to hundreds of legal questions submitted by phone and email from prosecutors and paralegals worldwide.

Finally, TCAP continued to manage the Army's 26 SVPs, 23 SVNs, and 23 SVWLs located at the Army's 21 busiest UCMJ jurisdictions. Their primary mission is to ensure that every instance of sexual assault, child abuse, and intimate-partner violence within their geographic area of responsibility is properly investigated and, where appropriate, charged and prosecuted. The SVPs, SVNs, and SVWLs also work with the Criminal Investigation Command's specialized Sexual Assault Investigators and with the local SVC to ensure that survivors are treated respectfully, notified of all available support services, and kept abreast on the status of the investigation and prosecution. Our SVPs are also charged with creating local training programs for trial counsel and government paralegals in order to ensure that our trial practitioners receive relevant military justice and advocacy training on a regular basis.

## **DEFENSE APPELLATE DIVISION**

The Defense Appellate Division (DAD), with 22 active duty and nine reserve component military appellate defense attorneys, provides appellate representation to eligible Soldiers and other individuals before ACCA, CAAF, and the Supreme Court of the United States. Eligible Soldiers include those convicted at courts-martial where the approved sentence includes a punitive discharge or confinement for one year or more. DAD attorneys also assist military and civilian trial defense counsel in the preparation and filing of extraordinary writs before the aforementioned courts.

The DAD currently represents Soldiers in approximately 600 cases. These cases are moving through the various stages of the appellate process, either recently docketed and referred to DAD, pending action by ACCA or CAAF, or awaiting final action and discharge from the Army. Approximately 203 cases are pending review and submission to ACCA.

Last year, DAD filed 408 briefs with ACCA. The DAD also filed 349 briefs with CAAF. Appellate counsel raised assignments of error in approximately 55% of these cases. Counsel also argued 27 cases at ACCA and 20 at CAAF.

Army DAD co-chaired, with Navy-Marine Corps Appellate Government Division, a joint training event at Joint Base Myer-Henderson Hall to organize and provide advanced appellate advocacy that included government and defense appellate attorneys as well as special victim attorneys and advocates from the Army, Navy, Air Force, Marine Corps and Coast Guard.

Some of the significant cases from this past year include:

*United States v. Hukill*, 76 M.J. 219 (C.A.A.F. 2017). Specialist Christopher Hukill was convicted of one specification of rape and one specification of abusive sexual contact in violation of Article 120, UCMJ. The ACCA denied Hukill's initial appeal which was based on a claim of ineffective assistance of counsel. However, the ACCA granted reconsideration to entertain Hukill's claim brought under *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), and again denied relief and affirmed the findings and the sentence. The CAAF granted SPC Hukill's petition to review the issue of whether, in a court-martial tried by military judge alone, the military judge abused his discretion by granting the Government's motion to use the charged sexual misconduct for M.R.E. 413 purposes to prove propensity to commit the charged sexual misconduct. The CAAF held that the use of evidence of charged conduct as M.R.E. 413 propensity evidence for other charged conduct in the same case is error, regardless of the forum, the number of victims, or whether the events are connected. Moreover, as in *Hills*, the CAAF reiterated that the error had constitutional implications since the error violated the appellant's presumption of innocence. The CAAF's holding has impacted multiple cases on appeal and at court-martial, as the use of charged misconduct to show propensity was a common practice in the Army.

*United States v. Gurczynski*, 75 M.J. 120 (C.A.A.F. 2016). The government charged Private Gurczynski with two specifications of possessing child pornography, in violation of Article 134, UCMJ. At trial, the military judge granted the defense's motion to suppress evidence of child pornography from Private Gurczynski's digital media devices. The government appealed this ruling pursuant to Article 62(a)(1)(B), UCMJ. The Army Court affirmed the military judge's ruling, and the government subsequently filed a certificate for review signed by The Judge Advocate General to the CAAF. In its opinion, the CAAF unanimously rejected the government's appeal, finding that the plain view exception to the Fourth Amendment's warrant requirement does not apply because the underlying search was unreasonable. The CAAF cited several factors in its analysis, including: 1) Private Gurczynski "was convicted of the offense for which search warrant was issued five months prior to the search," and 2) "over nine months passed between the issuance of the search warrant and the digital examination of the seized devices."

*United States v. Commisso*, 76 M.J. 315 (C.A.A.F. 2017). Sergeant First Class Jason Commisso was convicted of one specification each of violating a lawful general regulation, making a false official statement, indecent recording of a person's private area, obstruction of justice, and two specifications of abusive sexual contact, in violation of Articles 92, 107, 120, 120c, and 134, UCMJ. After trial, SFC Commisso discovered

that three panel members who sat on his court-martial panel had regularly attended the SARB meetings, including at least four meetings prior to his court-martial where his case was discussed from the putative victim's perspective. These three members failed to disclose either their knowledge of the case or their participation in the SARB in response to voir dire questions designed to elicit this information. Upon discovering this lack of candor, the defense counsel filed a post-trial motion for a mistrial, which was denied by the military judge. The ACCA dismissed the guilty findings for the Art. 92 and Art. 107 violations but affirmed the remainder of the findings and sentence. The CAAF granted SFC Comisso's petition to review the issue of whether the military judge abused his discretion in denying the defense's post-trial motion for a mistrial, thereby violating the appellant's right to have his case decided by a panel of fair and impartial members. The CAAF held that the military judge abused his discretion in denying the motion for mistrial. The fact pattern in this case highlights concerns about implied or actual bias of panel members based on their role in the SHARP program.

*United States v. Mitchell*, 76 M.J. 413 (C.A.A.F. 2017). Sergeant Edward Mitchell II was taken into custody by military police and interrogated regarding various alleged offenses. Sergeant Mitchell invoked his right to counsel during that interrogation. He was released, but apprehended again by military police about two hours later in order to execute a search authorization the police had obtained in the intervening time. The search authorization allowed the police to lawfully seize the appellee's cell phone, which they did. The police then asked the appellee for the passcode to his cell phone, which he declined to provide. After some discussion, the appellee agreed to unlock his phone for police and disable its security system. The police later found incriminating evidence on the phone. Prior to trial, the SGT Mitchell successfully moved to suppress the evidence obtained from the phone because the police violated his Fifth Amendment and *Edwards v. Arizona*, 451 U.S. 477 (1981), rights by asking for his passcode and asking for him to unlock the phone. The government unsuccessfully appealed the military judge's order suppressing the evidence to the Army Court of Criminal Appeals. The Judge Advocate General of the Army then certified three issues to the CAAF relating to the application of the Fifth Amendment and the *Edwards* rule to the appellee's entry of his passcode. The CAAF cut through the certified issues by holding that the plain language of M.R.E. 305(c)(2) mandated suppression of the contents of the phone. The CAAF held that when the police asked SGT Mitchell for his passcode, they violated the *Edwards* rule prohibiting custodial interrogation after a suspect has invoked the right to counsel. As a result, the CAAF held it was proper to suppress the contents of a lawfully seized cell phone that a suspect unlocked in response to a police request for his passcode after the suspect invoked his right to counsel. The Court found that it did not need to reach the question of whether or not entry of the passcode into the phone was itself testimonial, because the original request for the passcode called for a testimonial response.

*United States v. Nieto*, 76 M.J. 101 (C.A.A.F. 2017). Two Soldiers alleged that Specialist Luis Nieto used his cell phone to make video recording of the Soldiers using the latrine at a base in Afghanistan. Based on this allegation, two noncommissioned officers "looked through" the appellant's cell phone, but did not find any photos or videos



consistent with the allegations. An Army CID agent began an investigation, during which CID was told by unknown persons that they had seen both a cell phone and a laptop computer in Specialist Nieto's living area. A CID agent requested a search authorization for both the appellant's phone and any laptop he own based on the agent's personal knowledge that Soldiers "normally downloaded the photos they take" from phone to computers. A military magistrate granted this search authorization, and CID agents subsequently seized both a cell phone and a laptop computer from the appellant. The appellant sought to suppress the contents of the laptop computer but was unsuccessful in that motion at trial. The Army Court of Criminal Appeals summarily affirmed the appellant's resulting conviction. The CAAF, however, granted review of whether or not the military judge abused his discretion by failing to suppress the contents of the laptop. The CAAF held that probable cause to search a digital media device for evidence of an alleged crime must be supported by a "particularized nexus" linking an alleged crime to the digital media device. The Court found any nexus between the laptop computer of Specialist Nieto and the alleged crime under investigation was insufficient to establish probable cause to search the laptop. A law enforcement officer's "generalized profile" of suspect behavior was not enough to establish such a nexus absent some additional facts supporting the application of that profile to the suspect or digital media in question.

## 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, as opposed to habeas actions challenging Army decisions such as a denial of conscientious objector status. Additionally, Soldiers can also seek review of a decision by the Army Board for Correction of Military Records denying clemency for a court-martial sentence pursuant to the Administrative Procedures Act, 5 U.S.C. § 701, et al.

During FY17, the Military Personnel Litigation Branch was involved in eight habeas corpus cases, with five cases still active and three having been successfully defended against collateral attacks on court-martial convictions or seeking federal court intervention related to other confinement issues such as confinement conditions, illegal detention, and transfer out of military confinement facilities. Additionally, the General Litigation Branch periodically handles civil lawsuits involving Constitutional challenges to the military justice system, such as allegations involving alleged violations of equal protection, due process, and the First Amendment.

The following cases highlight the types of issues handled by the Litigation Division:

*Gray v. James W. Gray, Commandant, USDB* (D. Kan.). In 1988, a general court-martial convicted Petitioner Ronald Gray of the premeditated murder of two women, the

attempted premeditated murder of a third woman, the rape and sodomy of the women, burglary, and larceny. Two of the three women were Soldiers. The court-martial sentenced Gray to death. The military appellate courts affirmed the court-martial conviction. In 2001, the US 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 Gray's execution.

In November 2008, Ronald Gray filed a motion in the United States 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 November 2008, the District Court granted the stay of execution. In April 2009, Gray filed a petition for writ of habeas corpus. The government filed its 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 the 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 his issues after his habeas proceedings. Gray filed his reply on November 1, 2012, which completed the briefings in the case.

In November 2014, a new district court judge was assigned to the case. On April 2, 2015, the Chief Judge for the District of Kansas heard oral argument regarding Gray's 21 asserted assignments of error raised in his habeas petition. On September 29, 2015, the District Court issued its memorandum and opinion addressing all counts of Gray's habeas petition. The Court denied 14 counts, finding that the military courts had provided Gray full and fair consideration on those issues. Additionally, the Court denied Gray's Eighth Amendment challenge to the method of his execution and Gray's jurisdictional challenge. Lastly, the Court dismissed Gray's five remaining arguments without prejudice. On September 27, 2015, Gray filed a Motion to Alter or Amend Judgment pursuant to Federal Rule of Civil Procedure 59. The Government filed its response on November 6, 2015. The Court denied Gray's motion on December 23, 2015, and he appealed to the Tenth Circuit Court of Appeals. Prior to briefing, the Court of Appeals noted the District Court may have improperly issued a hybrid dismissal of Gray's claims and ordered the parties to show cause why the Court should not vacate the District Court's judgment and remand the case for appropriate action. The parties filed a joint response on March 24, 2016 agreeing that the proper action was to return the case to the district court. On May 3, the District Court ordered Gray to show cause why the Court should not dismiss all of his claims without prejudice to allow him to exhaust his claims in the military appellate courts. Gray submitted his response on May 27 and the Government replied on June 24, which completed the briefings in the case. On October 26, the District Court dismissed Gray's habeas petition without prejudice to allow him to exhaust his unexhausted claims in the military courts or to refile his petition without the unexhausted claims. On November 13, 2017, the CAAF dismissed Gray's writ-appeal petition with prejudice on jurisdictional grounds.

*Boal et al. v. United States* (C.D., Cal.) Mark Boal, a film producer, interviewed SGT Bowe Bergdahl about SGT Bergdahl's reasons for leaving his post in June 2009. Portions of these interviews were aired in the Serial podcast produced by Boal. The prosecution in *US v. Bergdahl* sought release of all audio recordings of the interviews between Boal and Bergdahl, totaling approximately 25 hours. The prosecution team reached out to Boal's private counsel to negotiate release of the audio recordings, discuss issuance of a subpoena for the subject materials, and to suggest in camera review. On 20 July 2016, prior to issuance of the military subpoena, Plaintiffs (Boal and his production company) filed a complaint for declaratory and/or injunctive relief seeking to prevent service of a military subpoena for audio recordings. On 21 July 2016, Plaintiffs filed an application for a temporary restraining order (TRO) enjoining issuance of the military subpoena. On 25 July 2016, the Court adopted the Parties' joint stipulation regarding a briefing schedule, requiring response to the application for TRO no later than 5 August 2016, with Plaintiffs' reply due no later than 15 August 2016. Additionally, Parties agreed that the military subpoena shall not issue until the Court renders an opinion on the application for TRO. On 29 July 2016, a media organization filed an *Amici Curiae* brief with the Court. Defendant's filed a response 5 August 2016, requesting denial of the TRO on abstention and non-waiver of sovereign immunity grounds. Ultimately the parties settled and certain portions of the audio recordings were released by Mr. Boal.

## **INTERNATIONAL AND OPERATIONAL LAW DIVISION**

The International and Operational Law Division (IOLD), provides overarching legal advice and guidance on the Army's implementation of the DoD Law of War Program. In FY17, the mission and programs of the OTJAG IOLD continued to support the military justice system across three primary lines of effort: 1) preventing law of war violations; 2) preparing judge advocates and paralegals to administer military justice in deployed environments; and 3) maintaining sufficient contacts both domestically and internationally in order to ensure the Army's position on the law of armed conflict and other legal matters are adequately understood.

First, IOLD aimed to prevent violations of the law of war by Army personnel through several proactive steps. IOLD evaluated all new weapons for compliance with international law. IOLD reviewed all HQDA operations and concept plans and rules of engagement for compliance with domestic and international law. IOLD further helped prepare directives, policies, instructions, and training materials to ensure that Army personnel understood the principles and rules of the law of war. Whenever Army personnel were alleged to have violated the law of war, IOLD supported the reporting, investigation, and prosecution of the allegations.

Second, IOLD prepared judge advocates and paralegals for upcoming operational deployments to Operational Inherent Resolve, Operation Spartan Shield, and Operation Freedom's Sentinel/Resolute Support missions. Specifically, IOLD conducted mission-tailored pre-deployment training programs using Mobile Training Teams (MTTs). The

MTTs were comprised of subject matter experts and recently re-deployed Judge Advocates and paralegals. The instruction covered all core legal disciplines, with a particular focus on the law of war and military justice. The law of war discussions examined the lessons learned from the tragic military strike on the Doctors Without Borders trauma center in Kunduz, Afghanistan. Those talks centered on the post-strike investigation and its findings that certain principles of the law of war were violated. With respect to the military justice portions of the MTT, the instructors explored the unique aspects and logistical challenges of administering military justice in a deployed environment.

Third, much of IOLD's efforts in FY17 were spent on implementing TJAG's guidance for strategic legal engagements. In FY17, the JAGC focused much of its strategic engagements efforts on developing training packets on international law issues where the U.S. position is question. IOLD created training packets on targeting military objectives, authority to detain in non-international armed conflict, and the legality of autonomous weapon systems. These training presentations are designed for a number of audiences both military and civilian and can be tailored depending on the audience. In addition, OTJAG published a supplement on administrative investigations and criminal law focusing on targeting and the Law of Armed Conflict for assessing compliance with the Law of Armed Conflict.

Additionally, TJAG and other JAGC senior leaders participated in numerous other legal engagements with their counterparts from partner nations around the world. Partner nation visitors to OTJAG participated in substantive discussions and conducted additional site visits to TJAGLCS, the United States Army Legal Services Agency, and ACCA at Fort Belvoir. These programs demonstrated the importance of organizational structure and resourcing to provide commanders with the highest quality legal support. The programs also provided a comprehensive overview of the military justice system throughout all pre-trial, trial, and appellate stages. Additionally, IOLD, in partnership with the Defense Institute of International Legal Studies and the International Institute of Humanitarian Law, provided human rights and military justice training for foreign legal officers from various countries including Uzbekistan, Colombia, Argentina, Estonia, and others. Finally, IOLD began providing legal training to members of the U.S. Military Observers Group on the legal basis for the mission, rules for the use of force, and the UN Code of Conduct.

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

On September 30, 2017, the Army's end-strength was 476,245 Army Soldiers on Active Duty compared to 475,400 at the end of FY16. The attorney strength of the JAGC Active Component (AC) at the end of FY 17 was 1,819 (including general officers). This does not include 73 officers attending law school while participating in the Army's Funded Legal Education Program. The FY17 end-strength of 1,819 compares with an end-strength of 1,803 in FY16. The diverse composition of the FY17 AC attorney population included 116 African-Americans, 57 Hispanics, 105 Asians, 2 Native Americans, and 504 female Soldiers.

The grade distribution of the JAGC AC attorneys for FY17 was: six general officers authorized (five filling JAGC authorizations, one serving in a Military Occupational Specialty (MOS) coded position (Chief Prosecutor for the Commissions)); 122 colonels; 262 lieutenant colonels; 501 majors; and 928 captains and first lieutenants. An additional 100 warrant officers, 629 Civilian attorneys, 798 Civilian paraprofessionals and 1,618 enlisted paralegals from the AC supported legal operations worldwide.

The attorney strength of the JAGC USAR at the end of FY17 was 1,831 (which includes officers serving in Troop Program Units, the Drilling Individual Mobilization Augmentee (DIMA) Program, the Individual Ready Reserve, and the Active Guard & Reserves). The attorney strength of the ARNG at the end of FY17 was 876.

At the end of FY17, over 293 Army JAGC personnel (officer and enlisted, AC and Reserve Component) were deployed in operations in Afghanistan, Djibouti, Egypt, Guantanamo Bay, Honduras, Iraq, Israel, Jordan, Kosovo, Kuwait, Qatar, and other locations around the world.

## **CONCLUSION**

In FY17, the JAGC continued its efforts to constantly improve every area of our practice. Many of these efforts involved TCAP and DCAP, which provided personnel and expert advice to assist with numerous high profile trials. Along with TJAGLCS, 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 effectively prosecute sexual assault and family abuse offenses while our SVC program continues to grow and improve, providing a holistic approach to victim care that is constantly increasing in popularity among those in need of its services. We have also continued established partnerships with local, State, and Federal practitioners in our ongoing and constant effort to improve our practice.

In a year filled with significant change, the JAGC continued to provide superior legal advice to senior commanders and leaders. The JAGC continued to perform its military justice functions in a just and effective manner. The JAGC also continues to monitor newly emerging military justice requirements, including all proposed legislation which affects both the UCMJ and the MCM, to help to ensure a premier military justice system that the Army demands and that Soldiers deserve.

**CHARLES N. PEDE**  
Lieutenant General, US Army  
The Judge Advocate General

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

Report Period: FISCAL YEAR 2017

<b>PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)</b>					
TYPE COURT	TRIED		CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
	Arraigned	Completion			
GENERAL	498	393	333	60	[I]
BCD SPECIAL [A]	177	134	121	13	[I]
NON-BCD SPECIAL	3	2	2	0	[I]
SUMMARY	112		[G]	[G]	-30.4%
OVERALL RATE OF INCREASE (+)/DECREASE (-) OVER LAST REPORT					[I]

### **PART 2 – DISCHARGES APPROVED [B]**

GENERAL COURTS-MARTIAL ( CA LEVEL)		
NUMBER OF DISHONORABLE DISCHARGES (+ dismissals)	122 (+26)	
NUMBER OF BAD-CONDUCT DISCHARGES	146	
SPECIAL COURTS-MARTIAL		
NUMBER OF BAD-CONDUCT DISCHARGES	86	

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

FOR REVIEW UNDER ARTICLE 66 – GENERAL COURTS-MARTIAL	303	
FOR REVIEW UNDER ARTICLE 66 – BCD SPECIAL COURTS-MARTIAL	86	
FOR EXAMINATION UNDER ARTICLE 69 – GENERAL COURTS-MARTIAL	67	

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

TOTAL ON HAND BEGINNING OF PERIOD		88 [C]	
GENERAL COURTS-MARTIAL	[D]		
BCD SPECIAL COURTS-MARTIAL	[D]		
REFERRED FOR REVIEW		480 [C]	
GENERAL COURTS-MARTIAL			
BCD SPECIAL COURTS-MARTIAL			
TOTAL CASES REVIEWED		523 [E]	
GENERAL COURTS-MARTIAL			
BCD SPECIAL COURTS-MARTIAL			
TOTAL PENDING AT CLOSE OF PERIOD		45 [C]	
GENERAL COURTS-MARTIAL			
BCD SPECIAL COURTS-MARTIAL			
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		-20.2%	

### **PART 5 – APPELLATE COUNSEL REQUESTS BEFORE U.S. ARMY COURT OF CRIMINAL APPEALS (CCA)**

NUMBER	428	
PERCENTAGE	89.17%	

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

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

PERCENTAGE OF CCA-REVIEWED CASES FORWARDED TO CAAF 344 of 523	65.77%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD	-1.60%
PERCENTAGE OF TOTAL PETITIONS GRANTED 200 of 388	51.55%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD	+611.03%
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY USACCA	26.39%

**PART 7 – APPLICATIONS FOR RELIEF UNDER ARTICLE 69, UCMJ**

TOTAL PENDING BEGINNING OF PERIOD		0	
RECEIVED		4	
DISPOSED OF		2	
GRANTED	0		
DENIED	1		
NO JURISDICTION	0		
WITHDRAWN	1		
TOTAL PENDING AT END OF PERIOD			

**PART 8 – ORGANIZATION OF COURTS [H]**

TRIALS BY MILITARY JUDGE ALONE			
GENERAL COURTS-MARTIAL		305	
SPECIAL COURTS-MARTIAL		119	
TRIALS BY MILITARY JUDGE WITH MEMBERS			
GENERAL COURTS-MARTIAL		88	
SPECIAL COURTS-MARTIAL		17	

**PART 9 – COMPLAINTS UNDER ARTICLE 138, UCMJ**

NUMBER OF COMPLAINTS	23	
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**PART 10 – STRENGTH**

AVERAGE ACTIVE DUTY STRENGTH	476245[F]	
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**PART 11 – NONJUDICIAL PUNISHMENT (ARTICLE 15, UCMJ)**

NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED	26638	
RATE PER 1,000	55.93	
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD	-10.50%	
RATE OF INCREASE (+)/DECREASE (-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		+423.61%

## 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.
- [H] Only includes cases that were tried to completion.
- [I] A comparison to the previous year is not possible as the previous year contained cases that were dismissed or disposed of administratively.



