

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

October 1, 2021, to September 30, 2022

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 2021 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.

THE BUSINESS OF THE COURT

During the October 2021 Term of the Court, the Court met its goal of issuing opinions in all cases heard during the Term prior to the end of the Term. A summary by the Court staff of selected decisions is presented in *Appendix A*. Statistical reporting and graphical representations of the filing and disposition of cases are set forth in *Appendix B*.

Pursuant to public health guidance in response to the COVID-19 pandemic, the Court monitored federal and local responses to the pandemic, adjusted safety protocols for Court personnel and visitors, reconfigured work spaces for social distancing, and maintained proper sanitization with minimal contact.

Since the departure of Judge Scott W. Stucky, the Court has been reduced to a quorum of four Judges. Because a replacement has yet to be confirmed and appointed, Chief Judge Kevin A. Ohlson called upon the Court's Senior Judges pursuant to Article 142(e), UCMJ, to conduct essential business of the Court and hear cases set for argument on the master docket. Senior Judge Andrew S. Effron heard 6 cases; Senior Judge Scott W. Stucky heard 5 cases; Senior Judge Susan J. Crawford heard 4 cases; Senior Judge Walter T. Cox heard 4 cases; Senior Judge Margaret A. Ryan heard 3 cases; and Senior Judge Charles E. Erdmann heard 3 cases.

Information pertaining to specific opinions is available on the Court’s website which includes copies of the published opinions and Daily Journal entries. Information about other dispositions may be found in the Court’s official reports, the Military Justice Reporter, and on the Court’s website. Additionally, the Court’s website 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.

RULES OF PRACTICE AND PROCEDURE

During the October 2021 Term, the Court approved the addition of Rule 36B and changes to Rules 9(e), 21A, 30A(c), and 36(a). The changes to Rules 9(e) and 36(a) were approved to incorporate reference to the Court’s Guidelines for Electronic Filings of Pleadings within the Rules of Practice and Procedure. The changes to Rule 21A were approved to facilitate the analysis of *Grostefon* issues. The changes to Rule 30A(c) were approved to reflect changes brought about by legislation regarding *DuBay* hearings. The addition of Rule 36B, regarding citation to the UCMJ and MCM, was approved to provide certainty about whether the law put forth by counsel has changed since the initial pleading, whether counsel is relying on an outdated version of the statute, and whether the statute may now be inapplicable.

BAR OF THE COURT

During the October 2021 Term, 182 attorneys were admitted to practice before the Court, bringing the cumulative total of admissions to the Bar of the Court to 37,784.

JUDICIAL OUTREACH

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. Due to the public health crisis of COVID-19, no outreach was conducted during the October 2021 Term of Court. The Judges of the Court did participate in numerous engagements, professional training, speaking, and educational endeavors on military installations, at law schools, and before professional groups.

CONTINUING LEGAL EDUCATION AND TRAINING PROGRAM

On March 9 and 10, 2022, 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 Kevin A. Ohlson, 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 (TJAGLCS); Major Steve Dray and Lieutenant Colonel Dave Segraves, TJAGLCS Criminal Law Faculty; Professor Geoffrey S. Corn, South Texas College of Law, and Professor Eric T. Jensen, Brigham Young University, J. Reuben Clark Law School; Professor Elizabeth L. "Liz" Lippy, Temple Law School; Dean Roger A. Fairfax, Jr., American University Washington College of Law; Associate Dean Lisa Schenck, The George Washington University Law School, and Professor David A. Schlueter, St. Mary's School of Law; the Hon. James E. Baker, Senior Judge, U.S. Court of Appeals for the Armed Forces, Professor, Syracuse University College of Law and the Maxwell School of Citizenship & Public Affairs, and Director, Institute for National Security and Counterterrorism; Colonel Winston Williams, Professor and Head of the Department of Law, U.S. Military Academy; Colonel Martin Mitchell, U.S. Air Force (Retired), Commissioner to Chief Judge Kevin A. Ohlson, United States Court of Appeals for the Armed Forces.

