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S. HRG. 112–217

PROVIDING LEGAL SERVICES BY MEMBERS OF THE JUDGE ADVOCATE GENERALS' CORPS

HEARING

BEFORE THE

SUBCOMMITTEE ON PERSONNEL

OF THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

JULY 20, 2011

Printed for the use of the Committee on Armed Services

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PROVIDING LEGAL SERVICES BY MEMBERS OF THE JUDGE ADVOCATE GENERALS' CORPS

WEDNESDAY, JULY 20, 2011

U.S. SENATE,
SUBCOMMITTEE ON PERSONNEL,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:27 p.m., in room SR–232A, Russell Senate Office Building, Senator Jim Webb (chairman) presiding.

Committee members present: Senators Webb, Hagan, Blumenthal, Brown, Ayotte, and Graham.

Committee staff members present: Richard D. DeBobes, staff director; Leah C. Brewer, nominations and hearings clerk; and Jennifer L. Stoker, security clerk.

Majority staff members present: Jonathan D. Clark, counsel; Gabriella E. Fahrer, counsel; Gerald J. Leeling, counsel; Peter K. Levine, general counsel; and Jason W. Maroney, counsel.

Minority staff members present: Diana G. Tabler, professional staff member; and Richard F. Walsh, minority counsel.

Staff assistants present: Jennifer R. Knowles and Breon N. Wells.

Committee members' assistants present: Gordon Peterson, assistant to Senator Webb; Ethan Saxon, assistant to Senator Blumenthal; Charles Prosch, assistant to Senator Brown; Brad Bowman, assistant to Senator Ayotte; and Andrew King and Sergio Sarkany, assistants to Senator Graham.

OPENING STATEMENT OF SENATOR JIM WEBB, CHAIRMAN

Senator WEBB. The hearing will come to order.

Let me begin by apologizing for the delay here. We normally would have started much earlier. But this is a hearing that was requested by Senator Graham, and he has apparently been held up for a while. I hope he will show up in all due time.

I didn't want to delay this hearing any longer by taking that risk. So we will go ahead and begin, and then hopefully, Senator Graham will be joining us soon.

The subcommittee meets today to receive testimony on legal services provided by members of the Judge Advocate Generals' (JAG) Corps. As I mentioned, we are holding this oversight hearing at the request of Senator Graham. He has been a champion of the military legal community for some time.

As one who has a rich appreciation for the critical role that our uniformed members of the JAG community perform, I would like

to express my appreciation to him for all the work that he has done and also for his requesting this hearing.

Many individuals outside the military associate JAGs solely with military justice. JAGs do play a significant role in administering and supervising the military justice system, which is inextricably linked to a commander's responsibility for maintaining good order and discipline. However, this is not the only important function of JAGs.

As the independent panel that reviewed the judge advocate requirements of the Navy and Marine Corps pointed out, "The demand for judge advocate support will continue unabated, driven by the increasing complexity and intensity of the legal and policy environment in which commanders are required to operate."

In addition to military justice requirements, the panel examined substantial and increasing operational law requirements of the Navy and Marine Corps, the requirements for judge advocates with litigation experience to support military commissions charged with trying detainees for violations of the law of war, and the new requirements for judge advocate support for the integrated disability evaluation system.

JAG officers also are important players in addressing the legal complexities of defense contracting and acquisition programs that cost billions of dollars.

One motivation for this hearing is the committee's longstanding concern about a series of appellate court decisions critical of the post-trial processes of the Navy and Marine Corps, addressing the denial of due process for defendants in those cases. Despite assurances that these problems were being addressed, they persisted, culminating in the case of *United States* v. *Foster*. This case is perhaps the most egregious example of how bad a system can get without proper accountability.

Sergeant Foster was convicted of domestic rape in December 1999. His record of trial languished in the Navy and Marine Corps appellate process until February 2009, when the Navy-Marine Corps Court of Criminal Appeals overturned his conviction because the conviction "could not withstand the test for legal and factual sufficiency."

Sergeant Foster spent more than 9 years in confinement awaiting the automatic appellate review of his case, a review that ultimately concluded that the conviction was not supportable. The court described the evidence of rape as "anemic at best" and concluded, "We have determined that Sergeant Foster's conviction for rape was improper, as the Government did not establish his guilt. Therefore, the appellant has served nearly 10 years of confinement in part for an offense of which he should not have been convicted."

The court also said, "We find the delay in this case so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." In short, Sergeant Foster experienced a travesty of justice.

As a result, the committee concluded that it could no longer rely on promises from the Department of the Navy to improve its system and reacted by requiring the Department of Defense (DOD) Inspector General (IG) to review the systems, policies, and procedures

currently in use to ensure timely and legally sufficient post-trial reviews of courts-martial within the Department of the Navy.

The DOD IG report will be included in the record of this hearing.

[The information referred to follows:]

IPO2010E003 December 10, 2010

Inspector General
United States Department of Defense

Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy

Additional Information and Copies

The Department of Defense Office of the Deputy Inspector General for Policy and Oversight, Assistant Inspector General for Investigative Policy and Oversight, prepared this report. If you have questions or would like to obtain additional copies, contact Ms. Melvina Coakley at (703) 604-8622 (DSN 664-8622).

Suggestions for Evaluations

To suggest ideas for or to request future evaluations, contact the Office of the Deputy Inspector General for Auditing at (703) 604-9142 (DSN 664-9142) or fax (703) 604-8932. Ideas and requests can also be mailed to:

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DEC 10 2010

MEMORANDUM FOR SECRETARY OF THE NAVY

SUBJECT: Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy (Report No. IPO2010E003)

This final report is provided for your review and comment. Your comments on the previous draft report were considered in finalizing the report and are included verbatim in the final report. Management comments on the recommendations are summarized and discussed in connection with individual recommendations.

You generally concurred with the draft and included technical/factual corrections and updates, which were incorporated. However, the final report reflects several continuing disagreements. We specifically request your comments on these disagreements. Please ensure we receive your comments on this final report within 30 days. Submit your comments electronically to melvina.coakley@dodig.mil.

We appreciate the courtesies extended to the review staff. For additional information or for any questions you may have, please contact me at (703) 604-8300 or have your staff contact Ms. Melvina Coakley, (703) 604-8622. You may also contact Mr. John Perryman, Director of Oversight, at (703) 604-8765.

Gordon S. Heddell

Gordon S. Heddell

cc:
Judge Advocate General of the Navy
SJA to the Commandant, USMC

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Evaluation of Post-Trial Reviews of Courts-Martial Within the Department of the Navy (Report No. IPO2010E003)

I. INTRODUCTION AND SUMMARY

In its "Report on the National Defense Authorization Act for 2010," the Senate Armed Services Committee directed the DoDIG to review the systems, policies and procedures for post-trial review of courts-martial in the Department of the Navy (DON) and to assess their adequacy (see Appendix A). We announced the review on November 4, 2009. After assembling a team with the required expertise, we began field work in February 2010, focusing on the following specific objectives:

- the history of Navy and Marine Corps problems and attempted corrections since 1990 to ensure the appellate review process for general and special courts-martial met legal standards;
- whether current systems, procedures and policies ensure timely and legally sufficient post-trial courts-martial reviews within the Navy and Marine Corps; and
- whether Navy and Marine Corps resources devoted to post-trial processes, information and tracking systems, procedures and policies, and monitoring/supervision are adequate to meet due process requirements under the Uniform Code of Military Justice and case law.

The post-trial process begins immediately after a court-martial concludes. The specific actions (type and number) entailed in the process are determined by whether the accused was convicted and, if so, the sentence imposed. Appendix B is a flow chart showing major legal steps in the post-trial process.

For this review, we focused on the most expansive post-trial processing and review requirements—those triggered when a special or general court-martial conviction results in 1 year or more in confinement, a punitive discharge, or death. In each such case:

- the trial counsel must ensure preparation of a verbatim record of trial, which the military judge authenticates;
- the accused, usually through defense counsel, may challenge the court-martial results and/or submit matters involving clemency;
- the staff judge advocate must review the case and prepare a recommendation for action by the convening authority (a commander empowered to convene a court-martial);
- the convening authority must take action approving, modifying, mitigating, or setting aside the findings and/or sentence;
- the staff judge advocate must prepare orders executing the convening authority's action; and
- the entire record of trial and associated documents must be sent to the Navy-Marine Corps Appellate Review Activity (NAMARA) for review, first by Appellate Defense and Appellate Government counsel and then for judicial review and decision by the Navy-Marine Corps Court of Criminal Appeals (the Court).

To evaluate the post-trial process, we reviewed the governing policy and requirements, organizational structures and alignments, and pertinent guidance from organizations such as the American Bar Association (ABA). We also examined previous reports with findings and recommendations related to Navy appellate reviews. In addition, we met with officials responsible for appellate reviews in the Navy and Marine Corps, including the Judge Advocate General of the Navy (Navy JAG) and the Staff Judge Advocate to the Commandant of the Marine Corps (Marine Corps SJA). For comparative purposes, we also met with Army and Air Force officials involved in their appellate review processes, and collected and reviewed information from them. We also visited various Navy and Marine Corps operating sites to view systems and processes, and interview responsible personnel. In total, we interviewed 71 officials in the Navy, Marine Corps, and other Services.

We determined that Navy JAGs have not fully accomplished their post-trial military justice mission as required in statute and regulation. There have been consistent failures in leadership, supervision and oversight at all organizational levels, impacting military justice in both the Navy and Marine Corps. The failures resulted in inadequate institutional vigilance to ensure process health and, in many instances, failures to exercise the diligence and competence required of legal professionals. Serious post-trial processing problems persisted for at least the last two decades, and some old Navy and Marine Corps cases with lengthy post-trial processing delays still find their way into the appellate courts.

Process failures occurred at almost every segment in the post-trial process. They resulted from inadequate leadership, supervision and oversight over organizations suffering from many policy and structural deficiencies, including:

- ineffective Navy and Marine Corps tracking systems and absent, or unenforced, processing timelines;
- inadequate policy prescribing expectations and standardized processes, procedures and checklists for processing courts-martial;
- decentralized organizational structures wherein every legal office or staff judge advocate functions independently without higher headquarters oversight or professional supervision; and
- ineffective inspections, which either did not detect/identify post-trial problems, or did not lead to sufficient or lasting corrective actions.

Over the last 3-4 years, many significant improvements have been instituted, including initiatives not yet completed, or still in planning or development stages. However, unless addressed appropriately, issues remain that could preclude enduring reform. The principal issues are summarized below.

A. Case Tracking and Management

Automated tracking systems for appellate cases have a long and troubled history in the Navy. The current Case Management, Tracking and Information System (CMTIS) was fielded in October 2006, substantial modifications were completed in May 2010, and additional modifications are ongoing. And, the Marine Corps has a separate case tracking system, the Case Management System (CMS), which was not fielded until February 2010. Although these

systems represent progress in recent years, Navy and Marine Corps managers and supervisors still do not have the visibility they need from automated systems to monitor case progress and timeliness across the post-trial process. Two months after our initial data call, the Navy was still struggling to provide needed case processing information. In comparison, the Army and Air Force were able to provide case processing information on request.

Some in the Navy JAG organization believe the current CMTIS and Marine Corps CMS have the capabilities needed to oversee the post-trial process and prevent problems from recurring. The CMTIS, however, still has significant problems with missing data (individual cases) and "lost" cases—partial case records "rolled-up" into CMTIS in 2006 and still not accounted for, or cases never included in CMTIS. One cause for the missing cases may be premature records destruction, which we were told was a routine practice in at least one Marine Corps installation until approximately 2006.[1]

B. Standards and Timelines

Some post-trial processing problems resulted from nonexistent or inadequate process standardization, guidelines, checklists, and responsibility assignments across the Navy and Marine Corps. In any organization, especially one as large as the combined Navy and Marine Corps, defined and published processes and performance standards are needed to ensure organizations operate properly, consistently and timely, despite personnel turnovers and the varying experience/expertise of assigned personnel. Although some officials interviewed identified the Uniform Code of Military Justice and Manual for Courts-Martial as their process guides, these overall guides are not sufficiently detailed to assure consistently good or timely post-trial processes.

In the last 3-4 years, the current leadership team has been attacking problems in the military justice system, but without published, institutionalized standards and requirements for both field and headquarters mission areas, this area remains a concern. This year's annual review of military justice administration in the Navy offers an opportunity to address this issue in greater detail.

C. Supervision and Oversight

We found few oversight or supervisory mechanisms embodied in policy or institutionalized processes, and very limited oversight capability existed historically. Only the Navy JAG and the Commander, Naval Legal Service Command, who is also the Deputy Navy JAG, have supervisory authority over Navy field activities and they have limited their oversight capabilities. Prior to the CMTIS deployment in 2006, Navy field activity performance could not be monitored and totally depended on individual staff judge advocate experience. An organization without effective oversight capability cannot ensure subordinate activities perform to acceptable standards.

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[1] A Reserve judge advocate assigned to deal with delay problems after *Moreno* told us he visited the Office of the Staff Judge Advocate at Quantico, VA, and discovered they had routinely disposed of case records at the 5 year mark applicable to general administrative files, not unique military justice records. According to this source, although this practice had been discontinued when he visited the site, several earlier cases had been destroyed based on the erroneous application.

Similarly, prior to the Marine Corps CMS fielding in February 2010, there was no effective way to monitor Marine Corps field activities. Marine Corps field offices do not have higher headquarters supervisory legal authority except for the Navy JAG, who historically has not exercised supervision or oversight over Marine Corps organizations. The Marine Corps SJA is a headquarters-level staff function without supervisory authority over field legal functions, except as the Secretary of the Navy, Commandant of the Marine Corps, or Navy JAG confers.[2] We believe the Marine Corps SJA should be empowered to exercise professional supervision over Marine judge advocates.

The current Navy JAG established the Military Justice Oversight Council in 2009, creating the first high-level oversight mechanism for military justice we could identify in the Navy. This council, which includes both the Navy JAG and Marine Corps SJA, has been meeting monthly to address issues in military justice and review progress in significant cases. In addition, each week, the Deputy Commander, Naval Legal Service Command, now reviews all cases with convening authority action dates more than 75 days old to deal with issues and assess process timeliness. This weekly review, however, depends on ad-hoc reports, is labor intensive, is not required in policy, and has not ensured all old cases were located or addressed.

D. Inspections

The Navy JAG has operated an inspection program for many years; however, the program did not prevent the problems leading to our review. In 2006-2007, the current Navy JAG (then the Commander, Naval Legal Service Command) substantially redesigned the existing military justice inspection system, which he believed had become ineffective. The new system envisioned better, more rigorous field performance assessments through Naval Legal Service Command case monitoring using CMTIS, field reports on high visibility litigation, surveys, and more limited inspections during field visits. However, due in large part to CMTIS shortcomings and not using subject matter experts to examine military justice administration in the field, the redesigned system did not deliver as expected. The Navy continued not to have the visibility over cases needed to manage the appellate process effectively. The current Navy JAG recognized the shortcomings and in June 2010, announced a new inspection program to require annual inspections, as well as subject matter experts on the inspection teams. He advised us about the changes in June 2010, when we met to describe our review findings.

Navy inspections have not included Marine Corps activities and prior to 2010, Marine Corps visits to field activities, which reportedly were conducted under the Commandant's inherent authority to manage the force, were designed to assess legal community "health" and address "command concerns," but were not thorough inspections based on inspection standards or checklists. In May 2010, the Marine Corps instituted a Commander-based inspection program for its Staff Judge Advocate Offices, Law Centers, and Legal Service Support Sections.

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[2] For example, under agreement between the Navy JAG and Commandant of the Marine Corps dating to 1999, the Marine Corps SJA has had some authority to conduct Article 6 visits/inspections at Marine Corps units, but apparently did not exercise the authority prior to 2010.

Without effective case monitoring as described above, coupled with inspections insufficient to identify problems in the field, the DON has not been in a position to ensure either effectiveness or timeliness in post-trial processes.[3]

E. Chief Defense Counsel

The Navy is the only Service without a Chief Defense Counsel, and does not have an office responsible for trial defense services Navy-wide. Consequently, no one organization or supervisory authority is developing policies or training programs tailored to the community's needs, or overseeing the competence, delivery, or efficiency of defense services in the field. Unique issues and challenges confronting the defense counsel community warrant this attention. Not having a functional head for defense counsel issues represents a significant leadership vacuum in defense practice.

F. Improvements Noted

According to the Navy JAG and other senior leaders we interviewed, the current leadership team is committed to fixing the problems in the Navy and Marine Corps. Before this review, they had completed many initiatives and had many others underway or planned. The leadership team, including the Assistant Judge Advocate General for Military Justice (Code 02) and individual leaders in NAMARA and the Court, are all qualified, motivated and committed to improving quality in military justice administration and litigation practice in the Navy and Marine Corps. They labored to improve operating practices, developing tracking and other mechanisms to gain visibility over cases they could not attain through the Navy's official case tracking system. Assisted by declining caseloads and staffing surges beginning in 2004, they eliminated an immense case backlog. Significant improvements contributing to this result included:

- In 2007, at Navy JAG request, the Secretary of the Navy created a new Chief Judge of the Navy position, which should improve quality and performance in both the Trial and Appellate Judiciary.

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[3] In commenting on the draft report, the Navy JAG disagreed with our overall assessment:

> Navy post-trial processing has steadily improved as a result of delegating responsibility to . . . [Region Legal Service Office] Commanding Officers and holding them accountable to ensure post-trial processing compliance. Of cases tried after the *Moreno* case's effective date (10 June 2006), *no* Navy or Marine Corps case has required relief for unreasonable post-trial delay by either the . . . [Court] or the . . . [Court of Appeals for the Armed Forces]. That is a reflection of the improvement in timeliness at every segment of post-trial processing. The average time from sentencing to convening authority's action in FY07 (the first year for which CMTIS has complete data) was 93 days - already within the *Moreno* guidelines issued the year before. The average time for this segment of the post-trial process declined further by FY10 to 83 days. In fact, every year since *Moreno*, the average time from sentencing to convening authority's action has remained well below the 120 days permitted by the established guidelines. The average time from the convening authority's action to receipt for docketing has also fallen from a high of 69 days in FY 07 to 14 days in FY 10 -less than half of the *Moreno* guideline. Of those cases docketed after the *Moreno* case's effective date in 2006, only ten Navy or Marine Corps cases exceeded 18 months from docketing to decision by the NMCCA.

This level of specificity was not available from the Navy when we completed our field work. As discussed in this report, data inaccuracies and limitations in CMTIS prevented this type determination. In addition, neither CMTIS, the ad-hoc systems implemented to gain visibility over cases in the field, nor the quarterly "audits" conducted to identify lost/missing appellate cases prevented surprise when the *Bartolo case* surfaced during our review.

- In 2009, the Navy JAG established a new Judicial Screening Board process, which should enhance competence and credibility in judges assigned to the Court.
- In 2009, to help assure needed continuity and expertise, the Navy JAG civilianized the Deputy Director positions in the Appellate Defense and Appellate Government Divisions—the individuals in these positions will be critical in managing workload and staff, identifying caseload surge indicators, and securing resources and support to prevent backlogs from recurring.
- In 2009, the Navy published the first-ever policy for the Court [Judge Advocate General Instruction (JAGINST) 5814.1, "Navy-Marine Corps Court of Criminal Appeals," August 3, 2009], and new "Rules of Practice and Procedure Including Internal Operating Procedures" (effective February 1, 2010), providing some much needed standardization.
- Following the "Report on the State of Navy Military Justice," July 1, 2009 (the O'Toole report), the Navy JAG committed to reviewing annually the state of military justice in the Navy—these annual reviews should help improve effectiveness in both existing and new processes/programs, but the Marine Corps should be included in the reviews. Similarly, the recently-adopted Military Justice Oversight Council, which the Navy JAG chairs, is an important step in establishing the higher-headquarters supervisory review and oversight lacking historically.

Current staffing in the appellate divisions and Court appears sufficient to maintain timely processing, if current case levels continue. However, the appellate divisions and Court could not accomplish their day-to-day missions without substantial Reserve support. Assignment selection policies should be tailored to assure a well-qualified active duty complement, as well as a ready Reserve resource, for these divisions and the Court.

G. Recommendations

Section VI. of this report includes our detailed recommendations to address these principal issues and others identified in the review.

Upon completing our review, we issued a draft report with 16 recommendations for improvement in DON post-trial processing. The DON concurred with 14 recommendations and concurred in part with 2 recommendations.[4] The comments on recommendations are described and addressed in Section VI. Section VII is the complete DON response to the draft report.

II. BACKGROUND

A. Senate Armed Services Committee Concern

In *Toohey v. United States*, 60 M.J. 100 (C.A.A.F. 2004), the U. S. Court of Appeals for the Armed Forces established standards for assessing whether convicted Service members had been denied due process under the Fifth Amendment to the Constitution as a result of being denied timely processing of their appellate cases. Since then, a succession of Navy and Marine Corps

[4] In finalizing the report, we consolidated two recommendations into others to avoid overlap/redundancy.

cases have addressed extremely lengthy delays in appellate reviews.[5] In *United States v. Foster* (N.M.C.C.A. No. 200101955, February 17, 2009), a Marine's conviction for domestic rape was set aside because the conviction "could not withstand the test for legal and factual sufficiency." Foster had been confined for more than 9 years awaiting his automatic appellate review when his conviction was overturned.

According to the Senate Armed Services Committee:

> *. . . These cases demonstrate that cognizant legal authorities in the Department of the Navy have not taken necessary and appropriate steps to ensure that the resources, command attention, and necessary supervision have been devoted to the task of ensuring that the Navy and Marine Corps post-trial military justice system functions properly in all cases. . . .*

B. Uniform Code of Military Justice

The Uniform Code of Military Justice, 10 U.S.C. §§ 801-946, is the statutory foundation for the criminal justice system in the U.S. Armed Forces. The Uniform Code of Military Justice contains the non-judicial and judicial structures by which military members are disciplined for criminal misconduct. The punitive articles contained in §§ 877-934 (Articles 77 through 134) constitute the criminal code promulgated pursuant to the Congress' constitutional authority to make rules for regulating land and naval forces.

Courts-martial are the military forum for criminal trials and are conducted pursuant to provisions in the Uniform Code of Military Justice, as amplified in the Manual for Courts-Martial, promulgated by presidential Executive Order. As compared to civilian Federal courts, military courts have procedural differences to accommodate a highly-mobile military organization that must carry its code worldwide and function in austere and remote circumstances.

The military commander, who is the cornerstone of the military justice system, is responsible for building an effective, well-disciplined force and must possess authority to assure discipline. When a Service member commits a crime, a commander (one specifically designated as a convening authority) decides whether to convene a court-martial and send a person to trial (referral).

If the trial results in a conviction, the convening authority reviews the case and takes action on the findings and sentence. If the approved sentence includes death, dismissal of an officer, dishonorable discharge, bad-conduct discharge, or confinement for 1 year or more, the cognizant Service court of criminal appeals reviews the case.

In the Department of the Navy, the Navy-Marine Corps Court of Criminal Appeals fulfills this first-level appellate review function. Service courts of criminal appeals review cases for legal error, factual sufficiency, and sentence appropriateness. Senior military lawyers serve as judges

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[5] These cases include *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005); *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006); *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006); *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); and most recently, the unpublished *Foster* case.

on these appeals courts. Service Judge Advocates General review, for error, those cases involving less severe sentences arising from general court-martial convictions.

After a Service court of criminal appeals review, a convicted Service member may petition the U.S. Court of Appeals for the Armed Forces for further review. Unless the sentence extends to death, the Court of Appeals for the Armed Forces has discretion to grant or deny the additional appellate review. Review is required in a death case.

Five civilian judges, without fact-finding authority, comprise the U.S. Court of Appeals for the Armed Forces. If unsuccessful in the military courts, the convicted Service member may petition the U.S. Supreme Court to review the conviction. U.S. Supreme Court reviews are rare.

A convicted Service member is entitled by law to receive legal assistance and representation from a military appellate defense counsel, without cost, before a Service court of criminal appeals, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court. The Service member may also retain a civilian attorney, at personal expense.

C. Military Justice Organization

Under Secretary of the Navy Instruction (SECNAVINST) 5430.27C, "Responsibility of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps for Supervision and Provision of Certain Legal Services," April 17, 2009, the Navy JAG:

> *. . . is responsible for providing and supervising the provision of legal advice and related services throughout the Department of the Navy in the following areas:*
>
> *a. Military Justice. The JAG is responsible for the military justice function within the Department of the Navy. The military justice function includes, but is not limited to, the implementation, execution, management, and oversight of the military criminal justice system at the trial and appellate levels. In performing this function, the JAG has primary responsibility for military justice matters within the Navy, including: inspecting Naval Legal Service Command legal offices; certifying military judges for practice on the bench; certifying trial and defense counsel for practice in military courts-martial; taking action in certain courts-martial if the convening authority fails to do so; receiving records of trial from military courts-martial; establishing and staffing the Navy and Marine Corps Court of Criminal Appeals; and ordering review of certain cases by the Court of Appeals for the Armed Forces. . .*

The Navy JAG and Marine Corps organizational structures are shown in Appendix C. Their field and appellate-level organizations involved in military justice are described in Appendix D.

III. SCOPE

To assist us in evaluating the post-trial processes, systems and procedures (past and present) for courts-martial in the DON, we retained the services (temporary appointment) of a retired Brigadier General from the Air Force Judge Advocate General Corps who had served as a defense counsel, government counsel, and judge advocate at all organizational and command levels. We then reviewed the governing DoD and Service policy and other guidance documents, organizational structures and alignments, and other pertinent requirements or guidance from organizations such as the ABA. We also reviewed previous reports with findings and recommendations related to Navy and Marine Corps appellate reviews.

We met with the Navy JAG, Marine Corps SJA, their senior staffs, and various other Navy and Marine Corps officials involved in appellate reviews in the DON. For comparative purposes, we also met with Army and Air Force officials involved in their appellate reviews, and collected and reviewed information from them.

In addition, we visited various Navy and Marine Corps operating sites, including division heads and staffs at the Washington Navy Yard, the Pentagon, the Navy Region Legal Service Offices in Norfolk, Virginia, and San Diego, California, the Marine Corps Joint Law Center at Quantico, Virginia, and Marine Corps Legal Services Support Sections at Camp LeJeune, North Carolina, and Camp Pendelton, California. In total, we interviewed 71 officials in the Navy, Marine Corps, and other Services.

IV. FINDINGS AND ANALYSIS

A. Summary of Problems and Attempted Corrections

Serious post-trial processing problems have persisted in the Navy and Marine Corps for at least two decades. Some old post-trial delay cases still find their way to the appellate court. Although the current data are inadequate to determine the extent to which old cases will continue arriving at the Court, the data indicate a continuation is likely.

1. Standards

a. U. S. Constitution

The 5th Amendment to the Constitution provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." The U.S. Court of Appeals for the Armed Forces has interpreted this provision as extending to post-trial processing delays in courts-martial.

b. Courts-Martial

The Uniform Code of Military Justice (10 U.S.C. § 801 *et seq.*) and its promulgating Executive Order, the Manual for Courts-Martial, set forth the requirements and procedures for post-trial processing. These documents prescribe few specific timelines for post-trial processing, and those prescribed generally address defense counsel's duty to respond. There are occasional, non-directive exhortations in discussion sections to act "promptly" (e.g., provide written notice of findings and sentence, R.C.M. 502 (d)(5) in *Discussion (F)*), but there is no specified entitlement

to speedy post-trial processing. However, the U.S. Court of Appeals for the Armed Forces (formerly the U.S. Court of Military Appeals) has interpreted Articles 66 and 70, Uniform Code of Military Justice, as affording appellants a right to timely review and to defense counsel able to represent them in both a competent and timely manner before the court of criminal appeals (see *Diaz,* infra).

c. Professional Responsibility

Each state bar association publishes rules of professional responsibility governing the professional conduct of all attorneys licensed by the state. Failure to adhere to these rules can result in suspension or disbarment from practicing law in the state.

Over the years, the ABA has developed and published model Codes or Rules for Professional Responsibility. These rules assist state licensing authorities in formulating their rules of practice. There is also an ABA Model Code of Judicial Conduct pertaining specifically to judicial activity, which has been widely adopted.

Additionally, each Military Department has regulations detailing rules of professional responsibility to govern the practice of law by all uniformed and civilian attorneys working within the judge advocate corps or department. Furthermore, for military judges, the Army and Air Force have Service-specific Codes of Judicial conduct. The DON does not have a department-specific code, but has adopted the ABA's Code of Judicial Conduct for the Court.

A Service attorney is governed by the rules of the state of licensure and the employing military Service. Although there are periodic changes in these rules, for periods assessed in this review, they have always imposed a duty on counsel to act diligently to promote fair and efficient administration of justice. A list of important professional responsibility requirements relevant to this review are summarized in Appendix F.

d. Case Law

Many standards pertinent to administering military justice emanate from military and U.S. Supreme Court decisions. These decisions are binding on the Services, which are required to comply. Three important decisions are summarized below:

(1) ***Dunlap v. Convening Authority***, 48 C.M.R. 751 (1974) (Army case): The then U.S. Court of Military Appeals tackled the problem of post-trial delay by imposing a rule presuming a denial of speedy disposition when an accused was continuously confined after trial and the convening authority did not promulgate final action within 90 days. Failure to comply with this standard resulted in automatic dismissal of charges unless the Government could demonstrate diligence.

The court noted delays in convening authority actions had been the subject of critical court comments for a number of years. The court stated "Congress has commanded timeliness of proceedings not only for the pretrial stages of the courts-martial processes and the trial, but also in the appellate process. . . . Years of experience have demonstrated the need for a guideline as to the timeliness of the convening authority's action when the accused is continued or placed in arrest or confinement after conviction by the court-martial."

This 90 day rule became the established standard until its 1979 rescission in *U.S. v. Banks*, 7 M.J. 92 (C.M.A. 1979). In *Banks,* the Court reiterated the importance of timeliness in post-trial review, but concluded process improvements had eliminated the need for the inflexible 90 day rule imposed in *Dunlap*.

(2) ***Diaz v. Judge Advocate General of the Navy,*** 59 M.J. 34 (C.A.A.F. 2003) (Navy case): The U.S. Court of Appeals for the Armed Forces determined that an accused has a 5th Amendment due process right and an Article 66, Uniform Code of Military Justice, right to timely review of the findings and sentence at all stages of the proceeding. Furthermore, the Government has a statutory obligation under Article 70, Uniform Code of Military Justice, to provide appellants with counsel who can represent them in both a competent and timely manner.

(3) ***U.S. v. Moreno***, 63 M.J. 129 (C.A.A.F. 2006) *(*Marine Corps case*)*: A host of military appellate court decisions in the last several decades addressed post-trial processing delay problems. Although all the Services had cases with unacceptably long delays, the Navy and Marine Corps experienced consistently more difficulty in correcting the systemic practices causing the delays. Consequently, in 2006, the U.S. Court of Appeals for the Armed Forces established standards for measuring post-trial processing delays to determine whether a delay was unreasonable and whether the appellant was prejudiced thereby.

In *Moreno,* the Court, frustrated by years of unheeded warnings, declared it would "apply a presumption of unreasonable delay" whenever:

- the action of the convening authority is not taken within 120 days of the completion of trial;
- the record of trial is not docketed by the Service Court of Criminal Appeals within 30 days of the convening authority's action; or
- appellate review is not completed and a decision is not rendered within 18 months of docketing the case before the court of criminal appeals.

In announcing its decision, the U.S. Court of Appeals for the Armed Forces was clear that administrative, manpower and workload factors were not acceptable factors excusing delay and did not "trump the Article 66 and due process rights of appellants." The U.S. Court of Appeals for the Armed Forces was also clear it expected convening authorities, reviewing authorities, and courts of criminal appeal to document the reasons for delay and exercise the institutional vigilance absent in *Moreno*.

These *Moreno* timelines are the primary standards the Navy and Marine Corps currently use to measure timeliness in post-trial processing.

e. Policy

Relevant policy and requirements are listed in Appendix G.

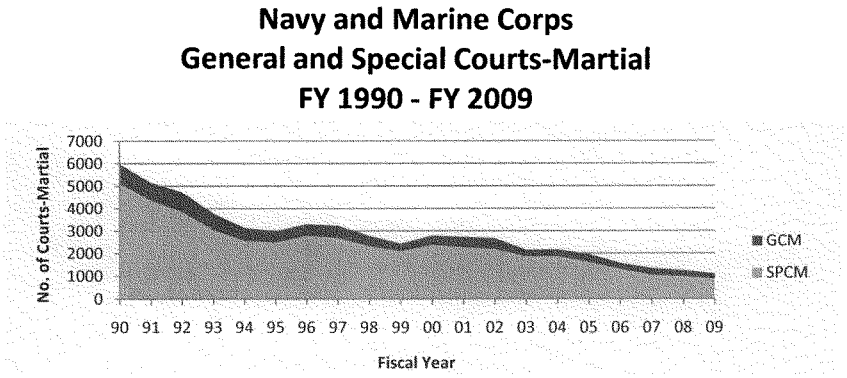
2. Facts

There is no reliable database or reporting system to identify or assess either the nature or extent of the DON's post-trial processing problems, either historically or currently. Information from automated systems pre-dating the 2006 CMTIS was generally unavailable or unreliable, and many data points could not be provided for our review. Additionally, the Navy used several different systems since 1980, and the Navy and Marine Corps continue to use different systems. The Marine Corps system did not provide any headquarters-level visibility until late 2009, and information was not reliable until the modified CMS was fielded in February 2010.

Article 146, Uniform Code of Military Justice, establishes a committee to meet annually and survey Uniform Code of Military Justice operations. The Committee is composed of judges from the U.S. Court of Appeals for the Armed Forces, the Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, the Marine Corps SJA, and two members of the public, which the Secretary of Defense appoints. The resulting Annual Reports of the Code Committee on Military Justice are published and are available on the web. The military justice data in these reports is the most complete, reliable information on historical performance available for the Navy and Marine Corps.

Appendix H is based on these annual reports and shows the numbers of courts-martial within the DoD, by Service and in total, for Fiscal Years 1990 through 2009 (the past 20 fiscal years). Appendix H also shows the numbers of records of trial that the Service courts of appeal received, by Service and in total, and the cases they reviewed, by Service and in total, during the 20 years.

As can be seen in Appendix H, over the 20 years, the Navy and Marine Corps accounted for over 61 percent of the total DoD courts-martial, and over 56 percent of the total DoD appellate cases reviewed. Over the 20 years, the Navy and Marine Corps also accounted for over 56 percent of the total general and special courts-martial conducted in the DoD. The graph below shows the trend in general and special courts-martial in the Navy and Marine Corps.



As can be seen above, the number of general and special courts-martial declined significantly, from 5,999 in FY 1990 to 1,112 in FY 2009. The decline was relatively steady over the years, although there were slight "bubble" increases in FYs 1996-1997, FYs 2000-2002, and FY 2004.

The general and special courts-martial involved in our review were those resulting in convictions in which the accused was sentenced to a year or more in confinement, a punitive discharge, or death. In these cases, the appeal process was supposed to have occurred automatically, unless the accused waived the appeal right (not permitted in a death case). The appeal process is shown in Appendix B.

To help assess historic and current post-trial practices, we researched case law dating to the 1970s and extracted cases illustrating the range and nature of the post-trial processing problems. See Appendix I. In addition, at our request, the Appellate Government Division (Code 46) searched the Lexis legal database, identifying 53 cases from the Court of Appeals for the Armed Forces and 195 cases from the Navy-Marine Corps Court of Criminal Appeals, all involving post-trial delay issues completed in the courts since 1990. Finally, an Office of the Judge Advocate General briefing slide from 2006 identified 19 cases decided in the 6 weeks December 1, 2005, through January 17, 2006, all with post-trial delays the Court found unreasonable.

One previous report was particularly helpful in examining the post-trial processing delay history. On May 4, 2009, in the wake of *Foster*,[6] the Navy JAG, then Vice Admiral Bruce MacDonald, directed Captain Daniel O'Toole and a panel of experts to examine the state of military justice in the U.S. Navy. In the resulting "Report on the State of Military Justice," July 1, 2009 (O'Toole report), Captain O'Toole concluded a series of events led to an environment in which a case like *Foster* was permitted to happen, and the Navy Judge Advocate General Corps needed to re-focus on its statutory military justice mission. The Navy JAG approved Captain O'Toole's findings and recommendations, and the newly-nominated Marine Corps SJA concurred.[7] Relevant discussion and findings from the O'Toole report are referenced, summarized, or quoted throughout this report. Recommendations from the report are listed in Appendix J.

The history of problems and attempted corrections are described in Appendix K.

3. Discussion

Many factors contributed to the persistent post-trial delay problems in the Navy and Marine Corps over the past two decades. Military justice lost focus as the core judge advocate mission area, and process failures occurred at every segment in the post-trial process. Despite multiple warnings and opportunities for reform, post-trial processing issues did not command sufficient senior leadership attention or interest. In 2006, frustrated by years of inaction in addressing the problems, the U.S. Court of Appeals for the Armed Forces established strict processing timelines in the *Moreno* case in an effort to take control of a situation the Navy and Marine Corps would not address. Over the years, the appellate courts repeatedly addressed inadequate "institutional

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6 Approximately 10 years from sentence to final appellate decision.

7 The charter for the review did not include Marine Corps operations. According to Captain O'Toole, his review was only one part of the multi-review process initiated after *Foster* to assess Navy and Marine Corps processes and accountability.

vigilance" and inadequate "professional diligence" demonstrated in multiple delay cases presented for court review.

Longstanding process failures stemmed from inadequate leadership, supervision and oversight in organizations suffering from many policy and structural impediments, including:

- ineffective tracking systems and absent or unenforced processing timelines;
- inadequate Service-wide policy prescribing Service expectations and standardizing processes, procedures and checklists for processing courts-martial;
- an almost unmanageable number of Navy convening authorities (every ship commanding officer is a convening authority), as contrasted to other Services where the number is far more constrained; and
- very decentralized organizational structures wherein every legal office or staff judge advocate functions independently without higher headquarters oversight or professional supervision.

Through statute and Secretary of the Navy Instruction the Navy JAG is responsible for administering military justice in both the Navy and Marine Corps. Historically, however, the Navy JAG appears to have exercised little oversight over Marine Corps practices or problems. In addition, prior to the *Foster* case, the Navy JAG did little to address post-trial delay problems in either the Navy or Marine Corps.

Our review focused on problems and attempted corrections over the past 20 years. Although Article 6 inspections[8] were conducted, the inspections were not rigorous or sufficiently thorough to highlight the significant process problems pervasive in both Navy and Marine Corps field units.[9] In 2006, the *Moreno* case triggered significant and well-intentioned efforts to address longstanding process problems and case tracking. However, Navy's reliance on its case tracking system (CMTIS - fielded in October 2006), its decision to undertake nonprocess-oriented field inspections, and the Marine Corps' lack of any substantive inspection system prior to May 2010, contributed to the overall difficulties in identifying and remedying post-trial process and delay problems.

Our review revealed lengthy delays and inadequate process/tracking at every major action point, including:

- preparing staff judge advocate reviews and convening authority actions;
- distributing records of trial to NAMARA;
- receiving and processing records of trial at NAMARA and the Court;

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[8] Section 806, Article 6(a), Uniform Code of Military Justice, provides ". . . [t]he Judge Advocate General or senior members of his staff shall make frequent inspection in the field in supervision of the administration of military justice. . . ." These inspections are generally referred to as Article 6 inspections.

[9] The Navy JAG did not typically conduct Article 6 inspections at Marine Corps units, instead deferring the responsibility to the Marine Corps SJA. On June 14, 2010, the Navy JAG published JAGINST 5040.1, "Uniform Code of Military Justice Article 6 Legal Office Assessments." The previous draft version was the template for inspections from about 2007 until the final publication.

- delays and excessive time extensions in the Appellate Defense Division (Code 45);[10] and
- productivity and workload management issues in the Court.

When case backlogs began in the late 1990s, and again in the early to mid-2000s, staffing issues aggravated the backlogs. Staff increases for the Court and the Appellate Defense Division (Code 45) were not sufficient or timely to address the growing backlogs. Requests for increased staffing went unheeded until the case backlogs reached crisis stage.

Tracking/monitoring systems were ineffective in affording sufficient visibility over "choke points," and the various divisions could not anticipate the growing caseload. Additionally, although responsible for cases after docketing, the Court did not take effective action to address the growing delay and backlog problems. Instead, the Court effectively surrendered its case management authority to an ever-increasing number of time extensions.

Overall, the Navy JAG and senior leadership did not satisfactorily identify, address, or fix the severe post-trial processing problems that recurred over two decades despite many warnings and trouble signs. When curative measures were taken, they were often short-lived or insufficiently institutionalized to endure past the incumbency of individuals who resolved problems at the time.

Prior to fielding CMTIS in October 2006, the Navy did not have an overall system capability to track courts-martial from the field to the Court. The focus seemed to be on "today," with little attention to reviewing trends or conducting analyses to alleviate long-term problems or prevent future problems, except when particular issues surfaced requiring resolution. NAMARA and the courts were unable to anticipate workload and locate the many old, missing and unaccounted cases.

Individual court decisions in 1984, 1994, and 1997, specifically mentioned the Navy was working on effective tracking systems. The decision in a 1997 case included specific assurances the tracking problems had been fixed. However, the many piecemeal Navy systems employed since the 1980s were inadequate for effective oversight or case management.

When the Navy CMTIS was deployed in October 2006, data from previous systems were brought into CMTIS as partial records. Some data may have been lost or corrupted in the transition. As a result, CMTIS case information has never been complete and accurate.

In addition, different organizational elements have different permission/access rights to the system, which limits ability to correct data, or input missing data upon discovery. Equally important, individual attorneys/legal personnel responsible for case actions do not use CMTIS in completing their work. Instead, support staff members generally complete after-the-fact data entries in CMTIS. The attorneys and other legal personnel responsible for case actions tend to view the system as additional work, not an aid to completing cases or monitoring case actions.

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[10] Military justice practitioners generally use the term "enlargement" when referring to a time extension.

A primary objective in designing CMTIS was to capture workload types and hours for manpower and resource purposes. This design provided a system capability similar to one a private law firm might use for billing purposes, but not one well suited to capturing, querying, and reporting the extensive data required to manage the many actions involved in the overall court-martial process. In every Navy field and appellate organization we visited, an internally-developed mechanism, such as a spreadsheet to track individual cases and actions, was the tool of choice.

Field units might check CMTIS in reporting on individual cases, but the system was generally viewed as cumbersome, unwieldy, and unreliable. Individual users cannot generate ad-hoc queries or reports, and any request for system change or ad-hoc query/report must be pursued formally and may not even produce an answer.

The division responsible for CMTIS was repeatedly criticized for being unresponsive and unhelpful. Based on our review, the Knowledge and Information Services Division (Code 65) has neither the staffing nor expertise needed to handle the many system challenges and respond timely to the many headquarters and field support requests.

The Navy and Marine Corps continue struggling to overcome technology and automated system deficiencies. While visibility over courts-martial cases has improved, needed and more comprehensive capability remains elusive in many respects.

As late as May 2010, CMTIS did not afford anyone in NAMARA the capability to monitor or have visibility over cases in the field. As a result, NAMARA did not know when to expect a record of trial from the field, or whether it had received cases due from the field, compounding the "lost case" problem. This issue is not a CMTIS issue alone and, instead, reflects in part a philosophical difference regarding field and headquarters responsibilities and authorities. We were told, in fact, that NAMARA's responsibilities did not begin until it received a record of trial and, therefore, NAMARA did not need visibility over cases pending in the field. Hence, NAMARA personnel were not authorized access to the CMTIS report module that would have allowed them to anticipate record of trial receipts.

Although recognizing the CMTIS data were incomplete and not fully reliable, NAMARA continuously requested system access or information to assist in accomplishing its mission, but the access requests were denied and the information received was not particularly helpful. Based on the significant post-trial delay and process problems persisting for much of the past 20 years, the decision to withhold useful information is inexplicable and cannot be justified. (Following a meeting with the Navy JAG in which we described our findings, we were told the appropriate officials in NAMARA now have system access, can correct erroneous data entries and input missing data, and soon will have capability to enter a new case in the system. Had NAMARA been given this authority when CMTIS was fielded, many current post-trial delay problems might have been avoided.)

The recently-fielded Marine Corps CMS appears to have substantially greater potential than the Navy CMTIS. Specifically, CMS appears to offer better and more complete capability for management to maintain visibility over individual case processing and status in the field, including post-trial processing in the field. However, CMS is still new, relatively untested and

has yet to develop all the needed capabilities. Additional time and study are necessary to judge the actual potential and determine whether CMS could be adopted for the Navy and Marine Corps overall.

After the *Moreno* decision in 2006, senior Navy and Marine Corps leadership began addressing more aggressively the problems plaguing their administration of military justice. Some resulting measures were detailed above. Others will be detailed subsequently in this report. Although many good changes were completed, initiated, or planned, they generally have not been institutionalized in policy, or other formal guidance. Additionally, several outdated policy documents require revision and reissuance.

A refrain heard repeatedly during interviews with the Navy JAG, Marine Corps SJA, and others was the deterioration in military justice administration resulted primarily from a culture of inattention and lost focus caused, in part, by the increasing need for operations law expertise in the years after the first Gulf War. Over time, military justice was not prized as much as operations law, which became the legal career path of choice, rewarded with promotions and fast-track assignments.

The autonomy accorded to highly-decentralized organizations in the Navy and Marine Corps led to very individualized processes and procedures, with little standardization. Many commanding officers had limited immediate legal support, and no one in the Judge Advocate General Corps or servicing legal organizations monitored events post-trial. The focus was on getting to trial; post-trial requirements were not important, and the typical first-assignment judge advocate had relatively little knowledge or understanding about post-trial processes.

Many remarked that no one came to the Judge Advocate General's Corps to be a "review officer," and judge advocates avoided the duty if at all possible. These factors led to a decline in both experience and grade levels for personnel assigned to justice duties. Justice was often left to the most junior and most inexperienced judge advocates. One individual told us he witnessed the assignment in which the staff judge advocate position at Pensacola Naval Air Station was reduced in grade from an O-5 (commander) to an O-2 (lieutenant junior grade).

Nearly constant war demands and deployments left many sections understaffed. As a Center for Naval Analyses study pointed out, the Navy Judge Advocate General Corps was "undermanned" for the challenges and workload faced in recent years.[11] Likewise, the Marine Corps judge advocate force experienced a temporary reduction in authorized strength while incurring increased work requirements and demands for new positions.[12] The military justice workload has been declining, but the trend is not guaranteed.

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[11] CRM D0017961.A2/Final, "Levels of Service Options for the JAG Corps: Personnel-Mission Tradeoffs," May 2008

[12] In commenting on the draft report, the Marine Corps provided the following clarification:

> The Judge Advocate Authorized Strength Report (ASR . . .) dropped in February 2008, as the Marine Corps was building its end strength to 202,000. The ASR increased again in August 2008 and has remained relatively stable since. The ASR (run twice annually) is the list of billets that is actually "purchased" by the Marine Corps given fiscal realities and funding priorities. Relevant ASR data is as follows:
> i. August 2007: 311
> ii. February 2008: 294

We note the many dedicated people who, despite the many problems, worked hard every day in Navy and Marine Corps legal justice organizations to deliver good work products. Their dedication continued even though they may have been handicapped with understaffing, deployments, imperfect processes, minimal supervision, field leaders with limited experience in military justice matters, and systems affording little visibility over courts-martial cases, especially in the post-trial phase. Some organizational units labored in isolation from other units involved in the same court-martial, within an overall context in which the Navy and Marine Corps had the largest court-martial caseload of any Military Department.

B. Do current systems, policies and procedures ensure timely and legally sufficient post-trial courts-martial reviews in the Navy and Marine Corps, and are resources sufficient?

1. Standards

Relevant policy and requirements are listed in Appendix G.

2. Facts

In commencing this review, we met with Vice Admiral James Houck, Navy JAG, and then Colonel Vaughn Ary, Deputy Staff Judge Advocate and Acting Marine Corps SJA (later confirmed in the position) and several senior members of their staffs. They described the post-trial problems and outlined their ongoing initiatives to address the problems. Both agreed the post-trial delays, and the systemic failures they represented, had become a serious problem requiring aggressive and enduring corrective action.

a. Ongoing Reviews and Initiatives

(1) **Military Justice Review**. On May 4, 2009, in the wake of *U.S. v. Foster*, then Navy JAG, Vice Admiral Bruce MacDonald, directed a review of military justice actions, policies and procedures to ensure the Navy Judge Advocate General Corps performed its military justice functions in a competent, professional manner. He specified the need to institutionalize the policies and changes required to assure professional and timely military justice administration.

Captain Daniel O'Toole and five senior Navy and Marine Corps judge advocates authored the resulting O'Toole report. This comprehensive report identified many weakness in the pre-trial, trial, post-trial and appellate phases, outlined the lessons learned, and included recommendations for improvement, several of which we adopted. This report served as the stimulus for a series of additional initiatives to improve upon changes already implemented.

One such initiative required an annual review of military justice and progress in improving the identified weakness areas. Captain O'Toole will lead the review again this year—the report was due November 30, 2010.

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iii. August 2008: 330
iv. February 2009: 367

(2) **Navy *JAG Corps 2020* Strategic Plan**. The plan, prepared in 2006, outlines four core capabilities and transformation focus areas, including "Accountability." Military justice is the key component in this capability, and the vision is to restore and strengthen the Judge Advocate General Corps' competence in this core area. The focus is on developing a career track for judge advocates to specialize in military justice, improving litigation quality in the courtroom, appellate level, and senior leadership positions. The plan also commits to developing key performance measures to, among other things, measure timeliness and ensure services are relevant. The plan is based on capturing military justice data in CMTIS.

The Navy and Marine Corps have other initiatives, either completed, being implemented, or in planning. Other significant initiatives are discussed or referenced in this report. Appendix L details the complete list.

b. Navy Field Organization

In 2006, the Navy realigned its field legal services offices within the Commander, Navy Installation Command Navy Region construct, creating Region Legal Service Offices (RLSOs). Consistent with consolidating assets in functional areas, the RLSOs acquired both the work and supervisory responsibilities for all installation staff judge advocates in the region. The formerly independent staff judge advocates were incorporated in and supervised by the RLSOs, and supported by the RLSO chain-of-command. Afloat legal staffs remained independent, but the RLSOs began supporting them administratively, as needed.

We visited the Mid-Atlantic RLSO, Norfolk, Naval Air Station, Virginia, and the Southwest RLSO, San Diego Metro, San Diego, California, to examine how they processed court-martial cases. The visits confirmed the concerns regarding processes and standards highlighted elsewhere in this report. See Appendices J and L.

Despite regionalizing legal services in 2006, the manner in which military justice is administered is not uniform across the RLSOs. As illustrated in the O'Toole report and confirmed in our review, there are significant variances in how individual offices do business and who "owns" specific processes. They lack standardization in both process responsibility and operating procedures. For example, depending on the RLSO involved, responsibility for post-trial case tracking may reside with the court reporter section, the staff judge advocate office, or the trial department. The responsibility may also be split between the trial department and the staff judge advocate office, with the trial department handling matters through record of trial authentication and the staff judge advocate's office assuming responsibility following the authentication. See Appendix M.

The inconsistent operating procedures and responsibilities amplify opportunities for error, inconsistent case results, and inadequate processes. Personnel turnover occurs frequently and processes change or get lost as less experienced military justice administrators assume court-martial duties.

Good, effective processes come from practice and experience that produce "lessons learned." These lessons learned are used to develop "best practices" from which uniform, tested performance standards and checklists are developed, resulting in standard processes and

procedures taught in a uniform, consistent manner in training, both formally and on-the-job. Periodic inspections then check actual performance to identify errors and opportunities for improvement.

We are not suggesting there is no room for innovation, creativity, or customization. We are suggesting the historic and current ad-hoc, trial-and-error method has not been effective.

Processes/procedures: The RLSOs developed individual, internal management processes and tracking mechanisms for their court-martial processes, including post-trial processes. Other than CMTIS, there is no standard system or mechanism to track a court-martial or actions on a court-martial. The RLSOs might use CMTIS on occasion to see if NAMARA received a particular record of trial, but generally do not use CMTIS in processing or tracking cases.[13]

The Navy JAG also does not have a Navy-wide standard operating procedure for managing or supervising military justice matters. There is some general direction in policy (Judge Advocate General Manual, and Judge Advocate General Instructions) dealing with military justice, but none provides for standard post-trial processing or tracking practices in the field. Other than the timelines for specific actions specified in *Moreno*, Navy JAG headquarters elements, including the Naval Legal Service Command, have not set timeliness goals and do not track the time required to complete individual actions or processes in a court-martial, including during post-trial processes.

In 2008, the Navy rescinded OPNAVINST 5810.4/JAGINST 5810.1, "Management Goals for Processing Navy Courts-Martial," September 5, 1984. This instruction prescribed time guidelines for processing a court-martial, from first knowledge about an offense until final appellate review completion. The only remaining processing time goal is the *Moreno* timelines, which the Naval Legal Service Command and Navy JAG now attempt to monitor closely.

JAG/CNLSCINST 5814.1, "Post-Trial Checklists," December 2, 1992, includes detailed checklists for determining progress in all court-martial phases. According to the JAG IG, however, the checklists have not been used for years and the instruction is undergoing revision.

Prior to June 2010, JAG IG inspections had become one-person checks that did not examine processes, case files, case management, or timeliness. The JAG IG spoke with command officials to assess relationships, but no longer completed comprehensive examinations. The inspections focused on leadership. Information on processing timeliness was not shared with the JAG IG before or during a field inspection.

The philosophy became that *Moreno* timeline monitoring at the Naval Legal Service Command made detailed JAG IG inspections unnecessary. However, CMTIS did not have the capability to give needed visibility over case processing or timeliness. Even if CMTIS had the capability, inspections to examine details of how individual field organizations function remained essential

[13] In our final meeting with the Navy JAG before preparing this report, we were told the May 2010 CMTIS modifications incorporated all the data fields the RLSOs agreed were necessary for their needs, and the RLSOs now use CMTIS. We were also told the RLSOs will be instructed in the next 2-3 months to discontinue using their ad-hoc tracking systems and rely on CMTIS.

as a check on actual policy implementation and execution. Following a meeting with the Navy JAG in which we described our findings, we were told the Navy JAG had already decided to revise the inspection program to inject more technical evaluations.

According to the RLSOs we visited, afloat legal officers/staffs are not required to coordinate minor legal matters with a RLSO; however, if a Service member is court-martialed, the responsible command processes the court-martial through the supporting RLSO. How the cases and records of trial are tracked, and by which RLSO, are decided based on coordination between RLSOs and the command legal staff. (See Appendix K)

Experience base: The regional office structure, through resource consolidation, enables greater efficiency in military justice services and has potential to enhance consistency in legal advice, because the structure falls under senior, regional staff judge advocate direction and supervision. However, the structure does not necessarily assure a correct staff judge advocate review or pre-trial advice in a given case.

Commanding officers and executive officers in the RLSOs and Navy Legal Service Offices traditionally were selected for their leadership skills and potential, not their military justice experience. Because operational law became the practice of choice, military justice experience levels for more senior judge advocates on staff in these offices declined.

Most attorney positions in the justice divisions are filled with generally inexperienced, first-tour lieutenants. Consequently, having senior, experienced counsel in supervisory positions is essential to controlling quality and timeliness in military justice services.

Several interviewees told us the post-trial review sections at the RLSOs are the least desirable justice positions and lack command interest. Further, the review sections are often used more heavily to fill deployment requirements. These factors all contribute to the continuing time delay and quality problems in post-trial processing.

Another factor adversely impacting military justice competence is operational deployments, both frequency and number. These requirements are filled to a large degree from RLSO and Navy Legal Service Office assets, reducing the staff available to accomplish the work and effectively reducing tour lengths for new judge advocates. Rather than the 24-36 month standard tour to learn military justice fundamentals and develop litigation skills, lieutenants now spend only 18-24 months in first tours at a RLSO, and the tour may be as short as 6-12 months.

The Military Justice Litigation Career Track (MJLCT) was recently developed to address the declining experience base in litigation and military justice practice. This initiative includes using specialty positions for supervisory counsel and commanding officer/executive officer positions in RLSOs and Navy Legal Service Offices. The objective is to enhance both quality and performance in field military justice administration.

Tracking systems: RLSOs have a segmented internal organizational structure, which divides case management among different specialized departments (see Appendices K and M). The segmentation complicates court-martial monitoring and administration, particularly since no one office is monitoring overall case processing and/or there is no single tracking mechanism.

Both RLSOs we visited use internally-developed case tracking mechanisms to monitor case progression. Although they enter required data in CMTIS, they do not use CMTIS to generate reports for local use or case tracking. CMTIS does not capture some data they need/want for case monitoring.

We compared the tracking mechanisms used in the two RLSOs we visited. The RLSOs used similar data points to monitor compliance with *Moreno* timelines and track their post-trial activities, but their tracking mechanisms were different (see Appendix M).

Command involvement/knowledge about military justice administration: Commanders are responsible for administering military justice, and it is important for them to remain informed about individual cases and in a position to gauge overall system performance. The Naval Justice School has a week-long course to train senior officers in military justice matters. Prospective O-5 (commander) and O-6 (captain) commanding officers and executive officers are encouraged to attend this course enroute to becoming commanding officers and executive officers, and many do. Prospective commanding officers also receive some military justice training at the Prospective Commanding Officer Course at the Command Leadership School in Newport, RI.

c. Marine Corps Field Organization

The Marine Corps has used the same organizational model for providing military justice legal services since the late 1960s. Legal Service Support Sections and Law Centers are the two primary organizational structures used. These organizations are typically divided into trial, court reporter, and review shops.

We visited the two Marine Corps Legal Service Support Sections at Camp LeJeune, NC, and Camp Pendleton, CA. We also visited the Joint Law Center at Marine Corps Base Quantico, Quantico, VA.

Like the Navy, the Marine Corps' decentralized operational structure does not easily lend itself to centralized oversight. In addition, segmented case processing across the different divisions in a Law Center or Legal Services Support Section exacerbates case tracking problems. Before the Marine Corps CMS was deployed in February 2010, no single system or mechanism tracked a case across a Legal Service Support Section or Law Center.

The Marine Corps SJA told us he is considering regionalization options to make some functions more efficient and effective. He is also attempting to decipher the various local support arrangements to bring greater functionality to judge advocate services. In addition, he wants to standardize judge advocate operations and obtain authority to exercise professional supervision over legal services delivered in the field, authorities he currently lacks. A draft instruction to achieve these results has been distributed for comment.

There is no higher headquarters or other supervisory legal organization to oversee or monitor Marine Corps field units. Field staff judge advocates and officers-in-charge are totally autonomous in administering military justice. Their effectiveness depends on individual supervisor initiative, experience and aggressiveness.

Furthermore, the Marine Corps SJA does not have field supervisory authority. He may only encourage/suggest improved field practices. Only the Commandant of the Marine Corps may require or direct a specific practice.

Experience base and staffing: The Marine Corps field organizations suffer from essentially the same stressors as the Navy. Frequent deployments and numerous individual augmentee assignments often reduce staffing at ashore sites.

When we visited the site, the Camp LeJeune Legal Service Support Section was 15 enlisted members below its 45 member authorized strength due to deployments and temporary duty assignments. At the Camp Pendleton Legal Service Support Section, 23 officers were assigned against 32 billets. Of the 23 officers assigned, 8 were deployed, leaving 17 (53 percent) of 32 officers actually in place to perform the work. Of 56 enlisted billets, only 51 members were assigned and 18 of these were deployed. Only 33 enlisted members (59 percent of total) were in place to perform the work.[14] To compensate, five judge advocates had been sent to Pendleton on temporary duty assignments.

Captains, the bulk of the Marine Corps' judge advocate work force in the military justice area, are experiencing reduced litigation opportunities, leading to a growing experience gap. Traditionally, first-assignment captains spent 2-3 years learning their basic trade. That time has been cut nearly in half for many.

The Marine Corps has also experienced a grade compression impact. The reduced time in grade narrows a junior officer's experience base at the time he/she would normally assume a mid-level leadership position.

Another factor impacting military justice practice in the field is demand for battlefield deployments. The best military justice practitioners may be lost to these deployments.

Processes/procedures: A senior Marine official cited inadequate, nonstandard processes and procedures as the root cause for post-trial delays. Among the overall initiatives underway or planned, the Marine Corps SJA is establishing a uniform process for shipping records of trial to NAMARA. The process would require Federal Express shipping to reduce transit time, a requirement the other Services already have.

The Marine Corps SJA is also exploring using electronic records of trial to ease handling and shipping processes, and further reduce the processing time involved. A test project is currently underway between Camp Pendleton and NAMARA to develop business rules and protocols for electronic record of trial submission, a noteworthy initiative.

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[14] In commenting on the draft report, the Marine Corps advised that using the number of billets in the table of organization numbers (T/O) to determine whether legal personnel were appropriately assigned "does not provide an accurate picture," as the Marine Corps relies on staffing goals (a percentage almost uniformly less than the T/O) in assigning personnel to Marine units.

Information from interviews and document reviews demonstrate some current uniformity in the way Marine Corps legal offices operate. However, each has developed unique internal operating procedures (see Appendix M).

Tracking systems: Camp Pendleton has used the Marine Corps CMS, together with internal mechanisms, for case tracking since 2003. Since the new CMS came on line and the Commandant directed its use in February 2010, the Marine Corps CMS has become the primary tracking system at Camp Pendleton. The officer-in-charge, Legal Service Support Section, uses CMS reports to brief case status to his convening authorities weekly.

In an initial visit to the Camp LeJeune Legal Service Support Section we learned the unit had begun entering data in CMS, but the system did not capture all the information the unit needed/wanted to keep staff judge advocates advised on case status. The staff was working with the information technology specialist responsible for CMS modifications (at Marine Corps headquarters) to adjust CMS. The officer-in-charge was aware the Marine Corps SJA wanted to eliminate multiple tracking systems; however, the unit still needed information from its internal tracking mechanisms.

In a follow-up visit in June 2010, after training on the new system in May, the unit was using CMS exclusively to track cases and generate reports. The staff still considered CMS imperfect and wanted it to capture more data for field use, but the system appeared to be gaining credibility and confidence in the field.

The Quantico Staff Judge Advocate enters all data in CMS and uses CMS daily. He also uses internal mechanisms (spreadsheets) to track information not currently available in CMS, which he needs/wants for case tracking and reporting.

d. Navy Tracking System

Since October 2006, the Navy JAG has had a central case tracking system, CMTIS, which permitted case tracking through record of trial receipt at NAMARA. Since system modifications in May 2010, CMTIS now has data fields permitting case tracking through the appellate processes at NAMARA and the Court, and the U.S. Court of Appeals for the Armed Forces.

Although independent (afloat) staff judge advocates do not use CMTIS, the RLSOs use the system to report all data (from investigation through record of trial receipt at NAMARA) for all Navy cases under their cognizance, which includes afloat cases. These offices also assist/advise afloat units without staff judge advocates and, on request, assist afloat units with staff judge advocates assigned. The RLSOs enter data in CMTIS for the afloat units.

The Marine Corps does not enter data in CMTIS and generally does not use the system, although some Marine military justice personnel may use CMTIS to track cases after they enter the appellate process at NAMARA and the Court. However, the military judges who preside over Marine Corps cases after sentencing or acquittal enter a "few case data points" in CMTIS.[15]

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[15] After the Marine Corps CMS was fielded in February 2010, military judges are no longer required to enter Marine Corps case data in CMTIS. NAMARA now must rely on the Marine Corps CMS for information on Marine Corps cases.

According to the Navy JAG, he required military judges to enter Marine Corps data in CMTIS because his authority to require the Marine Corps to do so was uncertain. He said the ongoing Section 506 panel review should help resolve such authority issues.[16]

After Marine Corps cases arrive at NAMARA, missing data are supposed to be entered in CMTIS so the case can be tracked from receipt through appellate court decision. However, permission and access issues have impeded these efforts.

Prior to June 2010, individual divisions in NAMARA did not have access rights allowing them to enter missing field-level data, or correct erroneous field data in CMTIS. In fact, they did not have access rights giving them any visibility over cases pending in the field. NAMARA could not anticipate incoming workload, or identify cases it should have received.

To correct a field-level error or enter missing CMTIS data, NAMARA had to contact the field unit where the court-martial occurred, ask the unit to complete the data, and then wait for the correction to appear in CMTIS. This approach, however, did not work for Marine Corps cases because the Marine Corps did not use CMTIS. NAMARA had the information in records of trial received for appellate review, but was not permitted to correct field-level data in CMTIS.

Following major initiatives in 2002 and again in 2006 to identify lost/missing Navy and Marine Corps appellate cases (see Appendix K), NAMARA has performed cumbersome "audits" at least quarterly to identify possible lost or missing cases. These audits use information from:

- the Navy and Marine Corps Appellate Leave Activity to identify Navy and Marine Corps members who are on appellate leave after a court-martial conviction; and
- the Service Brigs confining Navy and Marine Corps members to identify convicted members still in confinement.

To identify possible lost and missing cases, NAMARA compares information from these sources with its record of trial receipts. Then, NAMARA follows up with individual field units as necessary to locate cases for which it has not received a record of trial to begin the appeal process.

The prior efforts appear to have resolved many possible lost case issues. Unfortunately, since NAMARA was not permitted to input or correct field-level case data in CMTIS, results from the continuing efforts generally have not been reflected in CMTIS. As a result, CMTIS continues to have missing and inaccurate data. In addition, as discussed later in this report, the audits did not identify all cases in which an accused was on appellate leave or in confinement.

We were given a CMTIS report identified as "All Moreno Cases" as of March 10, 2010. Although two of the three timelines in *Moreno* depend on the convening authority action date to determine compliance, most (81.9 percent) records in the CMTIS report did not include this date, as shown in the table below.

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[16] The National Defense Authorization Act for Fiscal Year 2010, Section 506, "Independent Review of Judge Advocate Requirements of the Department of the Navy," requires ". . . an independent panel to review the judge advocate requirements of the Department of the Navy. . . ."

Results of Analysis
CMTIS Report Identified as "All Moreno Cases" on March 10, 2010

Description	With CA Action Date		Without CA Action Date		Total	
	No.	%	No.	%	No.	%
Cases with NMCCA Decision						
Navy	50	84.7%	9	15.3%	59	100.0%
Marine Corps	5	3.3%	146	96.7%	151	100.0%
Total	55	26.2%	155	73.8%	210	100.0%
Docketed with NMCCA/No Decision						
Navy	41	82.0%	9	18.0%	50	100.0%
Marine Corps	4	2.5%	155	97.5%	159	100.0%
Total	45	21.5%	164	78.5%	209	100.0%
Not Received at NMCCA						
Navy	260	43.8%	333	56.2%	593	100.0%
Marine Corps	45	3.7%	1,184	96.3%	1,229	100.0%
Total	305	16.7%	1,517	83.3%	1,822	100.0%
All Cases						
Navy	351	50.0%	351	50.0%	702	100.0%
Marine Corps	54	3.5%	1,485	96.5%	1,539	100.0%
Total	405	18.1%	1,836	81.9%	2,241	100.0%

As can be seen above, the omission rate for convening authority action date was high for cases processed through NAMARA with Court decisions (73.8 percent), for cases processed through NAMARA and pending Court decisions (78.5 percent), and for cases not yet received at NAMARA (83.3 percent). Although the omission rate was higher for Marine Corps cases (96.5 percent), they were also high for Navy cases (50 percent) even though Navy field units were supposed to be entering the information in CMTIS.

We did not examine other missing data in the March 10 report in detail, but did note that 417 cases had record of trial receipt dates at NAMARA, which field units were responsible for recording in CMTIS. In comparison, as can be seen above, a total of 419 cases had passed through NAMARA and were either pending Court decisions (209 cases), or had Court decisions (210 cases). Thus, at least 2 cases (419 – 417) in the March 10 report were missing record of trial receipt dates.

In addition, about 40 percent of the 1,822 cases not yet received at NAMARA had sentencing dates predating 2008. About 12 percent predated 2007. Thus, these cases were more than 26 months old, and more than 38 months old, respectively, at the report date and still not received for appellate review. This information is shown in the table below.

Results of Analysis
CMTIS Report Identified as "All Moreno Cases" on March 10, 2010
Age of Cases Not Yet Received at NAMARA

Sentencing Date in	Navy		Marine Corps		Total	
2006	82	13.8%	136	11.1%	218	12.0%
2007	176	29.7%	329	26.8%	505	27.7%
2008	135	22.8%	299	24.3%	434	23.8%
2009	149	25.1%	358	29.1%	507	27.8%
2010	51	8.6%	107	8.7%	158	8.7%
Total	**593**	**100.0%**	**1,229**	**100.0%**	**1,822**	**100.0%**

We alerted the Navy JAG to these findings and our belief that at least some of these cases were not subject to appellate review.

Prior to system modifications in May 2010, CMTIS did not have a data field to track whether a court-martial was subject to appellate review. Further, the system still does not identify whether a convicted Service member waives the right to appellate review. Accordingly, there was no way for CMTIS to limit the report to only cases requiring appellate review.

As we were completing field work on this review, in May 2010, another old Navy case surfaced. In *U.S. v. Bartolo,* the accused was convicted in general court-martial on January 10, 2006, and was sentenced to 70 months confinement and a dishonorable discharge for committing indecent acts with a female under age 16. NAMARA never received the record of trial and did not know the case existed until brig personnel preparing to release the appellant from confinement called to check the appeal status. Staff in the servicing legal office claimed the case was mailed to NAMARA in 2006; however, CMTIS did not include data entries identifying an active case, and the responsible legal office never followed up to ascertain whether NAMARA received the case. The field office was responsible for entering the data in CMTIS and ensuring the case receipt at NAMARA.[17]

The Navy JAG directed an inquiry to determine what happened in this case. In addition, as a result of the case, NAMARA completed its most thorough "scrub" to date based on both brig and appellate leave activity records. Based on this scrub, NAMARA officials advised us they were "99.5 percent certain" they had located all missing appellate records.

Following *Bartolo*, the Navy JAG directed a physical file review to address all "unaccounted for" cases identified in CMTIS, which included our concerns about unaccounted cases in the March 10 CMTIS report described above. Following this physical file review, in a meeting with the Navy JAG and his senior staff on July 8, 2010, we were told:

- Prior to fielding CMTIS in October 2006, Navy JAG did not have a central case tracking system and, although a central system was not required, he realized maintaining

[17] The March 10, 2010 "All Moreno Cases" CMTIS report described above did not include appellants' names, so we could not determine if the *Bartolo* case was included in this report.

visibility over courts-martial and completing required appellate reviews was critical to his mission.

- Upon becoming the Navy JAG in August 2009, his emphasis was on "getting it right" in the future, not on correcting the past.
- They had viewed problems with pre-October 2006 cases in CMTIS (partial case records "rolled-up" into CMTIS from prior systems) as problems with legacy recordkeeping, not problems with CMTIS.
- the Navy has now physically reviewed files and accounted for every Navy and Marine Corps case entered in CMTIS since October 1, 2006 (month CMTIS was fielded).
  - 833 Navy cases were all accounted for.[18]
  - 263 Marine Corps cases were all accounted for, even though they had to go back to the field on 57 cases, and initially identified 4 "live round" cases (detailed below).

- They did not physically review the files in 35,218 cases in CMTIS predating October 1, 2006, but 100 percent are either closed or under "positive NAMARA control."
- They have not been willing to devote the approximately 1.6 staff years needed to physically review files in all 35,218 cases in CMTIS predating October 2006.
- They have reviewed files in every case involving a sailor or marine still in confinement, and are sure another *Foster* case will not happen.[19] (They could not give us the same assurance regarding cases in which a convicted sailor or marine is no longer serving time. They also could not give us assurance that every case CMTIS should have captured was actually in the system.)
- The CMTIS reports NAMARA needs for case management should be ready in 2-3 months. The Assistant Judge Advocate General for Military Justice agreed his office could continue current ad-hoc tracking mechanisms until then.
- The RLSOs are already required to use CMTIS and, in the next 2-3 months, will be instructed not to use internal tracking systems/mechanisms. (They will need the internal systems until such time as they can rely on CMTIS data and have the capability to complete ad-hoc queries and reports based on CMTIS data.)

Upon following up on the Marine Corps cases identified as "live round" cases, we learned:

- Initially, several hundred cases from CMTIS were erroneously identified as not forwarded to NAMARA. Upon reviewing the files and other CMTIS reports, NAMARA (Administrative Support Division) determined 57 Marine Corps cases potentially still required post-trial action.
- The Marine Corps determined CMTIS inaccurately showed Article 66 reviews were necessary in 47 cases (not actually required), had not been updated to show appellate reviews were completed in another 5 cases, and incorrectly showed another recent case as late, leaving 4 unaccounted cases. With respect to these four cases, the Marines all had been discharged --

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[18] We randomly selected 20 cases from this list, and verified they were accounted for in the Navy and Marine Corps physical file reviews.

[19] We randomly selected 21 cases from 382 names on the world-wide brig list (12 brig locations), and verified they were accounted for in the Navy and Marine Corps physical file reviews.

they either reached the end of active service (EAS), or were administratively separated. None had a punitive discharge executed, although two had bad conduct discharges (BCDs) adjudged. The BCDs were suspended in pretrial agreements (PTA). Details on the four cases were:

- Bolla (1stMarDiv) – Trial date was April 11, 2006. Sentence was 12 months confinement, reduction in rank to E-1 (Private), and forfeit $848.00 a month for 12 months. Convening authority action was on June 21, 2006. An Article 64 (Judge Advocate) review, rather than the required Article 66 review, was conducted erroneously on June 28, 2006. The case is being sent to the convening authority to see if the initial action should be modified. (1,479 days from convening authority action until we were told the case was being returned to the convening authority.)
- Stagner (29 Palms) – Trial date was July 11, 2006. Sentence was 1 year confinement, reduction to E-1, and a BCD. Convening Authority Action on March 7, 2007, suspended the BCD and confinement over 6 months. The responsible staff judge advocate erroneously believed the suspended sentence did not trigger an Article 66 review and did not send the case to NAMARA. The Marine reached end of service and received a general discharge on December 7, 2006. The case was sent to NAMARA on June 30, 2010. (1,211 days from convening authority action until the record of trial was sent to NAMARA.)
- Thibodeau (K-Bay) – Trial date was June 9, 2008. Sentence was 52 days confinement, reduction to E-1 and a BCD. Convening authority action on October 24, 2008, suspended the BCD for 12 months (now remitted). The Marine was administratively separated (other than honorable--OTH--discharge) on February 19, 2009. The case was mailed to NAMARA on June 29, 2010. (613 days from convening authority action until the record of trial was mailed to NAMARA.)
- Brock (3d MAW) – Trial date was December 4, 2008. Sentence was 12 months confinement and reduction to E-1. Convening authority action on June 22, 2009, suspended confinement in excess of 6 months for 8 months (now remitted). Pursuant to a board waiver, the Marine was administratively separated (OTH discharge) on October 7, 2009. The case is being sent to NAMARA. (582 days from convening authority action until we were told the case was being sent to NAMARA.)

The Marine Corps advised it is working with commands to ensure these and other cases are properly handled in the future. The Marine Corps is also giving refresher training on the requirements for Articles 64, 66, and 69 reviews.

A Center for Naval Analyses study is currently reviewing the Judge Advocate General Corps' information technology needs. This study includes benchmarking various other systems against CMTIS to assess options available to the Navy. The Center for Naval Analysis requested and the Marine Corps demonstrated its CMS for this study twice, once in March 2010 and again in June 2010.

e. Marine Corps Tracking Systems

Commandant of the Marine Corps Administrative Order (MARADMIN) 062/10, "Implementation of Case Management System for Courts Martial," February 1, 2010, mandated that all Marine legal offices use the Marine Corps CMS fielded in February 2010. According to the order, CMS creates a common operating picture for all military justice practitioners,

enhances ability to generate reports, improves data capture for reporting purposes, and increases visibility over cases from the local office through the appellate process.

Local staff judge advocates and officers-in-charge are now able to view all cases within their cognizance. In addition, for the first time, the Marine Corps SJA is able to view all cases in the Marine Corps and has real-time access to the data. Based on initial feedback from the field, the Marine Corps CMS has significantly improved Marine Corps visibility over military justice administration, including post-trial review, in the Marine Corps and the software contractor is continuing additional improvements to meet user needs throughout the Marine Corps.

The Marine Corps CMS is also available for NAMARA to track cases from trial date through mailing the record of trial to NAMARA. In the future, this access should help NAMARA maintain visibility over Marine Corps cases throughout the post-trial process.

The Marine Corps CMS is a field-level tracking system enabling Marine Corps field legal offices to monitor cases in progress. The system:

- tracks a case from the date a command requests legal services or imposes pretrial restraint until NAMARA "dockets" the case;
- has capability to calculate total elapsed time from first data entry until last data entry in any Marine Corps case;
- captures several data points relating to the time required to perform a post-trial review, e.g., time with the court reporter, trial counsel, military judge, staff judge advocate, and convening authority;
- permits any authorized user to enter changes/corrections, and generate custom reports;
- permits Marine Corps headquarters offices and NAMARA to have system access and "see" cases in the field; and
- does not capture case processing activity at NAMARA and the appellate courts.[20]

The Chief, Military Law Branch, Marine Corps headquarters, is tasked with monitoring all pending cases for compliance with *Moreno* timelines. This tasking is part of an effort to build a sense of urgency (in the field) about the post-trial phase.

Each week, the Chief, Military Law Branch, prepares a tracking report directly from CMS displaying all cases pending in the field, by unit, along with a post-trial clock showing the time elapsed from sentencing date to current day. The tracking report has a "red stoplight" icon identifying each case exceeding the 120 day *Moreno* timeline, i.e., sentencing date to convening authority action date.

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[20] As noted previously, the Navy JAG no longer requires military judges to enter Marine Corps case data in CMTIS, and NAMARA now has access to enter data in CMTIS. In the future, NAMARA must enter Marine Corps cases in CMTIS to begin appellate case tracking.

The March 8, 2010, tracking report listed 127 cases, 31 with convening authority actions. Of these 31 cases, 7 exceeded the 120 day Moreno standard—the excess ranged from a few days to 151 days. Of the remaining 97 cases (without convening authority actions), 10 exceeded the 120 day standard at the report date.

This Marine Corps-wide information is visible and readily obtainable at headquarters, which is a significant improvement in tracking capability not existing even a few months ago. This capability, however, did not detect the "live round" cases with lengthy delays described above in connection with the Navy CMTIS capability.

f. Case Management/Electronic Case Filing

During interviews with various officials in NAMARA, the Army and Air Force appeals courts, and the Court of Appeals for the Armed Forces, the officials expressed great interest in enhancing their relatively rudimentary electronic case management capabilities. They stated interest in the internet-based Case Management and Electronic Case Filing (CM/ECF) system currently used throughout the Federal district court system, the U.S. Circuit Courts of Appeal, the Bankruptcy Courts, and the Court of Appeals for Veteran's Claims.

The Court of Appeals for Veterans' Claims recently transitioned to this system. We interviewed one of the court's judges, the former Judge Advocate General of the Air Force. He told us the CM/ECF system is an impressive case management and electronic filing system, which he has recommended to the Air Force Court of Criminal Appeals.

The Clerk of Court for the Court of Appeals for the Armed Forces told us the court would very much like to implement CM/ECF, but lacks authority to mandate the use. Instead, the court recently instituted an electronic filing program for petitions to that court.

Both Navy and Marine Corps Reserve and active duty counsel told us they believe the system would be a marked improvement over other data management systems. In fact, the Service courts of criminal appeals have discussed this system at length in previous conferences, and an Appellate Government Division (Code 46) representative has briefed the system to each Service court of criminal appeals.

Overall, we found unanimous interest in implementing this type system in all the Services, but neither DoD nor a Service has stepped forward to spearhead the implementation due to cost considerations, possible transition difficulties, and inadequate consensus among the Service Judge Advocates General. Because they have not reached an agreement, problems continue with the multiple, different Service systems, which judges on the Court of Appeals for the Armed Forces have noted.

During this review, we heard about various CM/ECF features and possible difficulties with adopting the system in the military. This information is included in Appendix N. Also, in our last meeting, the Navy JAG advised us the ongoing Center for Naval Analyses study, which included benchmarking CMTIS against CM/ECF and other systems, is revealing potential problems with the military adopting CM/ECF.

In our view, any study/evaluation involving CM/ECF or a similar system should include military justice practitioners (active duty, civilian, and Reserve) familiar with the system to ensure a thorough, balanced assessment. A standard electronic case filing and management system for military courts-martial could yield immense savings in time and funds.

g. Administrative Support Division (Code 40)

The Administrative Support Division in NAMARA has a standard operating procedure for case receipt, review, and quality control. Upon completing a review, a checklist is prepared identifying (among other things) data entries needed in CMTIS. Normally, the Administrative Support Division reviews and forwards all records of trial to the Court within 1-2 days after receipt from the field. This time applies to cases requiring appellate court review, as well as those sent to the Criminal Law Division (Code 20) for Judge Advocate General review.

The Deputy Director, a civilian employee, provides stability, continuity and experience in a unit generally staffed with junior Marine Corps enlisted members. The current Deputy, however, is nearing retirement. The Navy should consider hiring and training a replacement before the retirement to prevent a disruption possibly exacerbating the overall case processing delay problems, which have continued over the years.

We were told that 4-5 years ago, 15-20 percent of all cases received in the Administrative Support Division were "trouble" cases--something was wrong with the record of trial arriving in the division, requiring corrective action by the field unit responsible for the court-martial. We were also told the "trouble" rate is now down to about 1 percent, and resolving a trouble case now generally takes no longer than 48 hours. If a trouble case is not resolved quickly, the Assistant Judge Advocate General for Military Justice (Code 02), personally contacts the unit. Prior to the current procedure, a trouble case might not be resolved for 8-9 months.

Prior to the current Assistant Judge Advocate General for Military Justice, 70-80 court mandates (cases the Court or the U.S. Court of Appeals for the Armed Forces, returns for corrective action, e.g., rehearing on sentence) could be pending in the field at any given time without any overall visibility, or even a tool to monitor the mandates or their individual status. Today, with the mandate tracker developed internally and the office's constant oversight, as of March 5, 2010, there were only 16 pending court mandates and NAMARA had visibility over those mandates.

The improvements resulted from several efforts:

- the Criminal Law Division's focus on timely administration in its "Newsmailers" (information bulletins);
- greater field unit adherence to the Manual for Courts-Martial checklist for assembling records of trial; and
- improved training at the Naval Justice School.

These efforts improved record of trial assembly in the field, reducing errors in records of trial received at NAMARA.

However, Navy and Marine Corps processes still vary by unit. According to the Director, Criminal Law Division, more standardized procedures and checklists are needed, and a larger civilian support structure would enhance continuity.

Overall, the Administrative Support Division (Code 40) now has good processes in place and there is no case backlog. Due to a Lean Six Sigma[21] process completed in approximately 2007, the division reduced processing times to the current 1-2 day turnaround. (See Appendix K)

h. Appellate Defense Division (Code 45)

Overall, the Appellate Defense Division is currently functioning well. Cases are progressing through the division in a timely fashion, despite some limiting factors.

The Navy and Marine Corps tracking systems do not provide sufficient data for us to assess exact processing times in the appellate divisions (see Appendix K). However, when sending a case to Appellate Defense for review, the Court assigns a deadline for receiving defense briefs. If Appellate Defense cannot meet the deadline, an extension of time may be requested. If the request is justified, the Court will grant a time extension.[22] Although case complexity and record of trial length are the primary factors affecting the time required to review a record of trial, the number of extension requests and their lengths can be indicative of both workload and case age.

The graph below depicts the number of time extensions requested. Although not as good an indicator as the number of time extensions granted, the table provides some meaningful insight into both caseload and processing time.

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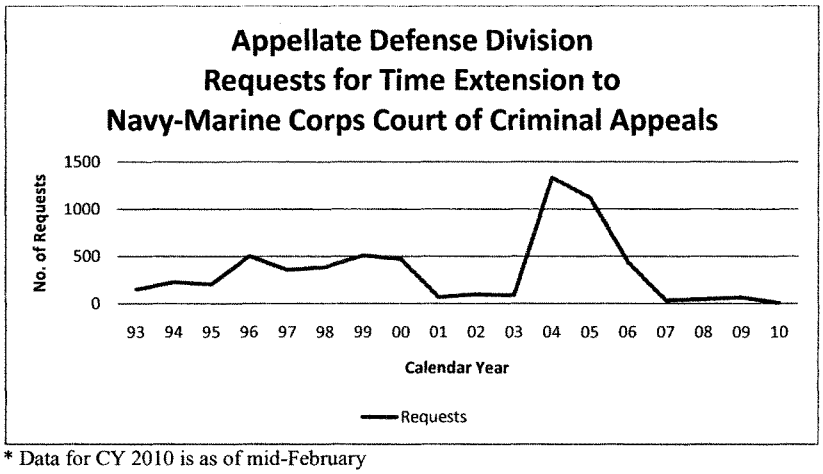
[21] A set of tools and methods for improving business processes used in both service companies and public sector agencies.

[22] As indicated in Appendix K, this is a significant change from the time when the appellate divisions had an agreement permitting up to 24 time extensions before a division would object, and the Court approved the requests without requiring justification.



* Data for CY 2010 is as of mid-February

The graph shows marked improvement beginning in 2005 and continuing into the current year. As of February 2010, the Appellate Defense Division had not requested a time extension in connection with any case pending in the division.

In providing this information, the Appellate Defense Division advised the data source was CMTIS and, thus, not completely trustworthy. Our specific conclusions in this report rely on this data only to the following extent: we believe the data reasonably establish the trend over time, reasonably show time extensions are no longer used as the primary technique to deal with high workloads and/or case backlogs, indicate caseload is now managed more timely, and division staffing is sufficient.

Civilian Deputies: To enhance continuity and experience, particularly in the appellate practice areas, the Navy JAG directed and NAMARA civilianized the deputy positions in the appellate divisions in 2009. The current Deputy Director, Appellate Defense Division (Code 45), has experience as both an active duty and Reserve appellate defense counsel, and brings good experience and management skill to the division. This Deputy is developing what will become a standard training and mentoring program. We were shown several lesson plans developed to date, which outline fundamental, common issue areas they encounter in practice. The Deputy personally reviews the materials with each new counsel.

The division has eight appellate counsel on staff, not counting the Director who was detailed full-time to other duties outside the office at the time of our interviews. Twenty-seven Reserve judge advocates assist the division, reviewing virtually all "thins" (smaller cases with less than 200 pages).

The Deputy has implemented several initiatives to improve oversight and business practices in the office. For example, a non-attorney staff member previously assigned cases. The Deputy now performs the duty to assure an equitable and balanced case distribution.

Two relatively recent Navy JAG policies have greatly enhanced productivity and addressed past problems:

- appellate counsel will not be deployed or assigned to individual augmentee duty; and
- no first-tour judge advocate will be assigned to the division.

Further, although not required, the Appellate Defense Division has been consulted about potential assignment candidates in recent times. Division management has been satisfied with the quality of personnel assigned to the office.

Director turnover: One problem, which recently recurred, is frequent turnover in the Director position. At the time of our interviews, the current Director had been reassigned to other duties (Section 506 panel) and his incoming replacement, slated for summer arrival, had also been re-directed to other duties.[23] This trend adversely impacts the Deputy's ability to attend to training and other duties. Conversely, it demonstrates the value of a having a civilian deputy to assure continuity.

Reservists: Another more recent development is the decline in experience level for Reserve unit personnel supporting the Appellate Defense Division (Code 45). Currently, all newly-separated active duty judge advocates must now be assigned first to a more traditional drill unit in the Reserve. As a result, the Appellate Defense Division does not receive these experienced Reservists and the overall experience level is declining. After inquiring about this policy, the Navy gave us a detailed explanation, which concludes:

> *. . . our policy is to place new accessions in the RLSO [Region Legal Service Office] and NLSO [Naval Legal Service Office] units. These units can best provide the mentoring and administrative support necessary to prepare junior officers for a career in the Navy Reserve. They provide an opportunity to complete career milestones for junior Reserve officers such as Reserve Pay officer, Training Officer, and Unit Administrative Officer. Additionally, placing new officers in units with other new accessions and junior officers allows those officers interaction with their peers, close supervision and mentoring by unit senior leadership, and competitive fitness reports. This also seems to work best for officers who are simultaneously embarking on Reserve careers and new civilian careers. It allows them to compartmentalize their Reserve duties and keeps Reserve duties from overwhelming them and their new civilian supervisors. We believe that these appellate skill sets will not become stale while new accessions complete their first tours in a RLSO or NLSO unit, and they*

[23] In commenting on the draft report, the Navy JAG advised that the replacement assumed the duties as assigned in summer 2010.

> *will then be able to join an Appellate unit after they have successfully transitioned into the Reserve program.*
>
> *By analogy, on the active duty side, the JAG Corps does not generally detail Law Education Program graduates directly onto line staffs as independent duty Staff Judge Advocates, even though the new LEP may have specific unrestricted line experience that would be valuable to that billet assignment. Instead, most are detailed . . . to OJAG or to RLSO or NLSO staffs as department heads. This allows them time to learn about the JAG Corps, even though they are already experienced Naval officers. Once they have completed their initial tour, then they can and are detailed to independent duty on line staffs and perform exceedingly well.*

The appellate divisions rely heavily on Reserve support to accomplish their missions. Reserve support played a large role in clearing the immense case backlogs plaguing Appellate Defense and the Court in this decade. Therefore, it will be important to assure the Reserve unit in the Appellate Defense Division maintains a cadre of knowledgeable, qualified counsel.

Time Extensions: Excessive Court-approved time extensions to submit briefs, and lengthy appellate delays were the norm in the early to mid-2000 timeframe (see Appendix K). As of March 4, 2010 (date of our last interview), the Division did not have cases pending initial pleadings in which a time extension had been requested. All cases were completed in the initial briefing period allowed. Before counsel may request a time extension, both the Deputy and Director must review and sign off before the request goes to the Court.

Law Clerks: In 2008, the previous Navy JAG established 1-year law clerk positions on the Court. The intent was for judge advocates serving as law clerks to gain work experience enhancing their training and preparation for follow-on assignments as either appellate defense or appellate government counsel.

Feedback from both the Appellate Defense Division (Code 45) and the Appellate Government Division (Code 46) is this program, while well-intentioned, has not improved appellate practice and may have had a reverse effect in both divisions. The 1-year tour with the Court reduces the usual 3-year tour the judge advocate would serve in an appellate division, leaving only 2 years for appellate counsel duty. Further, the law-clerk experience has not prepared the individuals sufficiently for appellate duties, which requires another 6 months or longer after an individual judge advocate arrives to work in the Appellate Defense or Government Division.

As a result, the appellate division has a fully productive counsel for only about 1 year and a much higher turnover rate. In the Appellate Defense Division (Code 45), this situation exacerbates attorney-client relationship issues and, thereby, affects the quality of representation. Based on actual experience, the law clerk initiative should be reviewed and adjusted appropriately.

Case Tracking: CMTIS is generally ineffective for the Appellate Defense Division (Code 45). The managers see the Knowledge and Information Services Division (Code 65) as unresponsive to system change requests.

An additional issue for the Appellate Defense Division has been its inability to automate records. The Deputy has repeatedly asked field units to "burn" records of trial onto compact discs and submit the electronic versions. When dealing with lengthy records and preparing briefs, defense counsel must frequently find and refer to specific words and passages in the record, which is difficult and time consuming when using hard-copy records. The search/find capability available with an electronic record would significantly reduce both the difficulty and time involved in locating specific material.

Trial Defense Counsel: The Navy is the only Service without a Chief Defense Counsel, and does not have an office responsible for trial defense services Navy-wide. Consequently, no one office is developing policies or training programs tailored to the community's needs, and no one person is overseeing the competence, delivery, or efficiency of defense services in the field. Unique issues and challenges confront the defense counsel community, and not having a functional head represents a significant leadership vacuum in defense practice.

The Navy JAG told us he plans to develop a formal Defense Counsel Assistance Program because the need for more assistance to the defense community has become apparent. At minimum, he intends to establish the program and is considering establishing a defense command. He has not decided on a specific solution, but establishing a formal Defense Counsel Assistance Program has been adopted as a JAG 2010 priority action item.[24]

i. Appellate Government Division (Code 46)

Current practice in NAMARA depends on hard copy records. Paper records of trial and pleadings are given to the Administrative Support Division (Code 40), the Court (Code 51), and the appellate divisions (Codes 45 and 46). Pleadings, briefs, and reply briefs are all paper documents, hand carried from one office to another, with support clerks subsequently recording the delivery and receipt information in CMTIS.

NAMARA (including the appellate divisions) does not have high-speed scanner capability to upload records of trial into electronic form. A current scanner, although recently upgraded, cannot handle the Appellate Government Division's routine litigation needs, which involve thousands-of-page court documents.

Based on internal initiative and support from the Assistant Judge Advocate General for Military Justice, the Appellate Government Division works electronically using the Marine Corps' SharePoint web-based, information-sharing site. Although up-loading lengthy records of trial is not possible, all working documents and taskings are up loaded to the site and all division personnel can access the information. SharePoint is the division's "one-stop" management and tracking tool.

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[24] On October 1, 2010, the Naval Legal Service Command (NLSC) was reorganized, separating the Naval Legal Service Offices (NLSOs) and Region Legal Service Offices (RLSOs) into two functional groups, eliminating the NLSC Vice Commander position, and creating new Deputy Commander, RLSOs, and Deputy Commander, NLSOs, positions with authority and resources to manage and supervise courts-martial case processes. The Commander, NLSC, also established a Defense Counsel Assistance Program (DCAP) and a Trial Counsel Assistance Program (TCAP).

The Appellate Government Division is currently working to give the field additional information on SharePoint. The division is also developing a military justice blog to use in updating prosecutors on military justice developments and practice tips. The division was able to configure SharePoint to meet its needs, e.g, due date tracking, in a way CMTIS could not be used.

Staffing/experience: Current staffing is adequate for the caseload. There are 10 appellate counsel (one deployed), and 2 civilian support personnel. As in the Appellate Defense Division, the Deputy Director is civilian, a recent initiative to enhance continuity. The Deputy Director, a former Marine major, became the Deputy after the military deputy was reassigned.

Most appellate counsel serve 3-year tours. Virtually all Appellate Government Division (Code 46) counsel are second-tour Marine Corps captains/ Navy lieutenants. Although they all should have had some military justice experience in their first tours, we were told some arrived at the appellate division with little to no military justice experience.

Law Clerks: As noted in the Appellate Defense Division section above, the Appellate Government Division's experience with the law clerk program has not been a useful or effective training enhancement, and has reduced tour length in the division. The director would prefer all his counsel serve the full 3-year tour.

Training: As part of the current Director's professional development program, all Appellate Government Division counsel are sent to a local civilian course on appellate brief writing. Other training courses include:

- the Appellate Judges Educational Institute Conference;
- the Association of Government Attorneys in Capital Litigation Conference;
- D.C. Bar Association's Appellate Advocacy seminar; and
- the annual Court of Appeals for the Armed Forces Conference.

These courses are considered essential for a counsel's professional development. The Director would like a more standardized, uniform training program for both field trial counsel and appellate counsel, with stable funding to assure continuity.

Operating Procedures: When a case/defense pleading comes to the Appellate Government Division, the Deputy Director assigns an attorney based on evaluating the case complexity and individual counsel workloads. The Deputy creates a "task," assigns the case, and establishes suspense dates, all on SharePoint. The division does not have a high-speed scanner with capability to upload lengthy records of trial to SharePoint, but the Deputy arranges to upload case pleadings and other case information, and the assigned counsel processes the case in SharePoint.

A recent innovation included assigning an experienced mentor, usually an experienced Reserve judge advocate, to help the appellate government counsel. The Division Director and Deputy meet daily to review case status.

The collaborative SharePoint technology allows Reservists assigned to the division, without regard to location, to review, edit, and comment on a brief. Reservists, several of whom currently are experienced Federal and state appellate attorneys, are valuable additional assets for the division.

The only remaining challenge to an efficient case processing and archiving system for the division is not having the high-speed scanning capability needed to upload lengthy records of trial to SharePoint. This capability would enhance overall case processing timeliness and effectiveness. For example, attorneys then could search for key words, phases, or legal arguments electronically, rather than manually searching the paper records of trial, possibly multiple times.

Trial Counsel Assistance Program: The Appellate Government Division supports the Trial Counsel Assistance Program, a program to advise field trial counsel on military justice litigation matters. Under this program, the division advises both Navy and Marine Corps prosecutors, using SharePoint as the platform to answer questions and share information. Email is used to answer questions directly, but both the issues and answers are uploaded to SharePoint for archiving and sharing. The Army and Air Force have been invited to participate on this site.

Another resource for information sharing currently being explored is a military justice blog, a discussion forum on SharePoint for those interested in the latest updates and advice and tips on military justice practice from a prosecutor's perspective. Previously, the Director sent emails with military justice updates and practice tips to the field, but this practice proved too cumbersome.

Technology: Anyone with access rights/permissions to the SharePoint site can monitor current cases, including tracking case status and action on any time extension request. A user can review all pleadings relevant to an appellate litigation. Once access becomes available to the high-speed scanner capability needed, the Appellate Government Division intends to upload and have the entire record of trial available on SharePoint.

j. Chief Judge of the Navy (Code 05) and the Court (Code 51)

The Court experienced several significant problems in the early to mid- 2000 timeframe. A case backlog overwhelmed the Court, exposing problems with insufficient staffing, inexperienced and unproductive appellate judges, ineffective detailing methodology for judge assignments, and ineffective case tracking and prioritization systems (see Appendix K). These problems led to significant changes and improvements.

Chief Judge of the Navy. In 2007, at Navy JAG request, the Secretary of the Navy established a new capstone position, the Chief Judge of the Navy, to oversee the entire Judiciary, both trial and appellate operations. The Chief Judge is the reporting senior for all appellate judges on the Court.

The Chief Judge's ability to rate and supervise the appellate judges addresses the Article 66 proscription against any appellate judge rating or otherwise affecting a fellow judge's evaluations and assignments (see Appendix K). In the past, limited supervisory authority was asserted as a key

problem in addressing less productive and less committed judges on the Court, a problem the new Chief Judge position should remedy.

In addition to addressing supervision and rating issues, the new Chief Judge position creates a community sponsor and resource advocate, one who can monitor professional competence, promote needed training initiatives, and supervise the Judiciary overall while assuring professional independence.

Judicial staffing and experience: As discussed in the O'Toole report, the increase to 13 active duty judges and 11 supporting Reserve judges in January 2006, immediately impacted the Court (see Appendix K). The Reserve judges use "flex drills" (roughly equivalent to telecommuting) to review many appellate cases submitted for adjudication. These cases are mostly guilty-plea cases involving less than 100 pages.

Additionally, during regular drill periods, Reserve judges are assigned to standing panels and assist in resolving larger, more complex cases. Their contributions are significant, accounting for 25 percent of the Court's case dispositions in calendar year 2008.

In 2007, the number of active duty judges increased to 17, but began declining in 2008, after a significant reduction in the case backlog. More important than the increase in numbers, in 2007, the Navy JAG increased former trial judge assignments to the court, and required designating up to four Court positions for officers in the Military Justice Litigation Career Track. In 2009, the Navy JAG clarified that one appellate judge on each panel must be a former trial judge. The Court, as presently composed, meets these requirements, but the requirements have not been included in policy.

As of July 1, 2009, there were four former trial judges on the court (three Navy and one Marine Corps), including a Military Justice Litigation Career Track "Specialist" and the Chief Judge. The Chief Judge is both a former trial judge and a designated Military Justice Litigation Career Track "Expert."

Many appeal cases involve pre-trial and post-trial procedure issues that non-career litigators with significant staff judge advocate experience can handle readily. However, the Court's history supports a conclusion that the most difficult appeal cases involve evidentiary, criminal law, and procedural trial issues. Former trial and appellate judges are more competent to resolve these cases correctly and efficiently. Thus, it is important to maintain a balanced mix of former judges and experienced staff judge advocates in the Court's composition. The latter bring a different perspective and experience base that helps inform court decisions. Those who have spent extensive time on the bench can become somewhat insulated from operational realities in everyday military life.

Over the last 2 years, the total number of active duty judges assigned to 3 panels ranged from 9 to 11, with 2-3 Reserve judges assigned to each panel (10 Reserve judges currently assigned). This staffing is sufficient for the current caseload. By the end of summer 2010 rotations, the Court will be staffed with 10 judges and 7 law clerks for 3 panels.

Judicial Screening Board: Under another initiative implemented in 2009, the Judicial Screening Board screens applicants for both trial and appellate judgeships. Those interested in a judge position must submit an extensive application explaining why they want the position, outlining the cases they have tried, and attaching their law school transcripts and fitness reports. One objective is to staff the

Court with three to five professional military justice litigation experts or former trial judges. The Chief Judge must be a career track litigation expert. The Court will also have three Marine judges and judges with staff judge advocate backgrounds, all with significant military justice experience.

Current Caseload: The staffing surge and decline in military justice caseload in recent years assisted the Court in regaining control over its docket. According to the Clerk of Court, who has been in the position since 2000, the Court has never been in better shape.

The Court's caseload on December 31, 2009, is shown in the table below in comparison to three other dates: July 2009 (when the O'Toole report was issued); April 2006 (immediately prior to the *Moreno* case when the Court was backlogged); and December 2000 (when a large backlog was building in the Appellate Defense Division, but had not reached the Court). The table shows the backlog, which inundated the Court in the mid-2000 timeframe, has been eliminated. As of December 2009, no case was over a year from docketing (the *Moreno* standard is 18 months) and only 4 cases exceeded 6 months from docketing.

Navy and Marine Corps Appellate Cases Docketed with Appellate Court, and Pending Decision in Judicial Panels

Date	# Cases Docketed	# Cases Pending In Panel		# Cases In Panel > 6 Mos		# Cases In Panel > 12 Mos	
	No.	No.	% *	No.	% **	No.	% **
12/31/00	1,319	87	6.6%	7	8.0%	0	0.0%
04/30/06	794	325	40.9%	24	7.4%	14	58.3%
07/01/09	320	173	54.1%	7	4.0%	0	0.0%
12/31/09	189	75	39.7%	4	5.3%	0	0.0%

* Percentage of total cases docketed

** Percentage of total cases in panel

Tracking: The Court uses three monthly CMTIS reports to oversee case progress. First, a *Moreno* report showing cases by trial date, date docketed with the Court, and date sent to panel. The second report lists cases according to the type court-martial involved and final disposition, showing the time in panel and listing the date docketed, date to panel, and number of pages. This report helps individual judges assess their workload and case age. The third report, a "judge activity" report, lists cases and case status by individual judge. The Chief Judge and Senior Judges on the Court receive an additional, more comprehensive management report with additional detail on the Court's activities.

The Chief Judge of the Navy created additional internal tracking reports to assist his oversight and management responsibilities. These reports include CMTIS information, but are not system generated. One statistic the Chief Judge examines is the number of cases tried in the past 90 days. This statistic helps the Chief Judge anticipate future caseload and adjust court staffing, if required.

There is no fixed metric or standard governing case production except the timelines mandated in *Moreno*. The Chief Judge has asked the Chief Trial Judge to track record of trial authentication times. Although this process point has not been a problem area historically, monitoring court-martial process points is a prudent practice to identify emerging problems early.

Time Extension Policy: Excessive time extensions (number and length) were a significant problem in the past (see Appendix K). In the post-2000 timeframe, prior to 2007, an initial 120 day time extension, and 6 or more time extensions in an individual case, were common. Now, appellate defense may receive an initial 60 day time extension, but any subsequent request may not exceed 30 days. Furthermore, on February 1, 2010, new Court rules imposed strict guidelines and required very specific and well-substantiated reasons for requesting a delay. The chart below shows the significant improvement experienced beginning in 2006 and continuing currently.

Navy-Marine Corps
Court of Criminal Appeals
Time Extensions Granted

Calendar Year	No. Time Extensions
2003	88
2004	1333
2005	1122
2006	441
2007	34
2008	46
2009	66
2010 *	0

* At about January 22, 2010

k. Military Justice Litigation Career Track

A number of initiatives have been developed to increase military justice competence across the Navy Judge Advocate General Corps. Among them, a Military Justice Litigation Career Track, first implemented in May 2007 (JAGINST 1150.2A, "Military Justice Litigation Career Track," June 17, 2009). As caseload declined but became more complex, and as the operations tempo/deployments increased, the cumulative effect was reduced time in the courtroom and eroded litigation experience (degree and quality) across the Navy, a trend all the Services experienced. The Military Justice Litigation Career Track initiative was intended to address this growing problem among Navy judge advocates.

JAGINST 1150.2A created a career path for litigators to develop and expand their experience. It also tasked senior litigators with identifying and developing judge advocates who demonstrate significant military justice knowledge and trial advocacy skills, thereby (1) developing the military justice litigators needed to improve effectiveness and efficiency in the courts-martial

process, and (2) forming the nucleus for a "reach-back capability," i.e., a pool from which experienced trial practitioners and staff judge advocates can be selected.

Applicants, generally senior 0-3 (lieutenant) and 0-4 (lieutenant commander) officers, may apply for entry into the career track through annual selection boards. Senior, experienced Navy litigators comprise these boards. A judge advocate who demonstrates the requisite quantitative and qualitative experience in military justice litigation may be selected for the Military Justice Litigation Career Track.

The Navy has designated 49 positions for Military Justice Litigation Career Track officers, and within 5 years plans to have a qualified pool (65 officers) to sustain the community. As of June 2009, the qualified pool (47 attorneys) consisted of 20 "experts" and 27 "specialists" selected from over 150 applicants. These positions are distributed throughout field appellate and headquarters organizations to assure an experience base of military justice practitioners in key military justice positions, such as appellate defense and appellate government division directors, and some Regional Legal Services Office commanders.

Not part of the Navy program, the Marine Corps has 22 positions coded for individuals with advanced degrees (Master of Laws--LL.M.) in criminal law. The advanced degree is preferred for individuals in the coded positions (e.g., Chief Defense Counsel, Senior Trial Counsel, and Defense Counsel), but exceptions may be approved based on other relevant qualifications.

l. Reserve Component

Complementing the Military Justice Litigation Career Track program is a new Navy Reserve Component Judge Advocate General construct developed in June 2009. Under this construct, expertise is aligned into three "pillars of practice:"

- military justice litigation;
- commander services and legal assistance; and
- specialty practices in international, environmental and admiralty law.

The military justice litigation pillar includes trial and defense counsel, appellate practice and litigation-related positions (e.g., the commanding officer and executive officer at a Region Legal Service Office). This pillar is designed to support the appellate divisions and help ensure qualified judge advocates are available to backfill field units when operational deployments impact the units. The Court (Code 51), and the Appellate Defense and Appellate Government Divisions (Codes 45 and 46), all depend heavily on Reserve judge advocates to fulfill their missions.

m. Military Justice Oversight Council

The Navy JAG chairs the Military Justice Oversight Council, established in 2009. The council currently meets monthly to review case management overall, and post-trial processing specifically. The Marine Corps SJA is a member, as are several senior Navy leaders involved in managing courts-martial matters.

