

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

October 1, 2017, to September 30, 2018

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 2017 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 146a, Uniform Code of Military Justice (UCMJ), Title 10, United States Code, § 946a.

After Chief Judge Charles E. “Chip” Erdmann completed his 15-year term on July 31, 2017, the Court was reduced to a quorum of four currently appointed Judges from August 1, 2017, to February 1, 2018. To conduct the essential business of the Court and hear the cases set for argument on the master docket, Chief Judge Scott W. Stucky called upon the Senior Judges of the Court to serve, pursuant to Article 142(e), UCMJ. Senior Judge Andrew S. Effron heard thirteen cases. Senior Judge Walter T. Cox III heard seven cases. Senior Judge Charles E. “Chip” Erdmann heard three cases. The Court resumed normal operations with a full complement of five currently-appointed Judges upon the appointment and taking of the Judicial Oath by Judge Gregory E. Maggs on February 2, 2018.

THE BUSINESS OF THE COURT

The number and status of completed and pending cases are set forth in the attached statistical report and graphs for the period from October 1, 2017, to September 30, 2018. 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.

During the October 2017 Term of Court, the Court met its goal of issuing opinions in all cases scheduled for hearing as business of the Term prior to the end of the Term and heard two cases in advance of the following Term. An informal summary of selected decisions is set forth in Appendix A.

RULES OF PRACTICE AND PROCEDURE

No changes were made to the Court's Rules of Practice and Procedure during the October 2017 Term of Court.

BAR OF THE COURT

During the October 2017 Term, 144 attorneys were admitted to practice before the Court, bringing the cumulative total of admissions to the Bar of the Court to 37,085.

JUDICIAL OUTREACH

In furtherance of a practice established in 1987, the Court scheduled special sessions and heard oral arguments outside of its permanent courthouse in Washington, D.C. during the October 2017 Term of Court. The 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 Cornell University Law School in Ithaca, NY, the University of Texas School of Law in Austin, TX, and at Fort Hood in Killeen, TX. In September of 2018, the Court heard the first two arguments for the following Term, (prior to the formal start of the Term on October 1, 2018), in order to timely honor commitments made to the Federal Bar Association and Fordham University School of Law. These cases will be decided in the 2018 Term of Court.

CONTINUING LEGAL EDUCATION AND TRAINING PROGRAM

On March 7 and 8, 2018, 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 Scott W. Stucky, 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; Brenner M. Fissell, Assistant Professor of Law at the Hofstra University Maurice A. Deane School of Law; Guyora Binder, Distinguished Professor and Vice Dean at the State University of New York Buffalo Law School; Colonel Martin Mitchell, U.S. Air Force (Retired), Commissioner to Judge Kevin A. Ohlson, United States Court of Appeals for the Armed Forces; Andreas Kuersten, former law clerk to Chief Judge Scott W. Stucky, United States Court of Appeals for the Armed Forces; Justice Steven H.

David of the Supreme Court of Indiana; Dwight Sullivan, Senior Associate Deputy General Counsel (Military Justice and Personnel Policy), Department of Defense; Elizabeth L. "Liz" Lippy, Associate Director of the Trial Advocacy Program at the American University Washington College of Law; and Major Jenna Reed, U.S. Marine Corps (Reserve).

Scott W. Stucky
Chief Judge

Margaret A. Ryan
Judge

Kevin A. Ohlson
Judge

John E. Sparks, Jr.
Judge

Gregory E. Maggs
Judge

APPENDIX A—SELECTED DECISIONS

United States v. Pugh, 77 M.J. 1 (C.A.A.F. 2017), holding that Air Force Instruction 90-507, while possibly having a valid military purpose, is overly and inappropriately broad as it pertains to FDA-approved food products.

United States v. Hennis, 77 M.J. 7 (C.A.A.F. 2017), holding that there is no constitutional, statutory, or regulatory basis for the Court to grant a request for an enhanced appellate defense team or funding for learned counsel, a mitigation specialist, and a fact investigator in a capital case.