Kevin A. Ohlson
Chief Judge

John E. Sparks, Jr.
Judge

Gregory E. Maggs
Judge

Liam P. Hardy
Judge

APPENDIX A

SELECTED DECISIONS OF THE COURT

United States v. Simmons, 82 M.J. 134 [C.A.A.F. 2022]. The question in this case was whether a change to a charge and specification by amending dates of the offense was a *major* or a *minor* change. This determination required analysis of what constitutes “a [material] variance between the date of the offense charged and the date of the offense proven at . . . court-martial,” and whether this material variance misled the Appellant. The majority found that the amendment to the charge constituted a major change. R.C.M. 603 itself does not explain what degree of change would make it sufficiently likely that an accused would be misled as to violate the rule. The majority’s analysis rested on the Court’s precedents on interpreting the text of the statute. The dissent came to the alternate conclusion while also relying on the Court’s precedents. Neither the majority or dissenting opinions reflect either’s views on the proper level of discretion the Government should have to change the charge sheet late in a trial proceeding; it is Congress’ purview to amend the R.C.M. and provide clarity on this issue.

United States v. Beauge, 82 M.J. 157 [C.A.A.F. 2022]. The “duty-to-report” exception to psychotherapist-patient privilege specifies when the exception applies, but not in what manner and to what extent it vitiates the privilege. The Court found that the “duty-to-report” exception makes discoverable information required to be reported to state authorities, but that it alone does not make discoverable the underlying confidential communications. Determining the reach of the exception requires examining the broader context of the rule and balancing the interests of the victim, the accused, and the military. The Executive strictly limited disclosure by indicating that it must be narrowly tailored to only the specific records or communications and not be viewed as a unitary whole. M.R.E. 510(a) suggests that a privilege-holder’s voluntary disclosure of privileged matter results in waiver only if the disclosure amounts to a “significant part of the matter or communication,” and even then only where the disclosure is made “under such circumstances that it would be inappropriate to allow the claim of privilege.”

United States v. Mellette, 82 M.J. ___ [C.A.A.F. 2022]. The question in this case was whether “communication[s]” in rule M.R.E. 513(a) should be interpreted narrowly to

exclude medical records and other similar evidence that does not constitute a confidential communication, or interpreted broadly to include all evidence that in some way reflects, or is derived from, confidential communications. The majority found that the rule should be interpreted narrowly, resting their opinion solely on the specific text of M.R.E. 513(a) and the Supreme Court’s mandate—and this Court’s own precedent—that states that evidentiary privileges “must be strictly construed.” Interpreting M.R.E. 513(a) broadly, the dissent concluded that the privilege covers diagnoses and treatments to the extent that they reveal communications between a patient and a psychotherapist for the purpose of diagnosing and treating the patient’s mental condition. Nothing precludes Congress from amending the language of M.R.E. 513(a) and expanding the patient-psychotherapist privilege.

United States v. Sigrah, 82 M.J. ___ [C.A.A.F. 2022]. The question in this case was whether the denial to strike testimony under R.C.M. 914 prejudiced Appellant. In this case, the R.C.M. 914 error infringed on a procedural right and had a substantial influence on the findings. The majority of judges found R.C.M. 914 to be ill-suited for handling cases in which the statements were once in the Government’s possession but are not currently in its possession, as the statute does not provide the military judges with guidance.

United States v. Richard, __ M.J. ___ [C.A.A.F. 2022]. The question in this case was whether the Appellant’s conduct prejudiced “good order and discipline.” The “good order and discipline” standard has avoided precise definition, either by Congress, the judiciary, or the President. Every element of a criminal offense must be proven beyond a reasonable doubt and cannot be conclusively presumed based on the accused’s conduct. Relying on an early military definition, the Court found that the evidence admitted at trial was legally insufficient to show that the Appellant’s conduct prejudiced “good order and discipline” within the military. It is the purview of Congress to provide clarity on what it means to prejudice “good order and discipline.”