All cases exceeding *Moreno* standards are individually briefed, as is each case without a decision after 6 months or more in the Court. The Council focuses on ensuring proper resources and procedures are in place and working. Once individual cases are completed, "lessons learned" from the case may be briefed to the Council. The Military Justice Oversight Council represents the first time the Navy JAG has been involved in reviewing military justice matters on a recurring basis, or assumed an active role in military justice oversight and supervision.

n. Inspections

Navy: There has been a JAG IG position for at least the last 2 decades with JAG IG inspection teams examining individual field units every 3 to 4 years. In 2006, the field portion of the JAG IG inspection program was revamped as a one-man-interview-based review without any detailed inspection of military justice processes, records, performance, or metrics. The redesigned field inspection system, which was coupled with other elements and intended to be more rigorous overall, did not achieve the desired results. CMTIS system limitations, including missing and inaccurate information, coupled with no longer using subject-matter experts in inspecting field military justice functions, undermined effectiveness in the inspection system.

In explaining the 2006 change, the Navy JAG said he re-structured the inspections program in his previous position commanding the Naval Legal Service Command because the inspection had become a "joke." The JAG IG could not complete in-depth inspections at every site every year, and people simply prepared for an infrequent inspection, "got things" in order, and knew they could "slack off" for the next few years. The inspections did not develop sustained good performance and were generally ineffective.

The Navy JAG changed the focus to a "more stepped and cumulative approach" with Article 6 visits, JAG IG visits, CMTIS metrics, and command oversight. According to the Navy JAG, however, the CMTIS piece did not materialize and the case visibility he counted on is still missing.

The Navy JAG emphasized a commitment to improving the inspection program. In June 2010, he announced future JAG IG inspections will again be team efforts with military justice experts embedded. In addition, he indicated he authorized hiring a clerk for administrative duties so the JAG IG could focus on substantive responsibilities.

The inspections now include fleet (independent) staff judge advocates, an initiative begun in 2009, and focus exclusively on military justice. The new inspection requirements will be formalized in Navy JAG policy.

Marine Corps: Major General Ary, the Marine Corps SJA, is working to standardize field processes and instill greater rigor in legal practice. He drafted a Legal Services and Administration functional area checklist for incorporation in the Commanding General's Inspection Program. Under this program, to improve commander oversight, subject matter experts will inspect Marine Corps Law Centers and Legal Service Support Sections to ensure compliance with standards and processing times.

The new checklist, formally published on June 3, 2010, focuses on standards and adherence, and will be applied to inspected units. These Inspector General inspections, coupled with the more rigorous Article 6 inspections General Ary has implemented, should help improve field legal services in the Marine Corps. According to Major General Ary, while past practice relied on trust, his approach is "trust, but verify" through inspection.

o. Authorized Staffing

Some case backlog and delay problems in both the Navy and Marine Corps related to inadequate staffing authorizations at both field and appellate levels.

Navy: A 2008 Center for Naval Analyses study determined the Navy could be at risk from maintaining a "status quo manpower option," even with a declining military justice caseload.[25] In assessing risks and costs, the study concluded:

- "modest to significant stress" was evident in the Region Legal Service Office commands and was "especially acute" in field commands that were "operational or joint;" and
- very long work weeks indicated a need for sizable increases in "manpower" to manage the expected workload.

According to the study, the status quo represented a "great deal of risk to the Navy" and, if selected as the "manning standard," the Judge Advocate General Corps was "undermanned."

The Assistant Judge Advocate General, Director of Operations (Code 06), advised us the Program Objective Memorandum (POM) 12 (January 4, 2010) indicates a likely reduction for FY 2012, due to concerns about a disproportionately large support-to-operational-personnel ratio. The Navy JAG also anticipates reduced authorizations and/or inventory, and has already been directed to reduce end-strength from the current 841 judge advocates to the 777 judge advocates authorized for the end of FY 2011.

The Navy is still recovering from a legalman shortage, which drove a decision to enhance legalman training to a paralegal-equivalent.[26] This enhanced training will enable legalmen to perform more legal tasks, relieving judge advocates from duties not requiring an attorney. The change, however, does not alleviate inadequate staffing concerns.

Another concern is an increase in "uncompensated" assignments, or the demand for judge advocates to fill duty billets for which there are no corresponding authorizations, such as requirements for joint-duty judge advocates. Judge advocate authorizations are declining, yet the Navy JAG must maintain higher personnel inventories to meet increasing individual augmentee and other duty demands.

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[25] We note the RLSO in San Diego reported its active caseload quadrupled after August 2008, and the high level continued through 2009. The increase may have resulted from Defense Base Closure and Realignment Commission realignments or a changing disciplinary trend.

[26] Legalman (LN), a Navy Enlisted Rating (Job) Description, denotes a paralegal with knowledge and expertise qualifying them to do perform some legal work under an attorney's supervision.

Marine Corps: In late 2007, the Marine Corps SJA proposed several increases in judge advocate structure to address a structural deficit and the increased requirements resulting from end-strength increases and emerging requirements. As a result, the judge advocate structure was increased and positions were "re-coded."

In 2008, positions historically held by judge advocates, but not coded as such, were re-coded as judge advocate billets. Between 2008 and 2010, the Marine Corps' Total Force Structure Division validated requests to recode approximately 56 judge advocate positions requiring specialized training and education (Master of Laws degree) in certain legal areas, including military justice. These positions were also prioritized for 100 percent staffing to eliminate personnel gaps in critical areas.

A secondary effect of recoding positions to require a Master of Laws degree was to increase opportunities for judge advocates to receive advanced education, which should elevate legal practice throughout the Marine Corps. Fifty one validated positions had been approved for re-coding as of June 4, 2010, and 56 positions will be coded for specialties by 2014.

To increase judge advocate inventories, Marine Corps Recruiting Command increased targeted judge advocate hires 71 percent between FY 2008 and FY 2010. The increase was from 35 in FY 2008, to 45 in FY 2009, and 60 in FY 2010.

In July 2009, due to force structure increases, the O-4 (major) judge advocate inventory fell to 71 percent of the Grade Adjusted Recapitulation.[27] To address this deficiency, the Marine Corps conducted a Return to Active Duty Board, selecting six reserve judge advocates to return to active duty. This initiative gave the Marine Corps additional experienced mid-level leaders with both military and civilian legal expertise. MARADMIN 296/10 was released on May 24, 2010, announcing the Fall 2010 Return to Active Duty Board.

The Marine Corps Judge Advocate Division calculated the following actual and projected staffing required to fulfill Marine Corps requirements for legal services. These levels, which are less than the Grade Adjusted Recapitulation (optimal strength) levels, reflect year-to-year increases between FY 2008 and FY 2012.

Marine Corps Judge Advocates
Judge Advocate Staffing to Meet Requirements

FY 2008: 393
FY 2009: 411
FY 2010: 432
FY 2011: 448
FY 2012: 460

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[20] According to Marine Corps Order (MCO) 1300.31A, "Enlisted Classification and Assignment Documents," March 3, 1992:

> "c. Grade Adjusted Recapitulation . . . reflects total Marine Corps manpower requirements by rank and PMOS [primary military occupational specialty] as of the end of the projected fiscal year. . . ."

Overall, the Marine Corps initiatives should help alleviate resource strains experienced in recent years.

p. Judge Advocate Promotions - Precept Language

After the first Gulf War, operational law positions became the positions of choice and the path to career success. The 2005 *Sea Enterprise* Panel on the Trial Judiciary concluded "[t]here is an undeniable perception that the judiciary is not a career enhancing assignment for Navy judge advocates." Promotion board statistics revealed few officers serving as military judges when promotion boards convened were selected for promotion. Selection to flag rank was virtually foreclosed to those in careers focusing on military justice.

Developing and maintaining increasingly technical litigation skills requires advanced education and progressive assignment to trial litigation positions, a reality likely to limit opportunities for assignment to sea duty and reduce assignment variety during a career. Under the traditional paradigm for promotion, such a career was not perceived as upwardly mobile.

A key consideration in developing the Military Justice Litigation Career Track program was the need to ensure an equitable promotion rate for those choosing to "specialize" in military justice, rather than remain more general "Fleet" practitioners. If litigators continued not being promoted - career track or not - promising attorneys would continue diverting to other practice areas in the Judge Advocate General Corps, or separating from the Navy to pursue civilian litigation careers. Therefore, one important element in the Military Justice Litigation Career Track program was including promotion board "precept language" explaining the need to ensure sufficient military justice practitioner promotions into higher grades to maintain an experience base and assure continuity in this core functional area.

The Marine Corps uses special precept language to advise promotion boards when a "critical shortage" (below 85 percent) occurs in a specified career field. The language may be used in O-5 (lieutenant colonel) and O-6 (colonel) promotion boards to highlight a shortage in the judge advocate specialty and assist in assuring an adequate number of judge advocates are promoted to the O-5 and O-6 grades.

Appendix O includes further information on Navy and Marine Corps precept language, usage, and results.

q. Overall Performance Measures

The Court provided a report based on CMTIS data showing the appellate cases resolved between January 1, 2009, and April 15, 2010 (16½ months). Only about 27 percent (266 of 980 records) had convening authority action dates and in about half these cases, the convening authority action date predated the trial data, indicating data input errors. Similarly, in about 9 percent of the total cases (87 of 980 records), the Court decision/resolution date predated the trial date, again indicating data input errors. After excluding cases with apparent data inaccuracies, our efforts to determine current compliance with the Moreno standards are shown in the table below.

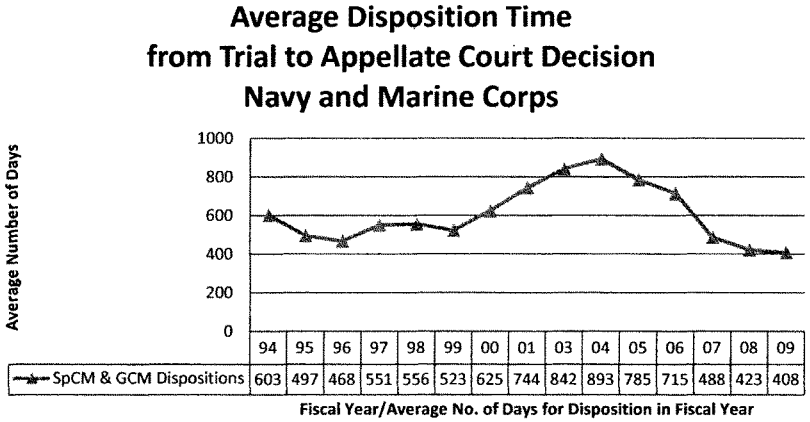
Navy and Marine Corps Court of Criminal Appeals
Cases Resolved 1/1/2009 - 4/15/2010

	Records	
	No.	%
Total Records	980	100.0%
Records with Trial Dates	935	95.4%
Records with Convening Authority Action Dates	266	27.1%
Records with Court Docket Dates	980	100.0%
Records with Court Decision/Opinion Dates	980	100.0%
Moreno Compliance--120 Day Standard (Trial to Convening Authority Action)		
Records Used to Measure Compliance	134	
Records Meeting Standard	23	17.2%
Moreno Compliance--30 Day Standard (Convening Authority Action to Docket)		
Records Used to Measure Compliance	273	
Records Meeting Standard	2	0.7%
Moreno Compliance--18 Month Standard (Court Docket to Decision)		
Records Used to Measure Compliance	980	
Records Meeting Standard	980	100.0%
Moreno Compliance-- First Two Standards Combined (Trial to Court Docket)		
Records Used to Measure Compliance	935	
Records Meeting Combined 150 Days Standard	446	47.7%
Moreno Compliance-- Three Standards Combined (Trial to Court Decision)		
Records Used to Measure Compliance	848	
Records Meeting Combined 690 Days Standard*	771	90.9%

* 120 days + 30 days + 18 months at 30 days per month

As can be seen above, the Court now appears to be doing well in meeting the 18-month *Moreno* timeline (100 percent compliance). Although field units still are not doing well in meeting their individual *Moreno* time standards for completing convening authority actions within 120 days, and ensuring the appeals are forwarded and docketed with the Court in another 30 days, overall, they meet the combined standard (150 days from trial date to docket date) in about 48 percent of the cases. The Court's timeliness then enables about 91 percent of cases to meet the combined, overall Moreno time standards (690 Days from trial to decision).

The following graph shows the overall improvement in this area over time between fiscal years 1994 and 2009.



The improvements beginning in FY 2005 and continuing through FY 2009 appear to be continuing.

The most telling indicator of how effectively the Navy and Marine Corps have addressed their longstanding post-trial delay problems is their current and future performance, which we attempted to assess based on compliance with time standards established in *Moreno* and the other limited statistical data available. The greater test will be their ability to sustain timely performance over the long-term, something we believe they can achieve from developing and institutionalizing appropriate standards, processes, case processing and tracking systems, and comprehensive inspections examining process utilization and effectiveness. Continuing active leadership involvement, supervision and monitoring at all levels will be essential to ensuring attention remains focused on post-trial review objectives and assuring timely, good-quality military justice administration overall.

3. Discussion

The Navy and Marine Corps have many good initiatives underway to address their post-trial problems. Existing statistical measures, although limited, demonstrate improvement in all areas --reduced processing times and speedier reviews are apparent. Assisted with declining caseloads and staffing surges from about 2004 to 2008, the immense case backlog has been eliminated. Current staffing in the appellate divisions and Court appears sufficient, with current caseloads, to maintain timely processing.

The Navy JAG's expressed commitment, following the O'Toole report, to continue reviewing annually the state of military justice in the Navy will be essential to ensuring effectiveness in existing and new processes/programs. The Military Justice Oversight Council, which the Navy JAG chairs, is an important step in establishing the higher-headquarters supervisory review and oversight that have been lacking historically.

Current leadership in the Assistant Judge Advocate General for Military Justice Division (Code 02), NAMARA, and the Court initiated many changes to improve their practices and attempt to develop effective tracking and other mechanisms to have case visibility they could not attain through CMTIS. Some staff members are particularly savvy about technology and have contributed to advancing the state of military justice administration through case automation and management.

Civilianizing the Deputy Director positions in the appellate divisions was a prudent decision helping to assure badly needed continuity and expertise in these offices. The individuals in the positions will be critical in managing workload and staff, identifying caseload surge indicators, and securing resources and support to prevent backlogs as have repeatedly besieged the offices in the past. It will be particularly important for the Assistant Judge Advocate General for Military Justice (Code 02) and the Navy JAG to respond to surge support needs when required.

Maintaining strong, experienced Reserve support units for those divisions and the Court is paramount. They could not accomplish their day-to-day mission without substantial and experienced Reserve support. Assignment selection policies should be tailored to assure a ready Reserve resource. When caseload increases, additional Reserve assignments should be considered first, since additional active duty assignments can take 6-12 months, which likely would be too late to meet an immediate need. Reserve resources will also be important in backfilling field military justice positions vacated due to deployments and individual augmentee requirements.

The new Chief Judge of the Navy position is a significant achievement, which should improve quality and performance in both the Trial and Appellate Judiciary. The new Judicial Screening Board process is also particularly noteworthy and should substantially enhance the Court's competence and credibility, eliminating past difficulties with appellate judge temperaments or backgrounds not suited to the position.

The Chief Judge of the Navy has supervisory authority over all Judiciary personnel and provides a unified voice and senior advocate for the community's needs. The new position consolidates responsibility and authority for professional supervision in a single office, achieving a needed focus and judicial competence heretofore missing. Coupled with efforts to establish a litigation career track and restore promotion opportunities for career litigators, the Chief Judge of the Navy should energize and motivate more judge advocates to pursue, not shun, military justice assignments. The new position should also increase the depth and breadth of military justice experience in the Judge Advocate General Corps, with improved field unit and military justice administration performance as one objective.

The first-ever Court publication (JAGINST 5814.1, "Navy-Marine Corps Court of Criminal Appeals," August 3, 2009), new "Rules of Practice and Procedure Including Internal Operating Procedures" (effective February 1, 2010), and improved internal case management procedures, are all much needed policy standardization and process improvements. The tracking systems and increased supervision incorporate some tools necessary for managing the caseload and identifying individual cases requiring priority review. The much more rigorous judicial selection process will, if sustained, help prevent the problems witnessed in the *Foster* case.

a. Case Tracking and Management

Automated tracking systems have a long and troubled history in the Navy JAG. Although progress has been made since 2006, effective and timely case tracking remains an elusive objective. As recently as June 2010, the Navy and Marine Corps were still finding "lost" cases, which still must work their way through the appellate process. This situation will likely continue in the foreseeable future.

A single court-martial tracking system should be the desired goal for the Navy and Marine Corps. If the ongoing Center for Naval Analyses study can be adjusted to include the coverage, a comprehensive study is needed to define a truly functional case management-focused tracking system to address the myriad of user data and reporting needs from field through appellate court levels in both the Navy and Marine Corps.

Additionally, the integrated case management solutions available in the Federal courts' Case Management / Electronic Case Filing (CM/ECF) system should be considered This system appears to offer an off-the-shelf technology adaptable to military requirements, and has universal interest across the Service courts of criminal appeals and the Court of Appeals for the Armed Forces. The proponents include active duty, civilian, and Reserve military justice practitioners, many of whom have first-hand experience with these systems in their civilian practices. Funding and other commitment/issues, however, have stymied efforts to seriously examine the system's utility.

We understand the ongoing Center for Naval Analyses study is including this system in benchmarking efforts. We encourage a detailed review of this system's adaptability/feasibility. The review should include military justice practitioners who understand the technology, know system capabilities, and are familiar with Service requirements.

Significant, dedicated funding will be necessary to develop and implement the courts-martial case processing and tracking system the Navy needs to address the inadequate automation and case tracking that caused lost visibility over appellate cases and resulting delays in administering military justice. The current, outdated reliance on paper production and transmission is laborious, costly, and produces untimely results.

b. Process Responsibility

Another significant issue is inadequate post-trial process uniformity in Navy and Marine Corps field units. Despite uniform organizational structures, Navy RLSOs each operate differently with distinct processes and without any uniform organizational alignment to control case processing. The O'Toole report noted inconsistent post-trial processing structures across the RLSOs, which our review confirmed. The same situation exists in the Marine Corps.

Another significant concern is inadequate standardization in procedures, checklists and templates for case processing in both the Navy and Marine Corps. Navy and Marine Corps field units use distinctly different, unit-developed standard operating procedures for case processing, without standardization across either Navy or Marine Corps units. Additionally, although CMTIS is the central case tracking system in the Navy, the RLSOs each maintain internal case tracking systems because CMTIS does not meet their overall needs.

The Marine Corps has achieved some recent progress in standardizing the case tracking function. The new Marine Corps CMS fielded in February 2010 appears to be gaining confidence. The two units we visited now both use the Marine Corps CMS exclusively for case tracking and reporting.

The information technology section responsible for managing the Marine Corps CMS has been conducting field training and developing upgrades and changes in response to field information requirements. Although CMS is still not a comprehensive data and time tracking system, the Marine Corps is making progress in this area.

In the Navy, two key regulations outlining detailed management goals and checklists for case processing have not been used for years. In fact, the management goals directive was rescinded without replacement. The only remaining time goals are those imposed in *Moreno*, after many court warnings, which followed noncompliance with published time and processing standards that became unused due to inadequate enforcement and interest.

Published standards and directives defining procedures, goals and expectations for individual processes are fundamental to any system's health and rigor. Standards are the means by which effective systems and processes endure and perform properly over time despite personnel turnover, organizational change, and deployment turmoil. They assure process continuity and reduce error opportunities.

Our interviews revealed significant process deficiencies in the field. Although improved since *Moreno*, continuing errors and delays appear to result primarily from lacking uniform, institutionalized processes and standards.

The current focus on *Moreno* compliance to avoid post-trial delays is good, but should not be the sole process and time management focus in military justice. Many pre-trial, trial, and post-trial processes require detailed attention and rigor. If not monitored and accomplished properly, any process can jeopardize case viability, or cause a lengthy, unnecessary delay.

Some individuals we interviewed described the historical cultural paradigm in the Navy as a hands-off, reactive approach to business, not a proactive or preventive approach. In recent years, there has been a more concerted effort to tackle process issues more aggressively. However, in our review, we found that oral discussions, informal documents, e-mails or telephonic communications were often the media of choice to announce changes, without follow-on institutionalization in more enduring formats. While these type communications are helpful when immediate action is needed, they should not substitute for formalizing policy in departmental regulations or instructions. We also found a tendency to use aspirational language, rather than create concrete standards. For example, a division recommendation to identify the specific *Moreno* time standards in a draft Naval Legal Service Command instruction was deemed unnecessary. The current language simply exhorts timely processing. Although such language is good, we believe it is not sufficient to motivate the thousands of people in the large and dispersed Navy and Marine Corps organizations to perform to a desired, but unspecified standard.

This year's annual review of Navy military justice administration, which Captain O'Toole is again heading, offers an opportunity to address this issue further. Because the Navy JAG is responsible for military justice administration in both the Navy and Marine Corps, the upcoming and future reviews should include Marine Corps military justice administration in the coverage.

c. Supervision and Oversight

This area has improved since the current Navy JAG began the Military Justice Oversight Council, and the Naval Legal Service Command gained current visibility over cases pending in the field. However, few oversight or supervisory mechanisms are embodied in official policy or institutionalized processes, and the decentralized Navy and Marine Corps organizations have little intermediate or higher headquarters oversight capability except at the Navy JAG, Marine Corps SJA, and Naval Legal Service Command levels.

Prior to CMTIS, field activity performance could not be monitored and totally depended on individual staff judge advocate experience and military justice focus. In establishing the Military Justice Oversight Council, the current Navy JAG created the first senior-level oversight mechanism for military justice we found in the Navy; however, that Council could be terminated at any time and successor Navy JAGs might choose not to continue the current commitment to military justice oversight.

Anticipating such an occurrence, the current Navy JAG began revising a SECNAV instruction to include provisions formally establishing the council. The draft instruction, which is still in review, requires annual Navy JAG reports to the Secretary of the Navy, Chief of Naval Operations, and Commandant of the Marine Corps.

In addition, the Region Legal Service Offices are now aligned to provide greater oversight and quality assurance for post-trial processing, at least for the ashore legal entities they supervise. However, they do not have supervisory or administrative control over the remaining independent staff judge advocates, who are totally autonomous in administering military justice and may vary greatly in experience and expertise.

d. Inspections

The Marine Corps recently instituted a comprehensive Commanding General IG inspection process, but the Navy retreated from more rigorous military justice inspections, believing its Naval Legal Service Command monitoring (based on CMTIS and other data), in conjunction with the Article 6 and more limited IG inspections, would be a sufficient tool. That belief was not fulfilled.

Just as establishing definitive standards is essential to developing sound processes, requiring recurring, detailed inspections to assess processes and procedures is essential to determining effectiveness. Inspections, with subsequent accountability for performance, help organizational leaders ensure processes are good, are actually used, and function as intended. In a recent closeout meeting, the Navy JAG acknowledged the current system had not met expectations and subsequently announced plans to revise the inspection program.

e. Convening Authorities

The sheer number of convening authorities in the Navy and their geographic dispersal creates unique military justice administration and logistics issues. For example, the legal personnel available to support many convening authorities have limited experience, which has contributed to errors in handling military justice matters. Modifications that simplify and streamline the current structure and subject independent afloat legal personnel to administrative control would substantially improve the post-trial process.

f. Authorized Staffing

Although we generally found current appellate division staffing adequate for current caseloads, some data suggests field staffing authorizations for both the Navy and Marine Corps may be inadequate. A 2008 Center for Naval Analyses study identified various "stressors" on personnel resulting from excessive workloads. The Marine Corps reported identical challenges and difficulties. Deployments and increased judge advocate requirements for which authorizations do not exist have imposed additional stress. The upcoming Section 506 panel review will have an opportunity to examine this area in greater detail.

g. Marine Corps SJA

Through statute and Secretary of the Navy instruction, the Navy JAG is responsible for military justice matters in the Marine Corps. In reality, however, neither the current nor previous Navy JAGs have generally exercised this responsibility vis à vis the Marine Corps, as evidenced by the longstanding post-trial delay problems. The operating paradigm has been to "trust" the Marine Corps to manage issues, in effect ceding responsibility without granting corresponding authority. Whether this situation resulted from respect for the Marine Corps' autonomy, or was a default result from overall time consuming demands on the Navy JAG, it produced a leadership vacuum in the Marine Corps.

In most routine matters, the Navy JAG advises, supports, and communicates with the Commandant of the Marine Corps through the Marine Corps SJA. Effective communication and interaction between the Navy JAG and Marine Corps SJA over the years seem to have depended primarily on their personal relationship, not any obligation involved in the respective positions. The current relationship between the two officers is direct and unimpeded, which has significantly benefited the efforts in recent years to resolve case backlogs and gain visibility over courts-martial cases.

The Marine Corps SJA does not have departmental responsibilities and supervises only those functions and personnel assigned to the Judge Advocate Division, Headquarters, Marine Corps. His role is advisory at the headquarters level, except as the Secretary of the Navy, the Navy JAG, or the Commandant of the Marine Corps may otherwise direct. From an overall perspective:

- Marine Corps field legal organizations do not have any supervisory legal organization monitoring their activities. They function totally autonomously.
- The Marine Corps SJA serves as the occupational field sponsor for judge advocates, legal services officers, and enlisted members, but does not have supervisory authority over these personnel. This authority remains within the non-JAG chain of command.

- The Navy JAG, by statute, holds exclusive authority to certify judge advocates as competent to perform duties as trial and defense counsel.
- The Marine Corps SJA is not authorized to conduct Article 6 inspections, or exercise professional supervision over legal services delivered in the Marine Corps.
- Not having field supervisory authority impacts the Marine Corps SJA's stature as the military legal community's leader in the Marine Corps. Recent legislation increasing the Marine Corps SJA's grade to Major General suggests some intent for the position to have greater leadership and supervisory responsibilities.
- The operations tempo and heavy demand for legal services in all disciplines has expanded the requirements for judge advocate functions in all Services. In this operational environment, the Navy JAG must rely on the Marine Corps SJA to exercise functional supervision and leadership in the Marine Corps judge advocate community, either on the Navy JAG's behalf or under direct authority that must be created.
- In most military organizations, a commander's staff judge advocate has direct and unimpeded access to the commanding officer, which assures access and independence in the legal advice rendered. Similarly, under statute, staff judge advocates and legal officers have the right to direct communication with convening authorities in all matters concerning military justice. The Marine Corps SJA position is two organizational levels below the Commandant. The Marine Corps SJA must pass through both the Director for the Marine Corps Staff and the Assistant Commandant before gaining access to the Commandant. In contrast, the Marine Corps SJA's civilian counterpart, the Counsel for the Commandant, is a direct report to the Commandant and has direct access. In military justice matters, it is essential for a commander's legal advisor to have unfettered access.

Consideration should be given to enhancing the Marine Corps SJA's authority to exercise more direct and effective professional supervision over Marine judge advocates and the legal services they deliver. We understand the Navy is considering this matter and reviewing a new draft SECNAV instruction, which among other things will address the Marine Corps SJA authorities and responsibilities. This draft was in the Navy General Counsel's office for review when we completed our field work.

V. CONCLUSIONS

Military Justice is the primary statutory mission for judge advocates. Other missions and practices evolved over time, but no other function is so inextricably linked to a commander's responsibility for maintaining a well-disciplined force. Although commanders own the military justice system and are the decision-makers, judge advocates administer and supervise the system. They bear a special responsibility for assuring the justice system is administered fairly and efficiently, and for diligently representing the interests of both the commander and the accused.

Our charge and principal focus was on reviewing the systems, policies and procedures used, and determining whether the resources devoted to military justice administration were adequate to assure appellants their due process rights as required under the U.S. Constitution, the Uniform Code of Military Justice, and applicable case law. Overall, we found significant improvements. Many good initiatives had been initiated, were under development, or were in planning.

However, some concerns remain that could preclude enduring reform if not addressed appropriately.

Over time, the Navy and Marine Corps judge advocate communities lost sight of their core mission. There was a consistent failure in leadership and inadequate institutional vigilance, supervision and oversight at all organizational levels involved in administering military justice. The failures also represented a deviation from fundamental principles of professional responsibility, which require diligence, competence and timely representation of clients' interests in the criminal justice system.

The highly decentralized Navy and Marine Corps organizations do not have intermediate supervisory staff judge advocate or command levels in most cases. As a result, effectiveness in any given unit continues to be, in many respects, ad hoc and dependent on the personality, work ethic, aggressiveness, and interest of individual supervisors and staff judge advocates. Current Naval Legal Service Command monitoring has had a beneficial effect.

Historically, institutionalized policy, standardization, and supervisory oversight could have ensured more effective military justice administration and prevented post-trial delay problems. Automated tracking systems either did not exist, did not provide needed visibility, or were ineffective in affording the visibility over cases needed for effective supervision. Inspections, where they existed, were ineffective in identifying process deficiencies, or eliciting sufficient corrective action. Time processing guidelines were not enforced or did not exist. Assignment policies for the Court and appellate divisions adversely impacted quality and continuity. Compounding the supervision and process deficiencies, dramatically increased deployments and individual augmentee requirements after 1991 created both turmoil and understaffing in post-trial functions.

In meetings, the Navy JAG, Vice Admiral James Houck, and the Marine Corps SJA, Major General Vaughn Ary, candidly assessed the post-trial delay problems triggering this review. In their words, there was a culture shift away from military justice to operational law, most significantly during Gulf War I and thereafter. They are implementing many initiatives to address outstanding issues, in addition to numerous initiatives dating to about 2005, which are now in force. As Major General Ary commented, they must set standards, train to standards, and inspect to standards.

VI. RECOMMENDATIONS

1. We recommend the Department of the Navy develop and field a single Navy and Marine Corps military justice case processing and tracking system that satisfies user requirements and achieves system-wide visibility over the entire court-martial process, including capability for an accused to monitor his/her appellate case status directly through web access. Continuing the current in-house efforts cannot be expected to resolve the problems experienced over the last two decades.

   Management Comments: Management comments on recommendations in the draft report are summarized and discussed below, and are included verbatim in Section VII below.

The DON concurred with recommendations 1 and 2 in the draft report, which have been consolidated into Recommendation 1 above. The DON advised:

(1) The Navy JAG is committed to developing a fully integrated DON military justice case processing and tracking system, a priority reflected in JAG Guidance 2010 (December 2009). The ultimate system objective must be accurate case tracking through all DON military justice processes to ensure timely mission accomplishment, and each accused Marine or Sailor receives due process.

(2) While this tracking system is being developed, current systems accurately track cases—CMTIS, augmented with manual back-up checks, is a functional, real-time case tracking capability for Navy cases, and the Marine Corps CMS, a single, mandated Corps-wide tracking system, provides all the visibility necessary for headquarters-level supervision and also provides an "accounts receivable" to the NMCCA for all Marine cases requiring appellate review.

(3) In March 2010, the Navy JAG (with concurrences from the DON Chief Information Officer, the DON Next Generation Enterprise Network System Program Office, and the DON Assistant for Administration) initiated a Center for Naval Analyses study to examine current Navy and Marine Corps case tracking systems, and also benchmark against the Federal Court's Case Management and Electronic Case Filing (CM/ECF) system and the Army and Air Force systems. The study, which is due in February 2011, will assist in identifying possible options for a unified Navy and Marine Corps system, and may provide a basis for a DoD-wide system.

(4) The Navy and Marine Corps have instituted numerous IT system improvements to monitor case tracking, but there is room for improvement. For example:

> Electronic Court Case Files: Most state and federal court systems are moving to full electronic/digital court records. Electronic records comply with the Paperwork Reduction Act, speed process delivery, and automate functions.

> Access to Data: A single, complete data entry, storage and retrieval system incorporating all criminal incident information across the Navy and Marine Corps would meet all current and future reporting requirements, and enable criminal activity statistical trend analysis.

> Case Management: There is a need to enable end user (investigators, counsel, support personnel) to quickly and effectively generate materials for courts-martial processing based on underlying system data (e.g. auto populated forms) and effectively distribute and document court compliance practices electronically to reduce manpower and improve efficiency.

> Workload analysis: An IT system to effectively manage legal offices, including managing personnel workload, identifying performance trends, streamlining internal

processes and evaluating manpower requirements, is standard practice in the private sector.

The DON will continue pursuing an integrated Navy and Marine Corps system. An integrated DoD system could be a more optimum long term solution.

Our Response: The management comments are responsive. They also acknowledge that current visibility over cases does not derive solely from the current automated systems, which must be augmented with "manual back-up checks." As discussed in the report, at the time of our field work, Navy field units were submitting weekly reports so the Naval Legal Service Command could assess compliance with *Moreno* standards. CMTIS reports were not reliable for that purpose and had to be supplemented. As also discussed in the report, even though visibility over cases improved both before and during our review, the improved case visibility did not prevent surprise when other old cases (*Bartolo, Bolla, Stagner, Thibodeau, and Brock*) surfaced during our review. Although we believe similar surprises are not as likely in the future, the possibility cannot be ruled out and should not be ignored.

2. We recommend the Secretary of the Navy issue policy establishing uniform post-trial processing standards, procedures, time guidelines and process responsibilities for the Navy and Marine Corps. Although our review focused on post-trial processing, more detailed process standards should be established for the entire court-martial process and should be institutionalized in Service policy.

Management Comments: The DON concurred, advising:

(1) JAGINST 5814. 1A requires the Commander, Naval Legal Service Command and Marine Corps SJA to institutionalize post-trial processes working successfully in the respective Service environments;

(2) the Marine Corps SJA has initiated standard post-trial processes in the Marine Corps, including a standard post-trial Staff Judge Advocate Review letter and standard Convening Authority's Action form;

(3) the Marine Corps SJA is reviewing other Marine Corps standards and local standard operating procedures for consolidation and development into Marine Corps-wide post-trial processes and standards; and

(4) under Commanding General Inspection Program purview, the Marine Corps recently implemented a new standard 16-page checklist addressing staff judge advocate offices, Legal Service Support Sections, and Law Centers, giving Commanders the ability to measure performance and hold legal professionals accountable.

Our Response: The management comments are responsive, assuming, JAGINST 5814.1A, currently in staffing within the Navy, establishes, "uniform post-trial processing standards, procedures, time guidelines and process responsibilities for the Navy and Marine Corps."

3. We recommend the Secretary of the Navy, or the Judge Advocate General of the Navy if so empowered, extend authority for the Navy Region Legal Service Offices and Naval Legal Service Command to supervise and direct timely and accurate post-trial processing by Navy independent (afloat) staff judge advocates. Independent staff judge advocates currently do not have a supervisory legal organization to which they answer for post-trial processing, either for specific issues or for military justice administration overall.

   Management Comments: The DON concurred that the Commander, Naval Legal Service Command and Region Legal Service Offices should supervise and direct timely and accurate post-trial processing, but nonconcurred that independent staff judge advocates' currently do not have a supervisory legal organization to which they answer for post-trial processing. According to the comments,

   > *"As reflected on page 89 of the DoDIG report, in 2005, the JAG directed Region Legal Service Offices (RLSO) and Naval Legal Service Command (NLSC) to supervise and direct timely and accurate post-trial processing by all commands in their areas of operation, including Navy independent and afloat staff judge advocates (SJAs)," and*
   >
   > *". . . Navy convening authorities and their independent SJAs rely on the advice and guidance of the cognizant RLSO."*

   Our Response: These comments do not address the central issue, i.e., there is no legal organization with authority to direct or supervise the independent staff judge advocates in post-trial processing matters. As clarification, on page 89 of the draft report, we noted that in 2005, the Navy JAG directed the new Region Legal Service Offices to "track and retain control over records of trial until convening authority actions were completed and the records were received by NAMARA." Tracking and retaining control over records of trial is different in character and degree from actively supervising and directing timely and accurate post-trial processing by independent SJAs. Further, as demonstrated by information in this report, RLSO efforts and convening authority/independent SJA reliance on advice and guidance of RLSOs historically failed to ensure timely post-trial processing of records of trial and submission to the Court.

4. We recommend the Secretary of the Navy direct a comprehensive review to identify the staffing needed to meet military justice requirements in the Navy and Marine Corps. The review should assess staffing adequacy and mix, and take into account the impact(s) frequent deployments and mandates to fill uncompensated billets have on the ability to complete mission requirements. The review should also assess the potential benefits from civilianizing some officer or enlisted billets to enhance continuity and help assure uninterrupted service in the post-trial process. The ongoing Section 506 panel review provides an opportunity for immediately assessing the needs.

   Management Comments: The DON concurred, agreeing the Section 506 panel review is an immediate opportunity and advising:

(1) the Navy JAG is providing the Chief of Naval Personnel and cognizant budget submitting offices with a comprehensive Navy JAG staffing needs review;

(2) the Marine Corps SJA is working closely with the Deputy Commandant for Manpower and Reserve Affairs, and the Total Force Structure Division, to assess Marine Corps' manpower needs; and

(3) in accordance with our recommendation, the Navy JAG intends to evaluate the feasibility of civilianizing post-trial review billets in the Region Legal Service Offices and will report the results in the Annual Report on Military Justice within the Department of the Navy, due November 30, 2010.

Our Response: The comments are responsive.

5. We recommend the Secretary of the Navy, Commandant of the Marine Corps, and Judge Advocate General of the Navy take appropriate steps to authorize the Staff Judge Advocate to the Commandant of the Marine Corps to:

   a. exercise professional supervision over Marine judge advocates and the legal services they deliver; and

   b. conduct Article 6, Uniform Code of Military Justice (UCMJ) inspections in the Marine Corps.

Management Comments: The DON concurred, advising:

(1) The Navy JAG and Marine Corps SJA, in coordination with the DON General Counsel, have been directed to revise SECNAVINST 5430.27C to increase Marine Corps SJA responsibility and authority to set and maintain standards for administering military justice and providing uniformed legal services in the Marine Corps. The revision will expressly delegate the Navy JAG's Article 6, UCMJ, inspection responsibilities within the Marine Corps to the Marine Corps SJA.

(2) Legislation will be proposed to establish a direct relationship between the Secretary of the Navy and the Marine Corps SJA to enhance oversight and accountability over the new Marine Corps SJA authority.

(3) A legislative change to 10 U.S.C. §806 will be proposed to make the Marine Corps SJA responsible and accountable for conducting Article 6, UCMJ, inspections in the Marine Corps.

(4) The changes all will be drafted to ensure consistency with the Navy JAG's Title 10 authorities.

Our Response: The comments are responsive.

6. We recommend the Judge Advocate General of the Navy establish a joint Navy and Marine Corps task force to review and assess systems such as the Federal Case Management / Electronic Case Filing (CM/ECF) system for possible fielding in the Navy and Marine Corps. The Navy should explore opportunities for including the Army and Air Force in the study, and making such a system a DoD-wide application.

   Management Comments: The DON concurred, advising that in March 2010, the Navy JAG initiated an IT requirements study in which the Center for Naval Analyses is benchmarking the Federal Court's Case Management and Electronic Case Filing (CM/ECF) system, as well as the Marine Corps, Army, Air Force and Department of Justice systems, to assist in identifying possible options for a unified Navy and Marine Corps system, and potentially commonalities across the DoD. Once recommendations from this study are received, the DON will assess the IT system(s) to pursue. Although DON will continue pursuing an integrated Navy and Marine Corps system, an integrated DoD system may be a more optimum solution. Currently, each Service has its own case tracking system and none has an electronic case filing system. For long-term efficiency across the Services, moving to a unified system could be advantageous. The Navy JAG will make its study results available to the Army and Air Force to evaluate the potential for adopting a common system.

   Our Response: The management comments are responsive.

7. We recommend the Judge Advocate General of the Navy implement a comprehensive and detailed inspection program for military justice administration in field units and ensure the inspections address processes and tracking systems. Independent (afloat) legal units should be included in the inspection program.

   Management Comments: The DON concurred, advising:

   (1) JAGINST 5040.1, issued on June 14, 2010, updates policy, responsibilities, and procedures for assessing Navy legal offices, including independent SJA offices, staffed with JAG community personnel, and provides for annually inspecting every Region Legal Service Office (RLSO), the Naval Justice School, and selected staff judge advocate offices;

   (2) by instruction, a subject matter expert in military justice will participate in every RLSO inspection to assess the RLSO's performance and compliance with statutory and regulatory requirements, including post-trial processing of courts-martial, and also review Naval Legal Service Office (defense and personnel representation functions) performance; and

   (3) with respect to the Marine Corps, the draft report details Marine Corps SJA actions to enhance both the Commanding General's Inspection Program and his own Article 6 inspection process, specifically to ensure compliance with standards and processing times. These inspections programs are designed to be complementary.

   Our Response: The comments are responsive.

8. We recommend the Judge Advocate General of the Navy establish a Chief Defense Counsel or equivalent position in the Navy. The Navy is the only Service without such a position, and the defense community lacks leadership and a community advocate to oversee defense

services and assure proper resources and training are available.

Management Comments: The DON concurred, advising that on October 1, 2010, Naval Legal Service Command (NLSC) was reorganized to separate the Naval Legal Service Offices (NLSOs) and Region Legal Service Offices (RLSOs) into two functional groups. This reorganization included eliminating the Vice Commander position, NLSC, and creating a Deputy Commander, RLSOs, and Deputy Commander, NLSOs. Each Deputy Commander has authority and resources to actively manage and supervise courts-martial case processes.

Commander, NLSC, also established both a Defense Counsel Assistance Program (DCAP) and a Trial Counsel Assistance Program (TCAP). The DCAP is led by a Navy captain Military Justice Litigation Career Track officer as its director, who serves in the role of a chief defense counsel of the Navy and reports to Deputy Commander, NLSO. DCAP is separate and distinct from the office of the Judge Advocate General Criminal Law Division (Code 20) and the Appellate Defense Division and will provide "reach-back support" dedicated to specific trial defense counsel needs. DCAP director supervises only personnel detailed to DCAP, but will assist the Deputy Commander, NLSOs, in exercising oversight and reporting responsibilities.

The TCAP is led by a Navy commander Military Justice Litigation Career Track officer, who serves as the chief trial counsel of the Navy, reporting to Deputy Commander, RLSOs. TCAP will provide Government-related subject matter expertise and support to RLSO trial counsel when requested (trial counsel, or Commanding Officer, RLSO) or as the Deputy Commander directs. TCAP Director supervises only personnel detailed to TCAP, but will assist the Deputy Commander, RLSOs, in exercising oversight and reporting responsibilities.

The Marine Corps has had a Chief Defense Counsel since 1985.

Our Response: The comments are generally responsive. Realigning NLSC Headquarters and creating new positions and functions with greater focus on the defense community are significant steps forward. The Deputy Commander, NLSOs, has been given the authority and resources to manage and supervise courts-martial defense matters, and will be assisted by the Director, DCAP, who serves in the role of chief defense counsel. However, the senior partner in the Navy's defense firm, the Deputy Commander, NLSOs, is also responsible for two other major legal programs: legal assistance and claims. We remain concerned that these additional responsibilities will negatively impact the Deputy Commander, NLSOs' ability to lead, oversee, and resource defense services. We continue to recommend establishing a Chief Defense Counsel position with the authority and resources to manage and supervise the Navy defense function, including the defense counsel and staff.

9. We recommend the Secretary of the Navy initiate a legislative proposal(s) to amend statute as appropriate to authorize the Staff Judge Advocate to the Commandant of the Marine Corps to certify a Marine judge advocate's competence to perform duties as a trial or defense counsel.

Management Comments: The DON agreed that a statutory change is needed to enhance and clarify the Marine Corps SJA's authority over delivery of professional legal services in the

Marine Corps. However, the DON believes modifying 10 U.S.C. §§ 5041, 5046, 1044, and 806 (to be implemented through revisions to relevant DON and Marine Corps regulations) will best accomplish the needed change and make amendment of Article 27(b) unnecessary.

Our Response: The comments are responsive. Although we believe pursuing a direct amendment to Article 27(b), Uniform Code of Military Justice, should continue as an active option during this process, we have modified our original recommendation to eliminate mention of Article 27(b). This modification provides DON greater latitude in pursuing changes needed to enhance and clarify the Marine Corps SJA's authority.

10. We recommend the Judge Advocate General of the Navy provide at least annual military justice updates to the Secretary of the Navy, Chief of Naval Operations, and Commandant of the Marine Corps. The updates should detail post-trial processing improvements, *Moreno* compliance, and progress in establishing effective oversight and tracking mechanisms for post-trial processing.

Management Comments: The DON concurred with recommendations 7 and 12 in the draft report, which have been consolidated in this recommendation, advising that the Navy JAG already initiated an annual reporting process, with the first annual report compiled in September 2009, and the second due November 30, 2010. According to the comments:

(1) the "Service Chiefs" will provide this annual report to the Secretary of the Navy, thus ensuring adequate Service input and comment to the Secretary;

(2) a proposed Secretary of the Navy instruction currently in coordination would institutionalize the annual reporting requirement; and

(3) the report will be a comprehensive assessment of military justice practice across the DON, including the Marine Corps.

Our Response: The comments are responsive.

11. We recommend the Judge Advocate General of the Navy update applicable service policy documents such as the Naval Legal Service Command Manual, the Judge Advocate General Manual, and the Legal Administration Manual to:

    a. Establish uniform business rules for shipping/transmitting records of trial to the Navy-Marine Corps Appellate Review Activity to assure speedy, positive tracking capability and visibility over records of trial at both field and appellate levels.

    b. Require the Navy-Marine Corps Appellate Review Activity to send all court "mandates" requiring convening authority action through the servicing field legal offices.

    c. Require convening authorities, upon completing a court-mandated action, to return the completion documents to the Navy-Marine Corps Appellate Review Activity through the servicing field legal office.

Management Comments: The DON concurred, advising:

(1) With respect to shipping/transmitting records of trial, JAGINST 5813.1B, "Standardization of General Courts-Martial and Special Courts-Martial Verbatim and Summarized Records of Trial," September 29, 2010, requires sending all records of trial requiring review under Articles 66 or 69 to the Office of the Judge Advocate General via FEDEX/UPS/DHL/USPS Express, or hand delivery (when feasible and authorized). The Marine Corps is currently conducting a pilot project to test using electronic records of trial. Possible project results include reduced costs and improved post-trial processing timelines, tracking, and service/departmental visibility.

(2) With respect to sending and returning mandates, the Manual of the Judge Advocate General (JAGMAN), Chapter I, has been revised, is currently in coordination, and final promulgation is anticipate in December 2010. Section 0155(c)(I) will be amended to include the following language based on the recommendation and to formalize current practice:

> *All supplementary orders that require convening authority action shall be returned to the convening authority via the servicing Region Legal Service Office or area Marine Corps Staff Judge Advocate's office. Additionally, once the court-mandated action is complete, convening authorities shall return the completion documents to the Navy-Marine Corps Appellate Review Activity via the same office.*

The Marine Corps SJA is currently revising the Legal Administration Manual (Marine Corps policy) to reflect these new processes.

Our Response: The comments are responsive.

12. We recommend the Judge Advocate General of the Navy monitor and maintain Reserve unit support for the appellate divisions and the Navy-Marine Corps Court of Criminal Appeals to assure sufficient numbers and experience to accomplish missions and meet immediate surge requirements.

Management Comments: The DON concurred, advising:

(1) the Navy JAG and Marine Corps SJA monitor Reserve support to these organizations continuously;

(2) separate reserve units support the appellate divisions and NMCCA – currently, 13 Naval Reserve judge advocates support the Appellate Government Division (Code 46); 20 Naval Reserve judge advocates, 1 Reserve Legalman and 5 Marine Corps Reserve judge advocates support the Appellate Defense Division (Code 45); and 10 Naval Reserve appellate judges and two Marine Corps Reserve appellate judges supported the NMCCA;

(3) personnel assignment numbers are monitored through the Military Justice Oversight Council and Service assignment processes (Navy JAG and Marine Corps SJA); and

(4) Marine Corps headquarters (Reserve Legal Services Support Section, Judge Advocate Division) centrally manages (administration, command, and control) Reserve legal services delivery to the Total Force (Marine Corps), and ensures trained and qualified legal personnel are available as directed to support active duty requirements, including requirements at the appellate divisions and NMCCA.

Our Response: The comments are responsive.

13. We recommend the Judge Advocate General of the Navy maintain an O-6 grade authorization for, and fill the Director, Appellate Defense Division (Code 45), position at the 0-6 level.

Management Comments: The DON concurred, advising the JAG Corps recognizes the importance and is committed to maintaining continuity and seniority in the billet, although temporary gaps may be unavoidable given military personnel rotations.

Our Response: The comments are responsive.

14. We recommend the Judge Advocate General of the Navy examine effectiveness and utility in the 1-year clerkship program established to enhance appellate counsel training and either modify or rescind the program.

Management Comments: The DON concurred, advising:

(1) although the appellate court clerkship program is vital to the NMCCA mission and counsel who serve as law clerks value the experience highly, the Navy JAG is reviewing assignment options to assess the effects of the resulting 2 year (vice 3 year) tours in the appellate divisions arising when an officer is assigned to a 1 year court clerkship prior to arriving at an appellate division; and

(2) the review results will be addressed in the Annual Report on the State of Military Justice within the Department of the Navy.

Our Response: The comments are generally responsive. However, we encourage a thorough review that includes an option to increase the duty tour to 4 years and, thereby, eliminate the impact on the appellate divisions.

VII. MANAGEMENT COMMENTS

THE SECRETARY OF THE NAVY
WASHINGTON, D. C. 20350-1000

November 5, 2010

MEMORANDUM FOR DEPARTMENT OF DEFENSE INSPECTOR GENERAL

SUBJECT: Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy (Project No. 2009C007)

Per your memorandum of September 24, 2010, the following comments are provided in response to the draft report concerning post-trial processing of courts-martial within the Department of the Navy.

Your report asserts that the Department has failed to ensure that all courts-martial receive timely post-trial review. While I am confident that the vast majority of courts-martial did receive timely post-trial review, there are instances where processes failed. The case of *United States v Foster*, the impetus for this review, is a stark example.

There are many reasons for the failures during this time period: a military justice ethos that produced the largest number of courts-martial within the DoD; the globally dispersed and decentralized nature of Navy and Marine forces, of which the judge advocate communities are a part; significant operational tempo and increasing client demands on judge advocates outside of military justice; and the difficulty of standardizing policies and instituting common operating systems across two mature Services with different organizational constructs. There is also evidence that, in some cases, inattention to detail and substandard professionalism at all levels allowed cases like *Foster* to suffer.

Your draft report states that "[t]he most telling indicator of how effectively the Navy and Marine Corps have addressed their longstanding post-trial delay problems is their current and future performance . . . ." Judged against this standard, I believe the Department of the Navy is meeting its post-trial military justice mission, as demonstrated by the following:

- In 2010, neither the Court of Appeals for the Armed Forces (CAAF), nor the Navy-Marine Corps Court of Criminal Appeals (NMCCA) found any failure of due process in any case because of post-trial delay. In 2009, only the *Foster* case required relief by NMCCA.

- The appellate process has not exceeded the 18-month guideline of the *Moreno* decision in any case this year, and only exceeded that guideline in two cases in 2009. One case was *Foster*; the other case required no corrective action.

- Your report indicates that the average disposition time from trial to appellate court decision in FY 2009 averaged 408 days - less than one-half of the FY 2004 rate - and, in fact, the most expeditious average processing rate since 1994. Our data from FY 2010 shows another record low post-trial processing rate: For cases decided by the NMCCA in FY 2010, the average time from trial to appellate decision declined to 248 days. Even when including remanded cases on which the NMCCA had taken previous action, the average rises to only 323 days.

SUBJECT: Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy (Project No. 2009C007)

As your report notes, there has been dramatic improvement in post-trial processing over the course of the last five years and that improvement is being sustained. A succession of Judge Advocates General and others in senior leadership positions focused on post-trial processes to not only correct the deficiencies of past cases, but also establish the institutional structures to ensure compliance into the future.

While I do not discount the possibility of pre-2006 cases having been misrouted for review outside of reliable channels, I believe that both Services and the Navy and Marine Corps Appellate Review Activity are tracking cases such that, today, no courts-martial are going unaccounted for in the post-trial process, and the timeliness of appellate review is well within the guidelines set forth by the Court of Appeals for the Armed Forces.

I have full faith and confidence that the current Judge Advocate General, in partnership with the Staff Judge Advocate to the Commandant, has been fully accomplishing, and will continue to fully accomplish, the post-trial military justice mission as required by statute and regulation. I agree with the Draft Report's conclusion that the improvements of the past five years should be institutionalized, and that there are still important improvements to be made, specifically in standardizing field processes and development of a single, consolidated case tracking system. I look forward to the results of the Judge Advocate General's upcoming review of case tracking and management options, as well as the Annual Report on Military Justice within the Department of the Navy. Finally, I believe the authority and accountability of the Staff Judge Advocate to the Commandant of the Marine Corps should be enhanced within the Marine Corps.

My comments on the draft report's recommendations are provided at TAB A. Additionally, substantive comments of the Judge Advocate General and the Staff Judge Advocate to the Commandant are provided at TABs B and C.

Thank you for your efforts in undertaking this important review, and for affording me the opportunity to provide comment. I am very willing to meet with you to further discuss your report if you feel that would be helpful.

Ray Mabus

Attachments:
As stated

cc:
Chief of Naval Operations
Commandant of the Marine Corps

Recommendation 1: We recommend the Department of the Navy to develop a unified Navy and Marine Corps criminal justice case processing and tracking system, and ensure its development and fielding. Continuing the current in-house efforts cannot be expected to resolve the problems experienced over the last two decades.

Comment: Concur.

Until recently, the DON was working on a system that would tend to satisfy this recommendation – the Department of the Navy Criminal Justice Information System (DONCJIS). In September 2010, DONCJIS was cancelled due to failure in performance tests and funding shortfalls. I have directed our executive for Enterprise Information Systems to identify a replacement system.

The goal of DONCJIS was to provide complete tracking of a criminal case in the DON from initial report to completion of appellate review, command action or investigative actions. The Navy and Marine Corps legal and law enforcement communities participated in the DON working group and Board of Governors for the project and provided stakeholder requirements input (for the judicial module) to the developers. DONCJIS would have provided processing/tracking information, including DIBRS reporting requirements, for all criminal justice cases in the DON regardless of whether the case entered the formal military justice process.

Recommendation 2: We recommend the Secretary of the Navy develop and field a single Navy and Marine Corps military justice case processing and tracking system that satisfies user requirements and achieves system-wide visibility over the entire court-martial process, including capability for an accused to monitor his/her appellate case status directly through web access.

Comment: Concur.

I am committed to developing a fully integrated DON military justice case processing and tracking system. Developing a fully integrated system is a JAG priority, as reflected in JAG Guidance 2010 (December 2009). The ultimate objective of such a system must be to accurately track all phases of a case through the military justice process in the DON in order to ensure timely accomplishment of the commander's military justice mission and ensure each accused Marine or Sailor receives due process. While this tracking system is being the developed, we have systems in place to accurately track cases. Within the Navy, the Court Martial Tracking and Information System (CMTIS) is currently providing a functional real-time case tracking capability, augmented by manual back-up checks. Within the Marine Corps, CMS, a single, mandated Corps-wide tracking system, provides all the visibility necessary for supervision to the HQMC level and provides an "accounts receivable" to the NMCCA for all Marine cases requiring appellate review

In March 2010, the JAG initiated a Center for Naval Analysis (CNA) study, concurred in by the Department of the Navy (Chief Information Officer) (DON CIO), the Next Generation Enterprise Network System Program Office (NGEN SPO), and the DON Assistant for Administration (DONAA), to examine current Navy and Marine Corps case tracking systems, and also benchmark against the Federal Court's Case Management and Electronic Case Filing (EC/CMF) system, as well as systems employed by the Air Force and Army. The CNA study, which is due in February 2011, will assist in identifying possible options for a unified Navy and Marine Corps system. The CNA study may also provide a basis for a DoD wide system.

The Navy and Marine Corps have instituted numerous IT system improvements to monitor case tracking, but there is room for improvement, for example:

- **Electronic Court Case Files:** Most state and federal courts systems are moving to fully electronic/digital court records. Electronic records comply with the Paperwork Reduction Act, speed delivery of process, and automate functions.
- **Access to Data:** A single, complete data entry, storage and retrieval system that incorporates all criminal incident information across the Navy and Marine Corps will meet all current and future reporting requirements and enable criminal activity statistical trend analysis. (See response to Recommendation 1)
- **Case Management:** Need to enable end user (investigators, counsel, support personnel) to quickly and effectively generate materials for courts-martial processing based on underlying system data (e.g. auto populated forms) and effectively distribute and document court compliance practices electronically to reduce manpower and improve efficiency.

- **Workload analysis**: An IT system to effectively manage legal offices, including managing personnel work load, identifying performance trends, streamlining internal processes and evaluating manpower requirements, is standard practice in the private sector.

DON will continue to pursue an integrated Navy and Marine Corps system., A Department of Defense (DoD) integrated system could be a more optimum long term solution.

Recommendation 3: We recommend the Secretary of the Navy issue policy establishing uniform post-trial processing standards, procedures, time guidelines and process responsibilities for the Navy and Marine Corps. Although our review focused on post-trial processing, more detailed process standards should be established for the entire courts-martial process and should be institutionalized in Service policy.

Comment: Concur.

Navy Regulations (Article 0331) and SECNAVINST 5430.27 (Subj: Responsibility of the Judge Advocate General and Staff Judge Advocate to the Commandant of the Marine Corps for Supervision and Provision of Certain Legal Services) assign oversight of the DON's military justice system to the JAG. As highlighted by the DoD IG in Appendix L, the JAG has already taken steps to ensure satisfactory post-trial processing. Specifically, the DoD IG noted the following: (1) in 2009 the JAG, "approved 'reporting' triggers for briefing military justice cases to the Military Justice Oversight Council"; (2) in 2010, the JAG adopted the development of a Navy and Marine Corps case tracking system as a JAG 2010 priority item; and (3) from June to September 2010 the JAG would, "conduct a zero-based review of military justice policy and execution directives in the Department of the Navy to ensure current practices are institutionalized and practitioners have ready references for guiding their practice and ensuring compliance with relevant requirements." DON military justice experts agree that arbitrary, one-size-fits-all process timelines are not as helpful as careful tracking and oversight tailored to individual cases.

Through JAGINST 5814.1A, JAG has established a requirement for the Commander, Naval Legal Service Command and the Staff Judge Advocate to the Commandant of the Marine Corps to institutionalize the post-trial processes that are working successfully in the respective service environments.

The SJA to CMC has already initiated the process of standardizing post-trial processes within the Marine Corps, including implementing a standard post-trial Staff Judge Advocate Review letter and a standard Convening Authority's Action form. In addition, the SJA to CMC is currently undertaking a review of other standards and local SOPs in the Marine Corps for consolidation and development of Marine Corps wide post-trial processes and standards. Under the purview of the Commanding General's Inspection Program, the Marine Corps recently implemented a new standard 16 page checklist addressing SJA offices, Legal Service Support Sections, and Law Centers. This checklist provides Commanders with the ability to measure the performance of their legal professionals and hold them accountable to standards.

Recommendation 4: We recommend the Secretary of the Navy, or the Judge Advocate General of the Navy if so empowered, extend authority for the Navy Region Legal Service Offices and Naval Legal Service Command to supervise and direct timely and accurate post-trial processing by Navy independent (afloat) staff judge advocates. Independent staff judge advocates currently do not have a supervisory legal organization to which they answer for post-trial processing, either for specific issues or for military justice administration overall.

Comment: Concur, in part.

I concur that Commander, Naval Legal Service Command and Region Legal Service Offices and should supervise and direct timely and accurate post-trial processing by independent and afloat staff judge advocates. I do not concur that independent staff judge advocates currently do not have a supervisory legal organization to which they answer for post-trial processing, either for specific issues or for military justice administration overall.

As reflected on page 89 of the DoDIG Draft Report, in 2005 the JAG directed Region Legal Service Offices (RLSO) and Naval Legal Service Command (NLSC) to supervise and direct timely and accurate post-trial processing by all commands in their areas of operation, including Navy independent and afloat staff judge advocates (SJAs).

Independent SJAs in the Navy provide general legal advice to their respective Commanders within their operational chain of command. For the specialized task of managing military justice cases through the pre-trial, trial, and post-trial phases up to docketing of a case on appeal at the Navy-Marine Corps Court of Criminal Appeals (NMCCA), Navy convening authorities and their independent SJAs rely on the advice and guidance of the cognizant RLSO.

Recommendation 5: We recommend the Secretary of the Navy direct a comprehensive review to identify the staffing needed to meet military justice requirements in the Navy and Marine Corps. The review should assess staffing adequacy and mix, and take into account the impact(s) frequent deployments and mandates to fill uncompensated billets have on the ability to complete mission requirements. The review should also assess the potential benefits from civilianizing some officer or enlisted billets to enhance continuity and help assure uninterrupted service in the post-trial process. The ongoing Section 506 panel review provides an opportunity for immediately assessing the needs.

Comment: Concur.

A comprehensive review would be useful, and the ongoing Section 506 Panel review provides that very opportunity for assessing manpower needs.

The JAG is providing a comprehensive review of Navy JAG staffing needs to the Chief of Naval Personnel as well as cognizant Budget Submitting Offices. Likewise, the Staff Judge Advocate to the Commandant of the Marine Corps is working closely with the Deputy Commandant for Manpower and Reserve Affairs and the Total Force Structure Division to assess Marine Corps' manpower needs.

Per DoD IG recommendation, the JAG intends to evaluate the feasibility of civilianizing post-trial review billets in the Region Legal Service Offices and will report the results of this review in the Annual Report on Military Justice within the Department of the Navy, due 30 November 2010.

Recommendation 6: We recommend the Secretary of the Navy, Commandant of the Marine Corps, and Judge Advocate General of the Navy take appropriate steps to authorize the Staff Judge Advocate to the Commandant of the Marine Corps to:

a. exercise professional supervision over Marine judge advocates and the legal services they deliver

Comment: Concur.

By statutory definition, the Staff Judge Advocate to the Commandant currently functions as a command legal advisor to the Commandant without authority to supervise the administration of military justice throughout the Service. I have taken steps to address this gap in two ways. First, I have directed the JAG and the SJA to CMC, in coordination with the General Counsel, to revise SECNAV Instruction 5430.27C in a way that would provide the SJA to CMC with increased responsibility and authority to set and maintain standards for the administration of military justice and the provision of uniformed legal services in the Marine Corps. Second, I will propose legislation that would establish a direct relationship between the Secretary and the SJA to CMC to enhance oversight and accountability over the SJA to CMC as the officer with that authority.

b. conduct Article 6, Uniform Code of Military Justice (UCMJ) inspections in the Marine Corps.

Comment: Concur.

The revision of SECNAVINST 5430.27C that I have directed will provide an express delegation of the JAG's Article 6, UCMJ, inspection responsibilities within the Marine Corps to the SJA to CMC. Further, I will propose legislative change to 10 USC § 806 to expressly make the SJA to CMC responsible and accountable for the conduct of Article 6, UCMJ, inspections within the Marine Corps. Both the regulatory and proposed statutory changes will be drafted to ensure consistency with the JAGs Title 10 authorities. Statutory change will thus place the responsibility for this function with the officer best positioned to perform it and provide the clearest line of accountability.

Recommendation 7: We recommend the Secretary of the Navy prepare annual reports detailing post-trial processing improvements, *Moreno* compliance, and progress in developing a comprehensive and effective case processing and tracking system.

Comment: Concur.

The JAG has already initiated an annual reporting process. The first annual report was compiled in September 2009. The second annual report is due 30 November 2010. This annual report will be provided to the Secretary of the Navy, via the Service Chiefs, thus ensuring adequate Service input and comment to the Secretary.

The requirement to continue annual reports is proposed for institutionalization in the proposed Secretary of the Navy instruction currently in coordination. The report will be a comprehensive assessment of the military justice practice across the Department of the Navy (including the Marine Corps).

Recommendation 8: We recommend the Judge Advocate General of the Navy establish a joint Navy and Marine Corps task force to review and assess systems such as the Federal Case Management / Electronic Case Filing (CM/ECF) system for possible fielding in the Navy and Marine Corps. The Navy should explore opportunities for including the Army and Air Force in the study, and making such a system a DoD-wide application.

Comment: Concur.

In March 2010, the JAG initiated a study of Navy JAG Corps IT requirements, including post-trial tracking systems. The study, conducted by the Center for Naval Analysis (CNA), is benchmarking the Federal Court's Case Management and Electronic Case Filing (EC/CMF) system, as well as the Marine Corps' CMS and those systems employed by the Air Force, Army, and Department of Justice. The CNA study will assist in identifying possible options for a unified Navy and Marine Corps system, and potentially commonalities across DoD. Once this study is completed, and the recommendations received, the DON will make an overall assessment of the IT system(s) to pursue.

Although DON will continue to pursue an integrated Navy and Marine Corps system, an integrated DoD system may be a more optimum solution. Currently, each Service has its own case tracking system and none have an electronic case filing system. For long-term efficiency across the Services, moving to a unified system could be advantageous. The Navy JAG will make the results of the CNA study available to the Army and Air Force to evaluate the potential for adopting a common system.

Recommendation 9: We recommend the Judge Advocate General of the Navy implement a comprehensive and detailed inspection program for military justice administration in field units and ensure the inspections address processes and tracking systems. Independent (afloat) legal units should be included in the inspection program.

Comment: Concur.

With respect to the Navy, JAGINST 5040.1 was issued on June 14, 2010, and updates policy, responsibilities, and procedures for assessment of legal offices staffed by Navy JAG Corps community personnel, to include independent SJA offices.

JAGINST 5040.1 provides that there will continue to be frequent (annual) inspections of every RLSO, as well as Naval Justice School (NJS) and selected SJA Offices. By instruction, a subject matter expert in military justice will participate in every inspection of every RLSO. This subject matter expert is to provide a complete and detailed assessment of the RLSO's performance and compliance with statutory and regulatory requirements - to include post-trial processing of courts-martial – and also to review Naval Legal Service Office (NLSO) performance (defense and personnel representation functions).

With respect to the Marine Corps, the draft report details the actions already completed by the SJA to CMC to enhance both the Commanding General's Inspection Program and his own Article 6 inspection process, specifically to ensure compliance with standards and processing times. These USMC inspections programs are designed to be complementary.

Recommendation 10: We recommend the Judge Advocate General of the Navy establish a Chief Defense Counsel or equivalent position in the Navy. The Navy is the only Service without such a position, and the defense community lacks leadership and a community advocate to oversee defense services and assure proper resources and training are available.

Comment: Concur.

This recommended action was initiated in December 2009. On 1 July 2010, Commander, Naval Legal Service Command (CNLSC) stood up the new Defense Counsel Assistance Program (DCAP), which is separate and distinct from the Office of the Judge Advocate General Criminal Law Division (Code 20) and the Appellate Defense division. The Director of DCAP is an experienced senior officer member of the Military Justice Litigation Career Track. An assistant director has also been detailed to the office. This office will augment the growth and expertise of the Military Justice Litigation Career Track by providing reach-back support dedicated to the specific needs of trial defense counsel.

The Director of DCAP works under the direct supervision of Deputy Commander, Naval Legal Service Office (DCOM-NLSO). The DCAP Director supervises only those personnel detailed to DCAP but will assist DCOM-NLSO in the exercise of her oversight and reporting responsibilities. DCAP is also available to defense counsel as a resource to assist in defending cases.

In addition to establishing DCAP, on 1 October 2010, CNLSC stood up the complementary Trial Counsel Assistance Program (TCAP) to support Region Legal Service Offices (RLSOs) by providing advice and assistance to government trial counsel throughout every phase of court-martial litigation. Service as the military justice subject matter expert on government-related matters for CNLSC, TCAP counsel may be consulted to provide support to trial counsel in all aspects of case preparation, including, but not limited to, drafting charges and specifications, drafting motions, preparing expert witnesses, devising trial strategy, and assisting with post-trial matters.

The Director of TCAP works under the direct supervision of Deputy Commander, Region Legal Service Office (DCOM-NLSO). The TCAP Director supervises only those personnel detailed to TCAP but will assist DCOM-RLSO in the exercise of his oversight and reporting responsibilities. TCAP will provide government related subject matter expertise and support to RLSO trial counsel when requested by trial counsel, the RLSO CO, or as directed by DCOM-RLSO. TCAP is also available to government counsel as a resource to assist in the prosecution of cases.

The Marine Corps has had a Chief Defense Counsel since 1985.

Recommendation 11: We recommend the Secretary of the Navy initiate a legislative proposal to amend Article 27(b), Uniform Code of Military Justice, authorizing the Staff Judge Advocate to the Commandant of the Marine Corps to certify a Marine judge advocate's competence to perform duties as a trial or defense counsel.

Comment: Concur, in part.

Concur that statutory change to enhance and clarify the authority of the SJA to CMC over the professional delivery of legal services, including supervision of the administration of military justice, within the Marine Corps is necessary. These changes are best accomplished by modifications to 10 U.S.C. § 5041, 5046, 1044, and 806 as implemented by revisions to relevant Departmental and Marine Corps regulations. With these enhancements of the authority of the SJA to CMC, and given the integrated court system of the Department of the Navy, amendment of Article 27(b) is unnecessary.

Recommendation 12: We recommend the Judge Advocate General of the Navy provide at least annual military justice updates to the Secretary of the Navy, Chief of Naval Operations, and Commandant of the Marine Corps. The updates should address relevant military justice matters and system health, including progress in establishing effective oversight and tracking mechanisms for post-trial processing.

Comment: Concur.

The JAG has already initiated an annual reporting process. The first annual report was compiled in September 2009. The second annual report is due 30 November 2010. This annual report will be provided to the Secretary of the Navy, via the Service Chiefs, thus ensuring adequate Service input and comment to the Secretary.

The requirement to continue annual reports is proposed for institutionalization in the proposed Secretary of the Navy instruction currently in coordination. The report will be a comprehensive assessment of the military justice practice across the Department of the Navy (including the Marine Corps).

Recommendation 13. We recommend the Judge Advocate General of the Navy update applicable service policy documents such as the Naval Legal Service Command Manual, the Judge Advocate General Manual, and the Legal Administration Manual to:

a. Establish uniform business rules for shipping/transmitting records of trial to the Navy-Marine Corps Appellate Review Activity to assure speedy, positive tracking capability and visibility over records of trial at both field and appellate levels.

b. Require the Navy-Marine Corps Appellate Review Activity to send all court "mandates" requiring convening authority action through the servicing field legal offices.

c. Require convening authorities, upon completing a court-mandated action, to return the completion documents to the Navy-Marine Corps Appellate Review Activity through the servicing field legal office.

Comment: Concur.

The Manual of the Judge Advocate General JAGINST 5800.7E (JAGMAN) is applicable throughout the Department of the Navy. The Naval Legal Service Command Manual is a U.S. Navy directive. The Legal Administration Manual is a Marine Corps Order.

With respect to shipping/transmitting records of trial, JAGINST 5813.1B was signed on 29 September 2010 (Subject: "Standardization of General Courts-Martial and Special Courts-Martial Verbatim and Summarized Records of Trial") and requires that all records of trial requiring review under Article 66 or 69, U.C.M.J., shall be sent to the Office of the Judge Advocate General via FEDEX/UPS/DHL/USPS Express or by hand delivery when feasible and authorized by trial counsel. The Marine Corps is currently conducting a pilot project to test the use of electronic records of trial. Possible results from this project include reduced costs, improved post-trial processing timelines, tracking, and service/departmental visibility.

With respect to the sending and return of mandates, The Manual of the Judge Advocate General (JAGMAN) chapter I has been revised and is currently being officially coordinated prior to final approval. We anticipate promulgation of the revised JAGMAN in December 2010. JAGMAN section 0155(c)(1) will be amended to formalize current practice by including the following language based upon the recommendation above:

> All supplementary orders that require convening authority action shall be returned to the convening authority via the servicing Region Legal Service Office or area Marine Corps Staff Judge Advocate's office. Additionally, once the court-mandated action is complete, convening authorities shall return the completion documents to the Navy-Marine Corps Appellate Review Activity via the same office.

The SJA to CMC is currently revising the Legal Administration Manual to reflect these new processes.

Recommendation 14. We recommend the Judge Advocate General of the Navy monitor and maintain Reserve unit support for the appellate divisions and the Navy-Marine Corps Court of Criminal Appeals to assure sufficient numbers and experience to accomplish missions and meet immediate surge requirements.

Comment: Concur.

The JAG and SJA to CMC monitor Reserve support to these organizations continuously.

The appellate divisions and NMCCA have separate supporting reserve units. Appellate Government (OJAG Code 46) is supported by 13 Naval Reserve judge advocates. Appellate Defense (OJAG Code 45) is currently supported by 20 Naval Reserve judge advocates, one Reserve Legalman and five Marine Corps Reserve judge advocates. The NMCCA units presently include 10 Naval Reserve appellate judges and two Marine Corps Reserve appellate judges.

The number of assigned personnel is monitored through the Military Justice Oversight Council and assignment processes of the JAG and SJA to CMC on behalf of the Commandant of the Marine Corps.

The Reserve Legal Services Support Section (RLSSS), Judge Advocate Division, HQMC, provides effective centrally managed administration, command and control of the delivery of Reserve legal services to the Total Force, and ensures that trained and qualified legal personnel are available to support active duty requirements as directed, including the appellate divisions and NMCCA.

Recommendation 15: We recommend the Judge Advocate General of the Navy maintain an O-6 grade authorization for, and fill the Director, Appellate Defense Division (Code 45), position at the 0-6 level.

Comment: Concur.

The Director, Appellate Defense is authorized as an O-6 billet and has traditionally been filled by an O-6. Although temporary gaps may be unavoidable given military personnel rotations, the JAG Corps recognizes the importance of this billet and is committed to maintaining continuity and seniority.

Recommendation 16: We recommend the Judge Advocate General of the Navy examine effectiveness and utility in the 1-year clerkship program established to enhance appellate counsel training and either modify or rescind the program.

Comment: Concur.

The appellate court clerkship program is valuable and contributes to NMCCA efficiency. However, the JAG is currently reviewing assignment options to assess the effects of two year (vice three-year) tours in the appellate divisions that arise when an officer is first assigned to a year-long clerkship prior to arriving at an appellate code. The appellate court clerkship program is vital to the mission of the NMCCA and is a highly valued experience by counsel who serve as law clerks. The results of this review will be addressed in the Annual Report on the State of Military Justice within the Department of the Navy.

DEPARTMENT OF THE NAVY
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IN REPLY REFER TO

5800
Ser 00/0116
22 Oct 10

From: Judge Advocate General
To: Secretary of the Navy

Subj: COMMENTS ON "EVALUATION OF POST-TRIAL REVIEWS OF COURTS-MARTIAL WITHIN THE DEPARTMENT OF THE NAVY"

Encl: (1) Case Tracking and Management
(2) Standards and Timelines
(3) Supervision and Oversight
(4) Inspections
(5) Chief Defense Counsel
(6) Improvements Noted
(7) Additional Comments

1. The Department of Defense Inspector General's draft "Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy" addresses many important issues. The review has provided useful insight that we will incorporate into our ongoing effort to provide a first class military justice system.

2. Other aspects of the report require clarification. Enclosures (1) through (7) address these issues.

JAMES W. HOUCK
Vice Admiral, JAGC, U.S. Navy

Enclosure (1):
Case Tracking and Management

CASE TRACKING AND MANAGEMENT (Draft report section LA)

The draft DoD IG report includes numerous references to the Navy's Court Martial Tracking and Information System (CMTIS). The report notes that while CMTIS "represents progress in recent years," the Navy "still [does] not have the visibility they need to monitor case progress and timeliness across the post-trial process."

Today, CMTIS provides a functional, accurate, real-time case tracking capability. Specifically, CMTIS provides:

- An accurate cradle-to-grave Navy case tracking from preferral to receipt by NAMARA.
- A single post-trial tracking report based on CMTIS data used by Navy Legal Service Command (NLSC) and all Region Legal Service Office (RLSO) commands.
  - Post-trial data access: In addition to the report, CMTIS post-trial tracking data is available to NLSC and RLSO via excel spreadsheet that contains all critical data elements; this permits NLSC and RLSO specific reports based on CMTIS data.
  - NLSC and RLSO have access to and visibility on all open and closed Navy cases.
- A system to monitor speedy trial and Moreno cases.

CMTIS was first employed on 01 October 2006. CMTIS was proposed by the OJAG Knowledge and Information Services Division (Code 65) as an alternative to the Homeport Electronic Legal Management (HELM) system, which, at the time, was the latest in a series of inadequate ventures with external contractors. In addition to the case tracking features noted above, CMTIS has the following objectives:

- Performance metrics. As mentioned in the DoD IG Report, the JAG Corps needs to ensure it has the right manpower and force mix to accomplish the mission. To accomplish this, the JAG Corps needed a tool that captures what type of work is being done and where, how much work is being done, and who is doing the work (e.g., Legalman, attorney, or civilian, and what paygrade). As the JAG Corps is a service organization, capturing its work involves capturing how much time personnel are spending on legal work. With CMTIS time data, the JAGC can determine current manpower and force mix requirements, and become more predictive on manning and force mix for its Navy client (e.g., when an aircraft carrier changes home port, the JAG Corps needs to understand what legal work is associated with the change in home port so it can change the manpower and force mix of the supporting legal office. CMTIS was designed to support this type of analysis).
- Case management. CMTIS is designed to support case management, not only in court-martial work, but in all JAG Corps business lines. Legal offices, whether Naval Legal Service Command offices or SJA offices, needed a tool to manage workload and have visibility on all work and cases within its office. The JAG Corps needed a knowledge management system that could 1) collect data for trend analysis, 2) retain historical

electronic files as opposed to paper legal files, and 3) a networked database to share information across offices and provide both JAG Corps Headquarters and legal offices with access to a single data base.

From initial deployment to present, OJAG has revised CMTIS in response to several factors. User interfaces were not always intuitive or user-friendly. CMTIS' interaction with NMCI was sometimes dysfunctional (CMTIS was not alone in this regard). Many JAG users resisted the time-counting features (e.g., "I didn't come to the JAG Corps to bill hours.") In recent years, some of the initial challenges have been eliminated or mitigated. In-house developers have made numerous design and functionality improvements and JAG users have become more accepting of the need for workload data collection and centralized case tracking. Despite these gains, the system has important shortcomings.

- Data access: There is no current ad-hoc search capability allowing the user to obtain only desired data elements. A consistent complaint about CMTIS is access to data and the inability to do searches of the data base to answer management questions or requests for information. Data is accessed via established reports which are time consuming to build and do not always meet end-user's requirements.

- Ease of use: Design of CMTIS modules is under review to provide a more intuitive and faster data input capability. [Current design has too many screens, it is difficult to edit/correct data, and there is no automated error checking system.]

- NMCI: NMCI bandwidth issues continue to make access to CMTIS problematic. [Cannot be used for real-time service as the system often times out too quickly, requiring logging back in (sometimes as many as 40 times a day).]

- More standardized IT Governance: JAG Corps is developing, with the assistance of CNA, a more institutionalized IT governance system for IT organization, processes, and service management.

- Training and knowledge on how to use CMTIS beyond the basic elements is poor even with established business rules and NJS training. Given the high turnover of military personnel and the CMTIS ease of use issues, there are continued concerns about proper data entry into CMTIS. A more robust training program is necessary and is being studied for implementation.

CMTIS has been on line for 4 years. In 2009, having observed CMTIS performance for three full years, the JAG assessed the need for a comprehensive review of next generation JAG Corps IT systems, including court-martial case management and post-trial tracking. Given the JAG Corps' history with a series of tracking systems, the JAG determined that an external assessment was important to making objective decisions about CMTIS as well as potential follow-on systems. Accordingly, in March 2010, the Center for Naval Analysis (CNA) was hired to perform the review. This review is scheduled to be completed in February 2011.

Enclosure (2):
Standards and Timelines

STANDARDS AND TIMELINES (Draft report section I.B)

The Report finds fault with a lack of standardization in procedures for case processing in the Navy and Marine Corps. The Report expresses concern that Navy and Marine Corps field commands have different, unit-developed standard operating procedures for case processing. I agree that some standardization in formal instructions, standardized checklists, and templates is useful.

The Navy JAG Corps has instituted numerous changes to ensure those are in place. These include the cancelling of out-dated, confusing checklists and timeline instructions, and emphasizing the guidelines mandated by the Court of Appeals for the Armed Forces (CAAF) in the *Moreno* case. It also includes the review, revision and promulgation of several key instructions, including revisions to the Manual of the Judge Advocate General (JAGMAN), the Naval Legal Service Command Manual, the Standardization of Verbatim Records of Trial, and the Post-Trial Checklist, all of which include procedures and timelines. Reporting "triggers" have also been incorporated into the Navy's standardized reporting process. These triggers include identification and reporting to headquarters of cases that exceed 75 days from sentence to convening authority's (CA's) action, the reporting to cognizant Assistant Judge Advocates General (AJAGs), and the Military Justice Oversight Council (MJOC), of appellate cases that exceed 120 days from sentencing to CA's action and 150 days from CA's action to docketing, cases docketed for longer than a year, cases in an appellate court panel longer than 6 months, and any case in which there have been more than 3 continuances requested by either party. The MJOC is incorporated into a pending Secretary of the Navy Instruction. I disagree that "*Moreno* timelines are the only standards the Navy and Marine Corps currently use to measure timeliness in post-trial processing." Report at 10. However, I agree that *Moreno* timelines are our ultimate standard, given that they have been imposed by CAAF.

The result of our emphasis on meeting on standards and timelines, along with enhanced oversight, is clear: The appellate process has not exceeded the 18-month guideline of the *Moreno* decision in any case this year, and only exceeded that guideline in two cases in 2009. One case was *Foster*; the other case required no corrective action.

The Report also blurs the nature of "*Moreno* violations" as well as the statistical picture of progress in post-trial processing, permitting an incorrect perception that many more appellants have been prejudiced by untimely post-trial processing than is in fact the case. While analysis of historical post-trial process trends is critical, the manner in which the Report portrays post-trial processing since 2006 is misleading.

"*Moreno*" Compliance Clarified

When discussing post-trial processing under the *Moreno* guidelines, it is essential that the parameters of the discussion be clearly articulated. The Report is not precise in its use of the term "*Moreno* cases" or "*Moreno* compliance." Specifically, the CAAF mandate in the *Moreno* case applies to cases tried on or after 10 June 2006, and cases on appeal that were docketed on or after that date. Additionally, however, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) used *Moreno* as guidance, and applied that guidance to *all* cases decided after 10 June 2006, regardless of when the case was tried or docketed. Even when so applied, exceeding the timelines in *Moreno* results in a presumption of unreasonable delay – not a *per se* due process

violation meriting relief. As a result, any review of "*Moreno* performance" should indicate precisely which cases are being discussed and whether a case is noteworthy because it simply does not meet the guidelines for timeliness, or because the appellant was not provided due process and was granted relief by the appellate courts. From 10 June 2006, the effective date of the *Moreno* decision, CMTIS contains cases decided by the NMCCA which reflect post-trial processing that exceeded the timelines of the *Moreno* decision, but that is just the beginning of the analysis. In none of these cases was there any finding of prejudice and no relief granted by the court. CMTIS also contains cases in which NMCCA granted relief for excessive post-trial delay, but for which *Moreno* is not binding precedent.

The following three paragraphs clarify "*Moreno*" compliance for the periods of post-trial processing from trial to docketing at the NMCCA; and from docketing to decision by the NMCCA:

(1) Relief for Due Process Violations. Of the 4,876 cases NMCCA decided since 10 June 2006 (the *Moreno* effective date), NMCCA has granted relief for excessive post-trial delay in 108 cases due to prejudice to an appellant (48 in 2006; 45 in 2007; 10 in 2008; 1 in 2009 [*U.S. v. Foster*, plus 4 dismissal orders for lost records of trial]; and 0 in 2010). Despite the unacceptable number of delayed cases adjudicated in the years immediately following the *Moreno* decision, it must be understood that, other than *Foster*, these are pre-*Moreno* cases (i.e., cases tried or docketed on appeal before 10 June 2006). The Report fails to correctly identify these cases as such. It also fails to describe that there are *no* cases other than *Foster* to which the *Moreno* precedent applies that have required relief by either the NMCCA or the CAAF for post-trial delay. The pattern of improvement in post-trial process is clear.

(2) Pre-*Moreno* Cases – Timeliness on Appeal. Of the 956 cases docketed before, but decided after *Moreno*, 187 cases exceeded 18 months from docketing to decision (104 in 2006; 75 in 2007; 8 in 2008; 0 in 2009; and 0 in 2010). Once again, despite the unacceptable number of delayed cases *decided* in the years immediately following *Moreno* (but which pre-dated the case's effective date), improvement in the appellate process is clear.

(3) Post-*Moreno* Timeliness on Appeal. Among the 3,920 cases docketed with the NMCCA since the effective date of *Moreno*, the NMCCA has exceeded 18 months from docketing to decision in only 10 cases (1 in 2007; 7 in 2008; 2 in 2009; and 0 in 2010). The leadership and specific corrective actions of the Judge Advocate General and Staff Judge Advocate to the Commandant of the Marine Corps have progressively reduced the time needed to process appeals, and have achieved 100% with the Moreno guidelines.

Enclosure (3):
Supervision and Oversight

SUPERVISION AND OVERSIGHT (Draft report section I.C)

As discussed above, numerous leadership, supervision and oversight initiatives have been very effective in ensuring compliance with post-trial processing, despite the decentralized organization of the Navy and Marine Corps. Contrary to the DoD IG report assertion, the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) has been authorized to conduct Article 6 inspections of Marine Corps field offices since 1999 by agreement between the JAG and SJA to CMC. See MCO P5800.16A. The JAG/SJA to CMC agreement was further ratified in 2005. See SECNAVINST 5430.27. To establish more visible and enduring authority, the Secretary of the Navy intends to propose that the current authority be codified in statute. The authority of the SJA to the CMC to conduct Article 6, UCMJ inspections of USMC military justice field activities derives from his professional relationship as a judge advocate providing legal services under the cognizance of the JAG. That relationship is established by Navy Regulations and embodied organizationally in MCO P5800.16A (1999) and SECNAVINST 5430.27C (2009).

Enclosure (4):
Inspections

INSPECTIONS (Draft report section I.D)

Several passages of the draft report contain the characterization that the JAG "retreated" from rigorous military justice inspections in 2006, implying that the JAG abrogated his responsibilities in overseeing and inspecting the provision of military justice services in the field. This is an inaccurate portrayal.

Over the past four years, the JAG Corps has followed the principle that an organization gets the results it measures, and the Navy JAG Corps has been measuring Region Legal Service Office performance in the areas of trial and post-trial processing. The proof is in the measured improvement at every segment of post-trial processing, culminating in FY09 and continuing in FY10, when average processing times were all within Moreno guidelines. Perhaps more importantly, neither CAAF nor the NMCCA have found any post-trial due process violations in any court-martial conviction since the *Moreno* case. It is also incongruous to portray the JAG as retreating from rigorous inspections when the pre-2006 inspection regime was a critical element of a system the report criticizes.

In 2007, the JAG and Commander, Naval Legal Service Command (NLSC) agreed that the Article 6 program needed to become more – not less – rigorous, and that the program needed to expand well beyond the standard three to four year visit cycles focused heavily on instructions and administrative matters. The goal – consistent with practices emphasized by Navy leadership and taught in the Navy Corporate Business Course – was to develop a comprehensive review program focused on actual results (as opposed to administrative inputs), and to measure these results through a system of carefully developed metrics.

As stated in JAGINST 5040.1D, the intent of that 2007 decision was to make the Article 6 process more rigorous by conducting field inspections on an annual vice three year basis and having these supplemented by additional information that would be gathered and evaluated year round. A wider array of tools was envisioned to continuously assess performance and the new inspection program was carefully designed to evaluate these fundamental elements:

- Quality. The objective was to determine if Navy Judge Advocates provided first-rate advocacy and judicial services. This was to be measured through:

  - Client surveys. The JAG Corps' assessment program sought input from client commands as one metric to help determine the quality of our performance in military justice. In August 2007, a survey was sent to 851 command clients, including Commanding Officers, Executive Officers and Command Master Chiefs. The survey results identified areas that the client commands perceived as strengths, as well as other areas perceived as needing improvement. The original plan was to target areas needing improvement and then to measure over time the extent to which clients perceived improvement. Although the results of the initial survey were widely publicized within the JAG Corps so that unit leaders could act on them, the cost and level of effort required to deploy follow-on surveys have proven considerable. The Navy JAG Corps will continue to use client surveys, however they will be less frequent than originally envisioned.

- Military Judge Surveys. The initial surveys in 2008 were conducted in coordination with the University of North Carolina. The military judges submitted anonymous quarterly surveys assessing the overall skill level of RLSO and NLSO personnel as reflected in courts-martial practice across a number of measures, including technical proficiency of counsel in court, the frequency of supervisory personnel in the courtroom and whether improvement is noted across quarters. A second military judge survey began in July 2010 and is ongoing.

- Headquarters (HQ) Assist Visits. JAGINST 5040.1 requires on-site participation by subject matter experts (SME) for Military Justice and for Legal Assistance. As part of the inspection process, these SME's also provide HQ Assistance – providing advice regarding military justice and legal assistance and on-site training and mentoring regarding these topics. In addition to this Article 6 on-site assistance, other HQ Assistance is provided through flag visits and other SME's throughout the year including assistance in Personnel matters, Personnel Security, Facilities, Ethics and Standards of Conduct, Recruiting, and Office Administration.

- Military Justice Litigation Career Track fill rates. This involved affirmative monitoring of the assignment of MJLCT personnel to P-coded billets during the detailing cycles, including leadership positions. The "fill-rate" for these billets has increased for the first two detailing cycles (37% [19 of 52 billets] and 56% [29 of 52 billets], respectively) and the third cycle is underway with specific emphasis by the JAG on continuing to increase the number of MJLCT personnel assigned to these key military justice litigation billets.

➢ Timeliness. As measured through:

- Review of Speedy Trial. We established that conducting a case within speedy trial standards would be a closely monitored metric. We closely monitored any speedy trial cases in violation of Article 10 or Rule for Courts-Martial 707, Uniform Code of Military Justice, and disseminated lessons learned. Affirmative monitoring of case status was accomplished through weekly command high visibility case reports to CNLSC of high profile litigation, specifically including speedy trial motions and cases involving speedy trial issues, weekly briefs to the Judge Advocate General and monthly MJOC meetings. For example, there have been no cases in the Naval Legal Service Command dismissed on speedy trial grounds in at least the last two years.

- *Moreno* guideline compliance: Routine reporting of Navy courts-martial case post-trial processes that exceed internal triggers or "*Moreno*" guidelines. For example, any case exceeding 75 days from sentencing without a CA's action are required to be reported to the Deputy Commander for RLSOs and to the MJOC. The NMCCA process is likewise tracked in CMTIS for all Navy and Marine Corps cases. Cases requiring appellate review which exceed internal triggers or *Moreno* guidelines are routinely reported to the MJOC. CMTIS reports since the effective date of the *Moreno* decision show continuous improvement in all

segments of post-trial processing, and *no* case convened after *Moreno* that required relief by NMCCA or CAAF as the result of unreasonable post-trial delay.

- Efficiency. As measured through:

  - Review of Case Management Tracking Information System (CMTIS) data for the command. For courts-martial, efficiency was determined by comparing processing times for cases and their costs (legal personnel costs and other case costs, such as travel or expert witnesses). CMTIS data is also used to adjust case-to-counsel loading to ensure sufficient resources are available.

Also, in 2007, the JAG IG instituted a program for inspecting military justice as practiced in independent, SJA commands. Two SJA inspections have been conducted. Fleet Forces Command Force/Staff Judge Advocates were inspected by the JAG IG in 2009. On-site inspections were conducted at HQ Fleet Forces Command, AIRLANT, SUBLANT, and SURFLANT. Each of the Force Judge Advocates and their staff were interviewed and their work examined within the following areas making use of the checklist and guidelines of JAGINST 5040.1: Military Justice (Non-Judicial Punishment and Courts-martial); Ethics and Standards of Conduct; Professional Rules of Responsibility; JAGMAN Investigations; FOIA and Privacy Act administration. Additionally, on-site interviews were conducted with the Executive Officer and Legal Officer aboard an operational Destroyer within the Fleet Forces Command chain of command with respect to the administration of military justice.

U.S. Pacific Fleet Force/Staff Judge Advocates were inspected by the JAG IG in 2010. On-site inspections were conducted at HQ PACFLT, AIRPAC, SURFPAC, and SUBPAC. As with the prior inspection of Fleet Forces Command, each of the Force Judge Advocates and their staff were inspected and interviewed and their work examined within the following areas making use of the checklist and guidelines of JAGINST 5040.1: Military Justice (Non-Judicial Punishment and Courts-martial); Ethics and Standards of Conduct; Professional Rules of Responsibility; JAGMAN Investigations; FOIA and Privacy Act administration.

The concept above, as reaffirmed in JAGINST 5040.1, is sound. During the period from 2007 to June 2010, the Article 6/Command Inspection program operated under the guidelines of draft JAGINST 5040.1. During this period of time, we learned numerous lessons that will improve the program going forward.

- Surveys are valuable ways to gain insights into quality, but administration of the surveys is labor intensive and requires extensive analysis that the JAG Corps is not resourced for on a regular basis.

- An annual visit to 18 commands, plus a major SJA activity, is a demanding schedule for a single IG to execute effectively, even if he is not expected to conduct the entire inspection regime by himself. Periodic visits by subject matter experts are extremely labor intensive, but essential. Workload demands on the headquarters staff who must conduct field inspections create difficult tradeoffs, as they are the same personnel who

developed many of the improvements noted elsewhere in the report and who work initiatives on substantive areas (e.g., sexual assault).

- Although we have developed CMTIS into a comprehensive data-collection and case tracking tool, this has taken longer than expected due to issues with Navy Marine Corps Intranet (NMCI), the number and expertise of our programmers, the limitations of the original "off-the-shelf" product upon which CMTIS was built, and lessons learned from early design deficiencies. CMTIS is currently under review.

Building on the experience of the past three years, additional changes have been instituted.

- JAGINST 5040.1 was finalized on June 14, 2010, and codifies policies and builds on the experience of the past three years. These include:

  - The JAG IG inspections are now regularly augmented with subject matter expertise. This will be labor intensive and sustaining it will require additional resources. Commencing in October 2010, an officer or senior civilian with military justice expertise will assist the IG with all inspections of RLSOs and fleet units. In addition, the instruction requires developing a schedule that ensures subject matter expertise support to NLSO inspections as well, in support of both military justice and legal assistance.

  - The JAG Corps hired a full-time staff assistant for the JAG IG to support the JAG IG with administrative duties and certain investigative functions. This will enable the JAG IG to focus more directly on critical substantive aspects of the job.

- On October 1, 2010, Naval Legal Service Command was reorganized to separate the Naval Legal Service Office (NLSOs) and Region Legal Service Offices (RLSOs) into two separate functional groups. This separation included the creation of the Deputy Commander, RLSO and Deputy Commander, NLSO. Dividing NLSC into separate prosecution and defense groups will allow staff assistants and subject matter experts to engage with more focused communication and reach back assistance to counsel and commands, thereby enhancing oversight on a daily basis. This oversight will be facilitated by the October of 2010 establishment of both a Defense Counsel Assistance Program (DCAP) and a Trial Counsel Assistance Program (TCAP). The DCAP is led by a Navy O-6 MJLCT officer as its director, who serves in the role of a chief defense counsel of the Navy and reports to Deputy Commander, NLSOs. The TCAP is led by a Navy MJLCT O-5, who serves as the chief trial counsel of the Navy, reporting to Deputy Commander, RLSOs.

Based on the above, non-concur with the following conclusions:

- Page 4 "In 2006, the current Navy JAG (then the Commander, Naval Legal Service Command) retreated from rigorous military justice inspections, based on a belief that Naval Legal Service Command case monitoring, in conjunction with field inspections and field email reports, was a sufficient check."

- Page 42 "In 2006, JAG IG inspection program was revamped as a one-man-interview-based review without any detailed inspection of military justice processes, records, performance, or metrics."

- Page 43 ". . . the Navy retreated from more rigorous military justice inspections, believing its Naval Legal Service Command monitoring (based on CMTIS and other data), in conjunction with the Article 6 and more limited IG inspections, would be a sufficient tool. That belief was not fulfilled."

I disagree with the conclusions on Page 13 "Although Article 6 inspections were conducted in the Navy and Marine Corps, the inspections were not rigorous or sufficiently thorough to highlight the significant process problems pervasive in both Navy and Marine Corps field units. As a result, the inspections had little impact on process failures, which persisted due to continuing problems. Coupled with the Navy JAG's misplaced reliance on CMTIS (after its fielding in October 2006) to ensure needed visibility over cases during field processing, nonprocess-oriented inspections did not detect post-trial process or delay problems."

As noted earlier, improvements in the oversight process are warranted, but fundamentally, the ultimate results are different than characterized by the DoD IG. Navy post-trial processing has steadily improved as a result of delegating responsibility to RLSO Commanding Officers and holding them accountable to ensure post-trial processing compliance. Of cases tried after the *Moreno* case's effective date (10 June 2006), *no* Navy or Marine Corps case has required relief for unreasonable post-trial delay by either the NMCCA or the CAAF. That is a reflection of the improvement in timeliness at every segment of post-trial processing. The average time from sentencing to convening authority's action in FY07 (the first year for which CMTIS has complete data) was 93 days – already within the *Moreno* guidelines issued the year before. The average time for this segment of the post-trial process declined further by FY10 to 83 days. In fact, every year since *Moreno*, the average time from sentencing to convening authority's action has remained well below the 120 days permitted by the established guidelines. The average time from the convening authority's action to receipt for docketing has also fallen from a high of 69 days in FY07 to 14 days in FY10 – less than half of the *Moreno* guideline. Of those cases docketed after the *Moreno* case's effective date in 2006, only ten Navy or Marine Corps cases exceeded 18 months from docketing to decision by the NMCCA.

Enclosure (5):
Chief Defense Counsel

CHIEF DEFENSE COUNSEL (Draft report section I.E)

Recognizing the unique issues and challenges of the defense counsel community, the JAG had already planned to realign organizational structure prior to the DoD IG report. Appropriate organizational changes have already been implemented.

On 1 July 2010, Commander, Naval Legal Service Command (CNLSC) stood up the new Defense Counsel Assistance Program (DCAP), which is entirely separate and distinct from the Office of the Judge Advocate General Criminal Law Division (Code 20) and the Appellate Defense division. The Director of DCAP is an experienced senior officer member of the Military Justice Litigation Career Track. An assistant director has also been detailed to the office. This office will augment the growth and expertise of the Military Justice Litigation Career Track by improving the quality of practice, by providing reach-back of technical expertise, and by providing additional career choices for litigation career track officers.

The Director of DCAP works under the direct supervision of Deputy Commander, Naval Legal Service Office (DCOM-NLSO) and serves a supporting role for NLSOs. The DCAP Director supervises only those personnel detailed to DCAP but will assist DCOM-NLSO in the exercise of his oversight and reporting responsibilities. DCAP will provide defense related subject matter expertise and support to NLSO trial defense counsel when requested by trial defense counsel, the NLSO CO, or as directed by DCOM-NLSO. DCAP is available to defense counsel as a resource to assist in defending cases. DCAP may request case specific or other administrative information from trial defense counsel or NLSO COs as necessary to assist in fulfilling its roles and responsibilities.

In addition to establishing DCAP, on 1 October 2010, (CNLSC) stood up the complementary Trial Counsel Assistance Program (TCAP) to support Region Legal Service Offices (RLSOs) by providing advice and assistance to trial counsel, upon request, throughout every phase of court-martial litigation. Service as the military justice subject matter expert on government-related matters for CNLSC, TCAP counsel may be consulted to provide support to trial counsel in all aspects of case preparation, including, but not limited to, drafting charges and specifications, drafting motions, preparing expert witnesses, devising trial strategy, and assisting with post-trial matters.

The Director of TCAP works under the direct supervision of Deputy Commander, Region Legal Service Office (DCOM-NLSO) and serves a supporting role for RLSOs. The TCAP Director supervises only those personnel detailed to TCAP but will assist DCOM-RLSO in the exercise of his oversight and reporting responsibilities. TCAP will provide government related subject matter expertise and support to RLSO trial counsel when requested by trial counsel, the RLSO CO, or as directed by DCOM-RLSO. TCAP is available to government counsel as a resource to assist in the prosecution of cases. TCAP may request case specific or other administrative information from trial counsel or RLSO COs as necessary to assist in fulfilling its roles and responsibilities.

Enclosure (6):
Improvements Noted

IMPROVEMENTS NOTED (Draft report section I.F)

As noted in this section and throughout the report, the current leadership team is committed to fixing problems and many initiatives have already been completed with many others in progress. Numerous leadership, supervision and oversight initiatives have been very effective in ensuring compliance with post-trial processing, despite the decentralized organization of the Navy and Marine Corps. While the Report does include reference to many of the initiatives undertaken in the last several years to improve the military justice practice, and post-trial processes in particular (Appendix L), it is important to present them in a manner that conveys a comprehensive picture of the current status of Navy and Marine Corps military justice improvements.

Beginning in 2005, prior to the *Moreno* case or the *Foster* case, there were a number of initiatives undertaken to address what had already been recognized as a decline in the military justice practice. Other initiatives followed. These accomplishments represent real, structural and process changes that have resulted in unprecedented success in improving post-trial and appellate processing of courts-martial in the Navy and Marine Corps. A comprehensive list of the numerous initiatives highlighting the commitment to improvement follows.

- Personnel Initiatives.
    - Trial Advocacy Training is formalized by JAG Instruction (2004)
    - Sea Enterprise 2005 studied the trial judiciary and made recommendations for enhancing the efficiency and effectiveness of trial judges
    - JAG Corps 2020 Strategic Plan (2006) addressed the overall delivery of military justice services as one of four core competencies. Emphasis was on elevating the level of practice through the institution of a Military Justice Litigation Career Track.
    - JAG commissions Defense Pilot Project (2006 – 2009) to explore feasibility of a different command structure than Naval Legal Service Command to more effectively and efficiently address military justice mission.
    - 2006 – 2008: JAG increases the number of appellate judges and from 9 to 17; authorizes increase in the number of law clerks, including civilian staff. Continues sufficient appellate government and defense division staffing.
    - 2006 – Commander, Naval Legal Service Command commissions Whitney, Bradley & Brown survey on military justice to evaluate case loads and manpower devoted to courts-martial practice.
    - 2006 – In partnership with the University of North Carolina, Dr. Dan Cable, initiated military judge quarterly assessments of litigation proficiency (1 year program).
    - 2007 – JAG authorizes hiring of civilian deputies for both appellate divisions who were accomplished appellate advocates and attorney supervisors, enhancing subject matter expertise and division stability.
    - Military Justice Litigation Career Track (JAGINST 1150.2 of 2007) initial instruction established 49 billets, including CO, XO and military judge billets, and career track requirements.

- 2007 – Upon the recommendation of the JAG, the Chief Judge, Department of the Navy position was approved by SECNAV as one-star "tombstone" billet (retirement eligible in the grade of O-7 following 12 months designated as Assistant Judge Advocate General in the third year of service).
- 2007 – The JAG directed a concentrated effort to revitalize the Criminal Law Division (Code 20). A career military justice litigator and MJLCT Expert was assigned as the Division Director. The staffing and experience level of Code 20 was also progressively increased, including the addition of a second MJLCT Expert and selected O-6 to dramatically increase "reach back" capability for litigators through the development of an extensive community of practice.
- 2007 – The JAG improves training, litigation support and continuity of Code 20 by authorizing the hiring of two civilians: a former civilian prosecutor with over 120 contested jury trials to serve as a deputy director and a sexual assault litigation specialist.
- 2008 – JAG limits detailing of appellate government and defense counsel to service as IAs.
- 2008 – Judicial Screening Board Instruction updated to enhance qualification process for judicial appointments (JAGINST 5817.1C).
- 2008 – JAG establishes the clerk-to-appellate advocate pilot program, in which counsel detailed to appellate government or defense serve one year as a law clerk at the NMCCA.
- 2009 – Military Justice Litigation Career Track instruction (JAGINST 1150.2A) updated to include 52 billets, including CO, XO and military judge billets.
- 2009 – JAG focuses detailing cycle on filling of military justice litigation career track billets, increasing fill-rate from 40% to 57%.
- 2009 – The Navy JAG Reserve program was reorganized into three pillars of support expertise in the new "Reserve Component Judge Advocate Total Force Structure" (JAGINST 1001).
- 2009 – Defense Counsel Assistance Program (DCAP) adopted as JAG 2010 priority action item.
- 2009 – Competitive board selection of first Chief Judge of the Department of the Navy as the capstone for the Military Justice Career Track (MJLCT).
- 2010 – Promotion results for Military Justice Litigation Career Track officers show military justice community practitioners are promoting at or above rates for their peers outside MJLCT: O-6 = 50% of in-zone candidates (1 of 2) and 30% selection above zone (1 of 3); O-5 = 60% in-zone (3 of 5) and 30% above zone (1 of 3); O-4 = 67% in-zone (2 of 3) (there were no above-zone candidates)
- 2010 – JAG commissions second program of quarterly military judge assessments of counsel performance, rolled out in July 2010.
- 2010 – JAG establishes Defense Counsel Assistance Program and O-6 Military Justice Litigation Career Track "Expert" as Director and Chief Defense Counsel of the Navy

- 2010 – JAG establishes Trial Counsel Assistance Program separate from criminal law policy division with O-5 Military Justice Litigation Career Track "Expert" as Director
- 2010 – JAG and Commander, Naval Legal Service Command direct reorganization of Naval Legal Service Command Headquarters to eliminate the single, neutral Vice Commander, and to include two Deputy Commanders, one each for Region Legal Service Offices (prosecutors) and the Naval Legal Service Offices (defense) with authority and resources to actively manage and supervise courts-martial case processes.