United States v. Jacobsen, 77 M.J. 81 (C.A.A.F. 2017), holding that mere compliance with the certification requirements of Article 62, UCMJ, does not conclusively establish appellate jurisdiction.

United States v. Guardado, 77 M.J. 90 (C.A.A.F. 2017), holding that the military judge's instruction that the members could consider evidence of charged offenses to establish Appellant's propensity to commit other charged offenses was not harmless, and that the government may not charge a general disorder offense if the offense is otherwise listed as an Article 134, UCMJ, offense.

United States v. Riesbeck, 77 M.J. 154 (C.A.A.F. 2018), holding that court stacking based on gender, intended to influence the result of a court-martial, created error that was not harmless beyond a reasonable doubt.

United States v. Honea, 77 M.J. 181 (C.A.A.F. 2018), holding that the record was irredeemably muddled and precluded proper review under Article 67, UCMJ, and setting aside the findings and sentence and dismissing the charge and specification with prejudice.

United States v. Mangahas, 77 M.J. 220 (C.A.A.F. 2018), holding that, where the death penalty could never be imposed for the offense of rape charged, the offense is not punishable by death for purposes of Article 43, UCMJ, in effect at the time of the offense.

United States v. Blanks, 77 M.J. 239 (C.A.A.F. 2018), holding that the military judge did not plainly err in providing the members with a negligent dereliction of duty instruction.

United States v. Robinson, 77 M.J. 303 (C.A.A.F. 2018), holding that the military judge did not abuse his discretion in denying the defense motion to suppress evidence

obtained from Appellant's cell phone because Appellant voluntarily consented to providing his passcode to investigators, and that Appellant waived any objection regarding the investigators exceeding the scope of the consent to search.

United States v. Eppes, 77 M.J. 339 (C.A.A.F. 2018), holding that the search of Appellant's residence was supported by probable cause, and therefore valid. While the Court held that a second search of Appellant's bags was outside the scope of the search authorization, the inevitable discovery doctrine applied.

United States v. Barker, 77 M.J. 377 (C.A.A.F. 2018), holding that the improper admission of victim impact statements which failed to meet the requirements of R.C.M. 1001A in a judge-alone court-martial did not substantially influence the sentence.

United States v. Andrews, 77 M.J. 393 (C.A.A.F. 2018), holding that the Court of Criminal Appeals was correct to review prosecutorial misconduct for plain error and that trial counsel's statements amounted to plain, obvious error, but that there was no material prejudice to Appellant's substantial rights.

United States v. Kelly, 77 M.J. 404 (C.A.A.F. 2018), holding that the Courts of Criminal Appeals have the power to disapprove a mandatory minimum sentence as set forth in Article 56, UCMJ.

United States v. Hardy, 77 M.J. 438 (C.A.A.F. 2018), holding that an unconditional guilty plea waives any unpreserved unreasonable multiplication of charges objection.

United States v. Dinger, 77 M.J. 447 (C.A.A.F. 2018), holding that a court-martial is not prohibited from sentencing a retiree to a punitive discharge or any other punishment established by the President.

United States v. Jones, 78 M.J. 37 (C.A.A.F. 2018), holding that the military judge did not err in admitting Appellant's statements to investigators and that, though the military judge improperly admitted Appellant's coconspirator's statement, the error was harmless beyond a reasonable doubt.

United States v. Barry, 78 M.J. 70 (C.A.A.F. 2018), holding that a Deputy Judge Advocate General can commit unlawful influence, and that the Navy Deputy Judge Advocate General did commit unlawful influence in this case.