APPENDIX B

USCAAF STATISTICAL REPORT
OCTOBER 2021 TERM OF COURT

CUMULATIVE SUMMARY

CUMULATIVE PENDING OCTOBER 1, 2021

Master Docket	24
Petition Docket	49
Miscellaneous Docket	<u>1</u>
TOTAL	74

CUMULATIVE FILINGS

Master Docket	30
Petition Docket	287
Miscellaneous Docket	<u>11</u>
TOTAL	328

CUMULATIVE DISPOSITIONS

Master Docket	37
Petition Docket	287
Miscellaneous Docket	<u>10</u>
TOTAL	334

CUMULATIVE PENDING OCTOBER 1, 2022

Master Docket	17
Petition Docket	49
Miscellaneous Docket	<u>2</u>
TOTAL	68

OPINION SUMMARY

<u>CATEGORY</u>	<u>SIGNED</u>	<u>PER CURIAM</u>	<u>MEM/ORDER</u>	<u>TOTAL</u>
Master Docket	23	2	12	37
Petition Docket	0	0	287	287
Miscellaneous Docket	<u>0</u>	<u>0</u>	<u>10</u>	<u>10</u>
TOTAL	23	2	309	334

MASTER DOCKET SUMMARY

PENDING AT BEGINNING OF TERM	24
FILINGS	
Petition granted from the Petition Docket	29
Certificates filed	1
Mandatory appeals filed	0
Remanded/Returned cases	<u>0</u>
TOTAL	30
DISPOSITIONS	
Affirmed	21
Reversed in whole or in part	10
Certificates dismissed	0
Other	<u>6</u>
TOTAL	37
PENDING AT END OF TERM	
Awaiting briefs	2
Awaiting oral argument	10
Awaiting lead case decision (trailer cases)	4
Awaiting final action	<u>1</u>
TOTAL	17

PETITION DOCKET SUMMARY

PENDING AT BEGINNING OF TERM	49
FILINGS	
Petitions for grant of review filed	287
Petitions for new trial filed	0
Returned cases	<u>0</u>
TOTAL	287
DISPOSITIONS	
Petitions for grant of review denied	252
Petitions for grant of review granted	29
Petitions for grant of review withdrawn	3

Petitions for grant of review dismissed	<u>3</u>
TOTAL	287

PENDING AT END OF TERM

Awaiting pleadings	11
Awaiting staff review	24
Awaiting final action	<u>14</u>
TOTAL	49

MISCELLANEOUS DOCKET SUMMARY

PENDING AT BEGINNING OF TERM	1
------------------------------	---

FILINGS

Writ appeals sought	4
Writs of habeas corpus sought	1
Writs of coram nobis sought	2
Other extraordinary relief sought	<u>4</u>
TOTAL	11

DISPOSITIONS

Petitions or appeals denied	7
Petitions or appeals granted	0
Petitions or appeals dismissed	3
Petitions or appeals withdrawn	<u>0</u>
TOTAL	10