➢ Process Initiatives

- 2007 – JAG Memorandum to SJAs dated 23 May 07, regarding unacceptable level of post-trial errors and inclusion of same as Art 6 inspection item; also requested Chief Judge NMCCA to include SJA names in headnotes of court opinions.
- 2007 – JAG directs Lean Six Sigma docketing project to reduce the record of trial receipt process from an average of 17 days to one; and docketing from 8 days to one. Changes in docketing procedures were incorporated in processing instructions and training for Codes 40 and NMCCA docket clerk and panel secretaries.
- 2008 – Cancelled out-of-date JAG INST 5810.1 (Management Goals for Processing Navy Courts-Martial) dated 1984. Timelines no longer reflected complexities and variations in courts-martial practice.
- 2009 – Case Evaluation Project assessed deficiencies in litigation training and performance, with emphasis on sexual assault cases. Made specific curriculum recommendations to the Naval Justice School (NJS).
- 2009 – JAG establishes the Military Justice Oversight Council (MJOC) as a flag/general officer forum for the review of military justice in the Navy and Marine Corps. The MJOC meets monthly to review structural, resource and other matters that affect the timely and effective delivery of military justice services. The MJOC is pending formal designation in a SECNAVINST.
- 2009 – JAG approves reporting "triggers" for military justice cases to be briefed to the MJOC by the cognizant AJAG (Vice Commander, Naval Legal Service Command, AJAG Criminal Law, or Chief Judge). Triggers include Navy cases at 75 days without a CA's action; JAD monitors CMS to identify and expedite any lagging Marine cases; cases that are not docketed with NMCCA by 150 days. Once at NMCCA, cases are briefed to the MJOC if docketed longer than one year; or in panel longer than 6 months, if appellant is confined. Cases with five enlargements and all mandates are briefed to the MJOC. These triggers are documented in the formal minutes adopted by the MJOC.
- 2009 – Internal operating procedures of NAMARA Code 40 include comprehensive case tracker implemented via Excel spreadsheet, including mandates (the data from the spreadsheets were later incorporated into CMTIS upgrade). RLSO COs and Marine SJAs receive the appellate case tracker and a

report of records of trial received in the previous month to ensure continuity of record control.

- 2009 – Written *DuBay* guidance provided to trial and appellate judges.
- 2009 – JAG directs annual Report on the State of Military Justice. First report compiled in July 2009;
- 2010 – JAG directs a second Report on the State of Military Justice report by 30 November 2010 and submits annual requirement for this report in pending SECNAVINST.
- 2010 – Adopted development of Navy-Marine Corps case tracking system as JAG 2010 priority action item.
- 2010 – JAG cancels bi-annual JAG Corps Seminar and diverts funding to Center for Naval Analysis study of information technology needs
- 2010 – NMCCA promulgates new Rules of Procedure, which regulate the enlargement process, and include published Internal Operating Procedures (IOPs), the only Service court to have such transparency of process.
- 2010 – Marine Corps launches Case Management System (CMS) to facilitate case visibility and management from trial through appeal.
- 2010 - CMTIS updated specifically to enhance post-trial visibility and case tracking; included revised Business Rules that describe and require compliance. Additional updates identified and programmed.

➢ Instructions

- 2009 – JAGINST 1150.2A (MJLCT) designates specific billets be filled with military justice specialists or experts, including 4 judges on the NMCCA, including the Chief Judge.
- 2009 – JAGINST 5814.1 establishes the NMCCA and sets out specific supervisory jurist responsibilities for senior panel judges and the Chief Judge, including active case management, and requirement that all appellate judges attend the Army Military Judge Course.
- 2010 – JAGNOTE 5450 establishes mission and function of Assistant Judge Advocate General, Chief Judge of the Department of the Navy
- 2010 – JAGINST 1320.1 formalizes detailing policy pertaining to military justice billets
- 2010 – JAGINST 5814.1 updated to reflect position and duties of Chief Judge, Department of the Navy as they relate to the NMCCA
- 2010 – JAGINST 5813.4G updated to reflect position and duties of the Chief Judge, Department of the Navy as they relate to the trial judiciary
- 2010 – JAGINST 5813.1A (Standardized Records of Trial) update includes new requirement for FEDEX or equivalent shipping of records of trial and tracking and documentation of receipt at NAMARA; pending signature

Enclosure (7):
Additional Comments

ADDITIONAL COMMENTS

The draft DoD IG report contains statements requiring correction or clarification. In addition to those identified elsewhere in our response, the following are noted. Page and paragraph numbers refer to the draft report.

Page 5, first bullet under paragraph I.F says that the Secretary of the Navy created the Chief Judge of the Navy position. This is true; however, the position conceived and proposed by the Judge Advocate General as part of the Navy JAG Corps' strategic plan to address the needs of military justice (JAG Corps 2020). The Secretary of the Navy approved the position as an Assistant Judge Advocate General at the JAG's recommendation.

Page 12, footnote 3 refers to the *Foster* case and states that the Court of Appeals for the Armed Forces (CAAF) found "failure at every level" of military justice. In fact, *Foster* was decided by the Navy and Marine Corps Court of Appeals (NMCCA), which was critical of itself in setting aside the findings and sentence of the trial court. In his concurring opinion, Chief Judge O'Toole found "some responsibility for delayed justice at every level of practice" but noted "it would be unfair to fail to take notice of changes initiated by the Judge Advocate General in response to cases such as this one."

Page 14, fourth paragraph states that, prior to fielding Case Management Tracking Information System (CMTIS) in 2006, the Navy did not have a system to track courts-martial from the field to the court; but in fact Homeport Electronic Legal Management (HELM) was used to track cases prior to fielding CMTIS. (HELM was unsuccessful, which lead to development of CMTIS.)

Page 33, third paragraph, states that Navy and Marine Corps Appellate Review Activity (NAMARA) civilianized the deputy positions. This action was at the direction of the Judge Advocate General and represented a part of a broader effort by the JAG to develop and maintain subject matter expertise and continuity in accomplishing staff work within the Office of the Judge Advocate General, recognizing that active duty officers must rotate on a two or three-year basis.

Page 33, last paragraph, states that "the replacement…was also re-directed to other duties." This is inaccurate. The replacement assumed the duties as assigned in the summer of 2010.

Page 36, fifth paragraph states that Appellate Government Division counsel do not necessarily have military justice experience. This is not true. No accession (first tour) officers are detailed to either appellate division; only counsel with prior service at a Naval Legal Service Office, a Region Legal Service Office, or a Marine Corps Law Center or Legal Service Support Section are assigned to these divisions.

Page 43, fourth paragraph, states that inspections of fleet Judge Advocates have never been done before. Inspections were conducted in 2009 and 2010.

Page 51, seventh paragraph, states that "the cultural paradigm in the Navy tends to be 'hands off' and reactive, not a proactive, preventative approach." This is false. It also states that "Navy JAG leadership" deemed unnecessary a suggestion to include a mention of *Moreno* timelines in a command instruction. The statement is not attributed, so it is unclear who, in the view of the Report, is among the "leadership." The Judge Advocate General and the Commander, Naval Legal Service Command have made *Moreno* standards a critical part of oversight efforts.

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3000 MARINE CORPS PENTAGON
WASHINGTON, DC 20350-3000

IN REPLY REFER TO:
5400
CMC
15 Oct 10

From: Commandant of the Marine Corps
To: Secretary of the Navy

Subj: DOD INSPECTOR GENERAL REPORT "EVALUATION OF POST TRIAL REVIEWS OF COURTS-MARTIAL WITHIN THE DEPARTMENT OF THE NAVY"

Encl: (1) SJA to CMC comment on DoD IG report w/ enclosures

1. The enclosure is provided as the Marine Corps' service-specific attachment to your comments on the subject DoD Inspector General's (DoD IG) draft report. We concur generally with the DoD IG's assessment and recommendations regarding the provision of legal services in the Marine Corps and we accept responsibility for the noted deficiencies in the execution and supervision of the Marine Corps legal mission.

2. As described in our recently published Marine Corps Legal Services Strategic Action Plan 2010-2015, we conducted a self assessment of our legal community and arrived at some of the same conclusions as the DoD IG. We immediately began addressing these deficiencies, but more remains to be done.

3. I consider the execution of legal functions a service level responsibility. Moreover, I believe the effective and efficient administration of military justice is critical to the ability of our commanders to maintain good order and discipline and is essential to protect the rights of our Marines and Sailors. To ensure that our legal community has the capability to support commanders in this area and to avoid a recurrence of the deficiencies highlighted in the draft DoD IG Report, I need a Marine officer responsible to the Commandant of the Marine Corps for the supervision of the administration of military justice in our Corps. The officer best positioned to provide that service-level supervision is the Staff Judge Advocate to the Commandant.

JAMES T. CONWAY

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
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WASHINGTON, DC 20350-3000

IN REPLY REFER TO:
5400
SJA
15 Oct 10

From: Staff Judge Advocate to the Commandant
To: Commandant of the Marine Corps

Subj: COMMENTS ON THE DOD INSPECTOR GENERAL REPORT "EVALUATION OF POST TRIAL REVIEWS OF COURTS-MARTIAL WITHIN THE DEPARTMENT OF THE NAVY"

Ref: (a) DoD IG Memo of 24 Sep 10

Encl: (1) Factual Inaccuracies in draft DoD IG Report
(2) Strategic Action Plan 2010-2015 of 15 Aug 10

1. Reference (a) is the Department of Defense Inspector General (DoD IG) draft "Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy." The enclosures are provided as the Marine Corps input to the Department's response. Enclosure (1) corrects factual inaccuracies in the report. Enclosure (2) is the Marine Corps Legal Services Strategic Action Plan 2010-2015.

2. In its draft report, the DoD IG identified a number of Departmental and Service deficiencies that contributed to the mishandling of courts-martial, particularly in the post-trial phase. The report cites failures in the leadership of both the Navy Judge Advocate General's Corps (JAGC) and the U.S. Marine Corps judge advocate community.

3. In their findings on page 2, the DoD IG stated:

> Process failures occurred at almost every segment in the post-trial process. They resulted from inadequate leadership, supervision and oversight over organizations suffering from many policy and structural deficiencies, including:
>
> - ineffective tracking systems and absent, or unenforced, processing timelines;
> - inadequate policy prescribing expectations and standardized processes, procedures and checklists for processing courts-martial;

Subj: COMMENTS ON THE DOD INSPECTOR GENERAL REPORT "EVALUATION OF POST TRIAL REVIEWS OF COURTS-MARTIAL WITHIN THE DEPARTMENT OF THE NAVY"

- decentralized organizational structures wherein every legal office or staff judge advocate functions independently without higher headquarters oversight or professional supervision; and
- ineffective inspections, which either did not detect/identify post-trial problems, or did not lead to sufficient or lasting corrective actions.

4. The deficiencies highlighted in reference (a) were apparent and well-documented in appellate case law. In a detailed assessment of the strengths, weaknesses, opportunities, and threats of the Marine legal community conducted in 2009-2010, the Marine Corps reached many of the same conclusions about the effectiveness and efficiency of its Service-level legal mission. The weaknesses identified in our self-assessment were published in enclosure (2) and included:

- Lack of uniformity in policies and procedures for legal services;
- Lack of oversight of the practice of law;
- Lack of formal mechanisms for maintaining military justice expertise; and
- Lack of current doctrine.

The Marine legal community has accepted responsibility for these failures and, when the DOD IG commenced its review, had already begun taking the steps necessary to address these deficiencies and to elevate the practice of law in the Marine Corps. Enclosure (3) sets forth our five strategic goals and some of the initiatives underway to achieve them.

5. To meet the requirement for an effective case tracking system, the Marine Corps developed, tested, and, in February 2010, implemented a Corps-wide Case Management System (CMS) to track cases from the initial request for legal services to docketing at the Navy-Marine Corps Court of Criminal Appeals. Utilizing the same commercial software used by the U.S. Army JAGC, the Marine Corps developed and fielded a system in less than six months. The DoD IG conducted their inspection of CMS within the first four months of implementation and observed the usual challenges that occur during transition to a new system. In spite of these challenges, the DoD IG noted:

Subj: COMMENTS ON THE DOD INSPECTOR GENERAL REPORT "EVALUATION OF POST TRIAL REVIEWS OF COURTS-MARTIAL WITHIN THE DEPARTMENT OF THE NAVY"

> The recently-fielded Marine Corps CMS appears to have substantially greater potential than the Navy CMTIS. Specifically, CMS appears to offer better and more complete capability for management to maintain visibility over individual case processing and status in the field, including post-trial processing in the field. (pg 15)

Since the DoD IG inspection, CMS has added additional capabilities and functionality based on user feedback. Through mandatory Corps-wide use, it is now thoroughly tested and provides a reliable and effective tracking system for all Marine court-martial cases until they are docketed by the appellate court. In addition, CMS has the capability to incorporate more advanced features.

6. To meet the requirement for inspections and standardized processes, procedures, and checklists, the Marine Corps instituted a sixteen page checklist for use in the Commanding General's Inspection Program in May 2010. This checklist provides clear standards for our commanders to evaluate the performance of Staff Judge Advocates, Legal Service Support Sections, and Law Centers. To increase the effectiveness of these higher headquarters inspections, a thirty-one page guide was recently published to assist the subject matter experts who conduct these inspections. By establishing clear standards in this format, commanders now have the ability to measure the performance of their legal team through vigorous inspections and enforce these standards by holding them accountable for their performance.

7. The DoD IG Draft report identified a decentralized system of military justice in both the Navy and Marine Corps in which execution of the legal mission, including case tracking and setting and supervision of standards of performance, was done almost entirely at the local level in both services. Decentralized execution is one of the strengths of our two services, but complete decentralization of standards, processes, and procedures results in the kind of inconsistency that leads to the failures documented in the DoD IG Draft Report.

8. In our internal analysis, we drew a conclusion similar to the DoD IG: that our previous failures were due in part to a lack of consistent leadership, oversight, and supervision of the administration of military justice and delivery of legal

Subj: COMMENTS ON THE DOD INSPECTOR GENERAL REPORT "EVALUATION OF POST TRIAL REVIEWS OF COURTS-MARTIAL WITHIN THE DEPARTMENT OF THE NAVY"

services to our clients. At the local level, commanders and their legal teams are responsible for the execution of military justice. At the department level, the JAG is responsible for the military justice function, including supervision and oversight of the military criminal justice system at the trial and appellate levels. I believe that the deficiencies reported by the DOD IG resulted, in part, from the absence of a legal officer at the Service level within each of the services with the responsibility and authority to supervise the administration of military justice. Each of the services requires a professional legal organization, with service-level legal leadership to meet the unique requirements of their particular service and service culture. The legal leadership of this service organization requires the ability to set uniform service-wide standards, then train to, inspect, and enforce those same standards.

9. This service legal leadership gap has been filled in the U.S. Navy by having the Departmental JAG perform this function. The SJA to CMC's authority to perform this function on behalf of the Commandant is, at best, limited. Statutorily, the SJA to the Commandant is simply that - an SJA, with no specific authority to conduct inspections under Article 6, UCMJ, or to exercise professional leadership and supervision over the Marine legal community. It is my continuing view that there must be a clear line of accountability for the supervision of the administration of military justice and provision of legal assistance. The clearest line of accountability is for the SJA to CMC to be statutorily required, and empowered, to exercise the same functions for Service-wide delivery of legal services as the JAG provides to the U.S. Navy.

10. The Marine Corps accepts responsibility for past failures in execution of the Marine legal mission. With a bias for action, we have begun to implement initiatives to ensure that the mistakes of the past are not repeated. We are committed to elevating the practice of law in the Marine Corps and the Department of the Navy, and will continue setting standards, training to standards, and inspecting to standards. Thank you for the time and attention given to this matter.

V. A. ARY

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Editorial comments/clarifications to the Draft DoD IG Report

1. Case Management System (CMS) Effectiveness
   a. Statement: "Marine Corps managers and supervisors still do not have the visibility they need from automated systems to monitor case progress and timeliness across the post-trial process." Page 3, paragraph 1.
   b. Comment: The Marine Corps CMS currently provides Marine military justice supervisors with complete visibility of pre-trial and post-trial case loads up until the point the record of trial is docketed by NAMARA and the departmental mission of appellate review begins. NAMARA has access to CMS and updates the appropriate fields upon receipt and docketing of U.S. Marine Corps cases, which notifies Marine personnel when they are mission complete at the service-level. After docketing by NAMARA, Marine military justice supervisors have to contact NAMARA to obtain information about cases.

      CMS has the capability to be modified if there are data points military justice managers in the field desire to track. The purpose of CMS is to accurately track Marine Corps cases. Therefore, requests for additional data points are thoroughly evaluated against this purpose prior to implementation of any requested changes.

2. Law Center MCB Quantico
   a. Statement: "A Reserve judge advocate assigned to deal with delay problems after *Moreno* told us he visited the Legal Services Support Section at Quantico, VA. . . ." Footnote 1, page 3.
   b. Comment: MCB Quantico, VA is an Office of the Staff Judge Advocate, not a Legal Services Support Section. The Legal Services Support Sections are Marine Expeditionary Force organizations that reside in the Marine Logistics Groups located at MCB Camp Pendleton, CA (1st MLG), MCB Camp Lejeune, NC (2d MLG), and MCB Camp Foster, Okinawa, Japan (3d MLG).

3. Inspection Program
   a. Statement: "In addition, Navy inspections have not included Marine Corps Activities, and the Marine Corps has not previously inspected its field activities." Page 4, paragraph 3.
   b. Comment: The Marine Corps recently institutionalized a Commander based inspection program into the functional areas within Staff Judge Advocate Offices, Law Centers, and Legal Service Support Sections. Over the past two decades the SJA to CMC has conducted what are known within the Marine uniformed legal community as Article 6 "visits." These visits were conducted per the inherent authority of the Commandant of the Marine Corps to manage the force and were designed to assess the health of the Marine Corps legal community and address any concerns raised by commands. The SJA to CMC does not have the statutory authority to conduct Article 6, UCMJ inspections and before 2010, the SJA to CMC did not review a standardized inspection checklist while conducting these visits.

Enclosure (1)

4. Inspection Program
   a. Statement: "[The] Marine Corps is now instituting a comprehensive inspections program." Page 4, paragraph 4.
   b. Comment: The Marine Corps instituted law center, SJA office, and LSSS inspections as part of the Commanding Generals Inspection Program on 15 May 2010 in MARADMIN 276/10. This inspection includes reviewing the performance of the service-level legal mission using standardized checklists for all practice areas.

5. Marine Corps Responsibility for Article 6 Inspections
   a. Statement: "The Navy JAG did not typically conduct Article 6 inspections at the Marine Corps units, instead *delegating* the responsibility to the Marine Corps SJA" (emphasis added). Footnote 6, page 13.
   b. Comment: 'Deferring' may be a more appropriate word than 'delegating.' The Navy JAG did not specifically delegate, but rather deferred this responsibility to the SJA to CMC. Article 6(a) inspections are a statutory responsibility of the JAG per 10 USC § 806(a) that may be delegated by the JAG to "senior members of his staff." The SJA to CMC is a member of the CMC and HQMC staff, not the Navy JAG's staff. Presently, the SJA to CMC performs inspections in the field based upon the inherent command authority of the CMC.

6. Authorized Strength Report
   a. Statement: "[T]he Marine Corps judge advocate force experienced reductions in authorized strength while incurring increased work requirements and demands for new positions." Page 16, paragraph 4.
   b. Comment: The Judge Advocate Authorized Strength Report (ASR or billets "purchased" by the Marine Corps) dropped in February 2008, as the Marine Corps was building its end strength to 202,000. The ASR increased again in August 2008 and has remained relatively stable since. The ASR (run twice annually) is the list of billets that is actually "purchased" by the Marine Corps given fiscal realities and funding priorities. Relevant ASR data is as follows:
      i. August 2007: 311
      ii. February 2008: 294
      iii. August 2008: 330
      iv. February 2009: 367

7. Marine Corps and Navy Are Separate Services
   a. Statement: "…within an overall context in which the Navy and Marine Corps had the largest courts-martial caseload of any *Service*." (emphasis added) Page 16, paragraph 5.
   b. Comment: The Navy and Marine Corps have the largest caseload of any *department*, however, the Navy and Marine Corps are separate services that together comprise the Department of the Navy.

8. Staffing Goals
   a. Statement: "At the Camp Pendleton Legal Service Support Section, 32 officers were authorized, but only 23 were assigned. Of the 23 officers assigned, 8 were deployed, leaving 17 (53 percent) of 32 authorized officers actually in place to perform the work. Of 56 enlisted authorizations, only 51 members were assigned and 18 of

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these were deployed. Only 33 enlisted members (59 percent of authorized) were in place to perform the work. To compensate, five judge advocates had been sent to Pendleton on temporary duty assignments." Page 23, paragraph 1.

b. Comment: The use of table of organization numbers (T/O) for purposes of determining whether legal personnel were appropriately provided to staff LSSSs, Law Centers and SJA offices does not provide an accurate picture. USMC Manpower relies upon staffing goals (a percentage almost uniformly less than the T/O) in order to determine how many personnel to provide to all Marine units. In April 2010, the LSSS, 1st MLG at MCB Camp Pendleton had a staffing goal of 23 officers with 28 on hand. Currently, they have a staffing goal of 25 with 27 on hand. Their enlisted staffing goal is currently 53 with 50 on hand. The LSSS, 2nd MLG at MCB Camp Lejeune has an officer staffing goal of 21 with 26 on hand. Their enlisted staffing goal is 49 with 51 on deck.

9. Case Management System Demonstration for the CNA Study

a. Statement: "A Center for Naval Analyses study is currently reviewing the Judge Advocate General Corps' information technology needs. This study includes benchmarking various other systems against CMTIS to assess options available to the Navy. The Marine Corps is not included in this study." Page 28, paragraph 3.

b. Comment: CNA requested and received two demonstrations of the Marine Corps' CMS in March and June of 2010.

10. Marine Corps Use of CMTIS

a. Statement: "The Marine Corps does not use CMTIS, but the military judges who preside over cases after sentencing or acquittal enter a "few case data points" in CMTIS." Page 28, paragraph 5.

b. Comment: Some Marine military justice personnel do use CMTIS to track Marine cases once after they enter the appellate process at the departmental level at NAMARA or NMCCA. These Marines are granted regional access to "read only" use of CMTIS after a request.

11. Improvements of CMS

a. Statement: "Based on initial feedback from the field, the Marine Corps CMS has significantly improved Marine Corps visibility over its appellate workload, and the software contractor is continuing additional improvements to meet user needs throughout the Marine Corps." Page 29, paragraph 1.

b. Comment: It is more accurate to state that the new CMS improves visibility over military justice administration, including post-trial review, at the Service level rather than over its "appellate workload." Post-trial appellate cases which require review under Article 66 or Article 69, UCMJ are tracked by Navy JAG after they are received by NAMARA. The post-trial process at the service-level has been significantly improved by the implementation of the CMS. In particular, the number of cases which exceed the 120 day post-trial Moreno standard for convening authority's action has dropped significantly since CMS was implemented.

12. CMS Tracking

a. Statement: "The Marine Corps CMS is a field-level tracking system enabling Marine Corps field legal offices to monitor cases in

progress. The system: … tracks a case from the date charges are preferred until NAMARA receives the record of trial." Page 29, paragraph 3, bullet 1.

b. Comment: CMS tracks the Marine cases from the date of a command's request for legal services (RLS) or the date pretrial restraint is imposed (if before an RLS is received). These events occur prior to preferral of charges. Additionally, tracking ends not when NAMARA receives the case but when NAMARA dockets the case.

13. CMS Capabilities

a. Statement: "The Marine Corps CMS is a field-level tracking system enabling Marine Corps field legal offices to monitor cases in progress. The system: … does not have capability to calculate elapsed time for individual activities, e.g., the time required to transcribe a record of trial." Page 29, paragraph 3, bullet 3.

b. Comment: The CMS captures several different data points relating to the time required to perform the service-level mission of post-trial review. For instance, although the exact number of days required to transcribe a record are not currently required to be captured, the amount of time in the Court Reporters office and area of responsibility are captured. Additionally, the time in review, time with trial counsel, military judge, SJAs, and convening authorities are also captured. These data points provide a thorough understanding of the efficiencies of each particular office or officer in performing their functions.

14. LL.M. Designations

a. Statement: "[T]he Marine Corps has designated 41 positions for individuals with advanced degrees (Master of Laws--LL.M.) in criminal law." Page 42, paragraph 1.

b. Comment: The Marine Corps has 22 positions coded for individuals with advanced degrees (Master of Laws - LL.M.) in criminal law.

15. LL.M. Positions

a. Statement: "Individuals in these positions (e.g., Chief Defense Counsel, Senior Trial Counsel, and Defense Counsel) must have these degrees (LL.M.s)." Page 42, paragraph 1.

b. Comment: As this sentence pertains to the Marine Corps, individuals with LL.Ms are preferred for these positions but not required with exceptions made based on other relevant qualifications.

16. USMC Total Force Structure Division

a. Statement: "In 2009 and 2010, the Marine Corps TFSD validated a request to re-code approximately 70 judge advocate positions . . ." Page 44, paragraph 6.

b. Comment: The sentence should read "Between 2008 and 2010, the Marine Corps' Total Force Structure Division (TFSD) validated requests to recode approximately 56 judge advocate positions requiring specialized training and education (Master of Laws degree) in certain legal areas, including military justice."

17. Recoding Positions for LL.M.'s

a. Statement: "A secondary effect of recoding positions to require a Master of Laws degree was to increase opportunities for judge advocates to receive advanced education, which should elevate legal

practice throughout the Marine Corps. Fifty-one (51) of 70 validated positions had been approved for re-coding as of June 4, 2010." Page 44, paragraph 7.

b. Comment: Fifty-six positions will be coded for specialties by 2014.

18. Judge Advocate Targeted Hiring

a. Statement: "To increase judge advocate inventories, Marine Corps Recruiting Command increased targeted judge advocate hires 71 percent between FY 2008 and FY 2010. The increase was from 30 targeted hires in FY 2008, to 40 in FY 2009, and 60 in FY 2010." Page 44, paragraph 8.

b. Comment: A more accurate statement would be that the "increase was from 35 targeted accessions in FY 2008, to 45 in FY 2009, to 60 in FY 2010."

19. Authorized End Strength

a. Statement: There is no number that constitutes authorized end strength. Page 45, table 1.

b. Comment: There is no "cap" on Marine Corps judge advocate end strength. These numbers were calculated by Judge Advocate Division and reflect the strength required to fulfill the requirements levied by the Marine Corps. This is less than the Grade Adjusted Recapitulation (GAR), which reflects optimal strength.

20. CMS Corrections to Post Trial Process

a. Statement: "As recently as June 2010, the Navy and Marine Corps were still finding 'lost' cases, which still must work their way through the appellate process." Page 50, paragraph 1.

b. Comment: This statement is accurate only with respect to cases that began before the implementation of CMS in February 2010 within the Marine Corps legal community; however, with respect to cases initiated after that date, the Marine Corps has visibility over the entire case load managed by our staff judge advocates, law centers, and LSSSs.

21. Misspelling

a. Statement/Comment: "Maine" on Page 51, paragraph 1 line 1 should read "Marine."

22. Statutory Mission of Judge Advocates

a. Statement: "Military Justice is the only statutory mission for judge advocates." Page 54, paragraph 4.

b. Comment: The 2008 NDAA mandates that legal counsel be provided to recovering service members while undergoing evaluation by a physical disability evaluation board and further authorizes Legal Assistance. Another statute, 10 USC § 1044, authorizes legal assistance to be provided by judge advocates.

23. Inspection of Military Justice Administration

a. Statement: "Inspecting military justice administration in the Marine Corps generally has been delegated to the Marine Corps SJA." Page 64, paragraph 3.

b. Comment: See Item 7

24. Legal Service Specialists

a. Statement: "As of May 2010, the Marine Corps had approximately ... 478 legal specialists...." Page 66, paragraph 3.
b. Comment: The appropriate title is "legal services specialists."

25. Core Competencies of a Marine Judge Advocate
a. Statement: "Marine judge advocates are expected to be 'legal generalists' with four corps legal competencies: military justice, operational law, ethics, and fiscal law in contingency operations." Page 66, paragraph 4.
b. Comment: The four core competencies that Marine judge advocates are expected to have are generally understood to be military justice, operational law, administrative law (of which ethics regulations are a subset) and legal assistance. Marine judge advocates practicing contract and fiscal law usually have Masters of Law degrees (LL.M.) in contract and fiscal law. They also practice under the supervision of the Counsel for the Commandant (CL).

26. Office of Military Commissions Staffing
a. Statement: "13 Marine judge advocates were serving as counsel in the Office of Military Commissions...." Page 66, paragraph 4.
b. Comment: "Eight active-duty Marine judge advocates."

27. Authorized Strength
a. Statement: "Current Marine Corps strength is approximately 204,000 Marines, including 390 to 440 judge advocates at any given time. Judge advocate authorized strength has remained fairly static for the last 20 years, while actual judge advocate numbers fluctuated from a 450 high in 1990 to a 360 low in 1999. In 2010, the number is 444, up from 407 and 409 in 2008 and 2009, respectively. Judge advocate authorizations were 393 for FY 2008, increased to 411 and 432 for FYs 2009 and 2010, respectively, and are projected at 448 and 460 for FYs 2011 and 2012, respectively." Page 114, Paragraph 2.
b. Comment: See item 21; also, the current active duty judge advocate inventory is 469, including 38 JAs that graduated from Naval Justice School on 8 October 2010.

28. Loss of Judge Advocate Billets
a. Statement: "In 2001-2002, judge advocates lost 64 positions to other Marine Corps Military Occupation Specialties in the buildup to 202,000 marines. Although a later legislative "plus up" gave the Marine Corps additional authorizations, judge advocates were not "reimbursed" for the loss. When the Military Expeditionary Units were re-coded to have judge advocate billets in their organizations, the judge advocate requirement increased by 7, but judge advocate authorizations were not increased correspondingly. The Military Expeditionary Units simply took the billets from other organizations, generally joint Law Centers and Legal Service Support Sections providing all military justice services." Page 114, paragraph 3.
b. Correction: This paragraph is incorrect. Judge Advocates did not lose billets (structure) between 2001 and 2002, and the 202k buildup didn't happen until 2007-2008. Recoding the MEU SJAs as 4405s may eventually drive an increase in accessions, but accession plans are influenced by a host of factors (retirements, funding, etc). Additionally, the MEUs billets were not taken from other

organizations. Judge Advocates served as MEU SJAs, but in billets coded as 8006 (unrestricted officer) or 0530 (civil affairs). The MEU billets have been recoded to 4405 (Master of International Law), and those changes will take effect in 2012.

29. Promotion Rates. In order to clarify the term "Selection Opportunity" and provide missing data points for the table at page 134, Table 1, the following table is provided. It should be noted that percentages may vary greatly year to year for judge advocates at the more senior field grade ranks due to the small zones as illustrated by the number of eligible and selected officers listed below the percentages in the 4402 columns (e.g., FY 11 selection rate for 4402 Colonels was 50% with only 4 eligible officers).

	Major 4402	Major All MOS	Lieutenant Colonel 4402	Lieutenant Colonel All MOS	Colonel 4402	Colonel All MOS	Precept Language
FY11	87.1% 27/30	82.8%	81.8% 15/22	65.6%	50.0% 2/4	53.6%	Yes
FY10	90.6% 29/32	87.6%	88.9% 16/18	71.8%	64.3% 9/14	53.4%	Yes
FY09	78.4% 29/32	87.0%	90.9% 10/11	70.6%	33.3% 4/12	50.5%	Yes
FY08	90.0% 18/20	87.4%	82.4% 14/17	65.0%	12.5% 1/8	51.0%	No
FY07	90.0% 27/30	86.5%	75.0% 9/12	62.4%	23.5% 4/17	48.4%	No
FY06	92.9% 26/28	86.7%	78.9% 15/19	67.2%	80.0% 4/5	50.8%	Yes

FY 05				61.8%		50.4%	No
FY 04				64.7%		51.2%	

Appendix A. Requirement for DoDIG Review

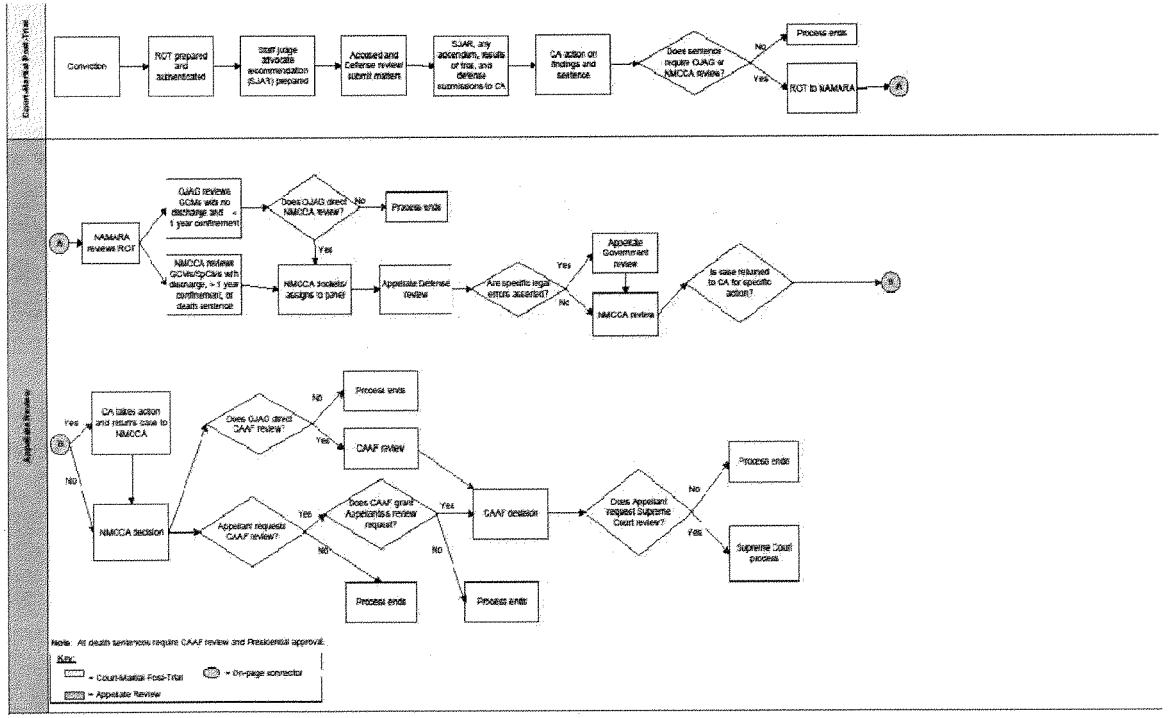
Senate Report 111-35 (to accompany S. 1390), "Report on the National Defense Authorization Act for 2010" (printing ordered July 2, 2009), directed a DoDIG review, as follows:

> **Inspector General review of post-trial processes for court-martial record preparation and appellate review within the Department of the Navy**
>
> The committee believes that action is long overdue to analyze and correct longstanding problems with the post-trial processes for preparation of records of courts-martial and for appellate review of court-martial convictions within the Department of the Navy. The United States Court of Appeals for the Armed Forces (C.A.A.F.) in the case of *Toohey v. United States*, 60 M.J. 100 (C.A.A.F. 2004), established standards for assessing whether convicted service members had been denied due process under the Fifth Amendment to the Constitution as a result of denial of reasonable appellate processing of their cases. Since then, a succession of Navy and Marine Corps cases, including, but not limited to, *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005); *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006); *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006); and, most recently, the unpublished case of *United States v. Foster* have addressed extremely lengthy delays in appellate review. In the *Foster* case, the conviction of a Marine was set aside because his conviction for rape "could not withstand the test for legal and factual sufficiency." This Marine had been confined for more than 9 years awaiting appellate review of his case. These cases demonstrate that cognizant legal authorities in the Department of the Navy have not taken necessary and appropriate steps to ensure that the resources, command attention, and necessary supervision have been devoted to the task of ensuring that the Navy and Marine Corps post-trial military justice system functions properly in all cases.
>
> The committee recognizes that a series of Navy Judge Advocates General have attempted to overcome the systemic challenges associated with preparing, authenticating, tracking, and forwarding records of trial from numerous commands entrusted with court-martial convening authority and ensuring that the appellate review process comports with all legal standards. The committee is convinced, however, that intervention is needed by departmental civilian and military leaders to definitively resolve these chronic administrative problems and that action should be taken immediately to resolve these issues.
>
> The committee directs the Inspector General of the Department of Defense, in consultation with the Secretary of the Navy, to review the systems, policies, and procedures currently in use to ensure timely and legally sufficient post-trial review of courts-martial within the Department of the Navy. The review shall discuss and summarize the history of problems experienced by the Navy and Marine Corps since 1990 in ensuring appropriate appellate review of general and special courts-martial and curative measures. The principal focus of the review shall be to determine whether the resources dedicated to post-trial processes, the information and tracking systems in use, the applicable procedures and policies, and the monitoring and supervision of actions of participants in the military justice system aimed at ensuring compliance with the procedural requirements of law are adequate to accomplish the requirements for due process of law under the

Uniform Code of Military Justice and applicable case law. This review should be provided to the Secretary of the Navy no later than January 1, 2010.

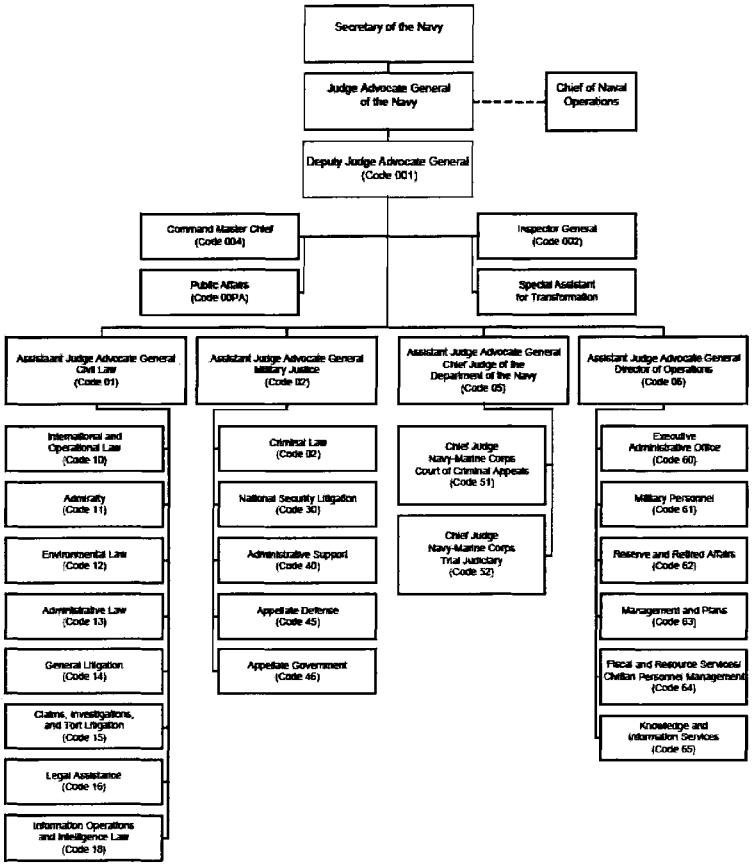
The committee further directs the Secretary of the Navy, in consultation with the Chief of Naval Operations and the Commandant of the Marine Corps, no later than March 1, 2010, to submit to the Committees on Armed Services of the Senate and the House of Representatives a written report on the findings and recommendations of the Department of Defense Inspector General and actions taken or planned to address these findings and recommendations, The Secretary shall include in the report his assessment of the adequacy of (1) the Department of the Navy's processes and resources dedicated to affording legally sufficient post-trial review of all Navy and Marine Corps cases, (2) the systems in place to track courts-martial cases, and (3) means to ensure accountability and compliance with the requirements of the Uniform Code of Military Justice and applicable case law.

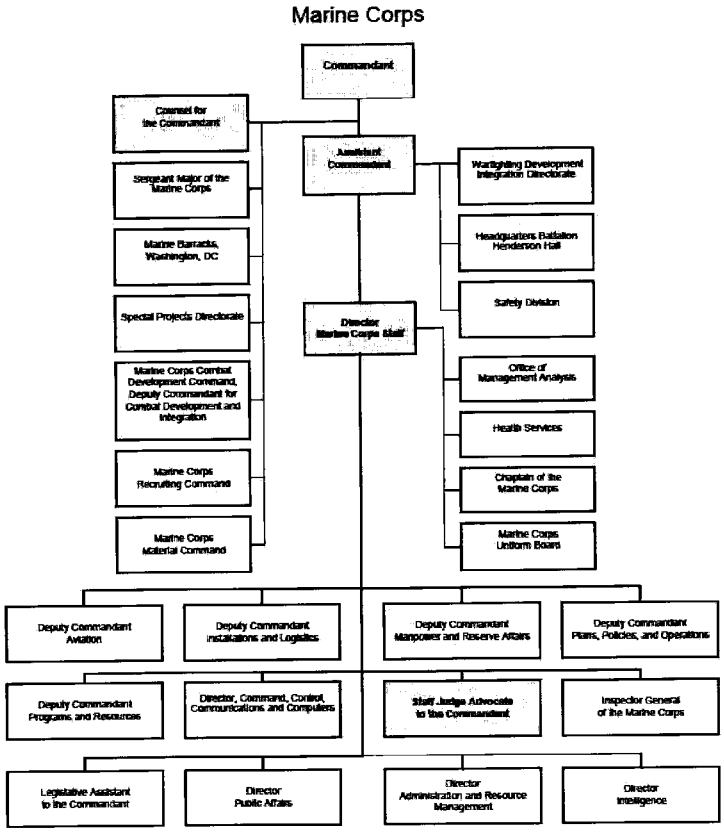
Appendix B. Court-Martial Post-Trial Process (Summary of Major Legal Steps)



Appendix C. Navy JAG and Marine Corps Organizations

Judge Advocate General of the Navy




Marine Corps
Commandant
Counsel for the Commandant
Sergeant Major of the Marine Corps
Marine Barracks, Washington, DC
Special Projects Directorate
Marine Corps Combat Development Command, Deputy Commandant for Combat Development and Integration
Marine Corps Recruiting Command
Marine Corps Material Command
Assistant Commandant
Director Marine Corps Staff
Warfighting Development Integration Directorate
Headquarters Battalion Henderson Hall
Safety Division
Office of Management Analysis
Health Services
Chaplain of the Marine Corps
Marine Corps Uniform Board
Deputy Commandant Aviation
Deputy Commandant Installations and Logistics
Deputy Commandant Manpower and Reserve Affairs
Deputy Commandant Plans, Policies, and Operations
Deputy Commandant Programs and Resources
Director, Command, Control, Communications and Computers
Staff Judge Advocate to the Commandant
Inspector General of the Marine Corps
Legislative Assistant to the Commandant
Director Public Affairs
Director Administration and Resource Management
Director Intelligence

Appendix D. Navy and Marine Corps Field and Appellate Organizations

The Judge Advocate General of the Navy (Navy JAG) heads the Office of the Judge Advocate General, a staff office within the Office of the Secretary of the Navy. The Navy JAG is responsible for delivering legal services in both the Navy and Marine Corps.

The Office of the Judge Advocate General supports the Navy JAG in advising the Secretary of the Navy on legal and policy matters. The office also supports the Navy JAG in advising and assisting the Chief of Naval Operations in formulating and implementing policies and initiatives pertaining to legal services within the Navy. The Deputy Judge Advocate General is also the Commander, Naval Legal Service Command.

The Navy JAG is responsible for the professional supervision of all Navy and Marine Corps judge advocates and for conducting Article 6 inspections of military justice administration in the Navy and Marine Corps. Inspecting military justice administration in the Marine Corps generally has been deferred to the Marine Corps SJA. The Office of the Judge Advocate General organization and the Marine Corps organization are shown in Appendix C.

a. Naval Legal Service Command

The Naval Legal Service Command provides legal services to afloat and ashore commands, active duty naval personnel, family members, retirees, and eligible beneficiaries from other Services, at 99 offices world-wide. The command:

- provides counsel for courts-martial, administrative boards, physical evaluation boards, legal assistance, and local commanders and, through the Region Legal Service Offices, handles post-trial matters for all assigned commands, and provides support to all afloat staff judge advocates and convening authorities as needed;
- provides training for Navy, Marine Corps and Coast Guard judge advocates, legalmen, and other DoD personnel; and
- is the primary sourcing organization for Navy Judge Advocate General Corps' individual augmentation and deployment requirements to support overseas contingency operations.

The Naval Legal Service Command consists of nine Naval Legal Service Offices (NLSOs), nine Region Legal Service Offices (RLSOs), and the Naval Justice School.[21] In FY 2009, the command had 386 judge advocates, 1 Civil Engineer Corps Officer, 10 Limited Duty (Legal) Officers, 213 legalmen, and 210 civilians. During the fiscal year, 15 percent of Naval Legal Service Command's judge advocates deployed as individual augmentees directly supporting overseas conflict operations in Iraq, Afghanistan, Djibouti and Guantanamo Bay, Cuba. The Naval Legal Service Command organization is shown in Appendix E.

[21] The NLSOs provide defense counsel representing the accused in courts-martial. The RLSOs provide prosecutors/trial counsel representing the Government in courts-martial.

b. Assistant Judge Advocate General for Military Justice (Code 02) and Navy-Marine Corps Appellate Review Activity (NAMARA)

The Assistant Judge Advocate General for Military Justice (Code 02) is one of four Assistant Judge Advocate Generals who report to the Deputy Judge Advocate General and Navy JAG. The Assistant Judge Advocate General for Military Justice:

- supervises the division director responsible for criminal law policy (Code 20);
- serves as a member, Office of the Judge Advocate General Ethics Committee;
- serves as the Chairman, Judicial Screening Board (JAGINST 5817.1C, January 7, 2008)
- coordinates administrative matters with the Chief Judge, Department of the Navy (Code 05); Chief Judge, Navy-Marine Corps Court of Criminal Appeals (Code 51); and the Chief Judge, Navy-Marine Corps Trial Judiciary (Code 52); and
- is the Officer in Charge, Navy-Marine Corps Appellate Review Activity (NAMARA)

As officer-in-charge, NAMARA, the Assistant Judge Advocate General for Military Justice supervises:

- the Administrative Support Division (Code 40);
- the Appellate Defense Division (Code 45); and
- the Appellate Government Division (Code 46).

(1) Criminal Law Division

The Criminal Law Division (Code 20) oversees all aspects of military justice policy in the Department of the Navy. Among its overall responsibilities, the Criminal Law Division reviews for error, and takes action on courts-martial cases involving less severe sentences arising from general court-martial convictions (Article 69 (a), R.C.M 1201(b)). In October 2009 (beginning of the current fiscal year), the Criminal Law Division was staffed with nine employees (seven military and two civilian), including two attorneys, and three legal advisors.

(2) Navy-Marine Corps Appellate Review Activity (NAMARA)

NAMARA is the organizational name for the Assistant Judge Advocate General for Military Justice divisions directly involved in receiving, processing and reviewing (substantive legal review) all cases requiring review by the Navy-Marine Corps Court of Criminal Appeals.

(a) Administrative Support Division

The Administrative Support Division (Code 40) receives, ensures completeness, and delivers a complete record of trial to the Navy-Marine Corps Court of Criminal Appeals for docketing and appellate review. The Administrative Support Division also receives and reviews general courts-martial records of trial forwarded for mandatory Judge Advocate General review under Article 69(a), when the appellants have not waived or withdrawn their rights to appellate review. In October 2009, the Administrative Support Division was staffed with 10 employees (8 military and 2 civilian), including 2 document examiners and 1 legal technician.

(b) Appellate Defense Division

The Appellate Defense Division (Code 45) represents Navy and Marine Corps appellants before the Court, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court, unless the appellant has hired civilian counsel for the representation and/or waived the right to military counsel. After docketing, a court-martial case record is sent to the Appellate Defense Division for examination as to whether any error may have occurred affecting legal or factual sufficiency in the case. As required, the Appellate Defense Division prepares legal briefs outlining asserted errors for the Court's consideration. The Appellate Defense Division also: (1) represents appellants before the Navy Clemency & Parole Board, if the cases are in appellate review and time constraints permit; (2) assists field trial defense counsel in filing extraordinary writs before the Court and the U.S. Court of Appeals for the Armed Forces; (3) provides an informal death penalty assistance team to advise field defense counsel facing potential capital cases; and (4) provides limited, informal advice to field trial defense counsel on specific cases in litigation. In October 2009, the Appellate Defense Division was staffed with 15 employees (10 military and 5 civilian), including 9 defense attorneys and 3 legal technicians.

(c) Appellate Government Division

The Appellate Government Division (Code 46) represents the United States in criminal appellate proceedings before the Court, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court. The division also: (1) makes recommendations to the Navy JAG concerning issues to be certified to the U.S. Court of Appeals for the Armed Forces; and (2) provides limited Trial Counsel Assistance Program (TCAP) support to trial counsel and staff judge advocates in the field concerning their representation of the United States in court-martial and post-trial processes. In October 2009, the Appellate Government Division was staffed with 13 employees (10 military and 3 civilian), including 9 government attorneys and 1 legal technician.

c. Marine Corps Judge Advocate Organization

As of May 2010, the Marine Corps had approximately 444 active-duty judge advocates, 340 Reserve judge advocates, 17 warrant officers, 478 legal services specialists, and 41 speech-recognition court reporters. These personnel work in legal offices supporting the Fleet Marine Forces in the continental United States, overseas, and on deployment throughout the world. Marine Corps Reserve judge advocates support offices in all functional areas.

Marine Corps judge advocates are not restricted officers, and may perform duty in various roles outside their occupational specialties. On average, Marine judge advocates serve one to two tours outside the legal profession during a career. Marine judge advocates are expected to be "legal generalists" with four core legal competencies, which are generally understood to be military justice, operational law, administrative law (with ethics regulations as a subset) and legal assistance. Marine judge advocates practicing contract and fiscal law usually have Masters of Law degrees (LL.M.) in contract and fiscal law, and practice under the supervision of the Counsel for the Commandant. In military justice, they serve as prosecutors, defense counsel, military judges, review officers, and appellate counsel for both the Government and Service members. As of March 2010, eight active-duty Marine judge advocates were serving as counsel in the Office of the Military Commissions, the organization authorized under the Military Commissions Acts of 2006 and 2009 to conduct trials for alien unlawful enemy combatants engaged in hostilities against the United States.

Most Marine Corps judge advocates are assigned to operational commands. The military justice mission is highly decentralized and handled by local judge advocate personnel. Legal Service Support Section officers-in-charge, Law Center directors (typically dual-hated as installation staff judge advocates), Military Justice Officers (supervise Military Justice sections within Legal Service Support Sections and Law Centers), and individual unit staff judge advocates supervise and oversee the delivery of military justice support in the field. Each Legal Service Support Section or installation Law Center serves multiple commanders and staff judge advocates in their respective installations or regions.

The three Marine Expeditionary Forces each has a Legal Service Support Section (located at Camps Pendleton, Lejeune, and Foster (Okinawa, Japan)) providing the bulk of military justice administrative support for the Marine Expeditionary Force. Individual command staff judge advocates within the Marine Expeditionary Force, however, remain the primary legal advisors to their commanders for military justice decisions. Marine law centers are located on other Marine Corps installations, such as air stations, recruit depots, and bases, and provide military justice administrative support at their respective installations.

There is no command or supervisory relationship between the Legal Services Support Section officers-in-charge and the wing/division staff judge advocates they support. The Marine Expeditionary Force staff judge advocate does not have any direct supervisory authority over the Legal Services Support Section, but can work through the Marine Expeditionary Force Commander to secure cooperation from a recalcitrant Legal Support Service Section in a particular matter. Consequently, as in the Navy, most Marine Corps staff judge advocates operate independently and in a highly decentralized manner. There are senior staff judge advocates in the Marine Expeditionary Force structure, but these staff judge advocates are concerned predominantly with operational legal duties, have relatively little military justice involvement, and have no institutional responsibility for overseeing or monitoring military justice activities in subordinate commands.

(1) Prosecution

Depending on office design, the staff judge advocate, Legal Service Support Section officer-in-charge, or Law Center director is the senior supervisory attorney for the trial counsel. In several offices, an installation Law Center director also acts as staff judge advocate for an installation commander. After staff judge advocates, Law Center directors and Legal Service Support Section officers-in-charge, the Military Justice Officers or legal team officers-in-charge are the mid-level supervisory attorneys for Trial Counsel. Senior trial counsel manage the trial counsel staff below them.

(2) Defense

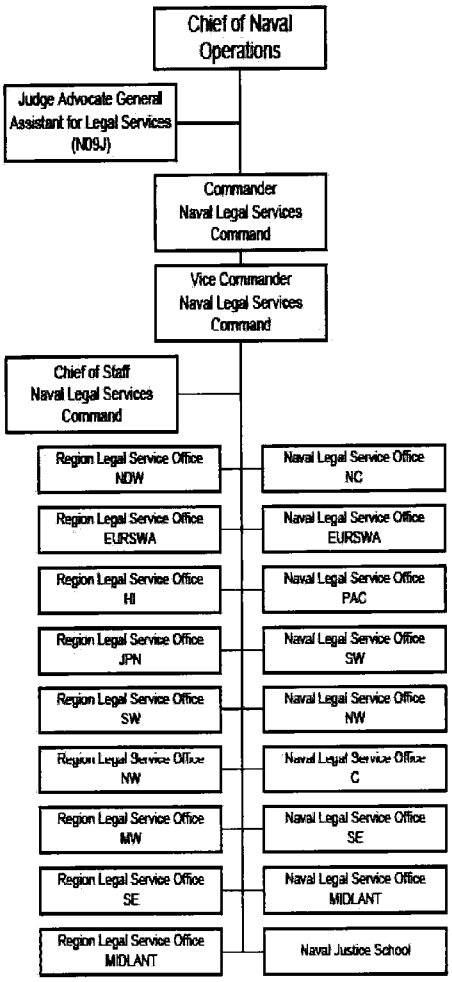
All defense counsel in the Marine Corps fall under the professional supervisory authority of the Chief Defense Counsel of the Marine Corps. In turn, each region in the Marine Corps (East Coast, West Coast, and Pacific) has a Regional Defense Counsel, who acts as the supervisory attorney and fitness report reviewing officer for all defense counsel in the region. The Regional Defense Counsel are attached to the Legal Service Support Sections and report administratively to the Legal Service Support Section officer-in-charge, but receive their fitness reports from the Marine Corps' Chief Defense Counsel. The senior defense counsel at a Legal Service Support Section or Law Center

provides professional supervisory oversight for junior defense counsel (like the senior trial counsel for junior trial counsel).

(3) Post-trial Processing and Review

The staff judge advocate, Legal Service Support Section officer-in-charge, or Law Center director is the senior supervisory attorney for processing post-trial cases. The Court Reporter Section, led by the Court Reporter Chief, is responsible for preparing and forwarding records of trial to all parties for authentication, and for providing authenticated records of trial to the Review Officer, who runs the Review Section. The Review Section is responsible for judge advocate reviews on cases not forwarded to NAMARA, and for preparing the post-trial documents necessary for cognizant staff judge advocate and convening authority post-trial reviews. The Review Sections are staffed primarily with military enlisted members supervised by a military judge advocate.

Appendix E. Naval Legal Service Command



Appendix F. Relevant Professional Standards

The Rules for Professional Conduct require attorney diligence and promptness in executing professional responsibilities. Primary relevant requirements are:

- a judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them (Rule 2.12, ABA Model Code Of Judicial Conduct);
- a judge shall perform judicial and administrative duties competently and diligently (Rule 2.5, ABA Model Code Of Judicial Conduct);
- a lawyer shall act with reasonable diligence and promptness in representing a client (Rule 1.3, ABA Model Rules of Professional Conduct 2004);
- a covered attorney shall provide competent, diligent, and prompt representation to a client (Rule 1.1., Judge Advocate General Instruction (JAGINST) 5803.1B, "Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General," February 11, 2000, Enclosure (1), "Rules of Professional Conduct");
- a covered attorney shall act with reasonable diligence and promptness in representing a client (Rule 1.3, JAGINST 5803.1B);
- a covered attorney's workload should be managed by the attorney (and supervisor, if applicable) so that each matter can be handled effectively (Comment (1) to Rule 1.3, JAGINST 5803.1B);
- perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions (Comment (2) to Rule 1.3, JAGINST 5803.1B);
- a covered attorney shall make reasonable efforts to expedite litigation or other proceedings consistent with the interests of the client and the attorney's responsibilities to tribunals (Rule 3.2, Expediting Litigation, JAGINST 5803.1B);
- dilatory practices bring the administration of justice into disrepute (Comment to Rule 3.2, JAGINST 5803.1B).

Furthermore, Rule for Courts-Martial 109, Manual for Courts-Martial, specifies "Each Judge Advocate General is responsible for the professional supervision and discipline of military trial and appellate military judges, judge advocates, and other lawyers who practice in proceedings governed by the code and this Manual."

Appendix G. Relevant Policy and Requirements

- 10 U.S.C. §5148 provides: "(b) . . . The Judge Advocate General shall be appointed . . . from judge advocates of the Navy or the Marine Corps . . . (d)(2) The Judge Advocate General of the Navy, under the direction of the Secretary of the Navy, shall . . . perform the functions and duties and exercise the powers prescribed for the Judge Advocate General in chapter 47 [Uniform Code of Military Justice] of this title . . ."
- Secretary of the Navy Instruction (SECNAVINST) 5430.27C, "Responsibility of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps for Supervision and Provision of Certain Legal Services," April 17, 2009. Prescribes the Judge Advocate General of the Navy's responsibility for supervising certain legal services in the Department of the Navy, including those performed in the Office of the Judge Advocate General, and sets forth responsibilities for the Staff Judge Advocate to the Commandant of the Marine Corps. The Marine Corps must comply with Navy regulations governing military justice activity if promulgated in specific Secretary of the Navy, or Judge Advocate General policy. The Marine Corps is not required to follow instruction from Navy commanders, such as the Commander, Naval Legal Service Command.
- Office of the Chief of Naval Operations Instruction (OPNAVINST) 5810.4/Judge Advocate General Instruction (JAGINST) 5810.1, "Management Goals for Processing Navy Courts-Martial," September 5, 1984. Contained very specific time goals for processing courts-martial, from first knowledge of an offense through investigation, trial, convening authority action, and thereafter to final appellate review. Effective March 20, 2008, the policy was cancelled at the Judge Advocate General's request. The Judge Advocate General indicated the Commander, Naval Legal Service Command, now monitors case progress and holds Region Legal Service Office Commanders accountable, thereby eliminating the need for these management goals.
- JAGINST 1150.2A, "Military Justice Litigation Career Track," June 17, 2009.
- JAGINST 5400.1A, "Office of the Judge Advocate General (OJAG) Organization Manual," July 6, 1992. Chapter 8 has military justice instructions regarding handling and processing records of trial at the Navy-Marine Corps Appellate Review Activity and the Navy-Marine Corps Court of Criminal Appeals.
- JAGINST 5800.7E, "Manual of the Judge Advocate General (JAGMAN)," June 20, 2007. Implements Uniform Code of Military Justice and Manual for Courts-Martial provisions; designates Navy general and special court-martial convening authorities; specifies a 120-day Moreno timeline for sentencing to convening authority action; references rescinded OPNAVINST 5810.4 for processing time goals; and requires the staff judge advocate to explain a delay exceeding the 120-day goal.
- JAGINST 5803.1C, "Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General," November 9, 2004. Applicable to both Navy and Marine Corps judge advocates.
- JAGINST 5813.1A, "Standardization of GCM/SpCM [General Court-Martial/Special Court-Martial] Verbatim Records of Trial," September 17, 1993.
- JAGINST 5813.4G, "Navy-Marine Corps Trial Judiciary," February 10, 2006. Requires all military trial judges to complete the Military Judge's Course successfully.
- JAGINST 5814.1, "Navy-Marine Corps Court of Criminal Appeals," August 3, 2009.

- JAGINST 5817.1C, "Judicial Screening Board," January 7, 2008.
- JAG/Commander Naval Legal Service Command (JAG/CNLSCINST) 1500.2A, "Trial Advocacy Training," October 12, 2004.
- Commander, Naval Legal Service Command Instruction (COMNAVLEGSVCCOMINST) 5040.1C, "Command Inspections," January 30, 2001, Enclosure (3), "Command Inspection Checklist." Not currently used; checklist in draft revision pending since about 2007 is currently used.[22]
- COMNAVLEGSVCCOMINST 5800.1E, "Naval Legal Service Command (NLSC) Manual," February 19, 2002. Naval Legal Service Command policy for operating and administering the Naval Legal Service Offices, Trial Service Offices, Naval Justice School, and their respective detachments, branch offices, and satellite offices. The publication does not reflect the current Naval Legal Service Command organization. The Trial Service Offices were disbanded and folded into the Region Legal Service Offices in 2006.
- COMNAVLEGSVCCOMINST 5814.1, "Post-Trial Checklists," December 2, 1992. In revision; applies to Naval Legal Services Command offices, not the Marine Corps; according to the Judge Advocate General Inspector General, this publication has not been used for several years.
- Marine Corps Administrative Order (MARADMIN) 062/10, "Implementation of Case Management System for Courts-Martial," February 1, 2010.
- MARADMIN 276/10, "Implementation of Command Inspections of SJA Offices, Law Centers and Legal Service Support Sections," May 10, 2010.
- Marine Corps Order (MCO) P5800.16a, "Marine Corps Manual For Legal Administration (LEGALADMINMAN)," August 31, 1999.
- Navy-Marine Corps Court of Criminal Appeals (NMCCA) ". . . Rules of Practice and Procedure Including Internal Operating Procedures" (effective February 1, 2010); Rule 23.2., "Motions for Enlargement of Time." Specifies timelines and requires very explicit justification for time extension requests.
- Criminal Law Division (Code 20) "Newsmailer" 2006-06A, *U.S. v. Moreno* Implications and Guidance. E-mail memorandum in which the Criminal Law Division disseminated the *Moreno* decision; newsmailers are not directive or policy-making in nature.
- Marine Corps Deputy Staff Judge Advocate Memorandum to Field, Subject: "Standards for Court-Martial Post-Trial Processing," January 9, 2010.

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[22] As we were completing this report, on June 14, 2010, the instruction was published in final form, rescinding COMNAVLEGSVCCOMINST) 5040.1C, "Command Inspections," January 30, 2001.

Appendix H. Military Justice Statistics (FY 1990 – FY 2009)

Fiscal Year/ Service	General Courts-Martial		Special Courts-Martial		Summary Courts-Martial		Total Courts-Martial		Nonjudical Punishment		Total Disciplinary Actions		ROT Received by Service Appellate Courts		Appellate Cases Reviewed by Service Appellate Courts	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
FY '90-FY'09	35,731	100.00%	66,429	100.00%	55,531	100.00%	157,691	100.00%	1,691,810	100.00%	1,849,501	100.00%	68,218	100.00%	71,774	100.00%
USN	5.412	15.15%	21,801	32.82%	20,202	36.38%	47,415	30.07%	408,585	24.15%	456,000	24.66%				
USMC	4,356	12.19%	25,922	39.02%	18,689	33.66%	48,967	31.05%	212,599	12.57%	261,566	14.14%				
Subtotal	9,768	27.34%	47,723	71.84%	38,891	70.03%	96,382	61.12%	621,184	36.72%	717,566	38.80%	38,519	56.46%	40,337	56.20%
USA	16,644	46.58%	10,345	15.57%	14,985	26.98%	41,974	26.62%	896,456	52.99%	938,430	50.74%	18,829	27.60%	20,197	28.14%
USAF	9,319	26.08%	8,361	12.59%	1,655	2.98%	19,335	12.26%	174,170	10.29%	193,505	10.46%	10,870	15.93%	11,240	15.66%
FY 09	1,092	100.00%	1,820	100.00%	2,929	100.00%	5,841	100.00%	65,036	100.00%	70,877	100.00%	1,611	100.00%	1,812	100.00%
USN	94	8.61%	203	11.15%	201	6.86%	498	8.53%	11,145	17.14%	11,643	16.43%				
USMC	140	12.82%	675	37.09%	1670	57.02%	2,485	42.54%	11,772	18.10%	14,257	20.12%				
Subtotal	234	21.43%	878	47.93%	1,871	63.88%	2,983	51.07%	22,917	35.24%	25,900	36.54%	694	43.08%	846	46.69%
USA	638	58.42%	528	29.01%	946	32.30%	2,112	36.16%	35,210	54.14%	37,322	52.66%	590	36.62%	618	34.11%
USAF	220	20.15%	414	22.75%	112	3.82%	746	12.77%	6,909	10.62%	7,655	10.80%	327	20.30%	348	19.21%
FY 08	1,146	100.00%	1,832	100.00%	3,070	100.00%	6,048	100.00%	73,186	100.00%	79,234	100.00%	2,034	100.00%	2,494	100.00%
USN	106	9.25%	292	15.94%	340	11.07%	738	12.20%	11,353	15.51%	12,091	15.26%				
USMC	163	14.22%	692	37.77%	1373	44.72%	2,228	36.84%	10,425	14.24%	12,653	15.97%				
Subtotal	269	23.47%	984	53.71%	1,713	55.80%	2,966	49.04%	21,778	29.76%	24,744	31.23%	852	41.89%	937	37.57%
USA	674	58.81%	488	26.64%	1252	40.78%	2,414	39.91%	44,390	60.65%	46,804	59.07%	867	42.63%	1,167	46.79%
USAF	203	17.71%	360	19.65%	105	3.42%	668	11.04%	7,018	9.59%	7,686	9.70%	315	15.49%	390	15.64%
FY 07	1,345	100.00%	2,156	100.00%	2,876	100.00%	6,377	100.00%	77,024	100.00%	83,401	100.00%	2,268	100.00%	3,398	100.00%
USN	148	11.00%	249	11.55%	243	8.45%	640	10.04%	9,850	12.79%	10,490	12.58%				
USMC	149	11.08%	800	37.11%	1262	43.88%	2,211	34.67%	15,012	19.49%	17,223	20.65%				
Subtotal	297	22.08%	1,049	48.65%	1,505	52.33%	2,851	44.71%	24,862	32.28%	27,713	33.23%	986	43.47%	1,590	46.79%
USA	809	60.15%	635	29.45%	1223	42.52%	2,667	41.82%	45,124	58.58%	47,791	57.30%	917	40.43%	1,268	37.32%
USAF	239	17.77%	472	21.89%	148	5.15%	859	13.47%	7,038	9.14%	7,897	9.47%	365	16.09%	540	15.89%
FY 06	1,368	100.00%	2,333	100.00%	3,069	100.00%	6,770	100.00%	76,510	100.00%	83,280	100.00%	2,972	100.00%	3,845	100.00%
USN	158	11.55%	335	14.36%	527	17.17%	1,020	15.07%	12,863	16.81%	13,883	16.67%				
USMC	120	8.77%	964	41.32%	1262	41.12%	2,346	34.65%	13,217	17.27%	15,563	18.69%				
Subtotal	278	20.32%	1,299	55.68%	1,789	58.29%	3,366	49.72%	26,080	34.09%	29,446	35.36%	1,536	51.68%	1,787	46.48%
USA	749	54.75%	579	24.82%	1140	37.15%	2,468	36.45%	42,814	55.96%	45,282	54.37%	968	32.57%	1,323	34.41%
USAF	341	24.93%	455	19.50%	140	4.56%	936	13.83%	7,616	9.95%	8,552	10.27%	468	15.75%	735	19.12%

Fiscal Year/ Service	General Courts-Martial		Special Courts-Martial		Summary Courts-Martial		Total Courts-Martial		Nonjudicial Punishment		Total Disciplinary Actions		ROT Received by Service Appellate Courts		Appellate Cases Reviewed by Service Appellate Courts	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
FY 05	1,606	100.00%	2,827	100.00%	3,376	100.00%	7,809	100.00%	80,986	100.00%	88,795	100.00%	3,332	100.00%	3,596	100.00%
USN	172	10.71%	473	16.73%	958	28.38%	1,603	20.53%	18,316	22.62%	19,919	22.43%				
USMC	187	11.64%	1,137	40.22%	1022	30.27%	2,346	30.04%	8,985	11.09%	11,331	12.76%				
Subtotal	359	22.35%	1,610	56.95%	1,980	58.65%	3,949	50.57%	27,301	33.71%	31,250	35.19%	1,835	55.07%	2,088	58.06%
USA	825	51.37%	700	24.76%	1252	37.09%	2,777	35.56%	45,299	55.93%	48,076	54.14%	954	28.63%	1,032	28.70%
USAF	422	26.28%	517	18.29%	144	4.27%	1,083	13.87%	8,386	10.35%	9,469	10.66%	543	16.30%	476	13.24%
FY 04	1,316	100.00%	3,068	100.00%	2,866	100.00%	7,250	100.00%	80,404	100.00%	87,654	100.00%	2,904	100.00%	3,572	100.00%
USN	163	12.39%	611	19.92%	1026	35.80%	1,800	24.83%	19,674	24.47%	21,474	24.50%				
USMC	150	11.40%	1,261	41.10%	928	32.38%	2,339	32.26%	8,985	11.17%	11,324	12.92%				
Subtotal	313	23.78%	1,872	61.02%	1,954	68.18%	4,139	57.09%	28,659	35.64%	32,798	37.42%	1,501	51.69%	2,069	57.92%
USA	647	49.16%	682	22.23%	755	26.34%	2,084	28.74%	42,004	52.24%	44,088	50.30%	856	29.48%	976	27.32%
USAF	356	27.05%	514	16.75%	157	5.48%	1,027	14.17%	9,741	12.12%	10,768	12.28%	547	18.84%	527	14.75%
FY 03	1,355	100.00%	2,990	100.00%	2,949	100.00%	7,294	100.00%	81,053	100.00%	88,347	100.00%	3,341	100.00%	3,317	100.00%
USN	170	12.55%	1,036	34.65%	1208	40.96%	2,414	33.10%	19,770	24.39%	22,184	25.11%				
USMC	145	10.70%	818	27.36%	782	26.52%	1,745	23.92%	8,344	10.29%	10,089	11.42%				
Subtotal	315	23.25%	1,854	62.01%	1,990	67.48%	4,159	57.02%	28,114	34.69%	32,273	36.53%	1,684	50.40%	2,162	65.18%
USA	689	50.85%	665	22.24%	858	29.09%	2,212	30.33%	43,037	53.10%	45,249	51.22%	1,089	32.60%	753	22.70%
USAF	351	25.90%	471	15.75%	101	3.42%	923	12.65%	9,902	12.22%	10,825	12.25%	568	17.00%	402	12.12%
FY 02	1,851	100.00%	3,174	100.00%	3,075	100.00%	8,100	100.00%	81,612	100.00%	89,712	100.00%	3,477	100.00%	3,275	100.00%
USN	276	14.91%	769	24.23%	1089	35.41%	2,134	26.35%	19,662	24.09%	21,796	24.30%				
USMC	223	12.05%	1,419	44.71%	1009	32.81%	2,651	32.73%	8,523	10.44%	11,174	12.46%				
Subtotal	499	26.96%	2,188	68.94%	2,098	68.23%	4,785	59.07%	28,185	34.54%	32,970	36.75%	2,010	57.81%	1,926	58.81%
USA	788	42.57%	602	18.97%	858	27.90%	2,248	27.75%	44,318	54.30%	46,566	51.91%	850	24.45%	785	23.97%
USAF	564	30.47%	384	12.10%	119	3.87%	1,067	13.17%	9,109	11.16%	10,176	11.34%	617	17.75%	564	17.22%
FY 01	1,741	100.00%	2,961	100.00%	2,901	100.00%	7,603	100.00%	88,710	100.00%	96,313	100.00%	3,151	100.00%	3,064	100.00%
USN	254	14.59%	751	25.36%	1066	36.75%	2,071	27.24%	21,670	24.43%	23,741	24.65%				
USMC	227	13.04%	1,513	51.10%	1037	35.75%	2,777	36.53%	13,351	15.05%	16,128	16.75%				
Subtotal	481	27.63%	2,264	76.46%	2,103	72.49%	4,848	63.76%	35,021	39.48%	39,869	41.40%	1,922	61.00%	1,726	56.33%
USA	770	44.23%	357	12.06%	672	23.16%	1,799	23.66%	45,082	50.82%	46,881	48.68%	721	22.88%	775	25.29%
USAF	490	28.14%	340	11.48%	126	4.34%	956	12.57%	8,607	9.70%	9,563	9.93%	508	16.12%	563	18.37%

Fiscal Year/ Service	General Courts-Martial		Special Courts-Martial		Summary Courts-Martial		Total Courts-Martial		Nonjudical Punishment		Total Disciplinary Actions		ROT Received by Service Appellate Courts		Appellate Cases Reviewed by Service Appellate Courts	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
FY 00	1,597	100.00%	3,094	100.00%	2,688	100.00%	7,379	100.00%	79,505	100.00%	86,884	100.00%	2,917	100.00%	2,268	100.00%
USN	252	15.78%	755	24.40%	974	36.24%	1,981	26.85%	19,842	24.96%	21,823	25.12%				
USMC	176	11.02%	1,626	52.55%	909	33.82%	2,711	36.74%	9,770	12.29%	12,481	14.37%				
Subtotal	428	26.80%	2,381	76.96%	1,883	70.05%	4,692	63.59%	29,612	37.25%	34,304	39.48%	1,738	59.58%	1,219	53.75%
USA	731	45.77%	393	12.70%	666	24.78%	1,790	24.26%	41,285	51.93%	43,075	49.58%	706	24.20%	660	29.10%
USAF	438	27.43%	320	10.34%	139	5.17%	897	12.16%	8,608	10.83%	9,505	10.94%	473	16.22%	389	17.15%
FY 99	1,507	100.00%	2,867	100.00%	2,143	100.00%	6,517	100.00%	75,687	100.00%	82,204	100.00%	3,013	100.00%	3,116	100.00%
USN	176	11.68%	670	23.37%	628	29.30%	1,474	22.62%	19,658	25.97%	21,132	25.71%				
USMC	173	11.48%	1,432	49.95%	937	43.72%	2,542	39.01%	8,907	11.77%	11,449	13.93%				
Subtotal	349	23.16%	2,102	73.32%	1,565	73.03%	4,016	61.62%	28,565	37.74%	32,581	39.63%	1,684	55.89%	1,894	60.78%
USA	737	48.91%	432	15.07%	487	22.73%	1,656	25.41%	38,879	51.37%	40,535	49.31%	872	28.94%	739	23.72%
USAF	421	27.94%	333	11.61%	91	4.25%	845	12.97%	8,243	10.89%	9,088	11.06%	457	15.17%	483	15.50%
FY 98	1,597	100.00%	2,913	100.00%	2,348	100.00%	6,858	100.00%	80,916	100.00%	87,774	100.00%	3,394	100.00%	3,877	100.00%
USN	247	15.47%	789	27.09%	743	31.64%	1,779	25.94%	21,452	26.51%	23,231	26.47%				
USMC	223	13.96%	1,533	52.63%	1040	44.29%	2,796	40.77%	10,033	12.40%	12,829	14.62%				
Subtotal	470	29.43%	2,322	79.71%	1,783	75.94%	4,575	66.71%	31,485	38.91%	36,060	41.08%	2,163	63.73%	2,518	64.95%
USA	685	42.89%	287	9.85%	489	20.83%	1,461	21.30%	41,447	51.22%	42,908	48.88%	731	21.54%	783	20.20%
USAF	442	27.68%	304	10.44%	76	3.24%	822	11.99%	7,984	9.87%	8,806	10.03%	500	14.73%	576	14.86%
FY 97	1,816	100.00%	3,428	100.00%	2,097	100.00%	7,341	100.00%	82,421	100.00%	89,762	100.00%	3,848	100.00%	3,338	100.00%
USN	280	15.42%	888	25.90%	687	32.76%	1,855	25.27%	22,664	27.50%	24,519	27.32%				
USMC	268	14.76%	1,810	52.80%	944	45.02%	3,022	41.17%	11,369	13.79%	14,391	16.03%				
Subtotal	548	30.18%	2,698	78.70%	1,631	77.78%	4,877	66.44%	34,033	41.29%	38,910	43.35%	2,313	60.11%	2,008	60.16%
USA	741	40.80%	325	9.48%	396	18.88%	1,462	19.92%	39,907	48.42%	41,369	46.09%	922	23.96%	733	21.96%
USAF	527	29.02%	405	11.81%	70	3.34%	1,002	13.65%	8,481	10.29%	9,483	10.56%	613	15.93%	597	17.88%
FY 96	1,835	100.00%	3,544	100.00%	1,872	100.00%	7,251	100.00%	76,626	100.00%	83,877	100.00%	3,471	100.00%	3,718	100.00%
USN	275	14.99%	1,124	31.72%	720	38.46%	2,119	29.22%	22,256	29.04%	24,375	29.06%				
USMC	254	13.84%	1,663	46.92%	869	46.42%	2,786	38.42%	8,649	11.29%	11,435	13.63%				
Subtotal	529	28.83%	2,787	78.64%	1,589	84.88%	4,905	67.65%	30,905	40.33%	35,810	42.69%	2,095	60.36%	2,090	56.21%
USA	789	43.00%	357	10.07%	238	12.71%	1,384	19.09%	36,622	47.79%	38,006	45.31%	806	23.22%	833	22.40%
USAF	517	28.17%	400	11.29%	45	2.40%	962	13.27%	9,099	11.87%	10,061	11.99%	570	16.42%	795	21.38%

Fiscal Year/ Service	General Courts-Martial		Special Courts-Martial		Summary Courts-Martial		Total Courts-Martial		Nonjudical Punishment		Total Disciplinary Actions		ROT Received by Service Appellate Courts		Appellate Cases Reviewed by Service Appellate Courts	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
FY 95	1,938	100.00%	3,299	100.00%	1,772	100.00%	7,009	100.00%	74,565	100.00%	81,574	100.00%	3,399	100.00%	3,619	100.00%
USN	263	13.57%	1,083	32.83%	1120	63.21%	2,466	35.18%	21,928	29.41%	24,394	29.90%				
USMC	240	12.38%	1,418	42.98%	313	17.66%	1,971	28.12%	5,705	7.65%	7,676	9.41%				
Subtotal	503	25.95%	2,501	75.81%	1,433	80.87%	4,437	63.30%	27,633	37.06%	32,070	39.31%	2,085	61.34%	2,276	62.89%
USA	825	42.57%	353	10.70%	304	17.16%	1,482	21.14%	38,591	51.75%	40,073	49.12%	810	23.83%	768	21.22%
USAF	610	31.48%	445	13.49%	35	1.98%	1,090	15.55%	8,341	11.19%	9,431	11.56%	504	14.83%	575	15.89%
FY 94	1,917	100.00%	3,316	100.00%	1,822	100.00%	7,055	100.00%	76,949	100.00%	84,004	100.00%	3,244	100.00%	3,824	100.00%
USN	371	19.35%	1,411	42.55%	1277	70.09%	3,059	43.36%	22,275	28.95%	25,334	30.16%				
USMC	211	11.01%	1,160	34.98%	195	10.70%	1,566	22.20%	5,359	6.96%	6,925	8.24%				
Subtotal	582	30.36%	2,571	77.53%	1,472	80.79%	4,625	65.56%	27,634	35.91%	32,259	38.40%	1,904	58.69%	2,301	60.17%
USA	843	43.97%	377	11.37%	349	19.15%	1,569	22.24%	41,753	54.26%	43,322	51.57%	810	24.97%	924	24.16%
USAF	492	25.67%	368	11.10%	1	0.05%	861	12.20%	7,562	9.83%	8,423	10.03%	530	16.34%	599	15.66%
FY 93	2,224	100.00%	3,766	100.00%	3,268	100.00%	9,258	100.00%	82,284	100.00%	91,542	100.00%	4,061	100.00%	4,542	100.00%
USN	485	21.81%	1,819	48.30%	2620	80.17%	4,924	53.19%	22,727	27.62%	27,651	30.21%				
USMC	249	11.20%	1,232	32.71%	278	8.51%	1,759	19.00%	7,459	9.06%	9,218	10.07%				
Subtotal	734	33.00%	3,051	81.01%	2,898	88.68%	6,683	72.19%	30,186	36.69%	36,869	40.28%	2,405	59.22%	2,654	58.43%
USA	915	41.14%	372	9.88%	364	11.14%	1,651	17.83%	44,207	53.72%	45,858	50.10%	1,030	25.36%	1,250	27.52%
USAF	575	25.85%	343	9.11%	6	0.18%	924	9.98%	7,891	9.59%	8,815	9.63%	626	15.41%	638	14.05%
FY 92	2,691	100.00%	4,874	100.00%	2,987	100.00%	10,552	100.00%	100,611	100.00%	111,163	100.00%	4,666	100.00%	4,240	100.00%
USN	579	21.52%	2,399	49.22%	1794	60.06%	4,772	45.22%	28,923	28.75%	33,695	30.31%				
USMC	311	11.56%	1,450	29.75%	500	16.74%	2,261	21.43%	12,299	12.22%	14,560	13.10%				
Subtotal	890	33.07%	3,849	78.97%	2,294	76.80%	7,033	66.65%	41,222	40.97%	48,255	43.41%	2,681	57.46%	2,242	52.88%
USA	1,165	43.29%	613	12.58%	684	22.90%	2,462	23.33%	50,066	49.76%	52,528	47.25%	1,291	27.67%	1,381	32.57%
USAF	636	23.63%	412	8.45%	9	0.30%	1,057	10.02%	9,323	9.27%	10,380	9.34%	694	14.87%	617	14.55%
FY 91	2,601	100.00%	5,504	100.00%	3,366	100.00%	11,471	100.00%	112,612	100.00%	124,083	100.00%	4,731	100.00%	5,155	100.00%
USN	426	16.38%	2,724	49.49%	1441	42.81%	4,591	40.02%	26,169	23.24%	30,760	24.79%				
USMC	371	14.26%	1,633	29.67%	979	29.08%	2,983	26.00%	15,491	13.76%	18,474	14.89%				
Subtotal	797	30.64%	4,357	79.16%	2,420	71.90%	7,574	66.03%	41,660	36.99%	49,234	39.68%	2,906	61.42%	3,008	58.35%
USA	1,173	45.10%	679	12.34%	931	27.66%	2,783	24.26%	60,269	53.52%	63,052	50.81%	1,280	27.06%	1,526	29.60%
USAF	631	24.26%	468	8.50%	15	0.45%	1,114	9.71%	10,683	9.49%	11,797	9.51%	545	11.52%	621	12.05%

Fiscal Year/ Service	General Courts-Martial		Special Courts-Martial		Summary Courts-Martial		Total Courts-Martial		Nonjudical Punishment		Total Disciplinary Actions		ROT Received by Service Appellate Courts		Appellate Cases Reviewed by Service Appellate Courts	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
FY 90	3,188	100.00%	6,663	100.00%	4,057	100.00%	13,908	100.00%	145,113	100.00%	159,021	100.00%	6,384	100.00%	5,704	100.00%
USN	517	16.22%	3,420	51.33%	1540	37.96%	5,477	39.38%	36,388	25.08%	41,865	26.33%				
USMC	376	11.79%	1,686	25.30%	1380	34.02%	3,442	24.75%	18,944	13.05%	22,386	14.08%				
Subtotal	893	28.01%	5,106	76.63%	2,920	71.97%	8,919	64.13%	55,332	38.13%	64,251	40.40%	3,525	55.22%	2,996	52.52%
USA	1,451	45.51%	921	13.82%	1121	27.63%	3,493	25.12%	76,152	52.48%	79,645	50.08%	1,759	27.55%	1,903	33.36%
USAF	844	26.47%	636	9.55%	16	0.39%	1,496	10.76%	13,629	9.39%	15,125	9.51%	1,100	17.23%	805	14.11%

Notes: ROT = Record of Trial; USA = United States Army; USN = United States Navy; USAF = United States Air Force; USMC = United States Marine Corps; Subtotal = Navy and Marine Corps combined, which is the Department of the Navy.

The Department of the Navy provided all the above data, which we generally were able to trace to data reported in the Annual Reports of the Code Committee on Military Justice, the most complete, reliable information available. The Departments of the Army, Navy, and Air Force all report their data for inclusion in the annual code committee reports.

Due to the time involved in completing records of trial and forwarding cases for appellate review, the appellate courts could not be expected to receive all courts-martial appellate cases completed in a fiscal year during the same fiscal year. Similarly, an appellate court could not be expected to complete reviewing all cases received in a fiscal year during the same fiscal year, e.g., each appellate court would have a case inventory at the beginning and end of each fiscal year. In addition, when case backlogs occur and efforts are undertaken to resolve case backlogs as occurred in the Department of the Navy, the number of cases that an appellate court reviews in a fiscal year can significantly exceed the number of cases received in the fiscal year. As can be seen in the table above, over the 20 fiscal years involved, the total number of appellate cases reviewed (71,774) did significantly exceed the total records of trial received (68,218) in those fiscal years. We did not attempt to assess the Army and Air Force data, and the Navy data were inadequate for us to assess case inventories.

Appendix I. Case Law – Unreasonable Post-Trial Delay

Example military appeals court cases addressing post-trial delay problems are summarized below. These cases illustrate delay problems plaguing the Navy and Marine Corps since at least 1990.

1. *U.S. v. Shely,* 16 M.J. 431 (C.M.A. 1983) (Navy): Sentenced October 1980; 38-page-guilty plea; 439-day delay between sentence and final supervisory authority action in case, "marked by administrative bungling and indifference . . . another of a disturbing number of cases involving intolerable delay in the post-trial processing of courts-martial which have arisen since this court, in *United States v. Banks*, 7 M.J. 92 (C.M.A.1979), withdrew from the 'inflexible application' of the presumption of prejudice from such delay."

2. *U.S. v. Bruton,* 18 M.J. 156 (C.M.A. 1984) (Navy): Sentenced September 1980; 40-page-guilty plea; 299 days to supervisory authority action; lengthy, unexplained delay in staff judge advocate recommendation (SJAR) preparation, which noted no irregularities or errors; in Court comments, Judge Everett stated:

> We recognize that the Navy-- the service in which this case arises-- faces special problems in accomplishing appellate review of court-martial convictions. Apparently, there are some 2,200 separate convening authorities in the Navy; and where, as here, the convening authority is the commanding officer of a vessel, the problems are aggravated by mobility. . . . Indeed, the convening authority may be under different supervisory authorities as he sails the seven seas. However, while we are cognizant of special problems in the seagoing services, there is nothing in this record to explain why it took so long for the supervisory authority in this case to act. . . . *Footnote 2:* To its credit, the Navy is attempting to develop an automated information system that will enable it to keep better track of its cases and their status. Hopefully, as this system is put in place, problems like that of the present case will vanish.

3. *U.S. v. Henry,* 40 M.J. 722 (N.M.C.C.A. 1994) (Navy): Sentenced: Sept 1985; Nearly 8 years (2,849 days) elapsed between sentencing and convening authority action due to lost record; convening authority was commanding officer of a deployed Seabee unit; original record of trial was lost, with no explanation as to how it was lost, when it was lost, or why it took so long to realize it was lost. The Court commented:

> ...we are troubled and frustrated by the frequency that this occurs in spite of repeated condemnations from this Court and the U.S. Court of Military Appeals. There ought to be an effective system in place to monitor the review of courts-martial in the naval service, a type of post-trial "chain of custody" of the case that is centrally controlled. The automated case tracking system mentioned by Chief Judge Everett in Bruton . . . was apparently never fully operational, and a new system is still in the process of being established. We recommend that the Judge Advocate General do everything in his power to make this tracking system an effective tool as soon as possible. We also strongly encourage all those responsible for the post-trial processing of Navy and Marine Corps cases not to adopt or adhere to a lackadaisical attitude in completing convening authorities' actions and forwarding records for review because of the lack of a judicially

> imposed time deadline. The net result of such an attitude can only be "a loss of respect for military law among Americans, in and out of uniform."

4. *U.S. v. Santoro,* 46 M.J. 344 (C.A.A.F. 1997) (Navy); Sentenced 1988 (date unknown); convening authority action on October 24, 1988; record disappeared for 7 years before Navy realized the Court never received or reviewed the record of trial. Navy initiated a search, but the official record was not located. Audio tapes of the trial proceedings were found, as were the convening authority's action and promulgating order, and an authenticated transcript made from the audio tapes. These records were forwarded to the Court of Criminal Appeals (formerly the Court of Military Review) as the "record" for review.

   Eight years after the fact, the judge who tried the case authenticated the transcript of the proceedings presented to the court; however, there was no convening order, charge sheet, or staff judge advocate recommendation (SJAR). All 14 Government exhibits and all 18 defense exhibits were missing.

   The Court was outspoken in its criticism, stating:

   > This is another record of trial reaching us many years after sentence was adjudged in a condition that can only be described as horrible. The fault for the abysmal condition of the record lies at the Government's doorstep, not the appellant's.
   >
   > For its part, the Government, too, spent considerable effort during oral argument assuring us that the Navy has come to grips with its case-tracking difficulties. Counsel stated: "I can assure the Court as an officer of the Court that there is a case-tracking system in place that is effectively working." In this light, the Government contended that there is no need to "send a message."
   >
   > No one can take comfort in the delays and defects reflected in this case. These problems arguably operated to deny society a full measure of justice because they left the Court of Criminal Appeals with little choice but to perform radical surgery on the findings and sentence. That result should be incentive enough to correct the problems for the future.

5. *U.S. v. Oakley* (N.M.C.C.A. January 9, 2002) (Marine Corps) (unpublished): 8 months from trial (in 2000) to convening authority action in a 36-page-guilty-plea case. In its decision, the Navy-Marine Corps Court of Criminal Appeals stated ". . . lengthy and unjustified delays by convening authorities and their staff judge advocates in the post- trial processing of court-martial cases continue to be a source of concern on appellate review."

6. *U.S. v. Pursley* (N.M.C.C.A. November 14, 2002) (Navy) (unpublished): Sentenced July 1997; 52-page-guilty plea-case; nearly 4 years (1,415 days) from sentencing to docketing at the Court.

7. *U.S. v. Mahr* (N.M.C.C.A. October 22, 2002) (Marine Corps) (unpublished): over 20 months from sentencing (July 2000) to convening authority action; 2 months from convening authority action to record of trial receipt at the Court.

8. *U.S. v. Jones* (N.M.C.C.A. October 31, 2002) (Marine Corps) (unpublished): 190-page-guilty-plea case; 21 months from sentence to convening authority action; 725 days (about 24 months) from trial (July 2000) to appeal docketing at the Court.

9. *U.S. v. Geter* (N.M.C.C.A. May 30, 2003) (Marine Corps)(unpublished): Sentenced July 10, 1998; guilty plea; 5 months for trial counsel to review 384-page record of trial; record of trial authenticated 7 months later; staff judge advocate recommendation (SJAR) signed 1 year later. Convening authority action 15 months after sentencing; 3 months from convening authority action to docketing at the Court.

10. *U.S. v. Williams* (N.M.C.C.A. May 6, 2003) (Marine Corps) (unpublished): Sentenced July 2000; 3 months for trial defense counsel to receive record; 6 months to staff judge advocate recommendation; 13 months to convening authority action; 14 months from sentencing to docketing at the Court. Problems with original trial defense counsel leaving active duty, and convening authority deployment; record of trial was missing several post-trial documents, but included several post-trial documents from an unrelated case.

11. *U.S. v. Khamsouk,* 58 M.J. 560 (N.M.C.C.A. 2003) (Navy) (unpublished): Sentenced Aug 1997; 13 months for authentication; approximately 20 months from sentencing to CA action.

12. *U.S. v. Urra* (N.M.C.C.A. March 6, 2003) (Marine Corps) (unpublished) Sentenced: August 2000; 72-page-guilty plea; about 1½ years (552 days) from sentencing to docketing; 477 days unexplained delay from trial to convening authority action.

13. *U.S. v. Izquierdo* (N.M.C.C.A. September 9, 2003) (Marine Corps) (unpublished): Sentenced March 1999; 50-page-guilty-plea case; over 1½ years (545 days) from sentencing to Court review.

14. *U.S. v. Freeman* (N.M.C.C.A. December 16, 2004) (Navy) (unpublished): Sentenced July 1997; less than 100 page record of trial; over 5 years from sentencing to convening authority action.

15. *U.S. v. Villareal* (N.M.C.C.A. February 28, 2005 (Marine Corps) (unpublished): Sentenced April 2003; 360 days from trial to staff judge advocate recommendation.

16. *U.S. v. Jones,* 61 M.J. 80 (C.A.A.F. 2005) (Marine Corps): Sentenced January 2000; guilty-plea with pretrial agreement; 36-page record of trial; 55-minute special court-martial; 6 months to transcribe, authenticate, and serve record of trial on trial defense counsel; 66 days more to staff judge advocate recommendation; 265 days after sentencing to serve staff judge advocate recommendation on defense counsel; 290 days from trial to convening authority action; 74 days from convening authority action to record of trial receipt at the Court.

17. *U.S. v. Peltier* (N.M.C.C.A. January 31, 2005) (Marine Corps) (unpublished): Sentenced September 2002; guilty plea with pretrial agreement; unexplained 8 months to send record of trial to Military Judge (authenticated July 2003); another 10 months to staff judge advocate

recommendation (signed May 2004); 22 months from sentencing to docketing at the Court (July 2004).

18. *U.S. v. Farmer* (N.M.C.C.A. September 27, 2005) (Navy) (unpublished): Sentenced June 2002; 6 months from sentencing to convening authority action; more than 2 years (816 days) from convening authority action to docketing at the Court (2 months from record of trial mailing to receipt, and then nearly 3 months from receipt to docketing). The Government asserted administrative oversight and ship workups/deployment as reasons for delay. The Court indicated the reasons did not excuse "routine, nondiscretionary, ministerial" tasks nonperformance, and the excessive delay in mailing the record to the appellate authority was "the least defensible of all."

19. *U.S. v. Clark (*N.M.C.C.A, March 14, 2005*)* (Marine Corps) (unpublished): Sentenced October 2002; over 500 days from sentencing to convening authority action; unexplained 13-month delay from record of trial authentication to staff judge advocate recommendation (signed March 26, 2004).

20. *U.S. v. Paternoster* (N.M.C.C.A. July 27, 2005) (Marine Corps) (unpublished): Sentenced March 2003; guilty plea; 35 page record of trial; about 2 years from sentencing to docketing; about 4 months from trial until trial defense counsel received the record of trial (according to the staff judge advocate, the review chief was indecisive/confused and did not seek assistance in resolving missing document issues prior to record of trial authentication); 2 months for trial defense counsel to receive the staff judge advocate recommendation (due to counsel transfer); unexplained 490 days from trial defense counsel's record of trial receipt to staff judge advocate recommendation.

21. *U.S. v. Rocha* (N.M.C.C.A. November 17, 2005) (Marine Corps) (unpublished): Sentenced February 2004; 473 days from sentencing to court docketing; 344 days from record of trial authentication to staff judge advocate recommendation. Government attributed delays to multiple staff judge advocate and support deployments to combat and post-war operations in Iraq. The Court concluded the reasons, although compelling, had to be balanced against the appellant's constitutional right to due process.

22. *U.S. v. Childers* (N.M.C.C.A. September 30, 2005) (Marine Corps) (unpublished): Sentenced April 2003; 736 days (about 25 months) from sentencing to docketing at the Court; 15 months from record of trial authentication to staff judge advocate recommendation. The staff judge advocate attributed the delay to multiple Third Marine Aircraft Wing deployments during Operations Enduring Freedom and Iraqi Freedom, resulting in a severe legal staff shortage in the unit.

23. *U.S. v. McElhanon* (N.M.C.C.A. December 19, 2005) (Marine Corps) (unpublished): Sentenced July 2003; 42-page-guilty-plea case; over 21 months from trial to docketed at the Court. The Government attributed the delay to "operational commitments."

24. *U.S. v. Sparks (*N.M.C.C.A. October 17, 2006) (Navy) (unpublished): guilty plea; 76-page record; about 9 years (3,573 days) from sentencing (May 1996) to re-docketing at the Court (March 13, 2006). NAMARA Code 40 first received the case nearly 3 years after convening

authority action on December 2, 1996. On February 15, 2001, the Court ordered a new convening authority action, which was completed roughly 5 years later on January 19, 2006. The case was re-docketed at the Court on March 13, 2006.

25. *U.S. v. Sanford* (N.M.C.C.A. July 10, 2006) (Navy) (unpublished): The Court found the almost 3 years from trial (August 2003) to final briefing before the Court were facially unreasonable, as were the 20 months from docketing to the initial appellant pleadings. The reason for delay was attributed to appellate defense counsel's large caseload. The Court expressed "frustration with the continuing practice of appellate counsel, from both sides of the aisle [appellate defense and government counsel], in making bald assertions regarding workload commitments without providing detailed information regarding case numbers and complexity, work hours, and what efforts have been made to obtain assistance."

26. *U.S. v. Canchola*, 63 M.J. 649 (N.M.C.C.A. 2006) (Marine Corps): Sentenced January 2003; guilty plea; 59-page record of trial; 1,263 days (about 42 months) from sentencing to Court decision; 503 days from record of trial authentication to staff judge advocate recommendation (four pages long, containing nothing unusual). Counsel argued the multiple deployments (convening authorities, staff judge advocates, and support) supporting Operation Enduring Freedom, Operation Iraqi Freedom, and their many follow-on missions caused severe staffing issues affecting the review process. The Court commented a general reliance on budgetary and manpower constraints did not constitute reasonable grounds for delay, or cause this factor to weigh in the Government's favor.

27. *U.S. v. Cooper* (N.M.C.C.A. March 15, 2006) (Navy) (unpublished): Sentenced April 2004; guilty plea; 104-page record of trial; 9 months from trial to staff judge advocate recommendation; 17 months from trial to docketing at the Court. The Court found the more than 1 year delay from court-martial adjournment to docketing at the Court was facially unreasonable. The Government asserted clerical errors in explaining the 9 month delay in mailing the original record of trial for convening authority action, but did not attempt to explain the 7 month delay in mailing the record of trial for court review.

28. *U.S. v. Simon,* 64 M.J. 205 (C.A.A.F. 2006) (Marine Corps): Sentenced October 2002; guilty plea to single charge, 36-page record of trial; 847 days (about 28 months) from sentencing to docketing at the Court; the Court noted the 572 days (about 19 months) from convening authority action to docketing at the Court was the "most glaring deficiency... [t]ransmission of the record of trial from the field to the court is a ministerial act, routinely accomplished in a brief period of time in the absence of special circumstances. There are no special circumstances in this case; indeed, no explanation for the delay has been offered. "

29. *U.S. v. Moreno,* 63 M.J. 129 (C.A.A.F. 2006) (Marine Corps): Sentenced September 1999; 208 days for military judge to authenticate 746-page record of trial; 490 days from sentencing to convening authority action; 76 days from convening authority action to docketing at the Court; the Court granted 18 time extensions to defense counsel—defense brief was filed 702 days after docketing; the Government's answer brief was 223 days after the defense brief; the Court issued its unpublished decision 197 days later; 1,688 days (4 years, 7 months, 14 days) from trial to complete Moreno's appeal right under Article 66, UCMJ, 10 U.S.C. 866.

The U.S. Court of Appeals for the Armed Forces commented:

> 490 days between the end of trial and the convening authority's action is excessive; 76 days between action and docketing is also unexplained; longest delay in this case -- 925 days -- involves the period from which the case was docketed at the Court of Criminal Appeals until briefing was complete; CCA granted eighteen enlargements of time; enlargement numbers four through eighteen each contained the same reason for the request: "other case load commitments." "Other case load commitments" logically reflects that Moreno's case was not getting counsel's professional attention, a fact that is the very antithesis of any benefit to Moreno. . . . As we said in *Diaz*, 59 M.J. at 38: Appellate counsel caseloads are a result of management and administrative priorities and as such...while appellate defense counsel's caseload is the underlying cause of much of this period of delay, responsibility for this portion of the delay and the burden placed upon appellate defense counsel initially rests with the Government. The Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation. See Article 70, UCMJ, 10 U.S.C. 870 (2000). Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals. Therefore, we decline to hold Moreno responsible for the lack of "institutional vigilance" which should have been exercised in this case.

Comments regarding post-trial processing standards in the military justice system:

> Our concern for post-trial timeliness has been heightened by the number of appellate delay cases that have come before this court and cases that are pending elsewhere in the military justice system. In recognition of the due process issues involved in timely post-trial review and appeal and in response to the cases giving rise to our concerns, we will establish post-trial processing standards to be applied to cases yet to enter the post-trial and appellate processes. Unfortunately, our confidence that procedural protections would suffice to ensure the speedy post-trial and appellate rights of service members has been eroded. It is of some concern that the Government brief asserts that the 1,688 day delay in this case was reasonable. We reject that contention and note that Moreno's case is not an isolated case that involves excessive post-trial delay issues.
>
> This increase in processing time stands in contrast to the lower number of cases tried in the military justice system in recent years. Our separate system of military justice often provides different or diminished constitutional rights in light of the need for prompt disposition of disciplinary matters. It follows then, as this court has noted, that the unique nature of review under Article 66(c), UCMJ, "calls for, if anything, even greater diligence and timeliness than is found in the civilian system." *Diaz*, 59 M.J. at 39.

Processing standards adopted:

> . . . we will apply a presumption of unreasonable delay . . . where the action of the convening authority is not taken within 120 days of the completion of trial.

> We will apply a similar presumption of unreasonable delay for courts-martial completed thirty days after the date of this opinion where the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of the convening authority's action.
>
> For those cases arriving at the service Courts of Criminal Appeals thirty days after the date of this decision, we will apply a presumption of unreasonable delay where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals

30. *U.S. v. Simmons* (N.M.C.C.A. November 8, 2006) (Marine Corps) (unpublished): Sentenced April 2001; guilty-plea case; 112-page record of trial; more than 2 years from sentencing to docketing at the Court; 140 days from record of trial authentication to sentencing; 538 days (about 18 months) from sentencing to final staff judge advocate recommendation; 605 days (about 20 months) from trial to convening authority action.

31. *U.S. v. Sands* (N.M.C.C.A. October 25, 2006) (Marine Corps) (unpublished): Sentenced June 2004; guilty-plea case; 46-page record of trial; 667 days (about 22 months) from trial to docketing at the Court; 164 days (about 6 months) from trial to record of trial authentication; 369 days (about 12 months) from record of trial authentication to staff judge advocate recommendation; 134 days (about 5 months) from convening authority action to docketing at the Court.[23] The Marine Corps review officer attributed the delay to war-time operational requirements impacting the 1st Marine Division, and particularly the personnel normally assigned to perform post-trial review. The Court concluded the explanation failed to show reasons for the delay, was "more an exercise in obfuscation than explanation," and showed the Government decided to expend resources on courts-martial, but radically reduced the resources required for timely post-trial review in the same cases (manpower reduced 70 percent). The Court's discussion is noteworthy:

> None of the agreements relating to actions on courts-martial are appended to the declaration or the record of trial. None of the general officers referred to in the declaration was the commanding officer who convened this special court-martial and took action in this case. The declaration provides no explanation for the delay of five months from trial to authentication by the military judge. It does not state whether this case was one of the 31 cases received by his office from Twenty-Nine Palms on 15 June 2005. It does not state this case was affected by any confusion between the legal offices on the two bases. The declaration does not say why it took one year after authentication of the record to draft a SJAR. It does not attempt to explain the delay of five months in executing the simple ministerial task of sending the record to this court after the convening authority's action was completed.
>
> While this declaration is notable for what it does not say, what it does say is important. It states that the Marine Corps reduced by 70% the staffing available for post-trial review mandated by law, yet continued unabated the number of courts-martial tried. The war may explain why certain individuals were actually overwhelmed at certain periods (although there is insufficient evidence in this

[23] The Court identified the total delay as 687 days.

> record to prove such a claim, and none are identified). However, it does not explain why the Government did not provide the appropriate resources to ensure the timely and efficient operation of this phase of the military justice system during periods of military operations. This Marine Corps command appears able to prosecute criminal cases through courts-martial during the current war, yet seeks to avoid the negative consequences when it is less diligent in implementing those post-trial procedures which are designed to protect the rights of convicted service members, and which are required by law. In none of the post-trial delay cases this court has seen has the Government even attempted to explain the disparity between assets made available for trial of courts-martial and the assets made available for their post-trial review. It has not done so here.
>
> We are not here questioning the discretion of military commanders on which cases to refer to court-martial, either generally or under the specific facts of this case. However, we emphasize that if commanders exercise their discretion to refer a case to court-martial, they assume, by requirement of law, the duty to provide appropriate and timely post-trial processing

32. *U.S. v. Bush* 68 M.J. 96 (C.A.A.F. 2009) (Marine Corps): Sentenced January 2000; guilty-plea case; 143-page record of trial; more than 7 years from sentencing to docketing at the Court.

Appendix J. O'Toole Report-Consolidated Recommendations

Part I

1. Coordinate and implement the Naval Justice School curriculum changes described in Appendix.

2. Continue to implement, evaluate, and adjust the Military Justice Litigation Career Track as part of *JAG Corps 2020*, with particular emphasis on filling coded billets within NLSC and the judiciary.

Part II

1. To reduce the potential for conflict of interest within Code 20 when providing technical assistance to both trial and defense counsel, and to make "reach back" expertise as accessible to the defense as to the prosecution, explore development of a Defense Counsel Assistance Program (DCAP), or its equivalent.

2. Expand the pool of candidates for judicial selection through more aggressive recruiting among MJLCT officers, and develop a pool of screened officers from which detailers may make assignments.

3. Commission a follow-on to the 2006 survey of military judges and supervisory counsel to assess the relative level of litigation competence.

4. Code 20, and the Chief Judge, NMTJ, should determine the best process for providing additional guidance, respectively, to counsel and military judges in conducting *Dubay* hearings.

Part III

1. Update the NLSC Manual and the JAGMAN to require:

   a. That all records of trial be forwarded to NAMARA by a servicing RLSO or LSSS;
   b. That all mandates must be forwarded by NAMARA to a convening authority through a servicing RLSO or LSSS; and that, upon completion of mandated action, a response to the mandate must be returned to NAMARA through the same servicing RLSO or LSSS.

2. Institutionalize current NAMARA procedures for tracking and oversight of cases and mandates in an organizational instruction, identifying responsible officials and parameters within which matters must be brought to the attention of the AJAGs or the JAG.

3. Explore feasibility of a uniform method for RLSO tracking of the post-trial process, and if feasible, include it in the NLSC manual; and

4. Consider repromulgation of joint JAG instructions with the CNO, and the Commandant of the Marine Corps, re-establishing post-trial processing guidelines, and providing new post-trial checklists and templates for required documentation.

5. Incorporate the format of the new NAMARA post-trial case and mandate tracking spreadsheets into a standard CMTIS report.

6. Explore having the Marine Corps use CMTIS or join the Navy in implementing an alternative case management information system, such as the federal court PACER system.

Part IV

1. Unless the case load remains stable for a prolonged period at below 1,000 cases, the NMCCA should be maintained at 10 active duty judges, including three panels of three judges each, plus the Chief Judge, who should not be on a regularly designated panel.

2. NMCCA must maintain a mix of SJAs and former trial judges to competently address some of the complex issues that arise during trial and post-trial. At least one-third of the panel appellate judges should be former trial judges and/or MJLCT officers.

3. Applicants must apply to the Judicial Screening Board and be selected for service on the bench. Detailing should then be done from the pool of eligible candidates.

4. All appellate judges must attend the Army-sponsored Military Judges Course in Charlottesville, and then maintain a continuing judicial education regime.

5. Active case management must be a clearly designated responsibility of the Chief Judge and the senior judges of the court.