## **Section 4**

### **Report of the Judge Advocate General of the Navy**

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

**OCTOBER 1, 2016 TO SEPTEMBER 30, 2017  
SUPERVISION OF THE ADMINISTRATION OF  
MILITARY JUSTICE**

## **JUDGE ADVOCATE GENERAL**

The Judge Advocate General (JAG) co-chairs the Military Justice Oversight Council (MJOC) with the Staff Judge Advocate to the Commandant of the Marine Corps pursuant to SECNAVINST 5430.27D. The MJOC meets quarterly to evaluate the practice and effectiveness of military justice, assess any potential impediments, and facilitate such action as is necessary to ensure a fair, effective, efficient, and responsive system of military justice. The following members have been appointed to the MJOC: Commander, Naval Legal Service Command (CNLSC); Deputy Judge Advocate General for Reserve Affairs and Operations; Deputy Staff Judge Advocate to the Commandant of the Marine Corps; Chief Judge of the Department of the Navy; Assistant Judge Advocate General for Military Justice; Assistant Judge Advocate General for Operations and Management; and Deputy Director, Marine Corps Judge Advocate Division, Military Justice and Community Development.

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

## **ASSISTANT JUDGE ADVOCATE GENERAL, MILITARY JUSTICE**

The Assistant Judge Advocate General for Military Justice (AJAG-MJ) advises JAG in the performance of statutory military justice duties; serves as a member of the OJAG Professional Ethics Committee, the Judicial Screening Board, and MJOC; and oversees OJAG's Criminal Law Division (Code 20) and National Security Litigation Division (Code 30). AJAG-MJ is also the Officer-in-Charge of the Navy-Marine Corps Appellate Review Activity (OIC, NAMARA - Code 04), the Administrative Support Division (Code 40), Appellate Defense Division (Code 45), and Appellate Government Division (Code 46). OIC, NAMARA is responsible for the 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 civilian Highly Qualified Expert (HQE), three civilian staff

members, two senior enlisted paralegals, and a ten-member reserve unit.

Mission. Code 20 coordinates, reviews, and drafts military justice and sexual assault policy, including all legislative and regulatory proposals affecting military justice and Sexual Assault Prevention and Response (SAPR) within the Department of the Navy (DON). Code 20 directly engages with members of Congress and their staffs on proposed amendments to the UCMJ, Manual for Courts-Martial (MCM), Manual of the Judge Advocate General, and other statutory and regulatory proposals affecting the military justice system. Code 20 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 U.S. Court of Appeals for the Armed Forces (CAAF) review, 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 the DoJ regarding approval for grants of immunity and orders for civilian witnesses to testify at trial by court-martial. Further, Code 20 provides a representative to the Naval Clemency and Parole Board, supplies advisory legal opinions to the Board for Correction of Naval Records, delivers informal advice for Navy and Marine Corps judge advocates regarding military justice, processes all Article 69, 73, and 74(b) UCMJ reviews and requests, and acts as the release and initial denial authority on all Freedom of Information Act (FOIA)/Privacy Act (PA) requests for information pertaining to courts-martial within the Navy and Marine Corps.

The Code 20 Division Director is a member of the Judicial Screening Board and serves as Commander, Naval Legal Service Command's Special Assistant for Military Justice, advising on policies, plans, resources, and procedures affecting Naval Legal Service Command's military justice mission.

The Code 20 Division Director also serves as Navy's representative to the Joint Service Committee (JSC) for Military Justice and functions as Navy's voting group member at regular meetings of the JSC. Since January 2017, the Navy has held the rotating chairmanship of the JSC. The JSC is the principal vehicle for staffing amendments to the UCMJ and MCM. The JSC's 2017 Annual Review of the MCM was completed in accordance with the President's requirement. In FY17, an Executive Order drafted by the JSC was forwarded for Presidential signature. This order implemented the Military Justice Act of 2016, the largest and most comprehensive overhaul of military justice since 1983, as well as other requirements of the National Defense Authorization Act (NDAA), congressional panel recommendations, and case law updates. The JSC proposed, and published for public and Service comment in the Federal Register, draft supplementary materials, additional amendments to the MCM implementing congressional panel recommendations, case law updates, and prior public and Service comments. The JSC also responded to other research tasks as directed by Department of Defense (DoD) Office of General Counsel.

The Military Justice Act of 2016, consisting of the Military Justice Review Group's (MJRG) recommended changes to the UCMJ, was signed by Congress in December 2016. Code 20 supported the entirety of the MJRG process, assigning Code 20 staff to weekly MJRG working group meetings to draft implementing regulations, punitive articles, rules of evidence, non-judicial punishment procedures, and supplementary materials for inclusion in a new MCM.

The Code 20 Division Director also serves as the Navy's point of contact for all Navy and Departmental requests for information and testimony before the congressionally-mandated Judicial Proceedings Panel (JPP), and the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD). The JPP's mandate is to conduct an independent review and assessment of judicial proceedings under the UCMJ involving adult sexual assault and related offenses that have occurred since the amendments made to the UCMJ by section 541 of the FY12 NDAA in order to make recommendations for improvements to such proceedings. The JPP met monthly and, prior to its dissolution on September 30, 2017, had issued 11 reports containing 63 recommendations to Congress, the Secretary of Defense, and the military Services. Code 20's HQE engaged with JPP staff members to provide substantive guidance in support of their mandate, including coordinating the testimony of several subject-matter experts at JPP hearings as well as researching and presenting historic information as requested by the panel.

Section 546 of the FY15 NDAA created the DAC-IPAD, a successor panel to the JPP. The DAC-IPAD's mandate is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces. The DAC-IPAD began holding quarterly meetings in January 2017, and recently issued its first annual report to both the Senate and House of Representatives' Committees on Armed Services. Code 20's HQE coordinates the Navy and Departmental response to DAC-IPAD requests for information and serves as an advisor to the 16-member panel providing substantive guidance to support DAC-IPAD's mandate to include making available subject-matter experts to testify.

OJAG's Criminal Law Division plays an active role in numerous multi-disciplinary working groups, including groups tasked with developing responses to retaliation, bullying and hazing, and fraternization.

In FY17, Code 20 continued to advance the Navy's Special Victims Investigation and Prosecution (SVIP) capability, as required by section 573 of the FY13 NDAA. In September 2017, Code 20 and the Naval Justice School (NJS) co-sponsored a two-day course on sexual assault policy for staff judge advocates (SJAs). The course is highly encouraged for SJAs currently providing advice to General Court-Martial Convening Authorities (GCMCAs), sexual assault-initial disposition authorities (SA-IDAs), those serving as Region Legal Service Office (RLSO) Command Services Department Heads, and SJAs for Type Commanders or other commands that frequently convene courts-martial. The course provides instruction on, and encourages discussion of, current legal

issues involving sexual assault policy and dispositions facing SJAs advising GCMCAs and SA-IDAs. Among the key topics reviewed were the FY17 NDAA and the Military Justice Act of 2016, the status of its implementation, the requirements recent policies and legislation place on SJAs and commanders, and the corollary impact on the military justice process. The September 2017 course was attended by judge advocates from paygrades O-3 through O-6.

The Criminal Law Division creates guides for commanders and SJAs on various topics, such as an overview of Military Rule of Evidence (MRE) 514 and a checklist for SJAs on sexual assault response that incorporates all requirements and references, current as of April 2017. These references are posted on Code 20's online Sharepoint site and updated as necessary. Code 20 also participated in a cross-functional training symposium on victims' rights that included Victims' Legal Counsel (VLC), disability evaluation attorneys, legal assistance attorneys, trial counsel, and SJAs. The Criminal Law Division regularly conducts tailored trainings for various providers within the SAPR program, such as a May 2017 course geared towards senior SJAs and a February 2017 course for VLC.

Code 20 maintains strong relationships with the Department of the Navy Sexual Assault Prevention and Response Office (DON SAPRO), N17, and the Naval Education and Training Command (NETC), and provides legal review of all SAPR training products before they are released to the Fleet. The Criminal Law Division is currently working closely with NETC on updating NETC's sexual assault prevention training: Full Speed Ahead (FSA) to include a module on social media misconduct. The updated module builds on the FSA foundational elements of personal accountability, peer engagement and intervention, values-based decision-making, resilience, and leadership, applying them in the context of non-consensually distributed intimate images.

Code 20 also participates in the Navy SAPR Cross-Functional Team (CFT), which is comprised of SAPR stakeholders representing all lines of effort. The CFT analyzes prevention initiatives, response and support, training, and policy legislation. The CFT meets monthly to provide updates, synchronize actions, discuss best practices and concerns in the SAPR field, and ensure standardization of messaging.

Code 20 is responsible for compiling the Navy's data for the Annual Report to Congress on Sexual Assault in the Military. To accomplish that objective, Code 20 Legal Officers relied exclusively on the Defense Sexual Assault Incident Database (DSAID), the comprehensive database launched in 2013 that tracks and reports sexual assault incidents. In 2017, Code 20 provided one fully-qualified DSAID Legal Officer who personally reviewed and entered over 1,000 Sexual Assault Disposition Reports and dispositions of Unrestricted Reports of sexual assaults. Code 20 continues to participate in monthly DSAID Change Control Board meetings responsible for providing recommendations to improve and enhance DSAID capabilities.

Finally, during the reporting period, Code 20 reviewed thirty-three records of trial under Article 69(a), UCMJ; three records under Article 69(b), UCMJ; and zero petitions under Article 73, UCMJ.

### **NATIONAL SECURITY LITIGATION DIVISION (CODE 30)**

Organization. During the reporting period, Code 30 was staffed with a maximum of two officers.

Mission. Code 30 serves as the JAG's central point of contact for matters involving classified information and national security cases. The Division works closely with other agencies in the intelligence and law enforcement communities, other Services, and the DoJ to refine the Navy's classified litigation practice, facilitate the use of Navy classified information, and coordinate the litigation of high-visibility cases while protecting Navy information. Code 30 also reviews proposed legislation and regulations pertaining to national security matters and interacts with Original Classification Authorities (OCAs) and Special Security Officers.

Code 30 provided extensive investigation and litigation support to commanders, SJAs, trial counsel, and defense counsel from all Services. Litigation support included reviewing and cataloging classified material for trial, coordinating with high-level OCAs about the protection and use of their classified information, processing security clearance requests for courts-martial personnel and requests for classification reviews of evidence, and advising on the assertion of the classified information privilege under Military Rule of Evidence 505, the Classified Information Procedures Act (CIPA), and the State Secrets Protection Act (SSPA). Code 30 support extended to the DoJ National Security Division by facilitating the use of Navy classified materials vital to trial and communicating between the intelligence and federal law enforcement communities and the Department of the Navy.

During the reporting period, Code 30 worked on twenty complex espionage and mishandling cases, including the long-term, high-profile case against the first Naval Officer accused of espionage in decades. Following his guilty plea, Code 30 is working with the Navy-Marine Corps Court of Criminal Appeals (NMCCA) to facilitate the use of classified materials during the appellate review process. Code 30 continued to be involved in the high visibility cases against Army Sergeant Bowe Bergdahl and Benghazi terror suspect Abu Khattala. Code 30 also worked closely with the Department of Defense, DoJ, and the Department of State to address the Federal Republic of Germany's concerns about U.S. military justice in connection with finding a missing witness for a sensitive court-martial. Code 30 continues to provide advice to military investigative agencies during developing espionage cases.

Code 30 co-sponsored the latest iteration of the Classified Information Litigation Course in July 2017 with NJS and taught numerous blocks of instruction to counter-intelligence officers at the Joint Counter Intelligence Training Academy, and to all-Service officers at the Army's Judge Advocate Legal Center and School. Code 30

continues to foster relationships within the intelligence community, the other Services, NCIS, FBI and DoJ.

Code 30 maintains an extensive library of resources and templates to assist in litigation efforts. Improvements to the Code 30 SharePoint site have ensured that this information is available to all Judge Advocates facing such challenging cases. Additionally, Code 30 retains a hard-copy library of significant Navy classified information cases.

Finally, Code 30 continues to publish and update a National Security Litigation primer. The primer serves as a starting point for attorneys across all services litigating cases involving classified information.

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

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

Mission. Code 40 provides administrative and logistical support services to NAMARA and NMCCA. Code 40 personnel review all records of trial forwarded to NAMARA for appellate review pursuant to Articles 66 and 69, UCMJ for completeness; promulgate decisions of the NMCCA in accordance with the Manual of the Judge Advocate General (JAGMAN) and the MCM; manage the OJAG court-martial central filing system, which includes original records of trial maintained at NAMARA; manage and retrieve archived records of trial stored at the Washington National Records Center in Suitland, Maryland; and return all NMCCA and CAAF mandates and judgments on remand to commands worldwide for corrective action.

During FY17, Code 40 examined 429 records of trial for completeness prior to forwarding the records for appellate review pursuant to Articles 66 and 69, UCMJ. Also during FY17, Code 40 promulgated 307 NMCCA decisions to appellants and transferred all 2014 (calendar year) records of trial (412) to the Washington National Records Center. FY17 also saw Code 40 coordinate the execution of 328 punitive discharges awarded to appellants at courts-martial. Code 40 oversaw 26 NMCCA mandates and 2 mandates ordered by CAAF. Code 40 finish filed 470 court-martial records.

### **APPELLATE DEFENSE DIVISION (CODE 45)**

Organization. During this reporting period, Code 45 was staffed with eleven active duty Navy and Marine Corps judge advocates, one civilian attorney, and two civilian support personnel. Two U.S. Coast Guard judge advocates were also co-located with Code 45 to execute Coast Guard appellate defense services. Twenty-one Navy and Marine Corps Reserve judge advocates supported Code 45.

Mission. Code 45 represents Navy and Marine Corps appellants before NMCCA, CAAF, and the U.S. Supreme Court. Code 45 provides assistance to trial defense

counsel in the field by helping to file extraordinary writs before the NMCCA and CAAF, providing advice on individual cases in litigation, and providing instructors at formal training sessions on topics including recent appellate rulings and how to preserve issues for appeal. Code 45 also works closely with the Defense Counsel Assistance Programs (DCAP) of both the Navy and Marine Corps to advance the skills and success of trial defense counsel.

As reflected in the chart below, a total of 361 new cases were docketed at the NMCCA in FY17. Code 45 filed 328 initial NMCCA pleadings, consisting of 117 briefs and 211 merit submissions. Reservists filed 72% of these initial pleadings. In addition, Code 45 filed 337 substantive pleadings, including 37 reply briefs, 26 responses to government motions (other than motions for enlargement), 7 supplemental briefs, 18 responses to court orders, 242 motions (other than motions for enlargement) and 7 petitions for extraordinary relief at the NMCCA. Counsel presented oral argument in 9 cases before the NMCCA.

Code 45 filed 50 supplemental briefs to petitions and 4 extraordinary writ appeal petitions at the CAAF. The Navy’s Judge Advocate General certified one case (*United States v. Hale*, 76 M.J. 713 (N-M. Ct. Crim. App. 2017)) to the CAAF. Code 45 filed 4 briefs and orally argued 6 cases before the CAAF.

<b>NMCCA</b>	<b>FY09</b>	<b>FY10</b>	<b>FY11</b>	<b>FY12</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>
Cases Docketed	694	678	598	514	437	373	348	383	361
Briefs Filed	149	159	161	191	143	161	118	123	117
Other Substantive Pleadings	410	847	693	632	522	587	326	326	337
Total Cases Filed	679	744	531	488	374	387	311	349	328
Oral Arguments	14	15	20	19	15	15	14	11	9
<b>CAAF</b>									
Petitions with Supplemental Briefs Filed	120	69	81	117	90	79	96	49	50
Briefs Filed	36	21	20	19	13	7	12	8	4
Oral Arguments	20	11	7	12	9	2	7	11	6
<b>U.S. Supreme Court Petitions</b>	3	6	2	3	2	4	0	0	3



While there has generally been a reduction in the number of cases docketed at the NMCCA in recent years, the percentage of cases appealed has increased. The percentage of cases in which appellate issues were raised as an overall percentage of appellate caseload was 22% in FY09 and 36% in FY17. This change correlates with an overall increase in appellate complexity.

Significant cases this term include:

- *A.M. v. United States*, (finding Art. 6b(a)(5), UCMJ, does not confer a right upon the alleged victim to contemporaneous access to written comments trial counsel submitted to an Article 32 preliminary hearing officer nor participation in discussions between trial and defense counsel and that Art. 6b(a)(3) does not include a right to contemporaneous access to exhibits the parties submitted, but did not display, during the preliminary hearing).
- *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017) (keeping the United States and the Real Party in Interest from filing briefs in response to J.M.'s petition for a writ of mandamus and holding the Constitution applies to MRE 513 despite the fact that the constitutional exception was removed from MRE 513).
- *United States v. Betancourt*, No. 201500400, 2017 CCA LEXIS 386 (N-M. Ct. Crim. App. June 6, 2017) (finding the military judge did not abuse her discretion when she ruled evidence seized during search of defense counsel spaces was admissible and that she did not err when she disqualified appellant's initial detailed defense counsel and compelled them to testify about how they obtained and secured appellant's cell phone).
- *United States v. Darnall*, 76 M.J. 326 (C.A.A.F. 2017) (finding no probable cause to apprehend appellant and ruling evidence should have been suppressed as fruit of the poisonous tree).
- *United States v. Hale*, 76 M.J. 713 (N-M. Ct. Crim. App. 2017) (presuming prejudice and reversing convictions due to defense counsel's conflict created by the conduct of trial counsel who was defense counsel's husband's supervisor and, alternatively, asserting Article 66(c), UCMJ, power to not affirm a case that "should not" be affirmed).
- *United States v. Motsenbocker*, No. 201600285, 2017 CCA LEXIS 651 (N-M. Ct. Crim. App. Oct. 17, 2017) (finding evidence that the victim is incapable of consenting due to intoxication, which violates Art. 120(b)(3), UCMJ, is admissible to prove sexual assault by bodily harm under Art. 120(b)(1)) (originally decided on Aug. 10, 2017 with corrected opinion issued on Oct. 17, 2017).

- *United States v. Hackler*, 75 M.J. 648 (N-M. Ct. Crim. App. 2016) (whether specifying a heterosexual act as an element of criminal adultery constitutes a violation of equal protection in light of recent legal developments with respect to sodomy and homosexual marriage).
- *United States v. Sager*, 76 M.J. 158 (C.A.A.F. 2017) (holding the words “asleep, unconscious, or otherwise unaware” in Article 120(b)(2), UCMJ, create three distinct theories of criminal liability).

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

**Organization.** During the reporting period, Code 46 was staffed with eleven active duty judge advocates (including one activated reservist), one civilian attorney, and two civilian administrative employees. In FY17, Code 46 was supported by seven reserve judge advocates in addition to the one activated reservist mentioned above.

**Mission.** Under Article 70, UCMJ, the primary mission of Code 46 is to represent the United States before NMCCA and the CAAF. Code 46 also provides interlocutory appeal and prophylactic appellate support and advice to Navy and Marine Corps trial counsel, SJAs, and post-trial review officers throughout the Navy and Marine Corps for all types of pretrial, court-martial, and post-trial matters.

A summary of FY17 appellate activity is provided in the following chart. These calculations are based on input from the Court-Martial Tracking and Information System (CMTIS) database. The calculations in CMTIS for “Briefs Filed” include Government briefs, answers to supplements, and supplemental briefs, and *amicus* briefs. “Other Pleadings” includes responses to extraordinary writs, motion responses, responses to Court Orders, and Petitions for Reconsideration. The number of CAAF and NMCCA briefs filed remained relatively constant from FY16, as did the number of oral arguments at both courts. This year, Code 46 conducted two outreach arguments: one at George Washington Law School and another at George Mason’s Antonin Scalia Law School.