PENDING AT END OF TERM

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

PETITIONS FOR RECONSIDERATION

ALL CASES

Begin pending	4
Filed	<u>10</u>
TOTAL	14

DISPOSITIONS

Denied	6
Granted	4
Dismissed	<u>2</u>
TOTAL	12

End Pending 2

MOTIONS

ALL MOTIONS

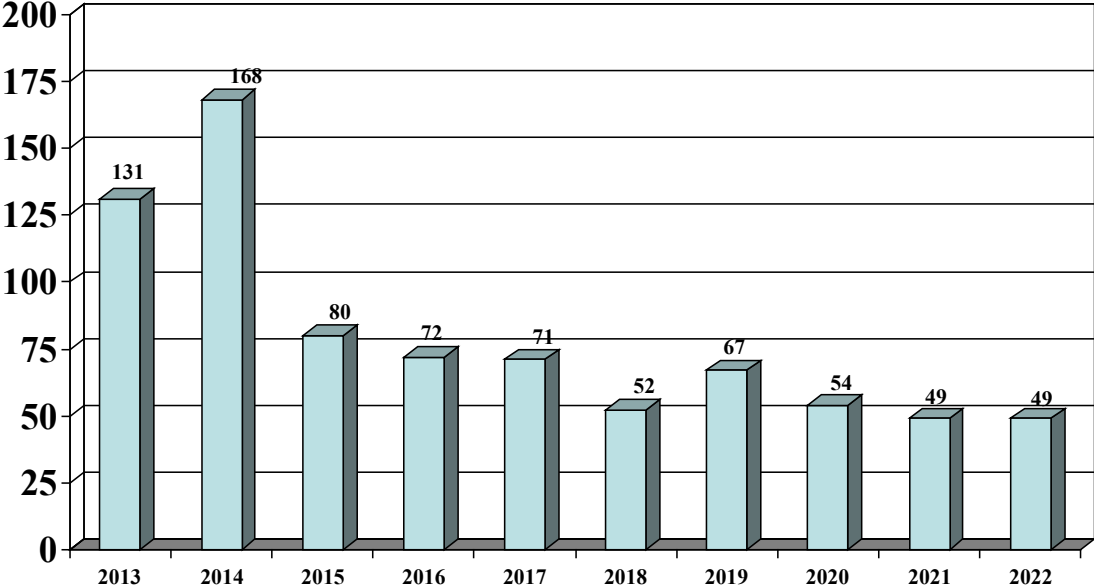
Begin pending	4
Filed	<u>311</u>
TOTAL	315

DISPOSITIONS

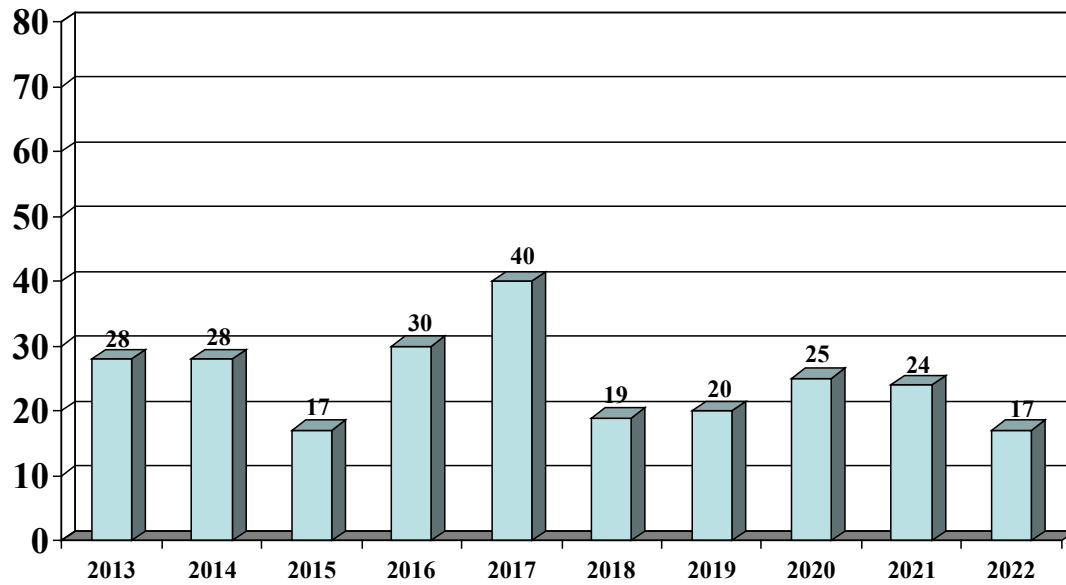
Granted	272
Denied	37
Dismissed	<u>2</u>
TOTAL	311