Appendix K. History of Problems and Attempted Corrections

Our evaluation revealed process failures in virtually every segment of the post-trial process. We found systemic problems or structures contributing to the problems, as follows.

a. Navy Field Organization

Decentralized operations, which are hallmarks in both the Navy and Marine Corps, have impacted delivering military justice services. Historically, Navy lieutenants (0-3s) and lieutenant commanders (0-4s) were assigned as staff judge advocates to individual units and installations, both ashore and afloat. More senior officers were assigned as staff judge advocates to operational and flag staffs.

The staff judge advocates were all totally "independent" in that no supervisory legal organization reviewed or monitored their work, or the quality of their legal advice. Most junior staff judge advocates could coordinate with prosecutors and more senior staff judge advocates; however, many were geographically remote and did not have easy access to assistance. Depending on their respective geographic locations, there was an informal oversight capability under which more senior staff judge advocates could assist junior staff judge advocate colleagues, but that capability depended on individual initiative.

In addition, the fidelity of the legal advice rendered depended on the staff judge advocate's training and often limited experience with potentially serious, complex fact patterns. Commands without staff judge advocates received legal advice, including military justice advice, from a Naval Legal Service Command office on an as-needed basis.

In this decentralized structure and under practices existing at the time, courts-martial documents typically flowed directly to and from commanding officers without necessarily passing through a staff judge advocate or legal organization. Depending on the legal expertise available to the commanding officer (and the commander or staff's awareness), the legal officer or staff judge advocate's assistance might or might not have been sought to ensure proper processing.

It was not uncommon for court-martial documents requiring action to be filed and forgotten. One individual we interviewed recalled that, on occasion, records were not found until a ship was decommissioned and its contents removed. This decentralized structure and informal command processing significantly increased lost record incidents and post-trial processing delays. The Navy JAG addressed this problem directly in 2005, directing that all records of trial and court-martial related documents must be transmitted through supporting legal offices.

Reorganizations in 1997 and 2006 addressed some structural problems impacting legal services delivery, but did not resolve all the problems. Prior to 1997, the Naval Legal Service Command (through Naval Legal Service Offices) was responsible for providing command advisory, prosecution and defense services to commands without staff judge advocates. Both the Congress and American Bar Association raised ethical concerns about prosecution and defense counsel being assigned to the same command, under the same commanding officer, and in the same physical location.

To remedy the ethical concerns, in 1997, the Naval Legal Service Command was reorganized, moving the prosecution and command advisory functions to a new organization, the Trial Service Offices. In 2006, the Trial Service Offices were reorganized and realigned within the Commander, Navy Installation Command Navy Region construct. Trial Service Offices were renamed Region Legal Service Offices.

Consistent with consolidating assets within functional areas, which is a principal driver in the regionalization concept, the Region Legal Service Offices acquired all the installation staff judge advocates and their responsibilities. Under the new organization, installation staff judge advocates were no longer independent or isolated; they were incorporated into and supported by the responsible Region Legal Service Offices and its chain of command.

Prior to the 2006 reorganization, there was no supervisory or "parent" organization to which any staff judge advocate, either ashore or afloat, could turn for advice or assistance. Correspondingly, there was no supervisory organization tracking or overseeing post-trial processing at the field staff judge advocate and convening authority levels. The Navy was essentially blind when it came to the state of military justice administration Navy-wide.

Following the 2006 reorganization, although convening authorities resident in the shore infrastructure were now aligned with Region Legal Service Offices for post-trial processing, many operational units, commanders, Fleet, and other nonshore-based convening authorities were not. Independent staff judge advocates continued to serve these organizational elements and commanders.

To improve support and bring more oversight to the post-trial process, in 2005, the Navy JAG directed the new Region Legal Service Offices to track and retain control over records of trial until convening authority actions were completed and the records were received at NAMARA. This direction included records from afloat commands with independent staff judge advocates.

We visited the Mid-Atlantic Region Legal Service Office, Norfolk, Naval Air Station, Virginia, and the Southwest Region Legal Service Office, San Diego Metro, San Diego, California, to examine in more detail how field organizations process courts-martial, both currently and in the past.

Historically, there has been no Navy-wide standard for post-trial processing. The offices we visited used internally-developed operating procedures to manage their cases. Since 2006, they generally used the *Moreno* guidelines to gauge case timeliness, and Appendix 14, Manual for Courts-Martial, to guide them in assembling records of trial for delivery to NAMARA. After the CMTIS was fielded in October 2006, they began entering basic case data in CMTIS, but typically maintained separate, in-house systems/mechanisms to track their cases and actions on cases. The CMTIS still does not capture all the data they need/want for case monitoring.

After the Region Legal Service Offices were established, they began asserting control over records of trial and actively engaging in the post-trial process. Most post-trial processing now takes place in the Region Legal Service Offices, or with their oversight, which has improved post-trial processing and case management. However, there still is no uniform set of procedures

or checklists that govern post-trial review (except for overall guidance in the Uniform Code of Military Justice and the Manual for Courts-Martial).

Procedures, systems and processes remain inconsistent and ad-hoc across the Region Legal Service Offices. Additionally, the Naval Legal Service Command did not have meaningful visibility over field processes or processing time until CMTIS began maturing after it was fielded in October 2006. The CMTIS, however, still does not provide complete visibility for either field or headquarters units.

b. Marine Corps Field Organization

Like the Navy, military justice in the Marine Corps is largely decentralized at the local judge advocate level. Staff judge advocates, Legal Service Support Section officers-in-charge, and Law Center directors (in their capacity as installation staff judge advocates) supervise and oversee the delivery of military justice support in the field.

Each Legal Service Support Section and installation law center serves multiple commanders and staff judge advocates in their respective installations or regions. This organization has remained relatively unchanged since the late 1960s.

Unlike the Army and Air Force where superior headquarters' staff judge advocates oversee and monitor military justice administration in the field, there has never been a formal or informal professional supervisory chain in the Marine Corps. Furthermore, unlike the senior legal officers in the Army, Navy, Air Force and Coast Guard, the Marine Corps SJA does not have authority under Article 6, Uniform Code of Military Justice, to oversee military justice administration in Marine Corps field units.

Further, the Marine Corps SJA does not have professional supervisory authority over Marine judge advocates. The Navy JAG is responsible for professional supervision and military justice administration in both the Navy and Marine Corps. However, history suggests that the Navy JAG is somewhat removed from matters in the Marine Corps judge advocate community. We did not find any evidence that the Navy JAG acted or intervened directly to address the Marine Corps' significant post-trial delay problems between 1990 and 2009.

In the last two decades, military justice supervision in the field has been a function exercised solely by field-level supervisors. There was no tracking system affording Service-wide visibility, and there was no higher-level supervisory authority in either the Navy or Marine Corps routinely monitoring or attending to justice administration in the field.

Field military justice practitioners could receive support, resources and advice informally from the Military Law Branch within the Judge Advocate Division at Marine Corps headquarters, and from the Marine Corps SJA. In addition, the Military Law Branch reviewed high visibility and officer misconduct cases on behalf of the Commandant of the Marine Corps, and prepared monthly reports based on the reviews. However, these capabilities and activities did not compensate for the inadequate oversight capability that permitted post-trial delay problems.

A senior Marine Corps official told us post-trial process efficiency has been almost entirely "personality" dependent. Efficiency depended on individual field staff judge advocates and their abilities and willingness to manage cases after trial, through the post-trial review process, and ultimately ensure case delivery to NAMARA.

Prior to *Moreno*, staff judge advocates focused largely on getting cases to sentencing, without much consideration to timely, accurate, or efficient post-trial processing, or case tracking. A senior official told us he personally witnessed this "failure" when stationed as the staff judge advocate at 29 Palms, California.

Almost 3 months after arriving there, he had not received a single record of trial for review. Upon investigating the cause, he discovered records of trial in the Review Office that were in various stages of review, with no one actively tracking case progress. He appointed an officer to take charge of the review process, eliminate the backlog, and ensure all future records of trial were finished, mailed, and received at NAMARA within 120 days.

He also created an internal tracking system to ensure records were not lost during mail delivery to various commands for action. This initiative, however, was an individual effort and continuation was not assured when a replacement staff judge advocate arrived for duty. At the time, nothing compelled individual staff judge advocates to ensure efficient processing, and there was no system allowing leadership at any level in the Navy or Marine Corps to monitor the overall court-martial progress and ensure field processes worked.

In addition, the senior official noted that "review officer" billets at the field level (those responsible for post-trial functions) were often staffed with inexperienced enlisted Marines, some with little or no formal post-trial review training, or Marine judge advocates not motivated to perform the rather laborious post-trial review job. He opined that post-trial review is neither glamorous nor motivating to judge advocates. They would rather try cases than read records of trial and prepare documents in the post-trial review process.

Another Marine official remarked that upon arriving at the Quantico, VA, Law Center in the 2003-2006 timeframe, there was a huge post-trial backlog. Records of trial languished because no one was tracking them and there was no uniform system to do so.. To resolve the backlog, the Law Center eventually hired a civilian employee to oversee post-trial processing. The current Marine Corps SJA told us he, when Law Center Director at the Miramar Naval Air Station in California, had to use eight separate reports to gain needed visibility over military justice processing in the Law Center.

In summary, the Marine Corps organizational structure for delivering legal services continues not to have functional supervision, oversight, or visibility.

c. Command Billets

Historically, Navy judge advocates serving as commanding officers and executive officers were selected based on their experience and leadership capabilities, because the organizations they would command had broad missions and a significant junior officer training and development responsibility. Although military justice is a statutory mission and core capability, many

commanding officers and executive officers at Navy Legal Service Offices and Region Legal Service Offices did not have significant military justice experience. Consequently, they were not ideally suited to helping train or develop either trial or defense counsel as military justice litigators.

Officers selected for command were generally those who had achieved high success in a range of positions with increasing responsibility, but generally not litigation positions. Military justice and litigation were generally not perceived as career enhancing. As a result, a disproportionate number of senior officers considered and selected for command had not spent significant time in military justice litigation or administration. Rather, they had successful operational or international law careers. Many were selected for command as a step to competing for flag rank.

Adding to the problem was a growing misalignment between the assumptions underlying the Commanding Officer/ Executive Officer detailing policy and the evolving Naval Legal Service Command needs. With the Region Legal Service Offices formation, the former Trial Service Office mission was broadened somewhat to include installation legal advice, but the offices remained predominantly command services and prosecution oriented.

As commands under the Naval Legal Service Command evolved into smaller, more specialized organizations with military justice as a larger mission component, the previous personnel detailing policy did not evolve to address the changing skill sets required for the leaders. Commanding officers were still selected based predominantly on the perception they would lead large organizations with multiple components, and because a command tour was necessary to attain flag rank.

d. Navy Case Tracking

Prior to October 2006, the Naval Legal Service Command, NAMARA, and the Court all used different information systems to meet their individual needs. Naval Legal Service Command systems primarily tracked the time devoted to courts-martial and other activities, but not individual cases, or case status. Case tracking was left to individual, local field office systems and mechanisms maintained at the individual Region Legal Service Offices, Navy Legal Service Offices, or their predecessor organizations.

In 2005, the Commander, Naval Legal Service Command, first directed local field office commanders to begin tracking their cases until NAMARA received the records of trial. Even with this change, case tracking responsibility remained with the local field offices and their localized systems and mechanisms.

At various times between 1985 and 2006, the Naval Legal Service Command used the Judge Advocate General Management Information System (1985 – 1998), the Military Justice Management Information System (1999 – 2000), Time Matters (2000 – 2003), and the Homeport Electronic Legal Management System (2003 – 2006), principally at the field office level. The Naval Legal Service Command headquarters received reports, generally not directly from automated systems, which permitted tracking the numbers of cases and certain date parameters, but not individual cases, actions on cases, or case status.

Prior to 2005, there was no requirement for field offices to track a case after delivering the record of trial to the responsible convening authority for final action. Independent staff judge advocates and legal officers were principally responsible for post-trial processing, including staff judge advocate recommendations and convening authority actions (two key problem areas in post-trial processing). Their actions remained outside the purview of the Naval Legal Service Command, and were not in information systems available to the headquarters staff.

In 2003, the Naval Legal Service Command began using the Homeport Electronic Legal Management (HELM) system, which had a command-level case tracking function, but still did not allow headquarters-level monitoring. To compensate, from 1999 through 2005, local field offices were required to complete quarterly court-martial Situation Reports (SITREPS) using Microsoft Excel software.

Even using the Homeport Electronic Legal Management System and Situation Reports, however, only the number of cases was tracked and reported, not individual cases. In addition, independent staff judge advocates did not use these systems, or submit Situation Reports to the Naval Legal Service Command. At the headquarters level, the Naval Legal Service Command did not have visibility over the post-trial process.

Between 1980 and 2006, the Trial Judiciary (trial judges who preside over courts-martial) used the TRIJUDAC Management Information System, and both NAMARA and the Court could monitor cases in the system. However, the trial judge's jurisdiction over a case ended with authenticating the record of trial. The system did not capture or track post-trial processing beyond the trial judge's jurisdiction.

NAMARA and the Court used an Oracle-based information system, NAUTILUS (official name), which began tracking a case when the convening authority delivered the completed record of trial to NAMARA, usually by mail. NAUTILUS tracking continued through appellate court action(s) until the appellate process ended. These systems, however, did not enable either NAMARA or the Court to ensure they received a record of trial for every case in which appellate review was required. Like the Naval Legal Service Command headquarters, they did not have any visibility over courts-martial completed in the field, and did not know when to anticipate receiving records of trial.

On October 10, 2006, the Knowledge and Information Services Division (Code 65) fielded the CMTIS to allow the Naval Legal Service Command and NAMARA to track courts-martial from ". . . knowledge of the offense to the completion of appellate review . . ." The CMTIS resulted from merging NAUTILUS (appellate case tracking system) and the TRIJUDAC Management Information System (Judiciary case management system). In connection with rolling out the new CMTIS, on October 3, 2006, the Navy JAG and Deputy Navy JAG sent a memorandum to JAG personnel worldwide, advising:

> . . . Complete and accurate data collection is vital for achieving our JAG Corps 2020 Goals. Every member of the JAG Corps team must make CMTIS a part of his or her daily routine. . . . CMTIS will permit all of us to track and manage cases and workloads across the enterprise, utilizing one simple application with specific modules pertaining to individual areas of practice. Developed with detailed input from users, CMTIS promises to be user-friendly and flexible. It will also help ensure the timely disposition of all military justice cases. . . ."

The CMTIS represented a positive step, but did not give the Naval Legal Service Command, NAMARA, or the Court capability to monitor the post-trial process and prevent problems. The system was hampered with missing or inaccurate data, with cases recorded in the system where the underlying courts-martial could not be accounted for, and lost courts-martial cases that continued to surface without ever having been recorded in the data system.

One reason for the inadequate case visibility was overly restrictive limitations on system access and use. For example, even after receiving a record of trial possessing the overall data and information, NAMARA personnel were not allowed to complete missing data fields, or correct erroneous data. Only the responsible field unit could make such corrections. After we discussed our findings with the Navy JAG, the NAMARA was given more access and authority to enter data directly in the system.

e. Marine Corps Case Tracking

The Marine Corps introduced the CMS in 1996, and substantially upgraded it in 2009. The original CMS was available, but used only sporadically over the past decade. Most Marine legal offices used locally-created, ad-hoc systems/mechanisms to track and report on their cases. The CMS was not adequate for their needs.

In 2005, when the Navy began developing CMTIS, the Marine Corps elected not to participate. Although recognizing the value of having a single system, the Marine Corps was concerned about the Navy system's utility and effectiveness. The Marine Corps decided to await development of the Department of the Navy Criminal Justice Information System (DONCJIS), which was advertised as a cradle-to-grave system for the entire criminal justice community.

In late 2009, after problems in the DONCJIS development became known, the Marine Corps contracted with IBM to upgrade its CMS and achieve needed capability quickly. The upgrades were completed in the fall of 2009, and the new system was fielded in February 2010. The new CMS is a Lotus Notes-based, web-enabled database designed to track courts-martial from receipt of request for legal services through post-trial review.

Marine Corps field units have read-only access to the Navy's CMTIS, which they use to find out when records were received at NAMARA, or when a case was docketed at the Court. Periodically, they may also check the Navy system to ascertain a case's appellate progression. We were told the NAMARA Administrative Support Division was given "read" access and trained on using the Marine Corps CMS, so NAMARA could now have visibility over Marine Corps cases pending in the field.

f. Assistant Judge Advocate General for Military Justice

When the current Assistant Judge Advocate General for Military Justice (Code 02) arrived in August 2008, NAMARA did not have a case tracking mechanism to monitor cases an appellate court returned to the field for action (court mandates). At his direction, an in-house spreadsheet program was created to track court mandates.

Another significant tracking gap was NAMARA's lack of visibility over cases (Navy and Marine Corps) due at NAMARA, e.g., cases with adjudicated sentences requiring appellate review, but not yet received. Consequently, a second home-grown, spreadsheet-based tracking product

(Appellate Tracker) was developed to identify and monitor these cases, and follow them through the last Service action (DD 214 discharge certificate issuance).

This Appellate Tracker is hosted on the Marine Corps' SharePoint web site, and every legal office in the Marine Corps can review or update a record and post new information. To keep the field informed, NAMARA sends monthly trackers via e-mail to the Navy Region Legal Service Offices, and Marine Corps Legal Service Support Sections and Law Centers. The new procedures enable NAMARA to oversee case progress throughout the Navy and Marine Corps, and spot cases with unexplained or inappropriate delays.

The CMTIS stores data such as attorney time and workload, and was designed primarily to measure workload volumes (for manpower purposes), not case processing time and efficiency. According to one user, the system interface is "mediocre" at best and, overall, the system is not a useful tool for NAMARA. System users cannot generate ad hoc queries or reports directly. They must formally request a new or modified query or report and then wait for responses that may not come, or not meet the need even if developed.

Following system modifications in May 2010, NAMARA and other users can now import data from a new CMTIS "Post-Trial Tracker" report into Microsoft Access (database) or Microsoft Excel (spreadsheet) and use the data as they want. However, upon importing the data into a spreadsheet, we were unable to relate data in individual spreadsheet columns to data in the underlying CMTIS report columns. Multiple data fields are reported in single CMTIS report columns and much data imported into the spreadsheet arrived in columns without headings—date fields are generally indistinguishable without the column identifiers. In our meeting with the Navy JAG and senior staff on July 8, 2010, we were told the problems would be resolved in 2-3 months.

g. Administrative Support Division, NAMARA

A counsel from the Appellate Government Division (Code 46) recalled the 1989-1991 timeframe when the Administrative Support Division (Code 40) was awash in records, with cases stacked everywhere. About 1,200 cases were "lost" and a Marine Corps member from the Appellate Government Division was assigned to find them.

In 2002, a new military Director was sent in to fix the Division's many problems. When the new Director arrived, about 400 records of trial were backlogged on the shelves awaiting log in and docketing. His assessment was the section lacked a sense of urgency, had a generally passive, reactive approach to the duties, and a culture of inattention and indifference had taken hold.

According to this former Director, he developed and improved office processes, established production expectations, instituted an audit system (to identify pending cases and locate missing records of trial), drawing data from the NATUILUS and other systems available in 2002-2003. He recalled a judge advocate from the Appellate Government Division was tasked to find all records of trial that could not be accounted for, and the judge advocate spent 6-12 months tracking them down, although not all were found.

In 2003, the Administrative Support Division (Code 40) facility was flooded and sustained considerable damage. The staff was relocated for 6 months and, during that time, another case

backlog developed because so many personnel (mostly junior Marine enlisted members) were tasked to perform renovation duties and other labor tasks. The division adopted a Standard Operating Procedure (SOP) in that era to standardize processing and speed case in-processing, which eventually helped overcome the backlog.

This former Director believes the Navy started on the path to reforming its broken processes during the 2002-2005 timeframe. Prior to then, it was not unusual for cases several months to more than a year old to arrive from the field. They arrived in batches (8-10 in a box) because units would wait until they had a full box before mailing a record of trial to NAMARA.

Prior to 2003-2004, it was not uncommon for Trial Service Offices to send authenticated records of trial directly to the convening authorities (commanders) for post-trial processing and forwarding to NAMARA. Many special court-martial convening authorities were staffed with collateral-duty legal officers who may have lacked sufficient knowledge to handle the processes. After convening authority action, the records of trial were mailed directly to NAMARA without passing through the supporting Trial Service Office. Consequently, records of trial were often incomplete, improperly assembled, and had not been subjected to quality review.

Court mandates were also a significant problem, as they were mailed directly to the convening authorities who often had no idea what to do with them. Cases often languished because collateral duty officers also did not know what to do with them. In approximately 2005, the previous Navy JAG, Vice Admiral Bruce MacDonald, changed the procedure, requiring all records of trial and court mandates to pass through the supporting Trial Service Office/Region Legal Service Office.

After the *Moreno* case in 2006, a Naval Reserve judge advocate was activated specifically to track down Navy and Marine Corps cases requiring appellate review and not received at NAMARA. To identify the missing cases, the Reserve judge advocate searched the Navy and Marine Corps Appellate Leave Activity database to identify individuals on appellate leave who had received sentences requiring Article 66 reviews. He then compared the names in NAUTILUS database records with names in records of trial received at NAMARA to identify missing records of trial, and then contacted field units to locate missing records. He identified about 400 missing records of trial and ultimately found "nearly 95 percent" of the missing records. (**Note**: even at a 95 percent find rate, about 20 records of trial were still missing, indicating individuals were placed on appellate leave, but their appeals were not initiated.)

Subsequently, NAMARA conducted this type "audit" approximately quarterly and continued to resolve actual or potential lost case issues. As of July 8, 2010, the Navy JAG had identified every sailor or marine currently in confinement and completed physical file reviews on their appellate cases. Although the Navy JAG assured us there will not be another *Foster* case, he could not give us a similar assurance regarding appellate cases for convicted sailors and marines no longer in confinement. He did assure us the 1,096 cases entered in CMTIS since October 1, 2006 were all accounted for, and every one of the 35,218 cases in CMTIS predating October 1, 2006 (partial records rolled-up into CMTIS from prior systems when CMTIS was activated) are either closed cases, or NAMARA received the records of trial. Again, he could not assure us that every historic case subject to appellate review was entered into CMTIS.

Another problem impacting the Administrative Support Division was "trouble cases," e.g., they were missing documents, improperly assembled, or had other problems when received at NAMARA. About 4-5 years ago, 15-20 percent of the records of trial received at NAMARA were trouble cases.

Further, after the problems were brought to the responsible field unit's attention, it was not uncommon for individual records of trial to "sit" 8-9 months before field units completed corrections so the appeals could go forward.

h. Appellate Defense Division

Caseload: The number of general and special courts-martial in DON generally declined relatively steadily between FY 1990 and FY 2009, but there were increases in FYs 1996-1997, FYs 2000-2002, and FY 2004. On a year-to-year basis, the number of courts- martial increased 312 in FY 1996, increased 358 in FY 2000, and increased 16 in FY 2004.[24] The increases had a significant impact on case processing at the appellate level, especially when considered in conjunction with the personnel reductions occurring in the decade following the first Gulf War.

The Navy Judge Advocate General's Annual Report (1997-1998) to the U.S. Court of Appeals for the Armed Forces confirmed problems in the Appellate Defense Division (Code 45). The report noted, by the end of FY1998, the Appellate Defense Division had been able to resolve a case backlog generated over previous years. The Division accomplished the reduction with 17 active duty and 25 Reserve judge advocates. A 75 percent personnel turnover occurred the previous summer, and the Reserves were credited with keeping the Division afloat.

A 2003 U.S. Court of Appeals for the Armed Forces' case, *United States v. Brunson,* 59 M.J. 41 (C.A.A.F. 2003), specifically commented on the "serious pattern of delay" in cases from the Appellate Defense Division. In reviewing the U.S. Court of Appeals for the Armed Forces' petition docket, the Clerk of Court's office discovered 26 cases in which timely petitions had been filed, but supplements to the petitions had not been filed within specified timelines.[25] Following an inquiry from the Clerk of Court's office, the Appellate Defense Division filed motions to file supplements "out of time" in all 26 cases. As of August 1, 2003, the U.S. Court of Appeals for the Armed Forces' petition docket included 43 cases in which petitions were filed without any timely supplement filings. Counsel filed motions to file supplements "out of time" in 35 of these cases, "out of time" requests for time extension in 3 cases, and did not file a motion or request in the remaining 5 cases. In the 38 cases in which a motion or request was filed, the motion or request was filed 6 to 26 days after the due date.

Another 2003 U.S. Court of Appeals for the Armed Forces case, *Diaz v. JAG* of *the Navy,* 59 M.J. 34 (C.A.A.F. 2003), addressed lengthy delays in processing the case, which was on its 11th time extension from the Court. Diaz had been confined 2 1/2 years and had his second appellate defense counsel. The first counsel cited caseload commitments as the reason for needing the 10th time extension. The U.S. Court of Appeals for the Armed Forces directed the Court to expedite the review and, more extraordinarily, to submit a report within 60 days detailing the steps being taken to assure appellants their rights to timely review under Article 66, Uniform Code of Military Justice.

Staffing: We first noted the mention of an Appellate Defense Division staffing issue in an appendix to the *Foster* inquiry. In the appendix, Captain Charles Dorman (then Director, Appellate Defense Division and later Chief Judge, Navy-Marine Corps Court of Criminal Appeals) commented that in

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[24] Records are inadequate for us to determine the cases requiring appellate review included in the overall courts-martial increases.

[25] A petition asks a court to take a specified action. A supplement adds to an original petition.

about 1996, he began to advocate hiring additional staff, including two civilian attorneys to provide continuity and assist the Division with more complex cases. He had observed that longer, more-complex cases were being passed from one counsel to the next, and multiple time extensions were being requested. He also had noticed how long it was taking for the Court to receive records from the field.

In 2001, according to one source, 17 defense counsel handled an average 50 cases each at any particular time. Another source recalled only 12-13 counsel during the September 2001 to May 2002 timeframe, with 2 Reservists mobilized in February 2002. These counsel included an experienced Navy Captain as the division director, an 0-5 (commander) deputy director, and four 0-4 (lieutenant commander) branch heads. With the increase in courts-martial beginning in 2000, the number of cases in the Appellate Defense Division pending briefings to the Court rose from 603 in 1999 to 1,233 in 2001, a 105 percent increase.

Staffing reviews in 2001and 2002 both concluded the Appellate Defense Division did not need additional staffing. However, in 2001, the then Assistant Judge Advocate General for Military Justice, Captain Dorman, learned about staffing issues in the Appellate Defense Division. He frequently reassigned counsel inbound for the Appellate Government Division to the Appellate Defense Division to alleviate the staffing problem. Between June 2002 and October 2003, the O-5 (commander) Director requested additional assistance numerous times, but to no avail.

A former appellate judge confirmed that proper staffing was an issue when he served in the late 1990s. The Appellate Defense Division always seemed to be understaffed, and the Appellate Government Division always seemed to be overstaffed. The Appellate Government Division always had an O-6 (Navy captain/Marine Corps coronel) director, and the Appellate Defense Division sometimes had only an O-5 (Navy commander/Marine Corps lieutenant colonel) director. He commented that Appellate Defense generally needs more people than Appellate Government because they have more work to do and bear the burden of identifying issues and preparing initial briefs. Appellate Government has only a reply obligation. Even in merits submissions,[26] defense counsel has to read the entire record and determine whether issues need to be raised. Merits submissions create virtually no work for the Appellate Government Division.

In 2003, a court-directed report in the Diaz case prompted a third staffing review. This review resulted in a May 2003 decision to (1) increase the Appellate Defense Division staffing from 14 to 20 appellate defense counsel, (2) activate three Reserve counsel, (3) require at least second-tour judge advocates with field experience, additional training, and better case prioritization, and (4) restore the Director position as an O-6 (Navy captain/Marine Corps colonel) with strong military justice background.

The staffing increase ultimately put the Appellate Defense Division on the path to recovery, but the curative measures had not been anticipated soon enough to prevent a growing backlog. By September 2003, the backlog was 1,099 cases and moving from the Appellate Defense Division into the Court.

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[26] The term "merits submissions" refers to cases presented to the Court on the merits, without defense counsel asserting any specific error, or submitting any supplemental pleading or legal brief.

By 2003, the number of counsel in the Appellate Defense Division had declined from 17 to 13. Additionally, the Director was no longer an 0-6 (captain), but an 0-5 commander (the Director, Appellate Government Division remained an O-6). The Deputy Director was also an 0-5. The average workload per counsel had increased to 70 cases, including three capital cases. During tenure in the Appellate Defense Division from May 2001 to June 2004, one counsel recalled her caseload generally varied from 40-60 cases, but peaked to over 90 cases at one point, reflecting a substantial backlog.

During the peak, cases were literally stacked everywhere in the counsels' offices--on shelves, in file cabinets, and on the floor. To assist with complex capital cases, two senior Reserve counsel were recalled to active duty. Despite their assistance, the need for time extensions to file defense briefs culminated in the Appellate Government Division agreeing:

- not to oppose the first 8 defense requests for time extension;
- to determine, on a case basis, whether to oppose time extension requests between 8 and 14; and
- beginning with the 15th request for time extension, to impose a standing objection.

In an August 31, 2004, memorandum to the Assistant Judge Advocate General for Military Justice, Subject ". . . [Time Extension] Polices," the Director, Appellate Government Division, stated concerns about the aforementioned "agreement" between the two Divisions. He commented that his Deputy had opposed 46 Defense requests for time extension in the prior 3 months, all in cases with more than 13 time extensions, meaning at least 18 months had elapsed since the cases were docketed with the Court. All the time extension requests were granted over his objections.

Director position: The Director, Appellate Defense Division (an O-6 authorization), suffered from considerable turmoil and under-grading from about 2000 through 2003, and was experiencing similar problems again at the time of our interviews. In 2001, the O-5 Director was in the office only 2-3 days a week because he was commuting from Rhode Island. The next director, an O-6, was in the office only 9 months. The O-5 Deputy succeeded that Director. In October 2003, following the Diaz case, an O-6 was again assigned. There were four different Directors in the 2001-2004 timeframe.

At the time of our interviews, the current Director (assigned in December 2009) was detailed full-time to assist with the Section 506 panel review. This Director was supposed to have left the Appellate Defense Division in April 2010, for duty on the Court. The replacement was to arrive in summer 2010, but was also diverted to other duties (as of the date on which this report was drafted). The Director, Appellate Government Division, an O-6 (Navy captain/Marine Corps colonel) position, appears to have been consistently filled at that level.

A former appellate judge noted the turbulence and occasional Director under-grading in approximately 2000 through 2003. This individual opined that the defense backlog at the time had several causes, among them inadequate supervision and oversight in the Appellate Defense Division. The Director and Deputy Director at the time were "hands off" and did nothing about inadequate productivity. During this time, there was generally no good cause for delays;

leadership simply was not addressing the problems and judges generally obliged defense requests for more time.

Performance problems: A former appellate judge noted competence problems in the Appellate Defense Division as well. Historically, the common practice was to assign first-tour judge advocates to the Appellate Defense Division. This practice was terminated in about 2003.

A November 2005, briefing slide depicted significant progress in reducing the backlog after the May 2003 decision to increase staffing in the Appellate Defense Division. The following table is derived from this briefing slide.

Appellate Defense Division
Case Age (in Months) at Various Dates

Date	7-12 Months		13-18 Months		Over 18 Months		Total	
	No.	%	No.	%	No.	%	No.	%
8/1/2003	141	56.9%	69	27.8%	38	15.3%	248	100.0%
10/1/2003	131	56.0%	61	26.1%	42	17.9%	234	100.0%
10/1/2004	52	63.4%	16	19.5%	14	17.1%	82	100.0%
10/1/2005	11	68.8%	2	12.5%	3	18.8%	16	100.0%

As can be seen in the table, between August 1, 2003, and October 1, 2005, the proportion of total cases 7-12 months old (most current cases) increased from 56.9 percent to 68.8 percent, demonstrating the process had become more timely. Conversely, the number of cases in the 13-18 months and over 18 months categories (oldest cases) declined significantly, further demonstrating the improvement in timeliness.[27] The total cases involved also declined dramatically, from 248 on August 1, 2003, to 16 on October 1, 2005, demonstrating the previous backlogs had been resolved.

We attempted to update this information, but it was no longer tracked in this format. We note, however, statistics in the O'Toole Report indicate the improvements generally continued through October 1, 2006--only two cases pending for more than a year and only six cases pending longer than 6 months on that date. The number of requests for time extension (shown and discussed later in this report) also indicate continuing improvement in this area.

The backlogged cases were moving, and many were appealed to the U.S. Court of Appeals for the Armed Forces, resulting in two landmark decisions addressing continuing, unreasonably-long- post-trial delay: *United States v. Moreno,* 63, M.J. 129 (C.A.A.F. 2006), and *United States v. Toohey,* 63 M.J. 353 (C.A.A.F. 2006) *(Toohey II),* both involving Marine Corps cases. *Moreno* imposed post-trial processing standards that, if violated, would trigger an unreasonable delay presumption and analysis for prejudice. These standards are applicable to all the Services.

[27] The proportion of cases in the over 18 month old category increased from 15.3 percent to 18. 8 percent, but this factor is not important in view of the significant declines in both total cases and in cases in each individual category.

In response to the court denouncements, both the Navy and Marine Corps used Reserve judge advocates to surge support and clear the remaining backlog in the Appellate Defense Division.

Reserve Assignments: Due to a recent change in Reserve judge advocate assignment policy, the experience level for Reserve judge advocates assigned to the Appellate Defense Division is declining. This policy requires new Reserve members to serve their initial tours in traditional drill units (generally, a Region Legal Service Office, or Naval Legal Service Office) where they can receive mentoring and administrative support to prepare them for careers in the Navy Reserve. Previously, new Reserve members with appellate experience could be assigned to "flex" drill units supporting the appellate divisions. Consequently, the Appellate Defense Division is now assigned a more senior pool of Reservists (often O-6s), but without appellate experience.

Chief Defense Counsel: There has never been a Chief Defense Counsel position in the Navy, and no single entity serves as the advocate, sponsor, or office of primary responsibility for defense services. The Appellate Defense Division offers limited support and advice to field calls for assistance, refraining from more active involvement due to ethical considerations. One current official told us that, based on the limited objections raised and how quickly counsel backs down when objections are raised (based on reading the record of trial), it appears field defense counsel could benefit from having more experienced supervisors and more advanced training.

Tracking: CMTIS generally has been ineffective for the Appellate Defense Division, and the Knowledge and Information Services Division (Code 65) has not been fully responsive to change requests. Some past problems included:

- Reserve judge advocates show up in reports requested for active duty personnel – the Appellate Defense Division has been trying to have this problem corrected since November 2009;
- the Appellate Defense Division cannot run needed reports, such as a "pending cases" list for a departing counsel, or a list showing all cases ever assigned to a particular counsel (both reports were available in the previous NAUTILUS);
- CMTIS does not have categories to identify filings with higher courts – U.S. Court of Appeals for the Armed Forces or the Supreme Court;
- CMTIS does not have separate data fields to track time extensions for the different courts – once a case goes to a higher court, any time extension the lower court granted in the case appears in CMTIS as if the higher court granted the time extension—if the lower court and higher court both grant time extensions in the case, the lower court record is lost in CMTIS; and
- the CMTIS cannot manage/track cases assigned to Reservists (27 Reservists who prepare briefs are in the Appellate Defense Division)--the office manager developed an ad-hoc database to manage these cases.

i. Appellate Government Division

In the 2001-2003 timeframe, the then Director, Appellate Government Division (Code 46), arrived for duty to find a "stunning" case backlog in NAMARA, a situation relatively unchanged from a previous tour in the division a decade earlier. An anthrax incident exacerbated the backlog, significantly slowing record of trial deliveries to the Navy Yard.

Time extensions were a "runaway" problem. The Director required counsel to challenge requests, asking that Appellate Defense Division counsel justify requests for time extension, but the Court declined to do so. According to this former Director, the *Foster* case was inevitable; military justice lacked effective processes and standardization.

According to the current Director, the Appellate Government Division has not used CMTIS in day-to-day operations, e.g., to track cases, generate pleadings, or track filing deadlines. Rather, the Division uses the Marine Corps' Microsoft "Share Point" application as a collaborative way to draft, review and finalize pleadings, as well as track cases and filing deadlines.

The CMTIS was too cumbersome, did not have a collaborative function, and could not be relied upon, as it often contained erroneous or incomplete information. Several people, usually legal clerks and support staff, enter data in CMTIS during the post-trial process. The inaccuracies result from events the support staff does not know about, or transcription mistakes in data entry.

For the Appellate Government Division, CMTIS is used strictly as a backup to check for filing date discrepancies. Because the responsible counsel enter and use SharePoint data directly, they have a vested interest in ensuring completeness and accuracy, including accurate filing dates. Thus, for any discrepancy between CMTIS and SharePoint, SharePoint is almost always relied on as the accurate data.

To amplify CMTIS shortcomings, the Director provided a March 4, 2010, system-generated report entitled "Cases with a Trial Date but Not Received at Namara with Forum of GCM [General Court- Martial] or SPCM [Special Court-Martial] with Confinement > 1 Year and/or Discharge." The report purported to show cases not received at NAMARA, although subject to appellate review under Article 66(b), Uniform Code of Military Justice. The report contained 27 pages of cases dating to 1999, and raised questions about CMTIS interoperability, usefulness, and accuracy as a case-management tool.[28]

Much data in this March 4 report preceded CMTIS, and may have resulted from the system's inability to incorporate and integrate case information from previous systems. However, about 3½ years after the CMTIS fielding, this system report had several pages of cases for which up-to-date information was missing, again calling into question the system's ability to track cases accurately. Furthermore, the inaccurate and/or incomplete information existed despite the numerous reviews/audits conducted over the last 3½ years to locate and deal with lost cases. As far as we could tell, not one prior review/audit included updating or correcting the official Navy case record. We tallied the following statistics from this CMTIS report:

[28] We previously discussed in detail the March 4 report, as well as several lost cases (e.g., *U.S. v. Bartolo)* subsequently discovered. The March 4 report did not include appellant names, so we could not determine if the report included these lost cases.

March 4, 2010, Appellate Government Division Report From CMTIS Purporting to Show Cases Subject to Review, but not Received at NAMARA

Year	No. Cases		Percent	
*	In Year	Cumulative	In Year	Cumulative
1999	10	10	0.80%	0.80%
2000	81	91	6.80%	7.70%
2001	154	245	13.00%	20.60%
2002	177	422	14.90%	35.60%
2003	125	547	10.50%	46.10%
2004	124	671	10.40%	56.50%
2005	82	753	6.90%	63.40%
2006	76	829	6.40%	69.80%
2007	70	899	5.90%	75.70%
2008	61	960	5.10%	80.90%
2009	166	1,126	14.00%	94.90%
2010	61	1,187	5.10%	100.00%
	1,187		100.00%	

* Based on CMTIS number.

As can be seen above, 829 cases (69.8 percent of the total) predated 2007, more than 39 months old at the report date.

The Appellate Government Division was unable to identify and locate cases in the "Cases not received" reports. As an example, we were shown a random report that included a case tried in July 2007. The CMTIS showed a convening authority action in October 2007, but no further information. No one was able to ascertain the current case status.

The Director previously provided this report to several others in the Navy JAG organization for follow-up. The distribution included those individuals responsible for CMTIS. At the time, he was told the apparent problem was merely a system failure to transfer old data into CMTIS, and the inability to transfer new data to the specific report. Although this case may represent an extreme example, it is not uncommon for the system to have incorrect or missing data.

The Director told us the Knowledge and Information Services Division (Code 65), the organization responsible for CMTIS, is working hard to correct deficiencies and inaccuracies, but the data depend on those inputting the information and the system's flaws are systemic. The CMTIS is fundamentally separate and distinct from the actual work products of those responsible for information accuracy. We are not convinced the system modifications in May 2010 resolved the CMTIS problems.

Another longstanding problem involves court mandates. The CMTIS inability to track court mandates efficiently and effectively makes it impossible for the Appellate Government Division to monitor status. This remained an issue until recently when the Assistant Judge Advocate General for Military Justice (Code 02) directed NAMARA to go through the system item-by-item and record, on a spreadsheet, all outstanding mandates. He also directed a new procedure to

track the cases and ensure timely compliance with whatever action a court had ordered in the mandate.

The NAMARA recently asked the Knowledge and Information Services Division (Code 65) to create a mandate tracker report in CMTIS, which they did; however, the report was not "user-friendly." As a result, NAMARA began manually entering the CMTIS report information in another ad-hoc spreadsheet to capture needed data in a usable form.

The Appellate Government Division tracks and oversees case production using the Marine Corps SharePoint website. The Assistant Judge Advocate General for Military Justice introduced this resource to resolve the many problems and frustrations permeating NAMARA, which resulted from inadequate information available from existing automated tools. Anyone with access and permission to the SharePoint site can see and monitor all cases currently at the Appellate Government Division. The visibility allows anyone to track a case's status, including time extension requests and approvals. From this site, one can access all relevant pleadings associated with an appellant. The intent, when high-speed scanners become available, is to have the entire record of trial also available on SharePoint.

j. Navy-Marine Corps Court of Criminal Appeals

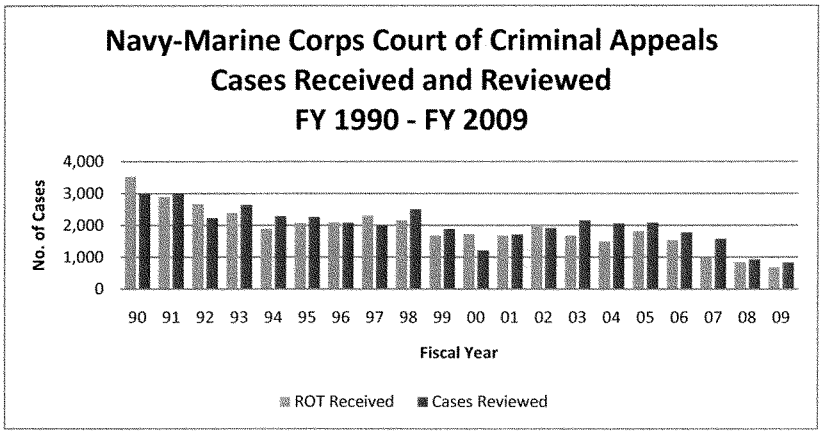
Historically, the Court has been troubled with difficulties in administration, staffing, and case tracking and management. In this regard, the Court handles a larger caseload each year than any other Service court of criminal appeals, and prior to 2006, resolved more cases than all the others Service appellate courts combined. And, the Court did so with fewer judges, fewer appellate counsel, and smaller support staffs than the Army and Air Force appellate courts. Navy and Marine Corps judges generated more case decisions per judge than judges in the other Service appellant courts.

Caseload: The most recent case backlog in the Court began in 2000, when the Court decided 1,219 of the total 1,738 cases received that year. The shortfall was due, in large part, to lower staffing, but other problems contributed to the backlog. A primary cause was inadequate case management and prioritization. Aware that a high number of cases were coming to the Court, the judges focused on numbers, trying to resolve an equally high number of cases and not fall farther behind. Some concentrated on resolving "easy" cases quickly, foregoing work on the more complex, or longer cases requiring substantial review time. Nonetheless, in 2001 - 2002, the Court decided several hundred fewer cases than were docketed, and the backlog increasingly became larger, more-complex felony cases.

Available statistics on general courts-martial support this information. According to Navy documents we reviewed and the O'Toole report, general court-martial reviews in 2000 - 2002 were substantially fewer (by half or more) than in all other years from 1999 through 2008. As an apparent result, between 2001 and 2002, cases over 6 months in panel increased to nearly 100 (none over 6 months in FY 2000). By 2004, nearly 50 cases had been in panel for more than 12 months.

On September 30, 2004, there were 104,529 pages of records on the shelf and the number increased to 112,726 pages on March 31, 2005. The appellate divisions and Court did not eliminate this backlog until 2008-2009.

The graph below compares the total general and special courts-martial received and reviewed in fiscal years 1990 through 2009.



As can be seen above, in 15 of the past 20 fiscal years, the Court reviewed more cases than it received in the year. This has been true in every fiscal year after 2002, indicating the Court has continued working to resolve a case backlog.

A July 7, 2005, memorandum from the Court's Chief Judge to the Senior Executive Board announced a series of initiatives to address the backlog, including:

- automate brief sheets for merits submissions (about 60 percent of caseload);
- standards for when and how to write opinions, focusing on using succinct language and creating an electronic bank of common language/clauses;
- using contract paralegals;
- assigning a Reserve judge to each active duty judge for training, mentoring and productivity;
- improving new judge training;
- monitoring productivity, including record of trial page tracking; and
- recruiting more Reserve personnel for commissioner duty preparing briefs.

He recommended: maintain at least 9, optimally 10 judges on the Court (at one point in FY 2002, the Court had only 5 sitting judges and was scheduled to have 7 or fewer judges by summer 2006); add 3 civilian judges for continuity and experience; eliminate "gapped billets" on the Court; fund contractor support to develop a new training manual; create a cradle-to-grave

tracking database; and require staff judge advocates to explain delays. Generally, these recommendations were offered as helpful options.

During FY 2005, the following actions were taken to address the backlog:

- increased from 2 to 5 commissioners;
- contracted for 2 civilian paralegals and 2 civilian attorneys;
- increased from 9 to 12 judges (in 2006, increased to 17 judges -- 13 active and 4 Reserve);
- increased the number of Reserve judges;
- streamlined the Court's processes;
- focused efforts on longer, older cases; and
- improved case prioritization—the first-in-first-out standard was modified based on case type, age, and confinement status.

In June 2006, an appellate Judge wrote a paper outlining more initiatives and recommendations, including:

- create new Rules of Practice for the Court (in June 2006), to reduce submission times for legal briefs, limit brief pages, prohibit automatic time extensions, and require a second time extension request to trigger a chambers conference and a third request to trigger a report to the Assistant Judge Advocate General for Military Justice and the Navy JAG;
- improve case tracking from docketing through opinion;
- require judicial status reports for all cases older than 6 months with internal reviews every 3 months until completion;
- adopt internal Court processing goals to facilitate compliance with the 18 month standard in *Moreno*;
- improve Reserve utilization;
- create a three-experienced-judge "cold case" squad to work the oldest, most difficult cases (33 in panel more than 6 months at the time);
- maintain a 12 judge panel until all backlogs are eliminated;
- maintain a full cadre of commissioners;
- detail senior enlisted personnel to handle administration;
- revisit the civilian judge proposal;
- establish a rigorous judicial screening board;
- establish a clerk program--one year at Court and then into the Appellate Defense Division, or Appellate Government Division;
- begin using electronic records of trial;
- eliminate judge authentication--enable court reporter or trial counsel to authenticate records of trial;
- permit an accused to waive appellate review as part of pretrial agreement (equates to civilian practice);
- reduce number of Navy and Marine Corps convening authorities; and
- staff NAMARA with more judge advocates.

By March 31, 2006, the page count in judicial panel had declined to 77,620 pages and the number of cases in panel over 6 months had declined to 39. Total cases in judicial panel was down to 253, the lowest since FY 2002.

The table below shows the number of cases docketed with the Court and pending in judicial panels on various dates between December 31, 2000, and December 31, 2009. The table also shows the numbers of cases pending in panel longer than 6 months and 12 months on the dates specified.

Navy and Marine Corps Appellate Cases Docketed with Appellate Court, and Pending Decision in Judicial Panels

Date	Cases Docketed	Cases Pending In Panel		Cases In Panel > 6 Mos		Cases In Panel > 12 Mos	
	No.	No.	% *	No.	% **	No.	% **
12/31/00	1,319	87	6.6%	7	8.0%	0	0.0%
04/30/06	794	325	40.9%	24	7.4%	14	4.3%
07/01/09	320	173	54.1%	7	4.0%	0	0.0%
12/31/09	189	75	39.7%	4	5.3%	0	0.0%

* Percentage of total cases docketed

** Percentage of total cases in panel

As can be seen above, at December 31, 2009, the numbers were at their lowest levels since April 30, 2006, indicating substantial improvements in this area.

In a September 2007 update, the Court's Senior Judge urged a minimum cadre of 9 appellate judges for the foreseeable future, and more former trial judge assignments to the Court, to increase experience levels and reduce the learning curve. Low experience levels impacted productivity, despite an improved caliber of judges overall, and the lack of career milestones impacted the Navy's ability to develop a future cadre of qualified judicial candidates. Additionally, four experienced judges were serving additional duty tours on the Court of Military Commission Review, which was their primary duty under DoD regulation.

Tracking: Although NAMARA initiated the NAUTILUS tracking system in 1996, it could not automatically flag cases in which the accused remained confined. The Court could "sort" cases by trial date, docket date, or date assigned to panel, but the system could not identify cases involving a confined appellant. Given the very substantial number of cases and those pending in panel for long time periods, over the next 10 years, management emphasis appears to have focused primarily on a "macro-level" approach to tracking cases based on the date assigned to a panel. The apparent intent was to reduce the number of older cases and eliminate the backlog, but the emphasis did not include any prioritization for factors such as an accused's confinement status.

Staffing: Insufficient staffing made it difficult to reduce the backlog. The Court was assigned 6 judges in 1999, 7 judges in 2000 through 2002 (but was down to 5 judges at one point during these years), 8 judges in 2003, 9 judges in 2004, 10 judges in 2005, and then surged to 16 judges in 2006. When Captain Dorman became the Chief Judge in 2003, the Court was at seven active duty judges, and three recently-departed judges had "dumped" many cases on the remaining judges. Judge Dorman lobbied continually for more judges.[29]

In 2004, Navy JAG leadership changed. The new Navy JAG had considerable military justice experience. In 2005, Chief Judge Dorman authored memoranda to the Navy JAG and Senior Executive Board appealing for a staffing increase, asserting the Court was inadequately staffed, describing the backlog, and highlighting the backlog's development due to an insufficient appellate defense staff in prior years. Shortly thereafter, in reaction to this advocacy and the *Diaz* decision ordering the Court to prepare a report explaining how it was going to address the backlog, the situation began improving. New judges began arriving in December 2005.

The Navy JAG activated three Reserve judges, increasing total judges from 9 to 12, increased the number of clerks from 2 to 5, and added 2 civilian staff attorneys. Additional Reserve judges were also added to the Reserve unit supporting the Court. A pilot law clerk program was initiated in 2006. Nine judge advocates (four active duty and five active-duty Reservists) came to the Court as law clerks. Two former clerks are now assigned as appellate government and appellate defense counsel, and a third was selected for the Judge Advocate General Corps' new litigation career track as a "Specialist."

By 2008, the Court and appellate divisions had generally resolved the case backlog. From a high of 18 appellate judges, the Court declined to 12 judges through the summer 2008 (10 active-duty and 2 Active Duty for Special Work Reservists). By fall 2008, the number had declined further to 10 judges, including one remaining Reservist. This Reservist was demobilized in September 2009, and replaced with an active duty judge, which kept the court at 10 judges. The number of clerks declined more rapidly, reaching a low of four, but in early 2009, the Navy JAG authorized an increase to two per panel. The Court now has 10 judges (3 each for 3 panels, plus the chief judge) and 7 law clerks (2 per panel, plus the senior clerk).

***U.S. v. Foster* /Judicial conduct and supervision:** *U.S. v. Foster* revealed a serious problem with post-trial processing delays-- the initial appellate review took almost 10 years to complete (sentenced December 1999, convening authority action February 2001, court docketing November 2001, and decision February 2009). Delays included 5 years to brief the case (26 time extensions) and order a *DuBay* hearing, and another year to complete the *DuBay* hearing.[30] In a concurring opinion in *Foster*, Chief Judge O'Toole commented that, although there was fault for delayed justice at every point in the post-trial process, "the principal responsibility for delay rests with this court."

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[29] In 2004, he was permitted to contract for some paralegals to support existing judges.

[30] A 1967 case (*United States v. DuBay*, 17 U.S.C.M.A. 147, 37 CMR 411) established procedures for holding hearings to determine issues raised collaterally that required findings of fact and conclusions of law. The hearings are commonly referred to as *DuBay* hearings.

A Navy JAG-directed inquiry following *Foster* revealed other problems with the Court. The Army appellate judge appointed to conduct the *Foster* inquiry addressed both management practices and judicial conduct, including the Court's multiple time extension approvals with virtually no justification required. Ultimately, 26 time extensions were granted, with no indication the Court ever conducted a rigorous inquiry into any basis for the requests.

The first judge assigned had the case for 18 months before retiring, with no evidence he worked on the case. He also left several other cases untouched, without formal case transfers or reassignments before his departure. The cases were simply "found" in his office.

The case was assigned to six different appellate judges during its pendency at the Court, with only two giving it immediate attention and review. The final reviewing judge noted the legal issues were readily identifiable with cursory review. According to the O'Toole report, the judges involved in the Foster case were:

> the product of an environment in which military justice was not viewed as a career enhancing experience. Accordingly, military justice litigation experience and judicial expertise were not primary factors in the selection of judges to the court. Indeed few had sufficient judicial experience to recognize that 25 delays by counsel in a single case should be a matter for concern . . . the lead appellate judge originally entrusted with the Foster case . . . did not have an adequate military justice litigation background, he never attended the Military Judges Course [not mandatory until recently], [and] he was not well-suited to the appellate bench . . .

Another issue highlighted in the *Foster* inquiry was the apparent lack of judicial supervision. At least one judge spent relatively little time working in the office, further aggravating caseload issues. This lack of diligence was known to the then Chief Judge, but nothing was done. Another judge frequently commuted from long distances, or tele-worked, due to personal family problems.

Among other difficulties a former chief judge asserted as reasons for not supervising a judge's performance was the proscription in Article 66 (g), Uniform Code of Military Justice, which provides ". . . no member of a Court of Criminal Appeals shall be required . . . or permitted, to prepare, approve, disapprove, review or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness or efficiency report, or any other report documents used in whole or in part for the purpose of determining whether a member . . . is qualified to be advanced in grade, or in determining the assignment or transfer of a member. . . ." This prohibition was offered as the reason for the Chief Judge not dealing more forcefully with performance issues. In addition, there were inadequate performance standards or objectives to measure and assess a judge's performance.

The inquiry officer's conclusions noted a "cavalier attitude to timely military justice at virtually every stage," and no sense of urgency in the post-trial or appellate process. Cases at the Court were handled on a first-in-first-out basis without consideration to prioritizing cases requiring expedited attention.

The O'Toole report notes the *Foster* case appeared to have been "largely ignored by the lead judge and unnoticed by the supervisory judges," despite the claimed capability to track individual cases in panel, both in NAUTILUS and in CMTIS. There were inadequate inquiries into case status and a general failure to use available tools and metrics to monitor case progression and caseload generally.

Our interviews disclosed that, in the past, judge selections were often based on the individual officer's geographical and retirement assignment preferences. Most appellate judges were in their final active-duty assignment. Compounding the experience and competence issues, officers selected for duty as appellate judges were not always required to attend and pass the Military Judge's Course at the Army Judge Advocate General School before being permitted to serve as a judge.

k. Other Appellate Processes

Including docketing time at the Court, in 2007, receiving, processing, delivering, and docketing records of trial at NAMARA required as much as a month. To streamline and standardize this intake process, both NAMARA and the Court conducted Lean Six Sigma evaluations, which a "Black Belt" Lean Six Sigma facilitator coordinated. As a result, case processing time in NAMARA was reduced from an average 17 days to 1 day. The docketing process, which formerly averaged 8 days, was reduced to 1 day. Other positive results included a pilot program for uploading appellate briefs into CMTIS; electronic filings with the Court; scanning smaller records of trial for electronic transmission to reserve counsel, which saves 4 days on average mailing time and approximately $56.00 per record; and establishing a working group to explore implementing electronic records of trial.

l. Inspections

(1) Navy

The Navy JAG has had an Inspector General (JAG IG) position for at least 25 years. The position was converted to a civilian position in 2001. The current JAG IG has been in the position as a civilian since January 1, 2002. The same individual was the JAG IG for a year previously while in the Navy as a captain and judge advocate. The JAG IG conducts inspections under authority from the Commander, Naval Legal Service Command. The Deputy Judge Advocate General is the Commander, Naval Legal Service Command. The JAG IG reports to the Deputy Judge Advocate General, who is responsible for rating the JAG IG's performance. The JAG IG's charter is, among other things, to inspect all Naval Legal Service Command organizations and staff judge advocate offices, as the Navy JAG selects, partially fulfilling the Navy JAG's Article 6 inspection mandate. The JAG IG does not inspect Marine Corps units.

In 2006, the then Commander, Naval Legal Service Command, (now the Navy JAG) restructured the JAG IG inspection program. In the previous 10 or more years, an inspection team (6 to 8 subject matter experts under JAG IG direction) would go to a field unit and complete an inspection using, in large part, the requirements in Commander Naval Legal Service Command Instruction (COMNAVLEGSVCCOMINST) 5040.1C, "Command Inspections," January 30, 2001, including Enclosure (3), "Command Inspection Checklist." Each subject matter expert

reviewed records and files using the checklists to gather information about case processing and tracking.

The restructured inspection program eliminated the "on-site, in-the-field" examination of such information and the six-to-eight-member inspection teams. Now, the JAG IG conducts the inspections alone.

The present on-site inspection involves 18 topic areas, but is limited to matters that cannot be assessed from other sources, reports, and information provided to the Naval Legal Service Command headquarters and Navy JAG. And, for the most part, information from field units to Navy headquarters is not shared with the JAG IG either before or during the inspections.

An on-site inspection is now designed to be supplementary, not comprehensive -- just one part in an overall field command evaluation. The Management and Plans Division (Code 63) and the Assistant Judge Advocate General, Director of Operations (Code 06), are responsible for case metrics and tracking *Moreno* statistics, and the information is not shared with the JAG IG.

According to the JAG IG:

- JAGINST 5810.1, "Management Goals for Processing Navy Courts-Martial," September 5, 1984, has not been used in inspections for years;
- JAG/CNLSCINST 5814.1, "Post-Trial Checklists," December 2, 1992 (containing extensive post-trial checklists) also has not been used in inspections for a long time and is being replaced with draft JAGINST 5040.1D, "Uniform Code of Military Justice Article 6 Legal Office Assessment," which is now used in the field;
- COMNAVLEGSVCCOMINST 5040.1C, "Command Inspections," January 30, 2001, Enclosure (3), "Command Inspection Checklist," is the most current inspection checklist published, but predates the reorganization creating the Region Legal Service Offices and is not currently used in inspections.

For the past 3 years, the JAG IG has been using the checklist in draft JAGINST 5040.1D, which accounts for the Region Legal Service Office structure, but is not a final policy. [31]

The Vice Commander, Naval Legal Service Command, told us the JAG IG sends out the draft checklist in advance so the unit can complete a self-assessment and return the information before the inspection. The JAG IG then travels to the unit and completes the inspection, which focuses on leadership and other areas, such as retention, recruiting, training, fitness, and facilities. Surveys are also completed. The military justice portion primarily entails interviewing various officials involved in military justice administration, investigation and execution (e.g., command leaders, trial counsel, command services personnel) to examine working relationships, which consumes about 40-50 percent of the inspection time (4-7 days). Navy JAG or Deputy JAG Article 6 visits often follow these "nuts and bolts" inspection.

Generally, the JAG IG is not given any court-martial case numbers or metrics before or during the inspections, and does not examine Region Legal Service Office records, case files,

[31] The instruction was published in final form on June 14, 2010, as we were completing this report.

documentation, or processing standards/timelines during the inspections. Prior to the changed philosophy for inspections, the JAG IG team examined files and records, and the military justice examination was more detailed.

The Navy JAG has not addressed post-trial processing problems specifically with the JAG IG, and the matter has not been a Navy JAG "special interest item" in the inspection program. Accordingly, since the headquarters' decision in 2006, inspections have not addressed military justice administration in detail, because the current Navy JAG believed the limited field inspections, together with Article 6 inspections and on-going reporting to the Commander, Naval Legal Service Command, would be sufficient for headquarters monitoring. In a recent meeting, however, the Navy JAG advised us he was re-initiating detailed field inspections because the CMTIS oversight envisioned in his 2006 decision did not materialize.

Navy field offices (Region Legal Service Offices, Naval Legal Service Offices, staff judge advocate offices) continue not having standard systems or processes. The JAG IG opined that staff turnovers caused good systems and processes to get lost and not carry over to incoming people and administrations.

The JAG IG has reported complaints about CMTIS being slow, having bad connectivity, requiring frequent screen "switching," lacking "user friendliness," and being unable to generate readily the type reports needed in the field. Field Commands have raised specific system complaints and recommendations to headquarters, and several working groups including both field and headquarters personnel have worked on CMTIS.

We requested JAG IG inspection findings/reports from prior years (1990, 1995, 2000), but they were no longer available. Two inspection reports, one from 2001 and another from 2004 were located. The inspection summary in the 2004 report included one comment relevant to post-trial processing delays. This comment noted a significant case backlog discovered in the prior inspection had been eliminated.

(2) Marine Corps

Prior to the current year, there was no formal inspection program for Marine Corps field legal activities. Field unit supervisors were solely responsible for ensuring proper and timely military justice administration. Article 6 inspections, which the Marine Corps SJA conducts on behalf of the Navy JAG, were the only higher headquarters opportunities to review and evaluate field operations. These visits were not inspections, per se, but offered insight into staffing, facility and operations matters that local personnel briefed to their staff judge advocates.

In late 2009 and early 2010, the Deputy Staff Judge Advocate to the Commandant of the Marine Corps (then pending confirmation as the Marine Corps SJA, and now the Marine Corps SJA) developed a comprehensive inspection checklist for field units, which he furnished to the Marine Corps Inspector General for use in field inspections. In addition, with the new CMS fielded in February 2010, the Marine Corps SJA now has visibility over case processing in the field, and headquarters can now monitor field performance and timeliness in post-trial processing.

m. Authorized Staffing

(1) Navy Judge Advocate General Corps

From 1990 to present, the number of judge advocates authorized in the Judge Advocate General Corps remained at approximately 1 percent of overall Navy end-strength. The actual numbers, however, declined from 922 in 1990, to between 789 and 810 in 2009, including about 441 Reserve judge advocates. General reductions in the post 1990-1991 period accounted for most of the decline in judge advocates between 1990 and 2009.

The reductions occurred despite a dramatic increase in operational law practice and increased demand for deployments and individual augmentee missions. The operational demands and significant deployment obligations impacted military justice significantly. One-third of Judge Advocate General Corps personnel (officer, enlisted, and civilian) are in the Region Legal Service Offices and Navy Legal Service Offices. Navy draws heavily from these offices to fill deployment and individual augmentee requirements.

The resulting impact on military justice is the reduced time legalmen and judge advocates remain on station performing military justice duties. In the past, a lieutenant generally spent 24-36 months on station. In recent years, when absences due to individual augmentee duties are taken into account, the time on station has declined to 18-24 months on average. And, the average may be closer to 6-12 months at home bases in the continental United States.

Currently, a new first-tour lieutenant generally spends the first 6-12 months at a Region Legal Service Office/Navy Legal Service Office before being assigned for individual augmentee duty. There is a 2-month training requirement prior to deployment, and the assignment lasts 6-12 months, often in Iraq, but increasingly in Afghanistan. (The Navy was given responsibility for supporting a National Afghan legal school). As of March 2010, 138 judge advocates were performing individual augmentee duties, primarily supporting Task Force 134 (Detainee Operations in Guantanamo Bay, Cuba), but requirements for detainee operations in Afghanistan and the Office of Military Commissions were increasing.

A 2008 Center for Naval Analyses study affirmed the increased workload. According to the report:

> . . . the status quo situation is marked by personnel working excessive hours (especially officers), work not being done at all times to the level of quality desired . . . and a backlog of work developing. Furthermore, the decline in military-justice-related work could reverse itself and trend upward again. This would leave many RLSO and NLSO commands severely undermanned, especially if military justice workload returns to pre-2003 levels. In addition, there are currently about 70 JAG IAs in Iraq, Guantanamo Bay, at sea and in Afghanistan. Should another conflict arise, JAG would be hard pressed to come up with more IAs to field.

In assessing the costs and risks of the "status quo," the report noted "modest to significant stress" evident in the Region Legal Service Office commands, and a developing work backlog, which also impacted work quality. The risk was assessed as "especially acute" in operational or joint

field commands. Their very long work weeks indicated a need for sizable staffing increases to manage the expected workload. The report summarized the "status quo" manpower standard as representing a "great deal of risk to the Navy," and if selected as the manpower standard, the Navy Judge Advocate General Corps would be "undermanned." The Marine Corps was not included in this study.

(2) Marine Corps Judge Advocates

Current Marine Corps strength is approximately 204,000 Marines, including 390 to 440 judge advocates at any given time. Judge advocate authorized strength has remained fairly static for the last 20 years, while actual judge advocate numbers fluctuated from a 450 high in 1990 to a 360 low in 1999. In 2010, the number is 469,[32] up from 407 and 409 in 2008 and 2009, respectively. Judge advocate authorizations were 393 for FY 2008, increased to 411 and 432 for FYs 2009 and 2010, respectively, and are projected at 448 and 460 for FYs 2011 and 2012, respectively.

Deployment and individual augmentee duties also have been a significant resource strain, and the demand for non-traditional positions has been growing. Individual augmentee duties were not factors when Marine Corps judge advocates were originally resourced, and involve duties not even existing at the time. Losses to deployment have reduced home station capability to handle the court-martial caseload from each unit, which is in addition to the court-martial caseload remaining when the unit deploys. Some case law decisions listed in Appendix I refer to problems resulting from high deployments leaving military justice units understaffed.

n. Standards and Processes

As described previously, Navy and Marine Corps decentralized operations led to considerable field unit autonomy in managing unit responsibilities. There are relatively few Service-directed standards or processes beyond the guidance in the Uniform Code of Military Justice and the Manual for Courts-Martial.

The extensive processing goals and checklists in JAGINST 5810.1, "Management Goals for Processing Navy Courts-Martial," September 15, 1984, and JAG/CNLSCINST 5814.1, "Post-Trial Checklists," December 2, 1992, have not been used in years, and management time goals have been rescinded without replacement, leaving the *Moreno* timelines as the only processing times currently under scrutiny. Field units monitor pre-trial speedy trial requirements, when pre-trial restraint is an issue.

In both current and prior organizational structures, processes have not been uniform or standard across the field elements. Process effectiveness depends on the administrative skill and experience of individual supervisors charged with the various justice processes. Most importantly, a particular unit's effectiveness in military justice administration depends heavily on the initiative and supervision exercised by the individual unit commander, staff judge advocate, and director/officer-in-charge. CMTIS does not afford needed visibility over internal unit processes, necessitating various individualized unit tracking mechanisms developed locally, which depend on the computer skills of assigned personnel.

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[32] Includes 38 judge advocates that graduated from the Naval Justice School on October 8, 2010.

o. Senior Official Perspectives

In our initial meeting with the Navy JAG, Vice Admiral Houck, he shared his belief that the Navy Judge Advocate General Corps drifted away from its military justice roots in the late 1980s/early 1990s, particularly after the first Gulf war. Operational and international law assignments became the more sought after duty and focus.

He affirmed that leadership must be much more engaged in detailing the right people with the right training, in sufficient numbers, and armed with good processes and data tracking capability. He also acknowledged his organization's significant problems in developing a truly useful and adequate automated case management system. He indicated the Marine Corp's new CMS might ultimately be the better system for case tracking, but observed it was too early to assess the system's full utility.[33]

The Navy CMTIS was originally developed as a workload management and measurement tool, not a case tracking tool; therefore, it has several shortcomings. Among the difficulties encountered was funding necessary system upgrades. Vice Admiral Houck cancelled this year's Navy-wide Judge Advocate General's conference to fund new system modifications.

In another interview, a Navy officer characterized the leadership culture in the Navy as one of "control by negation." This phrase refers to the traditional way in which senior commanders manage the historically autonomous, globally-dispersed Navy operations in which a ship's captain is authorized to act with virtually unchecked independence. This independence permeates the Service's operating culture and explains, in some measure, how the post-trial delay problems evolved.

According to the Navy JAG, three other factors impacted post-trial processing: inadequate staffing; a command focus on getting to court/sentence, not on post-trial events; and inadequate visibility over field case management. Absent an ability to "see" how field units were doing, field commanding officers were relied upon to run their organizations in an effective manner without higher headquarters oversight.

A retired Navy judge advocate and former appellate judge on the Court commented that, when working as a staff judge advocate beginning in 1975, he did not have delay problems because he made military justice his first priority; however, the Navy's many special court-martial convening authorities (around 2000 at the time, most on ships moving around the world) made tracking cases and issues difficult. He commented it could be "quite" difficult to "track down" a convening authority when most commanded ships, did not have staff judge advocates assigned, and might have only a legalman, or additional duty yeoman with collateral justice duties to assist in exercising military justice responsibilities.

As an appellate defense counsel, he recalled seeing charge sheets riddled with error because non-lawyers and enlisted members without legal training often drafted the documents. He also recalled serving as Legal Counsel to the Chief of Naval Personnel in the late 1990s, when the

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[33] In our final meeting with him before preparing this report, Admiral Houck indicated he is awaiting benchmarking results and recommendations from the ongoing Center for Naval Analyses study, but does not now believe the Marine Corps CMS would be a good replacement for CMTIS.

convictions in a series of courts-martial were set aside because the records had been "lost." Among the consequences, every affected Service member was due back pay, for years in some cases. The Navy personnel command had to find millions of dollars to cover the payments.

One early recollection from his time as both an appellate defense counsel and appellate judge involved the policy allowing lieutenant assignments to appellate government and defense counsel positions as their first duty assignments upon completing basic Naval Justice School training. The assignments were not good for these junior judge advocates who had neither tried cases nor matured as officers.

Major General Ary, the Marine Corps SJA, remarked that Marine Corps judge advocates had also drifted from the core military justice function because the "fast track" to good jobs and promotions had, over the years, shifted to duty in operational billets. This shift led to an environment of inattention and decline in processing performance, which led to long delays. Additionally, the sheer military justice case volume and decentralized organizational structure contributed to post-trial problems.

Major General Ary pointed out demands on the Marine Corps to assume more traditional Army-land roles in the Iraq conflict dramatically increased the demand for judge advocate services in operational billets. Frequent deployments and numerous individual augmentee requirements reduced staffing at ashore legal centers. Captains, who comprise the bulk of military justice judge advocates in the Marine Corps, experienced reduced litigation opportunities, leading to a growing experience gap. Traditionally, first assignment captains spent 2-3 years learning their basic trade, but this time has been cut nearly in half for some judge advocates due to deployment demands.

Additionally, Marine judge advocates have experienced a grade compression impact from the promotion process. In 1991, the average time for a Marine to become a major was 12 years and 4 months. In FY 2000 and FY2001, this time was 9 years and 7 months. In FY 2011, the time will be 10 years and 9 months. The reduced time in rank narrows the junior officers' experience base needed to move into a mid-level leadership position.

Given the demands for battlefield deployments, the best judge advocates are generally deployed to the battlefield. Additionally, the judge advocate community has been tasked with providing judge advocates for command support in lower echelon organizations without judge advocate positions in their historical organizational structures, e.g., the Marine Corps is now embedding judge advocates in battalions and regiments.

The post-trial process lacked the interest shown in the pre-trial process, and the primary "push" in the pre-trial process was to "get to sentence" on an accused. The Marine Corps SJA commented that, organizationally, the Marine Corps had always operated with a trust attitude, trusting people were doing their jobs. Since assuming the present position, the Marine Corps SJA has undertaken several initiatives to improve and monitor performance, thereby shifting to a "trust but verify" approach.

We discussed Marine Corps organizational structures in the field, primarily at the Legal Service Support Sections and Law Centers visited. The Marine Corps has three Legal Service Support Sections, one for each Marine Expeditionary Force. They provide military justice and administrative law services to the command, and their justice operations are organized into separate trial shops, court reporter shops, and review shops.

This separation increases the opportunity for pre- and post-trial delays because no single system tracks case movement through the field process. Without a common operating system for staff judge advocates, review officers, and officers-in-charge to monitor, oversight was as much or little as local supervisors and officers-in-charge chose to exercise. Existing tracking system/mechanisms were completely internal to the individual shops. Prior to the Marine Corps CMS fielding in February 2010, no central tracking system/mechanism existed to capture case activity in the Marine Corps, or across individual field organizations.

Another senior Marine official told us military justice was a chief focus for Marine Corps attorneys before September 11, 2001, and many joined the Marine Corps to litigate criminal cases. Due to the high caseload and litigation opportunities, Marine Corps judge advocates excelled as litigators. The same was true with Navy judge advocates. In trial and defense counsel roles, Marine Corps judge advocates interacted with Marine Corps commanders on military justice issues. Expertise in operational law was, prior to September 11, not considered a core competency. That situation changed.

Operational law and international law assumed greater roles in the Marine Corps judge advocate community as the Marine Corps became involved in two wars and judge advocates were assigned down to the battalion level in war zones. In contrast, the military justice caseload declined and with that decline, trial advocacy and military justice competency suffered.

Appendix L. Other Initiatives

Other Navy Initiatives:[34]

- May 23, 2007: The Navy JAG sent a memorandum to all staff judge advocates in the Navy addressing post-trial errors and advising that this area would be included as an Article 6 inspection item; he requested that the Chief Judge of the Navy-Marine Corps Court of Criminal Appeals include staff judge advocate names in court opinion "headnotes," which is now being done.
- 2007-2008: The Navy JAG selected an O-6 (Captain) military justice "Expert" as Director of the Criminal Law Division (Code 20), hired two experienced civilian litigators to assist with complex and capital cases, and re-established "Newsmailers" (current topic informational bulletins).
- 2008: The Navy JAG imposed a limitation on detailing appellate government and defense counsel to individual augmentee duty.
- 2009: A "Case Evaluation Project" was completed that assessed deficiencies in litigation training and performance, with emphasis on sexual assault cases and specific curriculum recommendations to the Naval Justice School.
- 2009: the "detailing cycle" focused on filling military justice litigation career track billets, increasing the fill rate from 40 percent to 57 percent.
- 2009: Navy Judge Advocate General Reserve program was reorganized into three "pillars of support expertise" in the Reserve Component Judge Advocate Total Force Structure (JAGINST 1001)—the objective was to assign Reserve officers with significant military justice or civilian criminal justice experience to positions supporting military justice.
- 2009: the Defense Counsel Assistance Program (DCAP) was adopted as a priority action item for 2010.
- 2009: JAGINST 1150.2A requires filling specific billets with military justice specialists or experts—the requirement applies to four judges on the Court, including the Chief Judge.
- 2009: the Military Justice Oversight Council (MJOC) was established. The Judge Advocate General of the Navy chairs the council, which is a general/flag officer forum for reviewing military justice in the Navy and Marine Corps. The council has been meeting monthly to review structural, resourcing and other matters that affect delivering timely and effective military justice services and evaluate case progress. A SECNAV instruction formalizing the council is in development.
- 2009: The Judge Advocate General of the Navy approved reporting "triggers" for briefing military justice cases to the Military Justice Oversight Council. The triggers include: cases at 75 days without convening authority action; cases not docketed with the Court after 150 days (the Marine Corps monitors CMS to identify its cases falling in the 75 day and 150 day parameters); cases docketed with the Court longer than a year; cases in panel longer than 6 months (if the appellant is confined); and any case in its 5th time extension. These triggers are documented in Council meeting minutes.

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[34] In commenting on the draft report, the Navy JAG submitted a list categorizing and expanding upon his overall initiatives to improve the military justice system. The list is included in Section VII, pages 102 - 106.

- 2009: NAMARA Code 40 procedures were modified to include comprehensive court "mandate" case tracking in an Excel spreadsheet; field staff judge advocates are given this tracker, plus a list showing the records of trial Code 40 received in the previous month, to help assure record control.
- 2009: trial and appellate judges were given formal guidance on *DuBay* hearings.
- 2010: The Navy JAG commissioned a new military judge "survey of counsel" scheduled for completion in July 2010.
- 2010: Developing a Navy and Marine Corps case tracking system was adopted as a JAG 2010 priority action item.
- 2010: Drafted a SECNAV instruction (still in review) requiring an annual report on the state of military justice to the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps.
- March-June 2010: After the *Bartolo* case surfaced, the Navy JAG directed an exhaustive audit of all relevant Navy and Marine Corps records to identify and locate any case due for appellate review that might be unaccounted for or missing. That review has been completed and there is high confidence every appellant case was accounted for.
- June 2010: Effective July 1, 2010, the Navy JAG intends to establish the Defense Counsel Assistance Office under the leadership of a captain, a Military Justice Career Track-designated officer, in the Judge Advocate General Corps who will report to the Commander, Naval Legal Service Command. At the same time, he intends to formally establish a Trial Counsel Assistance Office under the tactical control of the Assistant Judge Advocate General (Operations and Management). In addition, he will continue evaluating the feasibility of establishing a separate defense command.
- June 2010: The Judge Advocate General of the Navy directed all JAG IG inspections of Region Legal Service Offices and fleet units would include an officer or civilian with military justice expertise. Scheduling to ensure subject matter expertise in both military justice and legal assistance missions for inspections at Naval Legal Service Offices are also in development. The Judge Advocate General directed the JAG IG to hire a full-time staff assistant to support the office's administrative duties and certain investigative functions, enabling the JAG IG to focus on the critical substantive aspects of his job. Vice Admiral Houck is also working with Major General Ary to establish a common set of Article 6 military justice inspections items across the Navy and Marine Corps. This initiative will include soliciting stakeholder input and examining best practices.
- June 2010: A new instruction will be developed outlining detailing policy for military justice assignments, such as judicial tour lengths, requirements for attending and passing the Military Judge's course, a requirement for staffing NAMARA with at least second-tour officers, and assigning Reserve Component officers to military justice, including direct assignments to Appellate Defense Division (Code 45) and Appellate Government Division (Code 46).
- June - September 2010: The Navy JAG will oversee a zero-based review of military justice policy and execution directives in the Department of the Navy to ensure current practices are institutionalized and practitioners have ready references for guiding their practice and ensuring compliance with relevant requirements. Instructions will be reviewed and re-issued to coincide with the next annual update cycle for the Manual of the Judge Advocate General (JAGMAN), which begins October 1, 2010. Additionally, prospective commanding officers and

executive officers will be familiarized with the range of military justice instructions and requirements at an annual course.

Other Marine Corps Initiatives:

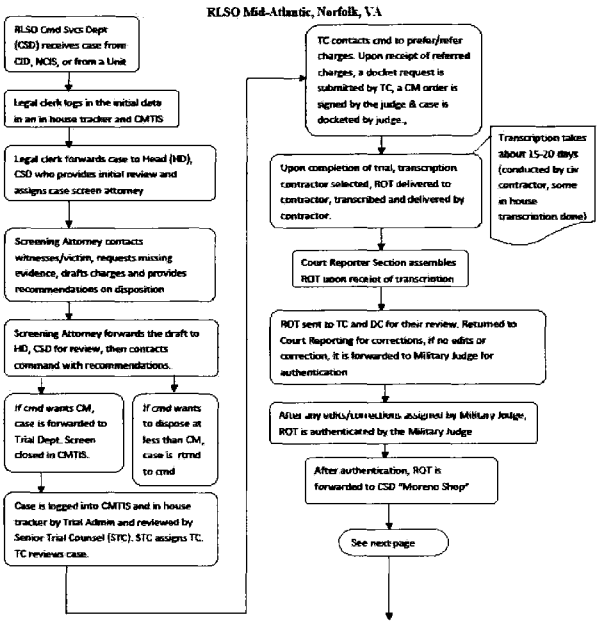
- 2009: Work began to identify inefficiencies in court-martial administration.
- January 9, 2010: The Deputy Staff Judge Advocate sent a memorandum to all Marine Corps judge advocates discussing standards for court-martial post-trial processing, outlining problem areas, reiterating the *Moreno* standards, and advising them to focus on three specific areas: the Case Management System, standardization, and inspections.
- February 2010: Fielded the upgraded Case Management System (CMS).
- 2010: Increasing the Information Technology section to four people--civilian chief with two enlisted members and one civilian employee.
- 2010: Training Marine field legal offices on CMS use and operations. (The training had been completed at the two Legal Service Support Sections that we visited.)
- 2010: Expanding CMS to include administrative separation actions.
- 2010: Created the Marine Corps-specific Trial Counsel Assistance Program under which a litigation expert at Marine Corps headquarters (currently, a field-grade officer) can answer questions from and advise trial counsel in the field. The program will include a GS-15 Sexual Assault and Complex Litigation Expert position, and the Staff Judge Advocate to the Commandant is considering a program expansion to have three field-grade trial counsel with proven military justice expertise at the regional level for consultation with local trial counsel. The program currently has military justice information for trial counsel throughout the Marine Corps, via web site, share point, blogs, and practice advisories.
- 2010: Plan to standardize and develop more common processes and methodologies--recent decision that all court reporters will work for and report to the Review shops to stop previous inconsistency under which reporters worked for either the Trial Section, Review Section, or military justice officer.
- 2010: Considering a proposal to standardize and develop a common curriculum for Marine members at the Naval Justice School that includes initial CMS training, rather than have Marine members learn CMS on the job after arriving at an installation.
- 2010: Strengthened focus and inquiry areas for Article 6 visits-- pursuant to authority in Article 6(a), UCMJ, and SECNAVINST 5430.27C, the Staff Judge Advocate to the Commandant visits all Marine Corps installations to assess the legal services provided. Since there was no standard inspection process, the current Staff Judge Advocate to the Commandant developed uniform information requirements for use in these visits.
- 2010: A new Legal Services Training and Readiness Manual was developed (signed May 13, 2010) establishing Core Capability Mission Essential Tasks for readiness reporting, and requiring standardized training for Marines assigned to Marine Corps legal services organizations. The manual includes formal taskings for schools that prepare personnel for service in the Marine Corps Legal Services Occupational field. After entry level training, the manual will be used periodically to evaluate a Marine's proficiency in the tasks required for the 44XX military occupational specialty.
- 2010: Standardized Forms/Hot Docs 2009. In conjunction with implementing the CMS, the Staff Judge Advocate to the Commandant began a process to capture and consolidate

forms, document templates, checklists and standard operating procedures, with a view toward standardization where appropriate. In April 2010, fleet testing began on "Hot Docs 2009" software, including all the forms and templates created, at legal offices throughout the Marine Corps. The testing is expected to last 4 to 6 months.

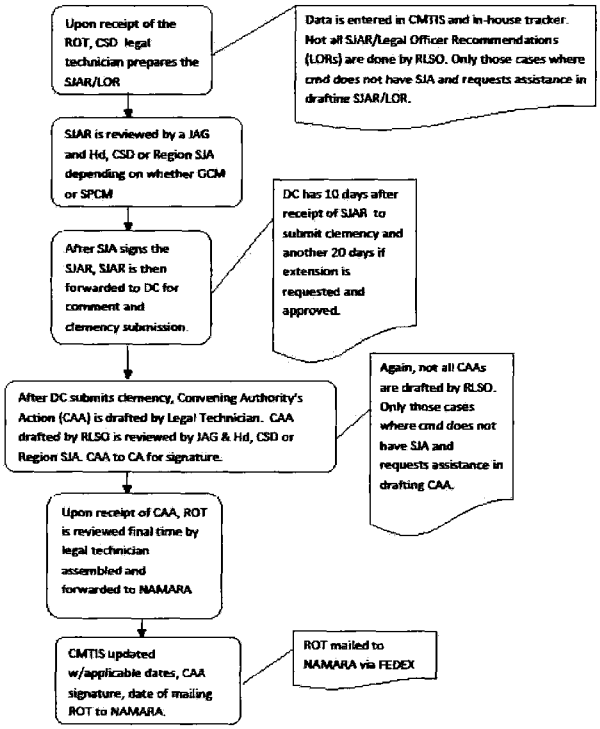
- May 25, 2010: Reserve Legal Services Support Section -- Based on a 2010 Marine Corps SJA initiative, in FY 2011, the Marine Reserve's Legal Services Support Section, which is currently part of the Marine Corps Mobilization Command, will formally transfer to the Staff Judge Advocate to the Commandant. The change will give the Marine Corps SJA operational sponsorship and management over Marine Reserve judge advocates that reside in the Reserve Legal Services Support Section, and further enhance integrating Reserve judge advocates into the total force, which is critical in light of operational demands.
- 2010: Electronic Record of Trial. The Marine Corps judge advocate community and the Appellate Government Division (Code 46) began a pilot project at Camp Pendleton to test transmitting and using electronic records of trial. The project is ongoing. The first electronic record of trial transmission to NAMARA has occurred, and business rules to govern the process are in development.
- Regionalize Post-Trial Processing. The Marine Corps judge advocate community is examining possibilities for streamlining review office structures throughout the Marine Corps. The intent would be to merge existing offices at a regional level to reduce moving parts, consolidate resources and expertise and, thereby, gain efficiencies and accuracy.

Appendix M. Field Office Process Flow Charts

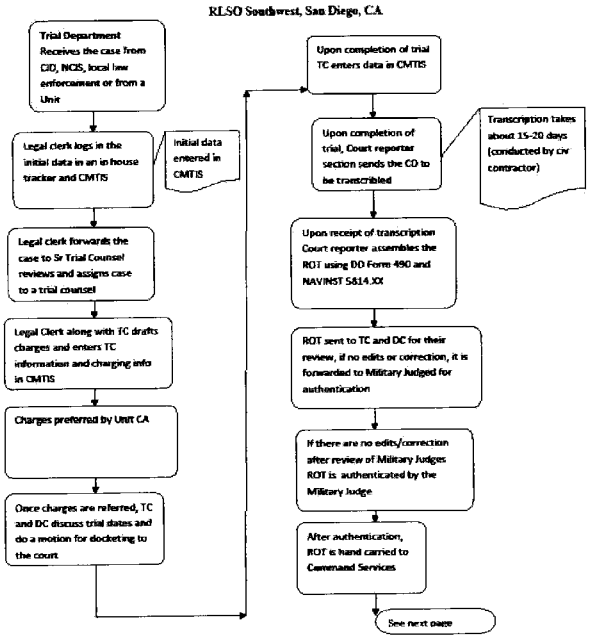
Navy RLSO Mid-Atlantic, Norfolk, VA



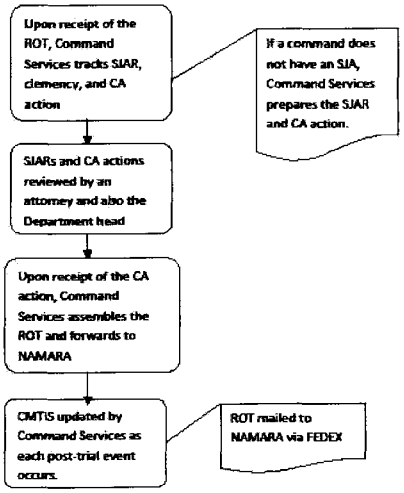
RLSO MidAtlantic, Norfolk, VA (continued)



Navy RLSO Southwest, San Diego, CA

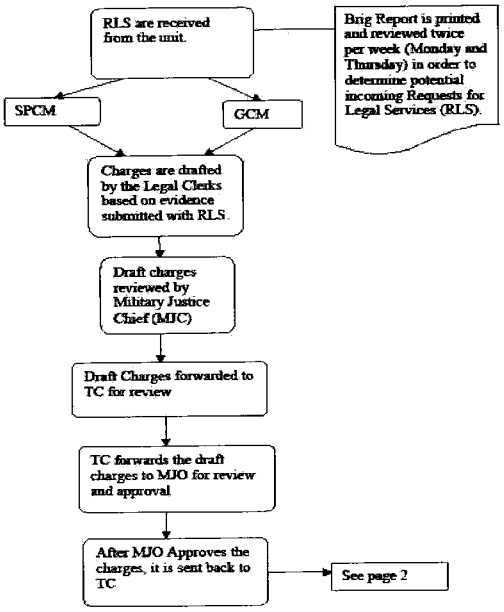


RLSO Southwest, San Diego, CA (continued)

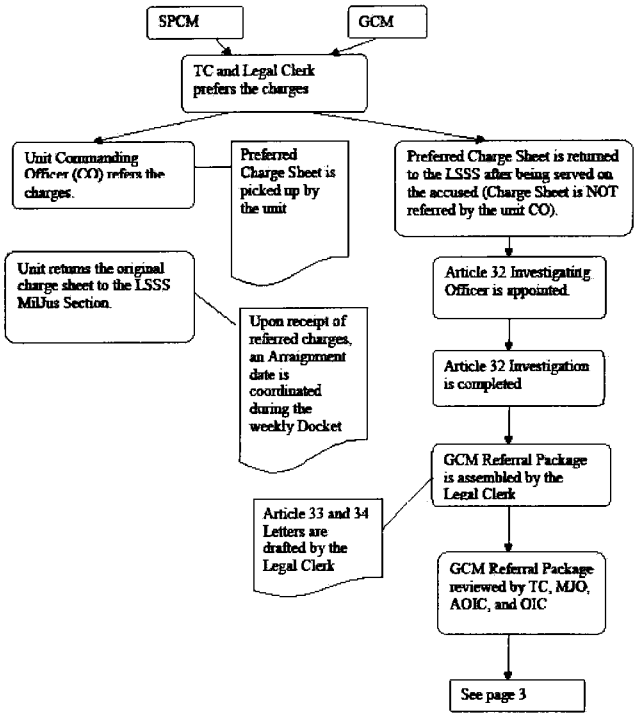


Marine Corps LSSS Camp Lejeune, NC

2nd MLG, LSSS, Camp Lejuene, NC Processes



2nd MLG, LSSS, Process, Camp Lejeune, NC (continued page 2)



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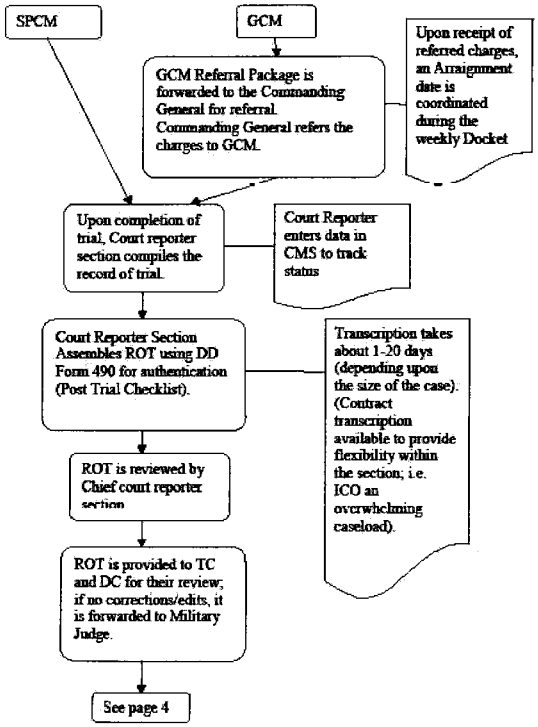

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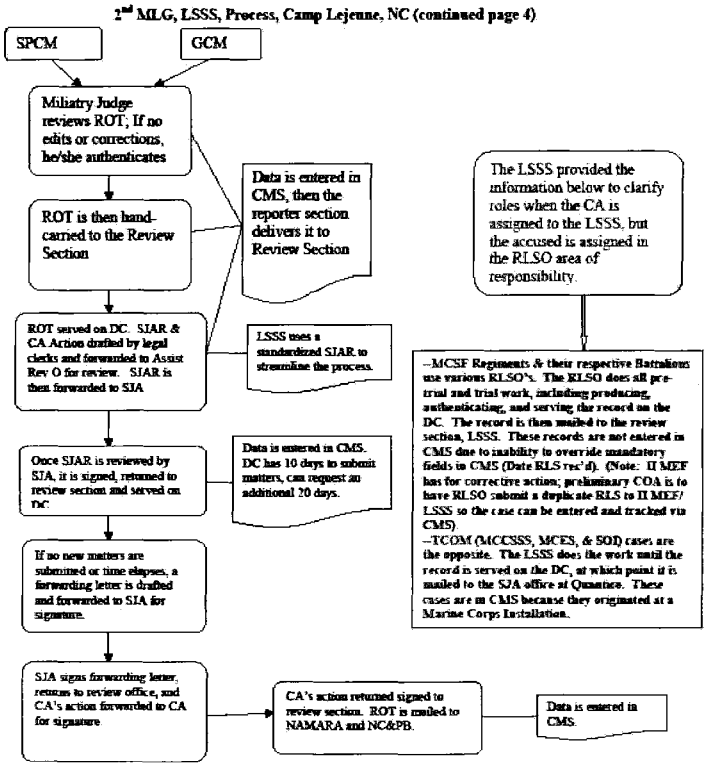
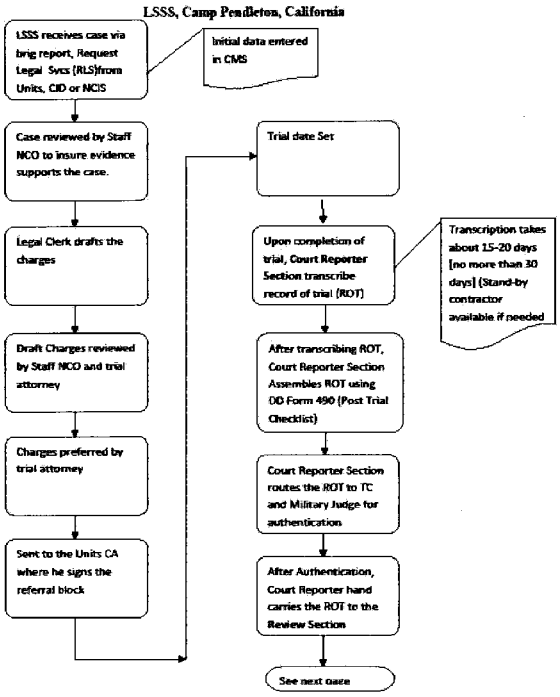
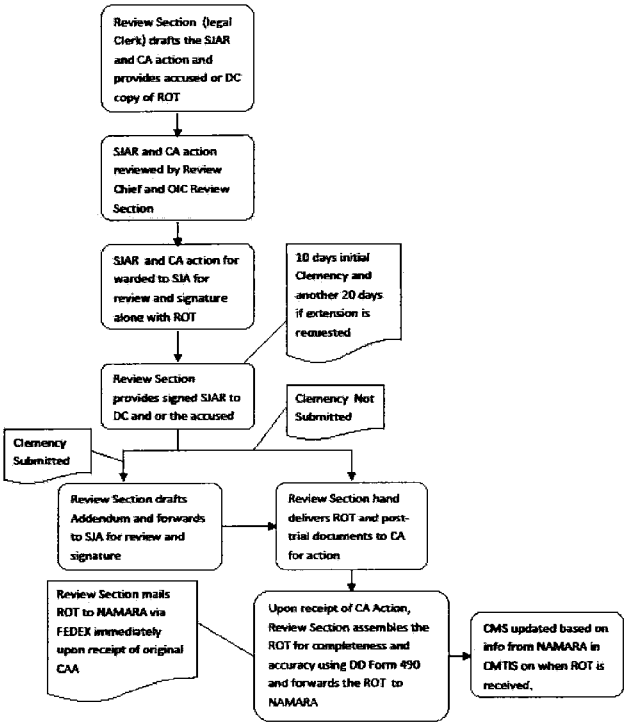


Marine Corps LSSS Camp Pendleton, CA



LSSS, Camp Pendleton, CA (continued)



Appendix N. Case Management/Electronic Case Filing (CM/ECF) System

The CM/ECF measures time and "date stamps" all documents received in the system. Attorneys enter data while working in the system. All case documents are loaded in the system, affording immediate access to any party needing access. The system can calculate the time elapsed between events, for a single case, or for multiple cases. Everything generating a data entry is time measurable.

All documents associated with the case are part of the official record of trial, which is located in CM/ECF and available real-time as filings are completed and judges enter rulings. The system's automatic service and notice function records when (date and time) a pleading is filed and electronically notifies all parties to the litigation. This function allows the responsible judge to issue an order directly in the system, and the responsible counsel to receive immediate notification the order was issued.

Everything associated with a trial (cradle-to-grave) is uploaded, recorded, transmitted, and stored electronically in the system. The case "view" is a "docket sheet" showing each step in the trial to date, making case status determinations easy without searches or having to view multiple screens.

The CM/ECF can be programmed to include standard forms for pre-trial, trial, and post-trial events. This capability includes standard forms for staff judge advocate recommendations (SJAR) and convening authority actions, which the responsibly party can complete in the system.

The system can also be programmed to aggregate case data and generate desired reports, such as a report on all sexual assault cases tried in a given period, or a report on cases exceeding post-trial processing goals. In addition, the system can be programmed to generate automatic reminders/warnings when actions on pending cases exceed processing time goals. For example, the Administrative Office, Federal Courts, uses a warning feature to alert the judge when a motion becomes 90 days old and has not been acted upon.

Other system features include:

- user name and password acts as digital signature on documents;
- 24-hour access to case file documents over the internet;
- ability to file pleadings electronically with the court;
- documents are automatically time stamped and marked as filed, from pretrial through appeal(s);
- automatic email notification when case activity occurs;
- ability to download and print documents directly from the court system;
- concurrent, multiple party access to case files;
- savings in time and expenditures for attorneys;
- expanded search and reporting capabilities; and

- easy to use -- based on standard internet browser.

System benefits include:

- attorneys nationwide have used successfully;
- no delays or added expenses associated with mail or courier services;
- speeds delivery and allows easier case activity tracking;
- reduces physical storage space needs and document processing times;
- uses standard internet software and established "PDF" format;
- is secure and reliable;
- court dockets are immediately updated and available;
- compiles documents electronically for appellate review;
- centralizes storage for all military justice pleadings;
- reduces needless document duplication;
- efficiently tracks aging cases;
- ensures that records of trial are not lost;
- provides appellate court with detailed summary, docket entries and case history;
- allows all case parties (including original trial and defense counsels) to track case from beginning to end;
- data can be used in custom reports;
- email notification when all case filings occur;
- electronic filing serves as certificate of service;
- attorney and case file mobility;
- can keep up with cases in and out of the office;
- improved ability to supervise green attorneys;
- ability to search/view pleadings (Service-wide), trial through appeals; and
- filings and docket entries serve as metrics.

Potential difficulties in adapting the system for military use:

- spearheading development (time investment is somewhat unknown);
- working out kinks – Service-specific interoperability requirements;
- little support from the Administrative Office, U.S. Courts – the Veterans Claims Court needed legislation to obtain the system, but the Administrative Office responded favorably to another Service's interest;
- system management (personnel);
- Navy Marine Corps Internet/Service-specific admin requirements; and could add additional layer to implementation.

Appendix O. Judge Advocate Promotions - Precept Language

Since FY 2007, the Navy used the following precept language in judge advocate promotion boards for O-4 (lieutenant commander), O-5 (commander) and O-6 (captain) officers. The language proved successful in enhancing promotion rates for military justice practitioners.

> Military justice plays a critical role in the maintenance of good order and discipline and accountability in the Navy. Efficient and effective military justice litigation requires experienced, well-trained judge advocate litigators ... In determining which officers are best and fully qualified, you shall favorably consider the Navy's need for senior officers who have been designated as Military Justice Litigation Experts and Specialists, giving equal weight to their contributions in military justice litigation that ordinarily would be given to other members of the JAG Corps community who have followed more traditional career paths.

Unlike the Navy, Marine Corps judge advocates compete for promotion with officers in all career fields and have performed well historically. Marine Corps promotion boards have generally recognized the experience gained in military justice positions.

The Marine Corps uses special precept language to advise promotion boards when a career field experiences a "critical shortage" (below 85 percent). The following special precept language may be used in a promotion board to highlight a shortage in the judge advocate specialty.

> Skill guidance: Within this board's charter to select those officers who are 'best and fully qualified,' the board shall give due consideration to the needs of the Marine Corps for officers with particular skills. At this time the needs of the Marine Corps reflect a critical shortage (below 85%) of officers in the grade of . . . in the following skill areas:

The table below shows the overall promotion rates for Marine Corps majors, lieutenant colonels, and colonels during recent fiscal years as compared to the rates (both percentage and actual number) for positions in the judge advocate Military Occupational Specialty. As can be seen in the table, major and lieutenant colonel judge advocate promotions generally were better than the overall rates, but colonel judge advocate rates generally were not:

- the promotion rate for major judge advocates was higher than the rate for majors overall in five (80 percent) of the six fiscal years reported;
- the rate for lieutenant colonel judge advocates was higher than the rate for lieutenant colonels overall in every (100 percent) fiscal year reported; and
- the rate for colonel judge advocates was higher than the overall colonel rate in two (33.3 percent) of the six years reported, and were lower in the remaining four years (66.7 percent).

We cannot attribute the differences reported to precept language usage. The rates for majors and lieutenant colonels were higher even though precept language was not used, and generally were lower for colonels even when precept language was used.

Promotion Results
Marine Judge Advocates Compared to Overall for Rank

FY	Major			Lieutenant Colonel			Colonel			Precept Language Used **
	JA MOS (a)	All MOS (b)	Dif.* (a)-(b)	JA MOS (c)	All MOS (d)	Dif.* (c)-(d)	JA MOS (e)	All MOS (f)	Dif.* (e)-(f)	
2011	87.1% (27 of 31)	82.8%	4.3%	81.8% (18 of 22)	65.6%	16.2%	50.0% (2 of 4)	53.6%	-3.6%	**No**
2010	90.6% (29 of 32)	87.6%	3.0%	88.9% (16 of 18)	71.8%	17.1%	64.3% (9 of 14)	53.4%	10.9%	**Yes**
2009	78.4% (29 of 37)	87.0%	-8.6%	90.9% (10 of 11)	70.6%	20.3%	33.3% (4 of 12)	50.5%	-17.2%	**Yes**
2008	90.0% (18 of 20)	87.2%	2.8%	82.4% (14 of 17)	65.0%	17.4%	12.5% (1 of 8)	51.0%	-38.5%	**No**
2007	90.0% (27 of 30)	86.5%	3.5%	75.0% (9 of 12)	62.5%	12.5%	23.5% (4 of 17)	48.4%	-24.9%	**No**
2006	92.9% (26 of 28)	81.7%	11.2%	78.9% (15 of 19)	67.2%	11.7%	80.0% (4 of 5)	50.8%	29.2%	**Yes**

* Percentage point difference
** Used in colonel promotion boards only in the fiscal years covered

Appendix P. Report Distribution

Office of the Secretary of Defense
General Counsel, Department of Defense
Assistant Secretary of Defense (Legislative Affairs)

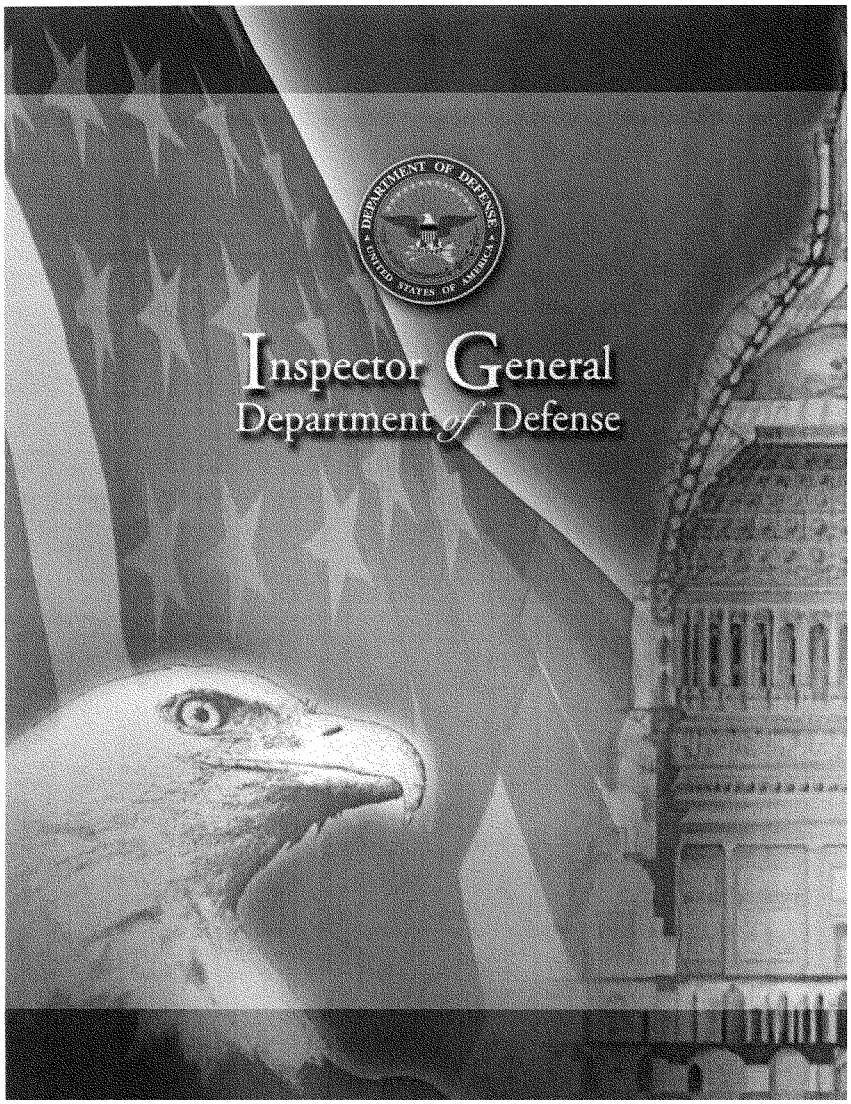
Department of the Navy
Secretary of the Navy*
Department of the Navy, Office of the General Counsel
Judge Advocate General of the Navy*
Naval Inspector General
Staff Judge Advocate to the Commandant, United States Marine Corps*

Department of the Army
Judge Advocate General of the Army

Department of the Air Force
Judge Advocate General of the Air Force

Congressional Committees and Subcommittees, Chairman and Ranking Minority Member
Senate Subcommittee on Defense, Committee on Appropriations
Senate Committee on Armed Services
Senate Committee on Governmental Affairs
House Subcommittee on Defense, Committee on Appropriations
House Committee on Armed Services
House Committee on Government Reform

*Recipient of draft report


DEPARTMENT OF DEFENSE
UNITED STATES OF AMERICA
Inspector General
Department of Defense

Senator WEBB. The DOD IG concluded that, "Serious post-trial processing problems persisted for at least the last two decades," and found that, "Process failures occurred at almost every segment of the post-trial process as a result of inadequate leadership, supervision, and oversight."

In addition to requiring the DOD IG review, the committee included a provision in the National Defense Authorization Act for Fiscal Year 2010 establishing an independent panel to review the judge advocate requirements of the Department of the Navy. The panel examined the functions of judge advocates in the Navy and Marine Corps and found that both Services had failed to increase judge advocate requirements to keep pace with the increasing requirements for legal support to commanders operating in an increasingly complex and intense legal and policy environment.

The final report of the independent panel to study the judge advocate requirements of the Department of the Navy, dated February 22, 2011, will be included in this record.