	<b>FY11</b>	<b>FY12</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>
<b>NMCCA</b>							
Briefs Filed	188	198	152	159	140	131	130
Other Pleadings	144	439	439	479	435	434	413
Oral Arguments	20	19	15	16	11	11	9
<b>CAAF</b>							
Briefs Filed	22	24	9	12	23	26	15
Other Pleadings	70	111	98	72	97	84	66
Oral Arguments	7	12	11	3	7	11	7

Significant issues this term include:

- *United States v. Darnall*, 76 M.J. 326 (C.A.A.F. 2017) (Whether agents had probable cause to apprehend a suspect where agents connected the suspect's name to an incriminating piece of mail, but had not connected the suspect himself to that incriminating piece of mail);
- *United States v. Bartee*, 76 M.J. 141 (C.A.A.F. 2017), petition for cert. filed, \_\_\_ U.S.L.W. \_\_\_ (U.S. Jul. 28, 2017) (No. 17-175) (Whether a convening authority violates Article 25, UCMJ, when he reconvenes the same panel after a military judge dismisses the panel for violating Article 25, but the convening authority states that he knew he could select other members and used the Article 25 factors);
- *United States v. Pabelona*, 76 M.J. 9 (C.A.A.F. 2017) (Whether unobjected to statements from a trial counsel made during closing argument on the merits and argument on sentencing amounted to prosecutorial misconduct under the plain error test);
- *United States v. Ravenscraft*, 2017 CCA LEXIS 419 (N.M.C.C.A. Jun. 27, 2017), and *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N.M.C.C.A. 2017) (Whether and how a military judge may order production or release of MRE 513 privileged communications when the privilege is asserted by the holder of the privilege);
- *United States v. Hale*, 76 M.J. 713 (N-M.C.C.A. 2017) (Whether a potential conflict of interest arises from trial counsel's supervisory position over trial defense counsel's husband that is tested for prejudice under *Culyer v. Sullivan* or *Strickland v. Washington*);
- *United States v. Dinger*, 76 M.J. 552 (N-M.C.C.A. 2017) (Whether Congress' statement in 10 U.S.C. § 6332 that the transfer of a member of the naval service to a retired status "is conclusive for all purposes" precludes the issuance of a punitive discharge to a retiree);
- *United States v. Forrester*, 76 M.J. 389 (C.A.A.F. 2017) (Whether punishing the same transaction of obtaining child pornography with four convictions unreasonably exaggerates Appellant's criminality and triples his punitive exposure, constituting an unreasonable multiplication of charges);
- *United States v. Chikaka*, 76 M.J. 310 (C.A.A.F. 2017) (Whether the lower court erred in failing to find evidence of unlawful command influence sufficient to shift the burden to the Government to disprove unlawful command influence, where the military judge admitted on the merits a campaign plan to "fully operationalize the Commandant's guidance" from

the Heritage Tour, and then during sentencing admitted a picture of the Commandant and allowed Appellant's commanding officer to testify that it was important for the members to adjudge a harsh sentence);

- *United States v. Sager*, 76 M.J. 158 (C.A.A.F. 2017) (Whether the language under Article 120(d) stating that a person may not make sexual contact with someone who is "asleep, unconscious, or otherwise unaware," creates three separate theories of liability under which one may be guilty of the offense); and,
- *United States v. Rosario*, 76 M.J. 114 (C.A.A.F. 2017) (Whether the NMCCA erred in conducting its Article 66(c), UCMJ, review by finding as fact allegations that supported charges of which an appellant was acquitted to affirm the findings and sentence).

Code 46 coordinates with Navy and Marine Corps Trial Counsel Assistance Programs (TCAPs) to advise and respond to questions from the field on pending litigation and appellate matters. Code 46 maximizes its reach electronically, operating a discussion board, a Military Justice Wiki, and a Military Justice Blog. Trial counsel and appellate government counsel from other Services are also able to participate and contribute to the Blog, the discussion board, and the Military Justice Wiki. In addition, Code 46 emails newsletters and memoranda to practitioners as necessary.

To best represent the United States before appellate courts, Code 46 coordinates with sister Services to maintain consistent United States positions before service appellate courts, the CAAF, and the U.S. Supreme Court, and moots cases jointly to maximize the efficacy and competence of appellate practice.

Code 46 works with the TCAPs and NJS, to provide formal trial counsel training. Code 46 training routinely covers: handling interlocutory appeals, extraordinary writs, *DuBay* hearings and remands; protecting the record to withstand appellate scrutiny; and explaining the fundamental areas of intersection between trial and post-trial processing and appellate review. In FY17, Code 46 conducted the Second Annual VLC Appellate Training to Navy and Marine Corps VLC. Code 46 also sent an instructor to the Marine Corps' 2017 Post-Trial Review Summit, contributing to the Marine Corps' efforts to minimize post-trial processing errors.

Code 46 counsel served on the Steering Committee for the highly successful Fifth Annual Joint Appellate Advocacy Training, held at Joint Base Myer-Henderson Hall from September 18-20, 2017. Code 46 counsel participated in and moderated various panels teaching appellate litigation skills with emphasis on preventing appellate reversal to appellate and trial counsel from across the services. The Training was attended by nearly 125 judge advocates from across the globe and from every military Service. Speakers included: Judge John E. Sparks, (CAAF); Professor Neal Katyal, Georgetown Law; Mr. Michael Dreeben, Deputy Solicitor General; Mr. Dwight Sullivan, Department of Defense Office of the General Counsel; Col (Ret) Don Christensen, President,

Protect our Defenders; Mr. Victor Stone, Victim's Attorney, Maryland Crime Victims Resource Center; Mr. Gregory Castanias, Partner, Jones Day; COL (Ret) Steven David, Indiana Supreme Court Justice; Mr. Kannon Shanmugam, Partner, Williams & Connolly. Code 46 counsel also attended advanced appellate training at the annual Appellate Judges' Education Institute and CAAF's Continuing Legal Education and Training Program.

Representatives from Code 46 also engaged in community outreach efforts this year, to include serving as mock trial coaches at American University Washington College of Law, as moot court judges for student competitions at the George Mason Law School, and as appellate moot court judges at the American Bar Association's (ABA's) National Appellate Advocacy Competition.

During FY17, Code 46 continued the DON's electronic record of trial program, which at year's end included approximately 95% of the trial records docketed at NAMARA.

### **ASSISTANT JUDGE ADVOCATE GENERAL, CHIEF JUDGE, DEPARTMENT OF THE NAVY**

The Assistant Judge Advocate General, Chief Judge, Department of the Navy (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.

### **THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS (CODE 51)**

Organization. During FY17, NMCCA included between seven and eight active duty Navy and Marine Corps appellate judges. The NMCCA was also supported by five Navy reserve and two Marine Corps reserve appellate judges, a mid-grade officer senior law clerk, two Navy and Marine Corps junior officer law clerks, and one junior officer temporary assignment law clerk. The Court benefitted from its robust intern program, which provided three part-time spring semester student law clerks, five summer student law clerks, and two part-time fall semester student law clerks.

Mission. NMCCA is responsible for all cases referred under Articles 62(b), 66(b), 69(d), and 73, UCMJ. The Court may also entertain petitions for extraordinary relief, including petitions filed by crime victims pursuant to Article 6b, UCMJ.

Legal issues addressed in FY17 included (case names in parenthesis):

- Whether the military judge's instruction on aggravated assault that "the risk of death or grievous bodily harm must be more than merely a fanciful, speculative,

or remote possibility' was prejudicial error since weeks before trial in *United States v. Gutierrez*, 74 M.J. 61, 68 (C.A.A.F. 2015) the Court of Appeals for the Armed Forces (CAAF) expressly overruled *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993), which formed much of the basis for the subject instruction. (*Rodriguez*)

- Whether the appellant received the effective assistance of counsel in his post-trial representation when detailed defense counsel specifically limited the appellant's requested clemency request due to a misunderstanding of the Convening Authority's (CA's) clemency powers. (*Giacinti*)
- Whether the appellant received the effective assistance of counsel in his post-trial representation when detailed defense counsel requested relief outside the authority of the CA to grant. (*Johnson*)
- Whether the Court is precluded from conducting a proper factual sufficiency review when members, without explanation, found the appellant guilty of larceny of an amount less than the amount charged - rendering the verdict arguably ambiguous. (*Peterson*)
- Whether adultery under the UCMJ unconstitutionally imposes criminal liability and punishment for only heterosexual service members. (*Williams*)
- Whether pursuant to a petition for extraordinary relief in the nature of a writ of error *coram nobis*, the Court should retroactively apply *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), which requires the use of the elements test to determine whether one offense is a lesser included offense (LIO) of another, to a 2001 conviction for indecent assault as an LIO of rape, setting it aside and substituting the permissible LIO of assault consummated by a battery. (*Diggs*)
- Whether an accused's representation was adversely affected by an actual conflict of interest and his convictions should be set aside under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), where, *inter alia*, the lead defense counsel failed to inform her client that the prosecutor was the rating officer of her active duty husband and that she anticipated that she herself would become a trial counsel within the region soon after the accused's trial. (*Hale*)
- Whether the Convening Authority violated Article 60, UCMJ, by disapproving the appellant's adjudged bad-conduct discharge when a pretrial agreement required only that he suspend and remit any adjudged discharge. (*Kruse*)
- Whether a command authorized search of the defense counsel offices amounted to unlawful command influence and prosecutorial misconduct, and whether the military judge violated the appellant's right to counsel under the Sixth Amendment to the Constitution by disqualifying his original trial defense counsel and compelling the attorney to testify against him at trial. (*Betancourt*)

- Whether the military judge abused his discretion in failing to eradicate apparent unlawful command influence from the appellant's trial in view of (1) the Commandant of the Marine Corps having made comments regarding the guilt of those accused of sexual assault during a series of lectures known as the Heritage Brief; (2) President Obama's comments regarding holding people accused of sexual assault accountable; (3) the Secretary of the Navy's comments regarding the Naval Academy failing to hold persons who commit sexual assault accountable; (4) the Superintendent of the Naval Academy's comment that he felt a "call to action" in dealing with sexual assault cases; and (5) the substantial pretrial publicity surrounding the appellant's case. (*Thompson*; Art. 69 Review)
- Whether the convening authority abused his discretion in denying a request for rehearing despite his doubts about the fairness and integrity of the court-martial and whether the military judge committed reversible error by restricting the appellant's allocution rights. (*Barry*)
- Whether a verdict was ambiguous where an appellant was charged with stealing a variety of items, including two dog kennels, and the members found him guilty of stealing one dog kennel without specifying which of the two kennels the guilty finding related to. (*Tinsley*)
- Whether a crime victim's Article 6b, UCMJ, statutory right to not be excluded from public hearings entitled her to a writ of mandamus ordering a preliminary hearing officer (PHO) to allow the victim to review the written comments and the evidentiary exhibits that the trial and defense counsel provided to the PHO for purposes of his Article 32(c), UCMJ, responsibilities before he prepared his report. (*Densford*)
- Whether in light of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), the military judge's admission of charged sexual misconduct pursuant to MRE 413, and subsequent instructions violated the appellant's due process rights. (*Wiredu*)
- Whether a court-martial lacked personal jurisdiction over a military retiree in light of the U.S. Supreme Court's holding in *Barker v. Kansas*, 503 U.S. 594, 605 (1992), that for tax purposes, military retirement benefits are not current compensation for reduced services; and (2) whether Congress' statement in 10 U.S.C. § 6332 that the transfer of a member of the naval service to a retired status "is conclusive for all purposes" precludes the issuance of a punitive discharge to a retiree. (*Dinger*)
- Whether the military judge erred in admitting propensity evidence in light of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). (*Luna*)

- Whether assuming *arguendo* that curative measures taken by the military judge were inadequate, could the court be confident that the members convicted the appellant on the basis of the evidence alone where prosecutorial misconduct that was severe and permeated the initial findings' argument. (*Andrews*)
- Whether when the appellant was charged with sexual assault by causing bodily harm and abusive sexual contact by causing bodily harm, both of which offenses required the government to prove beyond a reasonable doubt that the alleged victim did not consent to the sexual act or sexual contacts, it was error for the government to argue an uncharged violation that she was incapable of consenting, and additionally the military judge erred in instructing the members regarding incapacity due to intoxication using a standard established in *United States v. Pease*, 75 M.J. 180 (C.A.A.F. 2016). (*Motsenbocker*)
- Whether a military judge may craft a remedy to guarantee a meaningful opportunity to present a complete defense when the holder of the MRE 513 privilege asserts the privilege; the requested information does not fall under one of the enumerated exceptions to the privilege listed in MRE 513(d); and the failure to produce said information for review or release would arguably violate the Constitution. (*Ravenscraft*)

The Court will host the joint-service Fulton Conference in September of 2018. The three-day conference for the judges and staffs of the courts of criminal appeals includes one day on judicial writing by a member of the New York University School of Law faculty. As in other years of this acclaimed training conference, the speakers will include a mix of DoD and external speakers, with particular emphasis on the changes to military justice practice resulting from the Military Justice Act of 2016, as incorporated in the FY17 NDAA.

The NMCCA continues to maintain a website at <http://www.jag.navy.mil>. All NMCCA opinions are available for download at the website. In addition, the Court maintains audio files from oral arguments heard before it as well as a docket for upcoming oral arguments. Applications for admission to the NMCCA bar and rules of the court are also maintained on the website.

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

Organization. The Navy-Marine Corps Trial Judiciary (NMCTJ) is organized into eight geographic judicial circuits, with thirteen active duty Marine Corps judges and thirteen active duty Navy judges. Trial judges are stationed throughout the world in Fleet and Marine force concentration areas and travel to other locations, as required, to conduct trials. The active duty judiciary is supported by reserve units from both Services, with a total of fifteen reserve trial judges.

Mission. The core mission of the NMCTJ is to preside over all Navy and Marine Corps general and special courts-martial. In recent years, trial judges have presided



over cases directly impacted by the significant statutory changes enacted by Congress and executive orders issued by the President. They have directly implemented and addressed such topics as defining the evolving role of the Victims' Legal Counsel and the parameters of their representation, particularly in the area of production and discovery of victims' mental health records under MRE 513, guardianship of victims, victim participation in sentencing hearings, and defining the scope of admissible propensity evidence under M.R.E. 404b.

The caseload at the trial level is generally consistent with the previous year, and continues to reflect an especially high percentage of contested cases, particularly of general courts-martial (GCMs). In FY17, the NMCTJ presided over 565 trials (258 GCMs and 307 special courts-martial (SPCMs)). Of the adjudicated GCMs, 38% (98) were contested, as were 24% (75) of the SPCMs.

In addition to their primary military justice mission, our trial judges continue to support the Office of Military Commissions (OMC) Trial Judiciary, with three Navy and Marine Corps judges assigned to the pool of OMC judges. The Circuit Judge of the Eastern Judicial Circuit currently presides over the case of *United States v. al Iraqi*.

NMCTJ continues to support the training of new judge advocates by providing evaluators for the mock trial program at the Naval Justice School. NMCTJ judges also support moot courts at law schools throughout the U.S. Reserve trial judges are a vital part of these programs.

In February 2017, the NMCTJ hosted the Joint Military Judges Annual Training (JMJAT) in Tampa, Florida, attended by more than 110 active and reserve judges from all Services. Instructors for this training included active duty judges and faculty of the National Judicial College.

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

Organization. The Deputy Judge Advocate General of the Navy also serves as CNLSC, an echelon 2 command reporting to the Chief of Naval Operations. At the conclusion of FY17, NLSC was comprised of 458 judge advocates, 1 Civil Engineer Corps officer, 1 administrative Warrant Officer, 194 legally trained enlisted members, 13 administratively trained enlisted members, 215 civilians, and 36 foreign nationals.

Mission. NLSC provides 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 FY17 NLSC provided legal advice, services, and training to the Fleet through 14 echelon 3 commands (nine RLSOs; four Defense Service Offices; and NJS) and their associated detachments and branch offices, and through the worldwide VLC Program. Counsel from these commands handled courts-martial prosecution and defense, administrative boards, and physical evaluation boards; advised local commanders and their staffs; and provided legal assistance to active duty members, retirees, and their family members.

NLSC continues to track all military justice cases using the Case Management System (CMS). Tracked cases include all special victims' cases, as required by DoD Directive-Type Memorandum 14-003; all cases where an accused is placed in pretrial restraint, restriction, or confinement; and when the RLSO has substantial involvement in a case in anticipation of a possible court-martial. CMS is also used to track each officer Board of Inquiry. RLSOs have found CMS to be highly effective in tracking all cases and providing accurate information to local convening authorities and NLSC headquarters.

Over the past year, NLSC has been heavily involved in the development of the DON Naval Justice Information System (NJIS). NJIS is a web-based comprehensive case management system designed to track Navy and Marine Corps unclassified criminal incidents from initial report through adjudication. It is designed to be an information system in which users collaborate rather than simply populate a database. This is DON's attempt to achieve end-to-end Defense Incident-Based Reporting System (DIBRS) compliance.

Starting in August 2017, NLSC has provided members to the Joint Service Committee on Military Justice (JSC) Subcommittee tasked with making recommendations concerning the implementation of Section 5504 of the NDAA for Fiscal Year 2017. The Subcommittee is identifying potential uniform standards and practices for the DoD military justice system data collection, including pretrial, trial, post-trial, and appellate processes. The Subcommittee analysis is ongoing.

In FY17, NLSC completed 124 general courts-martial, 133 special courts-martial, and 128 Article 32 preliminary hearings. While the number of courts-martial has declined in recent years, the proportion of contested trials, the complexity of litigation, and the scope of out-of-court responsibilities (particularly case investigation and development) shouldered by trial and defense counsel have all increased substantially. Further, the addition of VLC into the trial process and the expansion of victims' rights have added new layers of complexity to trial and appellate practices. As a result, demand on judge advocates involved in the administration of military justice has increased.

## **DEFENSE COUNSEL ASSISTANCE PROGRAM (DCAP)**

Organization. DCAP is aligned under NLSC and reports to the Chief of Staff, Defense Service Offices (COS-DSO). DCAP's current Director is an O-5 qualified as "Specialist II" in the Military Justice Litigation Career Track (MJLCT). He previously served as a defense counsel, trial counsel, afloat SJA, NJS Evidence and Trial Advocacy Instructor and most recently, as a Senior Defense Counsel (SDC). The DCAP Director is also member of the Article 6 inspection team. As the defense subject matter expert on the team, the Director participated in Article 6 inspections of two of the four Defense Service Offices (DSOs) and their detachments in FY17.

The Director is supported by two Deputy Directors, both O-4s. One, stationed in Washington, DC, is qualified as a “Specialist II” and has previously served as a defense counsel, trial counsel, Naval Special Warfare Group SJA, and appellate government counsel. The other Deputy, stationed in the Fleet concentration area of Norfolk, Virginia, is a “Specialist I” and has previously served as a trial counsel, NJS Instructor, and defense counsel. By Summer 2018, an incoming Deputy, also an O-5 “Specialist II,” will be stationed in San Diego, California. DCAP is in the final process of hiring a Highly Qualified Expert (HQE) and expects to have this position filled by Spring 2018.

Although normally acting in an advisory capacity for defense counsel, DCAP personnel are also available for detailing to cases as warranted. Likewise, when local supervisory counsel is unavailable, DCAP personnel are available to serve as “behind-the-bar” supervisors for junior counsel litigating contested cases.

Mission. DCAP’s primary mission is to support and enhance the proficiency of the Navy criminal defense bar, provide experienced reach-back and technical expertise for case collaboration, and to develop, consolidate, and standardize resources for defense counsel. DCAP provides full-spectrum advice and serves as a resource through every phase of pre-trial investigation and court-martial litigation.

During FY17, DCAP assisted detailed defense counsel across the spectrum of trial practice including trial strategy, motions practice, argument development, investigations, discovery, requests for witnesses and expert assistance, voir dire strategies and questions, complex legal research, and preparing clients and witnesses for testimony. DCAP was available for on-site visits during trial preparation and were often in court to assist “behind-the-bar.” DCAP also provided advice on post-trial matters and frequently consulted with defense counsel concerning professional responsibility and ethics issues.

DCAP was responsible for a wide array of training for defense counsel. DCAP brought together military and civilian experts to provide comprehensive training on defending service members accused of sexual assault at the Defending Sexual Assault Cases (DSAC) course. Together with NJS and the Marine Corps defense bar, DCAP organized and presented at the semi-annual Defense Counsel Orientation course that is designed to prepare new defense counsel to represent court-martial and administrative separation clients. In addition, DCAP provided instruction at the Basic Trial Advocacy course and coordinated with the Trial Counsel Assistance Program (TCAP) to present the Senior Managers’ Course for military justice supervisors. Finally, DCAP conducted five individual week-long mobile training visits around the world, providing training to Defense Service Offices and their detachment offices.

DCAP aided in the effort to ensure that Defense Litigation Support Specialist (DLSS) positions were staffed with quality applicants, resulting in all eight defense investigator positions being filled. DCAP provided standardized training and assisted in establishing uniform policy and protocols for the DLSS program. DCAP also oversaw the procurement of Microsoft Surface Pro tablets to enhance the effectiveness and

mobility of DLSS.

DCAP continues to develop salient resources and provides written advisories on recent case law and changes to the UCMJ. DCAP maintains a centralized defense database on its Microsoft SharePoint site which allows for the collection of metrics and real-time exchange and dissemination of information and serves as a central repository of documents and resources developed by DCAP and counterpart offices in fellow Services, Code 20, and NJS. SharePoint allows offices to collaborate across vast geographical boundaries, promoting a “world-wide defense firm” mentality.

### **TRIAL COUNSEL ASSISTANCE PROGRAM (TCAP)**

Organization. TCAP is aligned under NLSC and reports to the Chief of Staff, Region Legal Service Offices (COS-RLSO). TCAP’s current Director is a Navy O-6, a Military Justice Litigation Career Track (MJLCT) designated “Expert.” The current Director, an O-6, received his LL.M. in Litigation from George Washington University School of Law. He previously served as a Military Judge, RLSO Executive Officer, Senior Defense Counsel, Senior Trial Counsel, and SJA.

The Deputy Director is a GS-15 civilian with approximately 15 years of experience prosecuting special victim crimes (SVCs) and advocating for victims’ rights. She also served as a Program Director at the National District Attorney’s Association, where she developed training and provided assistance to local prosecutors around the United States.

TCAP’s HQE is a former civilian prosecutor with 18 years of experience, most notably as a prosecutor specializing in crimes against children and as a senior attorney, instructor, and course coordinator for the National District Attorneys Association.

The Assistant Director is an O-4 MJLCT-designated "Specialist I" who has extensive military justice experience. He served as a defense counsel and trial counsel as well as a legal assistance attorney and SJA.

Mission. TCAP provides advice, assistance, support, resources, and training for Navy trial counsel worldwide. TCAP regularly assists and advises trial counsel on all aspects of prosecution, including pre-trial investigation, drafting charges, trial preparation and motions practice, discovery, securing and preparing expert witnesses, devising trial strategy, and professional responsibility issues. TCAP engages trial counsel in the field via regular case review conferences and coordinates with Code 46 to ensure court-martial prosecutions are postured to withstand appellate review.