End Pending 4

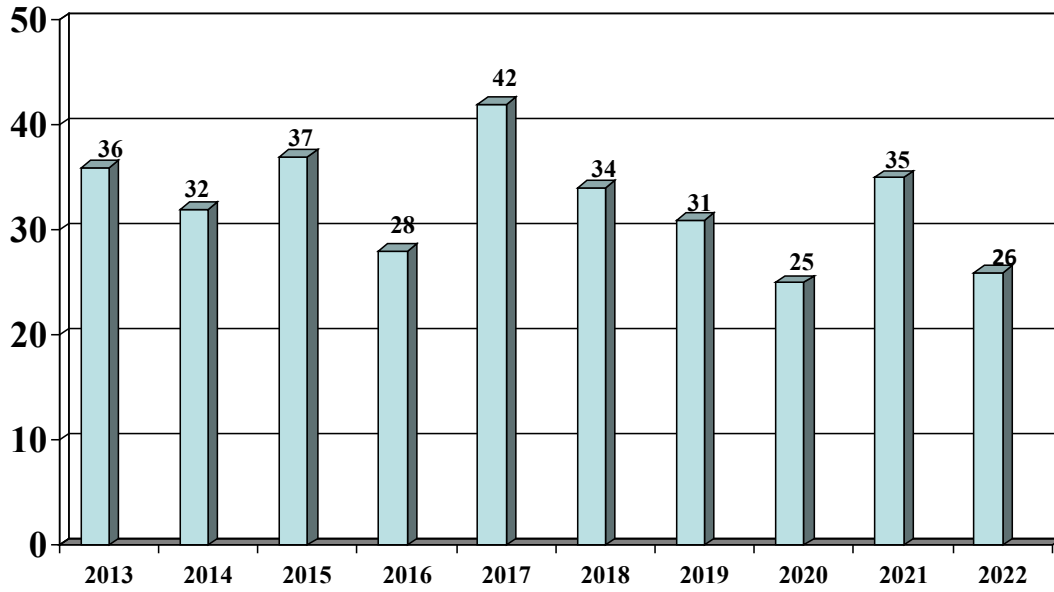
Petitions Pending at End of Term



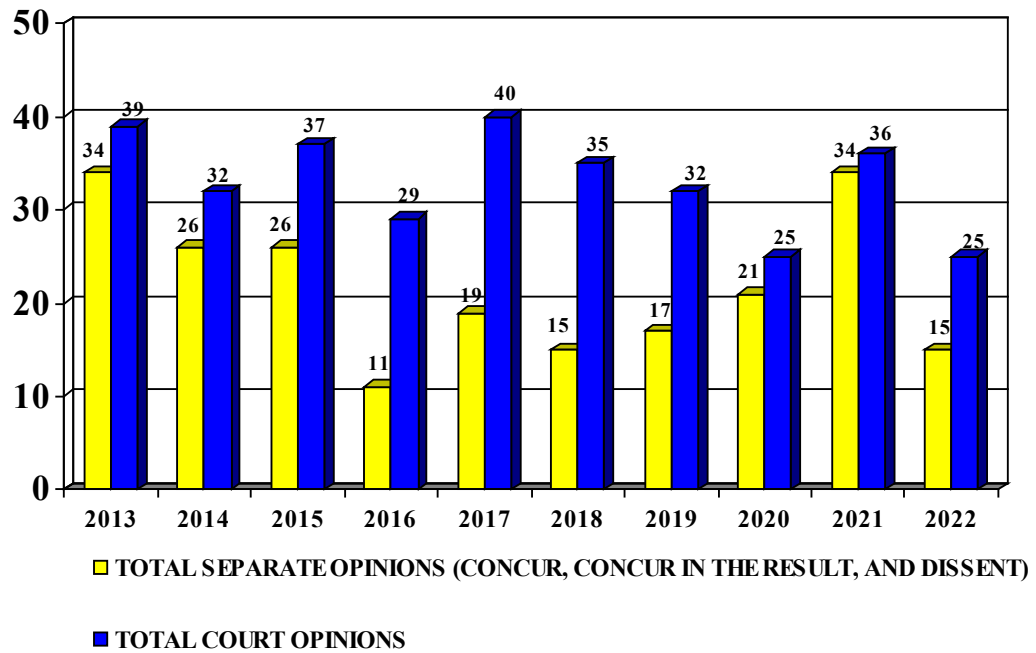
Master Docket Cases Pending at End of Term