[The information referred to follows:]

INDEPENDENT REVIEW PANEL TO STUDY THE JUDGE ADVOCATE REQUIREMENTS OF THE DEPARTMENT OF THE NAVY

FINAL REPORT

FEBRUARY 22, 2011

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Preface

The Secretary of Defense appointed this Independent Panel (the Panel) in accordance with Section 506 of the Fiscal Year 2010 National Defense Authorization Act to review the judge advocate requirements of the Department of the Navy. Congress mandated the Panel to "carry out a study of the policies and management and organizational practices of the Navy and the Marine Corps with respect to the responsibilities, assignment, and career development of judge advocates for purposes of determining the number of judge advocates required to fulfill the legal mission of the Department of the Navy." Specifically, Congress directed the Panel to review:

- emergent operational law requirements of the U.S. Navy and Marine Corps;
- new requirements to support the Office of Military Commissions;
- new requirements to support the disability evaluation system;
- requirements of the Department of the Navy for the military justice mission;
- whether additional authority for the Judge Advocate General over manpower policies and assignments of judge advocates in the U.S. Navy and Marine Corps is warranted;
- directives issued by the U.S. Navy and Marine Corps pertaining to shared missions requiring legal support;
- career patterns for Marine judge advocates to identify and validate assignments to non-legal billets; and
- other matters as appropriate for the purposes of the study.

The Panel complied with the Federal Advisory Committee Act (FACA), conducting five public meetings and archiving more than 200 documents. The Panel initiated its review by receiving a full day of testimony from Vice Admiral (VADM) James W. Houck, JAGC, USN, Judge Advocate General of the Department of the Navy, and Major General Vaughn A. Ary, USMC, Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) on the policies, management, and organizational practices of the U.S. Navy and the Marine Corps with

respect to judge advocates within the Department of the Navy. Subsequently, the Panel received testimony and information from several witnesses, including:

- VADM Bruce E. MacDonald, JAGC, USN (Ret.), Convening Authority for Military Commissions, testified about the present and future personnel requirements for the Office of Military Commissions;
- Dr. Neil B. Carey and Dr. Donald A. Birchler, Research Analysts from the Center for Naval Analyses (CNA), testified and provided information about the two-part CNA study titled *An Analysis of Navy JAG Corps Future Manpower Requirements (CNA Study)* on U.S. Navy judge advocate manning;
- Captain (CAPT) Daniel E. O'Toole, JAGC, USN, Chief Judge of the Department of the Navy; Colonel (Col) Peter B. Collins, USMC, Assistant Judge Advocate General (Military Justice); and CAPT Michael J. Boock, JAGC, USN, Commanding Officer, Naval Justice School, testified about the execution of the military justice mission in the Department of the Navy;
- General (GEN) David H. Petraeus, USA, Commander, NATO International Security Assistance Force, and Commander, U.S Forces Afghanistan; VADM Harry B. Harris, Jr., USN, Commander, U.S. Sixth Fleet; VADM John M. Bird, USN, Director, Navy Staff; VADM Robert S. Harward, USN, Commander, Joint Interagency Task Force 435, Afghanistan; Lieutenant General (LtGen) John F. Kelly, USMC, Commander, Marine Forces Reserve and Commander, Marine Forces North; and LtGen Richard F. Natonski, USMC (Ret.), former Commander for U.S. Marine Corps Forces Command, testified from their perspectives as senior line commanders, on emergent operational law requirements;
- CAPT Stacy A. Pedrozo, JAGC, USN, U.S. Navy Military Fellow, Council on Foreign Relations; Col John R. Ewers, USMC, Deputy SJA to CMC; and Colonel Kevan F. Jacobson, JAGC, USA, Director, Legal Center, The Judge Advocate General's Legal Center and School, testified from their perspectives as senior judge advocates, on emergent operational law requirements;

- Senior Executive Service (SES) Michael F. Applegate, Director, Manpower Plans and Policies Division, Manpower and Reserve Affairs, Headquarters, Marine Corps; and Col John R. Ewers, USMC, Deputy SJA to CMC, testified and provided information regarding Marine Corps career patterns, professional development, and promotion; and
- Mr. Robert C. Powers, President, Department of the Navy/Marine Corps Physical Evaluation Board; CAPT Michael I. Quinn, JAGC, USN, Assistant Judge Advocate General (Civil Law); and Lieutenant Colonel Peter C. Faerber, USMC, U.S. Marine Corps Wounded Warrior Counsel, testified and provided information regarding new requirements for the disability evaluation system.

The Panel sincerely thanks everyone who testified or provided information. Without exception, individuals and organizations, in particular, the Department of the Navy legal communities, including the Judge Advocate General of the Navy, the Staff Judge Advocate to the Commandant of the Marine Corps, and the General Counsel of the Navy, were exceptionally responsive to the Panel's requests for information.

The Panel thanks the Office of the Secretary of the Navy for providing administrative support. The personnel assigned to the Department of the Navy, Assistant for Administration were extremely cooperative, supportive, and professional in responding to the Panel's administrative and logistics requirements. In addition, the administrative personnel in the Office of the General Counsel of the Navy provided superb cooperation and assistance in logistical matters, and fund execution and management necessary to the Panel.

Finally, the Panel recognizes and thanks its Staff. Mr. Michael McGregor, CAPT Patrick Neher, JAGC, USN, Major Edward Danielson, USMC, Lieutenant Commander Raghav Kotval, JAGC, USNR, Major Suzan Thompson, USMC, and Lieutenant Lisa M. Senay, JAGC, USN, proved to be exceptionally capable, dedicated and hardworking professionals, and their contributions to the researching and drafting of this report were outstanding. Mr. Michael McGregor from the Office of the General Counsel (OGC) also provided superb guidance as the Staff Director. Ms. Gloria Williams, Executive Assistant, and Mr. Michael Gibson, Secretary, provided exceptional administrative support. Mr. Frank Putzu from OGC did an excellent job as the Designated Federal Officer in ensuring FACA compliance.

Executive Summary

Overview

The testimony provided to the Panel from senior military commanders, notably including General Petraeus, USA, Vice Admiral Harris, USN, Vice Admiral Bird, USN, Lieutenant General Kelly, USMC, Lieutenant General Natonski, USMC (Ret.) and Vice Admiral Harward, USN, uniformly and forcefully underscored the broad and valuable contribution of judge advocates to mission success of U.S. Armed Forces. Although judge advocates comprise only two percent of the officers in the Navy and Marine Corps, it is clear that their contributions far exceed their numbers throughout all phases of military operations from training to post-conflict operations. The Panel believes the demand for judge advocate support will continue, unabated, driven by the increasing complexity and intensity of the legal and policy environment in which commanders are required to operate. In addition, their contribution to good order and discipline, by supporting a just and functional military justice system, is equally noteworthy and essential to the overall well being of the Navy and Marine Corps. Military justice, from complex, high-profile general courts-martial to due process advice and representation during administrative proceedings, needs to remain an important and necessary core function for Navy and Marine judge advocates. In the end, proper manning, resourcing, training, and retention of judge advocates in the Navy and Marine Corps is both a necessity and a cost-effective force multiplier that contributes to the ultimate mission success of both Services.

After careful review and consideration of the Navy and Marine Corps manpower systems, previous manpower studies, testimony by senior commanders and judge advocates, and the assessments of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps, the Panel concludes that there is a requirement in the U.S. Navy for approximately 950 active-duty judge advocates and a requirement in the Marine Corps for a target inventory of approximately 550 active-duty judge advocates. The Marine Corps is on track to maintain a target inventory of 550 over the next five years. The Navy is currently well below 950 judge advocates on active duty. At the end of Fiscal Year 2010, 811 judge advocates were on active duty, and the existing manpower plans for the next five years are to further reduce the number of Navy judge advocates on active duty. Accordingly, the Panel expresses strong

concern over the current and future manning levels for judge advocates in the Navy, believing those manning levels create an unacceptable legal risk to the Department of the Navy.

One of the Panel's most notable conclusions relating to Navy and Marine Corps judge advocate manpower requirements is that the demand for operational law support could approximately double over the next decade. This strong rise in demand is based upon the testimony of senior operational commanders and judge advocates, consideration of the security trends identified in national and military strategy documents, and consideration of actual increased demand for operational law support over the last decade. Judge advocates are playing an ever increasing role in the complex legal and policy environments that currently confront, and will continue to confront, operational commanders.

Also, the testimony and information considered by the Panel makes clear that ensuring appropriate judge advocate training, experience, supervision and oversight is as equally important as ensuring appropriate manning levels. This manifested itself in the Panel's review of community health programs, military justice oversight mechanisms, and proposals to clarify and strengthen the roles of senior community leadership. Assigning judge advocates with the appropriate training and experience for a billet and maintaining appropriate oversight are crucial factors in ensuring that sound and effective legal services are provided and maintained within the Department of the Navy. It is vital that Department and Service leaders continue to support Navy and Marine Corps judge advocate community health initiatives that allow for the recruiting, training, and retention of the right judge advocates.

The Panel heard from several witnesses on the issue of post-trial processing of general and special courts-martial and reviewed the Judge Advocate General's *Report on the State of Military Justice* and the Department of Defense Inspector General's report titled *Evaluation of Post-Trial Reviews of Courts-Martial Within the Department of the Navy*. The Panel is satisfied that the Department of the Navy has taken effective steps to correct deficiencies in the post-trial process. The Panel considers it noteworthy that in 2010 no case was granted appellate relief for a due process violation resulting from post-trial delay. In order to assure continued, focused oversight by leadership on military justice, the Panel urges the Department of the Navy to institutionalize the Military Justice Oversight Council and the requirement for an annual report

on the state of military justice, and to aggressively follow through on finding and adopting a single electronic tracking system for courts-martial across the Department. The Panel believes that all three of these actions are essential in precluding a future failure in the post-trial process.

The Panel reviewed the role of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant and concluded, consistent with positions of the Secretary of the Navy and the Department of Defense Inspector General, that the role of the SJA to CMC for supervision of the administration of military justice and the delivery of legal assistance services within the Marine Corps, and for the professional and technical supervision of Marine judge advocates, should be clarified and strengthened.

The Judge Advocate General and Staff Judge Advocate to the Commandant testified separately and together and it was evident that both have intimate knowledge of their judge advocate communities, the challenges they face, and clear visions of how to maintain and enhance those communities. It was also clear that both recognized the value of teaming with each other and the General Counsel. Both reported strong and supportive relationships with their Service Chiefs, manifested in consistent support for their communities. Both recognized that the future will likely present a period of declining resources within the Department of Defense, resulting in greater competition for those resources and necessitating efforts to find efficiencies. Moreover, this anticipated decline in resources will occur during a period of increasing demand for legal services, particularly in operational law, while needing to maintain core competencies such as military justice. The Panel hopes that this report will assist decision makers in making informed decisions on the best manpower solutions in the context of these resource challenges.

Following is a summary of Sections I through VI of the Report. Section VII provides a consolidated list of the Panel's conclusions and recommendations found in each of these Sections.

Section I. Department of the Navy Legal Communities Today

The Department of the Navy is comprised of three legal communities: the Office of the General Counsel, led by the General Counsel of the Navy, with 708 full-time civilian attorneys; the Navy Judge Advocate General's Corps, led by the Judge Advocate General of the Navy, with 811 active-duty judge advocates and 50 career civilian attorneys; and the Marine Corps Legal

Services community, with 435 active-duty Marine judge advocates and 13 career civilian attorneys, the senior judge advocate serving as the Staff Judge Advocate to the Commandant of the Marine Corps. Although the legal communities in the three Military Departments are structured differently, the Department of the Navy maintains the lowest attorney to end-strength ratio among the Military Departments. The full-time attorney to end-strength ratio for the Department of the Army is 1 to 177; for the Department of the Air Force 1 to 198; and for the Department of the Navy 1 to 263.

Section II. The Navy and Marine Corps Manpower Management Systems

The Navy and Marine Corps have well-developed manpower management systems, operating in the context of the Department of Defense Planning, Programming, Budgeting and Execution System.

In the Navy, Budget Submitting Offices (BSOs) drive the manpower requirements. The BSOs are generally aligned with Echelon II commands, and determine and validate the peacetime and wartime manning requirements, including the number of judge advocates, for themselves and their subordinate commands and staffs. While the Navy Judge Advocate General (JAG) is not a BSO, the JAG does enjoy influence within the BSO system as a "customer" within the Field Support Activity BSO and the Department of the Navy, Administrative Assistant BSO. Those two BSOs account for 62% of judge advocate manning requirements within the Navy.

The Navy JAG also exercises influence in manpower management by assigning a senior judge advocate who serves as the judge advocate community manager within the Bureau of Naval Personnel, and the JAG has the statutory authority to make all judge advocate assignments in the Navy. Nonetheless, the JAG has no direct, formal role or authority in the determination or validation of judge advocate manpower requirements in the Navy.

In the Marine Corps, judge advocate requirements are driven by the Marine Corps' organizational force structure and the requirement to fill a proportionate share of non-legal assignments ("B-Billets"). Structure is determined by the Total Force Structure Division (TFSD) in concert with subject matter experts and functional advocates. TFSD evaluates each unit's mission statement and essential tasks and determines the right skills by grade and quantity

needed to accomplish that particular unit's mission. The process results in Tables of Organization that represent the total personnel required, tabulated by military occupational specialty (MOS), such as judge advocate (MOS 4402), and by grade for each unit in the Marine Corps. These requirements are continuously reviewed through a top-down, bottom-up process to ensure structured requirements meet mission requirements.

Fiscal realities require the Marine Corps to periodically prioritize the force structure to determine what portion of each unit's structure will be authorized for funding. The results of this process are produced bi-annually in the Authorized Strength Report (ASR). The Deputy Commandant, Manpower and Reserve Affairs inputs the ASR into a computer modeling process to create a Grade Adjusted Recapitulation – a forecasted target inventory. This inventory accounts for the number of judge advocates required on active duty to fulfill funded, structured requirements on the ASR, plus a proportionate share of B-Billets, and a certain number of officers as overhead to sustain the force.

The SJA to CMC participates in the Marine Corps manpower system as the Occupational Field Manager and Functional Advocate for the Marine Corps Legal Services community. These roles provide the SJA to CMC a formal, integrated, and meaningful role in Marine judge advocate structure, inventory, recruiting, education, training, and assignments.

Section III. Determining the Number of Judge Advocates Required to Fulfill the Legal Mission of the Department of the Navy

A. No Single Standard

The Panel found no set formula or standard within the Department of Defense or the Department of the Navy for determining the number of judge advocates required within the Military Departments or Services. The Panel did review the numbers of judge advocates in the other Military Departments; however, the legal communities in each of the Military Departments are different, and such comparison can only be used as a benchmark in examining judge advocate manning levels in the Department of the Navy. These benchmarks show that the Department of the Navy has substantially the lowest attorney-to-end-strength ratio of all the Military Departments.

B. Review of Operational Law Requirements

Since September 11, 2001 there has been a substantial growth in operational law requirements. For U.S. Navy judge advocates, the number of permanent operational law assignments has risen from 130 to 223. This reflects, in part, the Navy's establishment of Maritime Operations Centers and Maritime Headquarters at Navy component commands and numbered fleets, which integrate judge advocates into watch staffs. In addition, 584 U.S. Navy judge advocates have served in Individual Augmentee assignments, mostly in Iraq and Afghanistan. For Marine judge advocates, the number of permanent operational law assignments has risen from 20 to 47. In addition, 499 Marine judge advocates have deployed with Marine Corps operational units in support of Operation Iraqi Freedom and Operation Enduring Freedom, and another 108 Marine judge advocates have deployed as Individual Augmentees. This reflects, in part, decisions by senior Marine Corps battlefield commanders to increase the number of judge advocates in the command elements of Marine Expeditionary Forces and assign judge advocates to regiments and maneuver battalions.

This increase in demand for operational law support was detected in 2007 by the Center for Naval Analyses study, *An Analysis of Navy JAG Corps Future Manpower Requirements (CNA Study)*, which concluded that operational law requirements would increase at a minimum rate of 5.9% per year into the near future, doubling over 12 years. Continued growth is portended in the *Quadrennial Defense Review (QDR)*, which describes a landscape filled with increasingly complex legal and policy issues beyond Iraq and Afghanistan. The *QDR* identifies four enduring trends: the rise of new powers; the growth of non-state actors; lowered barriers for dangerous technologies, including missile technologies and weapons of mass destruction; and a competition for resources driven by demographic, climate change, and disease. These trends will contribute to an operational landscape where U.S. forces will have to deal with increasingly multi-dimensional or hybrid threats, threats to global commons including the cyber domain, growing anti-access/area denial capabilities, and weak or failed States that are not able, or are unwilling, to maintain the rule of law.

The Panel concludes that the number of permanent operational law billets in the Department of the Navy can be expected to approximately double over the next decade in

response to the increasing legal intensity and complexity of the modern operating environment. These billets will require forward-deployed judge advocates, integrated in the commander's staff, with the requisite levels of education, training, and experience to provide real-time advice to operational commanders. In regard to education, the Panel specifically believes that the Navy needs to develop and fund a requirement for its judge advocates to receive Joint Professional Military Education (JPME). Due to their status as unrestricted line officers, Marine judge advocates are already required to complete JPME as part of their general PME requirement.

C. Review of Requirements to Support Military Commissions

The Deputy Secretary of Defense requires the Department of the Navy to provide 30 U.S. Navy judge advocates and 13 Marine judge advocates to the Office of Military Commissions (OMC). Currently, 28 U.S. Navy judge advocates and 13 Marine judge advocates are assigned to the OMC. The Deputy Secretary of Defense manning requirement expires in December 2012 and, unless extended, Navy and Marine judge advocate end-strength will be reduced accordingly. In January 2010, pursuant to an executive order, the Attorney General of the United States published the *Final Report: Guantanamo Review Task Force*, which recommended 36 detainees for prosecution in either Federal Court or Military Commission. Two of those detainees have subsequently pled guilty, leaving 34 detainees recommended for prosecution. At this point, it is unclear how the Government will proceed in these cases. If a majority of these cases are prosecuted by military commissions, it is likely that the OMC will request judge advocates with greater levels of litigation experience. Such a request will require the JAG and the SJA to CMC to carefully balance the need to assign these more experienced, and likely more senior, judge advocates to OMC while maintaining an appropriate level of experience and leadership to fulfill the continuing legal mission of the Navy and Marine Corps. The existence of the OMC and the prospect for future military commissions underscores the need to develop and retain experienced, expert trial litigators in the Navy and Marine judge advocate communities.

D. Review of Requirements to Support the Disability Evaluation System

Pursuant to the Wounded Warrior Act of 2008, the Department of the Navy, along with the other military departments, is transitioning to the Integrated Disability Evaluation System (IDES). IDES creates a new requirement that certified counsel be provided to wounded, ill, or

injured service members upon receipt of results from an informal physical evaluation board (IPEB). This is in addition to the requirement for counsel at the formal physical evaluation board (FPEB). The Department of the Navy initially met this requirement through the activation of ten reserve U.S. Navy judge advocates. In addition, the Marine Corps activated four reserve Marine judge advocates, two at Camp Lejeune and two at Camp Pendleton, to provide both pre-IPEB and post-IPEB legal services to service members. The Department plans to replace the ten U.S. Navy activated reservists serving as IPEB counsel with ten Navy-employed civilian attorneys. In the near term, the Marine Corps plans to activate an additional nine, for a total of thirteen, reserve judge advocates to provide both pre-IPEB and post-IPEB counseling, and allow for further study of the appropriate number of legal counsel needed to accomplish the mission in the long-term. The Department has also taken satisfactory steps to meet the IDES training and certification requirement for IPEB counsel by providing introductory training to all new accessions during the Basic Lawyer Course, and by requiring personnel serving as IPEB counsel to attend a week-long training course to obtain certification.

IDES has also set new permissible attorney caseloads and processing times in the FPEB process. Currently, two U.S. Navy judge advocates are assigned to represent Sailors and Marines who elect review by the FPEB. As with IPEB counsel, these positions will be transitioned to Navy-employed civilian attorney positions. However, the new caseload and processing time requirements will require a third FPEB counsel.

Finally, IDES now allows the Services to provide, at their discretion, counsel to service members prior to the IPEB decision. The Marine Corps and the Army are providing counsel prior to the IPEB decision; the Navy and the Air Force are not. The Panel recommends that this difference be examined by the Department of Defense and Department of the Navy for the purpose of considering the balance of interests in providing early representation, and the implications of having the Services provide different levels of legal support to wounded, ill, and injured service members.

E. Review of Requirements for Military Justice

Support of the military justice system remains a core statutory mission for both U.S. Navy and Marine judge advocates and is fundamental to maintaining good order and discipline and to protecting the individual due process rights of service members.

Overall the number of courts-martial has decreased significantly over the last decade, more so within the U.S. Navy than in the Marine Corps. However, the number of general courts-martial cases, which tend to be more serious and complex, has stabilized since approximately Fiscal Year 2006 (FY 06) and now represent a growing percentage of total courts-martial tried. In FY 00, the Navy tried 252 general courts-martial and 755 special courts-martial compared to 108 general courts-martial and 127 special courts-martial in FY 10. In FY 00, the Marine Corps tried 176 general courts-martial and 1,626 special courts-martial compared to 178 general courts-martial and 623 special courts-martial in FY 10. There is little empirical evidence on the cause of the decline or on future trends in military justice, although some opined that caseloads might increase if deployed forces returned to garrison. However, the numbers of alternative disciplinary and administrative actions against individual service members requiring some level of judge advocate support within the Navy and Marine Corps have not experienced similar declines. These actions include summary courts-martial, nonjudicial punishment, and administrative separation. In fact, within the Marine Corps, rates of reported misconduct have remained relatively level over the last 10 years, indicating that reduced numbers of special courts-martial in the Marine Corps are a result of alternative disposition decisions by Marine commanders.

The Navy and Marine Corps must maintain a cadre of trained and experienced litigators, supervisory counsel, and judges to effectively and efficiently meet the demands of the military justice system, including the prosecution and defense of complex and high profile cases. The ability to maintain this cadre of experienced counsel has been made more challenging due to the significant and disproportionate decline in the number of less complex and less serious special courts-martial, and due to increasing demands to deploy judge advocates to operational assignments.

The Navy and Marine judge advocate communities have taken steps to address these challenges. The Navy has established a Defense Counsel Assistance Program and a Trial Counsel Assistance Program to better support defense and trial counsel practice across the Naval Legal Service Command (NLSC). The Navy has replaced the neutral Vice Commander, NLSC with two separate Deputy Commanders – one for Region Legal Service Offices that advise commands and prosecute cases, and one for Naval Legal Services Offices that advise individuals and defend cases. The Deputy Commanders will enhance the oversight and independence of both functions. The Navy also has implemented a Military Justice Litigation Career Track to ensure that, in the face of declining caseload, experienced litigators will be in place to litigate courts-martial and serve in supervisory positions within the Navy's military justice system and in the judiciary. Finally, the Navy is considering implementing a separate Trial Defense Command that would include a realignment of functions within the NLSC.

The Marine Corps also recently established a Trial Counsel Assistance Program to support Marine Corps prosecutors. The Marine Corps has had an independent Chief Defense Counsel of the Marine Corps organization for over 25 years to enhance the supervision and independence of Marine defense counsel. In 2005, the Marine Corps added a Military Occupational Specialty for judge advocates - Master of Criminal Law (MOS 4409). There are now 26 billets requiring this judge advocate specialty. The 4409 coded billets are supervisory (e.g., senior trial counsel, military justice officer, senior defense counsel, and regional defense counsel) and help ensure an effective cadre of military justice expertise and experience within the Marine Corps.

Post-trial processing performance was examined, particularly in the wake of the *United States v. Foster* decision by the Navy-Marine Corps Court of Criminal Appeals that identified serious post-trial process failures. Recent post-trial processing statistics demonstrate a clear and consistent improvement in performance. In 2010, no case was granted appellate relief for a due process violation resulting from post-trial delay.

Significant remedial measures were identified that will serve to preclude future failures in post-trial processing. These include the establishment of the following: (1) the Military Justice Oversight Council; (2) the position of Chief Judge, Department of the Navy; (3) an annual report

on the state of military justice in the Department of the Navy; (4) standards and inspections; (5) efforts to adopt a single courts-martial electronic tracking system; and (6) a pilot program to use electronic records of trial.

The Panel believes that the challenge presented to the leaders of the Navy and Marine judge advocate communities, with respect to their essential core military justice function, has as much to do with ensuring engaged leadership and effective oversight as it does with numbers of judge advocates. In this regard, the Panel believes that development and execution of a single courts-martial case tracking system and the codification in Department regulation of an annual report on the state of military justice and the Military Justice Oversight Council are imperative.

F. Review of Requirements for Community Health

During the Panel's study, it became evident that maintaining the quality of judge advocates, as well as the right number of judge advocates, is critical to successfully meet the legal support requirements for the Department of the Navy. The health of the Navy and Marine judge advocate communities is strong and rests on three pillars: recruiting, retention, and professional education and training. Key factors in preserving the strength of the communities include: continued, active interest and engagement by Navy and Marine judge advocate leadership in the recruiting process; continued support by the Department and the Services for the Navy's Judge Advocate Continuation Pay program and the Marine Corps' Law School Education Debt Subsidy program; and continued support by the Department and the Services for post-graduate education. The Panel underlines the importance of post-graduate education for judge advocates in a world where the ability to conduct military training exercises and real world operations are increasingly subject to nuanced policy and legal issues. Finally, the Panel is concerned that the U.S. Navy does not view Joint Professional Military Education (JPME) as a requirement for Navy judge advocates and consequently does not fund JPME training. The Panel believes that JPME would further enhance the ability and skill sets of Navy judge advocates, and recommends that the Navy develop and fund a requirement for JPME for its judge advocates.

G. Review of Other Manpower Studies

The Panel considered several prior manpower studies during its review, in particular, the *CNA Study* focused on U.S. Navy judge advocate manning levels and a series of Marine Corps manpower reviews. The common conclusion of all of the studies is that the need for U.S. Navy and Marine judge advocates is increasing, particularly in relation to Joint operational billets. For example, the *CNA Study* predicted that the requirement for U.S. Navy judge advocates in operational law areas would grow, conservatively, at an annual rate of 5.9%. Likewise, 2005 and 2007 Marine Corps studies recommend a realignment and/or increase of Marine judge advocate force structure to reflect an increase in demand for legal support to Marine Corps operating forces and Joint commands. In general, these prior manpower studies are in alignment with the Panel's views on manpower requirements.

H. Manpower Recommendations by the JAG and the SJA to CMC

The Judge Advocate General's (JAG's) assessment was that there should be 926 judge advocates on active duty to meet current demands for U.S. Navy judge advocates, including existing individual augmentee (IA) assignments and Office of Military Commission (OMC) assignments. This would include a baseline of 821 judge advocates to meet standing legal missions within acceptable levels of legal risk, and an additional 105 judge advocates to meet and sustain current IA and OMC requirements. At the end of Fiscal Year 2010, there were only 811 judge advocates on active duty in the Navy. The JAG believed this manning level (811) presented risks to the Navy, to Joint forces, and to the Judge Advocate General's Corps itself.

The Staff Judge Advocate to the Commandant of the Marine Corps assessed that a judge advocate force structure of approximately 408, with a targeted inventory of more than 550 judge advocates in the Marine Corps, would meet structured requirements for Service, Department and Joint legal billets, as well as requirements for non-legal assignments (B-Billets) and sustainment overhead. This assessment did not include any judge advocates to sustain the OMC requirement. The SJA to CMC believes the Marine Corps' projected target inventories for the next five years are sufficient to meet these forecasted requirements.

I. Panel's Manpower Conclusions

The Panel concluded that the Department of the Navy requires approximately 950 active-duty U.S. Navy judge advocates and a target inventory of approximately 550 active-duty Marine Corps judge advocates to fulfill the legal missions of the Department.

The Panel found that recent bottom-up, top-down, requirement-driven manpower determinations conducted by the Marine Corps, along with reviews directed by the Staff Judge Advocate to the Commandant of the Marine Corps, were most informative and applauds the Marine Corps for its recent actions and decisions to increase the force structure and inventory of judge advocates. The Marine Corps increased its judge advocate force structure from 340 in FY 06 to 378 in FY 11 and plans to increase structure to over 400 by FY 15. This increase results in a target inventory of approximately 550 active-duty Marine judge advocates over the next five years, which the Panel believes will be satisfactory. The Panel notes several factors that could affect this manpower projection, including an increase in military justice following the return of Marines from Afghanistan, continued historic rates of growth in structured operational law requirements, requirements associated with recommended changes to the SJA to CMC's role in the supervision of the delivery of legal services within the Marine Corps, or a significant reduction in Marine Corps total officer and enlisted end-strength.

In contrast, the Panel expresses strong concern over the current and projected manning levels for U.S. Navy judge advocates. The Navy finished FY 10 with 811 active-duty judge advocates, and has programmed further reductions in judge advocate manning over the next five years. These end-strength projections are well below the JAG's assessment of current manpower needs. The JAG projected that the JAG Corps currently needs 926 judge advocates to fulfill the Navy's legal mission within acceptable parameters of legal risk. The Panel looked favorably upon the JAG's assessment, noting that the current JAG is well situated to provide an assessment, having served as a community leader for over four years, and that the assessment was based upon a comprehensive command-by-command analysis across the entire Navy to include support to Joint commands. However, the Panel believed that the assessment of 926 should be adjusted to a requirement of approximately 950 active-duty U.S. Navy judge advocates by 2015. The Panel foresees several areas, particularly in the operational law arena, where continued growth should be expected. In reaching its recommendation of approximately 950

judge advocates, the Panel was also informed by the *CNA Study*, that while imperfect in some regards, would project a requirement of 974 judge advocates using a 45-hour work week, and the benchmark ratios of full-time attorneys to active-duty end-strength in the Army and Air Force that would suggest a comparable manning level for the Navy of 1205 active-duty judges advocates, using the Army ratio, or 1,077 active-duty judge advocates, using the Air Force ratio.

The Panel concludes its manpower assessment with three points of emphasis: first, the Panel, based upon review of the 2010 *Quadrennial Defense Review* and the testimony received, firmly believes that operational law requirements are likely to continue to grow at a rapid pace; second, that there are "fixed costs" that must be met in operating a military justice system worthy of the men and women serving in uniform; and, finally, the Panel again expresses its strong concern over future active-duty judge advocate manning in the Navy.

Section IV. Review of Career Patterns for Marine Judge Advocates

Marine judge advocates, unlike their judge advocate counterparts within the Judge Advocates General's Corps in the Army, Air Force, and Navy, are unrestricted line officers and undergo the same indoctrination and training as all other Marine Corps officers. Because of their status as line officers, Marine judge advocates compete for assignments and promotion with all other Marine Corps officers. The importance of this foundational paradigm was highlighted throughout the testimony of the senior Marine Corps operational commanders, as well as the senior members of the Marine Corps legal service community that testified before the Panel. Both groups articulated the firm belief that the service of Marine judge advocates as unrestricted line officers, serving in command, operational, and other non-legal billets, makes them better Marine Corps officers and legal advisors within the Marine Corps. Lieutenant General Natonski, USMC (Ret.), the former Commander of the 1st Marine Division, succinctly summarized the views when he stated, "having a lawyer that understands the culture . . . is critical in our [Marine Corps] culture and in the credibility of our judge advocates." Marine Corps training, education and manpower requirements account for the service of Marine judge advocates in non-legal assignments; and Marine judge advocates have competed, and continue to compete favorably for promotions and command.

Section V. Review of Directives Pertaining to Jointly-Shared Missions

The Department of the Navy is unique among the Military Departments in that it oversees two Services, the Navy and the Marine Corps. A benefit of serving in the same Department is that the Navy and Marine Corps legal communities share a foundation of common directives. The first among these common directives is the *Manual of the Judge Advocate General (JAGMAN)*. The *JAGMAN* provides common practice and procedures across both judge advocate communities, significantly enhancing the ability of Navy and Marine judge advocates to serve together in support of Department and Service missions. In addition, other directives that guide the practice of Navy and Marine judge advocates in the areas of claims, legal assistance, professional conduct, judicial screening, the trial judiciary, and the court of criminal appeals exist. The ability to team is bolstered by the fact that all U.S. Navy and Marine judge advocates begin their judge advocate careers together in the Basic Lawyer Course at the Naval Justice School. The Panel found that appropriate common directives, guidance, and training exist, and that the Judge Advocate General and the Staff Judge Advocate to the Commandant of the Marine Corps are committed, along with the General Counsel of the Navy, to working together to meet the Department of the Navy's legal requirements.

Section VI. Review of the Role of the Judge Advocate General of the Navy and the SJA to CMC

A detailed review of the statutory and regulatory roles and responsibilities of the Judge Advocate General of the Navy (JAG) and the Staff Judge Advocate to the Commandant (SJA to CMC) revealed an intricate and complex relationship between the Navy and Marine Corps judge advocate communities in support of the Department of the Navy and their respective Services. The role of the JAG of the Navy differs from the roles of the JAGs in the Army and Air Force due to the dual-Service nature of the Department of the Navy. Unlike the Army JAG and the Air Force JAG that are by statute placed within their Service staffs and report directly to their Service Chiefs, the Navy JAG is by statute placed in the Office of the Secretary of the Navy and reports directly to the Secretary. The Navy JAG is part of the Office of the Chief of Naval Operations only by regulation, and is not part of Headquarters, Marine Corps. The SJA to CMC, similar to the Army and Air Force JAGs, is by statute part of the Service staff (Headquarters,

Marine Corps), reports directly to the Service Chief (the Commandant), and is not part of the Office of the Secretary of the Navy.

Specific review of the authorities of the JAG over manpower policies and assignments within the Navy suggest that, while the JAG has been assigned the responsibility as a capability sponsor to "build a coherent legal community," by both the Secretary of the Navy and Chief of Naval Operations instructions, the JAG does not have any specific authorities within the Navy manpower management system commensurate with that responsibility. The Panel recommended that the Secretary of the Navy and the Chief of Naval Operations, in coordination with the JAG, identify the authorities necessary for the JAG to execute the assigned responsibility to build a coherent legal community. In regard to assignment of U.S. Navy judge advocates, the JAG has all necessary authority to make assignments in accordance with Article 6 of the Uniform Code of Military Justice. In regard to the Marine Corps, the JAG has some authorities over Marine judge advocates, but has no authority or direct role in the Marine Corps manpower policies or in the assignment of Marine judge advocates. The Panel concurred with the JAG that no additional authority over Marine judge advocate manpower policies and assignments is necessary or warranted. The Panel concluded that the Commandant, with the assistance of the SJA to CMC, is effectively managing Marine Corps judge advocate manpower, and the JAG is not best positioned to exercise additional authority in these areas.

Specific review of the authorities of the SJA to CMC over manpower policies and assignments within the Marine Corps suggest that the SJA to CMC has all the authorities necessary to effectively influence the formulation and application of manpower policies and assignments of judge advocates within the Marine Corps. The SJA to CMC is effectively integrated into the Marine Corps manpower system in his roles as the Occupational Field Manager and Functional Advocate for Marine judge advocates.

Finally, the Panel concluded that the role of the SJA to CMC should be clarified and strengthened in statute and regulation by establishing a direct relationship between the SJA to CMC and the Secretary of the Navy, by providing the SJA to CMC with the authority and responsibility to supervise the administration of military justice and legal assistance within the Marine Corps, and by providing the SJA to CMC the responsibility for the professional and

technical supervision of Marine judge advocates, consistent with the JAG's title 10 authorities and the role of the General Counsel. All the testimony and evidence on this point suggested that clarifying and strengthening the role of the SJA to CMC would improve the delivery of legal services within the Marine Corps, including the post-trial processing of courts-martial at the Service level, by institutionalizing clear lines of authority and accountability. The Panel agrees that legislation would provide the more enduring institutional basis for clarifying and strengthening the role of the SJA to CMC; the Panel also believes that the Departments of the Navy and Defense are best able to determine which particular functions need to be statutory or regulatory or both, and to draft such legislation and regulations.

I. Department of the Navy Legal Communities Today

The Department of the Navy (DON) consists of two uniformed Services: the United States Navy and the United States Marine Corps. That construct – a single Military Department, headed by a Secretary with responsibilities and authorities over two Services and their respective Service Chiefs – is unique among the Military Departments of the United States. In turn, it has resulted in a more complex alignment of legal resources.

For the purpose of providing a simplified, introductory description of the complex alignment of legal resources within the DON, the Panel finds it useful to rely on the approach published by the DON in *One Mission, One Team: A 21st Century Strategic Vision for Legal Support in the U.S. Department of the Navy*.[1] Three legal communities support the DON in its legal mission: the Office of the General Counsel (OGC), the Navy Judge Advocate General's Corps (JAG Corps), and the Marine Corps Legal Services community.

In Section VI of this report, the Panel will discuss in more depth the intricate relationships of authorities and responsibilities that exist among the three legal communities that are serving one Secretary. But we begin now by noting our agreement with the language that opens *One Mission, One Team: A 21st Century Strategic Vision for Legal Support in the U.S. Department of the Navy*, which states:

> The three legal communities have roles and functions that are both independent and interdependent. Each has a unique identity, distinct roles and functions, and different areas of expertise based on history, organizational structure, culture, staffing, training and mission needs. However, they also share areas of practice and have common or complementary guiding principles and core values. They recognize that they must work together to identify, remedy and prevent gaps and seams in their legal services in order to best support the Department. Most importantly, the communities recognize that to support the Department of the Navy of the 21st Century, they must identify and collectively serve all of the legal needs of the Department as effectively and efficiently as possible.[2]

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[1] *One Mission, One Team: A 21st Century Strategic Vision for Legal Support in the U.S. Department of the Navy* (undated) [hereinafter *DON Strategic Legal Vision*].
[2] *Id.* at 1.

A. *Office of the General Counsel*

The OGC consists of 708 full-time civilian attorneys[3] and 193 supporting personnel.[4] It is headed by the General Counsel, who is the chief legal officer of the Department of the Navy and the principal legal adviser to the Secretary of the Navy (SECNAV).[5] OGC's primary function is to provide business and business-related legal advice and services to the Navy and Marine Corps, including Fleet and shore establishments, and the Military Sealift Command.[6] OGC's principal areas of expertise include: acquisition law, including international transactions; business and commercial law; real and personal property law; civilian personnel and labor law; fiscal law; environmental law; intellectual property law; intelligence law; ethics and standards of conduct; Freedom of Information Act (FOIA) and Privacy Act law; and litigation related to these areas.[7] OGC is organized as a law firm, with the General Counsel responsible for supervision and evaluation of all attorneys within OGC.[8, 9]

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[3] Office of the General Counsel Memorandum, *Subj: Request for Information* (Aug. 31, 2010) (revised by E-mail from Danielle P. Bianchi, Assistant to the Deputy General Counsel, Office of the General Counsel, to Michael McGregor, Staff, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy (Nov. 18, 2010, 17:20 EST)).

[4] Vice Admiral (VADM) James W. Houck, JAGC, USN, Judge Advocate General of the Navy, *Presentation to Panel Created Under Section 506 of the Fiscal Year 2010 National Defense Authorization Act*, 5 (Sep. 1, 2010) [hereinafter VADM Houck Presentation].

[5] *See* 10 U.S.C. § 5019 (2010); U.S. Dep't of Navy, Sec'y of the Navy Instr. 5430.7Q, *Assignment of Responsibilities and Authorities in the Office of the Secretary of the Navy*, ¶ 7.(b)(5), at 13 (17 Aug. 2009) [hereinafter SECNAVINST 5430.7Q]; U.S. Dep't of Navy, Sec'y of the Navy Instr. 5430.25E, *The General Counsel of the Navy; Assignment of Responsibilities*, ¶¶ 3.-.4, at 1-2 (27 Dec. 2005) [hereinafter SECNAVINST 5430.25E].

[6] *DON Strategic Legal Vision*, *supra* note 1, at 3.

[7] *Id.; see also* SECNAVINST 5430.25E, *supra* note 5, ¶ 4.c., at 2.

[8] *DON Strategic Legal Vision*, *supra* note 1, at 4. The Office of the General Counsel (OGC) is organized as a single law firm in order to ensure the independence, consistency, and quality of the legal advice and counsel provided by OGC attorneys. *Id.* As integral members of client teams, OGC attorneys provide proactive legal advice and prevent legal impediments that could jeopardize the accomplishment of the Department of the Navy (DON) mission. *Id.* As the only primarily civilian organization providing legal support to the DON, OGC believes it is unique in its ability to develop in-depth expertise in a variety of areas vital to the DON mission and provide clients with continuity of support. *Id.*

[9] Furthermore, by DoD instruction and SECNAV designation, the General Counsel is the qualifying authority to evaluate the qualifications of persons recommended for appointment, transfer, reassignment, or promotion as civilian attorneys within the DON, and to approve or disapprove such actions. The General Counsel has delegated this authority to the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps for civilian attorneys practicing under their respective cognizance or supervision. U.S. Dep't of Defense Instr. 1442.02, *Personnel Actions Involving Civilian Attorneys, passim* (30 Sep. 2010); SECNAVINST 5430.25E, *supra* note 5, ¶ 4.c.(6)(d); Secretary of the Navy Memorandum, *Subj: Designation of General Counsel as the Qualifying Authority for Personnel Actions Involving Civilian Attorneys* (1 Jun. 1978); The General Counsel of the

In coordination with the Judge Advocate General of the Navy (JAG), the General Counsel is responsible for ensuring that the DON intelligence activities are conducted in a legal manner, and for providing or supervising legal advice and services with respect to legislation.[10] In addition, the General Counsel assists the Under Secretary of the Navy in providing oversight of the Naval Criminal Investigative Service (NCIS).[11] The General Counsel also performs any other functions assigned by SECNAV consistent with law. The General Counsel maintains a close working relationship with the JAG and the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) on matters of common interest.[12]

B. Navy JAGC Community

The Navy JAG Corps community consists of 811 active-duty judge advocates, 456 reserve judge advocates, 478 active-duty enlisted personnel (holding the legalman rating), 173 reserve enlisted personnel, and 409 civilian employees (including 50 full-time civilian attorneys).[13] With an overall size of 2,327 personnel, the mission of the JAG Corps community is to provide legal solutions from a military perspective, whenever and wherever needed.[14]

The principal areas of practice in the Navy JAG Corps include military justice, international and operational law, admiralty law, environmental law, administrative law (which itself includes diverse sub-practice areas such as command relationships, legislation, military personnel law, installation law, FOIA/Privacy Act, and ethics), general litigation, claims, legal assistance, information operations, and intelligence law.[15] The JAG Corps organizes these practice areas into three principal lines of operation: court-martial litigation, which accounts for approximately 20% of the practice; legal assistance, which accounts for approximately 15% of

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Navy Memorandum, *Subj: Delegation of Qualifying Authority for Personnel Actions Involving Civilian Attorneys* (Feb. 3, 2011).

[10] SECNAVINST 5430.25E, *supra* note 5, ¶ 4.c.(5), at 3; *DON Strategic Legal Vision*, *supra* note 1, at 5.

[11] SECNAVINST 5430.25E, *supra* note 5, ¶ 5.d., at 3.

[12] *Id.* ¶ 6., at 4.

[13] Numbers current as of September 30, 2010. Note that on September 1, 2010 – the date the Judge Advocate General of the Navy (JAG) presented a detailed brief to the Panel – the number of active-duty judge advocates was 828. VADM Houck Presentation, *supra* note 4, at 5. Fluctuation in the inventory of judge advocates is discussed *supra* in Part II of this report.

[14] *Id.* at 11.

[15] U.S. Dep't of Navy, Sec'y of the Navy Instr. 5430.27C, *Responsibility of the Judge Advocate General of the Navy and the Staff Judge Advocate of the Marine Corps for Supervision and Provision of Certain Legal Services*, ¶ 4., at 2-4 (17 Apr. 2009) [hereinafter SECNAVINST 5430.27C].

the practice; and operational law and command advice, which accounts for approximately 65% of the practice.[16]

The Navy JAG Corps is headed by the JAG.[17] The JAG is the senior uniformed legal officer in the DON. As such, the JAG is responsible for providing independent legal advice and opinions to SECNAV and the Chief of Naval Operations (CNO).[18]

The JAG has both Departmental and Service-level responsibilities. He reports to SECNAV and serves as a Staff Assistant to the Secretary.[19] As a Staff Assistant, the JAG performs duties relating to legal matters arising in the Department as may be assigned by the Secretary of the Navy and acts on other matters as assigned by the Secretary.[20] He also "provides or supervises the provision of all legal advice and related services throughout the Department of the Navy, except for the advice and services provided by the General Counsel,"[21] and he "provides legal and policy advice to the Secretary of the Navy on military justice, administrative law, claims, operational and international law, and litigation involving these issues."[22]

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[16] VADM Houck Presentation, *supra* note 4, at 13.

[17] The JAG heads the JAG Corps. U.S. Dep't of Navy, U.S. Navy Regulations 1990, arts. 0331, 1009 [hereinafter NAVREGS]; SECNAVINST 5430.7Q, *supra* note 5, ¶ 7.c.(5), at 18; SECNAVINST 5430.27C, *supra* note 15, ¶ 3., at 1. By statute, the JAG is appointed from judge advocates of the Navy or the Marine Corps who are members of the bar of a Federal court or the highest court of a State and who have had at least eight years of experience in legal duties as commissioned officers. 10 U.S.C. § 5148 (2010). NAVREGS are promulgated by the Secretary of the Navy under 10 U.S.C. § 6011 (2010). NAVREGS, *supra*, art. 0102. Article 0102 of NAVREGS provides: "Regulations issued under [10 U.S.C. § 6011] are permanent regulations of general applicability, as opposed to regulations issued by the Secretary under Article 0104." *Id.* Article 0104, in turn, describes the Secretary's plenary authority under title 10 to issue regulations to carry out his or her functions. *Id.* art. 0104. NAVREGs Article 0103 provides: "United States Navy Regulations is the principal regulatory document of the Department of the Navy, endowed with the sanction of law, as to the duty, responsibility, authority, distinctions and relationships of various commands, officials, and individuals." *Id.* art. 0103.

[18] 10 U.S.C. § 5148(e).

[19] NAVREGS, *supra* note 17, arts. 0310, 0331; SECNAVINST 5430.7Q, *supra* note 5, ¶ 3.a.(2), at 2, ¶ 7.c.(5), at 18; SECNAVINST 5430.27C, *supra* note 15, ¶ 4., at 2.

[20] 10 U.S.C. §§ 5014, 5148 (2010); NAVREGS, *supra* note 17, art. 0331; SECNAVINST 5430.27C, *supra* note 15, ¶ 4., at 2.

[21] NAVREGS, *supra* note 17, art. 0331.

[22] *Id.; see also* SECNAVINST 5430.7Q, *supra* note 5, ¶ 7.c.(5)(b), at 18; SECNAVINST 5430.27C, *supra* note 15, ¶ 7., at 4-5.

The JAG commands the Office of the Judge Advocate General (OJAG),[23] which supports him in the execution of his Departmental and Service-level responsibilities, and in his execution of responsibilities as the Department of Defense Representative for Ocean Policy Affairs.[24] Those latter responsibilities include representing the Department of the Defense in oceans policy matters at international and U.S. interagency meetings, negotiations, and conferences; developing Department of Defense positions in ocean and maritime policy matters; and providing advice and assistance to the Office of the Secretary of Defense and, upon request, to the Joint Staff.

The Secretary has assigned the JAG Service-level responsibilities. These responsibilities include serving as the Special Assistant for Legal Services to the Office of the Chief of Naval Operations.[25] In that role, the JAG "advises and assists the Chief of Naval Operations (CNO) in formulating and implementing policies and initiatives pertaining to the provision of legal services within the Navy."[26] The JAG also makes all assignments of U.S. Navy judge advocates under direct statutory authority.[27]

Judge advocates in the U.S. Navy are organized into a staff corps, which means they compete against only judge advocates for promotion, and command only activities appropriate to their staff corps.[28] The establishment of a staff corps of U.S. Navy judge advocates occurred in 1967,[29] eighteen years after the establishment of the Judge Advocate General's Corps in the U.S.

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[23] NAVREGS, *supra* note 17, art. 0331; SECNAVINST 5430.7Q, *supra* note 5, ¶ 7.c.(5), at 18; SECNAVINST 5430.27C, *supra* note 15, ¶ 3., at 1.

[24] Deputy Sec'y of Defense Memorandum, *Subj: DoD Representative for Ocean Policy Affairs* (Nov. 8, 2009); *see* SECNAVINST 5430.27C, *supra* note 15, ¶ 6., at 4; *see* Chief of Naval Operations Notice 5430, *Change to the Organization of the Office of the Chief of Naval Operations (OPNAV), Special Assistant for Legal Services (N09J)*, enclosure (1) (May 18, 2007) [hereinafter OPNAVNOTE 5430] (updating Chief of Naval Operations Instr. 5430.48D, *Office of the Chief of Naval Operations (OPNAV) Organization Manual* (29 Mar. 1993)). The Panel notes that OPNAVNOTEs are typically stamped "canc frp" (canceled for record purposes) on a date one year from the date of their creation. Here, although OPNAVNOTE 5430 was stamped "canc frp May 08", the Panel treats it as enduring authority because it contains a cancellation contingency indicating that it will not be canceled until "contents are incorporated into the OPNAV Organization Manual." OPNAVNOTE 5430, *supra*, at 1. As of the writing of this report, the OPNAV Organization Manual has not been updated.

[25] SECNAVINST 5430.27C, *supra* note 15, ¶ 5., at 4; OPNAVNOTE 5430, *supra* note 24, enclosure (1).

[26] SECNAVINST 5430.27C, *supra* note 15, ¶ 5., at 4.

[27] 10 U.S.C. §§ 801, 806 (2010).

[28] 10 U.S.C. §§ 5148, 5150 (2010); NAVREGS, *supra* note 17, art. 1001.

[29] An Act to Establish a Judge Advocate General's Corps in the Navy, Pub. L. No. 90-179, 81 Stat. 545 (1967).

Army and the Judge Advocate General's Department in the U.S. Air Force.[30] In establishing a separate staff corps for uniformed lawyers in the Navy, Congress found,

> The establishment of a Judge Advocate General's Corps is not a new idea. It was considered at the time the Uniform Code of Military Justice was under consideration by the Congress. At that time the Judge Advocate General of the Navy suggested that the creation of a corps be postponed until after an evaluation of the special duty status of Navy lawyers could be made. This decision was possibly influenced also by doubts whether uniformed lawyers were really required on career basis. Now there is no question that uniformed lawyers will be a permanent part of the career Navy and it seems appropriate to recognize this and to give these lawyers the professional status and organization that other professional groups have enjoyed for many years.[31]

The legislative history indicates that Congress was also persuaded that a separate Navy staff corps was necessary in light of the increasing demand for, and complexity of, legal services provided by uniformed Navy lawyers.[32]

Although organized into a staff corps, the Navy JAG Corps is less centralized than OGC. U.S. Navy judge advocates typically serve in one of three types of assignment: in OJAG, in the Naval Legal Service Command (NLSC), or as independent staff judge advocates (SJAs). Today, approximately 120 U.S. Navy judge advocates serve in OJAG,[33] approximately 369 serve in NLSC,[34] and the balance are SJAs who report independently to their respective commands or

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[30] Effective February 1, 1949, the Elston Act established a Judge Advocate General's Corps for the Army. Military Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604, 642-44 (1948). Under the authority of the Air Force Military Justice Act, on January 25, 1949, the Air Force issued General Orders No. 7 creating the Air Force Judge Advocate General's Department, which was later changed to the Judge Advocate General's Corps. U.S. Dep't of the Air Force, Washington, General Orders No. 7 (25 Jan. 1949).

[31] S. Rep. No. 90-748, 90th Cong. (1st Sess. 1967), *reprinted in* 1967 U.S.C.C.A.N. 2113, 2115. The Senate report documented a significant growth in the demand for uniformed legal services in the Navy combined with an alarming reduction in the number of law specialists being retained in the Regular Navy. Junior officers serving as law specialists were leaving the Navy after completing their initial service obligation because of a lack of professional identity. *Id.* "Unless this trend is reversed, the Navy legal staff will be composed almost wholly of inexperienced junior officers serving their 3-year obligated tour of military duty." *Id.*

[32] H.R. 12910, 90th Cong. (1st Sess. 1967) at 113 Cong. Rec. 27483, 27485 (daily ed. Oct. 2, 1967) (statements of Rep. Philbin and Rep. Bennett).

[33] The Office of the Judge Advocate General (OJAG) is in the executive part of DON. 10 U.S.C. § 5148. The primary mission of OJAG is to support the JAG in providing legal and policy advice to the Secretary of the Navy, *id.*, and to support the JAG in assisting the Chief of Naval Operations (CNO) in formulating and implementing policies relating to the delivery of legal services in the U.S. Navy, NAVREGS, *supra* note 17, art. 0331; SECNAVINST 5430.27C, *supra* note 15, ¶¶ 3., 5., at 1, 4; OPNAVNOTE 5430, *supra* note 24, enclosure (1).

[34] Naval Legal Service Command (NLSC) is a U.S. Navy, echelon 2 command under the CNO. *See* Chief of Naval Operations Notice 5400, *Standard Navy Distribution List (SNDL), Shore Chain of Command*, enclosure (4) (Oct. 1,

activities (to include assignments to Joint and combined commands).[35] NLSC includes the Naval Justice School, Region Legal Service Offices (RLSOs), and Naval Legal Service Offices (NLSOs). RLSOs principally provide prosecution services and command services to commands lacking SJAs. NLSOs principally provide defense services, legal assistance, and disability evaluation system assistance.

C. Marine Corps Legal Services Community

The Marine Corps Legal Services community is comprised of 435 active component Marine judge advocates, 331 reserve component Marine judge advocates, 17 active component legal administrative officers, 426 active component enlisted legal services specialists, and 13 career civilian attorneys.[36] Marine Corps Legal Services are the most de-centralized of the three legal communities within the Department of the Navy and within the Department of Defense (DoD). The Marine Corps does not have a JAG Corps. Based on their unique Service history, culture, and operational nature, the Marines are committed to the concept that all officers be unrestricted line officers, trained and indoctrinated as rifle platoon leaders, and developed as complete Marine Air-Ground Task Force (MAGTF) officers.[37] Similarly, judge advocates, as with all Marine officers, are assigned by the Commandant of the Marine Corps (the

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2010) [hereinafter OPNAVNOTE 5400]; *see also* Chief of Naval Operations Instr. 5450.189B, *Mission and Functions of the Naval Legal Service Command* (Jan. 19, 2007) [hereinafter OPNAVINST 5450.189B].

[35] The balance of 339 also includes approximately 30 judge advocates in student assignments and 21 line officers attending law school under the Navy's Law Education Program. *See infra* Section II for a break-out of U.S. Navy judge advocate billets.

[36] All numbers are current as of September 30, 2010. The total active-duty judge advocates – 435 – only counts "4402 – judge advocates," and does not include "4401 – student judge advocates." As of December 1, 2010, the total number of judge advocates (4402) on active duty was 461, plus an additional 93 student judge advocates (4401), for a total inventory of 554. Active and reserve component numbers were provided by Manpower and Reserve Affairs, Headquarters, Marine Corps.

[37] The Marine Air-Ground Task Force (MAGTF) is the Marine Corps' principle organization for all missions across the range of military operations. U.S. Marine Corps, Marine Corps Doctrinal Publication (MCDP) 3, *Expeditionary Operations*, 69 (16 Apr. 1998) [hereinafter MCDP 3]. MAGTFs are general purpose forces of combined arms that can be tailored (task-organized) to the requirements of a specific situation. *Id.* Each MAGTF has four core elements: a command element (i.e., headquarters), ground combat element (e.g., units of infantry, artillery, or tanks), aviation combat element, and logistics support element. *Id.* at 70-71. There are both standing MAGTFs (e.g., Marine Expeditionary Units) and ad hoc mission-specific MAGTFs (e.g., SPMAGTF-Afghanistan). *See id.* at 75-77.

Commandant), and report directly and independently to the commanders[38] within the operating forces[39] and supporting establishment.[40]

Principal areas of practice for Marine judge advocates include military justice, operational law, legal assistance, and administrative law. Marine judge advocates practice within these areas in two roles: command legal advisor or legal service support provider. Command legal advice is generally provided by SJAs. SJAs are assigned within the operating forces to the command elements of the standing Marine Expeditionary Forces (MEF) and headquarters of the Major Subordinate Commands (MSC),[41] and within the supporting establishment to the headquarters for major bases and installations. SJAs provide independent legal advice to their commands on all matters within their cognizance, which generally includes military justice, operational, and administrative law. Legal service support is generally provided within the operating forces by Legal Service Support Sections (LSSS) and within the supporting establishment by Law Centers and Base SJA Offices.[42] Legal service support is provided to Commanders, individual Marines and Sailors, and their families. This general support includes military justice services (prosecution, defense, and review), personal and family legal assistance, civil law/ethics, command investigations, and claims.

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[38] The Marine Corps believes this construct "allows the commander to make the most efficient and effective use of legal assets, reinforces the relationship between the commander and assigned judge advocates, and builds mutual trust and responsiveness between the judge advocate and client base." Staff Judge Advocate to the Commandant, U.S. Marine Corps, *Submission to the Independent Panel Review of Legal Requirements in the Department of the Navy*, 3 (31 Aug. 2010) [hereinafter SJA to CMC *Submission*].

[39] The Marine Corps' organization consists of Headquarters, Marine Corps; the operating forces; the supporting establishment; and the Marine Corps Forces Reserve. The operating forces consist of Assigned Marine Corps Forces, Security Forces, and Fleet Marine Forces. All combat, combat support, and combat service support units are part of the Assigned Marine Forces, and are generally task-organized for employment as MAGTFs. *See* U.S. Marine Corps, Marine Corps Doctrinal Publication (MCDP) 1-0, *Marine Corps Operations*, 1-17 to -19 (27 Sep. 2001) [hereinafter MCDP 1-0].

[40] The supporting establishment assists in the training, sustainment, equipping, and embarkation of the operating forces. The supporting establishment includes entities such as Marine Corps Recruiting Command, Marine Corps bases and air stations, and recruit depots. *Id.* at 1-22.

[41] The Marine Corps operating forces are, by statute, organized into three Marine Expeditionary Forces (MEFs). The MEF is the largest MAGTF and is composed of a command element (i.e., headquarters) and three Major Subordinate Commands (MSCs): the Marine Division, the Marine Air Wing, and the Marine Logistics Group. There is one additional MEF within the reserve component.

[42] Under a local memorandum of agreement implemented in the mid-1990s, while in garrison, the three Legal Service Support Sections (LSSSs), located at Camps Lejeune (North Carolina), Pendleton (California) and Foster (Japan) provide military justice trial services to all commands on board the installation, both operating forces and supporting establishment commands. U.S. Marine Corps, *Marine Corps Legal Services - Strategic Action Plan 2010-2015*, 8 (2010) [hereinafter USMC *SAP*].

A small number of Marine judge advocates practice in additional areas, which include, for example, environmental, labor, and procurement law. Practice in these areas is generally limited to those Marines serving within the offices of the Counsel to the Commandant, which is a part of the Office of the General Counsel. In addition, to accomplish the broader mission of the Marine Corps, the DON, and the DoD, Marine judge advocates fill a variety of Joint, Departmental, and non-legal billets.[43]

The senior judge advocate in the Marine Corps is the SJA to CMC and serves within Headquarters, Marine Corps.[44] The SJA to CMC performs those Departmental functions as assigned by the Secretary of the Navy. The SJA to CMC's primary Service-level responsibilities include providing legal advice to the Commandant and Headquarters, Marine Corps in designated practice areas; supervising the Chief Defense Counsel of the Marine Corps; serving as Rules Counsel for matters of professional responsibility involving Marine judge advocates; and serving as the Occupational Field Manager for all active-duty Marine judge advocates.[45] The SJA to CMC is supported by Judge Advocate Division (JAD), which is established within Headquarters, Marine Corps, and is composed of the SJA to CMC, a Deputy SJA to CMC, and several subordinate coded branches.[46]

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[43] *Id.* at 5.

[44] 10 U.S.C. § 5046 (2010). *See generally* 10 U.S.C. §§ 5041-5042 (2010) (explaining that Headquarters, Marine Corps is a Military Service Staff established within the executive part of the Department to "furnish professional assistance to the Secretary" and the Service Chief. Although the Commandant presides over Headquarters, Marine Corps, it performs its duties under the "authority, direction, and control of the Secretary of the Navy.").

[45] *See* SECNAVINST 5430.27C, *supra* note 15, ¶ 8., at 5-6. The designated practice areas are: military justice, administrative law, international and operational law, and legal assistance matters. *Id.* ¶ 8.a., at 5. Together with the Counsel for the Commandant, the SJA to CMC also provides legal advice on standards of conduct and government ethics. *Id.* ¶ 8.h., at 6.

[46] The SJA to CMC serves as an O-8 (major general), 10 U.S.C. § 5046, and the Deputy SJA to CMC is an O-6 (colonel), per the Marine Corps Table of Organization. The SJA to CMC supervises all of the judge advocates within Judge Advocate Division (JAD). *See* U.S. Marine Corps Order P5800.16A, *Marine Corps Manual for Legal Administration (Short Title: LEGADMINMAN)*, ¶ 22004., at 22-5 (31 Aug. 1999, through Ch-5, 28 Nov. 2005) [hereinafter *LEGADMINMAN*]. JAD consists of the following coded branches: Military Law Branch (Code JAM); International and Operational Law Branch (Code JAO); Research and Civil Law (Code JAR); Legal Assistance Branch (Code JAL); Judge Advocate Support Branch (Code JAS); and Information, Plans, and Programs Branch (Code JAI). *See id.* ¶ 22004., at 22-5 to -6; *see also* http://www.marines.mil/unit/judgeadvocate/Pages/Branches.aspx.

D. The DON Legal Communities in Context to Other Military Department Legal Communities

Table 1, below, provides the number of attorneys in the Department of the Army, the Department of the Air Force, and the DON, as of September 30, 2010. The DON data is broken out into its two military Services.

	Army	Air Force	Navy	Marines
Office of the General Counsel[1]	**Total: 32**	**Total: 55**	**DON Total: 708[2]**	
Political Appointees	2 (both vacant)	1	1	0
Career Civilian Attorneys	32 (4 x SES)	54 (7 x SES)	653[3] (22 x SES)[4]	54 (2 x SES)
JAG Corps/Marine Corps Legal Services	**Total: 4,661**	**Total: 2,574**	**Total: 1,302**	**Total: 779**
Active-Duty Judge Advocates	1,828	1,225	811	435
Career Civilian Attorneys	565 (2 SES)	408 (3 SES)	50	13
Reserve Judge Advocates	1,522	671	441	331
National Guard	746	270		
Flag/General Officers (AC/RC and Guard)	5/3	6/7	2/1	1/0
Army Materiel Command (All civilian attorneys)	**Total: 319** (5 x SES)	Chart accurate as of September 30, 2010 [1] OGC numbers do not include judge advocates assigned to OGC to prevent double counting. OGC totals include career Senior Executive Service (SES) and political appointees (unless unfilled), but not schedule C employees (Army 1, Air Force 1, and Navy 2). [2] OGC attorneys serving USN and USMC offices and commands are all DON OGC attorneys. [3] U.S. Navy number of 653 includes OGC personnel assigned to the DON Secretariat. [4] U.S. Navy SES number of 22 includes 10 SES personnel assigned within the DON Secretariat.		
Army Corps of Engineers (All civilian attorneys)	**Total: 449** (2 x SES)			

Table 1. Number of Attorneys in Department of the Army, Department of the Air Force, and Department of the Navy as of September 30, 2010

The data in Table 1, above, and Table 2, below, benchmarks the ratio of full-time attorneys to military Service end-strength, the ratio of reserve component judge advocates to military Service end-strength, and the ratio of active-duty flag and general officers to military Service end-strength.

	Army	Air Force	Navy	Marines
Service End-strength	**566,045**	**334,196**	**328,303**	**202,441**
Total Active-Duty Judge Advocates (x) to End-strength	(1,828) 1 to 310	(1,225) 1 to 273	(811) 1 to 405	(435) 1 to 465
Total full-time attorneys (x) to End-strength[1]	(3,193) 1 to 177	(1,688) 1 to 198	(1,515)[2] 1 to 216	(502) 1 to 403
			DON total (2,017) 1 to 263	
Reserve Component Judge Advocates (x) to Active-Duty End-strength[3]	(1,522) 1 to 372	(671) 1 to 498	(441) 1 to 744	(331) 1 to 612
Active-Duty Judge Advocate Flag/General Officers (x) to Active-Duty Judge Advocate End-strength	(5) 1 to 366	(6) 1 to 204	(2) 1 to 406	(1) 1 to 435

Chart accurate as of September 30, 2010.
[1] Includes active-duty judge advocates and civilians working for JAG, SJA to CMC, and OGC.
[2] USN total of 1,515 includes all OGC attorneys not assigned to the USMC.
[3] Does not include the National Guard. Reserve attorneys in the Navy and Marine Corps are organized to support the active component.

Table 2. Ratios of active component judge advocates to military Service end-strength, full-time attorneys to military Service end-strength, reserve component judge advocates to military Service end-strength, and active-duty flag/general officers to active-duty judge advocate end-strength as of September 30, 2010

As indicated above, the judge advocate to end-strength ratios, total attorneys to end-strength ratios, and the judge advocate leadership to end-strength ratios in the Department of the Navy reveal that the Department of the Navy has significantly fewer attorneys per end-strength than does the Department of the Army or the Department of the Air Force.

II. The Navy and Marine Corps Manpower Management Systems

The Panel's primary mandate is to conduct an independent review of the judge advocate requirements in the Department of the Navy (DON). Section III of this report addresses the Panel's independent determination of the number of judge advocates required to fulfill the legal mission of the DON. In arriving at that independent determination, the Panel considered the DON's existing plans for future judge advocate manning. Although the Panel did not consider itself to be constrained by those plans given its mandate, the Panel recognized that the Navy and Marine Corps have well-developed manpower management systems designed to achieve, within fiscal restraints, a force that has the capabilities and capacity to prevail in war, prevent and deter conflict, and execute the additional priorities established by the President and the Secretary of Defense. The Panel decided, therefore, that it was appropriate to provide an overview of the Navy and Marine Corps manpower management systems before turning to its independent determination.

The Navy and Marine Corps manpower management systems operate in the context of the Department of Defense Planning, Programming, Budgeting, and Execution System (PPBES).[47] The PPBES is an iterative, cyclical, four-phase process, which for purposes of military manpower management can be summarized as follows:[48]

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[47] *See* Chief of Naval Operations Instr. 1000.16K, *Navy Total Force Manpower Policies and Procedures*, § 1 of enclosure (1), ¶ 100.3.a., at 1-2 (22 Aug. 2007) [hereinafter OPNAVINST 1000.16K]; U.S. Marine Corps Order 5311.1D, *Total Force Structure Process (TFSP)*, 3 (26 Feb. 2009) [hereinafter MCO 5311.1D]; U.S. Marine Corps Order 3900.15B, *Marine Corps Expeditionary Force Development System (EFDS)*, 3-5 (10 Mar. 2008). As described in OPNAVINST 1000.16K:

> [Total force] requirements become authorized positions if they are supported by resources (i.e., are funded). Resources are provided through the Planning, Programming, Budgeting and Execution System (PPBES). . . . The ultimate objective of PPBES is to provide the best mix of total forces, equipment and support attainable within fiscal constraints. PPBES enables senior leadership to assess alternative ways to achieve the objectives established by the President and the Secretary of Defense. The decisions from the PPBES involve balancing near term readiness, sustainability and force structure requirements with long-term modernization needs to ensure warfighting capability today and in the future.

OPNAVINST 1000.16K, *supra*, ¶ 100.3.a.-b., at 1-2.

[48] U.S. Dep't of Defense Financial Mgmt. Regulation, Volume 1-15, § 2A (Sep. 2007); *see* U.S. Dep't of Defense, Dir. 7045.14, *The Planning, Programming, and Budgeting System*, ¶¶ 3.1., 4.1.-4.3., at 1-3 (May 22, 1984) (Certified Current as of Nov. 21, 2003); *see* U.S. Dep't of Defense Handbook 7045.7-H, *Future Years Defense Program (FYDP) Structure* (Apr. 2004). *See generally* http://comptroller.defense.gov/budget2010.html (providing information on

- **Phase one: the planning phase**. In this phase, senior officials in the U.S. government broadly identify capabilities required to meet national security objectives. Principal documents developed in this phase include the National Security Strategy,[49] the Quadrennial Defense Review,[50] the National Military Strategy,[51] Strategic Planning Guidance, Defense Planning and Programming Guidance, and the Combatant Commanders' Integrated Priority List.[52] For the Navy and Marine Corps, additional key documents include the Maritime Strategy,[53] the Naval Operations Concept,[54] and annual planning guidance from the Chief of Naval Operations[55] and the Commandant of the Marine Corps.[56]

- **Phase two: the programming phase**. In this phase, fiscal constraints are introduced into the process, with the goal of prioritizing capabilities and balancing resources in a way that most efficiently manages risk. The main product in this phase is the Program Objectives Memorandum (POM). Annually, the Department of the Navy submits a POM that describes the resources and programs, including military manpower, which it believes necessary to provide required capabilities, within an acceptable level of risk, and within previously identified programming targets.[57] This continuing cycle of annual POM submissions informs a Future Years Defense Program (FYDP), which serves as the

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the Department of Defense budget); http://www.finance.hq.navy.mil/fmb/10pres/books.htm (providing information on the Department of the Navy budget); http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc/ (providing information on the President's budget process).

[49] President of the United States, *National Security Strategy* (May 2010).

[50] U.S. Dep't of Defense, *Quadrennial Defense Review Report* (Feb. 2010) [hereinafter *QDR*].

[51] *The National Military Strategy of the United States of America, A Strategy for Today; A Vision for Tomorrow* (2004) (2004 version under revision).

[52] *The Strategic Planning Guidance, Defense Planning and Programming Guidance*, and *Combatant Commander's Integrated Priority List* are not released outside the Department of Defense and thus were not considered by the Panel.

[53] *A Cooperative Strategy for 21st Century Seapower* (Oct. 2007), *available at* www.navy.mil/maritime/Maritimestrategy.pdf.

[54] *Naval Operations Concept: Implementing the Maritime Strategy (2010), available at* http://www.navy.mil/maritime/noc/NOC2010.pdf.

[55] *CNO Guidance for 2011: Executing the Maritime Strategy* (Oct. 2010), *available at* http://www.navy.mil/features/CNOG%202011.pdf.

[56] *35th Commandant of the Marine Corps Commandant's Planning Guidance (2010), available at* http://www.usmc.mil/unit/hqmc/cmc/Documents/CMC%2035%20Planning%20Guidance%20FINAL.pdf.

[57] *See* Deputy Sec'y of Defense Memorandum, *Subj: Procedures and Schedule for Fiscal Year (FY) 2012-2016 Integrated Program/Budget Review* (Apr. 9, 2010). Beginning in April 2010, the Department of Defense moved to an annual programming cycle. *Id.* Program Objectives Memorandum (POMs) are submitted every year and programming decisions are reflected in Future Years Defense Program (FYDP). *Id.*

five-year baseline for future programming and budget submissions. The FYDP, in turn, is updated each year by a new POM.

- **Phase three: the budgeting phase**. The objective of this phase is to develop the President's budget — essentially to organize an appropriations request — consisting of the resources previously identified in the programming phase. The President's budget includes military manpower line items for each Service. The President's budget request is submitted to Congress in February.
- **Phase four: the execution phase**. In this phase, after an appropriations bill becomes law, it is the responsibility of the Department of the Navy to execute the budget for that fiscal year.

In a single year, all four phases are pursued simultaneously. As of the writing of this report, the Department of the Navy is executing its Fiscal Year (FY) 2011 budget, submitting its 2012 budget request to the Department of Defense, developing its 2013 POM, and refining its organization, strategy, and doctrine.

A. Today's Fiscal Environment

Funding force structure modernization, while winning two wars, and without increasing the budget topline, is the central fiscal challenge facing the Department of Defense (DoD) over the 2012-2016 FYDP, according to the Secretary of Defense.[58] To meet that challenge, the Secretary has directed the Military Departments and other defense components to cut at least $100 billion in overhead costs, in order to transfer those savings into combat power and force structure modernization.[59] In May of 2010, the Secretary of Defense stated,

> Therefore, as the Defense Department begins the process of preparing next's years Fiscal Year 2012 budget request, I am directing the military services, the joint staff, the major functional and regional commands, and the civilian side of

[58] *See* Robert M. Gates, Sec'y of Defense, Defense Opening Statement for Senate Appropriations Committee, Room 192, Dirksen Senate Office Building (Jun. 16, 2010) [hereinafter Gates, Opening Statement for Senate Appropriations Committee], *available at* http://www.defense.gov/speeches/speech.aspx?speechid=1488; *see* Robert M. Gates, Sec'y of Defense, Remarks at the Eisenhower Library, Abeline, Kan: Defense Spending (May 8, 2010) [hereinafter Gates, Remarks at Eisenhower Library], *available at* http://www.defense.gov/speeches/speech.aspx?speechid=1467.

[59] Robert M. Gates, Sec'y of Defense, Statement on Department Efficiencies Initiative at the Pentagon (Aug. 9, 2010), *available at* http://www.defense.gov/speeches/speech.aspx?speechid=1496.

> the Pentagon to take a hard, unsparing look at how they operate – in substance and style alike. The goal is to cut our overhead costs and to transfer those savings to force structure and modernization within the programmed budget. In other words, to convert sufficient "tail" to "tooth" to provide the equivalent of the roughly two to three percent real growth – resources needed to sustain our combat power at a time of war and make investments to prepare for an uncertain future.[60]

One month later, in testimony before the Senate Appropriations Committee, the Secretary of Defense stated,

> We are already beginning the next step in this process of reform as we prepare the fiscal 2012 budget. Last month I called on the Pentagon to take a hard, unsparing look at how the department is staffed, organized and operated. This initiative is not designed to reduce the defense topline. I believe the current topline is the minimum needed to sustain a military at war and to protect our interests in the years to come in an ever more unstable and dangerous world. Rather, my goal is to significantly reduce our overhead costs in order to free up the resources needed to sustain our force structure, to modernize, and create future combat capabilities while living within our current topline.
>
> To this end, the department has recently set a goal to find more than $100 billion in overhead savings over the five fiscal years starting in FY 12. No organization within the department, including my own office, will be excluded from these efforts.[61]

The Secretary also called particular attention to the budgetary pressures on the Department of the Navy. In a speech before the Navy League of the United States, the Secretary criticized the unsustainable costs of specific shipbuilding programs, and concluded with this observation,

> It is important to remember that, as the wars recede, money will be required to reset the Army and Marine Corps, which have borne the brunt of the conflicts. And there will continue to be long-term – and inviolable – costs associated with taking care of our troops and their families. In other words, I do not foresee any significant increases in top-line of the shipbuilding budget beyond current assumptions. At the end of the day, we have to ask whether the nation can really

[60] Gates, Remarks at Eisenhower Library, *supra* note 58.
[61] Gates, Opening Statement for Senate Appropriations Committee, *supra* note 58.

afford a Navy that relies on $3 to 6 billion destroyers, $7 billion submarines, and $11 billion carriers.[62]

The Panel recognizes the fiscal pressures on the DoD as a whole and, in particular, the requirement for the DON to cut overhead in order to sustain combat power, modernize force structure, and reset the Marine Corps. Accordingly, in its analysis of judge advocate requirements, the Panel considered that there are not only risks from having too few judge advocates, but also from having too many judge advocates in a zero-sum-gain FYDP.

B. U.S. Navy Judge Advocate Manpower Management

On September 30, 2010, the authorized end-strength[63] of active-duty judge advocates in the U.S. Navy was 811.[64] In October 2010, the Bureau of Naval Personnel published its projected authorized end-strength for FY 11 and the FYDP as follows:

Fiscal Year	11	12	13	14	15	16
End-Strength	801	782	745	746	747	747

Table 3. Projected U.S. Navy Judge Advocate Authorized End-Strength

As illustrated, the U.S. Navy has programmed for a 6.7% reduction in the authorized end-strength of active-duty judge advocates over the next five years.[65] To understand how U.S. Navy

[62] Robert M. Gates, Sec'y of Defense, Remarks at the Navy League Sea-Air-Space Exposition at the Gaylord Convention Center, National Harbor, Md. (May 3, 2010), *available at* http://www.defense.gov/speeches/speech.aspx?speechid=1460.

[63] *See* U.S. Dep't of Defense, Instr. 1120.11, *Programming and Accounting for Active Military Manpower*, enclosure (2), at 8 (Apr. 9, 1981, Incorporating Change 1, Oct. 30, 2007) [hereinafter DoDI 1120.11] (defining end-strength as "Strength at the end of a fiscal year and synonymous with end-year strength."); OPNAVINST 1000.16K, *supra* note 47, appendix B to enclosure (1), at B-6 (defining end-strength as: "The number of officer and enlisted requirements which can be authorized (funding) based on approved budgets. End-strength is set forth for each activity in the FYDP.").

[64] On September 1, 2010, when the JAG testified to the Panel, the inventory of judge advocates on active duty was 828 and the projected authorized end-strength for the fiscal year ending later that month (September 30, 2010) was 800. However, the final fiscal year end-strength for U.S. Navy judge advocates issued by the Bureau of Naval Personnel was 811, or 11 over the original projection of 800.

[65] The data in Table 3 is from the Fall 2010, Officer Programmed Authorizations (OPA). The 6.7% reduction in active-duty judge advocate authorized end-strength is based primarily on the programmed loss of 31 billets to support the Office of Military Commissions (OMC) and the programmed loss of 23 "adaptive core" billets to support contingency operations. The Office of the Secretary of Defense (OSD) provides funding for OMC billets on a renewable basis, and the current funding authorization will expire in December 2012. OMC requirements are discussed further in Section III.C., *infra*, of the report. In Fiscal Year 2010, the Navy received an increase in end-

judge advocate authorized end-strength is programmed, a brief review of the Navy Total Force Manpower System is necessary.

The U.S. Navy's Total Force Manpower System "is a complex process with many interdependent roles."[66] The Chief of Naval Personnel is the single manpower resource sponsor, with responsibility to "Assess, validate, and approve manpower requirements."[67] The Commander, U.S. Fleet Forces Command and the heads of the Navy's warfare enterprises[68] "Assess and validate the required capabilities and . . . [m]ake manpower funding recommendations to the manpower resource sponsor. . . ."[69] Budget Submitting Offices (BSOs), which are generally aligned with the Navy's echelon II commands, have responsibilities to "(1) Develop Mission, Function and Task [(MFT)] statements . . . (2) Oversee the day-to-day management of manpower authorizations . . . [and] (3) Initiate the shore manpower requirements process."[70]

Insofar as determining judge advocate manpower requirements are concerned, the Navy's BSOs drive the process.[71] They "determine and validate" the peacetime and wartime judge advocate requirements for themselves and their subordinate commands and staffs.[72] They also make decisions on whether to fund, on behalf of the Chief of Naval Operations or the Secretary of the Navy,[73] the manpower requirements that have been identified and validated.[74] Funded

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strength of 2,700 personnel ($1.8B), applicable across the Future Years Defense Program (FYDP), to partially compensate the Navy for its provision of personnel as Individual Augmentees (IA) in support of contingency operations. The Navy's internal distribution of those 2,700 "adaptive core" billets included providing the JAG Corps with 23 billets to support rule of law operations in Iraq and Afghanistan.

[66] OPNAVINST 1000.16K, *supra* note 47, § 1 of enclosure (1), ¶ 100.6., at 1-4.

[67] *Id.* § 1 of enclosure (1), ¶ 100.6.a., at 1-4.

[68] *See* Jessie Riposo et al., *Navy Enterprises: Evaluating Their Role in Planning, Programming, Budgeting and Execution (PPBE)* (Rand Corporation, 2009).

[69] OPNAVINST 1000.16K, *supra* note 47, § 1 of enclosure (1), ¶ 100.6.b.(1)-(2), at 1-5.

[70] *Id.* § 1 of enclosure (1), ¶ 100.6.d.(1)-(5), at 1-5.

[71] *See* OPNAVINST 1000.16K, *supra* note 47, § 4 of enclosure (1) (stating that a Budget Submitting Office (BSO) must submit its manpower requirements via the cognizant Navy enterprise to the Director of the Total Force Management Division at the Bureau of Naval Personnel (OPNAV N12) for final approval); U.S. Navy Bureau of Naval Personnel, *Manpower Management Coding Directory*, §§ 7, 12 (26 Aug. 2008) [hereinafter BUPERS *Manpower Management Coding Directory*].

[72] OPNAVINST 1000.16K, *supra* note 47, § 4 of enclosure (1), ¶ 400.5.a.-b., at 4-2.

[73] *See id.* § 4 of enclosure (1), ¶ 400.6., at 4-3 (funding decisions made with input of enterprise sponsor, if applicable).

[74] Although funding decisions, or authorizations, are made by BSOs, they are subject to the overall programmatic management of the Chief of Naval Personnel. The Chief of Naval Personnel is responsible for aligning

manpower requirements are referred to as "Billets Authorized" or BA.[75] "Billets" in the Navy are the individual positions carried on a unit's activity manning document. "Funded" means the application of programmed end-strength.[76]

BSOs can choose from a range of techniques to determine manpower requirements.[77] In general, regardless of technique employed, BSOs must identify the MFTs required to be performed at specific units, and measure the workload required to achieve an acceptable level of readiness for those particular MFTs.[78] Officer manpower requirements are then calculated using (1) the applicable "Navy standard work week" to determine the *quantity* of manpower required,[79] and (2) the Navy's Officer Manpower and Personnel Classification system to determine the

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authorizations to programmed end-strength – a process known as manpower balancing. *See id.* § 7 of enclosure (1), at 7-1 to -6.

[75] *See id.* §§ 4, 7 of enclosure (1).

[76] *See id.* § 7 of enclosure (1), ¶ 700.3.a., at 7-1. Not all manpower requirements are necessarily funded. When manpower requirements differ from funding levels, the excess or shortfall is required to be addressed during the next phase of the Planning, Programming, Budgeting, and Execution System (PPBES). *Id.* § 4 of enclosure (1), ¶ 400.6., at 4-3.

[77] *See* OPNAVINST 1000.16K, *supra* note 47, § 4 of enclosure (1), ¶ 400.6., at 4-3; *see* Navy Manpower Analysis Center, *Navy Total Force Manpower Requirements Handbook* (Apr. 2000). Budget Submitting Offices are permitted to use a variety of "techniques" to determine manpower requirements, including: industrial engineering studies, industry standards, operational evaluations, functionality assessments, procedures established in Office of Management and Budget Circular A-76, application of staffing standards, mathematical models, business process re-engineering, lean six sigma, better business practices, or other methodologies approved by CNO (N12). OPNAVINST 1000.16K, *supra* note 47, § 4 of enclosure (1), ¶ 402.3.h., at 4-12. Of note, the February 2008 Center for Naval Analyses (CNA) analysis of future U.S. Navy judge advocate manpower requirements, discussed further in Section III.G., *infra*, of the report, is an example of one type of "other methodologies approved by CNO (N12)." *See id.*

[78] They are also directed to ensure that the workload is "materially related" to one or more "mission essential tasks," which are registered in the Defense Readiness Reporting System. *Id.* § 4 of enclosure (1), at 4-10 to -14. Mission essential tasks are derived from the master catalog of tasks described in the Universal Joint Task List, Chairman of the Joint Chiefs of Staff Manual 3500.04E, *Universal Joint Task Manual* (25 Aug. 2008) [hereinafter CJCSM 3500.04E], and the Universal Naval Task List, OPNAVINST 3500.38B/MCO 3500.26/USCG COMDTINST 3500.1B, *Universal Naval Task List (UNTL) Version 3.0* (Jan. 2007, through CH-1 1, 10 Nov. 2008). Tasks in the Universal Joint Task List (UJTL) are categorized by level of war into Strategic National (SN), Strategic Theater (ST), Operational (OP), and Tactical (TA). CJCSM 3500.04E, *supra*, enclosure B. There are few UJTL tasks that expressly list a judge advocate office as the Office of Primary Responsibility (OPR); however, there are hundreds of UJTL tasks that require regular legal support and virtually every task will require legal support, directly or indirectly.

[79] Under Appendix C of OPNAVINST 1000.16K, the Navy calculates manpower requirements based on: peacetime, wartime, or mobilization; whether the command under study is afloat or ashore; and whether the command is located in a place where dependents are authorized. OPNAVINST 1000.16K, *supra* note 47, appendix C to enclosure (1). Thus, there are different "Navy standard workweeks" for: (1) shipboard manning during war (81 hours gross, 70 hours productive); (2) ashore and shipboard manning during peacetime in locations at which dependents are authorized (40 hour gross, 33.38 hour productive); (3) ashore and shipboard manning in peacetime at locations in which dependents are not authorized (57 hour gross, 49.6 hour productive); and (4) ashore manning during mobilization, defined as emergency operations and combat build-up (60 hours gross, 57.22 hours productive). *Id.* § 4 of enclosure (1), ¶ 402.3., at 4-10 to -11, appendix C to enclosure (1).

quality of the manpower required.[80] For judge advocate manpower determinations, *quality* refers to the rank and specialty skills required of the judge advocate to perform the required work.[81] BSOs must calculate the minimum quantity and quality of manpower required to "efficiently accomplish the activity's mission."[82] Once manpower requirements are determined by a BSO, they are recorded on a Statement of Manpower Requirements (SMR) and forwarded to the Director, Total Force Requirements Division[83] for final approval. Once approved, the requirements are recorded in the Navy's Total Force Manpower Management System database.[84] BSOs are also required to continually review and update manpower requirements.[85] BSOs effect minor changes via "Billet Change Requests" (BCRs) and major changes via new SMRs.[86]

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[80] U.S. Dep't of Navy, *Manual of Navy Officer Manpower and Personnel Classifications, Volume II: Major Code Structures*, 19 (Oct. 2010).

[81] *See* OPNAVINST 1000.16K, *supra* note 47, § 2 of enclosure (1), ¶ 200.4., at 2-2.

[82] *Id.* In addition to determining the quantity and quality of manpower required, the Budget Submitting Office (BSO) must determine whether military manpower is required at all. Using "Manpower Mix Criteria" and a "Decision Matrix tool," the BSO determines whether the requirement can be met by military or civilian personnel, or contracted for. *Id.* § 2 of enclosure (1), ¶ 200.5., at 2-2. Contracting for attorney services is not an option in almost all situations, as the longstanding opinion of the General Counsel of the Navy is that the provision of legal advice to the Department of the Navy and its Services is an inherently governmental function. *See* The General Counsel of the Navy Memorandum, *Subj: Out-Sourcing Legal Services* (Jul. 9, 1997) (including a copy of a U.S. Dep't of Justice, Office of Legal Counsel Letter (Mar. 23, 1975)); *see also* U.S. Dep't of Justice, Office of Legal Counsel, *Constitutional Limits on "Contracting Out" Department of Justice Functions Under OMB Circular A-76* (Apr. 27, 1990), at 1990 WL 488475 (O.L.C.). "A requirement/position is military if the successful performance of duties is required: (1) for reasons of law, executive order, treaty, or international agreement; or (2) for command and control of crisis situations, combat readiness, risk mitigation, or esprit de corps; or (3) when unusual working conditions are not conducive to civil service employment; or (4) when military [personnel] provide a more cost effective source of support; or (5) when military-unique knowledge and skills are required for successful performance of the duties." OPNAVINST 1000.16K, *supra* note 47, § 2 of enclosure (1), ¶ 200.5.a.(1)-(5), at 2-2 to -3.

[83] Director, Total Force Requirements Division is a flag officer on the staff of the Chief of Naval Operations, identified by the staff code of OPNAV (N12).

[84] OPNAVINST 1000.16K, *supra* note 47, § 4 of enclosure (1), ¶ 400.5., at 4-2 to -3.

[85] *Id.*

[86] Minor changes are defined by exception as those that do not require preparation of a new Statement of Manpower Requirements (SMR). New SMRs can be directed by a Budget Submitting Office (BSO), a warfare enterprise, or the Chief of Naval Personnel. New SMRs are mandatory when there are major Mission, Function and Task (MFT) revisions, significant changes in workflow as a result of technological changes or changes in fleet force structure, or in response to status of forces agreements, inter-service support agreements, or other types of memoranda of agreement or understanding. *Id.*

Today, 11 Navy BSOs and 5 activities outside of the Navy fund a total of 801 judge advocate Billets Authorized (BA).[87] Of the 11 Navy BSOs, there are a "top five" that source 85% of the total judge advocate BA.[88] Table 4, below, displays these in descending order:

Billet Submitting Offices	Billets Authorized
Field Support Activity (FSA)[1]	369
Department of the Navy, Administrative Assistant (DON/AA)[2]	120
Commander, U.S. Fleet Forces Command	81
Naval Education and Training Command	65[3]
Commander, U.S. Pacific Fleet	48

[1] Field Support Activity (FSA) provides resources for the Naval Legal Service Command.
[2] Department of the Navy, Administrative Assistant (DON/AA), previously identified as the Administrative Assistant to the Under Secretary of the Navy, sources billets within the Secretariat, including billets within the Office of the Judge Advocate General, the Navy-Marine Corps Appellate Review Activity, and the Navy-Marine Corps Court of Criminal Appeals.
[3] Includes 21 billets authorized for line officers attending law school through the Navy-funded Law Education Program (LEP). Those 21 officers, known as LEPs, have Navy designator 1950 while in law school and convert to designator 2500 (judge advocate) once admitted to a State bar.

Table 4. Top Five Navy Billet Submitting Offices that Source 85% of Judge Advocate Billets Authorized

Before discussing the role of the Judge Advocate General of the Navy in the U.S. Navy manpower management system, five additional technical items merit brief mention.

First, the total U.S. Navy judge advocate BA of 801 includes 30 billets in the "Individuals Account," which is a special category to cover the requirements relating to students, trainees,

[87] Data obtained from the Navy Total Force Manpower Management System (TFMMS) is current as of October 27, 2010. The five outside activities are the Defense Intelligence Agency, National Security Agency, Office of the Secretary of Defense, U.S. Transportation Command, and the Joint Chiefs of Staff. The Navy treats them as BSOs within the Navy TFMMS, as they have "purchased" specific judge advocate billets through manpower funding transfers to the Navy. TFMMS is the single, authoritative manpower database for Navy. OPNAVINST 1000.16K, *supra* note 47, appendix B to enclosure (1), at B-18; BUPERS *Manpower Management Coding Directory*, *supra* note 71, at §§ 7, 12. *See also* Navy Manpower Analysis Center, *Position Management Business Requirement, Ver. 1* (18 Mar. 2010).
[88] The other six Navy BSOs with responsibility for determining judge advocate requirements are, in descending order: Central Operating Activity (COA) (Billets Authorized (BA) of 23) (Note: The COA is a division within the Bureau of Personnel with responsibility to manage authorizations from outside agencies); Naval Special Warfare Command (BA 17); Bureau of Medicine (BA 15); Naval Personnel Command (BA 6); Naval Reserve Force (BA 2); and the Office of Naval Intelligence (BA 1).

transients, medical patients, prisoners, and personnel awaiting discharge.[89] The Chief of Naval Personnel determines the Individuals Account.[90] For the judge advocate community, the student portion of the Individuals Account is especially important, as it is the basis for funding post-graduate education, which is discussed further in Section III.F. of this report.

Second, the Chief of Naval Personnel is responsible for managing the relationship between end-strength and BA. Ideally, BA and end-strength will be the same; however, there are a variety of situations in which there might be variances. For example, emergent manpower requirements outside the Navy, which were not programmed for within the Navy budget, may have to be met by Navy personnel at the direction of the President or the Secretary of Defense. Or, a BSO or warfare enterprise might realize manpower efficiencies beyond programmed savings. Moreover, a specific manpower community may not be executing to its full programmed manpower authorization due to delays in recruiting, training, or promoting qualified personnel. The Navy refers to the process of aligning end-strength and BA as "manpower balancing,"[91] and the results of that balancing are reflected in community-specific Officer Programmed Authorizations (OPA).[92] OPA is calculated via a computer program called Programmed Manpower Authorizations System (PMAS), which executes a variety of algorithms to achieve the most efficient and effective distribution of end-strength. Typically, for small communities like the judge advocate community, OPA and BA are the same or very close. For example, for FY 10, both BA and OPA were 801. To the extent that there are variances between BA and OPA in the U.S. Navy judge advocate community in any year, BA is the indicator of judge advocate manpower requirements as determined by BSOs, and OPA is the indicator of end-strength programmed for distribution to the judge advocate community as determined by the Chief of Naval Personnel.[93]

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[89] *See* OPNAVINST 1000.16K, *supra* note 47, § 1 of enclosure (1), ¶ 100.2.b.(3), at 1-2, § 5 of enclosure (1), appendix B to enclosure (1).

[90] OPNAVINST 1000.16K, *supra* note 47, § 1 of enclosure (1), ¶ 100.2.b.(3), at 1-2.

[91] *Id.* § 7 of enclosure (1), ¶ 701.4., at 7-3 to -4.

[92] Officer Programmed Authorization (OPA) is defined as: "A recurring, published document projecting planned officer authorizations for current and future FYs (budget and program years). Planned authorizations are summarized by designator and paygrade within designator for each FY and controlled precisely to the approved end strength for each FYs." *Id.* appendix B to enclosure (1), at B-12. OPA is published twice each fiscal year in the Navy. *Id.* § 7 of enclosure (1), ¶ 705.2., at 7-19.

[93] OPA and BA are almost identical for the judge advocate community across the current FYDP as indicated below:

Third, separate from BA and OPA, there is an "inventory" of judge advocates on active duty in the Navy at any given moment in time. Inventory can fluctuate depending upon a variety of factors including the number of officers in the accessions pipeline or the number awaiting retirement or discharge. But inventory cannot exceed authorized end-strength as of the last day of the fiscal year. In October 2010, there was an inventory of 821 judge advocates on active duty in the Navy.[94]

Fourth, the Navy also fills manpower requirements outside of the Navy, including, but not limited to, the White House, the State Department, the Office of the Secretary of Defense, the Joint Chiefs of Staff, and NATO.[95] The Navy does not determine the manpower requirements for organizations and agencies outside the Navy, but it participates in the processes whereby those requirements are identified, validated, and funded.[96] Typically, an executive agent having authority over the outside command or activity is responsible for justifying the manpower requirements.[97] Funding (end-strength) is either provided at the direction of the Secretary of Defense or negotiated via a manpower memorandum of agreement.[98]

Fifth, the Navy also provides temporary manning to combatant commands and Joint Task Forces (JTFs) through Individual Augmentation (IA) procedures.[99] The supported combatant command or JTF identifies the temporary manpower requirements necessary to accomplish an

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	FY 11	FY 12	FY 13	FY 14	FY 15	FY 16
BA	801	782	745	746	747	747
OPA	801	784	747	748	749	749

[94] *See* Letter from VADM James W. Houck, Judge Advocate General of the Navy, to Mr. Daniel J. Dell'Orto, Chairman, Independent Review Panel (Ser 00/0102) (Sep. 29, 2010) [hereinafter VADM Houck Letter (Ser 00/0102)].

[95] OPNAVINST 1000.16K, *supra* note 47, §§ 5, 7 of enclosure (1), at 5-3, 7-14 to -18.

[96] *See id.* §§ 5, 7 of enclosure (1), at 5-3, 7-16.

[97] *See id.*

[98] *Id.* § 7, at 7-16. The Total Force Requirements Division acts as Navy's "military manpower coordinator" for requirements outside of the Navy, including the permanent peacetime positions at Joint commands. The Division represents the Navy in the Joint Requirements Validation Board and Defense Agency Manpower Review process, and manages Navy end-strength as it is applied against Joint billets.

[99] *See* Chairman of the Joint Chiefs of Staff Instr. 1301.01C, *Individual Augmentation Procedures*, 2 (1 Jan. 2004, Current as of 16 Dec. 2008) [hereinafter CJCSI 1301.01C] ("An IA is an unfunded temporary duty position identified on a [Joint Manning Document] by a supported [combatant commander] to augment staff during contingencies."); *see* Chief of Naval Operations Instr. 1001.24, *Individual Augmentation (IA) Policy and Procedures*, ¶ 3., at 2 (5 Jul. 2000) [hereinafter OPNAVINST 1001.24]. *See generally* CJCSM 3500.04E, *supra* note 78.

assigned mission and records them on a "Joint Manning Document (JMD)."[100] The supported commander forwards the JMD to its subordinate Service component commanders with instructions on which positions are to be filled by each Service.[101] If there are positions on the JMD that cannot be filled by the Service component commanders, the JMD is forwarded to the Joint Staff.[102] The Joint Staff prioritizes the remaining unfilled positions and works with both the supported commander and the Services to find sourcing solutions by consensus.[103] If consensus cannot be reached, a formal sourcing board is convened and recommended solutions (and dissenting views) are forwarded to the Secretary of Defense for adjudication.[104]

JMD positions tasked to the Navy for sourcing are reviewed by the Deputy Chief of Naval Operations for Operations, Plans, and Strategies (N3/N5), who determines whether the Navy's sourcing solution will come from the active or reserve components. If the solution will come from the active component, N3/N5 works with Commander, U.S. Fleet Forces Command to identify the specific military personnel who will serve as IAs.

For judge advocate IA requirements, an informal process is worked in parallel with the formal process described above. As soon as the supported commander begins to articulate a requirement for judge advocate IAs, sourcing solutions are sought via an informal Joint Legal Support Sourcing Working Group convened by U.S. Joint Forces Command.[105]

C. The Role of the Judge Advocate General in the Navy

The Judge Advocate General of the Navy (JAG) is not a Budget Submitting Office (BSO), and he has no authority to determine judge advocate requirements or authorize judge advocate billets in the DON or in the U.S. Navy as a Service.[106] The JAG does, however, have an important degree of influence in the determination of judge advocate manpower requirements

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[100] CJCSI 1301.01C, *supra* note 99, ¶¶ 1.b., 5.a., 5.c., at 1-2, ¶ 1.a.(1) of enclosure (A), at A-1; *see* OPNAVINST 1001.24, *supra* note 99, ¶ 2., at 1, enclosure (2), at 3. *See generally* CJCSM 3500.04E, *supra* note 78.
[101] CJCSI 1301.01C, *supra* note 99, enclosure (A).
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] Joint Chiefs of Staff, Joint Publication 1-04, *Legal Support to Military Operations, passim* (1 Mar. 2007) [hereinafter JP 1-04].
[106] As a three-star (O-9), the JAG can influence judge advocate manpower determinations through his professional relationships with the senior flag officers in command of Navy Budget Submitting Offices (BSOs) or through his reporting relationship to the Chief of Naval Operations.

within Field Support Activity (FSA) and the Department of the Navy, Administrative Assistant (DON/AA), which together account for 62% of the community. As Vice Admiral (VADM) James W. Houck, JAGC, USN, Judge Advocate General of the Navy, explained to the Panel, the JAG is a customer of the FSA and the DON/AA; they provide him with resources for, respectively, the Naval Legal Service Command (NLSC) and the Office of the Judge Advocate General (OJAG).[107] The JAG and the NLSC Commander initiate the processes whereby judge advocate manpower requirements are determined by the FSA and the DON/AA.

The JAG also exercises influence within the Bureau of Naval Personnel. The Bureau has designated officer community managers,[108] including a manager for the judge advocate community, who is a senior judge advocate selected by the JAG. That officer, supported by the JAG, is responsible for developing Judge Advocate General's Corps accession plans and promotion plans, monitoring the balancing of judge advocate end-strength and Billet Authorization (BA), and reviewing Billet Change Requests (BCRs) and Statement of Manpower Requirements (SMRs) before action is taken by the Director of the Total Force Manpower Division.[109] That means the JAG influences, but does not control the size and shape of, the JAG Corps. It also means that he has visibility into the judge advocate manpower determinations made by BSOs, although for the 38% of the JAG Corps falling outside the FSA and the DON/AA, that visibility officially does not occur until the penultimate step in the approval process.

The Judge Advocate General, by statute, makes all judge advocate assignments in the Navy.[110] The JAG assigns four officers to the Bureau of Naval Personnel to work as assignments detailers for the JAG Corps. The JAG also personally approves the individual assignments of all judge advocates in the rank of lieutenant commander and higher.[111]

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[107] VADM James W. Houck, JAGC, USN, Judge Advocate General of the Navy, Transcript of September 1, 2010 Hearing, at 239 [hereinafter VADM Houck Testimony].

[108] The Officer Community Management (OCM) Division of the Bureau of Naval Personnel "manages community requirements for all active component and reserve component (including Full-Time Support (FTS)) officer communities." http://www.npc.navy.mil/Officer/CommunityManagers/.

[109] *See generally* OPNAVINST 1000.16K, *supra* note 47.

[110] 10 U.S.C. § 5148.

[111] The JAG and two senior Navy flag officers emphasized to the Panel in open testimony the importance of the role of the Judge Advocate General in making judge advocate assignments in the Navy. VADM Houck Testimony, *supra* note 107, at 160-63; VADM Harry B. Harris, Jr., USN, Commander, U.S. Sixth Fleet, Transcript of October 13,

The JAG is responsible for recruiting officers into the JAG Corps,[112] and for providing initial and continuing professional training to judge advocates in the Navy, Marine Corps, and Coast Guard.

D. Marine Judge Advocate Manpower Management

1. Structure.[113] The Marine Corps Total Force Structure Process establishes the necessary structure for each organizational unit of the Marine Corps. This structure is identified on unit Tables of Organization (T/O).[114] The T/O represents the total personnel requirement for each command, tabulated by billet,[115] Military Occupational Specialty (MOS),[116] and grade necessary to accomplish the unit's particular mission. Accordingly, the T/O includes any organic judge advocate requirements (e.g., 1st Marine Logistics Group (MLG) headquarters T/O includes a requirement for one Marine officer, with a Primary MOS (PMOS) of 4402 (judge advocate), in the grade of O-5 (lieutenant colonel), to serve as the SJA).[117] The cumulative T/Os constitute the optimal force structure for a fully manned Marine Corps. Ideally, the total number of billets in this structure, requiring a PMOS of 4402, represents the total number of judge advocate positions that must be filled to meet the Marine Corps' enduring Service-level legal

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2010 Hearing, at 17-19 [hereinafter VADM Harris, Jr. Testimony]; VADM John M. Bird, USN, Director, Navy Staff, Transcript of October 13, 2010 Hearing, at 26 [hereinafter VADM Bird Testimony].

[112] VADM Houck Testimony, *supra* note 107, at 164-67.

[113] MCO 5311.1D, *supra* note 47, ¶ 32. of enclosure (1), at 8-5 (defining "Force Structure" as the "number, size and composition of Marine Corps units required to perform the Marine Corps mission essential tasks.").

[114] *Id.* ¶ 75. of enclosure (1), at 8-11 (defining Table of Organization and Equipment (T/O&E) as "A report which contains the organizational mission statement, manpower, and equipment requirements and authorizations for the organization to perform its mission."). For purposes of this review, the Panel will only refer to the T/O, rather than T/O&E, as this is limited to the manpower requirements of the organization.

[115] "Billet" refers to the official title of a particular duty assignment, e.g., "Staff Judge Advocate (SJA), II Marine Expeditionary Force (MEF)."

[116] Every Marine, after completing initial entry-level training, attends a formal in-service school to receive education in a particular career field (e.g., Naval Justice School for judge advocates and enlisted legal service specialists). *See* U.S. Marine Corps Order 1200.17B, *Military Occupational Specialties Manual (Short Title: MOS Manual)*, enclosure (1) (15 Apr. 2010) [hereinafter MCO 1200.17B]. After completing this education, each Marine is assigned a Military Occupational Specialty (MOS) denoted within the Marine Corps manpower system by a four-digit numerical code. *Id.* For example, Marine judge advocates are designated 4402, Marine enlisted legal service specialists are designated 4421, and Marine legal administrative officers are designated 4430. *Id.* This initial MOS is their primary MOS or "PMOS." *Id.* MOSs are grouped together into functional areas, known as "Occupational Fields" or OccFld. *Id.* The OccFld for any particular MOS is denoted by the first two digits of the MOS numerical code (e.g., the OccFld for 4402 is 44). *Id.*

[117] Each requirement, or billet, on the T/O will have a corresponding "Primary" MOS (PMOS) and a "Billet" MOS (BMOS). The PMOS identifies which Primary MOS community must fill the billet (e.g., 4402 – judge advocate), whereas the BMOS identifies the requisite skills an officer must have for that particular billet (e.g., 4409 – Masters of Criminal Law).

mission. Force structure also accounts for enduring Departmental and Joint Service judge advocate billets required to be filled by the Marine Corps.[118] The Marine Corps' 4402 structure, as with all other Marine Corps structure, is managed by the Deputy Commandant for Combat Development and Integration (DC CD&I) via the Total Force Structure Division (TFSD). TFSD uses top-down strategic guidance,[119] policy restraints/constraints,[120] and commanders' bottom-up recommendations[121] to determine the T/O required for each unit within the Marine Corps.[122] As of September 30, 2010, the Marine Corps had 376 structured billets requiring a PMOS of 4402.[123] Approved structure for the past five years, the current execution year, and out-years in the Future Years Defense Program (FYDP) are listed below in Table 5. The Panel notes two significant points: first, since 2006 the Marine Corps has added over 35 billets to its 4402 structure; second, this data does not reflect an additional 32 billets, validated by the 2010 Marine Corps Capabilities Assessment Review (CAR), which are pending inclusion in the T/O starting in FY 15. The CAR will be discussed further in Section III.G., *infra*.

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[118] *See* MCO 5311.1D, *supra* note 47, ¶ 4.a.2.(p), at 6. These billets are referred to respectively as "external billets" (e.g., billets within the DON's OJAG) or Joint Duty Billets (e.g., billets within the Office of Legal Counsel to the Chairman, Joint Chiefs of Staff (CJCS)). These billets are not found on any Marine unit Table of Organization. MCO 1200.17B, *supra* note 116, enclosure (1). Rather, the former are aligned with a "billet sponsor" within Headquarters, Marine Corps (e.g., SJA to CMC) and the latter are maintained by the Joint Officer Matters Officer (JOMO) at Deputy Commandant for Manpower and Reserve Affairs (DC M&RA). *See* MCO 5311.1D, *supra* note 47, ¶ 3. of enclosure (1), at 5-4 to -8. The four digit numeric coding for these billets is 90XX. *Id.* enclosure (1).

[119] Top-down strategic guidance includes the National Security Strategy, National Defense Strategy, National Military Strategy, Joint Vision, and the Commandant's Planning Guidance. *Id.* ¶ 3.b. of enclosure (1), at 1-2.

[120] *Id.* ¶ 3.a. of enclosure (1), at 1-1. Policy restraints/constraints include an array of legislative and executive policies, e.g., limitations on general officer and senior enlisted billets.

[121] *Id.* ¶ 3.b. of enclosure (1), at 1-2. Bottom-up recommendations include input from Marine Forces (MARFOR) commanders as well as other operating forces and supporting establishment commanders.