TCAP provides more in-depth case assistance upon request. A TCAP counsel is detailed as trial counsel or assistant trial counsel when case complexity demands special proficiency. For example, the TCAP Director was recently detailed as the lead trial counsel on a high profile national security case; the previous Assistant Director served as trial counsel in a premeditated murder case; the Deputy Director is assisting

with a complex domestic violence/strangulation case; and, the HQE has provided on-scene expert assistance in several complex child sexual assault and child exploitation cases.

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

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's SharePoint discussion board enables real-time responses to inquiries from the field leveraging enterprise knowledge for the benefit of the more remote offices. The discussion board facilitates a closer prosecution bar by enabling discussions between trial counsel worldwide.

Finally, TCAP plays a vital role in training trial counsel, partnering with NJS and Code 20 in the development of litigation training. TCAP personnel routinely serve as instructors at a variety of courses at the NJS schoolhouse, online, and in-person at offices worldwide. Coordinating with NJS, TCAP conducted a special victim crimes course: intermediate and advanced prosecution principles in domestic violence, adult sexual assault and child abuse/exploitation crimes. The course provided focused training sessions to Navy, Marine, and Air Force prosecutors and paralegals. This year, TCAP coordinated with the Marine Corps TCAP to standardize baseline, intermediate, and advanced training in the dynamics of special victim crimes, as well as trial advocacy. Additionally, TCAP conducted on-site training for all RLSOs focusing on trial advocacy and prosecution of special victim offenses. Using DON Sexual Assault Prevention and Response Office funding, TCAP ensured prosecutors' attendance at special victim crimes training including courses with the National District Attorney's Association (training on sexual assault and child abuse), and the End Violence Against Women International Annual Conference. TCAP also facilitated outside training with the Department of Justice (Sexual Assault Nurse Examiner Expert Witness Course) and the Association of Prosecuting Attorneys Child Abuse Symposium.

TCAP supplements its training outreach with a number of webinars focusing on prosecuting special victim offenses and other evidentiary topics. These webinars enable Navy prosecutors and paralegals to attend educational programs online presented by our own and nationally recognized experts at little to no cost.

### **VICTIMS' LEGAL COUNSEL (VLC) PROGRAM**

Organization. The VLC program is led by a senior O-6 Chief of Staff and a civilian (GS-15) Deputy Chief of Staff and operates independently of both trial and defense organizations. The program consists of 33 specially trained and certified Navy judge advocates, two of whom are reservists, and 10 administrative personnel. VLC are

assigned to 25 naval installations around the world, including Annapolis, Maryland; Washington, District of Columbia; Oceana, Virginia; Little Creek, Virginia; Norfolk, Virginia; Groton, Connecticut; Mayport, Florida; Jacksonville, Florida; Pensacola, Florida; Gulfport, Mississippi; Great Lakes, Illinois; San Antonio, Texas; Coronado, California; San Diego, California; Lemoore, California; Ventura, California; Bremerton, Washington; Everett, Washington; Pearl Harbor, Hawaii; Guam; Bahrain; Naples, Italy; Sigonella, Italy; Rota, Spain; and Yokosuka, Japan.

In addition, the VLC program has renewed a contract with a local Bahraini counsel to assist eligible victims of sexual offenses committed by foreign nationals whose cases are being prosecuted within the Bahraini court system. Although the Bahraini courts recognize the rights of victims, the language barrier and the prohibition against VLC appearing before the Bahraini bench created a need for specific local counsel services to ensure the rights of victims are preserved.

Mission. The VLC Program provides independent legal counsel to eligible sexual offense victims. VLC advise victims of their reporting options, work with victims through the investigation and military justice process, advocate for victims' rights and interests, and help victims obtain access to other support resources. VLC complement the care and support victims receive through other organizations such as the Sexual Assault Prevention and Response Program, the Family Advocacy Program, the Victim Witness Assistance Program, and services offered by victim advocates, chaplains, and healthcare providers.

In accordance with federal law, eligibility for VLC services extends to victims of sexual offenses who would otherwise be eligible for legal assistance services from a military attorney. Generally this includes Navy active-duty and reserve personnel, other service personnel and retirees when assaulted by an active-duty Navy perpetrator, adult and minor dependents of active-duty Navy members when assaulted by an active-duty member, and Department of Defense civilians. VLC began providing services to minor dependents assaulted by active duty perpetrators on June 24, 2014 as directed by the FY14 NDAA. VLC services are available to victims filing Restricted Reports, Unrestricted Reports, or declining to file an official report of sexual assault.

VLC provide personal representation and advice to victims involved in collateral misconduct connected with a report of sexual assault, although collateral misconduct resulting in administrative processing or court-martial necessitates assignment of a separate military defense counsel. VLC also provide basic legal assistance services directly connected to a report of sexual assault. Assistance with more substantive matters are referred to the nearest military legal assistance office.

All communications between VLC and their clients, including minors, are confidential and privileged. VLC assess all minor client's capacity separately and continuously to determine if the client has the considered judgment and capacity to direct VLC representation. No victim is required to contact or consult with a VLC, and declining VLC services initially does not preclude a victim from representation later.

VLC support is available in-person and via remote means, if necessary, by telephone, email, text, video-teleconferencing, and FaceTime.

All VLC are required to successfully complete the Special Victims' Counsel Certification (SVCC) Course offered by either the Army or the Air Force in order to be certified by the Judge Advocate General to practice as a VLC. VLC also attend specialized courses and symposia such as Prosecuting Special Victims Cases (NJS), Representing Child Victims (Army), Ending Violence Against Women International, and the National Crime Victims Law Institute. In addition to outside training, in June 2017, the VLC Program held its second annual Training Symposium, bringing together almost all of the VLC and support staff from around the globe to receive instruction from experienced VLC within the program as well as from outside experts on topics such as vicarious trauma, military justice, and leadership development. Further, VLC participate in internal monthly training which include topics such as retaliation, federal labor and employment law, the Freedom of Information Act, civilian victims' rights, and ethics.

The Navy VLC Program's appellate practice team consists of four VLC specially trained by the Navy Appellate Government division. In FY17, team members attended the Joint Appellate Advocacy Training held at Henderson Hall in September 2017. The members of the appellate team are tasked with remaining current on appellate cases involving victims' rights, supporting any VLC with imminent trial-level appellate issues, and taking on post-trial appellate cases, as necessary.

During FY17, Navy VLC provided legal support to 1,750 sexual offense victims (950 of whom were new clients for VLC during FY17), participated on behalf of victims at more than 560 military justice and administrative proceedings, and conducted 580 outreach briefs on VLC services to approximately 30,000 personnel.

In addition, in FY17, Navy VLC provided training at the SVCC course and the Representing Child Victims courses, provided regular training to victim advocates, and attended and presented at the VLC program symposium. VLC also provided training at the Federal Law Enforcement Training Centers and at Sexual Assault Medical Forensic Examiner trainings conducted around the country and worldwide. Several VLC appeared before or were interviewed by the Judicial Proceedings Panel Federal Advisory Committee offering their insight on victim-specific issues related to the VLC Program.

## **NAVAL JUSTICE SCHOOL**

Organization. NJS reports to CNLSC for administrative and operational control. NJS is comprised of a staff of approximately 61 officers, enlisted members, and civilians across all Sea Services (Navy, Marine Corps, and Coast Guard). The main NJS facility is located in Newport, Rhode Island, and there are two detachments located in San Diego, California, and Norfolk, Virginia. A two-person branch office is located at the U.S. Army's Judge Advocate General's Legal Center and School in Charlottesville, Virginia. Seventeen reserve personnel (15 officers and two enlisted) supported NJS in

FY17. Training curriculum for Military Justice is controlled by the Military Justice Cross-Functional Team (CFT), consisting of 15 experienced Judge Advocate and paralegal instructors and led by an O-4 MJLCT-designated "Specialist I."

NJS has a GS-15 Educational Program Specialist who provides expert advice on the science of education, assists in the formulation of the school's educational and training curriculum, and advises leadership and mentors instructors. She has established guidelines for curriculum planning, reviewed plans and instructional programs, and continues to assess and ensure that NJS is meeting Fleet training needs.

Mission. The mission of NJS is to oversee and provide formal training to Sea Service judge advocates and paralegals to ensure their career-long professional development and readiness to deliver quality legal services to the Fleet. NJS also trains commanders and senior officers in the practical aspects of military law to enable them to perform their command and staff duties and to administer military justice.

In FY17, NJS provided instruction to more than 3,600 students worldwide at more than 1,450 in-resident courses ranging in length from one day to 13 weeks. NJS instructors also provided off-site teaching in military justice, administrative law, and operational law to commands on board Naval Station Newport, including the Naval War College, Naval Leadership and Ethics Center, the Defense Institute of International Legal Studies, Officer Development School, Senior Enlisted Academy, Surface Warfare Officers School, Officer Candidate School, and Limited Duty/Chief Warrant Officer Indoctrination School.

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

1. Basic Lawyer Course. 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 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 FY17, NJS graduated 150 students.

2. Legalman Accession Course. This 11-week course, offered three times in FY17, trains Navy enlisted personnel selected for conversion to the Legalman rating. The course provides ten ABA-approved credits towards a paralegal degree or certificate in partnership with an accredited educational service provider. In addition to training in military justice, court reporting, administrative investigations, and administrative separations, the course includes four paralegal studies courses taught by NJS officer instructors: Ethics, Legal Research and Writing I, Introduction to Law, and Emerging Legal Technologies. The five weeks of military-specific training within the course double as the reserve Legalman Accession Course. In FY17, there were 38 active duty graduates and 10 reservists.



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 (MOS) of Marine Corps Legal Services Specialist. Curriculum consists of training in military justice, post-trial review, and legal administration. In FY17 112 Marines completed this program.

4. Legal Services Court Reporter Course. This 13-week course, offered twice annually, provides court reporter training to Marine Legal Services Specialists, grades E-3 to E-7, seeking the MOS 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 FY17, 28 Marines graduated from this course.

5. Senior Officer Course in Military Justice and Civil Law (SOC). This scenario-based 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 FY17, NJS provided 24 offerings of the SOC in Newport, San Diego, Norfolk, Camp Lejeune, Parris Island, Quantico, Pensacola, Okinawa, and Cherry Point. Per NAVADMIN 302/12, this course is mandatory for O-6s prior to assuming command. In FY17, 1,091 officers graduated from this program.

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 dedicated judge advocate. In FY17, NJS provided 16 offerings of the LOC in San Diego and Norfolk to a total of 600 students.

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, non-judicial punishment, and courts-martial procedures. In FY17, NJS provided 17 offerings of the LCC in San Diego and Norfolk with a total of 442 students graduating.

8. Senior Enlisted Leadership Course in Military Justice and Civil Law (SELC). This three-day course provides senior enlisted leaders of all Services training focusing on military justice matters. In FY17, NJS provided 9 offerings of the SELC in San Diego and Norfolk and had a total of 424 graduates.

In addition to the “core” courses, NJS provided 24 resident specialty courses, many of which are pre-approved for continuing legal education (CLE) credit from state bar associations such as the Prosecuting Special Victim’s Cases (PSVC) course and

Defending Sexual Assault cases (DSAC) course which offer specialized training to prosecutors and defense counsel litigating complex sexual assault, child abuse, and domestic violence cases.. In FY17, these resident courses reached more than 654 legal professionals.

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

The Legalman Paralegal Education Program (LPEP) is a government-funded education program leading to an Associates of Science degree in Paralegal Studies. This program, established in 2010, is mandatory for all Legalmen (NOS B630) to meet minimum occupational standards for the Legalman rating. Following completion of the Legalman Accession course, students normally complete a semester of in-resident courses with an accredited educational service provider before checking into their first permanent duty station as a Legalman. Upon checking in, they normally participate in distance learning with the accredited educational service provider until completing the degree requirements. In FY17, 38 students attended LPEP as in-resident students, and more than 50 students were enrolled in the distance learning option.

NJS also offers a wide variety of online training and education courses through the Blackboard learning management system and NJS SharePoint portal. These systems are accessible 24/7 and offer on-demand training with opportunities for feedback and instructor interaction. The online courses cover specific topics on large practice areas such as post-trial processing, ethics, and law of the sea. Additionally, NJS offers in collaboration with Navy and Marine Corps Trial Counsel Assistance Programs (TCAP) the Trial Counsel Orientation (TCO) online course, which is an entry-level training for first time trial counsel. Teaching tools include assigned readings, recorded videos, discussion boards, practical assignments, and knowledge checks. In FY17 NJS Online provided an estimated 5,000 hours of instruction to more than 1,000 students worldwide.

NJS publishes an online course catalog, the USN/USMC Commander's Quick Reference Handbook for Legal Issues, and various study guides in support of its academic programs.

Through the Interservice Legal Education Review Committee, Commanding Officer, NJS, the Dean of Students for the U.S. Army's Judge Advocate General's Legal Center and School, and the Commandant, Air Force Judge Advocate General's School meet annually to discuss new initiatives and opportunities for cross-training.

## NAVY ACTIVITIES

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

In 2007, the JAG Corps established the MJLCT to improve the overall quality of Navy court-martial litigation. The MJLCT is a career track for judge advocates with demonstrated military justice knowledge and advocacy skills. Entry into the MJLCT is through a competitive board. The track combines continued training, education, and courtroom experience with oversight by and access to senior, seasoned litigation mentors to help judge advocates develop the skills needed to become preeminent trial lawyers and judges. Military Justice Litigation Qualified (MJLQ) officers are detailed to lead trial departments at each of our nine RLSOs and defense departments at our four DSOs. 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 FY17, there were 79 Navy MJLCT officers. These officers generally fill billets specifically designated as career track assignments, as trial counsel, defense counsel, appellate counsel, and trial and appellate judges. Additionally, MJLCT officers serve in a number of other assignments that benefit from their military justice expertise, including billets at the Office of Military Commissions (OMC), on board aircraft carriers, and as Region Staff Judge Advocate. Two MJLCT officers are currently attending post-graduate school to obtain LL.M. degrees in Trial Advocacy, and one is assigned as a legislative fellow on a U.S. Senator's staff.

The promotion rate for MJLCT officers continues to be closely monitored. The promotion selection boards in FY17 selected MJLCT officers at an equivalent, or higher, rate to the overall in-zone selection rate. The O-6 promotion selection board selected two of three MJLCT officers in-zone and one above zone, the O-5 selection board selected six of seven MJLCT officers in zone and two above zone, and the O-4 selection board selected all seven MJLCT officers in-zone.

Designations within the MJLCT are as follows:

a. SPECIALIST I. This 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 are normally eligible for SPECIALIST I after their fourth year of active duty.

b. SPECIALIST II. Following SPECIALIST I qualification, a judge advocate may qualify as SPECIALIST II after obtaining additional qualitative and quantitative military justice litigation experience as well as professional development as a naval officer. Candidates are normally eligible for SPECIALIST II after five years as SPECIALIST I.

c. EXPERT. Following SPECIALIST II qualification, a judge advocate may qualify as EXPERT after obtaining significant additional 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 are eligible for assignment to the most senior MJLCT positions. Candidates are normally eligible for EXPERT after five years as SPECIALIST II.

SPECIALIST II and EXPERT MJLQ are community management tools to guide the detailing, training, and professional development needs of MJLCT judge advocates and to ensure the community maintains its ability to execute this core function across the community billet structure. JAG Corps leadership seeks to provide all MJLCT judge advocates with training and duty assignment opportunities that facilitate their professional development within the MJLCT, the JAG Corps, and the Navy.

As judge advocates seek MJLCT advancement, they are required to demonstrate increased courtroom experience, continued growth in litigation leadership, and familiarity with the broader mission of the Navy. MJLCT judge advocates are encouraged to explore non-litigation assignments to enhance their professional development and their leadership skills and to contribute to the overall mission of the JAG Corps and the Navy.

## 2. Sexual Assault Prevention and Response (SAPR) Initiatives

In FY17, the Navy continued to execute a multifaceted approach to address sexual assault awareness and training, prevention, victim response, investigation, and accountability. Navy judge advocates were integral in all levels of the SAPR program, including reviewing numerous SAPR training products intended for Sailors, SAPR victim advocates (SAPR VAs), and Sexual Assault Response Coordinators (SARCs). OJAG Code 20 (Criminal Law Division) works hand-in-hand with Naval Education and Training Command (NETC), Department of the Navy Sexual Assault Prevention Response Office (DON SAPRO) and N17 to review these products. For example, in NETC, the Criminal Law Division provided in-depth review of an update to the General Military Training "Full Speed Ahead." Full Speed Ahead builds on the foundational elements of personal accountability, peer engagement and intervention, values-based decision-making, resilience, and leadership articulated in prior trainings. The Criminal Law Division assisted in the development and review of a module on social media misconduct, specifically the wrongful distribution of intimate images.

NJS provides SAPR training in each of its JAG officer accessions courses consisting of in-depth instruction on Article 120, UCMJ, as well as detailed exploration of the roles and responsibilities of SAPR stakeholders, the meaning of current statistics, the mechanics of sexual assault reporting systems, and the role and responsibilities of the Sexual Assault Initial Disposition Authority. In addition, NJS instructs Sea Service legal professionals (e.g., judge advocates, Navy paralegals, Marine Corps Legal Specialists, and Coast Guard Legal Technicians) on all aspects of sexual assault disciplinary proceedings, including the role of VLC and the Navy's commitment to facilitating victim participation in the criminal justice system.

Navy VLC regularly support command training events and base programs

focusing on sexual assault issues to ensure Sailors are aware of legal resources available to sexual assault victims. Moreover, Navy VLC routinely provide training to investigators at the Federal Law Enforcement Training Centers (FLETC) and information regarding victims' rights and program services through base and Armed Forces newspaper articles and radio programs, as well as through briefings to first responders such as healthcare personnel, SAPR VAs, SARCs, and law enforcement personnel.

The TCAP continues to provide training as part of the NCIS Advanced Adult Sexual Assault Investigations Training Program, a course for investigators and prosecutors that is focused on improving multi-disciplinary coordination of sexual assault investigations. In practice, this translates to early and regular coordination between Regional Senior Trial Counsel and NCIS on investigation and prosecution of cases. TCAP also continues to train and advise trial counsel, paralegals, and administrative support personnel on sexual assault prosecutions.

### 3. Additional Information

#### a. Compliance With Processing Time Goals

In FY17, no Navy case was dismissed on speedy trial grounds. Four Navy cases exceeded 120 days from sentencing to CA's action (*Moreno 1* guideline). Delay in these cases was primarily due to voluminous records of trial although one was delayed due to a defense request for an extension in submitting matters in clemency and another for a defense post-trial Article 39(a), UCMJ session. No Navy cases exceeded the 30 day window from the date of CA's action to docketing at NMCCA (*Moreno 2* guideline). One NMCCA case has exceeded the *Moreno 3* guideline of 18 months from docketing to decision.

#### b. Measures Implemented by the Navy 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

##### Litigation Expertise

As noted in Paragraph 1 above, the Navy established the MJLCT in 2007 to ensure that the Navy develops and retains experienced litigators to participate as trial counsel, defense counsel, and military judges in the Navy's increasingly complex docket. Our MJLCT attorneys spend significant portions of their careers in various military justice assignments, to include prosecution, defense, and judicial assignments. Upon promotion to Commander, MJLCT officers frequently 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 assignments

outside the career track, such as sea duty onboard aircraft carriers and SJA billets, to develop them as naval officers and to broaden their Fleet perspective. As a result, our litigators understand the importance of each role in our military justice system—insight that 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, executive officers, division directors, and Assistant Judge Advocate General. MJLCT officers are immersed in the daily prosecution, defense, and judicial hearing of cases throughout the Service and at the Office of Military Commissions. The goal of the MJLCT program is to improve the effectiveness and efficiency of the court-martial process by allowing judge advocates to serve repeated tours in litigation-intensive billets. This allows the Navy to develop senior MJLCT officers with extensive contested case experience in all three areas of practice—prosecution, defense, and the judiciary.

The career track initiative has positioned the Navy well to provide the effective prosecution, defense, and judicial hearing of the cases including national security cases, sexual assault cases, cases before the military commissions, and capital cases. Among Navy Commanders and Captains in the career track, the Navy has developed a cadre of officers with experience litigating national security/classified information cases. Similarly, we have numerous senior and mid-grade officers with experience on military commissions as trial counsel, defense counsel, trial judges or appellate judges. All MJLCT officers have robust experience in a wide range of sexual assault related cases. Each area of practice (prosecution, defense, and judiciary) currently includes MJLCT members who have significant experience and expertise in sexual assault cases, national security cases, and commissions cases, and every practice area has ready access to these experts for support if the need arises. There are no MJLCT officers with significant capital experience, as the Navy has tried no capital cases in recent decades. Several of the MJLCT officers have served at the military commissions as trial or defense counsel on the two referred capital cases, but both cases remain in pretrial litigation. Currently, the Services are not required to provide learned counsel (as defined by the ABA) in capital cases. Given the quality of senior, experienced litigators that the Navy has developed over the past ten years, we are confident that the Navy is well-positioned to prosecute, defend, and adjudicate a capital case if one were to be referred. Given the circumstances of a particular case, the Navy may pursue additional defense counsel through recall of reserve officers or contracting for civilian counsel who meet the ABA standard of learned counsel.

### Training and Education

NJS provides judge advocates with tiered military justice instruction from active component judge advocates 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 (LTCC) 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, 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; the National Institute of Justice (a 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. Of the 79 career litigators in the MJLCT at the end of FY17 approximately one-third have earned an LL.M. in litigation.