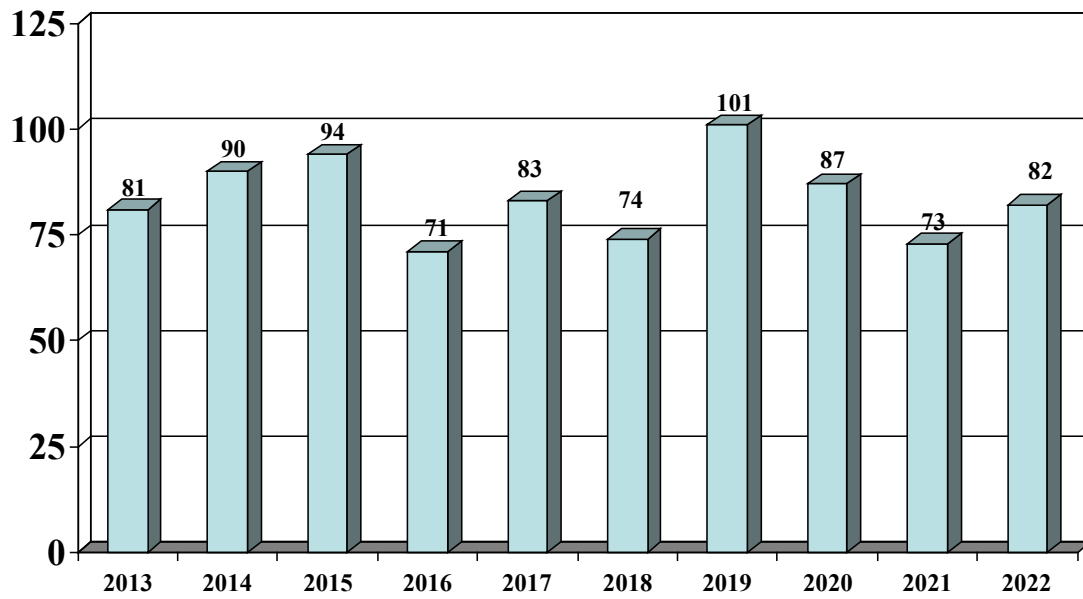
Oral Arguments Per Year



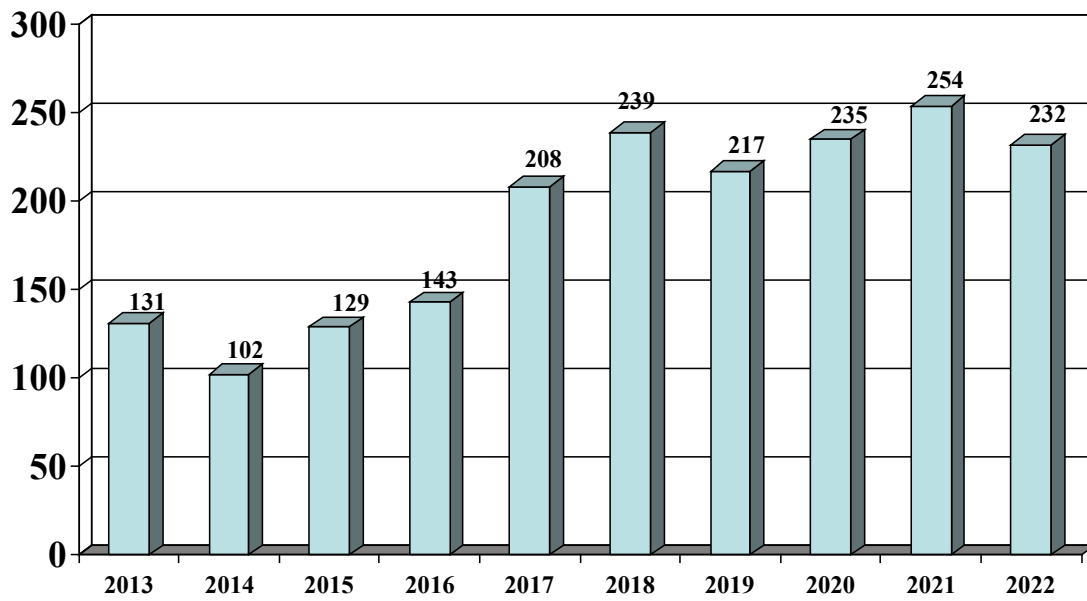
Total Opinions Per Year



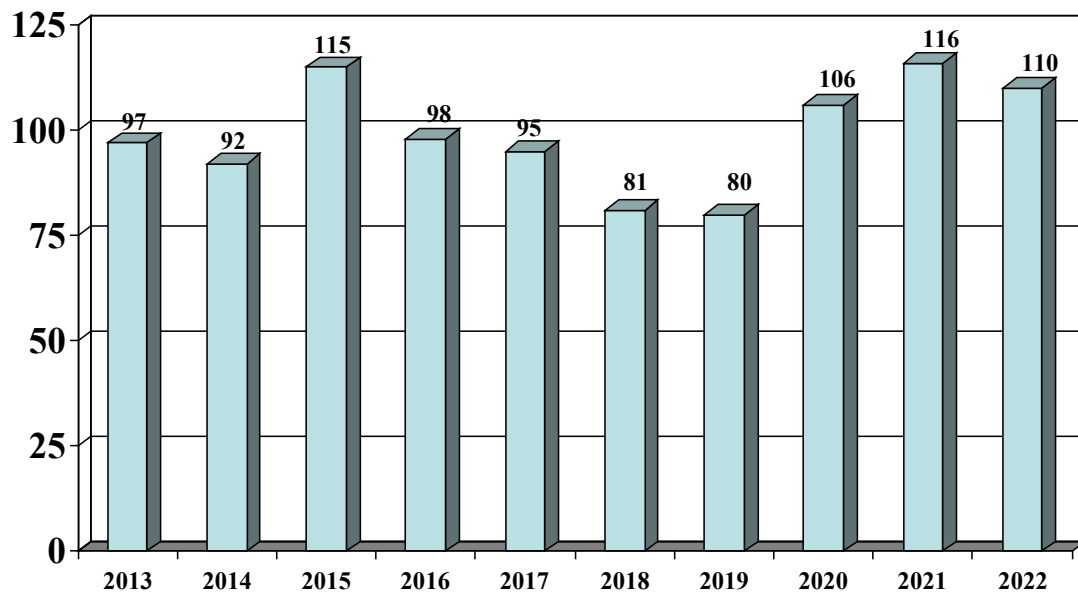