[122] As part of this development process, Total Force Structure Division (TFSD), in concert with Subject Matter Experts (SMEs) from the Marine Air-Ground Task Force (MAGTF) and functional advocates (e.g., SJA to CMC is the Functional Advocate for legal services), evaluate each unit's mission statement and associated Mission Essential Tasks (METs), and determine the right skills by grade and quantity needed to accomplish that particular unit's mission and METs. *Id.* Those skills are then mapped to an MOS, as identified in the MOS Manual. *See generally* MCO 1200.17B, *supra* note 116.

[123] Recognizing that many of the senior billets within this structure require further education and training in a particular area of concentration, Judge Advocate Division (JAD) has worked with Commanding General, Training and Education Command (TECOM) to add additional judge advocate MOSs to the 44XX occupational field within the MOS system. *See id.* enclosure (1). These additional MOSs include 4405 - Master of International Law, 4406 - Master of Environmental Law, 4407 - Master of Labor Law, 4408 - Master of Procurement Law, 4409 - Master of Criminal Law, and 4410 - Master of Law (General). *Id.* JAD then worked with Total Force Structure Division (TFSD) to code the Billet MOS (BMOS) for many of these 376 structured 4402 billets, so that they are required to be filled with judge advocates who were assigned an additional MOS from the 4405-10 series. *See* USMC *SAP*, *supra* note 42, at 24, annex F, at 3-6. Each of these additional MOSs is referred to as a Necessary MOS (NMOS), as it is necessary for a Marine to obtain one of these additional MOSs to be fully qualified for the particular billet. MCO 1200.17B, *supra* note 116, enclosure (1).

Fiscal Year	06	07[1]	08[2]	09[3]	10[4]	11[5]	12[6]	13[7]	14	15	16
Structure	340	341	350	354	366	378	388	376	376	376	376

[1] Reflects elimination of one billet in Okinawa, and addition of two operational law billets within Joint commands.
[2] Reflects elimination of one billet at Headquarters, Marine Corps, addition of four operational law billets within Joint commands, and addition of six billets within SJA offices at Quantico, VA; New Orleans, LA; and Camp Lejeune, NC.
[3] Reflects addition of one operational law billet in Center for Law and Military Operations (CLAMO) at Charlottesville, VA, addition of two billets within SJA offices at Quantico, VA, and one operational law instructor billet at Quantico, VA.
[4] Reflects elimination of one billet at U.S. European Command (EUCOM), and addition of 13 billets for Office of Military Commissions (OMC) requirement.
[5] Reflects addition of eight billets for Guam, addition of one operational law billet at Marine Cyber Command, and three billets in SJA offices at Quantico, VA.
[6] Reflects addition of two billets for Guam, and addition (actually re-coding) of seven billets for Marine Expeditionary Unit (MEU) SJAs and one Deputy SJA in II MEF (Marine Expeditionary Force).
[7] Reflects elimination of 13 OMC billets at end of FY 12, and addition of one labor law billet.

Table 5. Structure

This structure reflects the active management by TFSD, Judge Advocate Division (JAD), and individual commands to effect a series of incremental changes in an effort to maintain alignment between structure and actual mission requirements.[124]

2. Authorized Strength Report.[125] Fiscal realities require the Marine Corps to prioritize the force structure to determine what portion of each unit's structure will be authorized for funding. The Commandant does this through a Manning and Staffing Precedent Order,[126] which delineates "excepted commands"[127] – those units whose structure will be funded at 100%, and "priority commands"[128] – those units whose structure will be funded at 95%.[129] All

[124] Some of these historical and on-going efforts will be discussed further in Section III.G., *infra*.
[125] MCO 5311.1D, *supra* note 47, ¶ 7. of enclosure (1), at 8-2 (defining the Authorized Strength Report (ASR) as "A report publishing the portion of the force structure which, within budgetary constraints, is authorized to be filled – utilized by Deputy Commandant for Manpower and Reserve Affairs (DC M&RA) for planning the future, and distributing the current, personnel inventory of the Marine Corps.").
[126] U.S. Marine Corps Order 5320.12G, *Precedence Levels for Manning and Staffing, passim* (8 Jan. 2010) [hereinafter MCO 5320.12G].
[127] *Id.* ¶ 4.a(2)(b)1., at 3. Excepted Commands include, for example, Marine Expeditionary Unit (MEU) Command Elements, which will in 2012 include one 4402 major to serve as the MEU Staff Judge Advocate (SJA) for each of the seven MEU command elements. *See id.*
[128] *Id.* ¶ 4.a(2)(b)2., at 3. Priority Commands include all operating forces, including the SJAs within the command elements of the Marine Expeditionary Forces (MEFs) and their major subordinate commands, as well as the 4402s serving as service providers at the Legal Service Support Section (LSSS). *Id.* Priority Commands also include all external billets, formal schools, and Headquarters, Marine Corps billets. *See id.*
[129] *Id.*

remaining commands are delineated as "proportionate share commands,"[130] – those units whose structure is funded based on the remaining funding available.[131] The outcome of this formulation is published in the Authorized Strength Report (ASR). TFSD publishes the ASR semiannually, in February and August. The report includes the current year ASR, as well as the five out-years in the FYDP, subject to change pursuant to variations in manning precedents. These figures, as well as the ASRs for the past five years, are listed below in Table 6. Consistent with Table 5, above, which depicts structure, the figures for ASR below do not account for the approved addition of 32 billets to the 4402 structure in FY 15.

Fiscal Year	06	07	08	09	10	11	12	13	14	15	16
ASR	333	306	311	330	361	362	365	354	353	352	353

Table 6. Authorized Strength Report

The ASR is utilized by the Deputy Commandant for Manpower and Reserve Affairs (DC M&RA) for planning the future, and assigning the current, personnel inventory of the Marine Corps.

3. Inventory. DC M&RA, Manpower Plans (MP), plans and manages Marine Corps personnel inventory.[132] DC M&RA (MP) converts the forecasted ASRs through a computer modeling process to create a Grade Adjusted Recapitulation (GAR) – a series of forecasted target inventories. The GAR provides the basis for all manpower planning activities associated with inventory development, including accessions, promotions, and retention.

[130] *Id.* ¶ 4.a(2)(b)3., at 3. For example, Proportionate Share (Pro Share) Commands may be made up of remaining supporting establishment forces, including judge advocates assigned to the SJA offices for most bases and stations. *See id.*

[131] *See id.* However, those particular billets within Priority or Pro-Share Commands, requiring a Necessary MOS such as 4405 - Master of International Law, are funded at 100%. SJA to CMC *Submission, supra* note 38, at 10.

[132] "Inventory" is the total number of officers within a given MOS category actually serving on active duty at any given time. For judge advocates, this could include both 4402 (judge advocate) and 4401 (student judge advocate). The inventory at the end of each fiscal year should ideally be the same number as the Grade Adjusted Recapitulation (GAR) requirement for that particular MOS category. The Marine Corps restricts its use of the term "end-strength" to the legislative connotation which is the number of all officers in the Marine Corps on active duty at the end of the fiscal year. Therefore, individual MOS officer communities do not have a particular "end-strength." Rather, it is more appropriate to speak of the total number of Marine judge advocates in terms of "inventory" and "requirements" – the planned target inventory.

This modeling process first pulls the funded structure from the ASR by MOS, and then allocates a proportionate share of "free" B-Billets[133] and P2T2 (patient, prisoner, transient, trainee)[134] to that particular MOS. Free B-Billets are those billets which any Marine Air-Ground Task Force (MAGTF) officer can fill, regardless of MOS, in order to contribute to the broader mission of the Marine Corps. The modeling process allocates each MOS community a share of free B-Billets proportionate to the relative size of that MOS community in the ASR. P2T2 is the number of Marines of a particular MOS forecasted to be in a patient, prisoner, trainee or transient status at any given time, based on a particular MOS's training standards and historical trends. Similar to the Navy's "Individual's Account," P2T2 represents the "overhead" required to build and maintain an inventory of sufficient quantity and quality of judge advocates. These totals (structure + B-Billets + P2T2), are organized by grade, and then adjusted for legislative grade constraints. The result of this modeling process is the GAR – the target inventory.

The GAR provides the planning basis for building and shaping appropriately sized inventories of judge advocates to meet projected legal requirements as well as the broader mission requirements of the Marine Corps such as B-Billets, command, and opportunities for

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[133] Billets are categorized as either A-Billets, Free B-Billets, or Necessary B-Billets, depending on their MOS coding. Each billet is coded on a unit Table of Organization (T/O) with two types of MOSs: a Primary MOS (PMOS) and a Billet MOS (BMOS). The PMOS identifies which MOS community must fill the billet, whereas the BMOS identifies the requisite skills an officer must have for that particular billet. Billets are then categorized as A-Billets or B-Billets based on the coding of the PMOS and BMOS. A-Billets are those billets that require the skill sets of a specific PMOS, and therefore the BMOS and the PMOS are the same, e.g., 4402. B-Billets are those billets on a unit T/O in which the BMOS is coded for something other than a PMOS. In such cases, the BMOS is coded with either a Free MOS (FMOS) or a Necessary MOS (NMOS), and hence referred to as either a "Free B-Billet" or a "Necessary B-Billet." In the case of free B-Billets, the PMOS and BMOS are both coded with the FMOS of 8006, which means that billet may be filled by any PMOS community and requires only the general skills of any Marine Air-Ground Task Force (MAGTF) officer. Necessary B-Billets, on the other hand, are required to be filled by a particular PMOS community, such as 4402, and the billet duties involve some other requisite skills. For example, a Necessary B-Billet may be coded for a PMOS of 4402 and a BMOS of 4405-4410. The 4405-4410 series are NMOSs assigned to Marine judge advocates as an additional MOS, after they have received specialized training and skills (e.g., 4405 is assigned to Marines who obtain an LL.M. in International Law, and 4409 is assigned to Marines who obtain an LL.M. in Criminal Law). Necessary B-Billets requiring a PMOS of 4402 may also be coded for a BMOS of 8007, which means the billet requires the general skills of any MAGTF officer. These are typically used on T/Os for education and training commands, where the Marine Corps believes it is beneficial to have a variety of PMOSs represented on the particular staff, although the billet, often an instructor, only requires the general skills of any MAGTF officer. MCO 1200.17B, *supra* note 116, enclosure (1), at x, 1-3, 1-138 to -142.

[134] DoDI 1120.11, *supra* note 63, *passim*. P2T2 represents the number of Marine officers, of a particular MOS, who are forecasted to be in one of the following statuses at any given time: a *patient* – hospitalized for longer than 30 days; a *prisoner* – incarcerated for longer than 30 days, but less than 6 months; a *transient* – in the process of executing a change of station/assignment orders; or a *trainee* – in entry level accessions training or training in excess of 20 weeks. *Id.* For judge advocates, this includes 4401 "student judge advocates."

training and Professional Military Education. Table 7, below, provides the GAR for the current execution year and out-years in the FYDP. Consistent with Table 6, above, which depicts ASR, the figures for the GAR do not account for the approved addition of 32 billets to the 4402 structure in FY 15.

Fiscal Year	11	12	13	14	15	16
GAR	543	541	540	531	530	532

Table 7. Grade Adjusted Recapitulation

Forecasted inventories are then built and shaped by recruiting, accessions, education, training, and promotion.[135] DC M&RA determines the judge advocate accession mission required each fiscal year to maintain the required number of judge advocates in future years. This accession mission planning takes into account expected attrition, career selection, promotion rates, and the future years' requirements. Marine Corps Recruiting Command (MCRC) is responsible for meeting each fiscal year's judge advocate accession mission. After accession to the active force, judge advocates then enter the training pipeline, which is managed by Training & Education Command (TECOM). Naval Justice School (NJS) provides the training and education for each judge advocate to obtain their Primary MOS (PMOS). Actual inventories in the judge advocate community are subject to fluctuations from planned or projected inventories due to unforeseen changes in attrition rates or civilian market conditions.

4. Assignments. The Commandant makes all assignments of Marine Corps officers, including judge advocates.[136] "Assignments" means the issuing of orders transferring

[135] As will be discussed further in Sections III.F. and IV., *infra*, the Marine Corps has taken aggressive measures to maintain an appropriate inventory of judge advocates. DC M&RA has increased the accessions mission by 71% since FY 08 (from 35 to 60 annually). The Law School Education Debt Subsidy increased by 50% in FY 11 (from $30,000 to $45,000 annually). Two Return to Active Duty Boards were conducted in FY 10 and FY 11, returning 12 officers to active duty as judge advocates. Already, the judge advocate inventory has improved from 75% of the O-1 to O-5 requirement in October 2009 to 94% of the O-1 to O-5 requirement in October 2010. Additionally, judge advocates were precepted as critically short on the FY 12 colonel selection board. ALNAV 074/10 announced that 11 Marine judge advocates had been selected by the FY 12 Selection Board for promotion to colonel. Message 231654Z NOV 10, ALNAV 074/10, *Subj: FY12 U.S. Marine Corps Colonel Selections* [hereinafter ALNAV 074/10]. As of December 1, 2010 the Marine Corps' 4402 (judge advocate) inventory had increased to 461, and the 4401 (judge advocate student) inventory to 91, for a total inventory of 554, slightly above the GAR.

[136] *See* 10 U.S.C. § 806.

someone on a permanent basis to a new billet, within a new command, at a new duty location. These orders are referred to as a "Permanent Change of Station" (PCS) orders.[137] This authority is delegated to DC M&RA. DC M&RA, Manpower Management (MM), uses a modeling process, which compares the current, funded billets within the ASR to current, assignable inventory of judge advocates to develop "staffing-goals."[138] Each year assignments of judge advocates to particular units are then made consistent with that unit's staffing goal.[139] The staffing goal gives priority to filling A-Billets[140] within the ASR. When assigning a staffing goal to a B-Billet manning requirement, the staffing goal model considers the relative "health" of a particular occupational field's (e.g. 44XX) inventory. If, during any given year, there are inventory shortfalls for a particular occupational field, that field will receive fewer staffing goals for B-Billet requirements.

DC M&RA (MM) determines which officer, amongst the pool of officers eligible for PCS orders, will be assigned to that particular unit, based on the following priorities (in order of precedence):[141]

- needs of the Marine Corps;
- MOS/billet variety;
- availability of the individual;
- Overseas Control Date;
- seniority; and

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[137] An assignment, made by Permanent Change of Station (PCS) orders, is also referred to as a "permanent assignment." The Panel will use the term "permanent assignment" throughout this report to refer to assignments made by PCS orders.

[138] MCO 5320.12G, *supra* note 126, ¶ 4.a.(1)(a)-(b), at 1-2; MCO 5311.1D, *supra* note 47, ¶ 68. of enclosure (1), at 8-10.

[139] *See generally* MCO 5311.1D, *supra* note 47. In response to requirements imposed by higher authority, or urgent, un-programmed requirements, Marine judge advocates may be assigned in excess of an organization's structural requirements. *See id.* ¶ 4.a.(2)(q), at 7. Such additional assignments are called "overstaffs" and are to be approved by Deputy Commandant for Manpower and Reserve Affairs (DC M&RA) and are to be of short duration. *Id.* Overstaff requests in excess of three years require submission of a Table of Organization and Equipment Change Request (TOECR) by the requesting unit to establish a permanent requirement. *Id.*

[140] A-Billets are those billets that require the skill sets of a specific Primary MOS. Therefore the Billet MOS and the Primary MOS are the same, e.g., 4402.

[141] U.S. Marine Corps Order P1300.8R W/ CH 1-8, *Marine Corps Personnel Assignment Policy* (4 Oct. 1994).

- individual preference.

Once officers' assignments are approved, they are issued PCS orders transferring them to their new assignments. Generally, officers are required to serve a minimum of 36 months at the location of their new assignment.[142]

Although officers, judge advocates included, are assigned based on a particular unit's funded, structured billets – or staffing goals – the officer is actually ordered to report for duty to the Commanding General (CG) within the superior chain of command of the respective unit. The CG has the discretion to detail the officer to any duties, based on the needs of that particular unit. For example, a particular unit, such as a Legal Service Support Section (LSSS) within the Marine Logistics Group (MLG), will generally have a staffing goal for several company grade judge advocates based on funded trial/defense counsel billets on the LSSS Table of Organization (T/O). However, upon reporting for duty, the MLG CG may detail a judge advocate to serve as staff secretary or as a company commander. This ability to reassign incoming personnel allows the commander, who is generally best positioned, to task-organize his resources in such a way as to best accomplish the mission. The impact on the legal community is tempered by the fact that this reassignment only occurs with respect to a small minority of officers, is typically only for one year out of three, provides that particular officer a career broadening opportunity, and occurs only to the extent the CG believes it does not risk accomplishment of the current legal mission.

5. Individual Augmentation. In addition to permanent assignments, Marine judge advocates may be temporarily assigned to Joint Service duties as Individual Augmentees (IA).[143] IA requirements, as identified on a Joint Manning Document (JMD) for a particular Joint Task Force (JTF), to be filled by the Marine Corps are first tasked to the respective Marine forces component commander. If the component commander cannot fill the requirement, it will be forwarded to the Deputy Commandant for Manpower and Reserve Affairs (DC M&RA) for validation and global sourcing. If DC M&RA cannot fill the requirement from within the active component, then it will be forwarded to Commander, Marine Forces Reserve to

[142] *Id.* ¶¶ 1100-1101, at 1-3 to -4. This is referred to as the "Time On Station" (TOS) requirement. After serving the minimum TOS, an officer is eligible for PCS orders to a new duty station assignment.

[143] *See generally* U.S. Marine Corps Order 1001.61, *Policy and Procedures for Sourcing Personnel to Meet Individual Augmentation (IA) Requirements* (5 May 2000) [hereinafter MCO 1001.61] (establishing policies and procedures for sourcing judge advocates to meet IA requirements).

fill from within the reserve component. These duty assignments are generally six months in duration, during which time the parent Marine command receives no manpower compensation or relief. Therefore, the duties that were left behind by the judge advocate assigned as an IA must be performed by personnel remaining within the unit.

6. Tables of Organization and Equipment Change Request. As inventory and assignments are driven largely by the Authorized Strength Report (ASR), which is in turn driven largely by structure requirements, it is critical to ensure unit Tables of Organization (T/Os) are actively managed to reflect current requirements. Commanders, staff, and headquarters organizations review unit T/Os to identify necessary force structure changes. Billet structure may be modified through a T/O and Equipment Change Request[144] (TOECR). TOECRs may call for the addition or deletion of structure, the realignment of structure, or modifications to existing structure such as the Military Occupational Specialty (MOS) or grade required. A request for additional structure for a particular command, without any off-set from another command, is called an "uncompensated" request.[145] Uncompensated requests amount to an increase in overall force structure. As such, all uncompensated requests must be first vetted through an annual Uncompensated Review Board (URB), and then approved by the Commandant.[146] A request that seeks to realign structure from one command to another command is a "compensated" request.[147] Compensated structure changes are approved by Total Force Structure Division (TFSD), on behalf of the Commandant.

7. Occupational Field Management. Within this system, the SJA to CMC is the Occupational Field Manager[148] and Functional Advocate[149] for the Marine Corps' 44XX

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[144] *See* MCO 5311.1D, *supra* note 47, ¶ 2. of enclosure (1), at 5-1 to -2.
[145] *See id.* ¶ 4.a.(2)(m), at 6, ¶ (7) of enclosure (1), at 5-6, ¶ 20. of enclosure (1), at 8-3.
[146] *Id.* Uncompensated Tables of Organization (T/O) change requests submitted by the SJA to CMC must be signed by the Director, Marine Corps Staff, then vetted through the annual Uncompensated Review Board (URB), the Doctrine, Organization, Training, Materiel, Leadership and Education, Personnel and Facilities (DOTMLPF) Working Group, and submitted to the Deputy Commandant for Combat Development and Integration (DC CD&I). *Id.* The DC CD&I presents the SJA to CMC's uncompensated requests, along with all others from the annual URB to the Marine Requirements Oversight Council (MROC) for the Commandant's decision. *Id.* If approved, the changes will be added to the following August Authorized Strength Report (ASR) with an effective date three fiscal years from the current fiscal year. *Id.*
[147] *Id.*
[148] *Id.* ¶ 59. of enclosure (1), at 8-9 (defining Occupational Field Managers as "The principal point of contact between the Commandant and the total force with regard to capabilities and force structure, intended structure

occupational field.[150] MOS Managers assist the SJA to CMC in these roles.[151] Three MOS Managers are appointed within Judge Advocate Division (JAD) to manage each of the MOSs within the 44XX occupational field: 4402 - judge advocates; 4430 - legal administrative officers; and 4421 - legal service specialists.[152] As the Occupational Field Manager and Functional Advocate, the SJA to CMC has a formal, integrated, and meaningful role in judge advocate structure, inventory, recruiting, education, training, and assignments, including:

- interaction with TFSD to effect changes to structure, through,
  - procedures for submission of, and provision of comments/concurrence/non-concurrence on all TOECRs affecting judge advocate structure;
  - participation in force structure Doctrine, Organization, Training, Materiel, Leadership and Education, Personnel and Facilities (DOTMLPF) assessments, solutions and working groups affecting judge advocate structure;
  - provision of Subject Matter Experts (SMEs) to force structure review boards and working groups, and to evaluate and determine legal skills necessary to accomplish a unit's prescribed Mission Essential Tasks (METs); and
  - sponsorship management of all assigned external billets.[153]
- interaction with Training & Education Command (TECOM) to affect the MOS system and school opportunities. This includes request procedures and SME input with respect to,

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changes, training, and unique operational considerations pertaining to a specific Occfld [sic]. OccFld managers are assigned purview over a grouping of Military Occupational Skills (MOS) and their respective MOS managers.").

[149] The Functional Advocate "Serve[s] as the Commandant's primary point of contact for a specific Marine Corps function . . .[,]" including Legal. *Id.* ¶ 4.b. of enclosure (1), at 8-1.

[150] MCO 5311.1D, *supra* note 47, ¶ 8.a., at 25.

[151] *Id.* ¶ 52. of enclosure (1), at 8-8 (defining MOS Managers as "The Commandant's subject matter expert on a specific MOS who advises the Commandant on derivation of capabilities and force structure; and who serves as a technical advisor to an Occupational Field (OccFld) manager by assisting in the classification, training, and career progression of personnel within an MOS. MOS Managers will be overseen by OccFld managers.").

[152] USMC *SAP*, *supra* note 42, at 2. The MOS Manager for 4402s is the Judge Advocate Division Support Branch (JAS) Branch Head, for 4421s, the Legal Chief of the Marine Corps, and for 4430s, the Legal Administrative Officer of the Marine Corps. *Id.* at 2 n.2.

[153] *See* MCO 5311.1D, *supra* note 47, ¶ 8.h., at 25.

- the establishment of additional Primary MOSs (PMOSs) or Necessary MOSs (NMOSs) within the 44XX occupational field;
- changes to skills required for any MOS within the 44XX occupational field;
- accompanying changes to formal school and training requirements; and
- increase in the number of annual assignments to formal school.[154]

- interaction with DC M&RA, Manpower Plans (MP) to affect the rate of accessions, promotions, and retention programs. This includes request procedures and SME inputs with respect to,
  - accession mission planning;
  - return to active duty boards;
  - debt subsidy pay;
  - career designation boards; and
  - promotion precepts.
- interaction with DC M&RA, Manpower Management (MM) to effect assignments. The officer within DC M&RA (MM) responsible for annually preparing the proposed list – or "slate" – of officers to be assigned, and to which billet/unit, is referred to as an assignment "monitor." Each monitor is responsible for several thousand officers, and therefore relies on the recommendations of the MOS Manager's input. The monitor will, particularly in the case of judge advocates, give those recommendations great weight.[155]

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[154] *See* U.S. Marine Corps Order 1200.15C, *MOS System Modification Process*, ¶ 4.d., at 4 (11 Sep. 2009); *see* MCO 5311.1D, *supra* note 47, ¶ 2. of enclosure (1), at 7-2 to -3.

[155] Colonel (Col) John R. Ewers, USMC, Deputy Staff Judge Advocate to the Commandant of the Marine Corps, testified that the Deputy Commandant for Manpower and Reserve Affairs (DC M&RA) Manpower Management (MM) approved 100% of Judge Advocate Division's (JAD's) (4402 MOS Manager) recommended assignments for this past year. Transcript of October 13, 2010 Hearing, at 132, 145-46 [hereinafter Col Ewers Testimony]. Similarly, Senior Executive Service (SES) Michael F. Applegate, Director, Manpower Plans and Policy Division, Manpower and Reserve Affairs, Headquarters, Marine Corps, testified that this was consistent with historical trends, in which 98-99% of JAD's recommended assignments are approved by M&RA (MM) and, ultimately, the Commandant of the Marine Corps. Transcript of October 13, 2010 Hearing, at 156-57 [hereinafter SES Applegate Testimony]. He also testified that, in those one or two rare cases over the years where there may have been disagreement, it was generally with respect to O-6 level assignments, in which case the controversy would typically be resolved at the general officer level. *Id.* at 154-56.

- interaction with MCRC to affect the quality and flow of accessions.

Figure A, below, illustrates the Marine Corps manpower system.

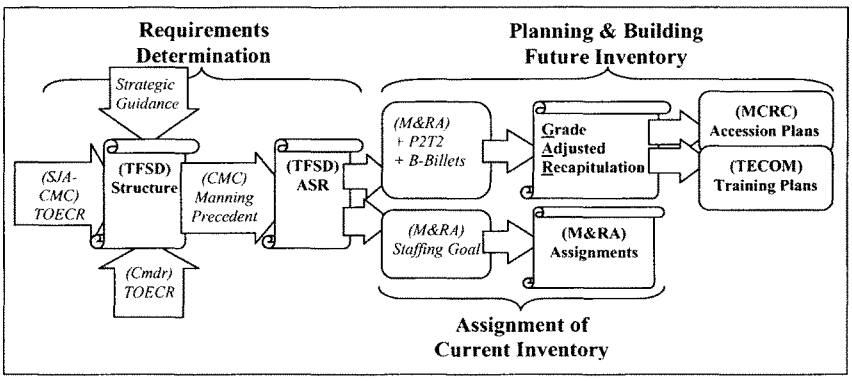

Figure A. Marine Corps Manpower System

III. Determining the Number of Judge Advocates Required to Fulfill the Legal Mission of the Department of the Navy

A. No Single Standard

There is no uniform standard within the Department of Defense (DoD) for determining the number of judge advocates required within the Military Departments or Services, nor is there a single standard for determining the number of judge advocates required within the Department of the Navy (DON). The Services and their parent Departments have different approaches to determining force structure, which reflect their different roles and missions, cultures, history, organization, and resources.[156]

That being said, the Panel also recognizes that there is a level of commonality in the practice of law by judge advocates across the Services, and a level of commonality in the organization of the three Judge Advocates General's (JAG) Corps. For those reasons, the Panel believes it useful to benchmark the number of judge advocates in the Army, Air Force, Navy, and Marine Corps. As illustrated in Table 8, below, (which contains the same data as Table 2, in Section I.D., *supra*), the judge advocate communities in the Navy and Marine Corps are

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[156] *See* Independent Review Panel to Study the Relationships Between Military Department General Counsels and Judge Advocates General, *Legal Services in the Department of Defense, Advancing Productive Relationships, Report of the Independent Review Panel* (Sep. 15, 2005). Although there is no uniform Department of Defense standard for determining judge advocate requirements, DoD does publish broad guidelines for the determination of military manpower requirements writ large, including a guiding principle that "National military objectives shall be accomplished with a minimum of manpower that is organized and employed to provide maximum effectiveness and combat power." U.S. Dep't of Defense, Dir. 1100.4, *Guidance for Manpower Management*, ¶ 3.1., at 2 (Feb. 12, 2005).

Additional standing policies include:
(1) manpower requirements are driven by workload and shall be established at the minimum levels necessary to accomplish mission and performance objectives;
(2) assigned missions shall be accomplished using the least costly mix of personnel (military, civilian, and contract) consistent with military requirements and other needs of the Department as prescribed by law;
(3) military and civilian manpower resources shall be programmed in accordance with validated manpower requirements, and within fiscal limits and acceptable levels of risk identified in Defense planning and programming guidance; and
(4) military and civilian manpower resources shall be allocated to maintain ready forces and accomplish defense missions in priority order, and commensurate with available resources and Congressional constraints. *Id.* ¶¶ 3.2., 3.2.3., 3.3.1., 3.3.2., at 2-3, 5.

significantly smaller than those of the Air Force and Army, whether measured in total numbers, computed as a ratio to active-duty end-strength, or compared by flag/general officer positions.

	Army	Air Force	Navy	Marines
Service End-strength	**566,045**	**334,196**	**328,303**	**202,441**
Total Active-Duty Judge Advocates (x) to End-strength	(1,828) 1 to 310	(1,225) 1 to 273	(811) 1 to 405	(435) 1 to 465
Total full-time attorneys (x) to End-strength[1]	(3,193) 1 to 177	(1,688) 1 to 198	(1,515)[2] 1 to 216	(502) 1 to 403
			DON total (2,017) 1 to 263	
Reserve Component Judge Advocates (x) to Active-Duty End-strength[3]	(1,522) 1 to 372	(671) 1 to 498	(441) 1 to 744	(331) 1 to 612
Active-Duty Judge Advocate Flag/General Officers (x) to Active-Duty Judge Advocate End-strength	(5) 1 to 366	(6) 1 to 204	(2) 1 to 406	(1) 1 to 435

Chart accurate as of September 30, 2010.
[1] Includes active-duty judge advocates and civilians working for JAG, SJA to CMC, and OGC.
[2] USN total of 1,515 includes all OGC attorneys not assigned to the USMC.
[3] Does not include the National Guard. Reserve attorneys in the Navy and Marine Corps are organized to support the active component.

Table 8. Ratios of active component judge advocates to military Service end-strength, full-time attorneys to military Service end-strength, reserve component judge advocates to military Service end-strength, and active-duty flag/general officers to active-duty judge advocate end-strength as of September 30, 2010

Even when adjusting to account for full-time civilian attorneys, it is clear that the DON has fewer attorneys (civilian and military) per active-duty end-strength, than either the Department of the Army or the Department of the Air Force. Taking the comparison a step further, as illustrated below in Figure B, one can calculate what the legal community within the DON would look like if it were similar to the legal communities in the Departments of the Army and Air Force.

Example 1. If the Department of the Navy looked like the Department of the Army, with regard to the ratio of full-time attorneys to active-duty end-strength (1 to 177), the Department of the Navy would have **2,999** Navy and Marine judge advocates and full-time civilian attorneys. Using the existing 811/435/771 ratio of Navy judge advocates/Marine judge advocates/full-time civilian attorneys, it would further break down into: 1,205 Navy judge advocates 646 Marine judge advocates 1,148 Civilian attorneys
Example 2. If the Department of the Navy looked like the Department of the Air Force, with regard to the ratio of full-time attorneys to end-strength (1 to 198), the Department of the Navy would have **2,681** Navy and Marine judge advocates and full-time civilian attorneys, further broken down to: 1,077 Navy judge advocates 578 Marine judge advocates 1,026 Civilian attorneys

Figure B. Examples of the DON legal community as if it were commensurate with the legal communities in the Departments of the Army and Air Force

The Panel cautions that there are limits to the utility of such benchmarking, as the roles and missions of the legal communities across the Military Departments are not identical. But even with that caveat, the above comparison is useful in the view of the Panel in that the size of the legal communities in the Departments of the Army and Air Force can represent an outer boundary or high end in force structure analysis.

B. Review of Operational Law Requirements

The Panel was directed to review the emergent[157] operational law requirements for the U.S. Navy and Marine Corps, including requirements for judge advocates in Joint Task Forces (JTFs), in support of rule of law objectives in Iraq and Afghanistan, and in operational units.

As part of its review, the Panel received the testimony of senior U.S. Navy and Marine Corps commanders and staff judge advocates;[158] interviewed senior commanders in Afghanistan,

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[157] Emergent can mean coming into existence or occurring unexpectedly. http://www.merriam-webster.com/. Since it is not self evident which meaning Congress intended to apply, the Panel will discuss both permanent operational law requirements that have developed since September 11, 2001, and those that occurred unexpectedly, as a result of contingency operations, with a focus on Operation Iraqi Freedom and Operation Enduring Freedom.

For a discussion of the development of operational law requirements before September 11, 2001, with a focus on the Marine Corps, the Panel recommends: Frederic L. Borch, *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti*, Office of the Judge Advocate General and Center of Military History, U.S. Army, *passim* (2001); Col Raymond E. Ruhlmann III, USMCR, *Legal Services Support to Operational Commanders: A Summary of Observations and Lessons from OEF/OIF Judge Advocates and Infantry Commanders*, Marine Corps Gazette, Nov. 2006, at 79-81; Lieutenant Colonel (LtCol) Walter G. Sharp, USMC, *The Warfighting Role of the Marine Judge Advocate*, Marine Corps Gazette, Feb. 1996, at 18; *Final Report to Congress: Conduct of the Persian Gulf War*, 605-32 (Apr. 1992) [hereinafter Conduct of the Persian Gulf War]; LtCol Gary D. Solis, USMC (Ret.), *Marines and Military Law in Vietnam: Trial by Fire* (History and Museums Division, Headquarters, Marine Corps 1989).

In summary, those authors point out that in WWII, Korea, and Vietnam, legal requirements were largely limited to the core functions of military justice and legal assistance. However, lessons learned from those conflicts led to Departmental and Service regulations requiring judge advocates to become more involved in operational planning, training and execution, in order to prevent law of war violations during the conduct of operations. For example, they required judge advocates to: (1) advise the commander on Law of Armed Conflict (LOAC) issues, (2) review operational plans for compliance with LOAC, and (3) provide LOAC training to operational forces. These requirements increased during the 1990s, beginning with the Gulf War, which expanded judge advocate involvement in the areas of claims, fiscal law, and contracting; as well as LOAC considerations of targeting, requisitions of private property, enemy prisoners of war, detainees, repatriation, and cessation of hostilities. Following the Gulf War, the U.S. military responded to contingencies involving low-intensity, asymmetric warfare; failed or weak states; and complex international legal authorities and mandates, which create legally intensive operating environments for the commander. The lessons learned from these operations reinforced the trend for increasing the involvement of judge advocates in operational planning, training, and execution identified in the Gulf War. The importance of operational law was noted by then-Lieutenant General Anthony Zinni, while serving as Commander, U.S. Central Command in 1996. He stated,

> Operational Law is going to become as significant to the commander as maneuver, as fire support, and as logistics. It will be a principal battlefield activity. The senior staff judge advocates may be as close to the commander as his operations officer or his chief of staff. They will be the right hand of the commander, and he will come to them for advice.

JP 1-04, *supra* note 105, at III-1.

including General (GEN) David H. Petraeus, USA, Commander, NATO International Security Assistance Force and Commander, U.S. Forces Afghanistan, and VADM Robert S. Harward, USN, Commander, Joint Interagency Task Force 435, Afghanistan; analyzed manpower data provided by the U.S. Navy and Marine Corps; and considered documents addressing the future direction of U.S. defense strategy and doctrine.

1. Overview

Since September 11, 2001, the operational law requirements of the U.S. Navy and Marine Corps have increased significantly, to include demand for judge advocates on JTFs, in support of rule of law objectives in Iraq and Afghanistan, and in other operational units.

- Since 2001, the number of permanent operational law assignments for U.S. Navy judge advocates has risen from 130 to 223, an increase of 75%. In addition, as of September 30, 2010, 584 U.S. Navy judge advocates have served in Individual Augmentee (IA) assignments, ranging from 7 to 15 months in duration, the majority of which (387) were "boots on the ground" tours in Iraq or Afghanistan. In total, 40% of U.S. Navy judge advocates serve in operational law assignments today. In 2001, less than 18% served in operational assignments.
- Since 2001, the number of permanent operational law assignments for Marine judge advocates has risen from 20 to 47, an increase of 135%. In addition, since September 11, 2001, 391 active component and 108 reserve component Marine judge advocates have deployed with Marine units in support of Operation Iraqi Freedom (OIF) or Operation Enduring Freedom (OEF), and another 80 active component and 28 reserve component judge advocates have deployed as IAs in support of OIF or OEF. This number of OIF and OEF deployments reflects decisions by senior battlefield commanders to increase the number of judge advocates in the command elements (i.e. headquarters) of Marine

[158] The senior commanders included Lieutenant General (LtGen) John Kelly, USMC (former Assistant 1st Marine Division Commander in 2003, I MEF Commander in 2008, and currently Commander, MARFORRES) and LtGen Richard Natonski, USMC (Ret.) (former Commander, Task Force Tarawa in 2003, Commanding General, 1st Marine Division in 2004, and Commander, Marine Forces Command in 2009). Senior judge advocates included Colonel Kevan F. Jacobson, JAGC, USA, Director, Law Center, The Judge Advocate General's Legal Center and School (TJAGLCS); Captain (CAPT) Stacy A. Pedrozo, JAGC, USN, U.S. Navy Military Fellow, Council on Foreign Relations; Col John R. Ewers, USMC, Deputy SJA to CMC.

Expeditionary Forces (MEF) and to assign judge advocates to the MEF's subordinate regimental combat teams and maneuver battalions.

- The enduring operational law requirements for the U.S. Navy and Marine Corps will continue to grow, notwithstanding the projected redeployment of forces from Iraq and eventual redeployment of forces from Afghanistan. Senior line commanders and judge advocates informed the Panel that the operational environment has become increasingly complex and legally intensive, and shows no signs of abating. The Panel agrees with their assessment based on its independent review of the *Quadrennial Defense Review* and other key national security strategy documents.
- The Panel believes that, as operational law requirements continue to grow, particularly within Joint commands, it will become increasingly important for U.S. Navy and Marine judge advocates to serve in those commands, including in senior billets. Both Services should ensure that their judge advocates receive Joint Professional Military Education (JPME) and that there are deliberate and robust manpower processes to nominate highly qualified judge advocates for service in Joint legal billets.
- The Panel observes that the role of the judge advocate in the U.S. Armed Forces may be undergoing a transformation. GEN Petraeus and other senior flag and general officers provided numerous examples of judge advocates executing duties outside the "legal lane." The Panel respects that there are differences in Service culture concerning the use of judge advocates, but believes it is worth highlighting that commanders recognize that the skill sets inherent in experienced operational judge advocates can be successfully applied to non-legal tasks – particularly counterinsurgency operations and maritime operations.

2. What is Operational Law?

The DoD does not have a doctrinal definition of operational law.[159] The Marine Corps defines operational law as: "that body of international, foreign (host nation), and United States

[159] The sea Services (Navy, Marine Corps, and Coast Guard) publish a Commander's Handbook on the Law of Naval Operations and an Annotated Supplement that is "designed to provide officers in command and their staffs with an overview of the rules of law governing naval operations in peacetime and during armed conflict." Office of the Chief of Naval Operations, *The Commander's Handbook on the Law of Naval Operations*, 3 *(NWP 1-14M)* (Jul. 2007)

domestic laws, regulations, and policies that directly affect United States military operations across the operational spectrum – from peacetime activities to combat operations."[160]

The Panel finds that definition of operational law useful for the purposes of this study. The Panel further recognizes that operational law refers to the range of legal and (related) policy issues directly affecting the planning, training, and execution of military operations. The JAG testified that operational law includes the following specialized practice areas: law of armed conflict, rules of engagement, law of the sea, international agreements, counter-terrorism, rule of law, operational environmental law, information operations/cyber law, intelligence oversight, Humanitarian Assistance/Disaster Relief (HA/DR), military commissions, international criminal tribunals, detention operations, foreign military assistance and training, counter-narcotics, ocean policy affairs, defense support to civil authorities, counter-piracy, counter-proliferation, and ballistic missile defense.[161] Other witnesses noted that operational law also includes legal issues relating to foreign claims, foreign criminal jurisdiction, fiscal law, contracting, human trafficking, sovereign immunity, international organizations, civil affairs, command relationships, joint matters, and legal issues unique to certain geographic areas like the Arctic or the South China Sea.[162]

The art of operational law is to identify legal and related policy issues in these divergent areas, and rapidly synthesize them in order to give timely and coherent legal advice to senior civilians, commanders, staffs, and tactical forces. The ultimate goal is to ensure U.S. forces can

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[hereinafter *NWP 1-14M*]; *see also* U.S. Naval War College, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (15 Nov. 1997). The Handbook does not provide a stand-alone definition of operational law. *See NWP 1-14M, supra*.

[160] U.S. Marine Corps Order 3300.4, *Marine Corps Law of War Program*, ¶ 2. of enclosure (1), at 1 (20 Oct. 2003).

[161] VADM Houck Testimony, *supra* note 107, at 127-60; VADM Houck Presentation, *supra* note 4, at 45-57 (1 Sep. 2010). Note that VADM Houck's list was illustrative, not exhaustive.

[162] *See* VADM Harris, Jr. Testimony, *supra* note 111, at 11-14; *see* VADM Bird Testimony, *supra* note 111, at 20-26; *see* CAPT Stacy A. Pedrozo, JAGC, USN, U.S. Navy Military Fellow, Council on Foreign Relations, Transcript of October 13, 2010 Hearing, at 84-107 [hereinafter CAPT Pedrozo Testimony]; *see* Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy Memorandum, *Subj: Summary of Preparatory Meeting of October 19, 2010*, enclosure (1) (27 Oct. 10) [hereinafter GEN Petraeus VTC Summary] (summarizing preparatory video teleconference (VTC) meeting of the Panel with GEN David H. Petraeus, USA, Commander, NATO International Security Assistance Force and Commander, U.S. Forces Afghanistan); *see* Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy Memorandum, *Subj: Summary of Preparatory Meeting of October 13, 2010*, enclosure (1) (18 Oct. 2010) [hereinafter VADM Harward VTC Summary] (summarizing preparatory VTC meeting of the Panel with VADM Robert S. Harward, USN, Commander, Combined Joint Interagency Task Force 435).

maintain readiness, ensure freedom of navigation, and conduct operations in accordance with applicable laws, regulations, and policies.[163]

It would be an oversimplification to conclude that all law practiced at an operational command or staff is operational law. Similarly, not all practice areas that could be described as operational are exclusively so. The practice of law at operational commands and staffs also includes traditional legal assistance, administrative law, and military justice.[164] Few judge advocates are permanently assigned to commands at which they practice operational law exclusively.[165] However, many permanent assignments, or billets,[166] may be properly viewed or categorized as operational law billets based on the fact that a significant portion of the duties involve the practice of operational law.[167] For example, judge advocate assignments to standing JTFs, combatant commands, subordinate service component commands, and many operational units within the U.S. Navy and Marine Corps, are generally classified as operational law assignments. Judge advocates are assigned to these commands primarily as Staff Judge Advocates (SJAs) or members of their staff. The SJA and respective staff provide operational

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[163] *See* SJA to CMC *Submission*, *supra* note 38, at 15.

[164] *See, e.g.*, VADM Houck Testimony, *supra* note 107, at 130-31; VADM Harris, Jr. Testimony, *supra* note 111, at 9. *See generally* Neil Carey et al., Center for Naval Analyses, *An Analysis of Navy JAG Corps Future Manpower Requirements, Part 2: OJAG, Embedded SJAS, NJS, and Reservists* (Apr. 2008) [hereinafter CNA Manpower Study, Part 2] (concluding that approximately 20% of an operational SJA's time is spent on military justice matters).

[165] Permanent assignments to practice exclusively operational law include, but are not limited to, positions within the Office of Legal Counsel to the Chairman, Joint Chiefs of Staff; positions within Code 10, Office of the Judge Advocate General, and International and Operational Law Branch (JAO), Judge Advocate Division (JAD); specific positions in combatant commander staffs; and certain positions at the Naval War College, the Marine Corps University, Naval Justice School, and The Judge Advocate General's Legal Center and School (TJAGLCS).

[166] The term "billet" is synonymous with the term "assignment." They both are used to denote the nature of the duties involved in a particular position within an organization. "Assignment" is generally used when speaking in the context of a particular officer, or group of officers (e.g., a judge advocate's future assignments will be determined by a variety of factors). "Billet" is generally used when speaking in the context of an organization's structure (e.g., the 1st Marine Division has two billets which are required to be filled by judge advocates).

[167] VADM Houck Testimony, *supra* note 107, at 130-31. In explaining that the U.S. Navy had 297 operational law billets as of August 2010 (including Office of Military Commissions (OMC) and Individual Augmentations (IAs)), the JAG stated,

> [S]ome billets do a mix of different things. So we make certain judgment calls in calling a billet an operational law billet as opposed to something else. What it does not include is the more traditional SJA advice. So if you are at a Navy region, you're doing important command advice work; or if you're in a Navy hospital; or if you're in the Bureau of Naval Personnel, you're doing command advice work there.

Id.

law support in their role as command advisors, including membership on operational planning teams, boards, and cells and service as watch officers within combat operations centers.[168]

As noted in Section II, *supra*, judge advocates may also be temporarily assigned to operational law duties at contingency JTFs or combatant commands through the Individual Augmentation/Augmentee (IA) process or a specific Request for Forces (RFF).[169] Judge Advocates may also be temporarily assigned to augment U.S. Navy or Marine contingency task forces.

3. Operational Law Requirements: U.S. Navy Judge Advocates[170]

The JAG advised the Panel that operational law billets fall into five categories for U.S. Navy judge advocates: permanent assignments afloat, permanent assignments at Joint commands, permanent assignments in U.S. Navy commands and staffs, IAs, and Office of Military Commissions (OMC).[171] Figure C, below, depicts the increase in permanent operational law billets since September 11, 2001.

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[168] *See generally* JP 1-04, *supra* note 105 (providing doctrine for the planning, training, and execution of legal support to joint military operations).

[169] *See* CJCSI 1301.01C, *supra* note 99, ¶ 5., at 2 (defining Individual Augmentation/Augmentee (IA) as "an unfunded temporary duty position (or member filling an unfunded temporary duty position)" identified on a Joint Manning Document (JMD) by a supported Combatant Commander (COCOM) to augment staff operations during contingencies.). IAs include positions at permanent organizations required to satisfy a "heightened" mission in direct support of contingency operations. *Id.* Either active or reserve component personnel may fill IA positions. CJCSI 1301.01C, *supra* note 99, ¶ 5., at 2; OPNAVINST 1001.24, *supra* note 99, ¶ 3.a.-c., at 2; *see* MCO 1001.61, *supra* note 143, ¶ 2.d., at 2, ¶ 4.f., at 4, ¶ 9., at 10.

[170] This section is limited to a discussion of the operational law requirements for U.S. Navy judge advocates. The subsequent section will discuss requirements for Marine judge advocates.

[171] VADM Houck Testimony, *supra* note 107, at 131. "Permanent" assignments refer to assignments to which judge advocates receive "permanent change of station" orders; permanent assignments are distinct from temporary assignments, such as individual augmentees. For purposes of this report, the numbers cited for "permanent" operational law assignments refer to the number of judge advocates actually assigned under permanent change of station orders to established billets. In other words, the numbers cited refer to billets actually filled by bodies. Permanent operational law billets do not include billets at the Office of Military Commissions (OMC) for purposes of this report. OMC billets were originally filled as IA assignments and later were converted by the Office of the Secretary of Defense to PCS assignments. For purposes of this report they are discussed separately in Section III.C., *infra*.

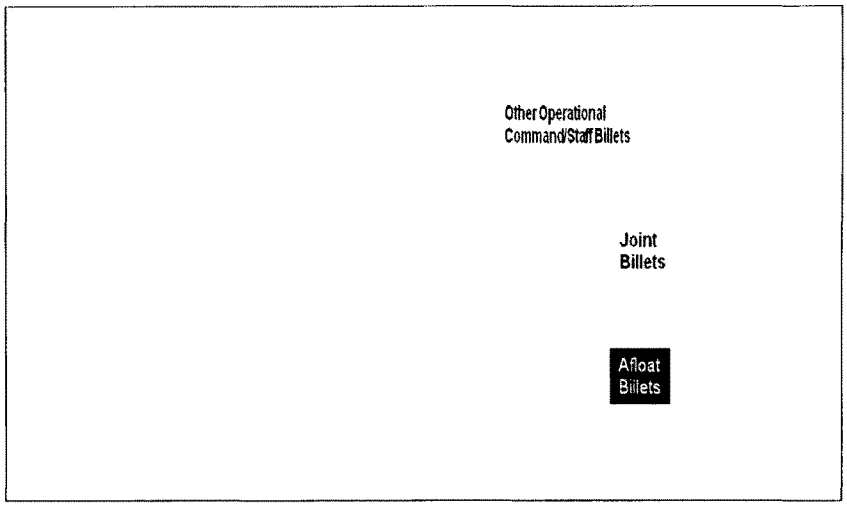

Figure C. Depicts the increase in permanent (not including IAs or OMC) U.S. Navy operational law billets since September 11, 2001

As indicated, despite a reduction in the number of permanent assignments for judge advocates afloat, the total number of permanent operational law assignments has increased significantly since September 11, 2001. This increase is attributed to rapid growth in Joint billets and U.S. Navy operational command and staff billets.

With regard to permanent assignments at Joint commands and staffs, which have grown from 29 to 56 billets, the JAG noted that U.S. Navy judge advocates currently serve as Legal Counsel to the Chairman of the Joint Chiefs of Staff and as the senior SJAs to several combatant commanders, and in the recent past have served as the senior SJAs at all of the geographic combatant commands, and at Joint Forces Command and U.S. Strategic Command.[172] In addition, U.S. Navy judge advocates serve in all of the combatant commander staffs, the Defense Intelligence Agency, National Security Agency, the Defense Institute of International Legal

[172] Judge Advocate General Memorandum, *Subj: Marine Corps Legal Services Strategic Action Plan 2010-2015*, at 4-5 (Ser 00/0098) (31 Aug. 2010) [hereinafter VADM Houck Memorandum (Ser 00/0098)].

Studies, the Marshall Center, the Asia-Pacific Center, the Office of the Secretary of Defense, the State Department, and the White House.[173]

Furthermore, the Panel received testimony that the growth from 42 to 126 billets at U.S. Navy operational commands and staffs was due to a combination of factors, including, but not limited to: the U.S. Navy's investment in establishing Maritime Operations Centers (MOCs) and Maritime Headquarters at U.S. Navy component commands and numbered Fleets;[174] a rapidly growing demand for judge advocates in Special Warfare commands;[175] the establishment of the U.S. Tenth Fleet and a rapidly growing demand for legal support in the cyber domain;[176] new demands for judge advocate support in the U.S. Africa Command area of responsibility;[177] expanding demands for judge advocates to support combatant commanders with responsibilities in the Arctic and western Pacific;[178] the formal adoption of HA/DR as a core competency for the sea Services;[179] the practice of "lawfare" by foreign States;[180] the expansion of rule of law

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[173] *See* VADM James W. Houck, Judge Advocate General of the Navy, Response to Panel Members' Request for Information #12 of Aug. 20, 2010 (providing a spreadsheet of PCS billets filled by U.S. Navy judge advocates outside the DON in FY 10).

[174] *See* CAPT Pedrozo Testimony, *supra* note 162, at 85-87, 93-94.

[175] VADM Houck Letter (Ser 00/0102), *supra* note 94, enclosure (6); VADM Harward VTC Summary, *supra* note 162, at 2.

[176] VADM Houck Testimony, *supra* note 107, at 148-49; CAPT Pedrozo Testimony, *supra* note 162, at 90-91; VADM Houck Presentation, *supra* note 4, at 54. Tenth Fleet was reactivated January 29, 2010 as U.S. Fleet Cyber Command/U.S. Tenth Fleet. As Fleet Cyber Command, it is the Naval component to U.S. Cyber Command. As U.S. Tenth Fleet, the command provides operational support to Navy commanders worldwide, supporting information, computer, electronic warfare and space operations.

[177] VADM Harris, Jr. Testimony, *supra* note 111, at 11-13.

[178] CAPT Pedrozo Testimony, *supra* note 162, at 88-90, 101-02; *see also* VADM Bird Testimony, *supra* note 111, at 26-27.

[179] CAPT Pedrozo Testimony, *supra* note 162, at 88-90.

[180] VADM Houck Testimony, *supra* note 107, at 147-48; VADM Bird Testimony, *supra* note 111, at 21-24; CAPT Pedrozo Testimony, *supra* note 162, at 94-97. Although the Panel received testimony describing the practice of "lawfare," the Panel urges caution regarding that term, as it is the Panel's view that the term is subject to misuse.

The Panel notes that the strategic concept of incorporating "legal warfare" into military strategy has a special meaning for the People's Republic of China (PRC). In an influential 1999 text entitled *"Unrestricted Warfare,"* Qiao Liang and Wang Xiangsui introduced the concept of "international law warfare" as an example of "means and methods used to fight a non-military war." Qiao Liang & Wang Xiangsui, *Unrestricted Warfare*, Ch. 2 (Beijing, PLA Literature and Arts Publishing House) (1999), *available at* www.opensource.gov. The Open Source Center (OSC) is the U.S. Government's premier provider of foreign open source intelligence. OpenSource.gov provides information on foreign political, military, economic, and technical issues beyond the usual media from an ever-expanding universe of open sources.

In 2003, the Communist Party Central Committee approved the strategic concept of "Three Warfares," a People's Liberation Army information warfare concept aimed at influencing the psychological dimensions of military

operations in the maritime domain, most notably in the areas of counter-piracy and counter-proliferation;[181] and rapidly growing demand for judge advocates with expertise in operational environmental law.[182] The final topic was highlighted by U.S. Navy senior line admirals, the JAG, and senior U.S. Navy SJAs as a practice area of growing importance, as environmental regulation and litigation poses a high risk to fleet readiness and the global mobility of U.S. Armed Forces.[183]

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activity. U.S. Dep't of Defense, Office of the Sec'y of Defense, *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China*, 22, 26 (2010) (discussing China's military strategy, including "legal warfare"). The "Three Warfares" include: psychological warfare, media warfare, and legal warfare, the latter of which is defined as uses of international and domestic laws to gain international support and manage possible political repercussions of China's military actions. *Id.* at 26. In its 2010 report on military and security developments involving the PRC, the U.S. Department of Defense stated the following regarding PRC "Legal Warfare":

> The concept of the "Three Warfares" is being developed for use in conjunction with other military and non-military operations. For example, China has incorporated the concept of Legal Warfare into its attempts to shape international opinion and interpretation of international law. An overwhelming majority of nations throughout the world, including the United States, believe that customary international law, as reflected in the UN Convention on the Law of the Sea (UNCLOS), effectively balances resource-related sovereign rights of littoral states in their EEZ with the freedoms of navigation and overflight and other internationally lawful uses of the sea of other nations. This majority view is based upon a sound reading of the negotiating history of UNCLOS, the actual text of UNCLOS itself, and decades of state practice. The PRC, however, appears to be making concerted efforts, through enacting domestic legislation inconsistent with international law, misreading the negotiations and text of UNCLOS, and overlooking decades of state practice in attempts to justify a minority interpretation providing greater authority by littoral states over activities within the EEZ.

Id.

The distinguishing features of the above-described PRC "Legal Warfare" – in contrast to most states' interpretation and application of law in the ordinary course of their international relations – are that the Chinese have expressly characterized the use of law as a form of unconventional warfare and they have formally incorporated such "Legal Warfare" as an element of military strategy.

For a more traditional definition of "lawfare," which again, the Panel does not endorse, *see also* Charles J. Dunlap, *Lawfare: A Decisive Element of 21st-Century Conflicts?*, 54 JFQ 34 (3d Quarter, Jul. 2009).

[181] VADM Houck Presentation, *supra* note 4, at 53 ("We must lead in the creation of international norms and standards that can help advance the common good and expand the rule of law in these domains of growing importance." (quoting Michèle Flournoy & Shawn Brimley, *The Contested Commons*, Proceedings, Volume 135/7/1,277, Jul. 2009)).

[182] VADM Houck Testimony, *supra* note 107, at 149-50; VADM Bird Testimony, *supra* note 111, at 24-27; CAPT Pedrozo Testimony, *supra* note 162, at 102-04; VADM Houck Presentation, *supra* note 4, at 55.

[183] *E.g.*, VADM Houck Testimony, *supra* note 107, at 149-50; VADM Bird Testimony, *supra* note 111, at 24-27; CAPT Pedrozo Testimony, *supra* note 162, at 102-04; VADM Houck Presentation, *supra* note 4, at 55.

The U.S. Navy judge advocate community has also filled a significant number of Individual Augmentation (IA) requirements, beginning in FY 03. Figure D, below, shows the total number of active component (AC) and reserve component (RC) judge advocates who have served in IA deployments, by fiscal year. A majority (387) of U.S. Navy judge advocate IAs have served "boots on the ground" tours in Iraq or Afghanistan of 7 to 15 months duration.

Figure D. Total number of (AC & RC) U.S. Navy judge advocates who have served as IAs.

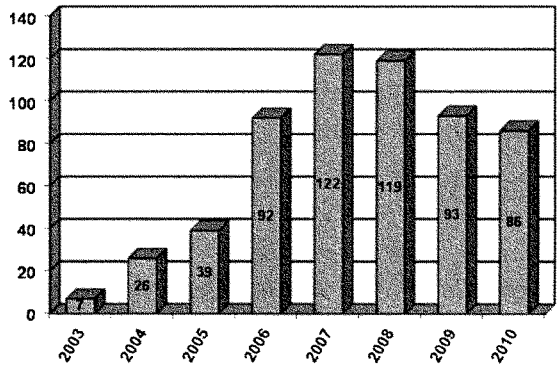

Table 9, below, illustrates the breakdown of current (December 2010) IA billet requirements to be filled by AC and RC U.S. Navy judge advocates. It is important to note that annually, it takes 70 active-duty officers to sustain the 56 AC billets due to training pipeline and personnel tempo (leave) requirements that must be added to the defined "boots on the ground" requirement. It is also important to note that the IA requirements in Afghanistan and Pakistan are growing. For example, on September 1, 2010, when the JAG testified to the Panel, there were no billet requirements in Pakistan and the Afghanistan billet requirement was 22. There are now 3 billet requirements in Pakistan and the billet requirements for Afghanistan have risen to 32.[184]

[184] *See* VADM Houck Presentation, *supra* note 4, at 50.

IA Requirement	AC/RC
Afghanistan	32/0
Iraq	13/4
Kuwait	0/1
Horn of Africa	2/0
Guantanamo Bay	2/2
Qatar	1/0
U.S. Central Command	1/0
Bahrain	1/0
Pakistan	3/0
Criminal Investigation Task Force	1/4
Other	0/20
Total IA Billets	56/30
Total IA Billets (+Sustainment)	**70/35**

Table 9. IA billet requirements to be filled by AC and RC U.S. Navy judge advocates.

Individual Augmentee duties can be quite diverse, including traditional operational law duties in rules of engagement, targeting, and the law of armed conflict, as well as detention operations, training foreign militaries in the requirements for military justice and human rights, establishing judicial and police capabilities in local communities and national governments, and investigating transnational crimes, to name a few.[185]

The Panel closes its discussion of operational law requirements within the U.S. Navy by highlighting two comments that were made to the Panel by senior commanders, beginning with VADM John M. Bird, USN, Director, Navy Staff. VADM Bird stated,

[185] VADM Houck Presentation, *supra* note 4, at 51; *see also* VADM Houck Testimony, *supra* note 107, at 142-43.

> I think law and legal advice permeates all phases of operations. As we say, from phase zero in peacetime to completion of wartime operations or phase five, so it's critical in both peace and war. I would say that the phase zero, phase one [—] the peacetime can be most critical, and if done right, will adequately prevent war. That's true across the range, but particularly on legal advice.
>
> The United States Navy has a cooperative strategy, a maritime strategy, that we sign in concert with the Coast Guard and the Marine Corps. In there we list six strategic imperatives and six core competencies. Legal advice is critical in each and every one of those imperatives, and each and every one of those core competences, without a doubt.[186]

Similarly, VADM Harry B. Harris, Jr., USN, Commander, U.S. Sixth Fleet, stated, "I consult with [judge advocates] on any and every significant issue that I face. . . Every operational commander I know wants all the judge advocates he or she can get."[187]

4. Operational Law Requirements: Marine Judge Advocates

a) Historic and Evolving Requirements

Within the Marine Corps the enduring requirement for operational law advice and services has been, and continues to be, filled primarily by the SJA permanently assigned to the Marine service component commands (e.g., Marine Forces Europe, South, Central, etc.) and command elements of the Marine Air-Ground Task Forces (MAGTFs).[188] Additionally, there are structured requirements for Marine judge advocates to be permanently assigned to operational law billets at service headquarters,[189] Office of the Judge Advocate General (OJAG),[190] Joint Staff,[191] and training commands.[192] Marine judge advocates also compete for

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[186] VADM Bird Testimony, *supra* note 111, at 20-21.

[187] VADM Harris, Jr. Testimony, *supra* note 111, at 9-10.

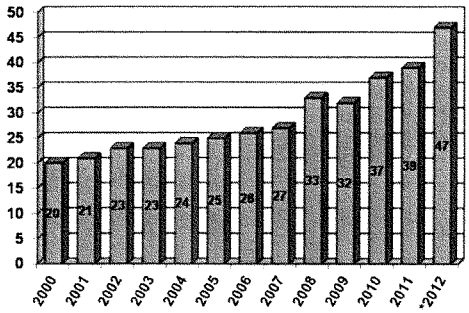
[188] *See* MCDP 3, *supra* note 37, at 69-73. The Marine Air-Ground Task Force (MAGTF) is the Marine Corps' principle organization for all missions across the range of military operations. MAGTFs are general purpose forces of combined arms that can be tailored (task-organized) to the requirements of a specific situation. *Id.* Regardless of size or mission, each MAGTF has four core elements: a command element (i.e., headquarters), ground combat element (e.g., units of infantry, artillery, or tanks), aviation combat element, and logistics support element. *Id.* at 70-71. The command element provides the command and control for planning and executing all military operations, and as such serves as the headquarters. *Id.* There are both standing MAGTFs (e.g., Marine Expeditionary Units (MEU) and Marine Expeditionary Forces (MEFs)) and mission-specific, contingency MAGTFs (e.g., Marine Expeditionary Brigade – Afghanistan (MEB-A)). *See id.* at 73-76. There are three standing MEFs (I, II, and III MEF), *id.* at 73, 75-76, and seven standing MEUs (11, 13, 15, 22, 24, 26, and 31st MEU), U.S. Marine Corps, *Concepts & Programs*, 33, 37, 262 (2010).

[189] E.g., Branch Head, Operational & International Law Branch (Code JAO), Judge Advocate Division (JAD), Headquarters, Marine Corps.

[190] E.g., International Law Officer, Code 10, Office of the Judge Advocate General.

permanent assignment to Joint operational law billets on the staff of the combatant commands that are not structured and aligned to be filled by any particular Service. The requirements for permanently assigned judge advocates to provide operational law support has steadily increased over the years, rising 135% from 2000 through 2012, as portrayed in Figure E, below, reflecting the rising legal intensity and complexity of the modern operating environment.

Figure E. Total permanent operational law billets for active component Marine judge advocates from 2000 to 2012 (*projected based on approved 4402 structure changes).



Despite this increase, the Panel notes that the total projected permanent operational law billets for the Marine Corps in 2012 remains relatively low (47) in comparison to the U.S. Navy (223). This is due to several factors. First, although the Marine Corps has deployed nearly 650 judge advocates in support of OEF and OIF, much of the demand arises from temporary war-time requirements, driven by the nature of operations in those theaters, and has and will continue to decrease as these contingencies abate. Second, the Marine Corps does not have permanent operational law billets equivalent to the U.S. Navy's "afloat" billets. That is, the U.S. Navy's enduring, non-contingency mission to maintain freedom of the seas requires naval forces to be routinely engaged in operations throughout the world. These operations require legal advisors to be routinely forward-deployed aboard ships to provide real time operational law advice to ship and task-force commanders. The Marine Corps does not have a non-contingency, operational

[191] E.g., Non-Proliferation Planner, Office of Legal Counsel, Chairman of the Joint Chiefs of Staff.
[192] E.g., Instructor/Trainer/Advisor at Naval War College, Marine Corps University, The Army Judge Advocate General's Legal Center and School (TJAGLCS), and Marine Air Ground Combat Center (MCAGCC), 29 Palms.

equivalent.[193] Lastly, there are only 12 Marine judge advocates serving in permanent Joint legal billets, in comparison to 56 U.S. Navy judge advocates filling Joint legal billets. The Panel further notes that these judge advocates are all in the grade of O-5 (lieutenant colonel) and below. In recent years, Marines have served as the SJA for U.S. Central Command and U.S. Strategic Command. However, currently Marines do not hold any of these senior, Joint SJA positions, and historically Marines have held a disproportionately small number of these positions.[194] The Panel believes that service in senior legal positions within the Joint community provides individual senior Marine judge advocates important career enhancing experiences, provides the Marine Corps the benefit of O-6 (colonel) judge advocates with senior-level Joint experience, and provides the Joint community the service perspective of the Marine Corps legal community. Accordingly, the Panel recommends that the Marine Corps consider measures to expand opportunities for senior Marine judge advocates to compete for senior legal positions within the Joint community.

b) Emergent Requirements – Within Operational Units

Operation Enduring Freedom – Task Force 58. Shortly after September 11, 2001, the 1st Marine Expeditionary Brigade (MEB), task-organized with, and composed of, the 15th and 26th Marine Expeditionary Units (MEU), and designated Task Force 58 (TF 58), deployed into Kandahar in southern Afghanistan. Their mission was a traditional Marine expeditionary operation – secure a forward operating base ashore, and then secure the Kandahar International Airport to ensure the flow of follow-on forces and material. TF 58 began operations in November 2001, secured the airport in December 2001, and began withdrawing shortly thereafter in January 2002. Judge advocate support was limited to three active-duty Marine judge advocates – the SJA within the command element (i.e., headquarters) of 1st MEB and a SJA within the command element for each subordinate MEU. The SJAs performed traditional

[193] The Marine Corps does have Marine Expeditionary Units (MEUs), Marine Security Guards, and Marine Security Force detachments routinely forward-deployed, conducting operations, on a non-contingency basis. However, the operational law support requirements (7 MEU SJAs) for these units are accounted for in the projected 47 total permanent operational law billets.

[194] The previous U.S. Central Command (USCENTCOM) SJA, a Marine colonel, was re-assigned along with others on the USCENTCOM staff, when GEN Petraeus was re-assigned from Commander, USCENTCOM to Commander, ISAF and U.S. Forces-Afghanistan, and continues to serve as GEN Petraeus' SJA.

operational law tasks, including advising commanders on Rules of Engagement (ROE), targeting, and detainee handling.[195]

Operation Iraqi Freedom I – I Marine Expeditionary Force. Similarly, during OIF I, the Marines' initial attack into Iraq by I Marine Expeditionary Force (MEF)[196] used conventional maneuver warfare to attack into Iraq and seize objectives in and around Baghdad, withdrawing shortly thereafter. I MEF was task-organized with all of its organic legal support – which included an SJA office, consisting of the SJA and one Deputy SJA – for the MEF command element and each of its major subordinate commands (i.e., 1st Marine Division (MarDiv), 2d Marine Expeditionary Brigade, 3rd Marine Aircraft Wing (MAW), and 1st Force Service Support Group (FSSG)). For the FSSG, this also included its subordinate Legal Service Support Section (LSSS), which was organized to deliver traditional military justice, claims, investigations, and legal assistance support to all commands within the MEF. I MEF crossed the line of departure in March 2003, and secured its objectives less than a month later in April, and began to withdraw in July 2003. The cognizant SJAs performed traditional operational law tasks, including advising commanders on ROE, targeting, and detainee handling.[197] A large part of their duties, however, involved conducting command investigations, either as the appointed investigating officer or as the cognizant legal advisor.[198] The LSSS provided traditional deployed legal services.[199]

Operation Iraqi Freedom II - Multi-National Force West. In March 2004, the Marine Corps returned to Iraq for OIF II to conduct stability and security operations in the Al Anbar

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[195] *See* SJA to CMC *Submission, supra* note 38, at 16-17, 18 n.50. *See generally* U.S. Dep't of Army, Center for Law and Military Operations, The Judge Advocate General's Legal Center & School, *Forged in the Fire: Legal Lessons Learned During Military Operations 1994-2008* (Sep. 2008) [hereinafter *Forged in the Fire*].

[196] I MEF, a standing MAGTF, was task-organized with a Ground Combat Element (GCE) consisting of the entire 1st Marine Division (MarDiv) reinforced with Task Force Tarawa (2d MEB) and the UK's 1st Armored Division, an Air Combat Element (ACE) consisting of the entire 3d Marine Aircraft Wing (MAW), and a Logistics Combat Element (LCE), consisting of the 1st Force Service Support Group (FSSG) (now re-designated the 1st Marine Logistics Group (MLG).

[197] E-mail from Col William G. Perez, USMC, former Task Force Tarawa SJA, to Major Edward Danielson, USMC, Staff, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy (Sep. 26, 2010, 02:30 EST); *see also* SJA to CMC *Submission, supra* note 38, at 16-17. *See generally Forged in the Fire, supra* note 195.

[198] *See* LtGen John F. Kelly, USMC, Commander, Marine Forces Reserve and Commander, Marine Forces North, Transcript of October 13, 2010 Hearing, at 60-62 [hereinafter LtGen Kelly Testimony].

[199] *See* SJA to CMC *Submission, supra* note 38, at 16-17.

Province.[200] The Marine leadership understood that this would be less of a conventional operation, and would instead require more classic counterinsurgency (COIN) strategy and tactics. "Establishing the rule of law is a key goal and end state in COIN."[201] The Marine Corps also anticipated that these would be small unit, widely dispersed, independent operations, operating far from the flag pole, and that they would be driven largely by human intelligence, which in turn would rely heavily on detainee operations and interaction with the civilian populace. Further, the Marine Corps believed that the enemy would likely exploit perceived violations of the law of war to affect the population. They believed that proactively investigating and addressing such allegations would be essential in the battle for the populace. The I MEF Commander made the decision to task-organize judge advocates at the regimental and battalion level.[202] This decision would ensure that the commanders closest to the situation on the ground could receive instantaneous advice on ROE, targeting, detainee operations, and rule of law operations, as well as legal support for claims, investigations, and fiscal law issues.

In 2004, and for some time thereafter, it was unclear for how long, or to what extent, the Marine Corps would be committed to Al Anbar Province. At the time, the guidance from senior civilian and military leadership was that U.S. forces would begin to redeploy from Iraq as soon as responsibility for security, and a sufficient rule of law system, could be turned over to the Iraqi government. As it turned out, the Marine Corps maintained nearly a MEF-size MAGTF, designated Multi-National Forces-West (MNF-W), in Iraq through January 2010.

For over five years, Marine judge advocates continued to serve at the MEF, division,[203] regiment, and battalion level, as well as at the headquarters of the air combat element (i.e.,

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[200] A Marine Corps MAGTF, built around a Marine Division, relieved the 82nd Airborne Division of responsibility for Al Anbar province on March 24, 2004, with the assigned mission of conducting Security and Stability Operations (SASO) from March 2004 to March 2005.

[201] U.S. Dep't of Army, *Field Manual 3-24, Counterinsurgency,* D-8 (15 Dec. 2006).

[202] LtCol Thomas A. Wagoner, *Update on Marine Operational Law*, Marine Corps Gazette, Mar. 2007. There were typically two or three regiments for each MEF rotation, and these were task-organized, through reinforcements, to form Regimental Combat Teams (RCT). Each RCT usually had an O-4/5 SJA and an O-3 Deputy SJA. Each RCT had between two and four battalions (Bns) and several independent, separate companies. Each maneuver Bn (e.g., Infantry, Amphibious Assault or Light Armored Assault) within the RCT typically had one company grade judge advocate assigned.

[203] The last Division to serve as the Ground Combat Element (GCE) in Iraq was in 2005. After 2005, the MEF's GCE no longer consisted of a singular Division-level headquarters. Rather, the organization was flattened horizontally, and the multiple subordinate Regimental Combat Teams (RCT) headquarters reported directly to the I MEF command element.

Marine Air Wing (MAW)) and the logistics combat element (i.e., Marine Logistics Group (MLG)). Most of these judge advocates served in the command advisor role, advising their commanders not only on operational law, but also on the core legal functions. A few Marine judge advocates were assigned exclusively to operational law duties. These few Marines filled requirements for operational law billets on the staff of the SJA for the command element of the MEF. The MLG continued to operate a deployed LSSS, which provided traditional military justice, administrative law, and investigation support.[204]

Operation Enduring Freedom – MEF (FWD). As the Marine Corps redeployed forces from Iraq, it began building up forces in southern Afghanistan. In April 2008 the Marines returned to Afghanistan with a single MEU, the smallest standing MAGTF.[205] The MEU was relieved in September 2008 by a larger contingency MAGTF, built around several infantry battalions.[206] In May 2009, the Marines increased this force to a brigade-sized MAGTF, and then increased it again in May 2010 to a MEF (FWD)-sized MAGTF.[207] Capitalizing on lessons learned from OIF, Marine battlefield commanders in Afghanistan currently employ judge advocates at each significant level of command – the MEF (FWD) command element, each Regimental Combat Team (RCT), and each maneuver battalion. Currently, a significant portion of the judge advocates' duties are of an operational law nature.[208]

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[204] Beginning with OIF II, the MLG no longer deployed the entire Legal Service Support Section (LSSS); rather, it deployed smaller task-organized Legal Service Support Teams (LSST), which provided less robust military justice services.

[205] This was the 24th MEU, a standing MEU home stationed at Camp Lejeune, North Carolina.

[206] This temporary, contingency MAGTF was designated "Special Purpose MAGTF – Afghanistan."

[207] 2d Marine Expeditionary Brigade (MEB) was task-organized for, and designated MEB-Afghanistan (MEB-A) to fill this requirement. MEB-A served as the MAGTF responsible for Marine operations in Helmand Province in southern Afghanistan from May 2009 to May 2010.

[208] *See* Staff Judge Advocate, 2d Marine Expeditionary Brigade (Marine Expeditionary Brigade – Afghanistan), Memorandum for Staff Judge Advocate, II Marine Expeditionary Force, *Subj: Ongoing Assessment of Best Practices To Provide Legal Support to the 2d Marine Expeditionary Brigade – Afghanistan* (25 Oct. 2009); 2d Marine Expeditionary Brigade, *Staff Judge Advocate Afghanistan After Action Report* (7-8 Jun. 2010).

In total, 499 (391 AC / 108 RC) Marine judge advocates deployed as organic or augmented staff within Marine Corps operational units in support of OIF and OEF between 2001 and present. Figure F, to the right, depicts the number of active component Marine judge advocates deployed with Marine operational units, annually, in support of OEF and OIF.

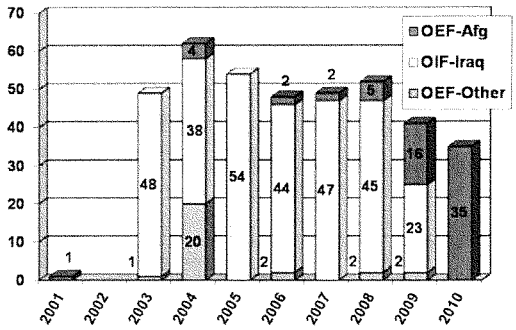

Figure F. Total (391) active component Marine judge advocates deployed as organic or augmented staff within Marine operational units in support of OIF and OEF between September 2001 and September 2010.

c) Emergent Requirements – On Joint Task Forces

A total of 108 (80 AC / 28 RC) Marine judge advocates filled requirements to serve on Joint Task Forces (JTF), including Multi-National Force-Iraq (MNF-I), Multi-National Corps-Iraq (MNC-I) and JTF-134 within Iraq, JTF-HOA in Djibouti as part of OEF, and JTF 101 within Afghanistan. Marines fill these requirements as Individual Augmentees (IAs). The requirements are identified on Joint Manning Documents (JMD), which are proposed by the respective JTF, approved by the respective combatant command, and validated and levied on the services by the Joint Staff.

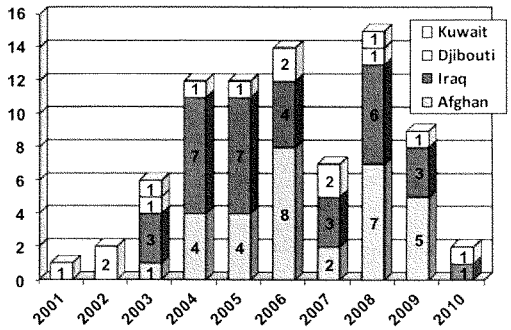

Figure G. Total active component Marine judge advocates (80) assigned and deployed as Individual Augmentees (IAs) to fill a JMD requirement on a JTF.

d) Emergent Requirements – In Support of Rule of Law Objectives in OIF & OEF

There is no agreement upon the definition of "rule of law," much less what type of operations constitute rule of law operations. Rule of law is a principle of governance in which all persons, institutions, and entities, public and private, including the state itself, are accountable for laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights principles.[209] Although somewhat oversimplified, rule of law operations are therefore often referred to as those operations designed to assist the host nation government in institutionalizing capacity for "cops, courts and corrections."[210]

Relatively few Marine judge advocates were, or are, assigned exclusively to support rule of law operations in Iraq and Afghanistan. Generally, legal advice and support to rule of law operations is one of many lines of operations, during COIN or other unconventional operations, in which a judge advocate practicing operational law will provide support. Accordingly, judge advocates serving as command advisors (i.e., SJAs) for Marine operational units, assigned a geographic area of operations, such as the Multi-National Force-West (MNF-W) or its subordinate RCTs and battalions (Bns), provided the bulk of Marine judge advocate support to rule of law operations. Nonetheless, approximately 60 Marine judge advocates[211] were assigned exclusively to rule of law operations. This generally included assignments to the command element for MNF-W[212] and Individual Augmentations (IAs) to various rule of law billets in Iraq[213] and in Afghanistan.[214]

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[209] U.S. Dep't of Army, *Field Manual 3-07, Stability Operations*, 1-9 (6 Oct. 2008).
[210] The Judge Advocate General's Legal Center & School, U.S. Army Center for Law and Military Operations, *Rule of Law Handbook: A Practitioner's Guide for Judge Advocates*, 231 (2010).
[211] Most of these billets were filled by reserve component Marine judge advocates.
[212] These assignments were in the G-9 section, which was composed of the reserve Civil Affairs Group responsible for overseeing Multi-National Force-West (MNF-W) rule of law operations.
[213] This generally included assignments to billets on the staff of Multi-National Force-Iraq (MNF-I) and Multi-National Corps-Iraq (MNC-I), responsible for overseeing different components of rule of law operations; to the Central Criminal Court of Iraq (CCC-I), assisting with the prosecution of national security and criminal cases; and to Joint Task Force 134 (JTF-134), assisting with detainee operations.
[214] This generally includes assignments to billets on the staff of JTF-101 and its predecessors, responsible for overseeing different components of rule of law operations.

e) Meeting Emergent Requirements Through Task-Organization

In total, 685 judge advocates, both active and reserve component, deployed to meet Marine judge advocate requirements in support of OEF and OIF.[215] As we have noted, most, but not all, of these judge advocates' duties required the practice of operational law. Having discussed these requirements, the Panel believes it is important to understand how the Marine Corps fulfilled these requirements.

By Marine Corps doctrine, a command's legal requirements are met by organic SJA offices, located within the command element of the MEF, as well as within each headquarters of the MEF's major subordinate commands (i.e., MarDiv, MAW, and MLG).[216] These SJA offices provide command advice and legal service support to their subordinate units (e.g., the MarDiv SJA provides support to its subordinate regiments and battalions). Additional support, as needed, is provided across the MEF by the Legal Services Support Section (LSSS), which is established as a subordinate unit within the MLG.[217] The Commander, MLG determines, in consultation with the MLG SJA and LSSS Officer in Charge (OIC), how to task-organize the LSSS assets, both in garrison and deployed, to best support the MEF. Ultimately, the I MEF Commander, in consultation with the I MEF SJA, approves the plan for legal services.

The LSSS is task-organized, following the principle of "centralization-where-practical and decentralization-where-required,"[218] to balance the efficiencies and synergies gained with centralizing legal services against the responsiveness and effectiveness gained by supporting commanders directly with their own organic legal support.[219] In garrison, the three LSSSs are consolidated at the three major Marine Corps installations – Marine Corps Bases Pendleton,

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[215] This included all requirements for the Marine Corps, within operational units and on JTFs, for all operations in support of OEF and OIF.

[216] *See generally* U.S. Marine Corps, Marine Corps Development and Educational Command, *Operational Handbook Number 4-10: Legal Services Support* (31 Jan. 1984) [hereinafter *Operational Handbook 4-10*]; *see also* U.S. Marine Corps, Marine Corps Warfighting Publication (MCWP) 4-11.8, *Services in an Expeditionary Environment*, Ch. 3, at 3-1 to -10 (24 Sep. 2001).

[217] The MLG, as the logistics combat element of the MAGTF, is responsible for providing all types of logistic support across the various elements of the MEF, such as fuel, maintenance, transportation, engineering, and services support. This latter category – "services" – includes legal services in addition to postal, dental, medical, and food services.

[218] *Operational Handbook 4-10, supra* note 216, ¶ 1005.e., at 1-3.

[219] *See id.*

Lejeune, and Foster – to provide support to the MEF and all of its subordinate elements, as well as the local commands and Marines within the supporting establishment.[220] For deployment, the LSSS is task-organized into smaller Legal Service Support Teams (LSST) or individual judge advocates to provide support to the deployed MAGTF and its subordinate elements.

This doctrinal concept for provision of legal support is designed to provide the capability to meet all of the anticipated legal support needs of a fully operational and deployed MEF-sized MAGTF. To the extent that unanticipated support requirements cannot be met by the LSSS, doctrine calls for filling these temporary requirements with judge advocates from the Total Force, which includes the Marine Forces Reserve.

This doctrinal model assumes that traditional legal requirements are generated by the command, such as military justice and legal assistance, and will therefore generally follow the command. For example, the LSSS would be expected, in the case of a large-scale, long-duration contingency, to task-organize an LSST to provide the full range of military justice services in theater to handle all military justice support requirements. As a result, meeting the legal requirements of a deployed unit would be something of a zero-sum calculation. Accordingly, most of the company grade judge advocates, permanently assigned to traditional military justice, administrative law, and legal assistance duties in garrison with the LSSS, could be expected to perform similar duties while deployed.

In practice, the Marine Corps generally followed this doctrinal model for meeting legal support requirements for OEF and OIF from 2001 to present. The MEF and its subordinate elements generally deployed to Iraq and Afghanistan with the bulk of the personnel in their organic SJA office.[221] However, by 2004, the operational law requirements for the deployed

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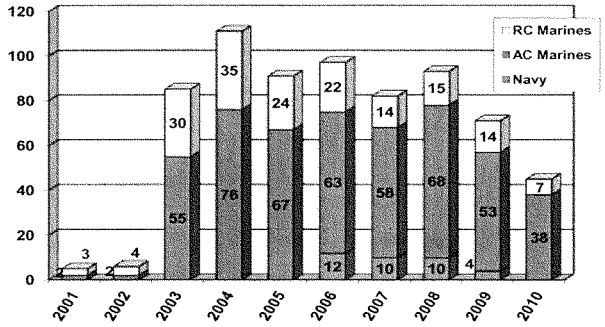
[220] The Marine Corps is organized broadly into four components: Headquarters, Marine Corps; the operating forces; the supporting establishment; and the Marine Corps Forces Reserve. *See* MCDP 1-0, *supra* note 39, at 1-17. The operating forces include all of the Marine Corps combat, combat support, and combat service support units assigned to the Joint Forces Command and Pacific Command. *See id.* at 1-18. The operating forces are task-organized for employment as MAGTFs. *Id.* This includes primarily all three MEFs, as well as Marine Security Forces and Marine Special Forces. The supporting establishment assists in the training, sustainment, equipping, and embarkation of deploying forces (e.g., Marine Corps Combat Development Command; Marine Corps Recruiting Command; and Marine Corps bases, air stations, and training installations). *Id.* at 1-22.

[221] Approximately 499 of the 649 active and reserve component Marine judge advocates deployed in support of OEF and OIF were assigned to the deployed MAGTF, either in the command element or in one of the subordinate units.

MAGTFs outpaced what could be met by the organic SJA offices within the MEF and Ground Combat Element (GCE). These SJA offices required augmentation. Additionally Marine leadership identified a need for legal support to be task-organized directly to Marine RCTs and maneuver battalions. In accordance with Marine Corps doctrine, the legal support was primarily sourced from the LSSS.[222] To the extent the LSSS, or other sources within the active component, could not address the requirement, the Marine Corps used its reserve component.[223] The Marine legal community effectively integrated its reserve component as part of the total force, filling nearly one-quarter of the total Marine requirement for judge advocates in OEF and OIF.[224] U.S. Navy judge advocates also provided augmentation for the MEF command element SJA office.[225] Figure H, below, depicts the total number of active and reserve component Marine judge advocates, and U.S. Navy judge advocates that filled Marine Corps requirements.

Figure H. Total number of (AC & RC) Marine and Navy judge advocates that filled the total (685) Marine legal requirements annually in support of OEF and OIF.



[222] Over 170 of the active component Marine judge advocates deployed with Marine units to OIF and OEF were permanently assigned to, and drawn from, the LSSS.

[223] Over 100 of the 169 reserve Marine judge advocates deployed to OIF and OEF deployed with Marine units.

[224] 169 of a total of 685 Marine judge advocate requirements (including assignment with Marine units and IAs) were filled by Marine reservists.

[225] 36 of the 685 total Marine judge advocate requirements in support of OEF and OIF were filled by U.S. Navy judge advocates. More specifically, U.S. Navy judge advocates filled six billets in FY 06, five billets in FY 07 and FY 08, and two billets in FY 09. Individual Augmentees assigned to the Marine Expeditionary Force (MEF) staff normally deployed for 12-14 months. However, as the individual U.S. Navy augments were only made available to the Marine Corps for six-month rotations, this effectively doubled the amount of U.S. Navy judge advocates used to fill these billets. All of the 36 U.S. Navy judge advocate augments served on the MEF SJA staff, except for two U.S. Navy lieutenants who served as detainee operations officers for Regimental Combat Team-2 (RCT-2) at Camp Ripper, Al Asad Air Base, and RCT-6 at Camp Fallujah, during the height of the surge in Al Anbar in 2007. *See* SJA to CMC *Submission*, *supra* note 38, at 17.

However, two dynamics affected the practical application of the Marine Corps' legal services support doctrine, adversely affecting the performance of the remain-behind military justice mission. First, although legal requirements generated by the command in theater could be, and were, met by the deployed legal resources, this does not account for the fact that many units left behind Marines with pending courts-martial and administrative separations when the unit deployed forward. Further, many serious disciplinary problems discovered in theater were addressed by returning the accused Marine to garrison for disposition, and the resolution of many minor disciplinary actions was delayed until returning to garrison. This phenomenon resulted in a significant, although reduced, remain-behind military justice mission. Second, the decision to task-organize individual field grade and company grade officers to RCTs and maneuver battalions, while proven to be extremely effective, was costly in judge advocate manpower.

These two unforeseen circumstances competed against one another for a limited pool of resources. As a result, there was a high turnover rate among company grade officers in military justice billets within the LSSSs and larger law centers, reducing the aggregate level of experience of available trial and defense counsel.[226]

Because Marine operations in Iraq have already concluded and once forces in Afghanistan have redeployed, the Marine Corps intends that judge advocates will return to garrison to a traditional model – where judge advocates are assigned to SJA offices within the MEF and its Major Subordinate Commands (MSCs) and a consolidated LSSS. It is not anticipated, nor has the Marine Corps suggested, that judge advocates will be permanently assigned to regiments and battalions upon return to garrison.[227] The Panel believes that the anticipated reduction in demand for judge advocates to be tasked-organized to regiments and battalions, along with the addition of 32 officers to the 4402 structure, should alleviate the strain on the judge advocate force and the military justice mission.

The Panel further notes that the Marine Corps is currently in the process of completely re-writing its doctrine for legal services support to Marine Corps expeditionary operations. The Panel expects this undertaking will consider, and, where appropriate, incorporate, the lessons

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[226] *See* SJA to CMC *Submission*, *supra* note 38, at 29; *see* Staff Judge Advocate to the Commandant, *U.S. Marine Corps Legal Services Military Justice Report 2010*, 3 (17 Dec. 2010) [hereinafter *USMC Military Justice Report 2010*].
[227] LtGen Kelly Testimony, *supra* note 198, at 70.

learned from OEF and OIF, in particular the increased need for operational law support to deployed MAGTFs at the command element level and throughout the MAGTF, including the lowest maneuver elements. Further, lessons learned from OEF, OIF and even Desert Storm and Desert Shield, suggest that the days of a robust "field" military justice operation, including the conduct of special and general courts-martial in theater, such as was the case in Vietnam, may prove to be the exception to the rule in future contingencies.[228]

The Panel notes that the impact of task-organizing judge advocates from the total force to augment deploying units was mitigated, in part, by the historical decrease in courts-martial, which has continued throughout OEF and OIF. This decrease has allowed the legal services community to man the remain-behind elements of the LSSS and Law Centers, while maintaining the average number of cases per counsel at a manageable level.[229]

5. Operational Law Education & Training for U.S. Navy and Marine Judge Advocates

Senior Commanders testified to the Panel that it is essential that judge advocates performing operational law duties arrive in theater with the education, training, and experience necessary to be effective on arrival.[230] Requirements to prepare judge advocates for operational law demands evolve alongside the demand as lessons learned in contingency operations are compiled, disseminated, and absorbed by the service components. To address these demands, the Services have implemented measures to improve the training and equipping of judge advocates to ensure that they are prepared to provide effective and efficient operational law capability to the supported commanders.

Basic Operational Legal Training (BOLT). Initiated in 2002, this five-day training program gives new judge advocates a working foundation in international and operational law. Originally, it was a "Marine-only" program given at the beginning or end of the ten-week Basic

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[228] Conduct of the Persian Gulf War, *supra* note 157, *at* 605-32. *See generally* Borch, *supra* note 157.
[229] *See* SJA to CMC *Submission*, *supra* note 38, at 24, 29.
[230] *See, e.g.*, VADM Bird Testimony, *supra* note 111, at 25-28, 51-52; LtGen Richard F. Natonski, USMC (Ret.), Commander, U.S. Marine Corps Forces Command, Transcript of October 13, 2010 Hearing, at 36-37, 43 [hereinafter LtGen Natonski Testimony]; CAPT Pedrozo Testimony, *supra* note 162, at 106-07.

Lawyer Course (BLC).[231] In August 2006, the program became a formal part of the Naval Justice School BLC curriculum, and now both Navy and Marine judge advocates participate.[232]

The Center for Law and Military Operations (CLAMO). CLAMO is a Joint, interagency, and multinational legal center responsible for collecting and synthesizing data relating to legal issues arising in military operations, managing a central repository, and disseminating resources, to facilitate the development of doctrine, organization, training, materiel, leadership, personnel, and facilities as these areas affect the military legal community. Both U.S. Navy and Marine judge advocates are assigned to CLAMO to assist in collecting valuable input from those returning from overseas contingencies, as well as disseminating it to the U.S. Navy and Marine legal community.[233]

Pre-Deployment Legal Training (PDLT). PDLT is a program in which Marine judge advocates preparing to deploy receive refresher training and the latest updates on legal issues in their planned area of operations.[234] These training periods are organized and managed by the respective Marine Expeditionary Force (MEF) SJAs.

Operational Law Training at Mojave Viper. Mojave Viper is the training program developed at the Marine Corps Air-Ground Combat Center (MCAGCC) in 29 Palms, California to train Marine combat units rotating into Iraq and Afghanistan in support of OIF and OEF. Each unit's assigned judge advocate participates in this training along with his unit. Beginning in May 2006, a Marine judge advocate was added to the Tactical Training Exercise Control Group (TTECG) at Mojave Viper.[235] This instructor incorporates training in detainee operations, Law of Armed Conflict (LOAC), Rules of Engagement (ROE), and Escalation of Force measures into the entire curriculum, including classroom training, practical application, and the final exercise.[236]

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[231] SJA to CMC *Submission*, *supra* note 38, at 18; *see* Marine Corps Center for Lessons Learned, *Legal Services Support to Operational Commanders: A Summary of Observations and Lessons from OEF/OIF Judge Advocates and Infantry Commanders*, 6 (3 May 2006) [hereinafter MCCLL *OEF/OIF Lessons Learned*].
[232] SJA to CMC *Submission*, *supra* note 38, at 18.
[233] *See id.*
[234] *Id.*
[235] *Id.* The judge advocate instructor billet was added in response to a Marine Corps Center for Lessons Learned (MCCLL) report. *See* MCCLL *OEF/OIF Lessons Learned*, *supra* note 231, at 6.
[236] SJA to CMC *Submission*, *supra* note 38, at 18.

Joint Professional Military Education (JPME). The JAG stressed the importance of JPME;[237] however, he noted that the U.S. Navy does not have a developed JPME program for judge advocates.[238] This is due to the fact that U.S. Navy judge advocates are waived from the Joint Specialty Officer provisions of the *Goldwater-Nichols Department of Defense Reorganization Act of 1986*.[239] Hence, U.S. Navy programmers do not recognize JPME as a valid requirement for U.S. Navy judge advocates. As the JAG explained,

> JPME right now, because there is no joint duty requirement for judge advocates, it's very difficult within a Service to say we have a requirement to do JPME. . . . In some respects, I feel like the blue suit Navy's program is the weakest of all of them and the least developed at this point . . . And so I just highlight it as an important area going forward where, within our own system in the Navy, I think because we don't have a formal – a requirement for it, then nobody really considers that in the resourcing equations.[240]

In the view of the Panel, the U.S. Navy needs to develop and fund a requirement for its judge advocates to receive JPME.

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[237] Joint Professional Military Education (JPME) I and JPME II partially satisfy requirements to achieve Joint Specialty Officer (JSO) designation under the Goldwater-Nichols Defense Reorganization Act of 1986. *See* Chairman of the Joint Chiefs of Staff Instr. 1800.01D, *Officer Professional Military Education Policy (OPMEP)* (15 Jul. 2009) [hereinafter CJCSI 1800.01D]. Under CJCSI 1800.01D, JPME is divided into three phases:
(1) JPME I - A first phase of JPME is incorporated into the curricula of intermediate- and senior-level Service colleges and other appropriate educational programs, which meet JPME criteria and are accredited by the Chairman, Joint Chiefs of Staff. *Id.* at A-A-6, GL-6. By law, the subject matter to be covered shall include at least the following: (a) national military strategy, (b) Joint planning at all levels of war, (c) Joint doctrine, (d) Joint command and control, and (e) Joint force and joint requirements development. *Id.* at GL-6.
(2) JPME II – A follow-on second phase of JPME for selected graduates of Service schools and other appropriate education programs that complements and enhances Phase I instruction. This phase is taught at Joint Forces Staff College and other accredited schools to both intermediate- and senior-level students and at Service senior level colleges to senior-level students, and completes their educational requirement for joint officer management. *Id.* at A-A-6, GL-6. In addition to the subjects specified in JPME Phase I above, by law, the curriculum for Phase II JPME shall include the following: (a) national security strategy; (b) theater strategy and campaigning; (c) Joint planning processes and systems; and 4) Joint, interagency, intergovernmental, and multinational capabilities and the integration of those capabilities. *Id.* at GL-6.
(3) CAPSTONE – CAPSTONE, the third phase of JPME, is a mandated six-week course for newly selected flag and general officers. *Id.* The course objective is to make these individuals more effective in planning and employing U.S. forces in joint and combined operations. *Id.* appendix K to enclosure (E). The CAPSTONE curriculum examines major issues affecting national security decision-making, military strategy, joint and combined doctrine, interoperability, and key allied nation issues. *Id.*
[238] VADM Houck Testimony, *supra* note 107, at 158-60.
[239] Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986).
[240] VADM Houck Testimony, *supra* note 107, at 158-60.

Like their U.S. Navy judge advocate counterparts, Marine judge advocates are waived from the Goldwater-Nichols requirements. However, Marine judge advocates are required to complete JPME as part of their Service's general Professional Military Education requirements.[241]

Post-Graduate Education. The JAG and the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) stressed the importance of post-graduate education leading to a Master-of-Laws (LL.M.) degree in international law or environmental law.[242] The JAG stated that the U.S. Navy currently sends, on average, 25 judge advocates per year through LL.M. programs, including international and environmental law, and its goal is to expand to 30 per year.[243] Similarly, the Marine Corps' Special Education Program (SEP), Advance Degree Program (ADP), and The Judge Advocate General Legal Center and School (TJAGLCS) offer Marine judge advocates the opportunity to obtain a LL.M. in, among other concentrations, international law. An LL.M. in international law leads to the assignment of an additional Military Occupational Specialty (MOS) of 4405.[244]

6. Future Operational Law Requirements

The Panel believes that operational law demands for U.S. Navy and Marine judge advocates will continue to rise. The *Quadrennial Defense Review (QDR)* portends an operational landscape rife with increasingly complex legal and policy issues – particularly for the sea Services. The *QDR* describes four enduring trends: the rise of new powers; the growth of non-state actors; lowered barriers for dangerous technologies, including missile technologies and weapons of mass destruction; and a competition for resources driven by demographics, climate change, and disease. These trends, in turn, will contribute to an operational landscape in which U.S. Armed Forces will have to deal with increasingly multi-dimensional or hybrid threats,

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[241] *See infra* Section III.F.

[242] VADM Houck Testimony, *supra* note 107, at 148-49 (also highlighting a new program that is being developed with George Washington University to include cyber law studies within an LL.M. program). *See also* Major General (MajGen) Vaughn A. Ary, USMC, Staff Judge Advocate to the Commandant of the Marine Corps, Transcript of September 1, 2010 Hearing, at 311 [hereinafter MajGen Ary Testimony]; VADM Houck Presentation, *supra* note 4, at 63.

[243] VADM Houck Testimony, *supra* note 107, at 171.

[244] Headquarters, Marine Corps anticipates that funding will be available this year for 5 SEP LAW students and 15 students to attend TJAGLCS. However, not all will concentrate in international law and obtain the additional MOS of 4405.

threats to the global commons including the cyber domain, growing anti-access/area denial capabilities, and weak or failed States that are incapable of, or unwilling to, maintain the rule of law.

The Panel takes particular note of the emerging operational law challenges presented by cyber warfare.[245] The Panel commends the JAG's efforts in this respect. The Panel notes that while the Marine Corps has recently structured and filled a SJA billet within the recently established Marine component of United States Cyber Command and has included cyber law as one of the disciplines in its post-graduate education program, it is still determining the requirement in this area. As the SJA to CMC stated,

> I think the Marine Corps is – is quantifying and assessing that requirement. I think that's a very hard thing to figure out. We've been lagging behind the Air Force and some of the other services in cyber law. We're going to have to figure out how to position ourselves for that requirement, but I couldn't begin to start to put a number or quantify that in an analytical way.[246]

Although it is difficult to calculate future manpower requirements for any community, the Panel believes, based on this near-certain future operating environment, that the demand signal for judge advocates with expertise in operational law will continue to grow at least at the same rate as it has since September 11, 2001. This means that the growth in permanent operational law billets can be expected to approximately double over the next decade for each Service.

In addition, the Panel notes the continued and forecasted demand signals for judge advocates in contingency operations. The Panel was particularly impressed with the importance of judge advocates in the execution of counterinsurgency operations, especially in rule of law operations. For example, GEN Petraeus, USA, Commander, NATO International Security Assistance Force, and Commander, U.S Forces Afghanistan, stated that in Iraq he relied on judge advocates to execute civil-military affairs missions, such as helping local populations hold elections; to provide contracting assistance in support of re-construction projects; and to design

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[245] The definition and scope of the cyberlaw practice area is still being determined and is likely to be an area of practice supported by both judge advocates and civilian counsel. For instance, JAG and OGC both have attorneys assigned to U.S. Tenth Fleet (*see supra* note 176), and the SJA to CMC and the Counsel to the Commandant provide legal support to Marine Corps Forces, U.S. Cyber Command.

[246] MajGen Ary Testimony, *supra* note 242, at 373-74.

rule of law "green zones" – secure areas accommodating courtrooms, counsel offices, and detention and corrections facilities.[247]

Both GEN Petraeus and VADM Harward, USN, Commander, Joint Interagency Task Force 435, Afghanistan, made the point that the overarching rule of law mission falls under the primary responsibility of the Department of State Bureau for International Narcotics and Law Enforcement Affairs and the Department of Justice.[248] However, those agencies are not "manned, trained and equipped" to execute the mission on the scale that is required in Afghanistan.[249] Therefore, both officers employ judge advocates to take a leading role in the execution of the rule of law mission at the operational and tactical levels. This requires judge advocates to assume greater duties than those that they have traditionally performed in previous conflicts.[250]

With respect to the rule of law mission and judge advocate support to counterinsurgency operations, GEN Petraeus testified that judge advocates would likely be required to remain in theater after combat forces have redeployed.[251] In fact, that has been the case in Iraq. The Panel further notes that the February 2010 *Quadrennial Defense Review (QDR)* concluded that the outcome of the conflicts in Iraq and Afghanistan, and against al Qaeda, will shape the security environment for decades to come. Assuming that assessment is correct, the Panel believes it essential that the Services increase their level of investment in judge advocates, both in quantity and quality. As the last decade has demonstrated, there are very high costs associated with attempting to execute global counterterrorism and counterinsurgency operations without sufficient legal resources.

Before concluding its discussion of future operational law requirements, the Panel desires to comment briefly on the relationship of judge advocates to the DoD Joint Officer Management Program and the Joint Officer Qualification System. One of the cornerstones of the *Goldwater-Nichols DoD Reorganization Act of 1986* was the mandate that officers be designated a Joint

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[247] GEN Petraeus VTC Summary, *supra* note 162, at 1.
[248] GEN Petraeus VTC Summary, *supra* note 162, at 2; *see* VADM Harward VTC Summary, *supra* note 162, at 2.
[249] GEN Petraeus VTC Summary, *supra* note 162, at 2.
[250] GEN Petraeus VTC Summary, *supra* note 162, at 2-3; *see* VADM Harward VTC Summary, *supra* note 162, at 2.
[251] GEN Petraeus VTC Summary, *supra* note 162, at 3.

Qualified Officer as a prerequisite to promotion to flag or general officer rank.[252] In the aftermath of Goldwater-Nichols and follow-on legislation, the DoD has developed a complex and comprehensive system for Joint Officer Management, including formal processes for attaining Joint qualification through either formal Joint duty assignment or by accumulating an equivalent level of joint experience, education, and training.[253] However, Goldwater-Nichols also permitted the Secretary of Defense to waive judge advocates from these formal requirements, and the Secretary has exercised that waiver. Thus, judge advocates have not been formally incorporated into the Joint Duty Assignment Management System, nor have they been formally required to obtain Joint qualification. That, in turn, has resulted in informal and inconsistent approaches to judge advocate participation in Joint service, education, and training across the Services. Given the growth in operational law requirements since September 11, 2001 and the expanding role of the judge advocate within Joint command structures, the Panel believes that the DoD should develop options for formalizing judge advocate participation in the Joint officer management program and Joint qualification system.

In conclusion, in the view of the Panel, the number of permanent operational law billets in the DON can be expected to approximately double over the coming decade, and there will continue to be a strong demand for judge advocates in support of contingency operations. The judge advocates who fill operational law billets will require levels of education, training, and experience commensurate with the increasingly complex legal and policy environment in which they and their commanders will operate.

C. Review of Requirements to Support Military Commissions

The Panel was directed to review "new requirements to support the Office of Military Commissions . . . ."[254] As part of its review, the Panel received the testimony of VADM Bruce

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[252] 10 U.S.C. §§ 601, 619 (2010).

[253] *See, e.g.*, U.S. Dep't of Defense, Instr. 1300.19, *DoD Joint Officer Management Program* (Oct. 31, 2007, incorporating Change 2, Feb. 16, 2010) [hereinafter DoDI 1300.19]; U.S. Dep't of Defense, *Joint Officer Management, Joint Qualification System Implementation Plan* (Mar. 30, 2007). One of the key policy objectives of Joint Officer Management is to ensure that "officers on the Active Duty List be assigned such that they can be credited with having completed a full joint assignment before appointment to brigadier general or rear admiral (lower half)." DoDI 1300.19, *supra*, ¶ 4.11, at 3.

[254] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(b)(2)(B), 123 Stat. 2190 (2009).

MacDonald, JAGC, USN (Ret.),[255] who serves as the Military Commissions Convening Authority within the Office of Military Commissions (OMC). The Panel also reviewed the laws, regulations, executive orders, and related public documents concerning military commissions and OMC.

1. Current Requirements

Under chapter 47A, title 10, United States Code, the President is authorized to establish military commissions to try alien unprivileged belligerents for alleged violations of the laws of war or certain other offenses.[256] Within the DoD, OMC is responsible for the administration of military commissions,[257] including providing the convening authority, prosecution, and defense counsel.[258] Under direct tasking from the Deputy Secretary of Defense, the existing manpower requirements to support OMC (and an independent trial judiciary) include 206 full-time military positions, 87 full-time civilian positions, a pool of 9 military trial judges available to preside in military commissions cases as required, and 10 military appellate judges who sit as a U.S. Court of Military Commissions Review in addition to their investitures in their respective military appellate courts.[259] Of those 206 military positions, 112 are judge advocate positions, distributed

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[255] VADM Bruce E. MacDonald, JAGC, USN (Ret.), Department of Defense Convening Authority for Military Commssions, Transcript of October 6, 2010 Hearing at 6-36 [hereinafter VADM MacDonald Testimony]. VADM MacDonald served as the Judge Advocate General of the Navy from July 2006 to October 2009.

[256] 10 U.S.C. §§ 801-946 (2010); *cf.* 10 U.S.C. § 948b (2010) (comparing the provisions of the Uniform Code of Military Justice to the authority for military commissions).

[257] The military commissions process begins when the prosecution drafts charges and the convening authority refers the case to trial. U.S. Dep't of Defense, Office of Military Comm'ns, *Office of Military Commissions Fact Sheet* (Current as of April 2010).

[258] *Id.; see also* http://www.defense.gov/news/commissions.html (providing background information concerning military commissions).