### Trial Counsel

Senior Trial Counsel (STC) (O-4 or above) are the nucleus of the Navy's SVIP capability and are prepared to prosecute complex cases including capital and national security cases. Each STC is hand-selected by the Judge Advocate General to fill one of nine STC billets. All STC are MJLCT officers. Upon reporting, all STC complete a one-week special victims investigation course and participate in additional specialized training such as litigating complex cases, TCAP targeted mobile training, and online special victims offenses or litigation training. All STC regularly report to TCAP on pending felony-level investigations and prosecutions. Additionally, members of TCAP may also be detailed to high-profile and complex 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), certified to practice by the JAG in accordance with Article 27b, UCMJ, and is a member in good standing with a State bar, who has completed a two-year tour as a First Tour Judge Advocate prior to assuming the duties of a prosecutor. All trial counsel are supervised by an STC, an Executive Officer (O-5 judge advocate), and a Commanding Officer (O-6 judge advocate). Detailing of counsel is within the discretion of the RLSO Commanding Officer who takes into consideration such matters as competence, experience, training, existing caseload, and availability of counsel, as well as case specifics. A Commanding Officer may detail a second, more experienced counsel to a particular case to provide the opportunity for practical mentoring. Additionally, uniformed members of TCAP may also be detailed to cases. All trial counsel have access to 24/7 support from TCAP.

Trial counsel receive military commission training from OMC when assigned to that office.

## Defense Counsel

Navy defense counsel attend NJS's Basic Lawyer course, Basic Trial Advocacy training, and Defense Counsel Orientation prior to or shortly after arriving at a DSO to serve as a core defense counsel. Within their first year as a core counsel, defense counsel attend Defending Sexual Assault Cases, the week-long course designed to provide judge advocates specific training on how to handle the legal issues and complexities involved in a sexual assault case. The course includes both practical exercises and lectures from experienced civilian and military defense attorneys and experts. The course allows for extensive discussion of existing case issues and students frequently use this time to consult with peers and faculty. Defense counsel also may attend Intermediate Trial Advocacy and Litigating Complex Cases trainings.

The Defense Counsel Assistance Program (DCAP) sends Defense Mobile Training Teams to each DSO headquarters and major detachment at least once each year. During these visits, DCAP works closely with the command and individual counsel with a focus on practical issues in defense work, including trial advocacy training based on current or recent case scenarios.

Resources permitting, Navy defense counsel have attended specialized advanced legal seminars. For instance, the Navy sends defense counsel to the National Child Abuse Defense and Resource Center's International Conference, National Association of Criminal Defense Lawyers' Zealous Advocacy in Sexual Assault, and Child Victim Cases course to ensure that trained counsel are available for child abuse cases. Advanced defense advocacy courses from the National Criminal Defense College and the Bronx Defenders are also available to Navy defense counsel.

Sexual assault cases are typically detailed to "core attorneys" assigned to a DSO. A DSO core attorney is a judge advocate (O-3 or above), certified to practice by the JAG in accordance with Article 27b, UCMJ, and a member in good standing with a state bar, who has 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, training, existing caseload and availability of counsel, and case specifics. A Commanding Officer may detail a second, more experienced counsel to a particular case 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 when 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 U.S. Army's Judge Advocate General's



Legal Center and School in Charlottesville, Virginia. This course meets the requirements to be JAG-certified as a military trial judge by providing incoming military judges the fundamentals of judicial practice. 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.

All trial-level military judges, active and reserve, attend the Joint Military Judges Annual Training (JMJAT). JMJAT is the venue for continuing education for all trial judges and for discussing current and evolving practice issues, such as the pending changes under the Military Justice Act of 2016, the evolution of victims' rights in recent National Defense Authorization Acts, advanced evidence, sentencing methodology, and judicial ethics.

Responsibility for hosting JMJAT alternates between the Navy-Marine Corps Trial Judiciary (NMCTJ) and the Air Force Trial Judiciary (USAFTJ). The USAFTJ hosted JMJAT 2017 onboard MacDill Air Force Base in Tampa, Florida in February 2017. At MacDill, instructors from within Department of Defense (DoD) and the services' trial judiciaries provided three days of training on challenging evidentiary issues, including presentations on new standards for ordering the production and disclosure of victims' mental health records.

Additionally, the trial judiciary sends judges to the National Judicial College (NJC) for individual courses. 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 our judges to perspectives from around the country. The NJC's courses cover everything from judicial writing and advanced evidence to handling capital cases and general jurisdiction.

The judiciary currently includes several judges who have handled classified information and national security cases as litigators and as military judges, as well as officers with extensive experience in military commissions. Specialized training in classified information cases is available to judges and litigants.

In FY17, all Navy and Marine Corps trial judges gathered for three days of training funded by Department of Defense Sexual Assault Prevention and Response Office related to issues involving special victims. Training topics included MRE 412, 413, 414 (policy, cases, methods, and foundational requirements); M.R.E. 513 (the threshold for ordering production of victims' psychotherapy records and the process for reviewing and protecting those records); the use of experts in child sexual assault cases; the role of VLC in the court-martial process; and pending changes compelled by the Military Justice Act of 2016.

Appellate judges also receive extensive and ongoing training. In 2011, the NMCCA instituted a two-day, in-house annual course to provide initial training to newly assigned judges and continuing education for active and reserve appellate judges. The

course focuses on court processes, opinion writing, ethics, appellate burdens of proof and persuasion, and advanced evidence. Appellate judges also attend the annual William S. Fulton, Jr. Military Appellate Judges' Training Conference, which is an inter-service, one-day event with the host rotating among the services. In 2017, the Air Force Court of Criminal Appeals hosted the conference, and expanded the conference to two days, which was widely well-received. Finally, two appellate judges attended the New Appellate Judges Seminar hosted by New York University School of Law.

c. The Independent Views of The Judge Advocate General on the Sufficiency of Resources Available, Including Total Workforce, 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 General's Corps, enlisted, and civilian communities were able to fulfill existing military justice and litigation obligations at the trial and appellate level. Trial counsel and defense counsel manning continues to be a challenge in light of shortages at the LT and LCDR paygrades due to planned billet growth. Increased accessions are projected to stabilize manning levels over the next three years, and Naval Legal Service Command has prioritized trial counsel and defense counsel billets in adjudication of planned billet gaps. With the passage of the Military Justice Act of 2016 (MJA 2016) and the implementation of changes to virtually every aspect of military justice litigation, the Navy faces a further challenge with respect to the potential manpower impact of changes in the military justice mission. Many of the changes in MJA 2016 redistribute the workload between communities of practice. For example, changes to post-trial processing shift significant review burdens from convening authorities to judges and from the trial level to the appellate activities. Burden shifts such as these have the potential to significantly impact resourcing and manning within litigation stakeholders, but the scope of the impact cannot be fully known until this new and fundamentally different approach goes into effect. The Litigation Training and Coordination Council (LTCC), comprised of military justice leadership from the Navy, Coast Guard, and Marine Corps, are anticipating these impacts, and are monitoring the needs of the Services to ensure that appropriate changes and accommodations are made to maintain excellence in our litigation practice.

The sufficiency of long-term resourcing will depend on the impact of Military Justice Act 2016 (MJA 2016) in practice. However, in the short to mid-term, ensuring sufficient training to maintain existing qualifications, preparing to adapt to MJA 2016 training, and ensuring adequate manning for trial and defense counsel represent the Navy's most critical challenges. With respect to training, the Navy seeks to leverage existing and emerging technologies to supplement and complete training requirements, as with the online module NJS is developing for baseline MJA 2016 training for all judge advocates. However, the anticipated loss of approximately one million dollars in Sexual Assault Prevention and Response Office (SAPRO) funds dedicated to training opportunities for litigators dealing with sexual assault cases and special victims has the potential to derail not only today's litigation training, but MJA 2016 training as well. JAG will continue to work with the Navy to ensure that the JAG Corps can meet these

challenges as they emerge, including maintaining sufficient manning in all military justice practice areas to fulfill mission objectives.

## **CONCLUSION**

In FY17, the Navy continued to focus on providing the best military justice advice and representation to Service members, commanders, and the Fleet. Although the court-martial caseload has remained steady, the Navy is looking towards an increased trial and appellate case load under MJA 2016. The complexity and visibility of the modern docket demands the best from our attorneys, paralegals, and support personnel. The as-of-yet unexplored legal terrain under MJA 2016 will challenge every member of the Navy JAG Corps.

Through efforts such as the continued development and refinement of our Military Justice Litigation Career Track, our highest level oversight of training with the Litigation Training and Coordination Council, and of the military justice system in practice by the Military Justice Oversight Council, the Navy has proven its commitment to excellence in this critical mission. Recognizing the magnitude of the changes coming to the military justice system with the implementation of MJA 2016, we are confidently poised to continue to prioritize military justice in the future.

## **MARINE CORPS ACTIVITIES**

The Marine Corps will submit a separate CAAF report for FY17.

## **Marine Corps Activities**

**Staff Judge Advocate to the Commandant of the Marine Corps**

**U.S. MARINE CORPS ANNUAL MILITARY JUSTICE REPORT FOR FISCAL YEAR 2017**

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## I. INTRODUCTION

The Marine Corps military justice community—trial counsel, defense counsel, victims’ legal counsel, and command advice judge advocates—continues to leverage the experience of its senior leaders and highly qualified experts (HQEs), combined with the strength of its organization and training programs, to accomplish the military justice mission. Highlights of these efforts include: continued improvements in the structured approach of case analysis and assignment of counsel; standardizing practice and procedure in light of the numerous statutory changes to the military justice system in recent years; implementation of a centralized electronic process for monitoring the training, qualifications, and capabilities of counsel; and approval of a phased training plan to prepare the entire Marine Corps for the implementation of the Military Justice Act of 2016 (MJA), which itself represents a sea change to the Uniform Code of Military Justice (UCMJ) and the military justice system.

The Marine Corps continued to provide timely and accurate legal services to commanders, accused, and victims by assigning judge advocates based on the requirements of each individual case and a judge advocate’s knowledge, training, and experience. With the assistance of HQEs, our experienced senior litigators supervise, advise, and mentor junior counsel to ensure the highest quality of military justice practice. Further, the Marine Corps has continued its practice of assigning experienced senior judge advocates to provide command advice to convening authorities. These efforts are supported by the Legal Service Support Sections (LSSSs) in the National Capital, East, West, and Pacific regions. The LSSSs have become regional centers of excellence where senior uniformed counsel, highly qualified civilian experts, and support staff combined with junior counsel to create effective litigation and advocacy teams.

Ongoing efforts to standardize practice in light of statutory and other changes include the release of Marine Corps Bulletin 5800 (MCBUL 5800). Among other things, MCBUL 5800 provides the Staff Judge Advocate to the Commandant’s (SJA to CMC’s) direction and guidance on the administration of military justice, specifies counsel qualifications for certain case types, and eligibility for and the scope of representation of the Victims’ Legal Counsel Organization. MCBUL 5800 will ensure the standardization of military justice practice within

the Marine Corps and allow its judge advocates to keep pace with recent legislative changes. However, the scope of past changes pales in comparison to the MJA, which contains the most significant statutory reforms to the military justice system since the establishment of the UCMJ over sixty years ago.

To implement these changes to the UCMJ the Marine Corps, along with its service counterparts on the Joint Services Committee on Military Justice, drafted an entirely new Manual for Courts-Martial (MCM) for approval by the President. Additionally, the Marine Corps has undertaken a review of its current service level policies to ensure a smooth transition once the changes to the UCMJ go into effect. That review remains a core component of the phased concept of operations supporting transition to practice once the MJA goes into effect.

Training to, and assessing the impact of, the MJA on the Marine Corps judge advocate community has become the main effort for the Judge Advocate Division. In combination with the hundreds of changes to the MCM it precipitated, the MJA fundamentally changes the practice and application of military justice, from the commission of one or more of the over 20 new offenses under the UCMJ, to report of an offense, to initiation of an investigation, and completion of post-trial review.

The Marine Corps will use a phased process to train the Service on the MJA changes. The Judge Advocate Division has developed an in-person program of instruction to train the Marine Corps judge advocate community on the upcoming changes and is currently on track to have provided live, in-person training to the entire judge advocate community by the end of the third quarter of calendar year 2018. Online refresher training for the community will become available by the fourth quarter of calendar year 2018. The second phase of training will be given by staff judge advocates (SJAs) to commanders and their staffs while the LSSSs will train the supporting elements in their regions.

To ensure a judge advocate community fully prepared to implement the MJA on January 1, 2019, the Marine Corps has begun a complete review of its military justice

practices at all stages of the process. It is assessing whether to implement a military magistrate program to accommodate a likely increase in demand for resources from the trial judiciary once military judges have authority to hold pre-referral proceedings and convening authorities may refer charges to a judge alone special court-martial.

The Marine Corps is also reviewing its military justice forms and templates to ensure they adhere to the new requirements of the MJA. Such review includes whether to recommend an update to DD Form 457 "Preliminary Hearing Officer's Report" to memorialize the rights that a preliminary hearing officer must advise an accused and a victim of during the proceeding. Also under consideration is whether DD Form 458 "Charge Sheet" should incorporate a method for documenting that a convening authority has consulted with a judge advocate before referring charges to a special court-martial. Other forms, the Marine Corps must discard, such as NAVMC 11911 "Report of Results of Trial," which will be replaced by a new form entitled "Statement of Trial Results." Finally, the Marine Corps is working with its counterparts in the Navy and Coast Guard to make recommendations for a new model plea agreement to replace the model pre-trial agreement that currently exists today.

In addition to preparing for the upcoming MJA changes, the Marine Corps supported numerous formal efforts to evaluate and recommend changes to the military justice system in Fiscal Year 2017 (FY17). The Marine Corps worked closely with the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP) as it completed its three-year analysis of adult sexual assault cases and related offenses within the Armed Forces. The Service received the JPP final report and is in the process of reviewing its 63 recommendations, some of which the Services have implemented already. This fiscal year also saw the establishment of the Defense Advisory Committee on Investigating, Prosecuting, and Defending Sexual Assault in the Armed Forces (DAC-IPAD). The DAC-IPAD advises the Secretary of Defense on the investigation, prosecution, and defense of sexual assault cases. Just as with the JPP, the Marine Corps has provided a Service representative to the DAC-IPAD to assist the committee in carrying out its mission.



## II. MILITARY JUSTICE BY THE NUMBERS

The Marine Corps litigated 131 general courts-martial and 172 special courts-martial to findings in FY17. The percentage of contested cases in FY17 was consistent with the previous year, while the percentage of contested cases during FY16 – FY17 remained at least 15% lower than FY13 – FY15 (see Figure A).

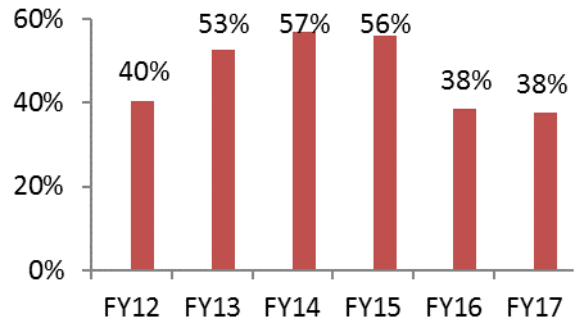


Figure A. Percentage GCMs Contested FY11 – FY17

The percentage of contested to uncontested special courts-martial followed that trend, with contested cases representing a similar percentage of cases overall during FY16 – FY17, during which a smaller percentage of cases were contested to uncontested than during FY13 – FY15 (see Figure B).

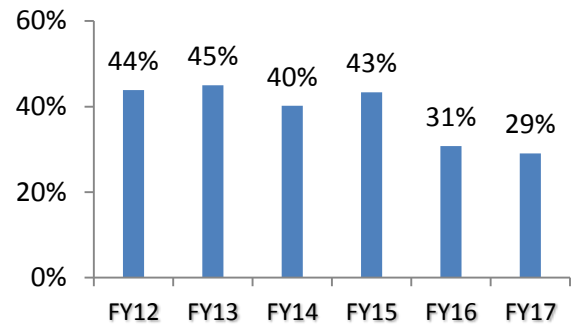


Figure B. Percentage SPCMs Contested FY12 – FY17

## III. POST-TRIAL REVIEW AND APPELLATE DECISIONS

Marine Corps compliance with post-trial time processing requirements is greatly enabled through mandatory use of the Case Management System (CMS) and other case tracking mechanisms used by Marine judge advocates and legal services specialists. The Marine Corps had no convictions reversed because of a denial of the right to speedy post-trial review, nor was any case otherwise remitted due to loss of records of trial.

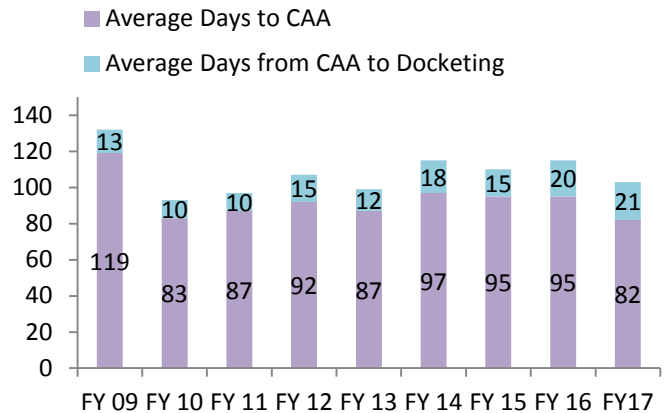
### A. Processing Time Goals

The Marine Corps had 475 general, special, and summary courts-martial that warranted post-trial review in FY17. For cases warranting appellate review, the Marine Corps averaged 82 days from the date of trial to convening authority's action (CAA), 13 days faster than the average during FY16 (see Figure C). The Marine Corps averaged 21 days from

CAA to docketing of the case with the Navy-Marine Corps Court of Criminal Appeals.

***B. Reversal of Convictions for Denial of Speedy Post-Trial Review, UCI, or Other Administrative Deficiencies and Cases in Which Provisions Were Held Unconstitutional***

The Marine Corps had no case during FY17 where a court found a provision of the UCMJ unconstitutional. No court reversed a general or special court-martial conviction for violation of the right to a speedy trial, a violation of timely post-trial review, or because of unlawful command influence. No court remitted a case for other administrative deficiencies.



**Figure C. Post-Trial Processing Times FY09 – FY16**

**IV. MILITARY JUSTICE PRACTITIONERS, TRAINING AND RESOURCES**

***A. Trial Counsel***

The Marine Corps has implemented career progression, training, experience requirements, and detailing criteria to ensure well-qualified judge advocates prosecute sexual assault cases. Our detailing criteria ensure that only those attorneys who have experience trying contested cases, who have demonstrated an aptitude for the courtroom, and who have received recommendations from supervisors may try Special Victim Investigation Prosecution (SVIP) cases. SVIP cases include murder, manslaughter, death or injury of an unborn child, rape and sexual assault, domestic violence involving grievous bodily harm, child pornography, or any attempts to commit those offenses. SVIP prosecutors also require additional sexual assault training that they normally receive by attending a Trial Counsel Assistance Program (TCAP) one-week annual training seminar. The Marine Corps maintains approximately 80 prosecutors throughout the LSSSs. At any given time, slightly more than 50% of these are qualified to prosecute SVIP cases.

The Marine Corps provides trial counsel with formal training and trial preparation advice, in addition to the mentorship and on-the-job training offered by the Regional Trial Counsel and other experienced judge advocates within the LSSS. With the exception of the National Capital Region, each of the regional LSSSs has a civilian HQE, each selected based on experience and expertise with complex special victim cases. The National Capital Region HQE billet is temporarily vacant, though the selection and hiring process are underway.

Marine Corps HQEs advise counsel on every SVIP case. Our HQEs collectively possess more than 60 years of litigation experience and participate in all areas of trial preparation, including collaboration on prosecutorial merits memos, preparing charging documents, interviewing witnesses, preparing affirmative and responsive government motions, identifying expert witnesses, and organizing evidence to improve case presentation to the members. These experts provide consistent guidance to trial counsel and ensure continuity throughout the Marine Corps in the disposition of sexual assault cases. HQEs also help retain institutional knowledge in prosecution sections that otherwise experience regular turnover of military personnel.

The TCAP supports trial counsel through training, sharing of resources, and the creation of offense-specific “playbooks.” The TCAP also sustained its recently created SVIP training course for trial counsel and support Marines from across the Marine Corps. The week-long course focused on the prosecution of sexual assault cases and 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 practitioners, including senior judge advocates, district attorneys, and expert witnesses who testify in sexual assault cases provided the instruction. To enhance community development, the TCAP regularly blogs on recent case law and legislative developments, results of and lessons-learned from recent courts-martial, and suggested forms and sample motions. The TCAP also sponsored the second annual Marine Corps Litigator of the Year competition in collaboration with faculty from a nationally recognized trial advocacy program.

### ***B. Defense Services Organization***

The Marine Corps Defense Services Organization (DSO) is dedicated to providing

criminal defense services to Marines worldwide. The DSO is a global organization of more than 70 attorneys geographically assigned within the four regional LSSSs. A colonel (O-6) heads the organization as Chief Defense Counsel of the Marine Corps and Officer-in-Charge (OIC) of the DSO. That officer reports directly to the SJA to CMC, and exercises functional supervision over all DSO personnel on the SJA to CMC's behalf. The DSO runs a Defense Counsel Assistance Program (DCAP), which currently has one active duty officer dedicated to it. In FY17, the DCAP also employed two civilian HQEs (one located in the eastern region and one located in the western region). The DCAP responds to queries from counsel in the field, and, since 2011, has aggressively sought out and sent defense counsel to training courses designed to ensure DSO attorneys maintain the knowledge and experience necessary to provide high quality representation in the most complex cases, including sexual assault cases.

The DSO utilizes training at the Naval Justice School as well as civilian training events sponsored by organizations such as the National Association for Criminal Defense Lawyers, Federal Public Defenders Association, Bronx Defenders Academy, and the National Criminal Defense College. The DSO also provides training internally to its counsel: Senior Defense Counsel provide training on a monthly basis and Regional Defense Counsel provided training on a quarterly basis in consultation with the Marine Corps criminal defense HQEs. The DSO provided zealous detailed representation to 1,580 Marines and Sailors in FY17.