**USCAAF STATISTICAL REPORT
OCTOBER 2017 TERM OF COURT**

CUMULATIVE SUMMARY

CUMULATIVE PENDING OCTOBER 1, 2017

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

CUMULATIVE FILINGS

Master Docket	49
Petition Docket	360
Miscellaneous Docket	<u>17</u>
TOTAL	426

CUMULATIVE DISPOSITIONS

Master Docket	70
Petition Docket	379
Miscellaneous Docket	<u>23</u>
TOTAL	472

CUMULATIVE PENDING OCTOBER 1, 2017

Master Docket	19
Petition Docket	52
Miscellaneous Docket	<u>0</u>
TOTAL	71

OPINION SUMMARY

<u>CATEGORY</u>	<u>SIGNED</u>	<u>PER CURIAM</u>	<u>MEM/ORDER</u>	<u>TOTAL</u>
Master Docket	34	0	36	70
Petition Docket	0	0	379	379
Miscellaneous Docket	<u>0</u>	<u>1</u>	<u>22</u>	<u>23</u>
TOTAL	34	1	437	472

MASTER DOCKET SUMMARY

PENDING AT BEGINNING OF TERM	40
FILINGS	
Petition granted from the Petition Docket	46
Certificates filed	2
Mandatory appeals filed	0
Remanded/Returned cases	<u>1</u>
TOTAL	49
DISPOSITIONS	
Affirmed	44
Reversed in whole or in part	9
Certificates dismissed	0
Other	<u>17</u>
TOTAL	70
PENDING AT END OF TERM	
Awaiting briefs	7
Awaiting oral argument	4
Awaiting lead case decision (trailer cases)	0
Awaiting final action	<u>8</u>
TOTAL	19

PETITION DOCKET SUMMARY

PENDING AT BEGINNING OF TERM	71
FILINGS	
Petitions for grant of review filed	358
Petitions for new trial filed	1
Returned cases	<u>1</u>
TOTAL	360
DISPOSITIONS	
Petitions for grant of review denied	320
Petitions for grant of review granted	46
Petitions for grant of review withdrawn	5

Petitions for grant of review dismissed	<u>8</u>
TOTAL	379

PENDING AT END OF TERM

Awaiting pleadings	15
Awaiting staff review	22
Awaiting final action	<u>15</u>
TOTAL	52

MISCELLANEOUS DOCKET SUMMARY

PENDING AT BEGINNING OF TERM	6
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FILINGS

Writ appeals sought	3
Writs of habeas corpus sought	0
Writs of coram nobis sought	2
Other extraordinary relief sought	<u>12</u>
TOTAL	17

DISPOSITIONS

Petitions or appeals denied	16
Petitions or appeals granted	0
Petitions or appeals dismissed	5
Petitions or appeals withdrawn	<u>2</u>
TOTAL	23

PENDING AT END OF TERM

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

PETITIONS FOR RECONSIDERATION

ALL CASES

Begin pending	2
Filed	<u>21</u>
TOTAL	23

DISPOSITIONS

Denied	18
Granted	0
Dismissed	<u>0</u>
TOTAL	18

End Pending	5
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MOTIONS

ALL MOTIONS

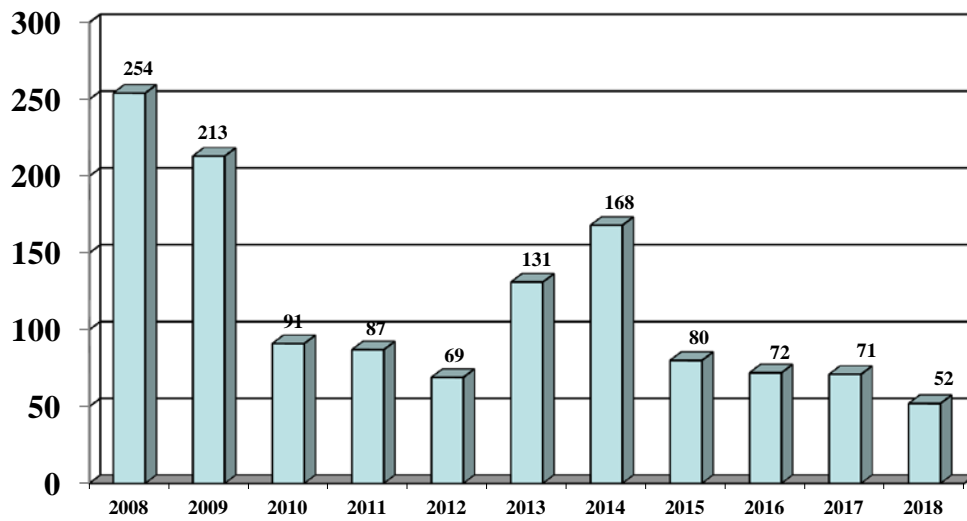
Begin pending	2
Filed	<u>332</u>
TOTAL	334