[259] VADM Bruce E. MacDonald, JAGC, USN (Ret.), the Convening Authority for Military Commissions, explained to the Panel that the manpower requirements for the Office of Military Commissions (OMC) have been established through a series of Directive Type Memoranda from the Deputy Secretary of Defense, dating back to 2002. VADM MacDonald Testimony, *supra* note 255, at 6-9; VADM Bruce E. MacDonald, JAGC, USN (Ret.), Department of Defense, Convening Authority for Military Commissions, *Office of Military Commissions: Military and Civilian Personnel Briefing*, 2-7 (Oct. 6, 2010) [hereinafter VADM MacDonald Presentation].
The original 2002 requirements were for 40 military and 25 civilian positions. VADM MacDonald Testimony, *supra* note 255, at 6; VADM MacDonald Presentation, *supra*, at 2. In December 2004, an additional 24 military and 26 civilian positions were established. VADM MacDonald Testimony, *supra* note 255, at 7; VADM MacDonald Presentation, *supra*, at 3. In November 2006 the requirement grew by an additional 28 military positions, and in May 2008 the requirement grew yet again for an additional 114 military personnel. VADM MacDonald Testimony, *supra* note 255, at 8-9; VADM MacDonald Presentation, *supra*, at 4-6. Also, in June 2008, 36 additional civilian positions were added to OMC by the Washington Headquarters Service (WHS), a component of the DoD. VADM MacDonald Presentation, *supra*, at 7; *see also* VADM MacDonald Testimony, *supra* note 255, at 9. With regard to

among the four Services as indicated below in Table 10.[260] The number of judge advocates currently assigned is also denoted.[261]

	Army	Navy	Air Force	Marine	Total
Requirement	35	30	34	13	112
Assigned	15	28	21	13	77

Table 10. Total judge advocate requirements and assignments for OMC

The Department of the Navy is also required to provide 22 Navy enlisted legalmen, 8 Marine Corps enlisted legal services specialists, and 4 Navy criminal investigators.[262] The Department of the Navy meets those requirements in the aggregate, although it only assigns two

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the trial and appellate judiciaries, both are independent; neither is assigned to OMC. VADM MacDonald Testimony, *supra* note 255, at 6-9; VADM MacDonald Presentation, *supra*, at 2-7, 15-16.

[260] VADM MacDonald Presentation, *supra* note 259, at 8. At the Panel's public hearing on October 6, 2010, Chairman Dell'Orto questioned VADM MacDonald about the shortfall for the Army and Air Force. Mr. Daniel J. Dell'Orto, Chairman, Independent Panel to Review the Judge Advocate Requirements of the Department of the Navy, Transcript of October 6, 2010 Hearing, at 17. VADM MacDonald responded,

> Well, I've talked to the TJAG of the Air Force, and I've allowed the Air Force and Army to not assign people. They have other missions that they've said they need to assign folks to, and up to this point, the way we're dealing with this is kind of taking it day by day, see where [the] commissions go. And it really depends on what the president and attorney general do with respect to commissions. If we remain at the current levels, we'll be done in pretty short order, I think, with commissions, so what I've allowed in particular in talking to General Harding at the Air Force, he asked if he could delay assigning three of his prosecutors to the prosecution function, keep them in Washington, DC, close by, such that if we got the word that we were going, if we got additional cases assigned to commissions, then Rich Harding is ready to assign them over to the prosecution function. Frankly, we don't have enough work at this point to keep them all busy, so we talk a lot about assignments and filling some of these billets, simply because there's just not the caseload that I think we expected at this point.

VADM MacDonald Testimony, *supra* note 255, at 17-18.

[261] This breakout does not include a Service-immaterial judge advocate position that has not been filled, but which, when included, brings the total requirement to 113 judge advocates. VADM MacDonald Presentation, *supra* note 259, at 14.

[262] VADM MacDonald Testimony, *supra* note 255, at 11-13; VADM MacDonald Presentation, *supra* note 259, at 10-11. The Department of the Navy provides two legalmen above requirement, and two of the four required criminal investigators. VADM MacDonald Presentation, *supra* note 259, at 10. The Army is required to provide 24 enlisted paralegals, 4 criminal investigators (warrant officers), an enlisted court reporter, and an administrative officer (warrant officer). *Id.* at 7, 12; *see also* VADM MacDonald Testimony, *supra* note 255, at 13-14. The Air Force is required to provide 22 enlisted paralegals, 4 criminal investigators (officer and enlisted), and an enlisted court reporter. VADM MacDonald Presentation, *supra* note 259, at 12-13; *see also* VADM MacDonald Testimony, *supra* note 255, at 14.

of the four required criminal investigators. It also assigns two legalmen above the requirement for 22.

2. Future Office of Military Commissions Requirements

On January 22, 2009, the President issued Executive Order 13492 calling for a prompt and comprehensive interagency review of the status of all individuals then detained at the Guantanamo Bay Naval Base.[263] In the interim, the Executive Order directed that "no charges [be] sworn, or referred to a military commission . . . and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, [be] halted."[264]

The interagency review was completed within one year, and on January 22, 2010, the Attorney General published a *Final Report: Guantanamo Review Task Force*,[265] which summarized the recommended dispositions of the 240 detainees. The interagency task force recommended 36 detainees for prosecution, including the 5 alleged September 11, 2001 co-conspirators and the alleged mastermind of the bombing of the USS COLE.[266] Of those 36 detainees, 6 were recommended for prosecution in federal district court and 6 for prosecution by military commissions.[267] No recommendations were made with regard to the other 24 detainees.[268]

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[263] *See* Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009).
[264] *Id.* § 7.
[265] *Final Report: Guantanamo Review Task Force* (Jan. 22, 2010) [hereinafter *Final Report: Guantanamo*], *available at* www.justice.gov/ag/guantanamo-review-final-report.pdf.
[266] Forty-four detainees were originally recommended for prosecution, but eight of those detainees were subsequently recommended for alternate dispositions (transfer or continued detention without prosecution). *Id.* at ii. That left 36 detainees with active cases or investigations. *Id.* In addition to those 36 detainees recommended for prosecution, the interagency approved 126 detainees for transfer, determined 48 were "too dangerous to transfer but not feasible for prosecution," and approved 30 for potential transfer to Yemen. *Id.*
[267] E-mail from Michael Chapman, Office of the Secretary of Defense, Legal Advisor to the Convening Authority Office of Military Commissions, to Lieutenant Commander Raghav Kotval, JAGC, USN, Staff, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy (Nov. 9, 2010, 15:09 EST). One of the six cases forwarded to the Military Commissions is pending trial. *Id.* Two of the six cases have been disposed of through guilty pleas, and three of the six cases are on hold pursuant to Executive Order 13492 of January 22, 2009. *See id.*
[268] *Final Report: Guantanamo*, *supra* note 265, at 11-12.

Today, it is not known how many detainees will be tried before military commission. Thirty-four cases remain of the 36 recommended by the interagency for prosecution, including the five alleged September 11, 2001 co-conspirators.[269]

VADM MacDonald, the Convening Authority for Military Commissions, was asked to opine on OMC's manpower requirements in two hypothetical situations: the first in which all, or most, of the 34 cases were referred for trial in federal district court; and the other in which most, or all, of those cases were referred for trial before military commission. VADM MacDonald stated that if the 34 cases were referred to federal district court for prosecution, OMC would likely be disestablished.[270]

VADM MacDonald testified that if all 34 cases were referred for trial by military commission, the existing manpower requirements established by the Deputy Secretary of Defense would be sufficient to try those cases. This conclusion was contingent on three assumptions: one, that the prosecutions would be a collaborative effort between the Department of Defense and the Department of Justice, with attorneys provided by both agencies; [271] two, that the military Services filled all their respective requirements, civilian and military; and three, that the military Services provided their most experienced and accomplished litigators to OMC.[272] On the latter point, VADM MacDonald acknowledged that there would be tension between assigning the best and brightest litigators to OMC and maintaining sufficient litigation expertise and leadership in the individual Service judge advocate organizations.[273] He concluded nonetheless that military commissions, if chosen for all or most of the 34 cases, would have to take priority. The Panel believes that on this point, it is worth highlighting the following colloquy that occurred between VADM MacDonald and a Panel member, Ms. Judith Miller. Ms. Miller stated,

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[269] As of the writing of this report, two detainees have pled guilty. Ibrahim Ahmed Mahmoud al Qosi pled guilty on July 7, 2010. http://www.washingtonpost.com/wp-dyn/content/article/2010/07/07/AR2010070704734.html. Omar Khadr pled guilty on October 25, 2010 and was sentenced on October 31, 2010. http://www.defense.gov/releases/release.aspx?releaseid=14023.
[270] VADM MacDonald Testimony, *supra* note 255, at 31.
[271] *Id.* at 21, 25.
[272] *Id.* at 28-29.
[273] *Id.* at 32-33.

> Just maybe an editorial comment, which is I completely understand what you've said about the tensions in deciding how to assign experienced versus somewhat less experienced people . . . and I think you are, if the military commissions do start rolling, if we don't really put on a world class performance, we're going to undermine the integrity of the overall military justice system in a way that really, I think, change[s] in a very bad way the mindset of our [sic] both our military in the United States and how we're looked at abroad.[274]

VADM MacDonald responded,

> I agree with that completely. If we're serious about military commissions, you know, to me, this is the time for our JAG Corps to shine, and to do that, you have to go, I think, with the best and brightest and most experienced in the courtroom, and I think that's something that we need to keep in mind is [that] that you can be a wonderfully talented attorney but just not have the kind of litigation skills to navigate in a courtroom. I think to be a successful litigator you have to have done case after case after case, and that's what I'm really looking for if we start focusing on doing these cases in a military commissions context . . . .[275]

The Panel believes that while future judge advocate requirements to support OMC are uncertain, they most likely will not increase in quantity even if all 34 cases are referred to trial before military commissions, but only if VADM MacDonald's three assumptions are met. It is possible that the current requirements established by the Deputy Secretary of Defense will be extended beyond December 2012. If so, then current Navy and Marine judge advocate end-strength planning, which only accounts for OMC judge advocate requirements through 2012, will need to be adjusted.

If all, or a significant number, of the 34 cases are prosecuted by military commissions, there will be a call from OMC for the most experienced and accomplished litigators. These litigators will most likely be serving in positions of significant responsibility within their judge advocate communities. The balancing of the need to provide OMC with the best litigators, while maintaining the right level of judge advocate experience and expertise within the Navy and the Marine Corps, will be challenging and must be carefully addressed by Service leadership.

The Panel believes that the prospect of future military commissions underscores the need to develop and retain experienced, expert trial litigators in the judge advocate communities of all

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[274] Ms. Judith A. Miller, Member, Independent Panel to Review the Judge Advocate Requirements of the Department of the Navy, Transcript of October 6, 2010 Hearing, at 34.
[275] VADM MacDonald Testimony, *supra* note 255, at 34-35.

the Services. In particular, that prospect supports the effort of the Judge Advocate General of the Navy to develop the military justice litigation career track for U.S. Navy judge advocates, and the effort of the SJA to CMC to develop and fill Masters of Criminal Law designated billets within the Marine Corps.[276] In the view of the Panel, it is essential that the DON have a sufficient number of experienced trial litigators and judges to simultaneously support military commissions and the traditional military justice system at the highest possible levels of professionalism.

D. Review of Requirements to Support the Disability Evaluation System

The Panel was directed to review "new requirements . . . to support the disability evaluation system for members of the Armed Forces."[277] As part of its review, the Panel received the testimony of Mr. Robert C. Powers, President, Department of the Navy/Marine Corps Physical Evaluation Board; Captain (CAPT) Michael I. Quinn, JAGC, USN, Assistant Judge Advocate General (AJAG) (Civil Law); and Lieutenant Colonel (LtCol) Peter C. Faerber, USMC, one of four U.S. Marine Corps Wounded Warrior Counsel. The Panel also reviewed information provided by the JAG and the SJA to CMC.

1. Understanding the Integrated Disability Evaluation System

The Department of the Navy is transitioning to the Integrated Disability Evaluation System (IDES) pursuant to the *Wounded Warrior Act*.[278] The IDES is the process by which the DoD determines whether Wounded, Ill, or Injured (WII) service members are fit for continued military service, and for those who are not fit for continued military service, IDES is the process whereby the DoD and the Department of Veterans Affairs (VA) determine the service members'

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[276] Those initiatives are discussed further in Section III, *infra*, of this report. The Military Justice Litigation Career Track is an initiative within the Navy JAG Corps that ensures, among other things, that judge advocates with specialized court-martial litigation qualifications are assigned to key military justice billets. U.S. Dep't of Navy, Judge Advocate General Instr. 1150.2A, *Military Justice Litigation Career Track*, ¶ 5.b., at 6 (Jun. 17, 2009) [JAGINST 1150.2A]. Masters of Criminal Law billets in the Marine Corps are identified with a Necessary Military Occupational Specialty (NMOS) numerical code of 4409. MCO 1200.17B, *supra* note 116, ¶ 1127.6. of enclosure (1), at 1-141. Once a billet is so designated, it should only be filled by Marine judge advocates possessing the required post-graduate education and NMOS. *See id.*

[277] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(b)(2)(B), 123 Stat. 2190 (2009).

[278] Wounded Warrior Act, Pub. L. No. 110-181, § 1612(b)(2)(F), 122 Stat. 430, 430 (2008).

disability ratings.[279] Although the IDES is complicated and still undergoing refinement, for purposes of this report, it can be summarized as follows.

The IDES begins when a qualified medical care provider determines that a WII service member cannot be returned to a full duty status as the result of an unresolved medical condition or residual impairments which bring into question the member's fitness for continued military service. In such circumstances, the medical care provider formally refers the service member into the IDES and the service member is assigned a DoD Physical Evaluation Board Liaison Officer (PEBLO) and a VA Military Service Coordinator (MSC) case manager.[280]

The next major milestone is the convening of a Medical Evaluation Board (MEB). MEBs are composed of at least two physicians and are held at the local Medical Treatment Facility (MTF).[281] The purpose of a MEB is to "render a decision on whether the service member's fitness for continued military service is questionable because of physical or mental impairment," and if so questionable, to fully document the nature and extent of the conditions that cause the service member to fail to meet retention standards.[282] The MEB prepares a report, which is provided to the PEBLO and the service member.[283] The service member is provided an opportunity to submit material in rebuttal to the MEB report and to obtain an impartial medical review.[284] If the MEB finds that the service member does not meet medical retention standards,

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[279] U.S. Dep't of Defense, Office of the Under Sec'y of Defense for Personnel and Readiness, *Integrated Disability Evaluation System (IDES) Operations Guide*, § 1.1 (Sep. 2010) [hereinafter *IDES Operations Guide*]. The *IDES Operations Guide* is in draft form, but is being used currently by all the Services. As a general matter, disability ratings are used to determine the level of financial compensation and benefits provided to a veteran by the Veterans' Association (VA), and the amount of disability severance pay or disability retirement pay and benefits provided to a service member by the DoD. *Id.* § 1.4. Under the IDES, as a general matter, the DoD must follow the ratings as determined by the VA. *See id.* § 3.4.

[280] *Id.* enclosures (3), (7). In addition, as discussed *infra* in Section III.D.5., Marines referred to the IDES receive the assistance of legal counsel, in the form of an activated reserve Marine judge advocate. Sailors referred to the IDES may seek the assistance of legal counsel, in the form of an activated Navy reserve judge advocate or a Navy legal assistance attorney, and such counsel will be provided on an as-available basis. CAPT Michael I. Quinn, JAGC, USN, Assistant Judge Advocate General (Civil Law), Office of the Judge Advocate General, Transcript of October 13, 2010 Hearing, at 191 [hereinafter CAPT Quinn Testimony]; CAPT Michael I. Quinn, JAGC, USN, Assistant Judge Advocate General (Civil Law), Office of the Judge Advocate General, *Legal Support for the Disability Evaluation System*, 4, 9 (Oct. 13, 2010) [hereinafter CAPT Quinn Presentation].

[281] U.S. Dep't of Navy, *Manual of the Medical Department (MANMED), NAVMED P-117*, art. 18-6, at 18-24 (Jan. 10, 2005) [hereinafter *MANMED*].

[282] U.S. Dep't of Navy, Sec'y of the Navy Instr. 1850.4E, *Department of the Navy (DON) Disability Evaluation Manual*, 10-2 (30 Apr. 2002) [hereinafter SECNAVINST 1850.4E].

[283] *IDES Operations Guide*, *supra* note 279, enclosure (8).

[284] *Id.*; *see also MANMED*, *supra* note 281, art. 18-3, at 18-18.

it forwards the complete case file to the DON Physical Evaluation Board (PEB) Administration.[285]

Assuming the MEB case file is complete as received by the DON PEB Administration, the next major step is the convening of an Informal Physical Evaluation Board (IPEB) to determine whether the service member's condition or conditions were incurred in the line of duty[286] and whether they render the member unfit for continued service. The IPEB is convened by the President of the PEB and is held at the Washington Navy Yard in Washington, D.C.[287] The IPEB is composed of a Navy medical officer and two line officers, one of whom is usually a Marine Corps officer.[288] The IPEB conducts a documentary review without the presence of witnesses or the service member, and reports its findings to the PEB Administration.[289]

If the IPEB finds the service member unfit for duty based on one or more conditions, the PEB Administration submits that finding and the case file to the VA and requests that the VA prepare a proposed disability rating for each of the referred and claimed conditions.[290] Assuming the case file is sufficient, the VA will rate the service member's referred and claimed conditions and provide a proposed rating decision to the PEB Administration.[291] The IPEB then takes the VA rating(s) and applies them to the service member's "military unfitting" condition(s).[292] When that is complete, the IPEB publishes its written decision and disposition recommendation

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[285] *IDES Operations Guide*, *supra* note 279, enclosure (8).

[286] To be considered in the "Line of Duty" (LOD) there must be a nexus between an injury and duty status. SECNAVINST 1850.4E, *supra* note 282, § 3410 of enclosure (3). If the injury was not in the LOD, or was due to the member's own misconduct, the member may not be entitled to medical care for the injury at the military's expense, and may not be eligible to receive disability retirement or separation benefits. *Id.* The normal practice is for the parent command to make a decision that is considered binding on the Disability Evaluation System (DES) process. *Id.* However, if the Informal Physical Evaluation Board (IPEB) or Formal Physical Evaluation Board (FPEB) determines the command determination is contrary to the evidence on the record, the President of the PEB may forward the LOD determination to Director, Secretary of the Navy Council of Review Boards. SECNAVINST 1850.4E, *supra* note 282, § 3406 of enclosure (3); *MANMED*, *supra* note 281, art. 18-16(1), (7), at 18-24.

[287] SECNAVINST 1850.4E, *supra* note 282, enclosure (10), at 10-2 to -3.

[288] *Id.*

[289] U.S. Dep't of Defense, Instr. 1332.38, *Physical Disability Evaluation*, ¶ E3.P1.3., at 16 (Nov. 14, 1996, incorporating Change 1, Jul. 10, 2006) (revised by Under Sec'y of Defense Memorandum, *Subj: Policy Memorandum on Implementing Disability-Related Provisions of the National Defense Authorization Act of 2008 (Pub. L. 110-181)*, ¶ E3.P1.3.2.2., at 2 (Oct. 14, 2008) [hereinafter USD Memorandum]).

[290] *IDES Operations Guide*, *supra* note 279, enclosure (10).

[291] *Id.* enclosure (12).

[292] *Id.* enclosure (11).

to the PEBLO and to the service member.[293] Upon receipt of the IPEB decision, the service member is entitled to the assistance of the DON counsel. The service member, with the advice of counsel, can appeal the IPEB decision to an Formal Physical Evaluation Boards (FPEB) and/or request a rating reconsideration from the VA.[294]

FPEBs are composed of three senior officers (usually in the pay-grade of O-6), including a Navy medical officer, a Navy line officer, and a Marine Corps officer.[295] The service member is assigned a counsel for the proceedings. The service member and counsel may be present, and may present testimonial and documentary evidence.[296] The FPEB determines whether the service member is fit for continued military service, and although it does not address specific VA disability ratings, it "must address decisions on 'unfitting' conditions and claimed conditions not deemed unfitting."[297] The FPEB issues its written findings to the service member and counsel.[298]

The service member, with advice of counsel, may then file a Petition For Relief (PFR) from an FPEB decision based on: new or newly discovered evidence; fraud, misrepresentation or misconduct; or a mistake of law. The decision to grant relief is determined by the Director, Naval Council of Personnel Boards, acting on behalf of the Secretary.[299] The right to representation by military counsel extends through the PFR.[300]

2. New Requirement to Provide Counsel Following the Informal Physical Evaluation Board Decision

The *Wounded Warrior Act* requires the Secretary of Defense and the Secretary of Veterans Affairs to establish "uniform standards and procedures among the military departments

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[293] *Id.*

[294] *Id.* With regard to VA ratings that did not concern unfitting conditions, the service member has separate procedural rights within the VA system, which he or she can exercise after separation from the Service. *Id.* enclosure (15). The service member is provided counsel by the military, and may, in addition or in lieu, obtain civilian counsel or a representative from a Veteran's organization at his or her own expense. USD Memorandum, *supra* note 289, ¶ E8.2.2.2., at 21; *see also* SECNAVINST 1850.4E, *supra* note 282, § 4301(a) of enclosure (4) ("No active duty or reserve member of the naval service found Unfit by the Informal PEB may be retired or separated for physical disability without the right to a Formal PEB hearing.").

[295] SECNAVINST 1850.4E, *supra* note 282, enclosure (10), at 10-3.

[296] *Id.*

[297] *IDES Operations Guide, supra* note 279, enclosure (10). Changes in status between claimed conditions and unfitting conditions can affect disability compensation. *See id.* enclosure (12).

[298] *Id.* enclosure (10).

[299] SECNAVINST 1850.4E, *supra* note 282, enclosure (5).

[300] USD Memorandum, *supra* note 289, ¶ E8.8., at 22.

for the provision of legal counsel to recovering service members while undergoing evaluation by a physical disability evaluation board."[301] The Secretary of Defense implemented this mandate through the October 2008 Directive Type Memorandum (DTM), which provides in pertinent part:

> Government legal counsel shall be available to consult (by telephone or otherwise) with a Service member regarding the Service member's rights and elections following the Service member's receipt of the decision of an Informal Physical Evaluation Board (IPEB). Military Departments may make legal counsel available to respond to inquiries by Service members earlier than receipt of the IPEB decision.[302]

The roles and responsibilities for the provision of counsel are also addressed in the DTM. The Secretary of the Military Department concerned, in coordination with the JAG, "shall . . . provide government counsel to advise and represent service members during the Physical Disability Evaluation (PDE) process (informal and formal Physical Evaluation Boards);"[303] and the JAG, "shall assign sufficient numbers of trained legal counsel to advise and represent service members in proceedings before Physical Evaluation Boards."[304] Thus, the Secretary of the Navy is responsible for the provision of legal counsel to WII Sailors and Marines as a general matter, and the JAG is responsible for assigning trained counsel to represent such Sailors or Marines at the post-IPEB and FPEB steps of the process.

The Assistant Judge Advocate General (AJAG) (Civil Law) advised the Panel that the new requirement to make legal counsel available upon receipt of an IPEB decision is being met through the activation of ten Navy reserve judge advocates dispersed at seven Navy shore installations.[305] In addition, he noted that the Marine Corps activated four reserve judge

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[301] Wounded Warrior Act, Pub. L. No. 110-181, § 1612(b)(2)(F), 122 Stat. 430, 430 (2008).
[302] USD Memorandum, *supra* note 289, ¶ E8.2.1., at 20.
[303] *Id.* ¶¶ E8.1.-E.8.1.1., at 20.
[304] *Id.* ¶ E.8.1.3.1., at 20.
[305] CAPT Quinn Testimony, *supra* note 280, at 179; CAPT Quinn Presentation, *supra* note 280, at 4, 9. The Navy JAG's calculations use the DON-approved man year standard of 1776 hours and are based on the FY 09 PEB case load of 6,227 DON cases, an average of 2.5 meeting per client and an average meeting time of 1 hour (6,227 X 2.5 X 1/1776 = 8.76 man years). CAPT Quinn Presentation, *supra* note 280, at 9; *see also* OPNAVINST 1000.16K, *supra* note 47, appendix C to enclosure (1). The Navy JAG then added 1.0 man year to account for outreach efforts conducted by the IPEB counsel. *See* CAPT Michael I. Quinn, JAGC, USN, *WII Analysis Spreadsheet* (16 Mar. 2010) [hereinafter *WII Analysis Spreadsheet*]; *see also* CAPT Quinn Testimony, *supra* note 280, at 190 (indicating that he would provide the Panel staff with a spreadsheet showing computations of work years).

advocates (two at Camp Lejeune and two at Camp Pendleton) to provide pre-IPEB and post-IPEB legal services to WII service members.[306]

The JAG advised the Panel that the Department of the Navy has programmed for 12 civilian attorneys to be hired to perform IDES legal services.[307] Two civilians will support the FPEB process and the remaining ten will perform IPEB services, the latter as permanent replacements for the ten reserve U.S. Navy judge advocates now providing those services. The Panel heard testimony from the JAG and the AJAG (Civil Law) that employing civilian attorneys at the IPEB and FPEB levels was beneficial, as civilian counsel provide a level of continuity and corporate knowledge in a specialized and technical area of practice.[308]

3. New Training Requirements

The Department of Defense's implementation of the *Wounded Warrior Act* requires military departments to coordinate with their respective Judge Advocates General to "provide legal training programs to ensure government legal counsel participating in the [physical disability evaluation] process have adequate training in the PDE process and procedures."[309] The DoD procedures introduce a new certification requirement for government counsel representing service members.[310] The Department of the Navy meets these requirements in three phases. First, at the Naval Justice School, all new accessions are given introductory training on Disability Evaluation Services (DES) requirements. Second, IPEB counsel are sent through a one-week training session at Naval Legal Service Office (NLSO) North Central (NC) where training is provided by counsel from the Wounded Warrior Regiment and the Navy's Safe Harbor program, and representatives from the Veteran's Administration, the Office of the Judge Advocate

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[306] CAPT Quinn Presentation, *supra* note 280, at 4.

[307] *See* VADM Houck Testimony, *supra* note 107, at 115 (testifying that the Navy has programmed for the 12 civilian attorneys in the FY 12 Program Objectives Memorandum (POM)).

[308] VADM Houck Testimony, *supra* note 107, at 117 (discussing the benefits of developing a corporate memory in a focused practice area); Mr. Robert C. Powers, President, Department of the Navy/Marine Corps Physical Evaluation Board (PEB), Transcript of October 13, 2010 Hearing, at 160-61 [hereinafter Mr. Powers Testimony] (discussing the complexity of the Veterans Administration Schedule for Rating Disabilities (VASRD)); CAPT Quinn Testimony, *supra* note 280, at 193 (discussing how the investment and corporate knowledge is lost when judge advocates transition to other positions).

[309] USD Memorandum, *supra* note 289, ¶ E8.9.1., at 22.

[310] *Id.* ¶ E8.9.2., at 22. Paragraph E8.9.3 continues to discuss the content of the training program. *Id.* ¶ E8.9.3., at 22; *see also* CAPT Quinn Testimony, *supra* note 280, at 185-86 (acknowledging training requirements).

General, and the Navy's Bureau of Medicine.[311] Counsel who have successfully completed this training are certified by the JAG or his designee. Finally, counsel for the FPEB are mentored and trained by more experienced counsel who have practiced before the boards.[312] The Panel finds that Navy JAG's training program satisfies DoD requirements.

4. Provision of Legal Counsel at the Formal Physical Evaluation Board

Provision of counsel to represent WII service members at the FPEB is not a new requirement, and JAG currently provides two active-duty U.S. Navy judge advocates assigned to NLSO NC to represent Sailors and Marines during the FPEB and PFR process.[313] The JAG and the AJAG (Civil Law) advised the Panel that the DON plans to transition to two dedicated civilian counsel to provide FPEB and PFR services.[314]

In response to the *Wounded Warrior Act*, the DoD has also implemented new policies regarding FPEB attorney caseload and FPEB processing timelines. In combination, those new policies may require that an additional counsel be made available to represent WII service members during the FPEB and PFR levels. With regard to attorney caseload, the new policy provides: "Normally, government legal counsel will not be assigned an overall caseload which requires them to represent more than ten (10) Service members per week at [FPEB] hearings."[315] Currently, the DON holds an average of 14 FPEB hearings per week, which means that dedicating two counsel to FPEB practice complies with the DoD attorney caseload policy.

With regard to the DoD policy on FPEB processing timelines, there is some confusion between the standards published in the October 2008 Directive Type Memorandum and the

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[311] CAPT Quinn Testimony, *supra* note 280, at 185-86; CAPT Quinn Presentation, *supra* note 280, at 7.
[312] CAPT Quinn Testimony, *supra* note 280, at 187; CAPT Quinn Presentation, *supra* note 280, at 7.
[313] CAPT Quinn Testimony, *supra* note 280, at 179-80; CAPT Quinn Presentation, *supra* note 280, at 7. The Navy JAG calculates the manpower requirement of two attorneys by using the DON approved work man-year standard of 1,776 hours and an average of 5.93 hours per FPEB. Based on 716 FPEBs per year this equates to 2.4 man-years (716 X 6/1776 = 2.4). *See WII Analysis Spreadsheet*, *supra* note 305; *see also* CAPT Quinn Testimony, *supra* note 280, at 190 (indicating that he would provide the Panel staff with a spreadsheet showing computations of work years). As with the IPEB counsel, the JAG intends to transition to civilian counsel for FPEB and PFR cases, beginning in FY 12. *See* CAPT Quinn Testimony, *supra* note 280, at 193 (discussing the transition to civilian counsel in 2012); CAPT Quinn Presentation, *supra* note 280, at 3 (listing 10 counsel for IPEBs and 12 total counsel for all PEBs, whether formal or informal).
[314] VADM Houck Testimony, *supra* note 107, at 115; *see* CAPT Quinn Testimony, *supra* note 280, at 179-80.
[315] USD Memorandum, *supra* note 289, ¶ E8.1.3.2., at 20.

September 2010 *Integrated Disability Evaluation System (IDES) Operations Guide*. The former provides specific processing goals for each step in the IDES process including a 40-day goal for FPEBs,[316] and the latter provides guidelines based on less specific IDES phases, including a 120-day goal for the overall PEB phase (which includes FPEBs).[317] Under either approach, however, the DON has concluded that it needs to increase the rate of FPEBS to at least 21 per week, which in turn will require the JAG to dedicate a third FPEB counsel to remain within the 10 cases per week per attorney standard.[318]

Finally, regarding counsel requirements to support the PEB, the Panel notes that currently, one active-duty judge advocate is assigned to serve as counsel for the PEB itself. The President of the PEB told the Panel that he believes the DON could further improve its overall case processing times by adding two counsel to the PEB, for a total of three counsel.[319] The PEB President stated that he would use additional counsel to more expeditiously and thoroughly prepare FPEB decisions.[320]

5. Provision of Legal Counsel Prior to Informal Physical Evaluation Board Decision

While mandating that legal counsel be made available to service members upon receipt of IPEB decisions, the Under Secretary of Defense's policy memorandum also authorizes military departments to make legal counsel available earlier in the IDES process on a discretionary basis.[321] The Army and the Marine Corps exercise this discretionary authority by actively providing legal counsel to service members prior to the IPEB decision.[322] In contrast, the Navy and the Air Force make counsel available at those early stages on an as-available basis only.

The SJA to CMC has stated that providing Marines with legal representation early in the IDES process implements the Commandant's pledge to support wounded warriors and their

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[316] *Id.* ¶ E3.P1.6.5., at 4.
[317] *IDES Operations Guide*, *supra* note 279, § 7.2.3.
[318] Interview by CAPT Patrick Neher, JAGC, USN, Staff, Independent Review Panel, with Mr. Robert Powers, President of the Department of the Navy/Marine Corps Physical Evaluation Board (Nov. 22, 2010).
[319] Mr. Powers Testimony, *supra* note 308, at 160, 167.
[320] *Id.* at 167. One attorney already supports the boards in accordance with Navy instructions. *See* SECNAVINST 1850.4E, *supra* note 282, § 4309 of enclosure (4).
[321] USD Memorandum, *supra* note 289, ¶ E8.2.1., at 20.
[322] CAPT Quinn Testimony, *supra* note 280, at 191-92 (explaining U.S. Army practice).

families. The SJA to CMC further expounded on the Marine Corps' intent and purpose in providing legal counsel prior to the IPEB, stating,

> Through the provision of legal counsel earlier in the process, the Marine Corps is able to shape the DES process making the outcome both more efficient and more accurate; resulting in more favorable results at the IPEB, fewer appeals of IPEB findings, and cutting the overall time in the system for the individual Marine. By positively influencing the outcome of the process through early involvement, the Marine Corps believes that our actions are more closely aligned not only with the NDAA, but also with the spirit and intent of Congress in taking the best care of our wounded warriors.[323]

LtCol Faerber, one of four U.S. Marine Corps Wounded Warrior Counsel, testified that the Marine Corps believes that both the individual Marine and the Marine Corps benefit from the early assistance of counsel in the IDES process. Early assistance of counsel enables the individual WII Marine to provide more timely and effective input into the IDES process. For example, legal representation by a Marine judge advocate who is geographically co-located with the Marine and his parent command allows for greater influence and communication with the command and the local Medical Treatment Facility (MTF) during the early stages of the IDES process. Obtaining early legal support results in the individual Marine receiving the best possible result, thus reducing appeals to the FPEB, and resulting in an earlier return of a fit Marine to his unit or discharge of an unfit Marine, either of which benefits the individual Marine and the Marine Corps.[324]

Currently, the Marine Corps is supporting the early provision of counsel through 4 activated reserve judge advocates, and expects to expand to 13 activated reserve judge advocates for the near term. However, the Marine Corps is currently studying and preparing a long-term

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[323] MajGen Vaughn A. Ary, Staff Judge Advocate to the Commandant of the Marine Corps, *Addendum to the 31 August 2010 Submission to the Independent Panel Review of Legal Requirements in the Department of the Navy*, ¶ 3 (Nov. 18, 2010) [hereinafter MajGen Ary *Addendum*]. Note: The advent of the wounded warrior model is very recent and no statistical information has been received by the Panel concerning its impact on IPEB appeals or overall processing timelines.

[324] LtCol Peter C. Faerber, USMC, U.S. Marine Corps Wounded Warrior Counsel, Transcript of October 13, 2010 Hearing, at 195-96 [hereinafter LtCol Faerber Testimony].

strategy, which will likely include revised manning requirements, based in part on the demand signal experienced by the additional activated reserve judge advocates.[325]

The U.S. Navy does not actively seek to provide counsel to WII service members prior to IPEB decisions. However, the JAG has authorized the ten reserve U.S. Navy judge advocates assigned IPEB duties and all Navy legal assistance counsel to provide pre-IPEB legal services on a space-available basis.[326]

While the *Wounded Warrior Act*, as implemented, allows for the Navy and Marine Corps to pursue different approaches to providing counsel in the earliest stages of the IDES process, the controlling DoD policy memorandum places the ultimate responsibility for the provision of legal counsel on the Secretaries of the Military Departments. If the Secretary of the Navy were to implement a Department-wide policy to provide counsel to all WII service members at the earliest stages of the IDES, the Assistant Judge Advocate General (AJAG) (Civil Law) estimated that an additional four to six counsel would be required above and beyond the ten that the DON has already programmed to hire.[327]

The Panel concludes that the issue of providing legal counsel earlier than presently required, as practiced by the Marine Corps and Army, involves issues and policy implications beyond its mandate to examine judge advocate manning in the Department of the Navy. However, the Panel recommends that the issue be examined by the Department of Defense and the DON for the purposes of studying the balance of interests in providing early representation and to consider the implications of the Services providing different levels of legal support to injured service members.

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[325] MajGen Ary *Addendum*, *supra* note 323, ¶ 6; LtCol Faerber Testimony, *supra* note 324, at 195, 198.

[326] CAPT Quinn Testimony, *supra* note 280, at 191-92 ("The Army is very proactive in this particular area . . . And also, most importantly, they have resourced and [sic] MEB outreach program. . . . [The Army] indicated that they had 42 [sic] civilian counsel and an equal number of paralegals that are going out to do specifically nothing but outreach, trying to get to those Soldiers earlier in the MEB process to provide them information."); *see also* CAPT Quinn Presentation, *supra* note 280, at 9 (correctly listing number as 22 civilian counsel). The Air Force provides counsel in a manner similar to Navy. VADM Houck Testimony, *supra* note 107, at 115.

[327] CAPT Quinn Testimony, *supra* note 280, at 193-94.

E. Review of Requirements for Military Justice

The Panel was directed to review the judge advocate requirements of the Department of the Navy for the military justice mission, including: (1) assignment policies, (2) training and education, (3) increasing complexity of court-martial litigation, and (4) the performance of the U.S. Navy and Marine Corps in providing legally sufficient post-trial processing of cases in general courts-martial (GCM) and special courts-martial (SPCM).[328]

In addition to the testimony and materials provided by the Judge Advocate General of the Navy (JAG) and the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) to assist in its review of military justice requirements, the Panel received testimony from: CAPT Daniel E. O'Toole, JAGC, USN, Chief Judge, Department of the Navy; Colonel (Col) Peter B. Collins, USMC, Assistant Judge Advocate General of the Navy (Military Justice); and CAPT Michael J. Boock, JAGC, USN, Commanding Officer, Naval Justice School.

Military justice is a primary statutory mission of U.S. Navy and Marine judge advocates.[329] To accomplish this mission, some judge advocates – particularly Staff Judge Advocates (SJAs) – provide legal support as command advisors, while others provide legal services as trial, defense, and appellate counsel; recorders; Article 32 investigating officers; review officers; and members of the trial and appellate judiciary. Figure I, below, illustrates the role of judge advocates throughout the military justice process, from report of the offense to final appeal.[330]

[328] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(b)(2)(C), 123 Stat. 2190 (2009).
[329] 10 U.S.C. §§ 801-946.
[330] SJA = Staff Judge Advocate; A32 = Article 32, UCMJ Pretrial Investigation; A34 = Article 34, UCMJ Advice of Staff Judge Advocate; TC = Trial Counsel; DC = Defense Counsel; IO = Investigating Officer; CO = Commanding Officer; ARR = Arraignment; MJ = Military Judge; CR = Court Reporter (not a judge advocate); ROT = Record of Trial; SJAR = Staff Judge Advocate's Recommendation; Rev = Review Officer; CAA = Convening Authority's Action; NAMARA = Navy-Marine Corps Appellate Review Activity; NMCCA = Navy-Marine Corps Court of Criminal Appeals.

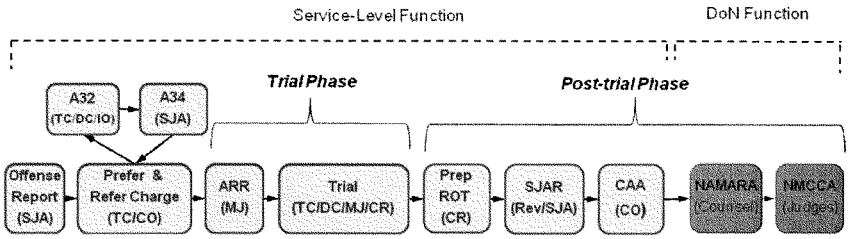

Figure I. Role of the Judge Advocate in the Military Justice Process

Generally, the number, training, and assignment of judge advocates to fulfill these roles within the military justice mission are driven by the dual demands of good order and discipline and individual due process rights. These demands manifest themselves in both the number and complexity of disciplinary and administrative actions, including: nonjudicial punishment; enlisted administrative separations; officer boards of inquiry; Article 32 investigations; and summary, special, and general courts-martial.

The Panel will first address the demand drivers of caseload and case complexity; we will then turn to the organization, education, training, and assignment of judge advocates for the provision of military justice services generally in the Department of the Navy, U.S. Navy, and Marine Corps. Finally, the Panel will address the post-trial processing of GCMs and SPCMs.

1. Caseload Statistics and Trends

Over the past 10 years, as depicted in Figure J and Table 11, below, there has been a significant decline in the total number of GCM and SPCM cases within the DON, from 2,809 cases tried in Fiscal Year (FY) 00 to 1,036 in FY 10.[331] The majority of the decline in the DON courts-martial caseload is attributable to a reduction in the number of SPCMs. By comparison,

[331] United States Court of Appeals for the Armed Forces, *Annual Reports of the Code Committee on Military Justice* (FY 00 – FY 09) [hereinafter CAAF *Annual Reports*] (compiling data for FY 00 through FY 09); Letter from CAPT Daniel E. O'Toole, JAGC, USN, Chief Judge, Department of the Navy, to Mr. Daniel J. Dell'Orto, Chairman, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy (Ser 05/0022) (Oct. 14, 2010).

the DON's GCM caseload has declined more slowly since FY 00, and the total appears to have stabilized beginning in FY 06.

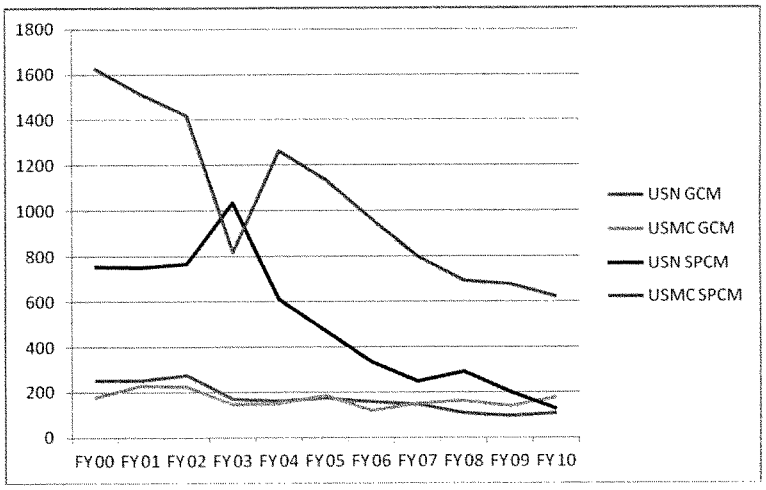

Figure J. The DON Caseload Trend

FISCAL YEAR/ SERVICE	TOTAL CASES TRIED	GCM		SPCM	
		No.	% DON	No.	% DON
FY 00 DON	2809	428	15%	2381	85%
USN	1007	252	59%	755	32%
USMC	1802	176	41%	1626	68%
FY 01 DON	2745	481	18%	2264	82%
USN	1005	254	53%	751	33%
USMC	1740	227	47%	1513	67%
FY 02 DON	2687	499	19%	2188	81%
USN	1045	276	55%	769	35%
USMC	1642	223	45%	1419	65%
FY 03 DON	2169	315	15%	1854	85%
USN	1206	170	54%	1036	56%
USMC	963	145	46%	818	44%
FY 04 DON	2185	313	14%	1872	86%
USN	774	163	52%	611	33%
USMC	1411	150	48%	1261	67%
FY 05 DON	1969	359	18%	1610	82%
USN	645	172	48%	473	29%
USMC	1324	187	52%	1137	71%
FY 06 DON	1577	278	18%	1299	82%
USN	493	158	57%	335	26%
USMC	1084	120	43%	964	74%
FY 07 DON	1346	297	22%	1049	78%
USN	397	148	50%	249	24%
USMC	949	149	50%	800	76%
FY 08 DON	1253	269	21%	984	79%
USN	398	106	39%	292	30%
USMC	855	163	61%	692	70%
FY 09 DON	1112	234	21%	878	79%
USN	297	94	40%	203	23%
USMC	815	140	60%	675	77%
FY 10 DON	1036	286	28%	750	72%
USN	235	108	38%	127	17%
USMC	801	178	62%	623	83%

Table 11. The DON Caseload Totals

Several points about the caseload within each Service merit note. First, the Marine Corps has historically prosecuted more SPCMs than the Navy, generally at about twice the rate. Second, as the number of SPCMs in the Marine Corps has declined over the last decade, the disciplinary actions disposed of at summary court-martial (SCM) and by nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ), have increased over that same period. In fact, though SPCMs had declined from 1,626 in FY 00 to 692 in FY 08, the total number of Marine Corps misconduct cases disposed of at NJP, SCMs, and SPCMs remained virtually the same in FY 00 (12,242) and in FY 08 (12,490).[332] This zero-sum correlation suggests that within the Marine Corps, rates of reported misconduct have stayed relatively constant; however, the rate at which they are disposed of at particular forums has changed, possibly reflecting a change in disposition philosophy. Third, while there are indications that NJP, SCMs, and administrative separation boards may have recently begun to increase within the U.S. Navy, this trend is less pronounced than in the Marine Corps; indeed, over the last decade, the U.S. Navy trend reflects an overall decline.[333]

Other than a direct numerical correlation in the Marine Corps between declining SPCMs and the increasing use of alternative non-judicial dispositions, there is little empirical evidence that explains the caseload trends, or its changing composition. However, in the view of several senior military commanders and experienced military justice practitioners, there are a number of factors that appear to be driving these trends. These factors include:

- an increase in the jurisdictional maximum punishment at SPCMs from six months to one year;[334]
- higher quality of recruits in both Services;[335]

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[332] Col Peter B. Collins, USMC, Assistant Judge Advocate General of the Navy (Military Justice), Navy-Marine Corps Appellate Review Activity, *Brief to the Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy*, 23-25 (Oct. 6, 2010) [hereinafter Col Collins Presentation].
[333] *Id.* at 22-25.
[334] Exec. Order No. 13262, 67 Fed. Reg. 18773 (Apr. 11, 2002) (amending Rule for Courts-Martial (R.C.M.) 201(f)(2)(B)). This amendment may also account for the drop in the number of GCMs in 2003, as some cases that might otherwise have been disposed of by a GCM were instead disposed of at SPCM due to the newly enhanced confinement authority. *See* Neil Carey et al., Center for Naval Analyses, *An Analysis of Navy JAG Corps Future Manpower Requirements, Part 1: RLSOs and NLSOs*, 50 (Feb. 2008) [hereinafter CNA Manpower Study, Part 1].
[335] VADM Houck Testimony, *supra* note 107, at 83; MajGen Ary Testimony, *supra* note 242, at 361-63.

- cultural shift among U.S. Navy line commanders serving as convening authorities, wherein they began opting to use administrative processes rather than courts-martial to dispose of misconduct, forcing problem Sailors out of the Navy;[336]
- for some time, the Marine Corps Legal Services community has been educating commanders about the lengthy post-trial review process required in special courts-martial cases in which a bad-conduct discharge is awarded, and its associated impact on unit manning;[337] and
- the high operational tempo since 2002 has placed heavy demands on time and resources, reinforcing the shift to lower forum resolutions, which typically require less time and fewer resources to adjudicate.[338]

Despite the downward trend in the total number of courts-martial in the DON, military justice remains an essential mission for DON judge advocates. As already noted, the number of disciplinary cases initiated in the DON has remained relatively consistent over the course of the last decade.[339] Even though many of these "cases" are ultimately disposed of at alternative forums rather than by court-martial, they still require the services of judge advocates. As the SJA to CMC stated in the *U.S. Marine Corps Military Justice Report for FY 2010*, "Although overall court-martial numbers and, particularly, special court-martial numbers declined, there appear[s] to be no corresponding reduction in the demand for military justice resources and expertise."[340]

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[336] CNA Manpower Study, Part 1, *supra* note 334, at 53.

[337] In accordance with Article 66, UCMJ, cases in which a bad-conduct discharge is adjudged are sent for review to the Navy-Marine Corps Court of Criminal Appeals (NMCCA), 10 U.S.C. § 866, where the appellate review process takes months. In accordance with Article 71(c), UCMJ, only after final appellate review may a punitive discharge be ordered executed. *Id.* § 871(c). Meanwhile, these Marines remain in an appellate leave status, creating a "lost-battalion" of Marines, performing little service to the Corps, but costing the Marine Corps needed manpower and litigation resources. Col Ralph F. Miller, *The Lost Battalion: Courts-martial for Minor Offenses is a Strain on Precious Resources,* Marine Corps Gazette, Jan. 2007, at 53-54 (urging commanders to consider disposing of minor misconduct cases at these lesser forums (e.g., NJP, SCM, administrative separation) and trumpeted the cost and time savings to be gained from so doing).

[338] VADM Houck Testimony, *supra* note 107, at 83-87.

[339] Even in the U.S. Navy, which has experienced a larger decline in courts-martial, the total number of misconduct cases disposed of at all forums exceeded 12,000 in FY 09. *See* VADM Houck Presentation, *supra* note 4, at 33.

[340] *USMC Military Justice Report 2010, supra* note 226, at 3.

Military defense counsel provide advice to Sailors and Marines notified of processing for administrative separation and to Sailors and Marines notified of a commander's intent to impose nonjudicial punishment.[341] Military defense counsel are also assigned to represent respondents at Administrative Separation Boards and Boards of Inquiry (officer administrative separation boards), while trial counsel (prosecutors) are responsible for a significant amount of administrative work associated with these alternative forums, including serving as recorders (government representative).

2. Case Complexity

Although the overall trend for courts-martial has been shifting from higher forums (GCMs and SPCMs) to lower forums (SCM, NJP, and administrative separation boards), the number of cases referred for trial by GCM has declined less than the number of SPCM cases, and the complexity of those cases that are proceeding to trial has increased. There is no formal, legal, or doctrinal definition of "case complexity." For purposes of this review, the Panel considered that a wide range of factors, either standing alone or in combination, could make a case sufficiently complex to merit special consideration. Indicators of case complexity include:[342]

- number and gravity of the charges and specifications alleged;
- number and location of witnesses;
- necessity for expert witnesses and consultants;
- requirement for scientific evidence, such as computer or other forensic analysis;

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[341] *See* U.S. Dep't of Navy, Judge Advocate General Instr. 5800.7E, *Manual of the Judge Advocate General*, ¶¶ 0109, 0119 at 1-15, 1-30 to -31 (20 Jun. 2007) [hereinafter *JAGMAN*]. In accordance with the *JAGMAN*:

> There is no right for an accused to consult with counsel prior to nonjudicial punishment; however, [Commanding Officers] are encouraged to permit an accused to so consult subject to the immediate availability of counsel, the delay involved, and operational commitments or military exigencies. Failure to provide the opportunity for an accused to consult with counsel prior to nonjudicial punishment does not preclude the imposition of nonjudicial punishment; it merely precludes the admissibility of the record of nonjudicial punishment in aggravation at a later court-martial, unless the accused was attached to or embarked in a vessel at the time of the imposition of nonjudicial punishment.

Id. ¶ 0109, ¶ a.(1), at 1-15.

[342] *See* USMC *SAP*, *supra* note 42, at 19-20; *see* SJA to CMC *Submission*, *supra* note 38, at 27; *see USMC Military Justice Report 2010*, *supra* note 226, at 20.

- challenging chain-of-custody evidentiary issues in cases involving multiple agencies and jurisdictions; and
- whether media interest is anticipated.

The JAG and the SJA to CMC noted the increased complexities presented by child pornography cases (which require detailed understanding of computer forensics) and sexual assault cases (which require a thorough understanding of the complex statutory construction of Article 120, UCMJ).[343] Additionally, concurrent with the DON's increased operational tempo over the past decade, there have been a number of complex, high-profile cases involving national security (espionage and disclosure or mishandling of classified information) and allegations of law of war violations.[344]

In view of the need to effectively and efficiently prosecute and defend complex cases, both Services must have sufficiently trained and experienced litigators, supervisory attorneys, and judges. Maintaining this cadre of experienced personnel is increasingly difficult in an environment in which there are fewer, less complex SPCMs involving relatively minor misconduct, and fewer cases overall, on which judge advocates may gain experience and maintain their perishable litigation skills.[345] This issue is particularly challenging for the U.S. Navy, which litigates approximately one-third as many cases as the Marine Corps, nearly half of which are GCMs.

Having reviewed the military justice system and the inputs which drive requirements – caseload and case complexity – the Panel turns to a review of how the Department and its two Service components organize, educate, train, and assign their judge advocates to fulfill these requirements.

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[343] VADM Houck Testimony, *supra* note 107, at 88 (defining complex cases as including "child pornography cases . . . computer crime cases . . . child pornography; sexual assault; sodomy; murder; all cases that involve, for example, forensics, the dependence on forensics."); MajGen Ary Testimony, *supra* note 242, at 276 (noting that cases have become more complex, in that they now include computer crimes and sexual assault cases that have high-visibility at the Congressional and the media level, which require strong evidentiary skill sets); *see also USMC Military Justice Report 2010*, *supra* note 226, at 20.

[344] *See USMC Military Justice Report 2010*, *supra* note 226, at 20.

[345] *See* VADM Houck Testimony, *supra* note 107, at 89-94.

3. Military Justice Organization

a) Department of the Navy

The Department-level military justice organization consists primarily of the Navy-Marine Corps Trial Judiciary (NMCTJ) (trial level courts); the Navy-Marine Corps Court of Criminal Appeals (NMCCA) (court of first appeal); the Navy-Marine Corps Appellate Review Activity (NAMARA), which includes the Appellate Government and Defense Divisions; and the leadership offices of the Assistant JAG (Military Justice) and the Assistant JAG (Chief Judge).

The NMCTJ is a unified judiciary that provides military trial judges to preside over all special and general courts-martial convened in the DON.[346] The NMCTJ is composed of the Office of the Chief Judge of the NMCTJ and six Judicial Circuits. The NMCTJ is currently composed of 9 Navy and 14 Marine Corps trial judges.[347]

The NMCCA conducts appellate review, unless waived by the appellant, of all courts-martial of members of the naval Service referred to the court pursuant to Articles 62, 66, 69, and 73, UCMJ. In addition, when necessary in furtherance of its jurisdiction, NMCCA reviews all petitions for extraordinary relief properly filed before it.[348] The NMCCA is currently composed of six Navy and three Marine Corps appellate judges.[349]

The Chief Judge, Department of the Navy, is a new AJAG position (established by the Secretary of the Navy on December 18, 2007) with primary administrative and supervisory responsibility over both the trial and appellate judiciaries. The Chief Judge is the reporting senior for the Chief Judge of the NMCTJ and all of the judges of the NMCCA.[350]

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[346] U.S. Dep't of Navy, Sec'y of the Navy Instr. 5400.40A, *Mission, Organization, Functions, and Support of Navy-Marine Corps Trial Judiciary*, ¶ 3., at 1 (Dec. 16, 2005) [hereinafter SECNAVINST 5400.40A].
[347] CAPT Daniel E. O'Toole, JAGC, USN, Chief Judge, Department of the Navy, *Presentation to Independent Review Panel created under Section 506 of the Fiscal Year 2010 National Defense Authorization Act*, 18 (Oct. 6, 2010) [hereinafter CAPT O'Toole Presentation].
[348] 10 U.S.C. §§ 862, 866, 869, 873.
[349] VADM Houck Presentation, *supra* note 4, at 24.
[350] U.S. Dep't of Navy, Judge Advocate General Notice 5450, *Mission and Function of Assistant Judge Advocate General, Chief Judge of the Department of the Navy*, ¶ 3.a.(1)-(2), at 1-2 (May 24, 2010) [hereinafter JAGNOTE 5450].

NAMARA is comprised of an Administrative Support Division, Appellate Government Division, and Appellate Defense Division.[351] The Appellate Government and Appellate Defense divisions within NAMARA are staffed by 12 U.S. Navy judge advocates and 11 Marine judge advocates.[352] Both divisions are led by O-6 division directors with extensive litigation experience. To maintain continuity and level of expertise, each division also has a civilian deputy director.

The AJAG (Military Justice) has primary supervisory responsibility for the execution of the JAG's statutory Departmental duties in military justice and related matters other than the judiciary. The AJAG (Military Justice) serves as the Officer-in-Charge, NAMARA; as such, he is responsible for the administrative review of records of trial, monitoring of post-trial appellate proceedings, supervising final action upon completion of appellate review, and ultimately archiving all records of trial received.

b) U.S. Navy

The Naval Legal Service Command (NLSC) field organization is comprised of Region Legal Service Offices (RLSOs) and Naval Legal Service Offices (NLSOs) and their subordinate activities. There are eight NLSOs, which are organized to provide an array of legal services, including court-martial defense services and legal assistance.[353] NLSO defense counsel provide representation of Sailors and Marines at GCMs and SPCMs, as well as other advice and representation.[354] The nine RLSOs provide a range of legal services to Navy commands, including trial counsel services to convening authorities in the prosecution of courts-martial and

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[351] U.S. Dep't of Navy, Judge Advocate General Instr. 5400.1A, *Office of the Judge Advocate General (OJAG) Organization Manual*, ¶ 107.a., at 1-16 (6 Jul. 1992) [hereinafter JAGINST 5400.1A]. Note: JAGINST 5400.1A was updated by Change Transmittal 1 on April 23, 2003, but that change did not affect the propositions for which it is cited in this report.

[352] Col Collins Presentation, *supra* note 332, at 27.

[353] *See* U.S. Dep't of Navy, Commander, Naval Legal Service Command Instr. 5800.1F, *Naval Legal Service Command (NLSC) Manual*, ¶ 0300, at 3-1 (Oct. 6, 2010) [hereinafter COMNAVLEGSVCCOM 5800.1F]. Naval Legal Service Offices (NLSOs) also provide personnel claims services, other claims and civil litigation, and command administration. *Id.*

[354] *Id.* ¶ 1100, at 11-1. NLSO services also include Article 32 hearings, pretrial confinement proceedings, boards of inquiry, administrative boards, and proceedings in which service members have been designated a party pursuant to the *JAGMAN*. *Id.* Additionally, defense counsel provide required counseling of rights prior to NJP and SCM. *See id.*

command services to U.S. Navy commands lacking dedicated staff judge advocates.[355] As of September 1, 2010, there were 54 U.S. Navy judge advocates serving as trial counsel in RLSOs and 82 serving as defense counsel in NLSOs.[356]

The Deputy JAG of the Navy serves as the Commander, NLSC. Commander, NLSC is authorized to organize, assign, and reassign responsibilities within the NLSC, including the establishment and disestablishment of its branch offices as necessary.[357] In addition, Commander, NLSC is responsible for the administration of legal services, providing direction for all NLSC activities and resources assigned, and performing such other tasks and functions as directed by the Chief of Naval Operations.[358]

The existing alignment of NLSC is undergoing transformation for a variety of reasons, including the desire to improve oversight and accountability of RLSOs and NLSOs, to improve the timeliness and quality of technical support provided to trial and defense counsel in the field, and to enhance the independence of the defense function.[359] In addition, the JAG is considering transitioning to an independent Trial Defense Command (TDC) with a potential target date of October 2012.[360] These initiatives are discussed further below.

On July 1, 2010, Commander, NLSC, stood up a Defense Counsel Assistance Program (DCAP). The mission of the DCAP is to support NLSOs by providing advice and assistance to trial defense counsel in the field when requested throughout every phase of court-martial litigation.[361] DCAP provides a full spectrum of privileged and confidential trial advice, resourcing, and expert witness assistance, training, and other defense bar services for counsel in

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[355] *See id.* ¶ 0301, at 3-1. Region Legal Service Office (RLSO) services also include: command services/administrative law; court reporting; international law (overseas RLSOs); ethics counseling; foreign criminal jurisdiction (overseas RLSOs); legal assistance and/or claims services, when necessary to meet the needs of the Navy; and command administration. *Id.* The mission of the RLSO trial department is to provide qualified trial counsel for the prompt, efficient, and professional prosecution of SPCMs and GCMs; government counsel for the conduct of Article 32 pretrial investigations; and counsel (recorders) for administrative boards. *Id.* ¶ 1400, at 14-1.
[356] VADM Houck Presentation, *supra* note 4, at 24. These officers, although identified as trial counsel or defense counsel, also provide command services and legal assistance, respectively.
[357] OPNAVINST 5450.189B, *supra* note 34, ¶ 5., at 2.
[358] COMNAVLEGSVCCOM 5800.1F, *supra* note 353, ¶ 0101, at 1-1.
[359] *See* VADM Houck Testimony, *supra* note 107, at 99-108.
[360] VADM Houck Testimony, *supra* note 107, at 99-100; VADM Houck Presentation, *supra* note 4, at 36.
[361] COMNAVLEGSVCCOM 5800.1F, *supra* note 353, ¶ 1200, at 12-1.

the field.[362] Serving as the military justice subject matter expert on defense-related matters for Commander, NLSC, "DCAP counsel may be consulted to provide support to trial defense counsel in all aspects of case preparation, including, but not limited to, motion drafting, expert witness preparation, devising trial strategy, assisting with post-trial matters, and providing advice concerning professional responsibility issues."[363]

On October 1, 2010, Commander, NLSC, established a Trial Counsel Assistance Program (TCAP) to support RLSOs by providing advice and assistance to trial counsel throughout every phase of court-martial litigation. The mission of the TCAP is to support RLSOs by providing advice and assistance to trial counsel, upon request, throughout every phase of court-martial litigation.[364] Serving as the military justice subject matter expert on government-related matters for the Commander, NLSC, TCAP counsel "may be consulted to provide support to trial counsel in all aspects of case preparation, including, but not limited to, drafting charges and specifications, drafting motions, preparing expert witnesses, devising trial strategy, and assisting with post-trial matters."[365]

Also effective October 1, 2010, the neutral position of Vice Commander, NLSC, was disestablished and replaced with separate Deputy Commanders for RLSOs and NLSOs.[366] Each Deputy Commander will have served previously in command of a RLSO or NLSO, and each reports directly to Commander, NLSC.[367]

The JAG explained that this new alignment provides a greater degree of oversight over RLSOs and NLSOs, as well as enhances the independence of the defense function.[368] In combination with the establishment of separate assistance programs for trial counsel and defense counsel, the JAG anticipates improvements in the quality and timeliness of the delivery of trial

[362] *See id.* ¶¶ 1200-1204, at 12-1 to -2.
[363] *Id.* ¶ 1200, at 12-1.
[364] *Id.* ¶ 1500, at 15-1.
[365] *Id.*
[366] VADM Houck Testimony, *supra* note 107, at 99-106; VADM Houck Presentation, *supra* note 4, at 36-37.
[367] VADM Houck Testimony, *supra* note 107, at 99-106; VADM Houck Presentation, *supra* note 4, at 37.
[368] VADM Houck Testimony, *supra* note 107, at 99-106; VADM Houck Presentation, *supra* note 4, at 37.

and defense services in the field, and improved accountability within the RLSO and NLSO chains of command.[369]

The JAG is also continuing efforts to implement a Military Justice Litigation Career Track (MJLCT) within the U.S. Navy JAG Corps. The purpose of the MJLCT is to ensure that, in the face of a declining caseload in the U.S. Navy, experienced litigators will be able to try courts-martial and serve in mentoring positions within the military justice community and on the bench.[370] The JAG explained that the concept of an MJLCT had been under consideration in the Navy JAG corps for many years. The initial MJLCT concept focused on protecting the promotion opportunities for litigation experts while continuing to allow them to practice their specialty.[371] More recently, the scope and underlying rationale for an MJLCT have been modified due to the declining caseload.[372]

The military justice challenge facing the U.S. Navy JAG Corps today is that the total number of courts-martial has declined substantially, including, in particular, less serious cases, which used to make up the bulk of special courts-martial. Those less serious cases were the cases upon which newly reporting junior officers "used to cut their teeth."[373] Because the total number of courts-martial in the U.S. Navy has fallen significantly and the number of less serious cases tried at court-martial has fallen precipitously, there has been a dilution in trial advocacy opportunities, particularly at the junior officer level, and a reduction in overall litigation experience across the Navy JAG Corps community.[374] And yet, the Navy JAG Corps must retain the capability to administer and try complex cases, such as capital cases, national security cases, and war crimes cases, in a timely and professional manner, under a military justice system in which judge advocates have responsibilities at every level of process, from initial investigation to final appeal.

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[369] VADM Houck Testimony, *supra* note 107, at 99-106; *see* VADM Houck Presentation, *supra* note 4, at 37.
[370] *See* VADM Houck Testimony, *supra* note 107, at 93-94. The JAG Corps has also taken steps to better tap into the trial advocacy expertise resident within the reserve community to support Naval Legal Service Command. *Id.* at 95.
[371] VADM Houck Testimony, *supra* note 107, at 93 (during testimony about the Military Justice Litigation Career Track, observing that "this has been discussed in the Navy JAG Corps for at least 25 years, and the notion that . . . wouldn't it be smart to have people that want to litigate and who are good at it continue to do it through the years and not have that be disadvantageous to them from a career standpoint?").
[372] *See id.* at 94.
[373] *Id.* at 89-91.
[374] *Id.*

In the face of the declining courts-martial numbers, the JAG has re-evaluated the MJLCT and concluded that, while the MJLCT is still a key component in ensuring the professional and timely execution of the military justice mission, the MJLCT community will have to be sized to meet the current caseload and the MJLCT officers will also have to perform duties outside military justice. A summary of an interview between the JAG and a Panel member provides that:

> The ultimate number of officers that will serve within MJLCT is still being determined as [the JAG] considers ways to realign the underlying support structures for military justice. In this regard, VADM Houck indicated the need to go forward cautiously and incrementally to avoid unintended consequences that might negatively impact the quality of military justice within DON. In the end, the cadre of MJLCT officers and billets will shrink to appropriately reflect the existing military justice caseload that has showed steady decline over the last several years. With growing pressure on DON budget and end strength, [the JAG] indicated that there was strong incentive to right size the force. The existing paradigm that Navy judge advocates start their careers in military justice will need to be changed to a paradigm where new Navy judge advocates are exposed to the practice of military justice for some period of time but not all or most start as military justice practitioners.
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> VADM Houck also stated that it is important to understand that while the primary function of a MJLCT billet will be military justice, it is not the only duties [sic] that an officer serving in that billet will perform.[375]

The JAG also advised the Panel that he is considering implementing a separate defense command within the U.S. Navy – a Trial Defense Command (TDC) – with a potential implementation date of October 2012. Conceptually, the legal assistance function now performed in NLSOs would be transferred to RLSOs. The TDC would be smaller than the current NLSO command structure, it would be populated by senior litigators, and it would focus exclusively on the defense function. RLSOs would become "the teaching hospitals" for newly accessioned judge advocates.[376] The JAG concluded his testimony on the topic of an eventual

[375] Summary of meeting between VADM James W. Houck, JAGC, USN, Judge Advocate General of the Navy, and Rear Admiral (upper half) (RADM) James E. McPherson, JAGC, USN (Ret.), Member, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy, of 23 Nov. 2010 [hereinafter VADM Houck/RADM McPherson Meeting of 23 Nov. 2010].
[376] VADM Houck Testimony, *supra* note 107, at 107.

TDC by stating, "That's under consideration. We have a lot of work to do to flesh that out and get it right, but that's where we're headed."[377]

c) Marine Corps

The execution and supervision of the military justice mission in the Marine Corps is completely decentralized — carried out by Marine commanders and the judge advocates supporting them. Marine SJAs advise commanders and supervise the overall local military justice process. SJAs work directly for commanders and are part of a commander's staff.

In support of commanders and their SJAs, military justice services are provided, in garrison, by consolidated legal offices on board major bases and installations, organized as Legal Service Support Sections (LSSS) and Law Centers. Each LSSS or Law Center serves multiple commanders (courts-martial convening authorities) and SJAs aboard their respective installations or in their respective regions. The Marine Corps has three active component LSSSs. The LSSS is part of the operational force, and is therefore an organic unit within their respective Marine Logistics Group (MLG). LSSSs are typically supervised by a senior lieutenant colonel judge advocate serving as the Officer-in-Charge. A fourth LSSS resides within Marine Forces Reserve.[378] Additionally, the Marine Corps has 12 Law Centers. Law Centers are part of the supporting establishment, and are therefore organized under the cognizant SJA for the respective base or installation commander. The level of legal services support at these Law Centers varies by mission and local arrangement, but all Law Centers provide military justice services.

The LSSSs and Law Centers are responsible for the handling of all aspects of a military justice case from the time a request for legal services is submitted by the command through

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[377] *Id.* at 107-08. The Department of Defense Inspector General (DoD IG) recommended that the JAG establish a Chief Defense Counsel or equivalent position within the U.S. Navy. U.S. Dep't of Defense, Inspector General, *Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy*, 61-62 (Dec. 10, 2010) [hereinafter DoD IG Report]. The DON responded by noting the alignment changes that have been recently implemented within NLSC. *Id.* at 62. The DoD IG, while supporting those alignment changes, found the DON comments to be only partially responsive to the DoD IG's original recommendation. *Id.* The DoD IG continues to "recommend establishing a Chief Defense Counsel position with the authority and resources to manage and supervise the Navy defense function, including defense counsel and staff." *Id.*

[378] USMC *SAP*, *supra* note 42, at 7. The Reserve LSSS provides centralized management, administration, and command and control of the delivery of reserve component legal services to the Marine Corps total force. Although RLSSSs act in general support of the Total Force (both active and reserve), they are generally mobilized or activated to support active component requirements (e.g., augmenting an active component LSSS, augmenting a deploying active component unit, or filling a Joint Manning Document (JMD) requirement).

Service-level post-trial processing and forwarding, if necessary, to NAMARA for appellate review.

Within both LSSSs and Law Centers, there are review offices, which guide cases through the post-trial review process. The review office provides the initial review of the court-martial proceedings and prepares the post-trial documents in support of the SJA, who conducts a second legal review of the proceedings prior to making the SJA's Recommendation (SJAR) and preparing the Convening Authority's Action (CAA).[379]

Currently, 133 Marine judge advocates are assigned to billets dedicated solely to military justice (46 trial counsel, 48 defense counsel, 11 review officers, 11 appellate counsel, and 17 military judges). An additional 79 judge advocates are assigned as SJAs and Deputy SJAs – billets that, while not solely dedicated to military justice, include vital pretrial and post-trial roles in addition to non-military justice duties.[380]

In 1985, the Marine Corps created the Chief Defense Counsel (CDC) of the Marine Corps and a separate reporting chain for defense counsel. Within this organization, defense counsel are supervised by, and receive performance evaluations from, local Senior Defense Counsel and Regional Defense Counsel (RDC). The CDC, a Marine colonel, and the three lieutenant colonel RDCs provide individual defense counsel with a significant depth of military justice experience to meet the mission of defending Marines and Sailors free from influence of any commander.

In May 2010, the SJA to CMC stood up a Trial Counsel Assistance Program (TCAP) to enhance the resources available for Marine prosecutors. The program is currently staffed with one field-grade and one company-grade officer. In addition to training, TCAP provides resources to assist Marine litigators using a number of electronic tools, including a litigation support website containing practice advisories, a military justice blog, a motions bank, and other useful documents and links.

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[379] 10 U.S.C. § 834; Manual for Courts-Martial, United States, R.C.M. 1106 (2008) [hereinafter MCM].

[380] MajGen Vaughn A. Ary, USMC, Staff Judge Advocate to the Commandant of the Marine Corps, *Brief to the Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy*, 25 (Sep. 1, 2010) [hereinafter MajGen Ary Presentation].

4. Training & Education

All U.S. Navy, Marine Corps, and Coast Guard judge advocates attend the Basic Lawyer Course (BLC) at Naval Justice School (NJS) in Newport, Rhode Island. The BLC is a ten-week course offered three times per year. In FY 10, 136 students (Navy, Marine Corps, and Coast Guard judge advocates) attended the BLC.[381] The BLC curriculum includes instruction on criminal law, evidence, trial advocacy, procedure, operational law, legal assistance (e.g., family law, consumer law, estate planning, and immigration), and administrative law (e.g., administrative separations, ethics/standards of conduct, Freedom of Information Act, Privacy Act, JAGMAN investigations, relations with civil authorities, and grievances).[382] Trial advocacy has received consistent emphasis in the BLC curriculum over the years. Seminars concerning specific skills, such as direct and cross-examinations, are conducted as the class progresses, culminating in a mock trial that moves from pretrial motions practice to a closing statement in a National Institute for Trial Advocacy (NITA) format.[383]

The BLC is designed to meet the requirements for basic judge advocate qualification and certification as set forth in the UCMJ. Upon successful completion of the BLC, Navy and Marine judge advocates are certified to practice law as a judge advocate, including, specifically, as trial and defense counsel.

U.S. Navy and Marine judge advocates are also provided with continuing in-service training and education, as well as access to resources for the practice of military justice after leaving NJS. These resources include mentoring and training at local military justice offices, opportunities for continuing legal education courses, and advice and support at local and higher echelons of command. Judge advocates often return to NJS from the fleet or attend courses at the Army Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Virginia, for further training as staff judge advocates and for specialized schooling in trial

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[381] CAPT Michael J. Boock, JAGC, USN, Commanding Officer, Naval Justice School, Transcript of October 6, 2010 Hearing, at 151 [hereinafter CAPT Boock Testimony].

[382] CAPT Michael J. Boock, JAGC, USN, Commanding Officer, Naval Justice School, *Presentation to Panel created under Section 506 of the Fiscal Year 2010 National Defense Authorization Act*, 13-17 (6 Oct. 2010) [hereinafter CAPT Boock Presentation].

[383] *Report on the State of Navy Military Justice 2009*, 2 (1 Jul. 2009).

advocacy, computer crimes, legal assistance, the law of military operations, and prosecuting and defending complex cases.[384]

5. Assignment Policies

a) Trial and Appellate Judiciary

The JAG has the authority to make assignments of U.S. Navy judge advocates to the trial and appellate judiciaries. Marine Corps assignments are made by Headquarters, Marine Corps (Manpower and Reserve Affairs, Officer Assignments) based on the recommendation of the SJA to CMC. Prior to being assigned to either the trial or appellate judiciaries, each officer must be certified by the JAG.[385] Certification is accomplished through the recommendation of the Judicial Screening Board.[386] The JAG, in conjunction with the Judicial Screening Board, endeavors to select officers who possess a suitable background in military justice, sound judgment, an even temperament, and exemplary writing skills for assignment to judicial billets.[387]

The Chief Judge, Department of the Navy (CJDON), makes recommendations to the JAG and the SJA to CMC on the billet structure and geographic location of judicial billets. In close coordination with the SJA to CMC regarding Marine judge advocates, the CJDON serves as the JAG's principal advisor on the assignment of military trial and appellate judges.[388] Furthermore, judicial staffing is closely monitored in light of caseload.[389]

b) Appellate Counsel

Only those officers with previous experience as a trial or defense counsel may be detailed to the Criminal Law Division, the Appellate Government Division, or the Appellate Defense

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[384] *See* CAPT Boock Presentation, *supra* note 382, at 19-20. NJS offers 31 courses for attorneys, nearly half of which focus on some aspect of trial advocacy. NJS also offers specialized courses in military justice throughout the year in Newport, Rhode Island and at its Detachments in Norfolk, Virginia and San Diego, California.

[385] 10 U.S.C. § 826.

[386] U.S. Dep't of Navy, Judge Advocate General Instr. 5817.1D, *Judicial Screening Board*, ¶¶ 3.-4., at 1 (May 10, 2010) [JAGINST 5817.1D] (noting that the following personnel are designated as Board members: AJAG (Chief Judge); AJAG (Military Justice); Chief Judge, NMCCA; Chief Judge, Navy-Marine Corps Trial Judiciary; Deputy AJAG (Criminal Law); Deputy SJA to CMC).

[387] *Id.* ¶ 3., at 1.

[388] JAGNOTE 5450, *supra* note 350, ¶ 3.e., at 3.

[389] VADM James W. Houck, JAGC, USN, Judge Advocate General of the Navy, Response to Panel Members' Request for Information #13 of Aug. 20, 2010, at 4-5 (providing a spreadsheet of PCS billets filled by U.S. Navy judge advocates outside of the DON in FY 10).

Division.[390] Additionally, to enhance productivity of appellate counsel, officers are assigned to the Appellate Divisions for a minimum period of three years; the JAG must approve waivers of the three-year tour length requirement.[391]

c) U.S. Navy

It is the policy of the JAG to assign the best and fully qualified judge advocate to every military justice billet.[392] Consideration is given to the volume and complexity of the military justice work load and the skill, training, experience, and pay grade of the officer to be assigned. New accession judge advocates are primarily assigned to RLSOs and NLSOs. All accessions are considered qualified for such assignments upon successful completion of the NJS Basic Lawyer Course.

The Navy JAG Corps strategic plan, *Navy JAG 2020*, committed to the establishment of "a career track enabling selected judge advocates to specialize in military justice litigation."[393] The plan anticipated that a cadre of seasoned litigators would "improve the quality of military justice litigation by keeping experienced and effective counsel in the courtroom, providing expert supervision and mentoring for new counsel, and creating a cadre of qualified judge advocates to fill selected billets in the military justice system."[394] The program was formally implemented in 2007 with the establishment of the Military Justice Litigation Career Track (MJLCT).[395] The current MJLCT instruction identifies 52 billets that require assignment of officers who possess the qualifications set out in the instruction for a "specialist" or "expert" in litigation.[396] These billets, generally aligned with geographic areas producing the most courts-martial, include some NLSC commanding officers and executive officers, senior trial counsel and defense counsel, as well as certain trial and appellate judges.[397] Specialists and experts are

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[390] U.S. Dep't of Navy, Judge Advocate General Instr. 1320.1, *Detailing Policy for Military Justice Billets*, ¶ 4.d., at 3 (Sep. 13, 2010).
[391] *Id.*
[392] *Id.* ¶ 4., at 1.
[393] U.S. Navy Judge Advocate General's Corps, *Navy JAG 2020*, 11 (undated).
[394] *Id.*
[395] U.S. Dep't of Navy, Judge Advocate General Instr. 1150.2, *Military Justice Litigation Career Track* (May 3, 2007) (canceled by JAGINST 1150.2A, *supra* note 276).
[396] JAGINST 1150.2A, *supra* note 276, enclosure (2).
[397] *Id.*

selected through an administrative board process and then detailed to these designated billets.[398] This community within the JAG Corps will have to be sized appropriately to meet a declining caseload that is comprised of nearly 50% GCMs. In this environment, where there are limited opportunities to develop litigation skills in less complex cases, consolidating litigation offices is expected to enhance the experience base of litigators, maintain their currency, and allow them to serve as mentors for new counsel.[399]

d) Marine Corps

Historically, the volume of courts-martial in the Marine Corps has exceeded that of the other Services. Over the past ten years, the Marine Corps tried an average of 31% of the total GCM and SPCM caseload in the Department of Defense. Even given the recent decline in numbers of GCMs and SPCMs, the Marine Corps continued to carry 28% of the overall DoD caseload in FY 09.[400] Accordingly, the statutory military justice mission remains the primary core practice for Marine judge advocates. The preponderance of Marine judge advocates will be detailed as either trial counsel or defense counsel, and often both, during their first tour in the Corps.

While Marine judge advocates have the opportunity to try many cases and learn the mechanics of courts-martial early in their careers, today's Marine judge advocates typically lack the opportunity for long-term continuity in trial billets needed to truly refine their military justice expertise. One reason for this shortfall is the need to meet the demand for legal support during combat operations. Marine judge advocates have been assigned on an ad hoc, but continuous basis to temporary duty, for periods of between 7 and 13 months, to augment deploying Marine Expeditionary Forces (MEF) SJA offices and their subordinate commands (e.g., regiments and battalions) in support of OIF and OEF. These assignments demonstrate the flexibility of the Marine legal services community to effectively task-organize to support combat forces. However, it is important to note that the billets in support of OIF and OEF have been sourced primarily from the company-grade judge advocates serving in non-deployed Legal Service Support Sections (LSSSs) and supporting establishment Law Centers throughout the Marine

[398] *Id.* ¶ 4., at 3-5.
[399] VADM Houck/RADM McPherson Meeting of 23 Nov. 2010, *supra* note 375; *see also* JAGINST 1150.2A, *supra* note 276, ¶ 3.d., at 2.
[400] *See generally* CAAF *Annual Reports*, *supra* note 331.

Corps, many of whom are serving as trial and defense counsel. This continuous turnover has decreased the amount of time, and continuity of service, for first tour company-grade judge advocates to gain experience and proficiency in military justice practice. Continuous rotation of personnel within a particular LSSS or Law Center has the potential to degrade the collective experience base and synergy typically resident, and critical, in a successful law office when new counsel practice alongside, and are mentored by, their more experienced peers.

This trend, coupled with the previously-noted increase in case complexity, led the Marine Corps to re-code judge advocate billets to identify areas in which specialized expertise is necessary. In 2005, the Marine Corps effected a change to the Military Occupational Specialty (MOS) Manual to add six additional "Necessary" MOSs (NMOS) for judge advocates, including 4409 – Master of Criminal Law.[401] Judge advocates holding the NMOS 4409 have a specialized understanding in technical and constitutional areas of criminal law and the UCMJ, and are eligible to serve in challenging billets requiring such expertise in military and criminal law issues. There are currently 26 billets coded for NMOS 4409. These billets are supervisory (e.g., senior trial counsel, military justice officer, senior defense counsel, and regional defense counsel) and must be filled by military justice experts with a Master of Laws (LL.M.) degree in criminal law or a proven history of military justice experience and expertise. A secondary effect of this re-coding is an increased opportunity for judge advocates to receive advanced degrees.

6. Post-Trial Processing of Special and General Courts-Martial

This review, along with the Department of Defense Inspector General (DoD IG) review,[402] was conducted in the wake of the case of *United States v. Foster*.[403] Foster, a Marine Sergeant, was convicted of spousal rape, aggravated assault, and communicating a threat, and began serving a 17 year sentence to confinement on December 3, 1999. On February 17, 2009, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) overturned the rape conviction based on legal and factual insufficiency. The Court went on to set aside the findings and sentence for the remaining convictions due to errors in the case and unacceptable delay, noting

[401] *See* MCO 1200.17B, *supra* note 116, ¶ 1127.6., at 1-141; *see also* Message 200004Z JUL 06, MARADMIN 329/06, *Subj: MOS Manual Changes and Conversions*.
[402] DoD IG Report, *supra* note 377, at 1.
[403] *United States v. Foster*, 2009 CCA LEXIS 62 (N-M.C.C.A. Feb. 17, 2009).

that "the delay in this case 'is so egregious that tolerating it would adversely effect [sic] the public's perception of the fairness and integrity of the military justice system.'"[404]

a) Post-Trial Procedure

Once a court-martial is adjourned by the military judge, the post-trial process begins with the transcription and assembly of the record of trial by the court reporter. Trial and defense counsel then review the record of trial, followed by review and authentication of the record of trial by the military judge.[405] The record of trial is then delivered to the Convening Authority (CA). Prior to the CA taking action on the case, the record is reviewed by the CA's SJA, who provides an SJA's recommendation (SJAR)[406] to the CA, along with any clemency submissions by the accused or counsel.[407] If the CA approves findings and a sentence[408] including at least one year of confinement or a punitive discharge, the case is forwarded to Navy-Marine Corps Appellate Review Activity (NAMARA).[409] Once at NAMARA, the record is reviewed for completeness before being forwarded for docketing at NMCCA.[410] Copies of the record are simultaneously provided to the Appellate Government and Appellate Defense Divisions.

b) Post-Trial Due Process Requirements

An appellant "has a constitutional right to a timely review guaranteed him under the Due Process Clause."[411] Military appellate courts have long recognized that appellate review under Article 66, UCMJ "embodies a concomitant right to have that review conducted in a timely fashion."[412] Speedy post-trial review includes the right to a timely Convening Authority's Action (CAA), the prompt forwarding of the record of trial to appellate authorities, and reasonably timely consideration by military appellate courts. The Court of Appeals for the

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[404] *Id.* (quoting *United States v. Haney*, 64 M.J. 101, 108 n.36 (C.A.A.F. 2006) (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)).
[405] MCM, *supra* note 379, R.C.M. 1103, 1104.
[406] *Id.* at 1106.
[407] *Id.* at 1105.
[408] *Id.* at 1107.
[409] *Id.* at 1111.
[410] U.S. Navy-Marine Corps Courts of Criminal Appeals, *Rules of Practice and Procedure and Internal Operating Procedures*, Rule 1.4, at 2 (1 Feb. 2010).
[411] *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003).
[412] *Id.* at 37.

Armed Forces (CAAF) has adopted the four factors set forth in *Barker v. Wingo*[413] "for reviewing post-trial delay due process claims": (1) length of delay; (2) reasons for delay; (3) the appellant's demand for speedy review; and (4) whether prejudice occurred as a result of the delay.[414]

In 2006, CAAF decided the case of *United States v. Moreno*, which mandated a new methodology for review of post-trial delay cases.[415] The Court set forth benchmarks for various steps of the post-trial process, violations of which would trigger a presumption of unreasonableness. Post-*Moreno*, CAAF applies a presumption of unreasonable delay when the CAA is not taken within 120 days of a court-martial; when the record of trial is not docketed by the Service Court of Criminal Appeals within 30 days of the CAA; and when appellate review is not completed and a decision is not rendered within 18 months of docketing the case. If the length of the delay is "facially unreasonable," an appellate court is required to balance the length of the delay against the other three *Barker v. Wingo* factors.[416] Each factor is weighed and balanced to determine if it favors the appellant or the Government, with no single factor being dispositive.

A review of the post-trial milestones in the *Foster* case shows that there were lapses at nearly every stage in the post-trial process, at both the Service and Department levels. Foster was sentenced on December 3, 1999. Two hundred and fifty days later, the military judge authenticated the record of trial. On February 9, 2001, 434 days after completion of the trial, the CA took action. It then took 291 days for the case to be docketed with the NMCCA.

The NMCCA granted 20 motions for enlargement of time to Foster's appellate defense attorney before the defense brief was filed on December 19, 2003 (752 days from docketing). The Government filed an answer brief on August 16, 2004 (241 days from submission of Foster's brief). Foster's response was filed on September 10, 2004. On June 21, 2006 (649 days later), Foster filed a Motion for Expedited Review. On July 6, 2006, the NMCCA ordered a fact-finding *DuBay* hearing and returned the case to the CA. The record of trial, including the *DuBay*

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[413] *Barker v. Wingo*, 407 U.S. 514, 530 (1972).
[414] *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)); *see also Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004).
[415] *Moreno*, 63 M.J. at 136-39.
[416] *Id.* at 136.

hearing, was re-docketed with the NMCCA on June 12, 2007, after which Foster and the Government were permitted to file additional pleadings. All pleadings were filed by December 5, 2008. On February 17, 2009 – 9 years and 2 months (3,364 days) after the completion of trial – the NMCCA issued its decision.

7. Remedial Measures and Initiatives

In the wake of *Moreno* and *Foster*, both the Navy and the Marine Corps conducted comprehensive assessments of their legal communities. This Section describes some of the initiatives each Service instituted to correct the deficiencies that led to the failures in the post-trial processing mission.

a) Military Justice Oversight Counsel

In 2009, the JAG established the Military Justice Oversight Council (MJOC).[417] The MJOC is a flag/general officer forum for the review of military justice in the Navy and Marine Corps.[418] Membership includes the JAG, the Deputy JAG (Commander, Naval Legal Service Command (NLSC)), the SJA to CMC, the AJAG (Military Justice), and the Chief Judge, Department of the Navy (CJDON).[419] The MJOC meets monthly to review structural, resource, and other matters that affect the timely and effective delivery of military justice services, and includes review of requirements needed to process the caseload or individual cases.[420] The *Evaluation of Post-Trial Reviews of Courts-Martial Within the Department of the Navy (DoD IG Report)* noted that, as presently established, the MJOC could be terminated at any time and successor Navy JAGs might choose not to continue the current commitment to military justice oversight.[421] To remedy this, a provision to formally establish the MJOC was included in a draft revision of Secretary of the Navy Instruction (SECNAVINST) 5430.27C, which is currently under review.[422]

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[417] DoD IG Report, *supra* note 377, at 4.
[418] *Id. at 182.*
[419] *See id.* at 43.
[420] One of the primary concerns noted in the DoD IG review was lack of oversight or supervisory mechanisms embodied in policy or institutionalized processes. *See id.* at 3.
[421] *Id.* at 53.
[422] *Id.* at 53, 182

b) Chief Judge, Department of the Navy

The position of the CJDON was approved by the Secretary of the Navy in December 2007.[423] Prior to the establishment of this position, Article 66, Uniform Code of Military Justice, prohibited the Chief Judge of NMCCA from writing fitness reports on other members of the court.[424] This prohibition had the unintended consequence of inhibiting active management of the NMCCA. Since the CJDON is not a sitting member of the Navy-Marine Corps Court of Criminal Appeals (NMCCA), the Article 66 prohibition no longer represents an impediment to the exercise of supervisory duties over the appellate judiciary. The duties and responsibilities of the CJDON include monitoring the productivity and timeliness of the trial and appellate judiciaries and taking administrative action consistent with the Code of Judicial Conduct as needed to ensure all judges perform their duties in a timely and effective manner.[425] The CJDON is required to periodically report to the JAG any administrative impediment, such as a lack of resources, which might cause any case to fail to be processed in accordance with the standards of *Unites States v. Moreno*.

c) Annual Report on the State of Military Justice

On May 4, 2009, in response to the *Foster* decision, the JAG established a panel to conduct a review of the actions, policies, and procedures necessary to ensure the U.S. Navy JAG Corps is able to perform its military justice function in a competent, professional manner. The *Report on the State of Navy Military Justice 2009*, published on July 1, 2009, responded to that Charter. That report, however, was limited to the U.S. Navy JAG Corps and did not include a review of Marine Corps legal services. There is now an annual reporting requirement to conduct a comprehensive assessment of military justice practice across the DON, including the Marine Corps. The annual report will be

[423] JAGNOTE 5450, *supra* note 350, ¶ 2., at 1.
[424] *See* DoD IG Report, *supra* note 377, at 39.
[425] JAGNOTE 5450, *supra* note 350, ¶ 3., at 1-5. "In the past, limited supervisory authority was asserted as a key problem in addressing less productive and less committed judges on the Court, a problem the new Chief Judge position should remedy." *See* DoD IG Report, *supra* note 377, at 39-40.

provided to the Secretary of the Navy, Chief of Naval Operations, and the Commandant.[426] As the JAG testified on September 1, 2010,

> I think, going forward, the vision would be different for that report, . . . that it would be . . . a collaborative effort between the two communities, but consistent with the JAG's responsibility to oversee Article 6, that that report would be submitted to the JAG [sic] to the Secretary, to the CNO and to the Commandant. But, clearly, the SJA to the Commandant would play a very big role, as would the Commander, Navy [sic] Legal Service Command in development of that report.[427]

d) Inspections[428]

In conducting inspections within the Navy, the JAG Inspector General (IG) has been directed to ensure that a subject matter expert in military justice will participate in every inspection of RLSO units, and provide a complete assessment of RLSO performance and compliance with statutory and regulatory requirements.[429] Similarly, inclusion of appropriate subject matter expert participation will be scheduled for NLSO inspections and approved during the semi-annual IG program review.[430] Additionally, as part of the inspection process, the JAG IG will conduct interviews of General and Special Courts-Martial Convening Authorities, SJAs, and members of the inspected commands regarding courts-martial process, including the level of NLSC leadership involvement and attendance at courts-martial.[431] To ensure the timeliness of processing of courts-martial, the JAG IG will also verify the status of the courts-martial tracking system at each inspected unit.[432]

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[426] *Id.* at 53. A draft revision to Secretary of the Navy Instruction 5430.27C, *Responsibility of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant for Supervision and Provision of Certain Legal Services*, currently under review, would institutionalize this annual reporting requirement. *Id.* at 53.
[427] VADM Houck Testimony, *supra* note 107, at 415.
[428] One of the primary deficiencies noted by the DoD IG was "ineffective inspections, which either did not detect/identify post-trial problems, or did not lead to sufficient or lasting corrective actions." DoD IG Report, *supra* note 377, at 2.
[429] U.S. Dep't of Navy, Judge Advocate General Instr. 5040.1, *Uniform Code of Military Justice Article 6 Legal Office Assessments*, ¶ 8.d.(2), at 4 (Jun. 14, 2010).
[430] *Id.*
[431] *Id.* ¶ 2. of enclosure (1), at 2.
[432] *Id.*

Marine Corps legal offices are now inspected by two primary means: the Commanding General's Inspection Program (CGIP)[433] and SJA to CMC inspections. On May 15, 2010, an Automatic Inspection Reporting System (AIRS) checklist[434] for command inspection of legal services was formally implemented.[435] The AIRS checklist addresses each functional area within SJA offices, Law Centers, and LSSSs, including military justice, court reporters, and post-trial matters. Under this program, subject matter experts with the CGIP inspect SJA offices, Law Centers, and LSSSs to ensure compliance with standards and processing times.

Under authority granted by Secretary of the Navy Instruction, the SJA to CMC has the authority to "conduct annual inspections to ensure that Marine Corps law centers are functioning properly and efficiently."[436] While these inspections historically included some assessment of the health of the provision of legal services at each office, there was no standardized inspection process. To correct this deficiency, the current SJA to CMC developed uniform information requirements for use in these inspections that, in conjunction with CGIP inspections, give Commanders and their SJAs a more accurate assessment of legal readiness.[437]

e) Case Tracking

Since 2006, the Navy JAG Corps has used the Court-Martial Tracking and Information System (CMTIS) to track individual U.S. Navy cases from preferral of charges to receipt by Navy-Marine Corps Appellate Review Activity (NAMARA). In February 2010, the Marine Corps implemented and made mandatory a single web-based, Corps-wide Case Management

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[433] U.S. Marine Corps Order 5040.6H, *Marine Corps Readiness Inspections and Assessments* (Mar. 18, 2007) [hereinafter MCO 5040.6H]. In accordance with MCO 5040.6H, Commanders, Marine Forces; Commanding Generals, Marine Expeditionary Forces; Commanding Generals, Major Subordinate Commands; Commanding Generals, Marine Corps Installations; and Commanding Officers of the Marine Corps shall design and implement a Commanding General's Inspection Program (CGIP) as outlined in NAVMC Directive 5040.6H. MCO 5040.6H, *supra*, ¶ 5.c., at 4; U.S. Dep't of Navy, Navy-Marine Corps Dir. 5040.6H, *Marine Corps Readiness Inspections and Assessments*, enclosure (1) (Mar. 18, 2007) [hereinafter NAVMC Dir. 5040.6H].

[434] Command Inspectors General use Automated Inspection Reporting System (AIRS) inspection checklists when conducting CGIP inspections. NAVMC Dir. 5040.6H, *supra* note 433, ¶ 1.b. of enclosure (1), at 3-1.

[435] Message 142126Z MAY 10, MARADMIN 276/10, *Subj: Implementation of Command Inspections of SJA Offices, Law Centers and Legal Service Support Section* (stating that SJA offices, Law Centers, and LSSSs had not previously been subject to inspection within the CGIP).

[436] SECNAVINST 5430.27C, *supra* note 15, ¶ 8.f., at 6.

[437] USMC *SAP*, *supra* note 42, at 26.

System (CMS).[438] CMS tracks court-martial cases in a single database from receipt of the Request for Legal Services (RLS) through trial and until the case is received at NAMARA. NAMARA uses CMTIS to track cases from receipt to NMCCA, then to archive; NMCCA uses CMTIS to track cases from receipt of the case until it is closed by the court's action.

The *DoD IG Report* spends a considerable amount of time evaluating both CMTIS and CMS, ultimately concluding that "Although [CMTIS and CMS] represent progress in recent years, Navy and Marine Corps managers and supervisors still do not have the visibility they need from automated systems to monitor case progress and timeliness across the post-trial process."[439]

Additionally, the *DoD IG Report* noted that:

> The recently-fielded Marine Corps CMS appears to have substantially greater potential than the Navy CMTIS. Specifically, CMS appears to offer better and more complete capability for management to maintain visibility over individual case processing and status in the field, including post-trial processing in the field. However, CMS is still new, relatively untested and has yet to develop all the needed capabilities.[440]

Until recently, the DON was working on a unified Navy and Marine Corps criminal justice case processing and tracking system – the DON Criminal Justice Information System (DONCJIS). In September 2010, DONCJIS was cancelled due to failure in performance tests and funding shortfalls. Witness testimony to the Panel supported the employment of a single system to track all the DON cases from cradle to grave.[441]

The Panel agrees with the goal of a single DON courts-martial case tracking system that accurately tracks all phases of a court-martial through the military justice process. In March 2010, the JAG initiated a Center for Naval Analyses (CNA) study to examine the current Navy and Marine Corps case tracking systems and to benchmark those systems against case tracking systems used by the federal court, the Air Force, and the Army. The CNA study, which is due in

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[438] Message 012130Z FEB 10, MARADMIN 062/10, *Subj: Implementation of Case Management System for Courts-Martial* (mandating use of the Case Management System (CMS) by February 17, 2010 by all Marine legal offices to track military justice cases).
[439] DoD IG Report, *supra* note 377, at 2-3.
[440] *Id.* at 16-17.
[441] VADM Houck Testimony, *supra* note 107, at 75; CAPT Daniel E. O'Toole, JAGC, USN, Chief Judge, Department of the Navy, Transcript of October 6, 2010 Hearing, at 114.

February 2011, may assist in identifying possible options for a unified DON case tracking system.

f) Electronic Records of Trial

A related initiative that may provide substantial improvements to the post-trial mission is the use of electronic Records of Trial (e-ROT).[442] A substantial amount of time is required to mail or hand-deliver records of trial from office to office during the post-trial phase for purposes of review, authentication, clemency, Convening Authority's Action (CAA), and, if necessary, appellate review. The Marine Corps has implemented the use of e-ROTs at the Legal Services Support Section at Camp Pendleton. Additionally, the NMCCA has approved a pilot program using these e-ROTs for their review of Camp Pendleton cases.

g) The Results

The DON's post-trial processing has steadily improved since 2006. The statistics below indicate that the leadership and specific corrective actions of the JAG and SJA to CMC have progressively reduced the time needed to process appeals.

- **Timelines**
  - Of the 3,920 cases docketed on appeal after (and thus controlled by) *U.S. v. Moreno* (June 10, 2006), only 10 exceeded the 18 month docketing-to-decision guideline:
    - 2006: 0
    - 2007: 1
    - 2008: 7
    - 2009: 2
    - 2010: 0

[442] The President amended R.C.M. 1104(a)(1) to allow electronic signature of "an electronic record of trial" and service of an authenticated electronic record of trial with a means to view it as satisfying the service requirements upon the accused and defense. *See* Exec. Order No. 13468, 73 Fed. Reg. 43827 (Jul. 28, 2008).

- **Due Process**
  - With the exception of *U.S. v. Foster* in 2009, no case docketed on appeal after *Moreno* was granted appellate court relief for a due process violation resulting from post-trial delay.[443]

The Panel was directed to determine the number of judge advocates required to fulfill the legal mission of the DON. In carrying out the study, the Panel was further directed to review the judge advocate requirements of the DON for the military justice mission. Having conducted this review, the Panel concludes that, with regard to the military justice mission, the judge advocate requirement is not necessarily just about numbers of judge advocates; more accurately, engaged leadership and effective oversight are the keys to ensure continued accomplishment of the DON's military justice mission.[444]

The Panel strongly supports the myriad of initiatives aimed at improving military justice processes that have been undertaken at both the Departmental and Service levels. The Panel believes, however, that three in particular are most responsive to a call for engaged leadership and effective oversight: a case tracking system, the Annual Report on the State of Military Justice, and the Military Justice Oversight Council (MJOC).

As the statistics above demonstrated, the DON has made significant improvements in post-trial processing of courts-martial over the past five years. In order to continue this positive trend, it is critical that the DON employ a single court-martial case tracking system. The system needs to be able to track cases from the preferral of charges or imposition of pretrial restraint at the Service level through appellate review at the Department level. Significant, dedicated

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[443] Letter from CAPT Daniel E. O'Toole, JAGC, USN, Chief Judge, Department of the Navy, to Mr. Daniel J. Dell'Orto, Chairman, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy (Ser 05/0024) (Nov. 3, 2010). This statistic does not include cases where appellate court relief was granted under the broad mandate of Article 66(c), UCMJ for post-trial delay that did not amount to a due process violation. *See, e.g., United States v. Bartolo*, 2011 WL 150190 (N-M.C.C.A. Jan. 18, 2011). In *Bartolo*, one of the cases noted in the DoD IG Report, the NMCCA found that while the post--trial delay was facially unreasonable, there was no prejudice to the appellant and no due process violation. The Court did, however, grant the appellant sentence relief after considering whether the delay affected the findings and sentence that should be approved under Article 66(c), UCMJ.

[444] Similarly, the DoD IG, in summarizing its findings, noted "consistent failures in leadership, supervision and oversight at all organizational levels, impacting military justice in both the Navy and Marine Corps." DoD IG Report, *supra* note 377, at 2.

funding will be necessary to develop and implement the courts-martial case tracking system the DON needs to ensure effective oversight capability.

While it is evident that the current leadership in the Navy and Marine judge advocate communities are focused on military justice, institutionalizing both the Annual Report on Military Justice and the MJOC will ensure continued focus.[445] The Panel therefore recommends inclusion of those requirements in the revision of SECNAVINST 5430.27C. As the AJAG (Military Justice), Col Peter B. Collins, USMC, stated during his testimony,

> [O]ne thing I don't have a checklist on is engaged leadership. 15 years from now, [if] leadership is not engaged, not taking this military justice stuff seriously, we will have [another case like] *Foster*. So we need engaged leaders, we need to set the standard, we need to train to those standards, [inspect to] those standards. That's how we keep going.[446]

F. Review of Requirements for Community Health

The Panel was directed to "review, evaluate, and assess such other matters and materials as the Panel considers appropriate for the purpose of the study."[447] Based upon the testimony and evidence provided to the Panel, it became clear that maintaining the quality of judge advocates is inextricably linked to maintaining the right number of judge advocates. Testimony from the client community was, without exception, complimentary when describing the professionalism of judge advocates. We believe that the health of the communities in this regard rests on three pillars: recruiting, retention, and professional education and training. We address each pillar below separately for the Navy and Marine Corps.

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[445] As the DoD IG noted, as currently established, the Military Justice Oversight Council (MJOC) could be terminated at any time and successor Navy JAGs might choose not to continue the current commitment to military justice oversight. *Id.* at 53.

[446] Col Peter B. Collins, USMC, Assistant Judge Advocate General of the Navy (Military Justice), Navy-Marine Corps Appellate Review Activity, Transcript of October 6, 2010 Hearing, at 122.

[447] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(b)(2)(G), 123 Stat. 2190, (2009).

1. Community Health within the Navy Judge Advocate General's Corps

The Navy JAG Corps strives to recruit, retain, and develop the highest quality of judge advocates to serve the Department of the Navy and ensure the U.S. Navy's legal readiness across the range of military operations.

a) Recruiting

The Navy JAG Corps has taken an active role in, and has been successful at, recruiting talented applicants for the Navy JAG Corps. JAG Corps recruitment includes frequent interaction with law schools, affinity groups, and outreach programs such as the Navy JAG Corps' National Moot Court Competition,[448] which is focused on the law school community.[449] By agreement with the Navy Recruiting Command, the Navy JAG Corps screens applicants to ensure it is obtaining those best suited for service in the U.S. Navy. During the application process, candidates go through a structured interview that is based upon the "whole-person concept," and their records are reviewed by a selection board, which recommends the best-suited candidates for a commission in the U.S. Navy JAG Corps.[450] While assuming a greater role in recruiting judge advocates requires expenditure of Navy JAG Corps resources, most notably attorney time,[451] Navy JAG Corps recruiting efforts have contributed to a large pool of qualified applicants and allowed the JAG Corps to be more selective.[452] Only four percent of qualified applicants are selected.[453]

Each year, the Navy gives approximately seven junior officers the opportunity to transfer laterally to the Navy JAG Corps through the Law Education Program (LEP).[454] This is an

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[448] VADM Houck Testimony, *supra* note 107, at 166-67; *see also* http://www.jag.navy.mil/nationalmootcourtcompetition.htm.
[449] VADM Houck Presentation, *supra* note 4, at 60.
[450] http://www.jag.navy.mil/careers /careers/apply.html (noting that "All candidates are judged on the 'whole-person concept' and only the best-suited individuals are professionally recommended."); *see* VADM Houck Testimony, *supra* note 107, at 164 (explaining the structured interview process).
[451] VADM Houck Testimony, *supra* note 107, at 167 (explaining that Navy Recruiting Command works closely with the JAG Corps by processing for a commission those applicants that are professionally recommended by the Judge Advocate General, and by providing funding for JAG Corps presence at certain national recruiting events).
[452] *See* VADM Houck Testimony, *supra* note 107, at 167; *see* http://www.jag.navy.mil/careers /careers/opportunities_sp.html (follow "Application Process" hyperlink).
[453] http://www.jag.navy.mil/careers /careers/opportunities_sp.html (follow "Application Process" hyperlink).
[454] http://www.jag.navy.mil/careers /careers/opportunities_lep.html.

exceptionally competitive program,[455] available to officers who have served on active duty for at least two years, but not more than six years.[456] Officers are selected by a board and receive funded legal education at an American Bar Association (ABA)-accredited law school, and in addition, their full salary.[457] Officers incur a six-year service commitment upon completing the program.[458]

b) Retention

The Navy JAG also views retention as a key to maintaining a JAG Corps that is strong enough to meet the legal requirements of the Navy. Within the Navy JAG Corps, retention efforts are focused on measures enhancing quality of life and monetary payments at strategic career milestones.

The Navy JAG Corps has taken some innovative steps in addressing quality of life issues through work-life initiatives that promote geographic stability and mitigate the loss of personnel who, without such programs, might leave active duty due to family conflicts. An example of such a program is the Virtual Command pilot program. The program allows judge advocates assigned to headquarters functions to telecommute by working out of a Navy office close to their home.[459] The Career Intermission Program that authorizes a member's temporary release from

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[455] Telephone interview by Lieutenant Commander Raghav Kotval, JAGC, USN, Staff, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy, with Commander Justin Clancy, JAGC, USN, Judge Advocate General's Corps Lieutenant Commander and Individual Augmentee Detailer (Dec. 7, 2010) (Commander Clancy explained that the JAG Corps typically receives 40 applications for the Law Education Program each year).

[456] U.S. Dep't of Navy, Sec'y of the Navy Instr. 1520.7F, *Law Education Program*, ¶ 5.c.(2), at 2 (6 Sep. 2002) [hereinafter SECNAVINST 1520.7F].

[457] *Id.* ¶¶ 3.-5. of enclosure (1), at 2-5; *see also* Message 090041Z JUN 10, NAVADMIN 198/10, *Subj: FY11 Law Education Program Selection Board*.

[458] *See* SECNAVINST 1520.7F, *supra* note 456, ¶ 6.c. of enclosure (1), at 5 (stating that "All program participants will serve on active duty following completion of the program for two years (24 months) for each year (12 months), or any part thereof, of legal training in the program."). ABA-approved law schools normally require three-years of attendance in order to earn a degree.

[459] VADM Houck Testimony, *supra* note 107, at 168-69. The program is currently in use in Jacksonville, Florida for functions that would otherwise be performed at headquarters. *Id.*

active duty, contingent on a subsequent service commitment, is an innovative U.S. Navy-wide program used by the Navy JAG Corps to retain judge advocates.[460]

The average undergraduate and law school debt of a new accession in the Navy JAG Corps is $108,000.[461] Educational debts are offset by all four Services through different programs in different amounts. Currently, aggregate compensation in the Army is the highest, at $185,000, followed by the Air Force, at $125,000, followed by the Navy at $60,000, and the Marine Corps at $45,000.[462] There are two general categories of incentives: continuation pay and Student Loan Repayment Programs (SLRP).[463] SLRP is currently only offered by the Army and the Air Force.[464]

The Navy Judge Advocate Continuation Pay (JACP) program provides payments totaling $60,000 to qualified judge advocates in approximately the fourth, eighth, and tenth years of their active-duty service. Navy JACP is not a bonus offered to every judge advocate, but a performance-based incentive offered only to officers who compete and are selected for career status. The JAG testified that JACP should be increased to $90,000, and in no event should it be withdrawn, despite a challenging fiscal environment.[465]

c) Professional Education and Training

Within the Navy JAG Corps, professional education and training is accomplished primarily through post-graduate legal education and through focused training courses offered by the Naval Justice School, and other institutions. Post-graduate education, resulting in a Master of Law (LL.M.) degree, is accomplished through a civilian law school or through the U.S.