### ***C. Victims' Legal Counsel Organization***

The U.S. Marine Corps Victims' Legal Counsel Organizations (VLCO) experienced continued growth in size and development of practice during FY17. The VLCO is comprised of the same four regions (National Capital Region, Eastern Region, Western Region, and the Pacific Region) as the LSSSs with 17 active duty full-time VLCs (four of whom are supervisory Regional VLCs) and two active duty part-time auxiliary VLCs. Additionally, the VLCO had seven civilian paralegals and three active duty Marine legal services specialists during FY17. In addition to the active duty component, the VLCO had four reserve VLCs, one of whom is the Reserve VLC Branch Head. The four Regional VLCs and the Reserve VLC Branch Head are all majors (O4); all VLCs, active duty and reserve, are captains (O3). The

current OIC, VLCO is an active duty lieutenant colonel (O5) recently selected for promotion to colonel (O6). The Deputy OIC, VLCO is a major.

The VLCO provided services to approximately 661 victims of crime during FY17. Of these victims, approximately 75% were victims of sexual assault, including sexual assaults perpetrated by an intimate partner, and approximately 25% were victims of domestic violence. Individual VLCs maintained an average of 25 cases at any given time. By contrast, in Fiscal Year 2016 (FY16) the VLCO assisted approximately 655 victims of victims: approximately 70% were victims of sexual assault victims, 25% were victims of domestic violence, and 5% were victims of other crimes.

During the VLCO annual symposium in FY17, the 1-in-6 Organization provided training to VLCO personnel on the dynamics of unwanted or abusive sexual experiences on men. Additionally, in FY17, the OIC, VLCO established a new VLCO SharePoint and made available standardized forms for each regional office to implement in its practice.

The growth and development of VLCO parallels growth and development of understanding among Marine Corps commanders of the critical importance of the VLC in the just preparation and litigation of cases. All of the regional offices engage in outreach activities with commanders, staff judge advocates, victim service providers, and professional military education classes. The outreach efforts included providing welcome aboard briefs to new personnel, one-on-one briefs to incoming commanders, courses to new uniformed victim advocates, and instruction in conjunction with other military justice counsel. In addition to representation, litigation, and outreach efforts, VLCs played a critical role in the development and execution of MJA training across the Marine Corps.

The performance of Marine Corps VLCs is a product of their professional diligence, which in turn is facilitated by a careful screening, interview, and vetting process. As with victims' counsel from other Services, Marine VLCs attend Special Victims' Counsel certification training, the annual VLCO training symposium, local quarterly training, and have the opportunity to attend other military and civilian training courses throughout the year.

#### ***D. Training Standards and Resources***

In addition to the training offered by Regional Trial/Defense/Victims' Legal Counsel and Senior Trial/Defense Counsel at the local level, Marine Corps trial, defense, and victims' legal counsel all had nationally recognized training available to them in FY17. Every Marine assigned to a litigation billet was able to attend at least one of the following courses: Intermediate Trial Advocacy, Post-Trial Processing, Court Reporter Course, Basic Trial Advocacy, Military Judges Course, Advanced Trial Advocacy Course; Special Victims' Counsel Course, Legal Service Specialists - Military Justice Course, Defense Counsel Orientation, Cross Examination, Law Office Manager Course, Classified Info Litigation, Paralegal Litigation Support, Prosecuting Special Victims Cases, Defense Counsel Orientation, or the Child Advocacy Course. In these courses, the focus of training included working with victims, trial advocacy, digital exploitation of children, child abuse, gathering and analyzing evidence, and partnering with victim advocates and NCIS special agents in investigating and prosecuting special victim cases. A variety of institutions sponsored these courses, including: the Naval Justice School, the National District Attorney's Association, the U.S. Department of Justice, the National Advocacy Center, the Federal Law Enforcement Training Center, and the Army and Air Force JAG schools. Resources for counsel engaged in other complex litigation were also available both inside and outside the classroom. For example, the Navy National Security Litigation Division (OJAG Code 30) provides individualized training and advice to all trial counsel prosecuting national security cases.

The Marine Corps also continued its partnership with the Office for Victims of Crime (OVC) at the U.S. Department of Justice, which has provided valuable financial support and advice on emerging laws and trends in the area of victims' rights. In FY16, the Marine Corps formed a new interagency agreement with OVC to provide \$40,000 per year from FY16 – FY19. This funding contributes to ongoing Marine Corps efforts to conduct training relating to victims' rights and victim assistance. In FY17, the Marine Corps used OVC funding to train 56 Victim-Witness Liaison Officers (VWLO) and Victim-Witness Assistance Coordinators at its Victim Witness Assistance Program (VWAP) Annual Training. This training taught VWAP officials their duties, helped them understand the rights and needs of victims and witnesses,

and prepared them to assist commanders as they fulfill their VWAP responsibilities throughout the military justice process. This VWAP training has equipped VWLOs to work in conjunction with investigators, trial counsel, and other SVIP capability members who interact with and support crime victims.

## **V. VIEWS ON THE SUFFICIENCY OF RESOURCES**

Marine Corps tactical litigators have operated at the strategic level for over a decade. Within the Marine Corps judge advocate community, the reality that local cases may garner national attention results in two critical considerations related to personnel resources: (1) retention of our most qualified judge advocates and legal service specialists; and (2) producing judge advocates with specialized education in criminal law, primarily through pursuit of the Master of Law degrees (LL.M.).

In an effort to retain our best judge advocates, Judge Advocate Division is working with Marine Corps Manpower and Reserve Affairs to resume the Law School Education Debt Subsidy (LSEDS) program. The program gives money to qualified judge advocates to offset significant law school debt that officers in other military occupational specialties do not share and helps first-tour judge advocates afford to remain on active duty. The Marine Corps most recently implemented the LSEDS program in Fiscal Year 2014. The program utilized a board selection process to select the ten best and most fully qualified judge advocates on active duty. Continued funding of the LSEDS program assists judge advocate community leaders in the essential areas of talent management and recruiting and retaining our best and brightest against the backdrop of the ever-increasing challenges of military law.

For those judge advocates who remain on active duty, an LL.M. in criminal law provides those judge advocates selected for an advanced degree specialized understanding in technical and constitutional areas of criminal law and the UCMJ. Judge advocates with this LL.M. serve in challenging military justice billets requiring expertise in military and criminal law issues. In particular, majors serve as senior trial or defense counsel in LSSSs or joint law centers. Similarly, majors and lieutenant colonels with this specialty may be assigned as regional trial or defense counsel. In FY17, thirteen judge advocates were competitively

selected by board process to attend resident education programs leading to LL.M.s in criminal law from an American Bar Association accredited program at a civilian institution or The Judge Advocate General's Legal Center and School of the U.S. Army. The number of students and seats available for this critical education effort is projected to increase in future years. Both military and civilian LL.M. programs provide judge advocates with specialized knowledge to handle the systemic changes to military justice, increased operational demands, and other statutory or policy priorities. Ultimately, this LL.M. program enables the Marine Corps judge advocate community to provide legal support, consistent with the Marine Corps ethos, using Marine judge advocates, who are both MAGTF officers and lawyers.

## **VI. CONCLUSION**

The practice of military justice across the Marine Corps judge advocate community in FY17 was characterized by both growth and success during a time of tremendous challenges posed by congressional and public scrutiny of military justice practice generally, coupled with the task of preparing for those major changes under the MJA. The Marine Corps will maintain systematic efforts to improve the practice of law within the Service through continuous evaluation, adaptation, and standardization. As the Judge Advocate Division prepares the Marine Corps for implementation of the MJA, it will continue to evaluate and improve practice and procedures and invest in our personnel to ensure the highest quality of legal services to commanders, accused, and victims.



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

Report Period: FY 2017[A]

<b>PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)</b>							
TYPE COURT	TRIED		CONVICTED		ACQUITTALS		RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
	USN	USMC	USN	USMC	USN	USMC	
GENERAL	124	126	99	113	23	13	-7.1%
BCD SPECIAL	133	165	120	146	15	19	-18.4%
NON-BCD SPECIAL	0	0	0	0	0	0	0
SUMMARY*	25	151	25	151	0	0	-47.3%
OVERALL RATE OF INCREASE (+)/DECREASE (-) OVER LAST REPORT							-25.2%

**PART 2 – DISCHARGES APPROVED \*\***

GENERAL COURTS-MARTIAL (CA LEVEL) NUMBER OF DISHONORABLE DISCHARGES	40 USN; 77 USMC
NUMBER OF BAD-CONDUCT DISCHARGES	29 USN; 30 USMC
SPECIAL COURTS-MARTIAL (CA LEVEL) NUMBER OF BAD-CONDUCT DISCHARGES	42 USN; 91 USMC

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

FOR REVIEW UNDER ARTICLE 66 – GENERAL COURTS-MARTIAL	202
FOR REVIEW UNDER ARTICLE 66 – BCD SPECIAL COURTS-MARTIAL	184
FOR EXAMINATION UNDER ARTICLE 69 – GENERAL COURTS-MARTIAL	22 [B]

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

TOTAL ON HAND BEGINNING OF PERIOD		171
GENERAL COURTS-MARTIAL	108	
BCD SPECIAL COURTS-MARTIAL	63	
REFERRED FOR REVIEW		347
GENERAL COURTS-MARTIAL	203	
BCD SPECIAL COURTS-MARTIAL	144	
TOTAL CASES REVIEWED		361
GENERAL COURTS-MARTIAL	190	

BCD SPECIAL COURTS-MARTIAL	171		
TOTAL PENDING AT CLOSE OF PERIOD		157	
GENERAL COURTS-MARTIAL	119		
BCD SPECIAL COURTS-MARTIAL	38		
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		-2.17%	

**PART 5 – APPELLATE COUNSEL REQUESTS BEFORE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS**

NUMBER	361		
PERCENTAGE	100%		

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

PERCENTAGE OF CCA-REVIEWED CASES FORWARDED TO CAAF (58)		16.1%	
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		-23.7%	
PERCENTAGE OF TOTAL PETITIONS GRANTED (16)		27.6%	
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		162.1%	
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY CCA		4.4%	
RATE OF INCREASE (+)/DECREASE (-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		104.4%	

**PART 7 – APPLICATIONS FOR RELIEF UNDER ARTICLE 69, UCMJ**

TOTAL PENDING BEGINNING OF PERIOD		5 [C]	
RECEIVED		5	
DISPOSED OF		3	
GRANTED	0		
DENIED	1		
NO JURISDICTION	2		
WITHDRAWN	0		
TOTAL PENDING AT END OF PERIOD		7	

**PART 8 – ORGANIZATION OF COURTS**

TRIALS BY MILITARY JUDGE ALONE	418	193 USN; 225 USMC
GENERAL COURTS-MARTIAL	172	80 USN; 92 USMC

SPECIAL COURTS-MARTIAL	226	113 USN; 113 USMC
TRIALS BY MILITARY JUDGE WITH MEMBERS	130	64 USN; 66 USMC
GENERAL COURTS-MARTIAL	78	44 USN; 34 USMC
SPECIAL COURTS-MARTIAL	52	20 USN; 32 USMC

**PART 9 – COMPLAINTS UNDER ARTICLE 138, UCMJ**

NUMBER OF COMPLAINTS	59	
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**PART 10 – STRENGTH**

AVERAGE ACTIVE DUTY STRENGTH	508,334	
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**PART 11 – NONJUDICIAL PUNISHMENT (ARTICLE 15, UCMJ)**

NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED	11,192 [D]	
RATE PER 1,000	22	
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD	26.3%	

**Explanatory Notes**

[A] Report Period. Case statistics were derived from the Navy and Marine Corps Case Management System.

[B] Part 3, Article 69. This figure represents only cases reviewed under Article 69(a)

[C] Part 7. This figure represents only cases reviewed under Article 69(b).

[D] Part 11. This figure was derived from Navy’s Quarterly Criminal Activity Report whereby Navy commanders report all known instances of criminal activity pursuant to JAGINST 5800.9C and from the Marine Corps Total Force System.

## **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, 2016 TO SEPTEMBER 30, 2017**

**INTRODUCTION**

The United States Air Force Judge Advocate General's Corps (JAG Corps) enhanced the effectiveness of the military justice system, a system that exists to promote justice, maintain good order and discipline, promote efficiency and effectiveness in the military establishment, and thereby strengthen the national security of the United States. This tri-fold purpose is, by design, different than any other American criminal justice or disciplinary system. A disciplined force is the foundation of combat effectiveness. The military justice system operates to balance the interests of the military establishment and command with the rights of the individual Airman accused of a crime and with full consideration and respect for victims of crime. Commanders, advised by judge advocates, and armed with the relevant facts, including victim input, assess the quality and quantity of evidence in order to maintain that critical balance. All components of our military justice system continued to balance the interests of the military establishment and command with the rights of the individual Airman accused of a crime and with full consideration and respect for victims of crime.

In furtherance of The Judge Advocate General's (TJAG) duties under Article 6(a), Uniform Code of Military Justice (UCMJ), "to make frequent inspection in the field in the supervision of the administration of military justice," TJAG and the Deputy Judge Advocate General, along with senior enlisted leaders, inspected legal offices at installations around the world, increasing readiness and improving the consistency and quality of legal services. The JAG Corps strives for timeliness in the delivery of a fair and equitable process that upholds justice and maintains good order and discipline, ensuring due process for the accused. To accomplish this mandate, we utilize a rigorous vetting process to select the very best practitioners as appellate and trial judges, senior trial and defense counsel, and special victims counsel. We also carefully screen paralegals and court reporters to ensure everyone who plays a part in the military justice process understands his or her role and is poised to execute such role with dedication and precision and a sense of urgency.

In addition, it is important that our military justice standards reflect our current practice and that our military justice metrics and milestones be both informational and inspirational. They must inform practitioners of what is expected and inspire participants to achieve the established milestones. Considering the last detailed study of military justice processing times occurred in 1996, I wanted to ensure that our metrics were up-to-date and reflected the realities of our current court-martial practice. As a result, I commissioned a team of military justice experts to conduct an extensive two-year study and review of contemporary military justice practice and processing. We began our study by engaging with the Air Staff's Directorate of Studies, Analysis and Assessments to help us look beyond the numbers to identify patterns, issues, and possibilities. We discussed relevant rules, goals, stakeholders,

and data collection and delivered 20 years of courts-martial data. The subsequent dissected findings were highly informative and provided us with tremendous insights as we drafted, and then narrowed, a variety of proposals. Our new metrics go well beyond simply repositioning numerical goals; they adjust our focus on what we measure and they align expectations with the law and court-room reality of today's courts-martial.

The resulting metrics and milestones were rolled in 2017 and have proven to be extremely useful tools in achieving outstanding processing times and just results. Our three metrics focus on compliance with the law: (1) bringing the accused to trial within 120 days of certain trigger events (Rule for Courts-Martial 707); (2) completing action by the convening authority on the findings and sentence of the court-martial within 120 days of completion of the trial (*Moreno* standard); and (3) forwarding the record of trial to the appropriate office for appellate review within 14 days of action by the convening authority (*Moreno* standard), while our data-driven milestones focus on ideal processing times to encourage legal practitioners to recognize strengths, identify weaknesses, and implement improvements to their whole process.

Last year, the re-institution of our circuits brought our military justice practice to new heights with increased judicial participation. Senior trial and defense counsel are now assigned to nearly every felony-level trial and extensive training opportunities are available for our junior counsel and paralegals. Finally, our new metrics and milestones will better inform and inspire practitioners to try cases more efficiently, ultimately ensuring justice for all.

### **THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA)**

The Air Force Court of Criminal Appeals (AFCCA) issued 254 opinions in Fiscal Year (FY) 17, up from 192 the prior FY. The court ended the FY with eight active duty judges assigned. Additionally, court staff went from two commissioners to one, while otherwise remaining constant at two paralegals and a clerk of the court. During FY17, the court was also supported by four reserve appellate judges, one reserve paralegal law school graduate, one part-time spring law student extern, two summer law student externs, and one part-time fall law student extern.

At the beginning of FY17, the Court had 269 cases docketed, including remand and miscellaneous docket cases. Of the docketed cases, 70 were pending decision, 32 of which were pending for more than 180 days, and five of which exceeded the *Moreno* standard. At the end of FY17, the Court had 192 cases docketed, including remand and miscellaneous docket cases. Of the docketed cases, 55 were pending decision, three of which were pending for more than 180 days, and two of which exceeded the *Moreno* standard.

The Court issued 17 published opinions during FY17. The court held oral argument in 10 cases. Pursuant to the Court's "Project Outreach" program, one of these oral arguments was held at the University of Houston Law Center and another was held at the Ohio State University Moritz College of Law. Outreach arguments are an exceptional tool that offer civilians the opportunity to observe and better understand the military justice system. This is especially critical for law students who may otherwise have very little experience with or

exposure to the military justice system. Further, outreach arguments serve as a powerful recruiting tool for the Air Force and The JAG Corps throughout the civilian community.

During FY 17, one appellate judge served on the United States Court of Military Commissions Review (USCMCR) and three additional judges were identified to serve on the USCMCR. 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. The United States Supreme Court granted certiorari on two Air Force Court of Criminal Appeals cases (along with one case from the Army Court of Criminal Appeals) involving the propriety of a sitting military appellate judge also serving on the USCMCR. The consolidated cases were pending at the end of FY17.

## **TRIAL JUDICIARY**

The Air Force Trial Judiciary Directorate (JAT) is responsible for docketing and presiding over all Air Force general and special courts-martial, as well as an array of federal hearings. The Directorate is staffed by 21 active-duty trial judges, three reserve trial judges, two noncommissioned officers, one civilian employee, and seven enlisted court reporters. The office of the Chief Trial Judge is co-located with the Central Docketing Office and the Court Reporter Manager at Joint Base Andrews, Maryland.

The Directorate is divided into five geographical judicial circuits, each led by a Chief Circuit Military Judge. The judges are headquartered at Ramstein Air Base, Germany; Joint Base Langley-Eustis, Virginia; Joint Base San Antonio Randolph, Texas; Travis Air Force Base, California; and Kadena Air Base, Japan and serve the European, Eastern, Central, Western, and Pacific Circuits, respectively.

In 2017, the Directorate created the Court Reporter Manager position in order to centralize management and detailing authority of all court-reporting and transcription taskings. In October, TJAG gave authority to the Directorate for world-wide detailing of court-reporters.

In FY 2017, Air Force judges presided over 475 general and special courts-martial. Judges also served as preliminary hearing officers in 84 Article 32 hearings involving sexual offenses or complex allegations. Additionally, judges served as legal advisors for officer discharge boards and in post-trial hearings, contempt proceedings, and Environmental Impact Statement public hearings.

In August, the Directorate, along with senior trial, defense, and special victims' counsel (SVC), as well as thirteen court reporters, held its second Air Force Circuit Annual Training at Joint Base Andrews, Maryland. All Air Force trial judges attended the 5-day event, which provided the opportunity to build upon circuit camaraderie and foster professionalism, while also offering instruction on such areas as forensic analysis of electronic media, digital evidence, forensic psychology, sexual assault nurse exams, and recent appellate cases. This year also included breakout instruction for all enlisted court reporters and the civilian court reporters in attendance on abbreviated records of trial and court reporter equipment training.

Air Force trial judges taught military justice in classrooms and courtrooms worldwide. 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, Virginia. Air Force trial judges trained new judge advocates, trial and defense counsel, special victims counsel, and staff judge advocates at the Air Force Judge Advocate General's School, on Maxwell Air Force Base, Alabama. 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. Judges continued their partnership with the Air Force Judge Advocate General's School to create several web-based training series on impeachment, discovery, hearsay, and evidentiary foundations.

Currently there are two active duty judges detailed to support the USCMCR. The Chief Judge continues to preside over the commission proceeding for the alleged USS Cole bombing.

## **AIR FORCE JUDICIARY**

The Air Force Legal Operations Agency (AFLOA), Judiciary Directorate (JAJ), is responsible for the administration of military justice across the Air Force. JAJ advises TJAG, the Chief of Staff of the Air Force (CSAF), and the Secretary of the Air Force (SecAF) 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.

The Directorate performs its mission through five divisions: the Government Trial and Appellate Counsel Division (JAJG); the Appellate Defense Division (JAJA); the Trial Defense Division (JAJD); the Military Justice Division (JAJM); and the Clemency, Corrections and Officer Review Division (JAJR).

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

#### **APPELLATE GOVERNMENT COUNSEL (JAJG)**

During this past year, eleven active duty judge advocates, nine reserve judge advocates, and one civilian attorney vigorously represented the government in Article 66 and Article 67 appeals of Air Force court-martial convictions. The Division is led by an O-6, Chief of Government Trial and Appellate Division and includes a GS-15, Associate Chief, an O-5, Deputy Chief for the Government Appellate Division, as well as the remaining counsel in the grade of O-3 and O-4 who represent the United States on all appeals before The Air Force Court of Criminal Appeals and the Court of Appeals of the Armed Forces. The Division also sought and obtained certification from The Judge Advocate General in three cases for review by the United States Court of Appeals for the Armed Forces (CAAF), and filed government appeals in four cases under Article 62, UCMJ, at the AFCCA. When appropriate, the Division 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. Specifically, in fiscal year 2017, JAJG's senior trial and appellate government counsel continued its diligent preparation for the sentence rehearing ordered by CAAF, including representing the government in two motions hearings and providing appropriate victim and witness support.