DISPOSITIONS

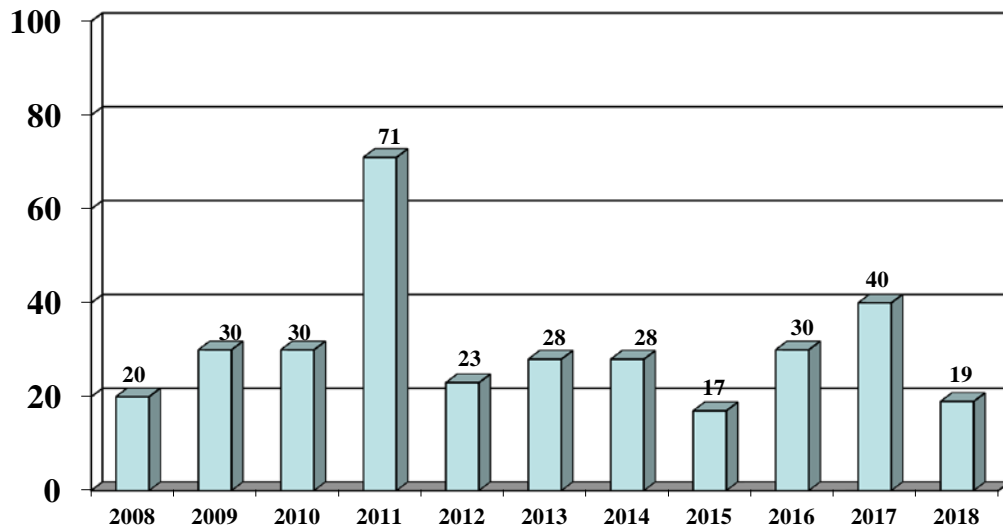
Granted	288
Denied	39
Dismissed	<u>0</u>
TOTAL	327

End Pending	7
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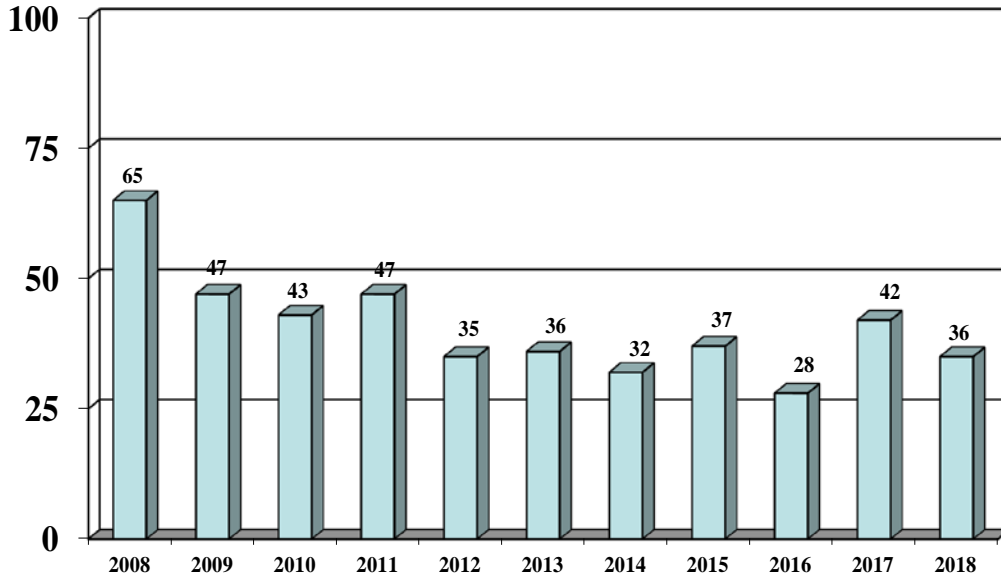
Petition Docket Term End Pending