Days from Petition Filing to Grant



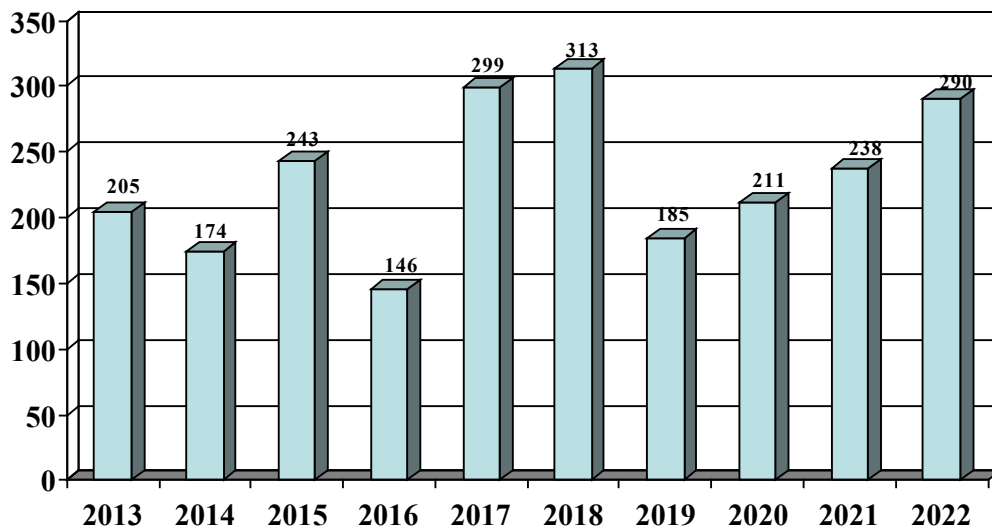
Days from Petition Filing to Oral Argument



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