Appellate government counsel zealously represented the government in 222 written briefs and 29 oral arguments before CAAF and AFCCA. Their advocacy resulted in notable appellate rulings during the year. In *United States v. McClour*, 76 M.J. 23 (C.A.A.F. 2017), CAAF agreed with JAJG and held that the Air Force's standard reasonable doubt instruction was not plainly erroneous. This holding resulted in CAAF affirming many other Air Force and Navy/Marine Corps cases on appeal where the same instruction had been used. In a published case of first impression, *United States v. Lutcza*, 76 M.J. 698 (A.F. Ct. Crim. App. 2017), JAJG convinced AFCCA that an accused did not have a reasonable expectation of privacy in the copy of the data from his cell phone that he consented to allow investigators to make. AFCCA held that it was permissible under the Fourth Amendment for investigators to search a copy of the contents of the accused's phone, even after he had subsequently revoked consent. JAJG's advocacy also persuaded AFCCA to deny a writ of coram nobis in *United States v. Lewis*, 76 M.J. 829 (A.F. Ct. Crim. App. 2017), a published decision. AFCCA held that CAAF's groundbreaking decision in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016) which made it error to use charged conduct as M.R.E. 413 evidence, did not apply retroactively to cases where the convictions had become final on appeal. AFCCA applied its holding in *Lewis* to two other cases. CAAF subsequently denied writ appeals in all three cases.

Appellate government counsel provided trial litigation support and training to the field throughout the year. Division counsel educated judge advocates and paralegals at Air Force training events such as the Military Justice Administration Course, the Trial and Defense Advocacy Course, the Annual Survey of the Law course and the various sexual assault prosecution courses hosted by the Air Force. In addition, counsel participated in training special agents of the Air Force Office of Special Investigations at the Federal Law Enforcement Training Center at Glynco, Georgia, and provided instruction to Drug Enforcement Agency analysts on providing effective courtroom testimony. Appellate counsel were also assigned to serve as lead trial counsel in several complex cases sent back by appellate courts for rehearing.

The Division receives crucial appellate counsel support from nine 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.

A summary of Air Force Appellate Government practice follows:

<b>AFCCA</b>	<b><u>FY13</u></b>	<b><u>FY14</u></b>	<b><u>FY15</u></b>	<b><u>FY16</u></b>	<b><u>FY17</u></b>
Briefs Filed	188	175	193	168	177
Cases Argued	14	18	10	11	16

<b>CAAF</b>	<b><u>FY13</u></b>	<b><u>FY14</u></b>	<b><u>FY15</u></b>	<b><u>FY16</u></b>	<b><u>FY17</u></b>
Briefs Filed	30	40	18	34	48
Cases Argued	9	14	13	9	13

<b>SUPREME COURT</b>	<b><u>FY13</u></b>	<b><u>FY13</u></b>	<b><u>FY15</u></b>	<b><u>FY16</u></b>	<b><u>FY17</u></b>
Petition/Waivers Filed	1	1	0	1	1
Briefs Filed	0	0	0	0	0

#### SENIOR TRIAL COUNSEL (JAJG)

Senior Trial Counsel (STCs) are detailed to prosecute cases by the Division headquarters at Joint Base Andrews, Maryland. Their primary responsibility is to represent the government in the most complex general courts-martial. The STC program consists of the O-5 Chief Senior Trial Counsel of the Air Force, 5 Circuit Chief Senior Trial Counsel, and 18 Senior Trial Counsel strategically located throughout the world. Eleven STCs have earned designation through training, knowledge and experience 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, along with the rest of 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. One STC also acts as liaison to the Department of Defense (DoD) Computer Forensics Laboratory and is the Air Force's legal expert on issues related to digital evidence. STCs prosecute approximately 91 percent of all Air Force general courts-martial. Additionally, in FY17, STCs prosecuted 82 special courts-martial, a 26 percent increase from the previous FY. The members of the Air Force's SVU prosecutors boast an experience of an average of 85 cases, which include approximately 20 cases specifically focusing on sexual assault charges.

In FY 17, STCs spent in excess of 3,200 days on temporary duty away from their home stations, and represented the government in more than 420 courts-martial and related hearings and proceedings. In addition to prosecuting courts-martial, all members of the Senior Trial Counsel team support the advancement of military justice by leading various training events including: legal office training in conjunction with each case; individual mentoring of junior counsel; briefings at Air Force major command staff judge advocate courses; and conducting online seminars to JAG Corps personnel worldwide. In total during FY17, STCs provided approximately 2,300 man hours of training to the field.

Again this year, in addition to other Air Force courses designed to enhance advocacy,

STCs took part in both the Intermediate and Advanced Sexual Assault Litigation Courses along with members of the Division's leadership who attended as faculty. Further, as part of the second annual Air Force Circuit Annual Training at Joint Base Andrews, STCs received intensive training specially tailored to the high-profile cases they prosecute and enhanced peer-to-peer education in a variety of subject areas. In addition to training conducted within the Government Trial and Appellate Counsel Division, Air Force Circuit Annual Training also allowed the entire STC corps to train in plenary sessions alongside judge advocates assigned to the Trial Judiciary, Trial Defense Division and SVC Division. This opportunity enhanced knowledge of the missions of the other divisions. STCs also received a variety of training offered by sister service and non-DoD sources. These trainings, such as the Navy's Prosecuting Alcohol Facilitated Sexual Assault course and the Association of Government Attorneys in Capital Litigation's Annual Conference, add to the perspective of STCs and allows for the cross-feed of information from outside of the Air Force. In total, STCs attended approximately 1,400 man hours of training to improve advocacy and prosecution skills.

### **APPELLATE DEFENSE DIVISION (JAJA)**

The Air Force Appellate Defense Division is responsible for delivering appellate defense services to Airmen on appeal. In FY17, ten active duty judge advocates, nine reserve judge advocates, one civilian attorney, and two paralegals served as champions on appeal for 456 Airmen. As in past years, reserve component judge advocates continued to provide support to JAJA. In FY17, reservists submitted 42 Assignments of Error and filed 15 Petitions for Review at CAAF.

In FY17, appellate defense counsel participated in Project Outreach arguments before AFCCA, and before CAAF at the University of Alabama Law School in Tuscaloosa, the University of Colorado School of Law in Boulder, and Peterson Air Force Base, Colorado.

In FY17, JAJA advocacy contributed to several notable rulings from appellate courts which helped clarify the rights of appellants and impacted the practice of military justice at the trial level. In *United States v. Pugh*, CAAF set aside the findings of guilt holding an Air Force regulation prohibiting consumption of foods containing hemp seed oil was overbroad. In *United States v. Meakin*, AFCCA found a violation of Article 12 of the UCMJ and ordered new post-trial processing to determine what relief the convening authority gives before AFCCA considers granting any additional relief on appeal. In front of CAAF, JAJA secured an important decision concluding unlawful command influence required a new trial in *United States v. Boyce*. Finally, JAJA advocacy secured a grant of certiorari from the Supreme Court of the United States in *United States v. Dalmazzi*. The important appointments clause and separation of powers issues raised by this case were argued before the Supreme Court on 16 January 2018.

In 2017, JAJA attorneys supported and attended multiple training events outside the Air Force. JAJA counsel attended joint military appellate advocacy training in the National Capital Region with the other services, civilian appellate advocacy training at the University of North Carolina – Chapel Hill School of Government, and training provided by the Council of Appellate Lawyers in Long Beach, California. Additionally, Division attorneys continued to brief at various courses to include training senior defense counsel at Joint Base Andrews and

new defense counsel at The Air Force Judge Advocate General's School.

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

**AFCCA**

	<u>FY 13</u>	<u>FY 14</u>	<u>FY15</u>	<u>FY16</u>	<u>FY17</u>
Briefs Filed	221	205	195	175	128
Cases Argued	10	8	10	14	10

**USCAAF**

	<u>FY 13</u>	<u>FY 14</u>	<u>FY15</u>	<u>FY16</u>	<u>FY17</u>
Supplements to Petitions	257	222	171	126	118
Grant Briefs	5	17	6	6	14
Cases Argued	10	13	13	11	10

**SUPREME COURT**

	<u>FY 13</u>	<u>FY14</u>	<u>FY15</u>	<u>FY16</u>	<u>FY17</u>
Petitions	1	1	2	2	1
Briefs in Opposition	0	0	0	0	0
Briefs on the Merits	0	0	0	0	1

**TRIAL DEFENSE DIVISION (JAJD)**

The Trial Defense Division is responsible for providing all defense services throughout the Air Force through its worldwide team of area defense counsel (ADC), defense paralegals (DP), senior defense counsel (SDC), chief senior defense counsel (CSDC), and defense paralegal managers (DPM). The Chief, JAJD, is assisted by a Deputy Chief, Policy and Training, and an Office Superintendent at Joint Base Andrews.

During FY17, the Division was staffed with 84 ADCs and 74 DPs. These ADC-DP teams were stationed at 69 operating locations worldwide. They were, in turn, supervised by the Division's 19 SDCs and 3 CSDCs. Each SDC supervised 4 to 5 ADC-DP teams and each CSDC in turn supervised 6 to 7 SDCs. Each of the 3 CSDCs was assisted by a DPM to help manage enlisted issues.

During FY17, JAJD completed the consolidation of the 19 SDCs from 19 operating sites down to the five circuit locations described above. Together, these 186 professionals provided defense services to Airmen around the world.

The continuing success of the Air Force's ADC program is largely attributable to its independence and the effective and zealous advocacy of its 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 his or her charge on a continuing basis. CSDCs likewise mentored the SDCs in their areas of responsibility. Newly appointed ADCs and DPs attend formal training at the Defense Orientation Course held at The Air Force Judge Advocate General's School, and all ADCs attend an annual course on sexual assault litigation held in their respective circuits. All SDCs attended Air Force Circuit Annual Training which included a Division-run Leadership Course, at Joint Base Andrews. Defense personnel also attended trial advocacy courses conducted at both The Air Force Judge Advocate General's School and various civilian-sponsored courses.

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

The Military Justice Division provides counsel and prepares positions on military justice law and policy for the SecAF, CSAF, and TJAG. The Division represents the Air Force on the DoD Joint Service Committee on Military Justice. JAJM also assembles reports and responds to requests for information on military justice issues and cases from Congress, the White House, DoD, Headquarters Air Force, the media, and general public. In addition, JAJM conducts appellate review and processing of courts-martial on behalf of TJAG, prepares advisory opinions on military justice issues raised in applications submitted to the Air Force Board for Correction of Military Records (AFBCMR), and processes military justice actions for decision by SecAF and CSAF. The Division promulgates Air Force regulations and directives for the administration of military justice and provides guidance to more than 150 convening authorities and their supporting legal offices as well as training on the same.

During the past fiscal year, JAJM examined 20 records of trial for review under Article 69(a), UCMJ; 1 record under Article 69(b), UCMJ; and 2 records under Article 73, UCMJ. It provided 81 advisory opinions concerning AFBCMR applications. It responded to 39 military justice inquiries submitted to senior officials, including the President, SecAF, and CSAF, and to Members of Congress. Additionally, the Division reviewed and released over 25,000 pages of court records in response to more than 570 requests by members of Congress, the media, law enforcement entities, and individuals under the Freedom of Information Act. In its oversight role for the Air Force's Victim Witness Assistance Program (VWAP), JAJM supported legal offices as they provided assistance to 10,765 victims and 4,282 witnesses of crimes in calendar year 2017.

JAJM twice presented the Military Justice Administration Course, a "back to basics" weeklong course attended by more than 110 judge advocates and paralegals. Division personnel also taught at additional courses, including the Staff Judge Advocate Course (a required course for judge advocates assigned to staff judge advocate positions); Gateway (an intermediate developmental course for judge advocates in the grade of major); Annual Survey of the Law (continuing education for Air Reserve Component judge advocates and paralegals); the Joint Military Judges Annual Training for military judges of all Services; and the Fulton Conference (continuing education for military appellate judges).

JAJM continued to expand the functionality of the Automated Military Justice Analysis and Management System (AMJAMS), which remained the premier military justice database among the Services, providing comprehensive case data for over three decades. AMJAMS had already been linked to the public website of The Air Force Judge Advocate General in order to make available the trial docket and results for general and special courts-martial across the Air Force. As discussed, TJAG approved the establishment of new metrics for courts-martial based on legal standards, the elimination of the previous metrics, and the wholesale revision of court-martial goals for timeliness, called milestones. These new metrics and milestones were incorporated in AMJAMS reporting during the fiscal year.

JAJM published a revised version of the Air Force's bedrock military justice policy, Air Force Instruction 51-201, to capture sexual assault prevention and response components of the National Defense Authorization Acts of 2014 through 2016. This update replaced temporary guidance to the field and brought the instruction in line with current practice. JAJM also actively engaged with the DoD Regulatory Reduction Task Force, presenting a plan to rescind repetitive Air Force federal regulations.

Throughout the fiscal year, JAJM supported the work of two federal advisory committees studying sexual assault proceedings under the UCMJ: the Judicial Proceedings Panel (JPP) and the Defense Advisory Committee on the Investigation, Prosecution and Defense of Sexual Assault in the Armed Forces (DAC-IPAD). The JPP published ten reports in 2017 prior to its sunset at the end of the fiscal year. JAJM coordinated Air Force comments to and developed strategic implementation plans during the drafting of those reports and following release of the JPP's recommendations. The DAC-IPAD stood up in early 2017 and is expected to continue much of the work of the JPP. JAJM worked to facilitate requests from the DAC-IPAD for 14 speakers to provide testimony at meetings. JAJM also provided the DAC-IPAD over 150,000 pages from 245 court-martial records for review.

Finally, JAJM led the Air Force effort to update the Manual for Courts-Martial and implement the Military Justice Act of 2016 (MJA), which was signed by the President on 23 December 2016. The MJA was the culmination of a multi-year effort that began with the comprehensive review of the military justice system and encompasses the most sweeping changes to the UCMJ in over 30 years. JAJM, through its seat on the Joint Service Committee on Military Justice (JSC), drafted for Presidential approval a complete rewrite of the Manual for Courts-Martial implementing the MJA. JAJM coordinated these proposed changes and adjudicated over 120 Air Force comments ensuring Air Force positions were accurately captured in the changes. Through its role on the JSC, JAJM is proud to have contributed -- directly, substantively, and significantly -- to the overhaul of the UCMJ.

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

At the end of fiscal year 2017, 237 Air Force personnel were in confinement. Of those, 90 inmates were in long-term confinement at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, and 43 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 2017 was 59.

During the reporting period, the division reviewed 13 Article 71, UCMJ, officer dismissal cases. The Secretary of the Air Force approved the dismissals in those cases. The division reviewed two enlisted cases for Secretarial clemency under Article 74, UCMJ. The Secretary granted clemency in both by substituting an administrative discharges for the adjudged bad conduct discharges. The division also reviewed two cases for Presidential Pardon consideration.

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

The Air Force Judge Advocate General's School is the educational arm of The JAG Corps. Located at Maxwell Air Force Base, Alabama, 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 topics 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 professional military education. During FY 2017, AFJAGS faculty members instructed more than 13,000 students at these military institutions.

Additionally, AFJAGS published 12 articles concerning military justice and other related criminal justice issues in *The Reporter* and *The Air Force Law Review*. With the assistance of subject matter experts from the Administrative Law Directorate, Air Force Legal Operations Agency's Civil Law & Litigation Directorate, and Air Force Legal Operations Agency's Judiciary Directorate, AFJAGS significantly revised the School's flagship publication, *Military Commander and the Law*, to include significant revisions to the military justice portions of this vital commanders' resource guide which incorporated new law and policy in the sexual assault and prevention arena. *Military Commander and the Law* is available online to Air Force legal offices and commanders worldwide. In addition, AFJAGS produced webcasts where subject-matter experts taught current military justice topics to personnel assigned to all base legal offices, ADC offices, and SVC offices. In FY17, there were several live webcasts on military justice topics. These webcasts are now available "on demand" via Campus, a web-based learning management system administered by AFJAGS and accessible to all members of The JAG Corps.

More than 2,400 students attended in-residence and distance education courses in FY17. With nearly 60 AFJAGS course offerings, the following courses devoted substantial resources to military justice-related topics:

- Advanced Sexual Assault Litigation Course
- Advanced Trial Advocacy Course
- Annual Survey of the Law
- Defense Orientation Course (for new area defense counsel and defense paralegals)
- Gateway (the JAG Corps' intermediate leadership course for majors)
- Intermediate Sexual Assault Litigation Course (held regionally in the United States and overseas)
- Judge Advocate Staff Officer Course (initial training for new judge advocates)

Law Office Manager Course  
Military Justice Administration Course  
Paralegal Apprentice Course  
Paralegal Craftsman Course  
Senior Enlisted Legal Orientation Course  
Senior Officer Legal Orientation Course  
Special Victims' Counsel Course  
Staff Judge Advocate Course  
Trial and Defense Advocacy Course  
Victim/Witness Assistance Program Course (Distance Education)

In addition to the above AFJAGS resident and distance-learning courses, to further enhance military justice advocacy training, AFJAGS continued administering the TRIALS program – “Training by Reservists in Advocacy and Litigation Skills” – where teams of JAG School faculty, augmented by Reserve judge advocates, conduct regional courses in foundational advocacy skills. In FY17, TRIALS programs were conducted at 7 locations: Osan Air Base, South Korea; Ramstein Air Base, Germany; Davis Monthan Air Force Base, Arizona; Joint Base Andrews, Maryland; Maxwell Air Force Base, Alabama; Joint Base Lewis-McChord, Washington; and Joint Base San Antonio-Fort Sam Houston, Texas. Relatedly, continuing to place a premium of trial advocacy training in all forms, AFJAGS added 30% more “on your feet” advocacy time for advocacy drills and workshops at the Trial and Defense Advocacy Course to further facilitate the transition of base-level trial and defense counsel to fully independent intermediate-level litigators.

To complete the circuit of senior-leader military-justice training already provided by AFJAGS to rising group and wing commanders in the Senior Officer Legal Orientation Course (SOLO) and command chief master sergeants in the Senior Enlisted Legal Orientation Course (SELO), AFJAGS developed and updated the *General Court-Martial Convening Authority (GCMCA) Training and Resource Guide*. These training materials are designed to facilitate in-person, “table top” refresher training to general court-martial convening authorities, administered by their respective SJAs. The training materials consist of a compact, comprehensive set of PowerPoint slides with detailed instructor notes for the staff judge advocate’s briefing their general court-martial convening authorities and a stand-alone *Resource Guide*. This guide has bullet background papers on topics of particular interest to the successful administration of general court-martial convening authorities duties, ranging from administrative discharges; nonjudicial punishment, courts-martial; and sexual assault prevention and response. AFJAGS will annually review, update and redistribute these materials to all Major Command staff judge advocates.

Finally, as previously described in the FY16 report, AFJAGS continued implementation of The JAG Corps’ first *Career Field Education and Training Plan (CFETP)* for judge advocates. The plan identifies key learning areas and levels of learning within those areas to establish a “life cycle” for legal training over the course of a judge advocate’s career. During FY17, AFJAGS faculty collaborated with the Professional Development Directorate in finalizing the CFETP’s requirements. The faculty then incorporated all CFETP requirements into all lesson plans for the Judge Advocate Staff Officer Course, Gateway, and the Staff Judge Advocate Course. Ongoing compliance with the CFETP and AFJAGS curriculum



standards is the focus of the School's self-inspection program administered by its Standards and Evaluation Division.

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

The Legal Information Services Directorate (JAS) acquires and develops new legal information technology (IT) tools and improves existing ones to better support military justice business processes throughout the Air Force.

The JAG Corps continued acquisition efforts in pursuit of capabilities for a Disciplinary Case Management System (DCMS) that will replace the Automated Military Justice Analysis and Management System (AMJAMS) as well as the Web-based Airman Separation Program (WASP), Judiciary Docket System (JDS), and other discipline-related applications hosted by JAS. Working with the Air Force Life Cycle Management Center (AFLCMC) the Air Force Research Labs (AFRL), and the Air Force Legal Operations Command Contract Law Field Support Center, JAS is utilizing an Other Transaction Authority procurement process to expedite DCMS acquisition through a small-scale, non-traditional prototype competition.

As previously reported, JAS has been supporting the SVC Program through a SharePoint site used by SVCs to track cases. The SharePoint site was designed as a temporary solution until a more robust system could be acquired and developed. In September 2015, JAS contracted through Defense Logistics Agency (DLA) for the development of an SVC case manager utilizing a commercial case-management platform hosted by DLA. Requirements corrections, as well as technical and contract execution challenges, have delayed DLA's release of the application until early 2018.

While making progress to replace AMJAMS with DCMS, JAS continued to coordinate with JAJM on needed upgrades to AMJAMS to maintain its usefulness pending funding and acquisition of the DCMS. In 2017, JAS focused on making changes to the application and reports necessary to support new Military Justice Metrics and Milestones, effective 1 January 2017. These efforts included adding additional data fields, modifying screens to clearly identify inputs associated with the metrics, and reworking the Speedy Trial Clock available inside each court-martial case. Additionally, the Courts In Progress, Executive Summary and Processing Times Reports were modified to account for the new standards.

### **SPECIAL VICTIMS' COUNSEL (SVC) DIVISION (CLS)**

The SVC Division delivers victim-centered advice and advocacy through comprehensive, independent representation to sexual assault victims worldwide, assists them in obtaining support and recovery resources, and promotes greater confidence in the military justice process and the United States Air Force. SVCs and special victims' paralegal (SVP) provide exceptional representation and advocacy for military members (whether in the active or reserve component) regardless of the accused's status, and for dependents, retirees, and DoD civilians when the accused is subject to the UCMJ. The headquarters element consists of two officers (Division Chief and Deputy Chief), one civilian (Associate Chief), and one senior noncommissioned officer (program manager).