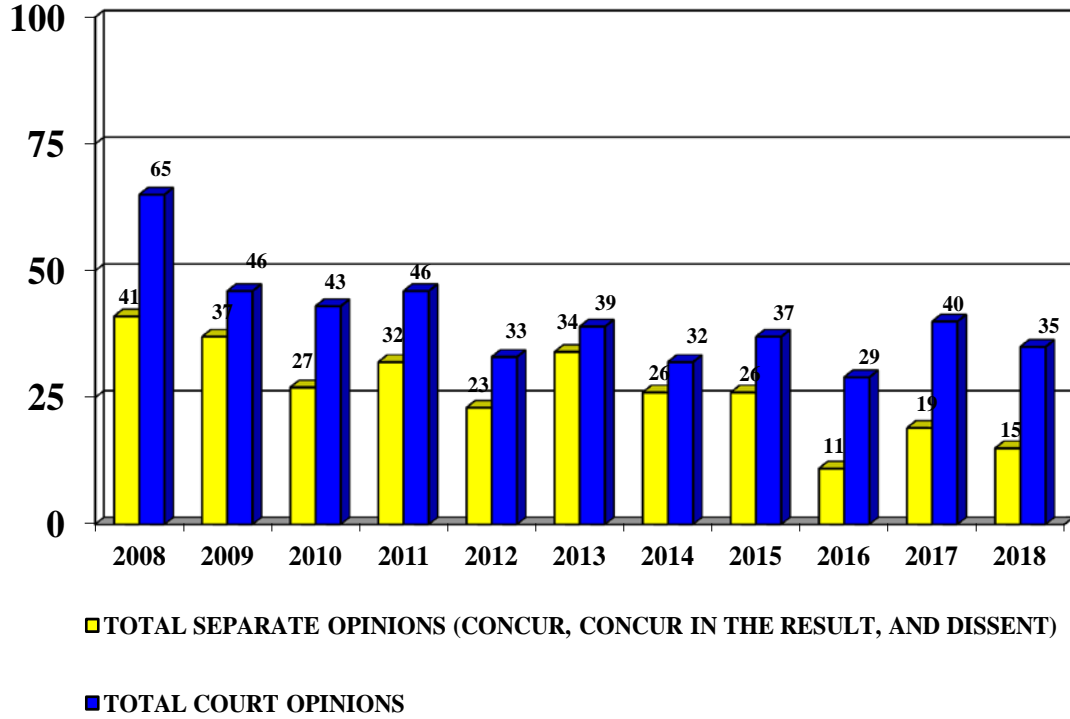
Master Docket Term End Pending



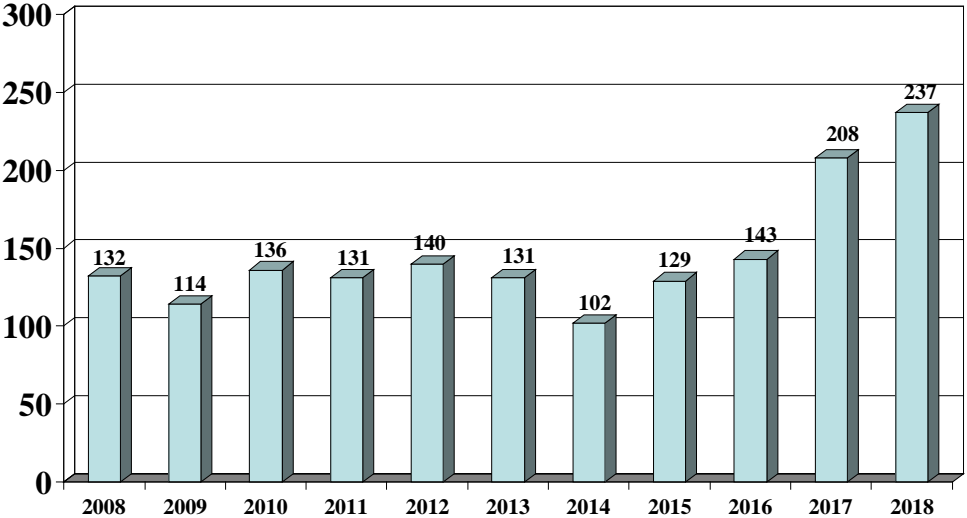
Oral Arguments Per Year



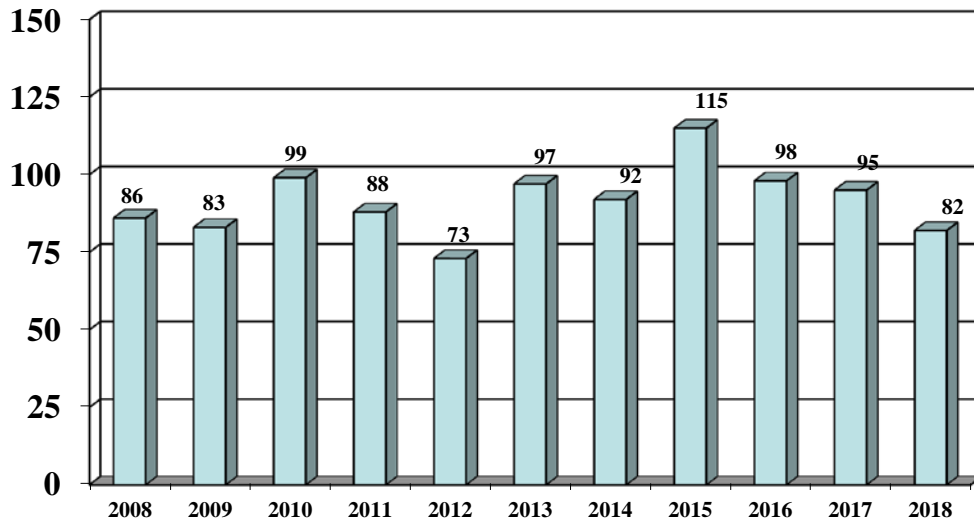