During FY17, the Air Force continued to fill billets to the SVC Program. At the end of 2016, 25 of 46 SVP positions had been filled. By the end of 2017, 45 of 47 paralegal positions had been filled, including the paralegal manager position at Division headquarters. On the officer side, 57 positions were filled, including the Division Chief, Deputy Division Chief, 6 senior special victims' counsel (SSVCs) and 47 SVCs. Additionally, the Division benefits from the expertise and strategic insights of the civilian Associate Division Chief. The SVC Program continued to grow to meet demand and opened 6 new offices, giving the Program a total of 48 offices, with the Whiteman Air Force Base, Missouri, SVC position currently vacant. To further maximize access for victims to SVCs, SVC leadership reviewed the support provided to facilities where there is no SVC assigned and realigned SVC territories to provide more equitable coverage. This will increase access of victims to SVCs, even when there is no SVC physically stationed at a victim's base.

The SVC Program continuously educates Airmen and promotes SVC services. Briefings are given at formal training courses such as the Senior Enlisted Legal Orientation Course, the Senior Officer Legal Orientation Course, the Sex Crimes Intermediate Training Program, the Annual Survey of the Law, the Dougherty-Nelson Continuing Legal Education Program, and the Sexual Assault Response Coordinator Course. In May 2017, The Judge Advocate General's School hosted the Special Victim's Counsel Course. SVCs also taught at and attended five iterations of the Intermediate Sexual Assault Litigation Course. In August 2017, SVCs also taught at and attended the Advanced Sexual Assault Litigation Course and the Appellate Advocacy Training Course. Additionally in August 2017, the SVC Chief briefed at two annual Family Advocacy Program conferences. In the fall of 2017, SVC leadership undertook a systematic review and overhaul of all courses taught by SVC personnel with a focus on providing timely and relevant training to attendees.

Air Force SVCs continued to be actively involved in all facets of the post-trial appellate rights of their clients. The SVC Program filed 9 pleadings on behalf of their clients at the Service-level Courts of Criminal Appeals. The SVC Program worked with the military confinement facilities and the Service parole and clemency boards to establish a process for submitting client input at confinement facility disposition boards and the Services parole and clemency board hearings. Air Force SVCs submitted 17 victim impact statements on behalf of their clients during the parole and clemency process. Air Force SVCs also represented their clients at 2 post-conviction (*Dubay*) hearings, 3 continued confinement hearings and 4 re-hearings.

Air Force SVC leadership continued to advocate for requisite changes in law. The SVC Program drafted legislation to expand the CAAF's jurisdiction and supported consistent language used in the FY18 National Defense Authorization Act (NDAA). In the future, the highest appellate court in the Armed Forces can ensure that victims have the same rights across all of the Services. Regarding a different section of Article 6b, SVC leadership proposed changes to the process for appointing an Article 6b representative. As SVC representation of non-verbal children increased, SVC leadership recognized the need for a military judge to appoint an Article 6b representative for the child earlier in the process of most courts-martial. The authority for a military judge to appoint an Article 6b representative prior to referral of charges was included in the FY18 NDAA.

At the end of FY17, SVCs were actively representing more than 830 victims, including child victims. During the fiscal year, SVCs participated in preliminary hearings and court-martial, as well as victim interviews with investigators, defense counsel, and trial counsel.

SVC client feedback on their experience with the SVC Program and their specific SVC continues to be overwhelmingly positive. An impressive 85% of clients surveyed indicated they were "extremely satisfied" with their SVC's representation, and almost 15% were "satisfied," resulting in an astonishing above 95% satisfaction rate. Not only was every represented victim satisfied with their SVC, 100% of victims would recommend other victims seek SVC representation.

## **PERSONNEL**

The JAG Corps has approximately 1,301 judge advocates on active duty. Company grade officers (lieutenants and captains) make up approximately 45% (579) of that number. Approximately 27% (352) are majors and approximately 18% (240) are lieutenant colonels. Colonels and above, including one lieutenant general, one major general, and one brigadier general, comprise approximately 10% (130) of the Corps. In addition, there are 897 Department of the Air Force civilians, of which 61% (551) are attorneys and 39% (346) are non-attorneys. Grade breakdown includes 307 GS-11s and below, 58 GS-12s, 127 GS-13s, 197 GS-14s, 201 GS-15s. There are 842 paralegals on active duty. Senior airmen and below make up approximately 27% (239) of that number. Staff sergeants make up approximately 21% (190), while 25% (222) are technical sergeants, and master sergeants make up approximately 16% (146). Senior master and chief master sergeants make up 4% (33) and 1% (12) respectively.

The Air Reserve Component (ARC) of The JAG Corps includes 949 Air Reserve Individual Mobilization Augmentee (IMA), Air Force Traditional Reserve unit-assigned, and Air National Guard judge advocates, of which 23% (215) are company grade officers (lieutenants and captains) and 65% (613) are field grade officers (majors and lieutenant colonels). The remaining 13% consist of 113 colonels, 5 brigadier generals, and 3 major generals. The ARC also includes 383 paralegals, of which 3% (12) are airmen or airmen first class, 10% (40) are senior airmen, 26% (88) are staff sergeants, 35% (119) are technical sergeants, 28% (97) are master sergeants, 4% (14) are senior master sergeants, and 4% (13) are chief master sergeants.

Fiscal Year 2017 was a great year for military justice in the Air Force where we capitalized on the synergy created by the circuits, implemented our new military justice metrics and milestones to improve our processing times and achieve just results, and constantly worked to improve the quality of our military justice processes. We look forward to a robust year of training as we prepare to implement the Military Justice Act of 2016. We will closely monitor these new requirements and their impact on military justice to ensure a fair, effective and efficient military justice system for all Airmen.

**CHRISTOPHER F. BURNE**  
Lieutenant General, USAF  
The Judge Advocate General

Period: Fiscal Year 2017				
<b>PART 1 - BASIC COURTS-MARTIAL STATUS (Persons)</b>				
TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE(+)/ DECREASE (-) OVER LAST REPORT
GENERAL	159	112	47	-35.10%
BCD SPECIAL	231	64	34	0.43%
NON-BCD SPECIAL [A]		133		12.71%
SUMMARY	76	75	1	-19.15%
OVERALL RATE OF INCREASE ( + ) / DECREASE ( - ) OVER LAST REPORT				-18.10%
<b>PART 2 - DISCHARGE APPROVED</b>				
GENERAL COURTS-MARTIAL (CA LEVEL)				
NUMBER OF DISHONORABLE DISCHARGES [B]			68	
NUMBER OF BAD CONDUCT DISCHARGES			37	
SPECIAL COURT-MARTIAL (CA LEVEL)				
NUMBER OF BAD CONDUCT DISCHARGES			64	
<b>PART 3 - RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG</b>				
FOR REVIEW UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL			98	
FOR REVIEW UNDER ARTICLE 66 - BCD SPECIAL COURTS-MARTIAL			64	
FOR EXAMINATION UNDER ARTICLE 69 - GENERAL COURTS-MARTIAL			17	
<b>PART 4 - WORKLOAD OF THE AIR FORCE COURT OF CRIMINAL APPEALS</b>				
TOTAL ON HAND BEGINNING OF PERIOD			255	
GENERAL COURTS-MARTIAL			134	
BCD SPECIAL COURTS-MARTIAL			83	
REFERRED FOR REVIEW			152	
GENERAL COURTS-MARTIAL			98	
BCD SPECIAL COURTS-MARTIAL			54	
TOTAL CASES REVIEWED			245	
GENERAL COURTS-MARTIAL			124	
BCD SPECIAL COURTS-MARTIAL			77	
TOTAL PENDING AT CLOSE OF PERIOD			165	
GENERAL COURTS-MARTIAL			108	
BCD SPECIAL COURTS-MARTIAL			60	

RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD (245/192)			27.60%
<b>PART 5 - APPELLATE COUNSEL REQUESTS BEFORE THE AIR FORCE COURT OF CRIMINAL APPEALS</b>			
NUMBER	151		
PERCENTAGE	99.3 4%		
<b>PART 6 - U.S. COURT OF APPEALS FOR THE ARMED FORCES</b>			
PERCENTAGE OF AFCCA REVIEWED CASES FORWARDED TO USCAAF (130/245)			53.06%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD			-19.34%
PERCENTAGE OF TOTAL PETITIONS GRANTED (25/130)			19.23%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD			11.32%
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY AFCCA (25/245)			10.20%
RATE OF INCREASE ( + ) / DECREASE ( - ) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD			4.47%
<b>PART 7 - APPLICATIONS FOR RELIEF, ARTICLE 69(b)</b>			
PENDING AT BEGINNING OF PERIOD			1
RECEIVED			0
DISPOSED OF			0
GRANTED	0		
DENIED	3		
NO JURISDICTION	2		
WITHDRAWN	0		
TOTAL PENDING AT END OF PERIOD			0
<b>PART 8 - ORGANIZATION OF COURT</b>			
TRIALS BY MILITARY JUDGE ALONE			233
GENERAL COURTS-MARTIAL	94		
SPECIAL COURTS-MARTIAL	139		
TRIALS BY MILITARY JUDGE WITH MEMBERS			157
GENERAL COURTS-MARTIAL	65		
SPECIAL COURTS-MARTIAL	92		
<b>PART 9 - COMPLAINTS UNDER ARTICLE 138</b>			
NUMBER OF COMPLAINTS		46	
<b>PART 10 - STRENGTH</b>			
AVERAGE ACTIVE DUTY STRENGTH		315,534	

<b>PART 11 - NONJUDICIAL PUNISHMENT (ARTICLE 15)</b>				
NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED			3,896	
RATE PER 1,000			12.35%	
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD			-0.48%	
<b>EXPLANATORY NOTES</b>				
<p>[A] Of the 231 SPCMs tried and acted upon, there were 64 convictions with a BCD adjudged and approved, 133 convictions without a BCD adjudged and approved, and 34 acquittals.</p> <p>[B] This includes 10 officer dismissals and 58 enlisted dishonorable discharges.</p>				

## **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, 2016 to September 30, 2017**

## **PERSONNEL AND TRAINING**

The Coast Guard has 223 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 SOUTHCOM, the Staff Judge Advocate to Joint Interagency Task Force South and DHS Joint Task Force East, and 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 also has several active duty judge advocates detailed to the Department of Justice, the Department of State, and the Department of Homeland Security.

Sixty judge advocates are currently assigned in non-legal “out-of-specialty” billets. They include four flag officers, the Vice Commandant of the Coast Guard (O-10), a Rear Admiral (O-8) who serves as the Commander, First Coast Guard District based in Boston, MA, a Rear Admiral (O-7) who serves as Assistant Commandant for Command, Control, Communications, Computers, and Information Technology (C4IT) and Commander, Coast Guard Cyber Command, and a Rear Admiral (O-7) who serves as Deputy Director of Operations at U. S. Northern Command (NORTHCOM). 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 107 civilian attorneys ranging from GS-13 to SES.

In Fiscal Year 2017, twenty 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. In addition, the Coast Guard sent attorneys to over forty different courses of instruction during fiscal year 2017, primarily at the various service JAG schools. Twenty-two Coast Guard officers are currently undergoing postgraduate studies to complete a Juris Doctor (J.D.) degree and will be certified as judge advocates at the successful completion of their studies. Two judge advocates are pursuing their Masters of Law (L.L.M.) degrees at civilian institutions. Additionally, two judge advocates are attending the Graduate Course at the United States Army Judge Advocate General’s Legal Center and School and another is a fellow at the Center for Law and Military Operations at TJAGLCS.

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

The judges on the U.S. Coast Guard Court of Criminal Appeals are:

Chief Judge Lane I. McClelland  
Judge Kurt Brubaker  
Judge John F. Havranek  
Judge Brian M. Judge  
Judge Robert W. Bruce



Judge John Luce  
Judge Scott Herman

Judge Brubaker joined the Court in Fiscal Year 2017 and serves as the second full-time, civilian judge on the Coast Guard Court of Criminal Appeals.

### **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 and an SJA at the Coast Guard's Personnel Service Command, advise approximately 350 officers exercising special court-martial jurisdiction. Responsibility for detailing trial defense counsel to general and special courts-martial rests with the Chief, Member Advocacy and Legal Assistance, 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, nine Coast Guard judge advocates are assigned to full time duty, typically two-year assignments, at various Navy Defense Service Offices throughout the country.

The Coast Guard had three general courts-martial trial judges and eight collateral-duty special courts-martial trial judges at the end of Fiscal Year 2017. 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 appeals of courts-martial cases 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. A Captain (O-6) serves as the Chief of Military Justice. A GS-15 Highly Qualified Expert is also assigned to this office and serves as Chief Prosecutor. Three judge advocates in the grades of O-3 and O-4 are also assigned to this office, supporting all office functions. For much of Fiscal Year 2017 the Office has been heavily involved, along with the other members of the Joint Service Committee, with implementation of the Military Justice Act of 2016.

Additionally, the Coast Guard's Special Victims' Counsel (SVC) Office is staffed by a senior SVC and three full-time SVC in Washington, D.C, with the Program Deputy and two full-time SVCs stationed in Alameda, California, and one full-time SVC stationed in Cleveland, Ohio. The program will continue to expand, adding two full-time SVCs at the United States Coast Guard Academy. Five additional Coast Guard judge advocates serve as special duty SVCs. This composition and assignment of SVCs helps to ensure all sexual assault victims receive timely and effective representation and advice. Prior to representing their first client, all Coast Guard SVCs attend specialized certification training and serve in an assistant/apprentice role.

## MILITARY JUSTICE STATISTICS

Fiscal Year	17	16	15	14	13	12	11	10
General Courts-Martial	13	17	19	23	09	14	06	12
Special Courts-Martial	20	15	13	22	14	14	32	20
Summary Courts-Martial	13	22	23	30	20	17	19	09
Total	46	54	55	75	43	45	57	41

## ADDITIONAL MILITARY JUSTICE STATISTICS

Appendix A contains the Coast Guard, fiscal year 2017 military justice statistics.

## APPELLATE REVIEW PROCESS

In Fiscal Year 2017, of the thirteen cases referred to the Coast Guard Court of Criminal Appeals for review under Article 66, nine complied with the *Moreno* post-trial processing timelines for convening authority's action. In *United States v. Clifft*, the convening authority took action 155 days after sentence; in *United States v. Summers*, the convening authority took action 142 days after sentence; in *United States v. Rodriguez*, the convening authority took action 159 days after sentence; and in *United States v. Rogers*, the convening authority took action 136 days after sentence. Of the same thirteen cases, all complied with the *Moreno* standard for time from convening authority's action to docketing with the Coast Guard Court of Criminal Appeals. All of these cases are still pending review.

The Coast Guard Court of Criminal Appeals met its goal of issuing an opinion within eighteen months or less of the date the case was referred in nineteen of the twenty-four<sup>2</sup> cases decided in Fiscal Year 2017. In *United States v. Ramos*, *United States v. Harpole*, *United States v. Knox*, *United States v. Bailey*, and *United States v. Hinojosa*, the court issued its decision more than eighteen, but less than twenty months after referral.

In Fiscal Year 2017, the Coast Guard Court of Criminal Appeals did not grant relief for post-trial delay in any cases, nor did they reverse any convictions as a result of command influence or denial of the right to a speedy review. 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 Coast Guard has taken several steps to increase trial and defense capabilities and to provide additional exposure to military justice litigation work for our judge advocates. To accomplish this, the Coast Guard has substantially increased its full-time practitioners within the last year.

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<sup>2</sup> Twenty-eight published and unpublished decisions were issued; of those, two were reassessments following a decision by the Court of Appeals for the Armed Forces, and two arrived at the Court under other than Article 66, and are therefore excluded from this analysis.

The Coast Guard continues to add trial and trial defense counsel billets. In accordance with a long-standing Memorandum of Understanding with the Navy, the Navy provides defense counsel for Coast Guard courts-martial, and the Coast Guard provides the Navy full-time judge advocates to perform trial defense work. Eight Coast Guard attorneys currently serve as defense counsel, with a ninth position soon to be filled. While attorneys in field legal offices serve as trial counsel for some courts-martial, the majority of trial services are provided by the Legal Service Command (LSC). Fifteen judge advocates at the LSC's east and west coast offices serve full-time as trial counsel, participating in the prosecution of about 67% of the Coast Guard's courts-martial.

Also, the Office of Military Justice provides training materials, policy guidance and technical support to staff judge advocates during military justice proceedings. The Office of Military justice assigned one judge advocate to provide on-site support to one complex court-martial in fiscal year 2017. The GS-15, an experienced retired judge advocate, has also served alongside judge advocates as detailed trial counsel in highly complex courts-martial. Additionally, the office continues to develop training and guidance for practitioners in the field.

In addition to military justice experience, many field legal offices develop supplemental litigation skills through Special Assistant U.S. Attorney (SAUSA) relationships with one or more U.S. Attorney offices. Collateral duty SAUSAs around the country assist in prosecution of a wide range of cases arising out of Coast Guard operations, from drug and migrant smuggling cases to environmental crimes. There are also seven full-time SAUSAs: five judge advocates serving in the Southern and Middle Districts of Florida, District of Puerto Rico, and the Central and Southern Districts of California focus on prosecution of drug and migrant smuggling cases, and two judge advocates serve as SAUSAs to the Department of Justice Offices of Aviation & Admiralty and Environmental Crimes in Washington, D.C.

Coast Guard judge advocates are trained initially with the Navy and Marine Corps at the Naval Justice School, and 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, which significantly add to the depth of knowledge and expertise available to Coast Guard trial counsel.

The Coast Guard increased its full time general courts-martial judges to three, and continues to utilize eight 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 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.

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. Enlisted personnel also receive training through the Naval Justice School's courses and programs.

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

The Coast Guard is improving the resources available to its legal program to perform its military justice functions. Previously, the Judge Advocate General chartered a working group to study the Coast Guard's military justice system and proposed ways to increase the proficiency of its practice. Several of those recommendations were implemented this year and they are already proving successful. We increased the number of full-time judges at both the trial and appellate levels. We have expanded the role of the Legal Service Command, instituting full-time trial counsel who either have the lead or assist in complex cases and sexual assault. We increased our defense positions and augmented the SVC program creating more full-time advocate positions. In a short time, the Coast Guard has realized the benefits of these additions but we recognize a shortfall –our administrative support. There is a noticeable lack of growth between the support staff and those judge advocates they serve. The Coast Guard is committed to exploring avenues available to ensure our judge advocates are properly supported with administrative personnel who are trained and competent, especially as the complexity of courts-martial increases with the implementation of the Military Justice Act of 2016.

S. J. ANDERSEN  
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, 2016 to September 30, 2017 (FY 2017)

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

Report Period: 1 OCTOBER 2016 - 30 SEPTEMBER 2017

<b>PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)</b>				
TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
GENERAL	13	10	03	-30.77%
BCD SPECIAL	20	19	01	+24%
NON-BCD SPECIAL*	00	00	00	00
SUMMARY	13	12	01	-69.23%
OVERALL RATE OF INCREASE (+)/DECREASE (-) OVER LAST REPORT				-17.39%
<b>PART 2 – DISCHARGES APPROVED</b>				
GENERAL COURTS-MARTIAL				
NUMBER OF DISHONORABLE DISCHARGES			11	
NUMBER OF BAD-CONDUCT DISCHARGES			05	
NUMBER OF DISMISSALS			01	
SPECIAL COURTS-MARTIAL				
NUMBER OF BAD-CONDUCT DISCHARGES			07	
<b>PART 3 – RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG</b>				
FOR REVIEW UNDER ARTICLE 66 – GENERAL COURTS-MARTIAL			04	
FOR REVIEW UNDER ARTICLE 66 – BCD SPECIAL COURTS-MARTIAL			06	
FOR EXAMINATION UNDER ARTICLE 69 – GENERAL COURTS-MARTIAL			04	
<b>PART 4 – WORKLOAD OF THE COAST GUARD COURT OF CRIMINAL APPEALS*</b>				
TOTAL ON HAND BEGINNING OF PERIOD			24	
GENERAL COURTS-MARTIAL		17		
BCD SPECIAL COURTS-MARTIAL		12		
REFERRED FOR REVIEW			29	
GENERAL COURTS-MARTIAL		17		
BCD SPECIAL COURTS-MARTIAL		12		
TOTAL CASES REVIEWED			28	
GENERAL COURTS-MARTIAL		16		
BCD SPECIAL COURTS-MARTIAL		12		

\* As a matter of practice, the Coast Guard does not try non-BCD special courts-martial.

TOTAL PENDING AT CLOSE OF PERIOD		15	
GENERAL COURTS-MARTIAL	9		
BCD SPECIAL COURTS-MARTIAL	6		
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		0%	

**PART 5 – APPELLATE COUNSEL REQUESTS BEFORE U.S. COAST GUARD COURT OF CRIMINAL APPEALS (CCA)**

NUMBER	29	
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 7/12	58.3%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD	+25%
PERCENTAGE OF TOTAL PETITIONS GRANTED 3/7	43%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD	-17%
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY CGCCA 3/12	25%
RATE OF INCREASE (+)/DECREASE (-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD	+6.2%

**PART 7 – APPLICATIONS FOR RELIEF UNDER ARTICLE 69, UCMJ**

TOTAL PENDING BEGINNING OF PERIOD		92	
RECEIVED		24	
DISPOSED OF		25	
GRANTED	01		
DENIED			
NO JURISDICTION	00		
WITHDRAWN	00		
TOTAL PENDING AT END OF PERIOD		91	

**PART 8 – ORGANIZATION OF COURTS**

TRIALS BY MILITARY JUDGE ALONE		25	
GENERAL COURTS-MARTIAL		07	
SPECIAL COURTS-MARTIAL		18	

TRIALS BY MILITARY JUDGE WITH MEMBERS	08	
GENERAL COURTS-MARTIAL	06	
SPECIAL COURTS-MARTIAL	02	

**PART 9 – COMPLAINTS UNDER ARTICLE 138, UCMJ**

NUMBER OF COMPLAINTS	01	
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**PART 10 – STRENGTH**

AVERAGE ACTIVE DUTY STRENGTH	39649	
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**PART 11 – NONJUDICIAL PUNISHMENT (ARTICLE 15, UCMJ)**

NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED	625	
RATE PER 1,000	13.3%	
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD	-24.7%	