Total Opinions Per Year



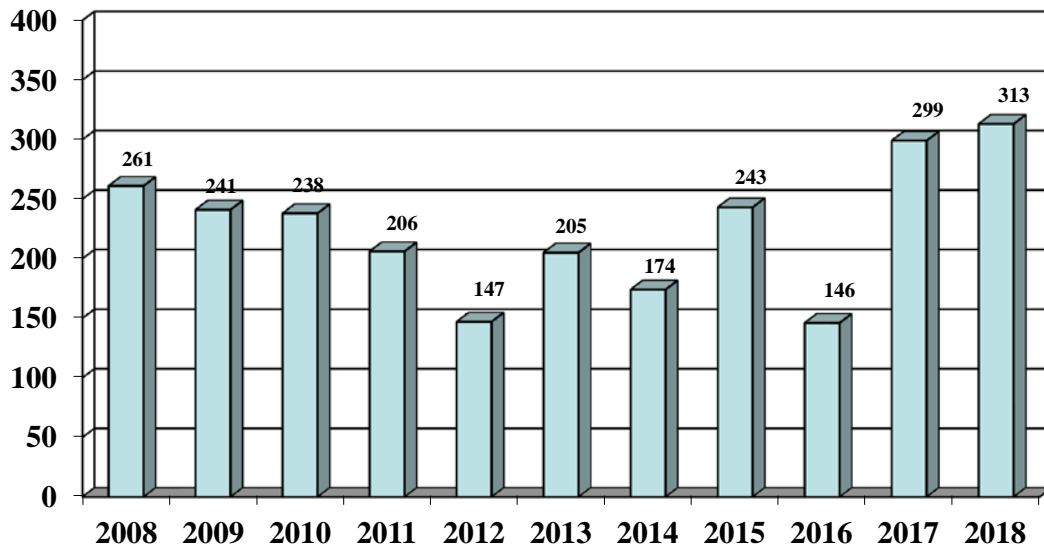
Days from Petition Filing to Oral Argument



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