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[460] Chief of Naval Operations Instr. 1330.2A, *Navy Career Intermission Pilot Program Guidelines*, ¶ 1., at 1, ¶ 3. of enclosure (2) (30 Aug. 2010); *see also* VADM Houck Testimony, *supra* note 107, at 169; VADM Houck Presentation, *supra* note 4, at 61.

[461] VADM Houck Testimony, *supra* note 107, at 173-74.

[462] VADM Houck Presentation, *supra* note 4, at 64; *see also* Message 161726Z SEP 10, MARADMIN 515/10, *Subj: FY11 Law School Education Debt Subsidy (LSEDS) Program* [hereinafter MARADMIN 515/10] (stating that eligible judge advocates qualify for three payments of $15,000, for a total of $45,000).

[463] 10 U.S.C. § 2171 (2010).

[464] VADM Houck Presentation, *supra* note 4, at 64.

[465] VADM Houck Testimony, *supra* note 107, at 174-75. The Navy JAG's concerns with the complete removal of the Judge Advocate Continuation Pay (JACP), as is periodically suggested in response to fiscal constraints, are that it factors into the lifetime financial plans of judge advocates and that its removal would negatively affect the quality of candidate recruited or retained in the JAG Corps. *Id.*

Army's Judge Advocate General's Legal Center and School (TJAGLCS).[466] The Navy JAG Corps' goal is to send every judge advocate to post-graduate school.[467] Authorized areas of study include international law, environmental law, trial advocacy, and military law.[468] The Navy JAG has negotiated agreements with several law schools to obtain reductions in tuition, thereby leveraging training funds.[469] The Navy JAG testified that post-graduate school education is imperative in developing subject matter experts who are able to support the DON in today's complex legal environment.[470] The Navy JAG also testified about the significant retention value of post-graduate education, stating that it was the "single biggest retention tool" for the Navy JAG Corps.[471] One year of funded post-graduate school at a civilian institution requires a commitment of three years (two years for TJAGLCS) of obligated service, beginning after the completion of education, to run concurrently with any pre-existing service obligation.[472]

The JAG also testified about the importance of Joint Professional Military Education (JPME) in today's Joint environment.[473] However, obtaining training for JPME has been challenging for the judge advocate community. As discussed in detail in Section III.B.5., *supra*, judge advocates are waived from the Joint Service Officer provisions of the *Goldwater-Nichols Defense Reorganization Act of 1986*.[474] Accordingly, Navy programmers do not recognize JPME as a valid requirement for U.S. Navy judge advocates, making it difficult for the Navy JAG Corps to obtain funding for such training.

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[466] VADM Houck Presentation, *supra* note 4, at 63; *see also* VADM Houck Testimony, *supra* note 107, at 171-73. Civilian institutions attended by Navy JAGs include Harvard University, Columbia University, the University of Pennsylvania, the University of Virginia, Georgetown University, George Washington University, Lewis and Clark College, Vermont Law School, the University of San Diego, and Temple University. VADM Houck Testimony, *supra* note 107, at 171-73; VADM Houck Presentation, *supra* note 4, at 63.

[467] VADM Houck Testimony, *supra* note 107, at 171 (recognizing that Navy-wide rules regarding funded education will make some officers ineligible).

[468] VADM Houck Presentation, *supra* note 4, at 63.

[469] VADM Houck Testimony, *supra* note 107, at 171-72 (testifying that, in the cases of Harvard, Columbia, the University of Pennsylvania, Georgetown, and George Washington, the combined scholarships total approximately the equivalent of tuition for five attorneys).

[470] *See* VADM Houck Testimony, *supra* note 107, at 172-73; *see* VADM Houck Presentation, *supra* note 4, at 63.

[471] VADM Houck Testimony, *supra* note 107, at 172.

[472] VADM Houck Presentation, *supra* note 4, at 63.

[473] VADM Houck Testimony, *supra* note 107, at 159-60.

[474] *Id.* at 158-60; *see also* Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986).

2. Community Health Within the Marine Judge Advocate Community

The Marine Corps seeks to maintain balance between its requirement for all officers to be integrated Marine Air-Ground Task Force (MAGTF) officers, and its requirement to maintain a professional legal community. The Marine Corps believes that these requirements are not mutually exclusive – the more complete a Marine MAGTF officer, the more effective a Marine judge advocate.

a) Recruiting

Within the Marine Corps, judge advocates are recruited using the same system used to recruit all Marine officers; the system is directed, managed, and executed by Marine Corps Recruiting Command (MCRC). The Marine Corps recruits potential officers through the use of Officer Selection Officers (OSO) located in geographical regions throughout the country. OSOs use a mix of advertising and outreach programs to connect with potential officer candidates. There are no judge advocate-specific incentives for recruiting. Rather, they are offered the same incentive as any other potential officer candidate – the opportunity to earn a commission and serve as a regular unrestricted Marine line officer, with all the normal rights, privileges, honors, and responsibilities that such service entails.[475] At a minimum, to be eligible to become a Marine judge advocate, candidates must have a score of at least 150 on the Law School Admission Test (LSAT) examination and meet all the same moral, mental, and physical requirements of all potential officer candidates.[476]

Nonetheless, in 2007 the Marine Corps created the position of Staff Judge Advocate within the MCRC staff, in part to provide the judge advocate community with a greater role in judge advocate accessions programs.[477] Not long after, MCRC formally established a program of mentoring, internship, and clerkship for law students who have completed Officer Candidate

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[475] SJA to CMC *Submission*, *supra* note 38, at 20, 40 n.169, 42 n.173; SES Applegate Testimony, *supra* note 155, at 136-38, 146-47; *see also* MajGen Ary Testimony, *supra* note 242, at 304-06; Col Ewers Testimony, *supra* note 155, at 157-59.

[476] U.S. Marine Corps Recruiting Command Order 1131.1, *Marine Corps Recruiting Command Law Programs*, 2, 4-5 (Jun. 15, 2009) [hereinafter MCRCO 1131.1]; see U.S. Marine Corps Order P1100.73B, *Military Personnel Procurement Manual, Volume 3, Officer Procurement (Short Title: MPPM OFFPROC)*, *passim* (29 Sep. 1989) [hereinafter MCO P1100.73B].

[477] USMC *SAP*, *supra* note 42, annex F, at 10-11.

School (OCS), have received their commissions, and are participating in the Platoon Leaders Course (PLC).[478] This program assists and encourages these accessions to complete law school, pass the bar exam, and ready themselves for The Basic School (TBS).[479] In so doing, the Marine Corps believes it will acquire more qualified officers and judge advocates, increase the likelihood of successful accessions, and ultimately increase the stature and reputation of its judge advocate program.[480]

Annually, the Marine Corps also accesses an average of eight judge advocates through lateral moves.[481] Lateral moves are accomplished through the Funded Law Education Program (FLEP) and the Excess Leave Program (ELP).[482] The programs offer active-duty Marine officers from other Military Occupational Specialties (MOS) an opportunity to attend an ABA-accredited

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[478] *Id.* annex F, at 11; *see also* MCRCO 1131.1, *supra* note 476, at 2. Platoon Leader's Course-Law is one of two general commissioning sources for judge advocates; the other is Officer Candidates Course (OCC) (Law). MCO P1100.73B, *supra* note 476, ¶ 2101.1., at 2-9; MCRCO 1131.1, *supra* note 476, at 2. The Platoon Leaders Course (PLC) (Law) is a program similar to the undergraduate PLC course for non-lawyers, through which the majority of Marine officer candidates are accessed. MCO P1100.73B, *supra* note 476, ¶ 2100., at 2-5 to -9. The PLC (Law) option is for those who are in their last year of undergraduate studies, or in their first or second year of law school. *Id.* ¶ 2100.1.b., at 2-5. Officer candidates in PLC (Law) earn their undergraduate degree, attend Officer Candidate School during the summer, earn their commission, receive a Military Occupational Specialty of 4401 (student judge advocate), then enter into an Inactive Ready Reserve (IRR) status while attending law school. MCRCO 1131.1, *supra* note 476, at 5-7; *see* MCO P1100.73B, *supra* note 476, ¶ 4.c., at 2-7. During the summer in between the first and second, and second and third year of law studies, they return to an active status and complete an internship with an active component Legal Service Support Section (LSSS), Law Center or Staff Judge Advocate (SJA) Office. *See* MCRCO 1131.1, *supra* note 476, at 9. After completion of law school, they must take, and pass, a state bar exam, at which point they return to active duty and attend The Basic School (TBS). MCO P1100.73B, *supra* note 476, ¶ 2100.4.c., at 2-7.

[479] *See* USMC *SAP*, *supra* note 42, annex F, at 11; MCRCO 1131.1, *supra* note 476, at 2.

[480] MCRCO 1131.1, *supra* note 476, at 2.

[481] USMC *SAP*, *supra* note 42, annex F, at 5, 11; Message 261031Z DEC 10, MARADMIN 694/10, *Subj: FY11 Report of the Funded Law Education Program (FLEP), Excess Leave Program (ELP), Special Education Program-Law (SEP LAW), Advance Degree Program-Law (ADP LAW), The Judge Advocate General's Legal Center and School (TJAGLCS) and College Degree Program (CDP) Selection Board Results* [hereinafter MARADMIN 694/10]; Message 250929Z SEP 09, MARADMIN 0579/09, *Subj: FY10 College Degree Program (CDP) and Law Education Programs (LEP) Selection Board Results*; Message 200929Z APR 09, MARADMIN 262/09, *Subj: FY09 College Degree Program (CDP) and Law Education Programs (LEP) Selection Board Results*; Message 140829Z APR 08, MARADMIN 241/08, *Subj: FY08 College Degree Program (CDP) and Law Education Programs (LEP) Selection Board Results;* Message 090729Z APR 07, MARADMIN 247/07, *Subj: FY07 Advance Degree Program (ADP), College Degree Program (CDP), and Law Education Programs (LEP) Selection Board Results*; Message 121330Z APR 06, MARADMIN 167/06, *Subj: FY06 Advance Degree Program (ADP), College Degree Program (CDP), and Law Education Programs (LEP) Selection Board Results*. The specific number of Funded Law Education Program (FLEP)/Excess Leave Program (ELP) participants is determined each year by Manpower and Reserve Affairs, Manpower Plans based on forecasted judge advocate inventory requirements and fiscal constraints.

[482] *See LEGADMINMAN*, *supra* note 46, Ch. 19, at 19-3 to -15 (further explaining FLEP and ELP Law (L)).

law school to obtain a degree of Juris Doctor, take and pass a bar examination, attend NJS, and be certified as a judge advocate.

Historically, new officer accessions and lateral moves provide a sufficient number of judge advocates to meet forecasted annual requirements. However, several factors have driven up forecasted requirements significantly, particularly within the field grade rank of major, which in turn has required the Marines to grow the number of judge advocates in the rank of major.[483] Recognizing that increasing accessions through FLEP and ELP would not generate results for well over four years, the Marines conducted two Return to Active Duty boards, specifically targeting reserve and separated experienced judge advocates, and officers who had obtained a law degree and were admitted to a State bar, in the grade of captain or major.[484] These boards recently concluded, selecting 12 judge advocates for return to active duty in FY 10 and FY 11.[485]

b) Retention

Historically, because the structure and forecasted inventories for judge advocates remained relatively steady from year to year in the Marine Corps, the Marine Corps has not had any significant retention problems within the judge advocate community. Nevertheless, the increase in forecasted judge advocate requirements, along with an anomaly in attrition amongst company grade judge advocates in 2008, led the Marine Corps to take initiatives to ensure that sufficient rates of retention continue among company grade officers.[486] The retention initiatives include continuing 100% career designation opportunity and increasing Law School Education

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[483] MajGen Ary Testimony, *supra* note 242, at 335-37. Incremental growth in force structure over the past 5 years, approved increase of 32 structured billets in FY 15, and an anomaly in the rate of attrition for company grade judge advocates in 2008, have combined to drive up forecasted future inventory requirements. *See id.*

[484] USMC *SAP*, *supra* note 42, annex F, at 5, 11; Message 241031Z MAY 10, MARADMIN 296/10, *Subj: Convening of the FY10 Return to Active Duty (RAD) Board Number 2 Officer Retention Board (ORB) Announcement* Message 051750Z JAN 10, MARADMIN 005/10, *Subj: Change 1 to the Convening Order for the Return to Active Duty (RAD), Interservice Transfer (IST), Officer Retention Board (ORB) Announcement*.

[485] MajGen Ary Testimony, *supra* note 242, at 336; SES Applegate Testimony, *supra* note 155, at 143-44; SES Michael F. Applegate, Director, Manpower Plans and Policies Division, Manpower and Reserve Affairs, Headquarters, Marine Corps, *Actions Taken to Resolve SJA Shortfalls*, 1 (Oct. 13, 2010) [hereinafter SES Applegate Presentation]. In addition, 34 judge advocate billets have been added to the inventory. SES Applegate Testimony, *supra* note 155, at 134-35. The Panel notes that two of the 34 billets are actually 4430 legal administration officer billets.

[486] *See* MajGen Ary Testimony, *supra* note 242, at 335-37. This includes incremental growth in force structure over the past 5 years, approved increase of 32 structured billets in FY 15, and an anomaly in the rate of attrition for company grade judge advocates in 2008, have combined to drive up forecasted future inventory requirements.

Debt Subsidy (LSEDS).[487] The 100% career designation means that any qualified company grade judge advocate applying, and competing, for career designation on an annual board is virtually guaranteed to be selected, whereas all other occupational specialties have recently been limited to an average of 85% career designation.[488] LSEDS is not designed to serve as a recruiting tool. The Marine Corps believes that officer candidates seeking to become Marine judge advocates generally are not considering a career in any other Service JAG Corps. Instead, the LSEDS program is designed to provide financial relief for career judge advocates burdened by law school debt. The program recognizes that judge advocates accessed through PLC and OCC have literally funded their own MOS training in contrast to other communities. LSEDS is being increased from $30,000 to $45,000 beginning in FY 11, which is significant in light of the fact that other popular financial incentives and bonuses for enlisted Marines and pilots are being simultaneously reduced.[489] In his testimony before the Panel, the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) supported raising LSEDS above $30,000 to help off-set rising law school debt, but cautioned against any excessive increase, explaining that "We want to make sure that we're still part of this organization and not viewed as a special corps within the Corps, and that allows us to be an effective voice in the Marine Corps."[490]

c) Professional Education and Training

As discussed in Section I.C., *supra*, the Marine Corps does not have a separate staff corps. Accordingly, Marine judge advocates complete the same initial ten weeks of OCS and six months of leadership education at TBS as all unrestricted line officers in the Marine Corps. After this initial common training, Marine judge advocates attend NJS alongside their sister sea Service peers.

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[487] *Id.* at 335, 337.

[488] *See* SES Applegate Testimony, *supra* note 155, at 132, 153; *see* SES Applegate Presentation, *supra* note 485, at 1.

[489] MajGen Ary Testimony, *supra* note 242, at 337 (advocating for an increase of the then-existing $30,000 Law School Education Debt Subsidy (LSEDS), without specifying the amount of the proposed increase); SES Applegate Testimony, *supra* note 155, at 141-42; SES Applegate Presentation, *supra* note 485, at 1; *see also* MajGen Ary Presentation, *supra* note 380, at 15-16. At the time of the Panel's public hearing on September 1, 2010, the Marine Corps was in the process of raising the LSEDS to $45,000.00, and accordingly released a message announcing the raise on September 16, 2010. MARADMIN 515/10, *supra* note 462.

[490] MajGen Ary Testimony, *supra* note 242, at 337-38.

Marine judge advocates receive further in-Service education and training, including the general Professional Military Education (PME) that is required for all Marine officers to become competent MAGTF officers, and specialized legal training. PME requirements include completion of a resident or non-resident Career Level School (CLS) for captains, Intermediate Level School (ILS) for majors, and Top Level School (TLS) for lieutenant colonels.[491] Generally, completion of ILS meets the requirement for Joint Professional Military Education (JPME) I, and completion of TLS meets the requirement of JPME II.[492] Consequently, Marine judge advocates complete JPME I and II as a matter of course, contrary to their Navy counterparts.

The Marine Corps supports specialized legal training in the form of post-graduate education. Specifically, active-duty Marine judge advocates may attend an ABA-accredited civilian law school full-time to obtain a Masters of Law (LL.M.) degree in a practice area for which the Marine Corps has identified a requirement for specialized knowledge, education, and training. Although they vary from year to year, the authorized LL.M. practice areas generally include international law, criminal law, environmental law, and labor law. This year, for the first time, judge advocates may also earn an LL.M. in cyber law.[493] The Marine Corps also allows active-duty judge advocates to attend the graduate course at The Judge Advocate General's Legal Center and School (TJAGLCS) full-time to obtain an LL.M. As discussed in Section III.G.5., *infra*, by identifying structured billets requiring judge advocates with specialized legal education, the Marine Corps is institutionalizing an increased demand signal for post-graduate education. By way of illustration, the annual quota for TJAGLCS had historically been 10 Marine judge advocates; however, the Marine Corps is negotiating with the Army to increase the

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[491] *See* U.S. Marine Corps Order 1553.4B, *Professional Military Education (PME)*, enclosure (1), at 1-1 to -4, 1-8, 1-11 (25 Jan. 2008) [hereinafter MCO 1553.4B]. CLS is typically completed through residence at Expeditionary Warfare School in Quantico, Virginia, or by correspondence; ILS is typically completed through residence at USMC Command & Staff College in Quantico, Virginia or other equivalent service schools (e.g., Army CSC), or by correspondence; and TLS is typically completed through residence at Marine War College or other equivalent Service schools (e.g., Naval War College), or through correspondence. *See id.*

[492] *Id.* at 1-1.

[493] Message 291029Z JUL 10, MARADMIN 423/10, *Subj: FY11 Funded Law Education Program (FLEP), Excess Leave Program (ELP), Special Education Program-Law (SEP LAW), Advance Degree Program-Law (ADP LAW), The Judge Advocate General's Legal Center and School (TJAGLCS) and College Degree Program (CDP) Selection Board* [hereinafter MARADMIN 423/10].

quota to 15 for FY 11 and beyond.[494] A sufficient number of alternates were selected on the last board should the quota increase be approved.[495] Similarly, the number of Marine judge advocates allowed to attend a civilian law school has increased from a historic range of two to five per year to seven in FY 11.[496] The Panel notes that even before these recent efforts, the Marine Corps had made significant progress in providing their judge advocates an opportunity to obtain an advanced degree. Currently, out of the active-duty population, 76% of colonels, 70% of lieutenant colonels, and 38% of majors have either attended the TJAGLCS career course or obtained an LL.M. from a civilian institution.[497]

3. Maintaining Community Health

The Panel concurs with the Navy JAG and the SJA to CMC's testimony about the importance of Judge Advocate Continuation Pay (JACP) and the Law School Education Debt Subsidy (LSEDS), and notes that judge advocates in the Navy and Marine Corps receive significantly lower amounts than their counterparts in the Army and the Air Force. While financial considerations may not be the impetus to join the Navy or Marine Corps, a later decision to remain on active duty may well include a financial analysis. Some judge advocates may desire to continue to serve, but may simply be unable to do so financially as a combination of law school debt and other financial commitments often incurred subsequent to joining the military, such as a mortgage and family expenses, become a reality. The Panel further recognizes that there exists an imbalance between officer communities in which initial education is provided at the expense of the government, for example aviation, and the judge advocate community, in which law school is usually paid for as a personal expense. The Panel believes that maintaining, and potentially increasing, JACP and LSEDS is directly related to maintaining the quality of judge advocates in the Department of the Navy.

The Panel applauds the Navy's commitment to recruiting, and concurs with the importance of the investment, even given the cost of valuable attorney time. The Panel likewise applauds the Marine Corps' recruiting and retention efforts, and recognizes the balance that must

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[494] *See id.*
[495] MARADMIN 694/10, *supra* note 481.
[496] MARADMIN 423/10, *supra* note 493.
[497] Col John R. Ewers, USMC, Deputy Staff Judge Advocate to the Commandant of the Marine Corps, *Marine Judge Advocate Career Progression*, 7 (13 Oct. 2010) [hereinafter Col Ewers Presentation].

be maintained between their cultural and operational requirement for well-rounded MAGTF officers on the one hand, and their commitment to accessing, retaining, and developing quality legal professionals on the other.

The Panel underscores the importance of post-graduate education for judge advocates in both the Navy and the Marine Corps. In a world where the ability to train and conduct military operations is increasingly subject to nuanced policy and legal issues, judge advocates with focused subject matter expertise increasingly contribute to mission capability. Finally, the Panel again expresses concern over the issue of JPME for U.S. Navy judge advocates. The Panel concurs with the JAG's testimony regarding the importance of JPME. In the view of the Panel, the Navy needs to develop and fund a requirement for its judge advocates to receive JPME.

G. Review of Other Manpower Studies

In its direction to the Panel, Congress invited the Panel to review, and incorporate as appropriate, the findings of applicable ongoing and completed studies in future manpower requirements, including the two-part study by Center for Naval Analyses (CNA) titled *An Analysis of Navy JAG Corps Future Manpower Requirements* (*CNA Study*).[498] The Panel found it appropriate to consider the *CNA Study*, and a series of additional studies conducted, or initiated by the Marine Corps.

1. CNA: An Analysis of Navy JAG Corps Future Manpower Requirements

The Panel considered the *CNA Study* analysis, and heard the testimony of the JAG, Dr. Donald A. Birchler, the research leader for the analysis, and Dr. Neil B. Carey, the project manager for all phases of the analysis.

A determination by Navy JAG Corps leadership that it was important to obtain an independent assessment of the Navy's current and future legal requirements and their impact on

[498] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(b)(3), 123 Stat. 2190 (2009); *see also* CNA Manpower Study, Part 1, *supra* note 334; CNA Manpower Study, Part 2, *supra* note 164.

manpower led to the request for the *CNA Study*.[499] The *CNA Study* was designed to be a comprehensive assessment of the Navy JAG Corps community across all budget submitting offices (BSOs).[500] Incorporating the officer, enlisted, and civilian populations, the *CNA Study* assessed the JAG Corps community as a whole, across all commands and functional areas. The expectation from the then-JAG was that the *CNA Study* would produce an algorithm that could be used in the manning process.[501] The study commenced in September 2006,[502] and work was completed in the fall of 2007.[503] The majority of the data relied upon by CNA was collected between May and June of 2007.[504] The first and second parts of the report were published in February and April of 2008, respectively.[505] The study was for the purposes of, and limited to, the U.S. Navy JAG Corps.[506]

a) Description and Methodology of the Study

CNA sought to accomplish three tasks through the study: first, to identify the priorities in, and current levels of, legal service provided by the JAG Corps; second, to facilitate the appropriate force structure; and third, to develop a range of options for the JAG Corps in its provision of legal services.[507]

There are significant similarities between the process prescribed by the Navy at large in manpower calculations, and the methods used by CNA for the Navy JAG Corps study. The Navy's Total Force Manpower Process was described in detail in Section II, *supra*. In summary,

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[499] Letter from VADM James W. Houck, JAGC, USN, Judge Advocate General of the Navy, to Mr. Daniel J. Dell'Orto, Chairman, Independent Review Panel (Ser 00/0105) (Sep. 29, 2010) [hereinafter VADM Houck Letter (Ser 00/0105)].
[500] *See* VADM Houck Testimony, *supra* note 107, at 196.
[501] *Id.* at 201.
[502] Dr. Neil B. Carey, Research Analyst, Center for Naval Analyses, Transcript of October 6, 2010 Hearing, at 39 [hereinafter Dr. Carey Testimony]; Neil Carey and Don Birchler, Center for Naval Analyses, *U.S. Navy JAG Corps Assessment*, 3 (6 Oct. 2010) [hereinafter CNA Presentation]; *see also* VADM Houck Testimony, *supra* note 107, at 195.
[503] Dr. Donald A. Birchler, Research Analyst, Center for Naval Analyses, Transcript of October 6, 2010 Hearing, at 70 [hereinafter Dr. Birchler Testimony].
[504] Dr. Carey Testimony, *supra* note 502, at 39 (also testifying that CNA collected the online work diary data in May and June 2007). The online work diary is discussed further in notes 508, 514, 515, and 537 *infra*.
[505] Dr. Carey Testimony, *supra* note 502, at 39-40; CNA Presentation, *supra* note 502, at 3. In addition, in May 2008, CNA published a separate, but related, report discussing three levels of service options which are discussed *infra* in Section III.G.1.(b). Dr. Carey Testimony, *supra* note 502, at 40; CNA Presentation, *supra* note 502, at 3.
[506] *See* VADM Houck Testimony, *supra* note 107, at 413.
[507] CNA Presentation, *supra* note 502, at 2.

the process within the Navy for calculating manpower begins with a Budget Submitting Office (BSO) identifying the Missions, Tasks, and Functions (MTFs) required to be performed, and then measuring the workload required[508] to meet the tasks at an acceptable level.[509] Using the applicable Navy standard workweek,[510] the BSO then determines the minimum quantity of active-duty personnel required.

The *CNA Study* used substantially similar methodology, but particularized the process to the JAG Corps. In the Navy BSO-driven system, a community such as the JAG Corps, that is not a BSO, is not holistically analyzed.[511] Using a list of practice areas developed with the assistance of the JAG,[512] CNA was able to develop a rough equivalent to MTFs – in this case a detailed list of practice areas, and for each practice area, a series of task functions.[513] Workload was measured through online work diaries.[514] In order to enhance the quality of the work diary methodology, CNA pretested the work diary with a working group, trained JAGs and other personnel on how to input the data, reported back to respondents to enable them to correct responses that were unclear, and ensured that the internet connectivity on aircraft carriers was

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[508] OPNAVINST 1000.16K gives Billet Submitting Offices (BSOs) considerable flexibility in measuring workload. *See* OPNAVINST 1000.16K, *supra* note 47, appendix C to enclosure (1). The work diary method used by the Center for Naval Analyses (CNA) study had already been used by other Navy commands such as U.S. Fleet Forces Command and the Navy Manpower and Analysis Center. Dr. Carey Testimony, *supra* note 502, at 41-42.

[509] *See supra* Section II.B.

[510] Workweeks vary depending on whether it is for purposes of shipboard manning during war (81 hours); ashore and shipboard manning where dependents are authorized (40 hours), or dependents are not authorized (57 hours); or ashore manning during mobilization (60 hours). *See supra* Section II.B., and discussion in note 79.

[511] *See supra* Section II.B., and discussion in notes 87 and 88, discussing the 11 Navy BSOs that fund judge advocate billets.

[512] CNA Manpower Study, Part 1, *supra* note 334, at 3; Dr. Carey Testimony, *supra* note 502, at 38.

[513] CNA Manpower Study, Part 1, *supra* note 334, at 34-35. Developing a list of practice areas and task functions was critical to establishing a framework for the study. Based on that framework, workload could be categorized, and categories compared to each other to determine where there should be increases or decreases in personnel. *Id.* at 40, 41 tbl.3-2.

[514] The Center for Naval Analyses (CNA) determined the work diary method was best suited to the JAG Corps. CNA Presentation, *supra* note 502, at 4. It consisted of judge advocates self reporting their work hours in 30 minute blocks in an online diary. CNA Manpower Study, Part 1, *supra* note 334, at 31-32; CNA Presentation, *supra* note 502, at 4. In addition to the work diary, CNA used a workforce assessment survey, which was embedded within the work diary, and through a separate survey attempted to include the contributions of personnel on limited duty. CNA Manpower Study, Part 1, *supra* note 334, at 36. We have not considered the contributions of those on limited duty (who are enlisted personnel temporarily assigned to commands within Naval Legal Service Command (NLSC)) as they do not relate directly to the judge advocate community. As the workforce assessment is embedded in the work diary, we discuss only the work diary. As discussed, the work diary has been considered an acceptable method of data collection for Budget Submitting Offices (BSOs). Dr. Carey Testimony, *supra* note 502, at 41-42.

sufficient to permit the participation of afloat personnel.[515] There was a high level of participation in the work diaries,[516] and a sensitivity analysis to adjust for assumptions made by CNA.[517] To obtain and cross reference additional sources of data to the work diaries, CNA interviewed over 25 Navy flag officers on their level of satisfaction with the Navy JAG Corps, and visited offices within the JAG Corps to conduct interviews.[518] CNA itself had confidence in the results of the study.[519] CNA's premise was that work hours were an "accurate indirect measure of workload."[520] CNA's findings were based on the number of hours worked each week from data obtained from work diaries. These hours established a weekly baseline for judge advocates in individual commands and for the community as a whole. CNA then compared this weekly baseline to one of three different options: a 40-hour workweek, a 45-hour workweek, and a 50-hour workweek. The comparison enabled CNA to determine how many hours over or under the target option judge advocates were working. This in turn allowed CNA to determine the number of judge advocates that would be needed to reach the targeted hours per workweek.[521]

b) Results of the *CNA Study*

CNA's most striking conclusions, other than those related to military justice, discussed below, were in the practice areas categorized as environmental law, international law, joint matters, and the law of war. In each of these practice areas, CNA predicted a 5.9% annual

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[515] Dr. Carey Testimony, *supra* note 502, at 44-45, 50-51 (also noting that when judge advocates were unable to receive links on the ship, CNA emailed them paper and pencil versions of the online work diary and accepted their responses via email in order to ensure data validity).

[516] In the CNA Manpower Study, participation rates were discussed separately for each command. *See generally* CNA Manpower Study, Part 1, *supra* note 334. In his testimony, a CNA analyst aggregated response rates for officers at RLSOs, NLSOs and OJAG at 87%. Dr. Carey Testimony, *supra* note 502, at 45.

[517] *See, e.g.*, CNA Manpower Study, Part 1, *supra* note 334, appendices A & B, at 417-32. Assumptions made included the number of hours that should be used each week, and the number of people who should have responded. *Id.* appendices A & B, at 417, 425. To control for the first assumption, CNA presented the findings with multiple options. *Id.* CNA devised a formula to account for the second assumption. *Id.* appendices A & B, at 420, 428. Using the responses of those who did complete the work diary, CNA was able to project the responses of those who should have completed the work diary. *Id.* appendices A & B, at 420-24, 428-32.

[518] CNA Manpower Study, Part 1, *supra* note 334, at 31 to 32. CNA believed the interviews of flag officers were important because they "illuminated what the future might be like for the JAG Corps" and provided insight into how senior officers perceived the community. *Id.* at 32. The interviews of judge advocates permitted CNA to resolve early design issues in the study and obtain the perspectives of judge advocates in the fleet. *Id.*

[519] Dr. Carey Testimony, *supra* note 502, at 64.

[520] VADM Houck Letter (Ser 00/0105), *supra* note 499.

[521] Center for Naval Analyses, *CNA – JAG Corps Functional Assessment*, 15 (undated) [hereinafter CNA Report Presentation].

growth rate.[522] One of the CNA research analysts stated that this projection likely underestimated the real growth rate, but explained that it was based on the best-available data.[523]

CNA's most comprehensive data collection and analysis was in the practice area of military justice.[524] CNA obtained data on courts-martial from 1990 to 2006, separated by general courts-martial (GCM) and special courts-martial (SPCM).[525] Focusing on the data from GCMs, but not the SPCMs,[526] CNA concluded that the number of courts-martial were mostly flat for the period between 2003 and 2006.[527] This was based on data from a three-year trend constituting the best evidence available to CNA. When the CNA analysts wrote their report in the fall of 2007, they concluded that the number of courts-martial was likely to remain steady.[528] CNA based its military justice recommendations on this conclusion; however, data now available shows that both GCMs and SPCMs declined significantly between the years 2006 and 2009.[529]

In arriving at its findings and recommendations regarding JAG Corps manning requirements, CNA relied on the number of judge advocates on active duty when it drafted its report in the latter part of 2007.[530] CNA did not consider the possibility of additional practice

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[522] Dr. Birchler Testimony, *supra* note 503, at 74; Dr. Carey Testimony, *supra* note 502, at 80; CNA Presentation, *supra* note 502, at 28-29.

[523] Dr. Carey Testimony, *supra* note 502, at 87. In their report, the Center for Naval Analyses (CNA) research analysts based the 5.9% increase on the annual rise in joint billets, their assessments of flag interviews, and discussions with JAG personnel. CNA Manpower Study, Part 1, *supra* note 334, at 46-47. Accordingly, CNA assumed an "increase in the near future exponentially at 5.9 percent annually (this is equivalent to saying that the workload will double in 12 years)." *Id.* at 47. However, CNA viewed the assumption as an underestimate of true growth, and noted that it did not include new initiatives, such as AFRICOM. *Id.* CNA did not base its assessment of a 5.9% increase on the work diaries. Dr. Birchler Testimony, *supra* note 503, at 88.

[524] Dr. Carey Testimony, *supra* note 502, at 71-72 (stating that military justice was the single largest workload area for Navy JAGs, and that it had the best available data).

[525] CNA Manpower Study, Part 1, *supra* note 334, at 50-51; Dr. Carey Testimony, *supra* note 502, at 69; *see also* CNA Presentation, *supra* note 502, at 17.

[526] Dr. Carey Testimony, *supra* note 502, at 69. At the time the CNA research analysts were writing their report, they had in their possession data showing that special courts-martial had been declining significantly prior to 2006. *See* VADM Houck Presentation, *supra* note 4, at 33.

[527] Dr. Carey Testimony, *supra* note 502, at 62, 83; *see also* Dr. Birchler Testimony, *supra* note 503, at 70.

[528] Dr. Birchler Testimony, *supra* note 503, at 70. One of the CNA research analysts testified that the reason for assuming the courts-martial level was going to remain steady was that they did not want to go beyond the realm of available data. Dr. Carey Testimony, *supra* note 502, at 69.

[529] VADM Houck Presentation, *supra* note 4, at 33.

[530] Neil Carey et al., Center for Naval Analyses, *Levels of Service Options for the JAG Corps: Personnel-Mission Tradeoffs*, 7 (May 2008) [hereinafter CNA *Levels of Service Options*] (citing the number of U.S. Navy judge advocates as 750 at the time the CNA report was drafted). The number of U.S. Navy judge advocates has increased to the current number of 811 judge advocates.

areas in its calculations.[531] CNA also provided two levels of calculations based on the military justice caseload observed between 2003 and 2006 (discussed by CNA as "pre-2003" and "post-2003").[532] In one calculation, referred to as the "low scenario," CNA assumed that the military justice caseload would remain at 2003 to 2006 levels.[533] In the other calculation, referred to as the "high scenario," CNA assumed that the post-2003 caseload level reflected a temporary reduction that would swing back upwards to its "pre-2003" level.[534]

When factoring in the "high" and "low" workload assumptions and the different workweek assumptions, CNA provided six different options which are graphically represented in Table 12, below.[535]

	Option 1	**Option 2**	**Option 3**	**Option 4**	**Option 5**	**Option 6**
Workweek assumption	40-hr.	45-hr.	50-hr.	40-hr.	45-hr.	50-hr.
Workload assumption	High (pre-2003)	High (pre-2003)	High (pre-2003)	Low (post-2003)	Low (post-2003)	Low (post-2003)
Officer increase	332	242	160	191	119	50

Table 12. CNA Options

CNA recommended that the Navy JAG Corps base its actions on the 40-hour workweek as it was consistent with Navy instructions, it gave the Navy some flexibility in the event of

[531] *See* CNA Manpower Study, Part 2, *supra* note 164, at 137; *see* CNA *Levels of Service Options*, *supra* note 530, at 10. At the time of the publication of the Center for Naval Analyses (CNA) report, two areas for which the Navy currently provides legal support, the Disability Evaluation System (DES) and the Office of Military Commissions (OMC), did not have defined legal requirements and thus did not have personnel assigned. *See* CNA Report Presentation, *supra* note 521, at 12. Including the personnel currently assigned would increase CNA's projected number of required U.S. Navy judge advocates by ten reserve judge advocates and two active-duty judge advocates for DES, and by 28 judge advocates for the OMC mission. *See* discussion *supra* Sections III.C and III.D.
[532] *See* Dr. Carey Testimony, *supra* note 502, at 62, 69 (stating that, although special courts-martial (SPCMs) continued to decline between 2003 and 2006, CNA only considered general courts-martial (GCMs), which were considerably more stable during that period). Both GCMs and SPCMs declined after 2006. VADM Houck Presentation, *supra* note 4, at 33.
[533] CNA Manpower Study, Part 1, *supra* note 334, at 77.
[534] *Id.* CNA did not consider a third scenario in which courts-martial caseloads would continue to decline. Dr. Carey Testimony, *supra* note 502, at 69.
[535] CNA Report Presentation, *supra* note 521, at 15.

unanticipated requirements, and it provided a work-life balance that makes service appealing for a group with more lucrative alternatives.[536]

Table 13, below,[537] reflects CNA's finding regarding U.S. Navy judge advocate manpower requirements by command type using the 50-hour workweek and the "low" scenario.[538]

Command	Weekly work hrs	Currently on board	Difference	% Change
NLSO	50.7	169	4	2.4%
RLSO	50.3	160	1	0.6%
OJAG	47.5	104	0	0
NJS	55.5	27	5	18.5%
SJA: Non-operational	47.1	94	16	17%
SJA: Joint command	49.9	18	6	33.3%
SJA: Operational	60.3	40	13	32.5%
SJA: Afloat command	53.1	34	9	26.5%

Table 13. U.S. Navy Judge Advocate Manpower Requirements by Command Type Based on 50-Hour Workweek and CNA's "Low" Scenario

It is important to note that Tables 12 and 13, above, incorporate CNA's analysis for *future* manpower requirements over three years, ending in Fiscal Year 2010,[539] and not *current*

[536] *Id.* at 16 (citing OPNAVINST 1000.16K, *supra* note 47).

[537] *See* CNA Manpower Study, Part 1, *supra* note 334, at 4-5 tbls.1 & 2; *see* CNA Manpower Study, Part 2, *supra* note 164, at 3-4 tbls.E-1, E-2, & E-3. These tables reflect hours that were adjusted to account for personnel who were on leave, sick, or in some other situation that prevented them from doing work related to the command. CNA Manpower Study, Part 2, *supra* note 164, at 44. Thus, the averages were adjusted up. *Id.* This was done by examining the average days worked as measured by the number of days in which a respondent entered at least some time in the online work diary. *Id.* The raw average workweek was then adjusted to reflect a typical five-day workweek. *Id.*

[538] CNA relied on the 50-hour workweek analysis for the most prominent calculations in the manpower study, and also computed manpower requirements for 40- and 45-hour workweeks. CNA Manpower Study, Part 1, *supra* note 334, at 56. The Panel, in creating this table, considered only the "low" options that were based on the "post-2003" caseload levels of military justice because, as discussed in Section III.E., *supra*, today's caseload is even lower than the "low" scenario. Therefore, between the two alternatives in the original tables – the "high" scenario and the "low" scenario - the latter is closer to our situation today.

[539] Dr. Birchler Testimony, *supra* note 503, at 73-74.

requirements.[540] An example is the case of SJAs at Joint Commands in billets projected to increase at a rate of 5.9% annually. Even though these SJAs were working an average of 49.9 hours per week when the data was collected in 2007, when the projected annual increase is included, future requirements increase the total number of judge advocates in this category by six, or 33%.[541]

c) Panel Assessment of the Center for Naval Analyses Study

The Panel notes that, using the Center for Naval Analyses' (CNA's) data on the "low" scenario, even at the most stressful workload level considered by CNA, the 50-hour workweek, there were no sub-communities that required a decrease in manning, and five that would require a significant increase in manning at the following percentages: NJS by 18.5%, SJAs for non-operational commands by 17%, SJAs for Joint commands by 33.3%, SJAs for operational commands by 32.5%, and SJAs for afloat commands by 26.5%.

The Panel believes that CNA's report accurately characterized the "status quo" at the time of its research as "barely able to deal with the current workload,"[542] as well as the risks of meeting only minimum requirements, which were described as the lack of a surge capacity and an inability to meet any new requirements.[543]

The Panel shares the JAG's assessment of the strengths and weaknesses of the *CNA Study*.[544] It was a valuable and good faith effort at quantifying workload.[545] Using self-reporting work diaries, in light of CNA's efforts to enhance reliability, was acceptable and in consonance with Navy manpower calculation methods. The recording of senior officers' views on legal support requirements was of particular interest and value. However, the data in the study is now over three years old, the prediction that the military justice caseload would stay constant or

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[540] *See* CNA Manpower Study, Part 2, *supra* note 164, 26-27 (table 2-2 provides a more complete description of what Center for Naval Analyses (CNA) refers to as "Product area, driver, and associated rule for future workload assumption.").
[541] *See id.* at 4 tbl.E-3.
[542] CNA Report Presentation, *supra* note 521, at 13. CNA found that legal services were stretched to the limit, with a compromised ability to thoroughly analyze complex legal issues. *Id.* CNA noted that workloads in the areas of operational and environmental law were increasing rapidly, and predicted that additional billets would be needed to support this increase. *Id.*
[543] CNA *Levels of Service Options*, *supra* note 530, at 12.
[544] *See* VADM Houck Testimony, *supra* note 107, at 208-09.
[545] *Id.* at 210-11.

increase has not proven to be accurate, and CNA was not asked to consider more nuanced approaches such as using civilian attorneys vice U.S. Navy judge advocates to meet some increasing workloads.[546] Consequently, while informed by the *CNA Study*, the Panel looks to the JAG's manpower estimate as more current and nuanced.[547]

2. Staff Judge Advocate to the Commandant of the Marine Corps, *2005 Strategic Planning Panel*

In December 2005, the SJA to CMC convened a panel of senior officers from the Marine legal community, which included SJAs, Officers-in-Charge (OICs), military judges, and others with extensive experience across the spectrum of legal practice areas.[548] Their charter was to make recommendations for changes to Marine legal services organization, training, and equipment in order to increase support to operational commanders and meet evolving, future legal requirements. In conducting its analysis, the *2005 Strategic Planning Panel (SPP)* observed that:

> Demands on our community have risen, and there are increased numbers of [judge advocate] assignments to joint billets, command, schools, and as MEU SJAs. The number of COCOMs, components and JTFs requiring [judge advocates] has also risen. At the same time, however, the structure of the 4402 community has remained the same.[549]

The *SPP* made recommendations on a host of organizational and training issues, including updating legal doctrine, providing further expertise in particular practice areas for particular billets, creating a Trial Counsel Assistance Program, and continuing to re-organize the reserve legal community to seamlessly integrate with the active component. With respect to numerical requirements, the *SPP* reviewed the entire 44XX occupational field structure, studied historical organizational work-loads and the ratio of judge advocates to respective geographic active-duty populations, and considered future operational demands.[550] The *SPP* found that the current 4402 structure was outdated, as it had judge advocates in supporting establishment billets which were no longer required to fulfill the legal mission, and it did not reflect the growing

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[546] *Id.* at 210.
[547] *See* VADM Houck Letter (Ser 00/0105), *supra* note 499.
[548] U.S. Marine Corps, *2005 Strategic Planning Panel*, 1 (13-15 Dec. 2005) [hereinafter *2005 SPP*]; SJA to CMC *Submission*, *supra* note 38, at 10.
[549] *2005 SPP*, *supra* note 548, at 1.
[550] *Id.* at 1, appendices A, C.

demand for judge advocate support in Marine Corps operating forces and on the staffs of component and combatant commands. Accordingly, the *SPP* recommended the re-alignment of 18 structured 4402 billets from the supporting establishment to the operating forces.

The *SPP* also recommended re-coding non-4402 billets to reflect actual legal requirements within Marine commands. Historically, within some commands, the Marine Corps has assigned judge advocates to fill billets listed on the Table of Organizations (T/O) that were coded for a PMOS other than 4402, and then detailed the assigned judge advocate to fill unstructured legal requirements within the command. A typical example involves the Marine Expeditionary Unit (MEU) SJA. For over two decades, the Marine Corps has been providing seven judge advocates to serve as command legal advisors to the commanders of the seven MEUs. However, there was no structured billet coded for a Primary MOS (PMOS) of 4402 on the MEU T/O. Therefore, these judge advocates are assigned to a billet coded for some other PMOS (e.g., 0530 "Civil Affairs Officer"). The result is an overall 4402 structure that reflects something less than what is actually required.

The Panel notes that the SJA to CMC convened the *SPP* proactively, and that it understandably focused on legacy defects in the Marine Corps' 4402 structure, rather than the emerging requirement for judge advocates to augment Marine Air-Ground Task Forces in Iraq and Afghanistan, or the Corps' decision 14 months later to grow to 202,000.[551]

3. 2006 Center for Naval Analyses Marine Corps Officer Manpower System Study

In 2006, the Center for Naval Analyses (CNA) conducted a study on behalf of Manpower and Reserve Affairs (Manpower and Personnel), of the Marine Corps officer manpower system to determine the degree to which officer inventories matched requirements.[552] CNA studied both the extent to which inventories met the requirements established in the Grade Adjusted Recapitulation (GAR), as well as the extent to which inventory allowed for staffing all A-billets (structured billets funded on the Authorized Strength Report (ASR)) and proportionate share of

[551] *See generally* Message 062050Z FEB 07, ALMAR 008/07, *Subj: Marine Corps End Strength Increase* [hereinafter ALMAR 008/07] (announcing that the Marine Corps would grow from the then-current end-strength of 175,000 to 202,000 Marines, over the course of 5 years).
[552] Cathleen M. McHugh et al., Center for Naval Analyses, *Analyses of the Marine Corps Officer Manpower System: Final Report* (May 2006).

free B-Billets.[553] The study included all 43 officer Military Occupational Specialties (MOSs), and covered 16 fiscal years, from 1992 through 2005.[554] Although not limited specifically to the 4402 MOS, it did specifically examine and report on the 4402 MOS in every aspect of the study. CNA found that: (1) although the 4402 Primary MOS's (PMOS's) inventories were generally short of the GAR requirement, their relative average shortfall was not "critically short;" (2) the 4402 PMOS inventories, on average, staffed approximately 95% of the required A-Billets, which was above the relative average; and (3) conversely, the 4402 PMOS had a below-average proportion of officers assigned to B-Billets.[555]

4. Judge Advocate Division 2007 Structure Review

In early 2007, the SJA to CMC undertook another review of the 4402 judge advocate structure. This study focused on the current need for judge advocate support, and did not factor in the then-recently announced plan to grow the Marine Corps to 202,000 by 2011.[556] This study considered the input of SJAs and OICs, vetted by their commanders, and conducted a line-by-line review and validation of every billet in the 4402 (judge advocate) structure. The study recommended 22 compensated (realigning 4402 structure), and 36 uncompensated (creating new 4402 structure) changes to the force structure.[557] Although titled "uncompensated" changes, 10 of the 36 requested were actually requests to re-code existing non-4402 structure that was historically filled by 4402s (i.e., seven MEU SJAs and three Deputy Marine Expeditionary Force (MEF) SJAs). The remaining 26 were primarily to increase the number of judge advocates in the MEF command elements, the Legal Service Support Sections (LSSSs), larger Law Centers, and the staffs of the Service component and combatant commands. The Panel notes that both the 2007 study and the *2005 Strategic Planning Panel (SPP)* recommended a realignment and/or increase of legacy 4402 structure to reflect an increase in demand for legal support to Marine Corps operating forces and Joint commands, not tied to the Corps' planned increase in end-strength.

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[553] *Id.* at 1-2.
[554] *See id.*
[555] *Id.* at 1, 34, 51, 53, 73.
[556] Letter from Staff Judge Advocate to the Commandant of the Marine Corps, *Subj: Judge Advocate Division Review of the Structure for Delivery of Legal Services in the Marine Corps*, 2 (30 Jul. 2007) [hereinafter SJA to CMC Letter of 30 Jul. 2007]; *see also* ALMAR 008/07, *supra* note 551.
[557] SJA to CMC Letter of 30 Jul. 2007, *supra* note 556, enclosure (1).

In light of Congress's stated concern in mandating this Panel, it is worth noting here that the Marine Corps' plan to "grow the force" to 202,000 was to build infantry battalions and to reduce strain on MOSs that were experiencing a 1:1 deployment-to-dwell ratio or less.[558] The judge advocate MOS community did not fall into this latter category; in fact, quite the opposite.[559] With respect to the former, growing infantry battalions translates into growing the MOSs that are a structured requirement on a battalion T/O, as well as those forces required to recruit and train an additional 5,000 Marines a year. Neither of these necessarily requires judge advocates.[560]

5. Marine Corps Growth, Re-alignment, and Re-coding of Judge Advocate Structure

Consistent with the 2005 and 2007 studies discussed in Sections III.G.2. and III.G.4., *supra*, the Marine Corps took various actions to grow, re-align, and re-code judge advocate structure to better meet mission requirements.

a) Re-coding Previously Structured 4402 Billets

The Marine legal community, while maintaining the preference for generalists, recognized that the growing volume and complexity of legal issues facing the Marine Corps required judge advocates with additional expertise in specific practice areas. In May 2006, consistent with the recommendations of the 2005 *SPP*, the Marine Corps effected a change to the

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[558] *See* U.S. Senate, Committee on Armed Servs., *National Defense Authorization Act 2010 to Accompany S.1390* (S. Rpt. 111-35, § 541), Washington: Government Printing Office, 2009 (stating "The committee has questioned the Marine Corps' decision not to create additional judge advocate billets or increase judge advocate manning as part of its overall growth in active-duty end strength of 27,000 since 2007.").

[559] E-mail from Captain John Russell, USMC, Judge Advocate Support, to Gunnery Sergeant Kenneth Emery, USMC (Aug. 23, 2010 EST 14:08) (with attachment "Deployment_by_MOSes.XLS").

[560] This stands in contrast to the U.S. Army's simultaneous end-strength growth, which was accompanied by a significant growth in judge advocate requirements. The U.S. Army's planned growth in end-strength of 65,000, from 2007 to 2013, must be understood in the context of the Army's recent force modernization. Beginning in 2003, the Army transformed from a Division-centric force to a Brigade-centric force. This modernization, or transformation, required the U.S. Army to increase the number of its Brigade Combat Teams (BCTs) from 33 to 42. Further, it required the Army to increase the capability of its BCT headquarters, including adding a Brigade judge advocate in the grade of O-4 (major) and a Brigade Trial Counsel in the grade of O-3 (captain) to its BCT Table of Organization (T/O). As a result, when the Army planned its end-strength increase, like the Marine Corps, the Army focused on growing its combat maneuver units, specifically Brigade Combat Teams, from 42 BCTs to 48 BCTs. Further, since the Army's T/O for its BCTs includes two judge advocates, the planned end-strength increase necessarily included judge advocates. From 2003 to 2010, the active-duty judge advocate inventory in the U.S. Army increased from 1501 to 1823. Of that, 60% were captains, and 30% were majors.

MOS Manual to add six "Necessary MOSs" (NMOS) for judge advocates.[561] The re-coding of certain billets within the 4402 structure to require one of these six NMOSs, created the requirement that these billets be filled with judge advocates possessing the advanced education, experience, and training required to obtain these additional MOSs. In addition, the re-coding created the requirement to fund these billets at 100% manning during the development of the Authorized Strength Report (ASR). By June 2010, 32 structured 4402 and 4410 billets had been re-coded to various NMOSs.[562] In June 2010, another 22 structured 4402 billets were re-coded, all of them to the 4409 – Master of Criminal Law.[563]

b) Judge Advocate Division 2007 Structure Change Request

On July 30, 2007, the SJA to CMC submitted a request to the Commandant for changes to the 4402 structure, consistent with the recommendations of the 2007 Structure Review (i.e., 26 new billets, 10 re-coding, and 22 re-aligned). The request was routed through Counsel for the Commandant, Total Force Structure Division (TFSD), Marine Forces Command, and, eventually, in February 2008, the request was diverted into the then-recently announced Uncompensated Review Board (URB).

c) Judge Advocate Division 2008 Uncompensated Structure Request

In April 2008, the Judge Advocate Division (JAD) submitted a new request to the then-upcoming 2008 URB. This request included, as justification, not only the legacy deficiencies identified in the 2005 and 2007 studies, but also new requirements based on the growth of the Marine Corps to 202,000.[564] This request reflected an analysis of how the planned active-duty population growth would affect the demand for military justice, legal assistance, and installation law services. Accordingly, this request included 34 new 4402 structured billets (8 more than the

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[561] The six new Necessary MOSs (NMOSs) include: 4405 – Master of International Law, 4406 – Master of Environmental Law, 4407 – Master of Labor Law, 4408 – Master of Procurement Law, 4409 – Master of Criminal Law, and 4410 – Master of Law (General). Designation of the 4402 NMOSs requires advanced degrees and experience. *See* MCO 1200.17B, *supra* note 116, ¶ 1127 of enclosure (1), at 1-138 to -142.

[562] Total Force Structure Division, *NMOS Report for PMOS 4402* (Nov. 10, 2010). In 2013, the Marine Corps will have 12 billets in 4405, 9 in 4406, 7 in 4407, 4 in 4408, and 2 in 4410.

[563] *Id.*

[564] *See* Letter from Staff Judge Advocate to the Commandant of the Marine Corps to Uncompensated Review Board, *Subj: Judge Advocate Division Uncompensated Structure Request and Justification for the 2008 Uncompensated Review Board* (22 Apr. 2008).

2007 request), as well as the re-coding of 19 unstructured legal billets. The SJA to CMC briefed the URB on the request in May of 2008. The URB validated the requirement, but due to funding priorities the new structure was ultimately disapproved.[565]

d) Judge Advocate Division 2009 Uncompensated Structure Request

In 2009, another URB was conducted.[566] JAD once again considered the findings of the 2007 review, as well as a revised analysis of requirements based on the growth of Marine Corps end-strength to 202,000, and requested the addition of 32 new structured 4402 billets.[567] The URB once again validated the requirement, but due to funding priorities the new structure was again ultimately disapproved.

e) Headquarters, Marine Corps 2010 Capabilities Assessment Review

In spring 2010, a Capabilities Assessment Review (CAR) assessed personnel requirements and made recommendations for changes in structure. The CAR recommended the addition of 32 new 4402 billets to judge advocate structure. The Marine Corps approved these changes, and they will be added to the force structure in FY 15.[568] However, the Marine Corps believes it will have the inventory on hand to fill these requirements by FY 14, and possibly as early as FY 13.[569]

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[565] Letter from Staff Judge Advocate to the Commandant of the Marine Corps to Uncompensated Review Board (URB), *Judge Advocate Division Uncompensated Review Board Request and Justification for the 2009 Uncompensated Review Board*, 3 (30 Mar. 2009) [hereinafter Letter from SJA to CMC to URB of 30 Mar. 2009] (chronicling the Judge Advocate Division's previous actions with respect to realigning and increasing the 4402 structure).

[566] Message 160424Z JAN 09, MARADMIN 0031/09, *Subj: Policies and Procedures for the 2009 Uncompensated Review Board (URB).*

[567] *See* Letter from SJA to CMC to URB of 30 Mar. 2009, *supra* note 565; *see also* MajGen Ary Testimony, *supra* note 242, at 328-30 (stating that the reduction from 34 to 32 billets in 2009 reflected a decision to convert two of the original 34 billets requested to a requirement for two 4430 legal administration officers rather than filling all of the requirements with 4402 judge advocates); *see also* MajGen Ary Presentation, *supra* note 380, at 14.

[568] *See* SES Applegate Testimony, *supra* note 155, at 135-36 (testifying that the current Force Structure Review Group (FSRG) would not re-consider the addition of the 32 structured 4402 billets, and that approval of those additions was a "done deal.").

[569] *Id.* at 135.

f) Re-Coding Historically Unstructured Legal Billets

In 2009 JAD submitted, and TFSD approved, a Table of Organization and Equipment Change Request (TOECR) requesting to re-code all seven Marine Expeditionary Unit (MEU) SJA billets from PMOS 0530 – "civil affairs" to PMOS 4402 and BMOS (Billet Military Occupational Specialty) 4405. The changes will be reflected on unit T/Os in 2012.

In reviewing these studies, the Panel notes favorably: the Marine Corps' efforts to actively manage legal requirements, including its use of a "bottom-up" structure review; careful assessment of increasing demands from operations and force growth; and, effective incorporation of the SJA to CMC as the Occupational Field Manager into the manpower process. The Panel further favorably notes the Marine Corps' commitment to following through with this decision by building its inventory of active-duty judge advocates well ahead of the date on which the structure changes actually take effect.[570]

H. Manpower Recommendations by the JAG and the SJA to CMC

The Panel considered the manpower recommendations of the Judge Advocate General of the Navy (JAG) and the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) regarding active-duty judge advocate manpower requirements in the Navy and the Marine Corps, respectively.

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[570] As was discussed in Section III.F., *supra*, and as will be discussed further in Section IV, *infra*, the Marine Corps has taken aggressive measures to maintain an appropriate inventory of judge advocates to meet structured and other requirements, including: increasing accessions by 71% since FY 08 (from 35 to 60 annually); offering 100% career designation; increasing the Law School Education Debt Subsidy by 50% in FY 11 (from $30,000 to $45,000 annually); and conducting two Return to Active Duty Boards in FY 10 and FY 11, returning 12 officers to active duty as judge advocates. As a result, the judge advocate inventory has improved from 75% of the O-1 to O-5 requirement in October 2009 to 94% of the O-1 to O-5 requirement in October 2010. Additionally, judge advocates were precepted as critically short on the FY 12 colonel selection board. ALNAV 074/10 announced that 11 Marine judge advocates had been selected by the FY 12 Selection Board for promotion to colonel. ALNAV 074/10, *supra* note 135. As of December 1, 2010 the Marine Corps' judge advocate inventory was as follows:

Grade	4401 – Judge Advocate Student	4402 – Judge Advocate	Totals
O-1/O-2	67	18	85
O-3	26	211	237
O-4		124	124
O-5		78	78
O-6		30	30
Totals	93	461	**554**

The JAG assessed that the U.S. Navy required, as of September 2010, a total of 919 judge advocates on active duty to meet standing, baseline mission requirements (821 judge advocates) plus requirements relating to Individual Augmentees (IAs) and the Office of Military Commissions (OMC) (98 judge advocates). Subsequent to the JAG's submission, the combined IA/OMC requirements have grown from 98 to 105, which primarily reflect increased demands in Afghanistan and Pakistan. As of December 2010, then, the JAG assessed that the U.S. Navy needs a total of 926 judge advocates on active duty to meet total existing mission requirements.

The SJA to CMC assessed that the Marine Corps required, as of September 2010, a total of 398 judge advocates to meet structured legal requirements, as well as an additional number of judge advocates to meet broader Marine Corps requirements, resulting in a total target inventory of 520 judge advocates.

1. The JAG Assessment

The JAG advised the Panel that he developed his assessment of judge advocate requirements after being asked by senior Navy leadership "what is your assessment of what your community needs to do its job?"[571] Specifically, the JAG testified,

> [W]hen I originally talked to Navy leadership, I did not present any specific numbers to them. . . . And after it was over, the comment was made to me, it would be helpful for us, leadership, if you would tell us what you think about it. It's interesting to know what the attorney ratios are across the Department of Defense; it is interesting to know what CNA came up with. It's interesting to know what sort of manpower assessments are done in the Bureau with respect to who's operational and who's support . . . but what we would really like to understand is, based on the benefit of your 30 years of active duty in the U.S. Navy, 25 years as a judge advocate and your position as a community leader now for four years, what is your assessment of what your community needs to do its job? . . . [T]hink about this in terms of a baseline for judge advocates, that if all your IA assignments and all your military commissions assignments went away tomorrow, how many judge advocates would you need to do your job?[572]

The JAG implemented the Navy leadership's tasking by taking the then-existing inventory of 830 active-duty judge advocates (early September 2010 inventory) and deducting

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[571] VADM Houck Testimony, *supra* note 107, at 216.
[572] *Id.* at 216-17.

from that inventory 75 judge advocates who were then serving in IA assignments or at OMC.[573] That left a non-IA/OMC "baseline" of 755 judge advocates on active duty as of September 1, 2010.[574] The JAG then assessed whether that baseline was sufficient to meet the standing legal requirements faced by the Navy JAG Corps community, considering his personal observations of the workload across the community, his consultations with senior staff judge advocates in the field, and the inputs of senior fleet commanders.[575]

The JAG ultimately concluded that the baseline of 755 judge advocates was not sufficient to meet standing legal requirements, as it resulted in a judge advocate community that was working at an unsustainable pace, leaving work undone, and leaving the Department of the Navy to assume an unacceptable level of legal risk. He stated,

> I believe the Department of the Navy is running risks with current JAG Corps manning. First, we must continue to improve the quality of our military justice mission. Moreover, commanders run the risk of failing to have important legal issues recognized, addressed, and accomplished in a timely manner. There is also a risk the analysis will lack rigor and ingenuity because existing assets are spread too thin. This is particularly relevant in light of the increasing demand trends for Navy JAGs in areas such as operational and international law, command advice, and support to Sailors and their families. To the extent JAGs are currently avoiding the legal risks noted above, they do so, in part, by working at an unsustainable pace, which will have an impact on retention and the quality of our manpower, particularly in light of law school debt and civilian employment options.[576]

The JAG identified three categories or levels of legal risk: risks to the Navy, risks to the Joint force, and risks to the JAG Corps itself.[577] For the Navy, the risks include: courts-martial cases poorly prosecuted or defended; reduced fleet training due to loss of range access; reduced fleet operational capabilities due to restrictions on use of sensors; delays in fielding weapons or cyber capabilities; delays in executing global basing plans; Sailors falling prey to predatory lenders or deploying without wills and powers of attorney; and backlogs in disability evaluation

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[573] VADM Houck Testimony, *supra* note 107, at 217-18; VADM Houck Presentation, *supra* note 4, at 75; *see* VADM Houck Letter (Ser 00/0102), *supra* note 94.
[574] VADM Houck Testimony, *supra* note 107, at 217-18; VADM Houck Presentation, *supra* note 4, at 75; VADM Houck Letter (Ser 00/0102), *supra* note 94.
[575] VADM Houck Testimony, *supra* note 107, at 226-27.
[576] VADM Houck Letter (Ser 00/0102), *supra* note 94, at 2; *see also* VADM Houck Testimony, *supra* note 107, at 187-92; VADM Houck Presentation, *supra* note 4, at 70.
[577] VADM Houck Presentation, *supra* note 4, at 70.

cases, courts-martial, military promotions, and claims adjudications.[578] For the Joint force, the risks include: restrictions on military activities in exclusive economic zones (which constitute 40% of the world's oceans); loss of, or degraded, freedom of navigation and overflight; infringement on sovereign immunity of warships, auxiliaries, and military aircraft; restrictions on use of unmanned systems and sensors; potential increases in violations of international law including the law of armed conflict; and ambiguous rules of engagement.[579] For the JAG Corps itself, the risks include: an inability to recruit and retain the best officers; degraded abilities to educate, train, and mentor judge advocates; and stress on the force.[580]

The JAG next identified – command by command – the minimum numbers of additional judge advocates required to execute standing, non-IA/OMC legal missions within an acceptable level of risk. The JAG concluded that an additional 66 judge advocates were required, broken down into the following major organizational divisions: 26 to serve in SJA assignments at fleet commands, 28 to serve within the Naval Legal Service Command (NLSC), 7 to serve within the Office of the Judge Advocate General (OJAG), and an additional 5 to attend post-graduate education programs.[581] Within the SJA segment, all the additional billets will support operational law requirements, with emphasis in the Pacific, European, and African areas of responsibility and functional areas of special warfare, cyber, maritime security operations, and operational environmental law. Within the NLSC segment, the emphasis was on building command services and legal assistance capacities in specific locations in which the Navy has recently increased its presence or footprint, improving the Trial and Defense Counsel Assistance Programs, and improving the quality and breadth of instruction at Naval Justice School. Within the OJAG segment, the emphases are on improving military justice oversight and inspection capacity, improving the Navy-Marine Corps Court of Criminal Appeals, and building expertise and reach-back capabilities within the cyber and environmental law divisions.

To recap, in the JAG's best professional judgment, the Navy requires 821 judge advocates, at minimum, to execute standing legal missions within an acceptable level of risk. To that minimum standing baseline of 821 active-duty judge advocates, the JAG assessed that he

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[578] *Id.*
[579] *Id.*
[580] *Id.*
[581] VADM Houck Letter (Ser 00/0102), *supra* note 94, at 1.

requires 105 judge advocates to meet and sustain current IA and OMC requirements.[582] In sum, according to the JAG's calculations, as of December 2010 the Navy requires 926 judge advocates on active duty to execute both the standing legal missions assigned and the IA and OMC requirements.[583] Notably, the JAG's assessment does not forecast future requirements; rather, it reflects the minimum manpower number that he believes is currently required in the JAG Corps community.

2. The SJA to CMC Assessment

The SJA to CMC explained to the Panel that "The Marine Corps must maintain a total inventory of judge advocates on active duty sufficient to fulfill the manpower requirements of both the Marine legal mission and those of the greater Marine Corps."[584] The breadth of roles performed by Marine judge advocates includes, he explained, "service-level legal requirements, departmental and joint legal billets, career broadening 'B-billets,' schools (both legal and PME) and command."[585] The SJA to CMC further stated that an additional number of judge advocates in a patient, prisoner, transient and trainee (P2T2) status are required in order to maintain this inventory.[586] The SJA to CMC explained that the actual inventory, as well as the target inventory (i.e., the Grade Adjusted Recapitulation (GAR)), fluctuates based on continuous re-evaluation and adjustment to the required force structure to meet legal requirements, a proportionate share of B-Billets that is cognizant of the health of the 4402 community, and a number of P2T2 to ensure a sufficient education and training pipeline.[587] In his testimony to the Panel, the SJA to CMC recommended that the Marine Corps should plan to a target inventory of 520 judge advocates in order to meet the requirements for a structure of 398 judge advocate billets and a corresponding number of P2T2 and proportionate share B-Billets.[588]

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[582] As noted earlier, the JAG's September 2010 assessment was 98 judge advocates to cover IAs and OMC; however, subsequently the IA requirements have grown and the total IA and OMC requirements as of December 2010 are 105.

[583] The JAG noted on September 1, 2010 that 32 reserve judge advocates have been recalled to active duty to help fulfill the IA and OMC requirements and that, on an annual basis, 34 reserve judge advocates were required to sustain the reserve IA and OMC billets. VADM Houck Presentation, *supra* note 4, at 50, 52; *see* VADM Houck Letter (Ser 00/0102), *supra* note 94, at 1.

[584] SJA to CMC *Submission*, *supra* note 38, at 6.

[585] *Id.*

[586] *Id.* at 6-7.

[587] *See* SJA to CMC *Submission*, *supra* note 38, at 6-13; *see* MajGen Ary Presentation, *supra* note 380, at 11.

[588] SJA to CMC *Submission*, *supra* note 38, at 6-7; *see also* MajGen Ary Presentation, *supra* note 380, at 11.

Subsequently, the Marine Corps has informed the Panel that the forecasted structure over the next 5 years will level out at 376, plus an additional 32 billets in FY 15, for a total structure of 408 through FY 16. In addition, the Marine Corps has determined that over the next five years to maintain an inventory to meet the requirements for 376 structured 4402 billets, plus appropriate B-Billets and P2T2, requires a GAR of at least 530. Adding the approved 32 structured billets in FY 15, and a corresponding increase in B-Billets and P2T2 requirements, brings this targeted inventory or GAR to over 550 for the next 5 years.

I. Panel's Manpower Conclusions

It is the view of the Panel that the Department of the Navy, today, requires approximately 950 active-duty U.S. Navy judge advocates and a target inventory of approximately 550 active-duty Marine judge advocates[589] to fulfill the legal mission of the Department. The Marine Corps target inventory is based on a recommended minimum of 400 structured Service, Department, and Joint legal billets,[590] a proportionate number of "B-Billets" (non-legal billets), and a sufficient number of "P2T2" billets[591] to ensure community health and proper career progression.[592]

The results of the Marine Corps's bottom-up, top-down, requirements-driven manpower determinations, along with the studies directed by the SJA to CMC, proved realistic and useful in the Panel's determination of judge advocate requirements within the Marine Corps. The Panel applauds the recent steps taken by the Marine Corps to increase both the number of structured judge advocate billets and its inventory of judge advocates on active duty.[593] The Panel believes that the Marine Corps' programmed target inventory of approximately 550 active-duty judge

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[589] The Panel notes that as of the date of this report, the Marine Corps' judge advocate inventory has grown to 554, consistent with the recommended target inventory of at least 550.

[590] The Panel notes that this forecasted structure of 408 reflects the programmed loss at the end of FY 12 of 13 billet requirements within Office of Military Commissions (OMC). Should the OMC requirement remain after FY 12, then the required structure will be increased to 421 through FY 16.

[591] The Panel notes that included in the category of "P2T2" are "trainees," which consist mainly of Marine officers who are designated 4401 "judge advocate students" until they complete training and are subsequently designated by the JAG, and assigned by the Commandant, the MOS 4402 "judge advocate." As a result, the total target inventory of over 550 includes 4402s and 4401s.

[592] As discussed in Section II, *supra*, the target inventory is a result of the Grade Adjusted Recapitulation (GAR) determination.

[593] The Marine Corps increased its 4402 structure by 38 billets, from 340 in FY 06 to 378 in FY 11, and will further increase its 4402 structure by another 32 billets by FY 15.

advocates over the next five years will be sufficient to fulfill the legal requirements of the Marine Corps. More specifically, the Panel believes that the target inventory will allow Marine judge advocates to continue to serve in non-legal billets in order to maintain their role as well-rounded, Marine Air-Ground Task Force officers and to contribute to the greater Marine Corps mission.

The Panel cautions that Marine judge advocate manpower requirements may increase if: (1) there is a significant increase in the military justice mission, which some witnesses believe might occur when Marines currently deployed to Afghanistan return to garrison; (2) structured operational law requirements continue to increase at or near the same rate as has been experienced since September 11, 2001; or (3) as recommended, the SJA to CMC is provided statutory or regulatory authority to supervise the administration of military justice and legal assistance in the Marine Corps, and to exercise professional and technical supervision over Marine judge advocates.[594] The Panel also recognizes that judge advocate manpower requirements in the Marine Corps could be affected if there is a significant reduction in Marine Corps total officer and enlisted end-strength. On this last point, the Panel wishes to emphasize that overall legal requirements do not necessarily or directly correlate to force structure or total end-strength.

In contrast to the Marine Corps – which is implementing a process of structured growth within its judge advocate community – the U.S. Navy is planning to reduce its judge advocate community.[595] The U.S. Navy finished FY 10 with 811 active-duty judge advocates, and has programmed a reduction in authorized end-strength over the next five years, from 801 in FY 11 to 747 in FY 16.

The JAG provided the Panel a comprehensive, command-by-command analysis of judge advocate requirements across the entire Navy, including support to Joint commands. The JAG

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[594] To properly execute these additional supervisory functions, the SJA to CMC would require a more robust Service headquarters organization (i.e., Judge Advocate Division (JAD)), particularly within the practice area of military justice.

[595] As discussed in Section III.H.1., *supra*, the JAG testified to the Panel that in preparing for his testimony to the Panel, he was invited by the senior U.S. Navy leadership to conduct his own best professional assessment of judge advocate requirements, which led to his assessment that the Navy requires 926 judge advocates on active duty today. The Panel recognizes that the senior Navy leadership appears open to changing its programming for active-duty judge advocate end-strength over the Future Years Defense Program (FYDP). VADM Houck Testimony, *supra* note 107, at 216-17.

assessed that there is a current requirement for 926 judge advocates on active duty in the U.S. Navy. The Panel views the JAG's assessment favorably, and recognizes that he is uniquely qualified to conduct a professional assessment of judge advocate manpower requirements in the U.S. Navy, based on his experiences in command and other senior leadership positions.

The Panel also recognizes that the JAG's assessment must be considered in the context of the severe budget climate facing the Department of the Navy. In this regard, the Panel notes that the JAG's assessment was intentionally conservative, designed to address the minimum requirements extant today. The JAG did not address likely future requirements, such as: additional Individual Augmentation (IA) growth in Afghanistan, Pakistan, and elsewhere; additional manpower requirements that will arise for the U.S. Navy if the Department of the Navy decides to affirmatively provide counsel to all Wounded, Ill, or Injured Sailors at the earliest stages of the Disability Evaluation System (as is currently being done by the Army and Marine Corps); additional manpower requirements that will arise if the U.S. Navy establishes an independent Trial Defense Command; additional permanent operational law requirements that, as the Panel concluded earlier, are continuing to increase at a rate that, unless arrested, will result in another approximate doubling of operational law requirements over the next decade. Thus, while the Panel believes the JAG's assessment of 926 U.S. Navy judge advocates is an accurate description of the requirement today, the Panel also believes that the judge advocate requirement over the next five years will be larger than 926.

The Panel is of the view that over the next five years, the U.S. Navy will be required to make judge advocate manpower investments beyond those identified by the JAG in the following areas: supervising the administration of military justice, supporting cyber law, supporting the special operations community, supporting rule of law missions, filling increasing IA demands in Afghanistan and Pakistan, responding to operational environmental law demands, and supporting efforts to maintain stability and navigational freedoms in the Western Pacific. The Panel emphasizes that it, like the JAG, is intentionally being conservative in its assessment in the face of the severe budget climate in the DoD. Beyond these additional requirements, the Panel believes that increased judge advocate requirements to support the Disability Evaluation System and to further improve the independent trial defense function in the U.S. Navy, although contingent, are likely. The Panel concludes that the JAG's assessment that 926 judge advocates

are required today will have to be adjusted upward to approximately 950 U.S. Navy judge advocates by 2015.

In reaching its conclusion regarding a future requirement for 950 U.S. Navy judge advocates, the Panel was also informed by the Center for Naval Analyses (CNA) study. While the *CNA Study* is now dated and has some reliability issues, it provided additional and useful support in the Panel's assessment of U.S. Navy judge advocate manpower requirements. The *CNA Study* remains the first and most detailed analysis of U.S. Navy judge advocate requirements ever conducted. It was co-sponsored by the Chief of Naval Personnel, adopted the U.S. Navy's official methodology for Budget Submitting Offices (BSOs) to conduct manpower determinations (i.e., measuring workload to accomplish validated missions, functions, and tasks), and applied that methodology across BSOs to calculate community-wide requirements.

Option 5 of the *CNA Study* calculated manpower requirements for a postulated "post-2003" constant level court-martial caseload, using a nominal 45-hour workweek, which CNA noted is the Federal average for government attorneys.[596] Using the then-extant baseline of 750 active-duty U.S. Navy judge advocates, CNA assessed that an additional 119 judge advocates were required to accomplish the assigned legal missions within an acceptable level of risk. The "option 5" total is 869 judge advocates. The Panel notes that CNA did not add to that 869 total, any judge advocate requirements for Individual Augmentees (IA) or the Office of Military Commissions (OMC). The Panel also notes that CNA underestimated both the decline in courts-martial and the growth in operational law. That noted, if one were to add today's existing sustainment requirements for IAs and OMC (105) to CNA's option 5 total (869), one could conclude that the U.S. Navy requires 974 judge advocates on active duty. The Panel emphasizes that it is not relying on the *CNA Study* to conclude that the U.S. Navy requires 974 active-duty judge advocates; rather, the Panel is noting that its own estimate that U.S. Navy judge advocate requirements will grow to approximately 950 over the next five years is certainly within the more conservative range of options presented by CNA several years ago.

The Panel also recalls the benchmarking to the Departments of the Army and the Air Force noted in Section I.D., *supra*, of the report. We caution that Inter-Departmental and Inter-

[596] CNA Presentation, *supra* note 502, at 15.

Service comparisons of legal manpower are of limited utility given that the roles and missions of the legal communities are not identical. However, the Panel believes that such benchmark comparisons are useful in that the size of the legal communities in the Army and Air Force may represent an outer boundary or high end in force structure analysis. As we noted in Section III.A., *supra*, if the Department of the Navy had the same ratio of full-time attorneys to active-duty end-strength as the Department of the Army, the U.S. Navy would have 1,205 active-duty judge advocates, and if it had a ratio like the Department of the Air Force, the U.S. Navy would have 1,077 active-duty judge advocates. While the Panel is not concluding that there is a requirement for 1,205, or even 1,077, active-duty judge advocates in the U.S. Navy, the Panel is noting that its conclusion that the U.S. Navy requires 950 active-duty judge advocates today is well within the outer boundary reflected in the requirements for the Department of the Air Force and the Department of the Army.

The Panel concludes its assessment of judge advocate requirements in the Department of the Navy by emphasizing three points, two of which apply generally to the U.S. Navy and the Marine Corps, and the last of which applies only to the U.S. Navy.

First, while it is difficult to predict future judge advocate manpower requirements given the uncertain nature of future wartime demands and the existing DoD budget climate, the Panel believes, based on its review of the 2010 *Quadrennial Defense Review* and other strategic documents, as well as the testimony it received, that requirements for judge advocates in the U.S. Navy and the Marine Corps will continue to grow over the next five years, particularly in the area of operational law. This will likely be the case, despite the projected redeployment of all U.S. military forces from Iraq by the end of 2011, and the eventual redeployment of U.S. combat forces from Afghanistan.

Second, while the numbers of general and special courts-martial declined over the last decade within the Department of the Navy, and particularly in the U.S. Navy, that decline does not directly correlate to a proportionate reduction in manpower requirements. There are certain inviolate "fixed costs" in operating a comprehensive military justice system worthy of our men and women in uniform, such as maintaining independent trial and appellate judiciaries; maintaining a Naval Justice School to educate and train judge advocates, legal officers, and line

officers; maintaining cadres of qualified military counsel capable of trying complex cases; and maintaining SJA offices that have the capacity to effectively discharge military justice responsibilities despite competing wartime demands. The Panel notes, for example, that both the Marine Corps legal community and the U.S. Navy JAG Corps are likely going to have to make additional manpower investments in the supervision of the administration of military justice to fully implement the recommendations made by the DoD Inspector General (IG) in its report of post-trial processing.

Third, given the existing publicly available budgetary programming authorizations for the Navy JAG Corps over the next five years, the Panel concludes that there will be a significant shortage of active-duty judge advocates in the U.S. Navy by 2015. The Panel is concerned that the U.S. Navy JAG Corps – despite its superb leadership – may be approaching a tipping point. The legal mission is increasing despite a shortage of active-duty judge advocates in the Navy right now,[597] and that shortage will worsen if existing manpower programming is not revised. In the Panel's view, the current shortage poses a significant level of legal risk to the Department of the Navy and the Joint Force, and a significant level of professional risk to the Navy JAG Corps. The Panel strongly recommends that the Department of the Navy and the U.S. Navy act to mitigate these risks.

[597] The 17% shortage is calculated based on FY 10 end-strength (811) and the Panel's assessment of a requirement for 950 judge advocates.

V. Review of Career Patterns for Marine Judge Advocates

The Panel was directed to "review career patterns for Marine Corps judge advocates in order to identify and validate assignments to nonlegal billets required for professional development and promotion."[598]

As part of its review, the Panel received the testimony of the SJA to CMC, as well as: Col John R. Ewers, USMC, Deputy SJA to CMC; and Senior Executive Service (SES) Michael F. Applegate, Director, Manpower Plans and Policies Division, Manpower and Reserve Affairs, Headquarters, Marine Corps. The Panel also considered written submissions, as well as Department and Service regulations, orders, and messages.

A. Every Marine a Rifleman, Every Marine Officer a MAGTF Officer

Central to the ethos – to the very self-perception – of the Marine Corps is the premise that "every Marine is a rifleman" and every Marine officer is a Marine Air-Ground Task Force (MAGTF) officer.[599] The force structure of the Corps reflects its central purpose: amphibious, expeditionary warfare. Because of its expeditionary nature, the Corps is also austere. This austerity places a premium on the role of every Marine,[600] which in turn drives the Marine Corps' approach to developing and assigning judge advocates.

Unlike their JAG Corps counterparts in the Navy, Army, and Air Force, Marine judge advocates are unrestricted line officers and undergo the same rigorous indoctrination and training as all other Marine officers. Just like all prospective Marine Corps officers, prospective Marine judge advocates must first earn a commission as a second lieutenant by successfully completing the Officer Candidate Course at Officer Candidates School (OCS) in Quantico, Virginia. The mission of OCS is "to train, evaluate, and screen officer candidates to ensure they possess the moral, intellectual, and physical qualities for commissioning, and the leadership potential to

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[598] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(b)(2)(F), 123 Stat. 2190 (2009).
[599] MajGen Ary Testimony, *supra*, note 242, at 339.
[600] Carl E. Mundy, Jr., *Every Marine a Rifleman*, Marine Corps Gazette, Jan. 1993, at 12.

serve successfully as company grade officers in the Operating Forces."[601] All Marine officers, including judge advocates, must then complete the Basic Officer Course at The Basic School (TBS) in Quantico, Virginia. The mission of TBS is to "train and educate newly commissioned or appointed officers in the high standards of professional knowledge, esprit-de-corps, and leadership required to prepare them for duty as company grade officers in the operating forces, with particular emphasis on the duties, responsibilities and war-fighting skills required of a rifle platoon commander."[602] TBS is a demanding six-month program that provides each lieutenant with the foundation to be a rifle platoon commander.

The importance of this MAGTF officer foundation for Marine judge advocates was a recurring theme throughout much of the testimony received by the Panel, and came from senior operational commanders as well as senior members of the Marine Corps Legal Services community. Lieutenant General (LtGen) Richard F. Natonski, USMC (Ret.), former Commanding General of the 1st Marine Division, testified that the Marine judge advocate's MAGTF officer foundation was "Absolutely critical."[603] He spoke specifically about the Marine judge advocate's ability, in the operational law realm, to "speak like a lance corporal, and understand what a lance corporal faces and then develop scenarios that a lance corporal could understand."[604] He concluded by stating, "Having a lawyer that understands the culture . . . is critical in our culture and in the credibility of our judge advocates."[605]

During his testimony, LtGen John F. Kelly, USMC, former Commanding General of I Marine Expeditionary Force (Forward), was asked why Marine judge advocates couldn't be like the doctors, chaplains, or nurses, who are staff officers in the Navy who may be assigned to a Marine Corps unit.[606] In answering that question, LtGen Kelly spoke about the expeditionary nature of the Marine Corps and the fact that there are no rear areas on the battlefield where Marines are assigned.[607] He added, "you can't always bet that you won't get attacked or overrun or something like that in the theater, and . . . when [Marine judge advocates] did get hit, I had no

[601] http://www.ocs.usmc.mil/?dest=home.
[602] http://www.tecom.usmc.mil/tbs/.
[603] LtGen Natonski Testimony, *supra* note 230, at 37.
[604] *Id.* at 38.
[605] *Id.* at 39.
[606] RADM James E. McPherson, JAGC, USN (Ret.), Member, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy, Transcript of October 13, 2010 Hearing, at 65.
[607] *See* LtGen Kelly Testimony, *supra* note 198, at 65-68.

second thought."[608] As Col John R. Ewers, USMC, Deputy SJA to CMC put it, "there's an assumption you can make about a Marine officer and the capability he brings on the battlefield . . . whether he's a lawyer or something else."[609] This confidence is borne out of the Marine judge advocate's initial training as a basic rifle platoon commander and is reinforced by a balanced career which allows them to mature into well-rounded MAGTF officers.

B. Assignment to Non-Legal Billets

"There is no 'standard' career pattern; many Marine judge advocates have had successful careers with almost exclusively legal assignments, while others have served in a number of billets outside of the legal community during the course of a successful career."[610] During his testimony, Major General (MajGen)Vaughn A. Ary, Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC), stated that a Marine judge advocate could expect to spend approximately 20 months of a 20-year career assigned outside of judge advocate billets.[611] These outside assignments may include assignments to non-legal "B-Billets," completion of formal courses of Professional Military Education (PME),[612] and tours as commanding officers.

Congress has indicated concern that "proposed near-term solutions, such as immediate termination of assignments of judge advocates to career enhancing, non-legal billets, will adversely affect the professional development and promotions of mid-level Marine Corps judge advocates . . .."[613] From both a force structure and a cultural perspective, the Panel does not recommend this "solution," nor does it appear that the Marine Corps leadership, either within or outside of the legal services community, intends to head in that direction.

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[608] *Id.* at 66.
[609] Col Ewers Testimony, *supra* note 155, at 123-24.
[610] SJA to CMC *Submission*, *supra* note 38, at 44.
[611] MajGen Ary Testimony, *supra* note 242, at 305. MajGen Ary clarified that the approximation of 20 months was not arrived at through scientific calculation, but rather through an informal poll conducted by the Judge Advocate Division among presently-serving judge advocates in the grades of lieutenant colonel and above. *Id.*
[612] *See generally* MCO 1553.4B, *supra* note 491 (explaining the Marine Corps' PME program). The Marine Corps Professional Military Education (PME) program specifies required knowledge, by area, at each career level. Participation in the PME program is an institutional expectation. The Marine Corps PME program consists of resident instruction as well as distance education. A competitive board process is used to select individuals who will attend resident PME courses, and judge advocates have been selected at roughly the same percentage as their peers in other specialties. SJA to CMC *Submission*, *supra* note 38, at 46.
[613] U.S. Senate, Committee on Armed Servs., *National Defense Authorization Act 2010 to Accompany S.1390* (S. Rpt. 111-35, § 541), Washington: Government Printing Office, 2009.

During his testimony, SES Applegate, Director, Manpower Plans and Policies Division, explained,

> Where that [solution] ultimately wouldn't work in the way we do business is that right now I have six [judge advocates] in command and 22 in PME schools and 43 in non-lawyer billets, which adds up to 70. If we stop doing that, I would reduce the inventory by 70 lawyers. I wouldn't make 70 extra lawyers because I wouldn't need them. The lawyer requirement has to go up for me to build more lawyers to fill lawyer billets because I'm already building enough lawyers to have the inventory to fill the non-lawyer billets.[614]

As illustrated in the Table 14, below, since combat operations began in Iraq in 2003, the opportunity for judge advocates to serve in "free B-Billets" (billets that can be filled by any officer, regardless of Military Occupational Specialty (MOS)) has steadily increased. This increase is due in part to the fact that other MOS communities, particularly the combat arms communities, had greater rates of deployment, and less dwell time, and therefore needed relief from the requirement to fill free B-Billets. As a result, Manpower and Reserve Affairs (M&RA), Manpower Management (MM) adjusted their staffing goals to assign increasing shares of free B-Billets to other MOS communities, including judge advocates.[615]

	2003	2004	2005	2006	2007	2008	2009	2010
Total Free B-Billets Filled by Judge Advocates	28	26	30	34	32	40	35	40
% of Judge Advocate Inventory in Free B-Billet	6.44%	6.27%	7.14%	8.25%	7.51%	9.93%	8.86%	9.24%
Judge Advocate Free B-Billets as a % of all USMC Free B-Billets	1.64%	1.68%	1.78%	1.94%	2.04%	2.44%	1.97%	2.35%

Table 14. Judge Advocate Assignments to, and Share of Free B-Billets

The SJA to CMC emphasized his commitment, and the Commandant's commitment,[616] to continue applying the Marine Corps ethos that "every Marine is a rifleman" to the legal

[614] SES Applegate Testimony, *supra* note 155, at 137.
[615] Col Ewers Presentation, *supra* note 497, at 4.
[616] At the time of MajGen Ary's testimony to the Panel, the Commandant of the Marine Corps was General James T. Conway, USMC.

services community by continuing to assign judge advocates to non-legal billets.[617] MajGen Ary, SJA to CMC, stated, "It's critical for us as a community to remain inextricably intertwined with the community we support, and we want to do that."[618] Approximately one month prior to becoming the 35th Commandant of the Marine Corps, General James F. Amos stated that he agreed with the existing Commandant's position on assigning judge advocates to non-legal billets, asserting,

> The opportunity to serve in command, operational and other non-legal billets is essential to the development of Marine judge advocates. We both consider, and are of the firm opinion, that our judge advocates are unrestricted line officers. For the past 50 years, we have maintained this approach because we believe service in non-legal billets makes our judge advocates better Marine officers and better legal advisors . . . [A] common culture and philosophy, gained through shared professional background, experiences and hardships, builds comradeship – an essential component to establishing trust between Commanders and their judge advocates. In short, service in non-legal billets ensures that our judge advocates are fully integrated and enhances their credibility.[619]

C. Promotion and Command Selection

Marine judge advocates are expected to have a career path that includes assignments to operational units, expeditionary tours, and non-legal billets, as well as completion of formal courses of PME for each rank. Practically, however, these varied career paths are more than expectations. Unlike the Army, Navy, and Air Force JAG Corps, which have separate promotion boards for lawyers, Marine judge advocates compete head-to-head as Marine officers against their peers from other MOSs. The standard precept language requires selection of those "best and fully qualified"[620] from all MOSs.[621]

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[617] MajGen Ary Testimony, *supra* note 242, at 139-40.
[618] *Id.* at 140.
[619] U.S. Senate Armed Servs. Committee, *Advance Policy Questions for General James F. Amos, USMC, Nominee for Commandant of the Marine Corps*, 24 (21 Sep. 2010).
[620] U.S. Dep't of Defense, Instr. 1320.14, *Commissioned Officer Program Procedures*, ¶¶ 6.2.3.4.6., E4.1.7.6., at 11, 19 (Sep. 24, 1996) (requiring the following promotion selection board certification: "That the officers recommended for promotion are . . . fully qualified and best qualified for promotion to meet the needs of the Armed Force concerned . . . among those officers whose names were furnished to the board."). Note that some boards select only to the "fully qualified" standard, in which case the certification should reflect that standard. *Id.* ¶ 6.2.3.4.6., at 11. A majority of the members of promotion selection boards convened under 10 U.S.C. § 611(a) (2010) and 10 U.S.C. § 14101 (2010) must certify that "the officers recommended for promotion by the board are best qualified for promotion to meet the needs of the armed force concerned . . . among those officers whose names were furnished to the selection board." 10 U.S.C. §§ 617, 14109 (2010); *see also* 10 U.S.C. § 5947 (2010)

As Table 15, below, illustrates, Marine judge advocates have historically been very successful on promotion boards. Over the past six years, the in-zone selection rates of judge advocates to the grades of major and lieutenant colonel compared very well with the overall averages for all occupational fields and significantly exceeded the overall selection average in all but one of the boards listed below (FY 09 major board). For colonel, the selection rate has been less competitive with that of other communities, with three years significantly below the overall average (FY 07, FY 08, and FY 09). Although the above-zone selections and the FY 10 board, which included a precept identifying a critical shortage of 4402 colonels, made up for some of the shortfall, the Marine Corps remained short of the required number of 4402 colonels.[622] Accordingly, a similar precept was included in the FY 12 colonel board, and the results from that board showed a noteworthy improvement in the selection rate for 4402 colonels.[623]

	Major 4402	Major All MOSs	LtCol 4402	LtCol All MOSs	Colonel 4402*	Colonel All MOSs
FY 12	*NOT YET RELEASED*				64.3% (9/14) [2]	52.1%
FY 11	87.1% (27/30)	82.8%	81.8% (15/22)	65.6%	50.0% (2/4) [0]	53.6%
FY 10	90.6% (29/32)	87.6%	88.9% (16/18)	71.8%	64.3% (9/14) [1]	53.4%
FY 09	78.4% (29/37)	87.0%	90.9% (10/11)	70.6%	33.3% (4/12) [2]	50.5%
FY 08	90.0% (18/20)	87.4%	82.4% (14/17)	65.0%	12.5% (1/8) [1]	51.0%
FY 07	90.0% (27/30)	86.5%	75.0% (9/12)	62.4%	23.5% (4/17) [0]	48.4%
FY 06	92.9% (26/28)	86.7%	78.9% (15/19)	67.2%	80.0% (4/5) [1]	50.8%

* Bracketed numbers in this column indicate above-zone selections (officers who had been previously considered for promotion); the bracketed numbers are not included in selection percentages.

Table 15. Marine Corps Officer In-Zone Promotion Rates[624] (4402 v. All MOSs)

(requiring that "All commanding officers and others in authority in the naval service" behave with exemplary conduct).

[621] MajGen Ary Testimony, *supra* note 242, at 351.

[622] *See id.* at 336-37, 350-51.

[623] *See* ALNAV 074/10, *supra* note 135.

[624] Col Ewers Presentation, *supra* note 497, at 8. Manpower Management Promotion Branch (MMPR) provided FY 12 statistics.

Marine Corps colonels, colonel selects, lieutenant colonels, and lieutenant colonel selects are eligible to be screened for command. Annual Command Screening Boards identify those officers who are best and fully qualified to meet commanding officer requirements in the operating forces and the supporting establishment. Because the Marine Corps has not established an expected or preferred career pattern for officers, assignments to the operating forces, recruiting duty, joint and external billets, the training community, and the supporting establishment all contribute to the depth and breadth of experience that are critical to the Marine Corps. The Command Screening Boards consider that all assignments are important to the Marine Corps, and that successful performance of assigned duties is the key to measuring an officer's potential.[625] Marine judge advocates have historically been very competitive on Command Screening Boards.[626]

The high rates of selection for promotion to field grade rank and command is a testament not only to the quality of Marine officers serving as judge advocates, but also to the level of integration of judge advocates into the professional cadre of Marine officers.

The assignment of Marine judge advocates to non-legal billets is not merely required for professional development and promotion, but is inextricably tied to what it means to be a Marine officer.[627] The Panel finds persuasive the testimony from senior judge advocates and operational commanders that having Marine judge advocates as unrestricted line officers, serving in command, operational, and other non-legal billets, makes them better Marine officers and better legal advisors.

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[625] U.S. Marine Corps Order 1300.64A, *Command Screening Program (CSP)*, ¶ 8.c., at 4 (23 Jun. 2004).
[626] SJA to CMC *Submission*, *supra* note 38, at 46.
[627] In response to a Panel member's question about the potential impact on the Marine legal services community if it was decided to unilaterally do away with assignments to non-legal billets, Col Ewers, USMC, Deputy Staff Judge Advocate to the Commandant of the Marine Corps, stated that, "It would fundamentally change what it is that we do . . . it would completely change the complexion of the way that we look at the Marine Corps and the people that we attract." Col Ewers Testimony, *supra* note 155, at 157-58.

V. Review of Directives Pertaining to Jointly-Shared Missions

The Panel was directed to "review directives issued by the Navy and the Marine Corps pertaining to jointly-shared missions requiring legal support."[628]

The Department of the Navy is unique from the Departments of the Army and Air Force, in that it oversees two Services: the U.S. Navy and the U.S. Marine Corps. One consequence of this shared Department is that the Navy and Marine Corps, along with their judge advocate communities, share a common mission to support the Department of the Navy and are subject to the oversight and direction of one Secretary.

While the Panel found no U.S. Navy or Marine Corps directives specifically pertaining to "jointly-shared missions requiring legal support," the Panel did find a foundation of directives issued by the Secretary of the Navy and the Judge Advocate General of the Navy (JAG) providing guidance to both Navy and Marine judge advocates in the execution of their legal duties. In addition, the Panel found evidence of the three legal communities' commitment to jointly share the common mission of providing legal support to the Department of the Navy.

The Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC), as well as the General Counsel of the Navy, are strongly committed to ensuring that the three legal communities operate as a team to effectively and efficiently support the legal needs of the Department of the Navy. Their commitment is manifested in their publication of a joint strategic vision titled, *One Mission, One Team: A 21st Century Strategic Vision for Legal Support in the U.S. Department of the Navy.*[629] As part of the vision statement, the three leaders agreed to the development and maintenance of three "Communities of Practice" in the areas of ethics, fiscal law, and international law as a first set of strategic initiatives.[630] This vision is also reflected in Department of the Navy directives that call for cooperation and coordination between these legal communities. For example, the

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[628] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(B)(2)(E), 123 Stat. 2190 (2009).

[629] *DON Strategic Legal Vision, supra* note 1, at 1 (signed by the General Counsel of the Navy, the Judge Advocate General of the Navy, and the Staff Judge Advocate to the Commandant of the Marine Corps).

[630] *Id.* at 10-11 (stating that: "The JAGC and OGC already are working to improve collaboration and reachback among their attorneys by establishing Communities of Practice (COPs) in many practice areas . . . Participation in these COPs is available to those who work in any of the three DON legal communities.").

Secretary of the Navy Instruction on roles and responsibilities expressly states that the General Counsel, the JAG, and the SJA to CMC shall maintain close working relationships on all matters of common interest.[631]

For judge advocates in the Navy and Marine Corps, the foundational directive reflecting this jointly shared mission and oversight is the *Manual of the Judge Advocate General (JAGMAN)*.[632] The *JAGMAN* regulates the practice of both Navy and Marine judge advocates, providing common practices and procedures across both communities.[633] The commonality of practice and procedures significantly enhances the abilities of Navy and Marine judge advocates to serve together in support of Navy and Marine Corps missions. For example, the fact that the form and standards for administrative investigations available to commanders and supported by judge advocates are prescribed by the *JAGMAN* allows for the effective support to a Navy commander by a Marine judge advocate or vice versa.[634]

Other directives that guide the practice of both U.S. Navy and Marine judge advocates include the instructions on: claims, legal assistance, professional conduct, judicial screening, the trial judiciary, and the court of criminal appeals.[635]

The ability of U.S. Navy and Marine judge advocates to successfully support shared missions is instilled during the Basic Lawyer Course (BLC) at Naval Justice School (NJS). NJS's mission is to train all sea Service (Navy, Marine Corps, and Coast Guard) judge

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[631] SECNAVINST 5430.7Q, *supra* note 5, ¶ 7.b.(5), at 13.

[632] *See generally JAGMAN*, *supra* note 341.

[633] The *JAGMAN* is over 400 pages long, including chapters on: Regulations Implementing and Supplementing the Manual for Courts-Martial; Administrative Investigations; Article 138 Complaints – Complaints of Wrong; Article 139 Claims – Redress of Damage to Property; Release of Government Information; Delivery of Servicemembers, Civilians, and Dependents – Service of Process and Subpoenas – State Tax and Regulatory Authority; Legal Assistance; General Claims Provisions; Authority of Armed Forces Personnel to Perform Notarial Acts; International Law; Customs Requirements – Domestic and Foreign; Admiralty Claims; Environmental Protection; and Payments Due Mentally Incompetent Members, Physical Examinations of Such Members, and Trustee Designations.

[634] *JAGMAN*, *supra* note 341, Ch. II. Note that Chapter II of the *JAGMAN* was significantly updated by Change Transmittal 2 of September 16, 2008.

[635] *See, e.g.*, SECNAVINST 5400.40A, *supra* note 346; *see* U.S. Dep't of Navy, Judge Advocate General Instr. 5815, *Navy-Marine Corps Court of Criminal Appeals* (Sep. 3, 2010) [hereinafter JAGINST 5815]; *see* JAGINST 5817.1D, *supra* note 386; *see* U.S. Dep't of Navy, Judge Advocate General Instr. 5801.2A, *Navy-Marine Corps Legal Assistance Program* (26 Oct. 2005); *see* U.S. Dep't of Navy, Judge Advocate General Instr. 5890.1A, *Administrative Processing and Consideration of Claims on Behalf of and Against the United States* (18 Jun. 2005); *see* U.S. Dep't of Navy, Judge Advocate General Instr. 5803.1C, *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General* (9 Nov. 2004) [hereinafter JAGINST 5803.1C].

advocates.[636] NJS is supported by both Navy and Marine Corps instructors and all U.S. Navy and Marine judge advocates attend the BLC.[637] After attending the BLC, U.S. Navy and Marine judge advocates continue to access professional education opportunities through the Naval Justice School throughout their careers.[638]

Combined U.S. Navy and Marine judge advocate efforts are also evident in the assignment of Marine judge advocates to the Office of the Judge Advocate General.[639] Recently, U.S. Navy judge advocates deployed with the SJA offices of Marine Expeditionary Forces,[640] demonstrating the ability of U.S. Navy and Marine judge advocates to team in the deployed environment.

The zenith of Navy and Marine Corps teamwork in the legal community is the judiciary. At both trial and appellate levels, the judiciary is fully integrated with 9 Navy and 14 Marine Corps trial judges, and 6 Navy and 3 Marine Corps appellate judges working for the Chief Judge of the Navy.[641] Selection of all judges is subject to a common judicial screening board. In addition, the Navy-Marine Corps Appellate Review Activity is manned by 18 counsel – 9 U.S. Navy and 9 Marine judge advocates. The counsel are fully integrated, representing Navy and Marine Corps appellants without distinction, and are currently led by a Marine Corps colonel on the Appellate Government side and a Navy captain on the Appellate Defense side.[642]

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[636] U.S. Dep't of Navy, Commander, Naval Legal Service Command Instr. 5450.3B, *Mission and Functions of Naval Justice School, Newport, Rhode Island* (undated) [hereinafter COMNAVLEGSVCCOMINST 5450.3B]; CAPT Boock Presentation, *supra* note 382, at 2.

[637] *See* CAPT Boock Presentation, *supra* note 382, at 5. There are 18 U.S. Navy judge advocates, 6 Marine judge advocates, 6 Navy legalmen, and 6 Marine legal service specialists assigned to Naval Justice School in Newport, Rhode Island. *Id.* The Basic lawyer Course (BLC) curriculum includes: legal assistance, administrative law, criminal law, evidence, procedure, trial advocacy, practical skills, and operational law. *Id.* at 13-17.

[638] *Id.* at 18-20. Naval Justice School post-BLC course offerings for judge advocates include: Legal Assistance, Staff Judge Advocate, Advanced Staff Judge Advocate, Iraq-Afghanistan Pre-Deployment Legal Training, Law of Naval Operations, Law of Military Operations, Information Operations Law, Effective Courtroom Communications, Computer Crimes, Prosecuting Complex Cases, Defending Complex Cases, Basic Trial Advocacy, Intermediate Trial Advocacy, Litigating Sexual Assault Cases, Trial Advocacy Continuing Legal Education, and Senior Trial/Senior Defense Counsel Leadership. *Id.* at 19-20.

[639] 21 Marine judge advocates and 6 Marine legal service specialists are assigned to OJAG. E-mail from Maria Catania, Office of the Judge Advocate General (Code 61), to CAPT Patrick Neher, JAGC, USN, Staff, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy (Dec. 2, 2010, 10:56 EST).

[640] 36 U.S. Navy judge advocates deployed with the Staff Judge Advocate Offices of Deploying Marine Expeditionary Forces during 2006, 2007, 2008, and 2009.

[641] CAPT O'Toole Presentation, *supra* note 349, at 18-19.

[642] VADM Houck Presentation, *supra* note 4, at 24; Col Collins Presentation, *supra* note 332, at 8. Several instructions explain the process by which judges are detailed to the judiciary, and the criteria for judge advocates

The Panel concludes that the General Counsel, the JAG, and the SJA to CMC are committed to full cooperation in finding the most efficient and effective ways to provide legal services for the Department of the Navy. Appropriate common directives and guidance, bolstered by shared training through NJS, exist and are generally sufficient. The existence of common practices, procedures, and legal training enhances the ability of the two Services to consider, and efficiently implement, collaborative efforts in support of Department of Navy missions.

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to hold those positions. *See* SECNAVINST 5400.40A, *supra* note 346; *see* JAGINST 5815, *supra* note 635; *see* JAGINST 5817.1D, *supra* note 386.

VI. Review of the Role of the Judge Advocate General of the Navy and the SJA to CMC

As part of its study, the Panel was directed to "review the role of the Judge Advocate General of the Navy, as the senior uniformed legal officer of the Department of the Navy, to determine whether additional authority for the Judge Advocate General over manpower policies and assignments of judge advocates in the Navy and Marine Corps is warranted."[643] During the course of that review, the Panel determined that it was appropriate to also review the role of the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC).

The Panel reviewed the existing statutory and regulatory authorities; received testimony and written materials from the Judge Advocate General of the Navy (JAG) and the SJA to CMC; reviewed the report of the Inspector General of the Department of Defense (DoD IG) concerning post-trial processing of courts-martial; and solicited and received from the Secretary of the Navy, the position of the Department of the Navy concerning potential regulatory and legislative changes to the roles and functions of the JAG and the SJA to CMC. Included in the DON position were the Service perspectives of the Chief of Naval Operations (CNO) and the Commandant.

A. Judge Advocate General of the Navy

As noted earlier in this report, the JAG has a role within the DON that is different than the roles of the JAGs of the Army and Air Force within their respective Military Departments and Services. To better understand the unique nature of the role of the JAG within the DON, the Panel believes it useful to first review the statutory roles of the Army and Air Force JAGs, and to then draw comparisons between their roles and the role of the JAG of the Navy.

After that comparison, in Sections VI.A.2. through 5., *infra*, the Panel will provide more detailed analysis of the role of the JAG of the Navy, at both the Departmental level and the Service level. In turn, within each of those discussions, the Panel will identify the major statutory and regulatory authorities addressing the JAG's Department- and Service-level roles.

[643] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(b)(2)(D), 123 Stat. 2190 (2009).

More specifically, the Panel will discuss the JAG's Departmental role under statute (Section VI.A.2., *infra*); the JAG's Departmental role under regulation (Section VI.A.3., *infra*); the JAG's Service-level role under statute (Section VI.B.4, *infra*); and the JAG's Service-level role under regulation (Section VI.A.5., *infra*).

In Section VI.A.6, *infra*, the Panel will address the Department- and Service-level roles of the Deputy JAG and the Assistant JAGs, and in Section VI.A.7. and Section VI.A.8., *infra*, the Panel will address the question of whether the JAG needs additional authority over manpower policies and assignments of judge advocates in the Navy and the Marine Corps, respectively.

1. Comparison to Army and Air Force JAGs

The statutory role of the JAG in the DON differs from that of the Army and Air Force JAGs in two prominent ways: first, in the positioning of the billet within the Department; and second, in the duties assigned.

All four Services have a Military Staff within the executive part of their respective Departments (i.e., the Office of Chief of Naval Operations; Headquarters, Marine Corps; Army Staff; and Air Staff),[644] and each Service Chief presides over his or her respective Military Staff – subject to the authority, direction, and control of the respective Secretary.[645]

The function of all four Military Staffs is to assist the Secretaries of their respective Departments in carrying out their responsibilities.[646] All four Military Staffs have general duties to provide professional assistance to their respective Secretaries and Service Chiefs.[647] They also have general duties to prepare their respective Services for employment, and to perform the following functions: recruiting, organizing, supplying, equipping, training, servicing, mobilizing, demobilizing, administering, and maintaining.[648]

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[644] 10 U.S.C. §§ 3031 (Army), 5031 (Navy), 5041 (Marine Corps), 8031 (Air Force) (2010).
[645] *Id.* §§ 3032 and 3033 (Army), 5032 and 5033 (Navy), 5042 and 5043 (Marine Corps), and 8032 and 8033 (Air Force) (2010).
[646] *Id.* §§ 3032 (Army), 5032 (Navy), 5042 (Marine Corps), 8032 (Air Force).
[647] *Id.*
[648] *Id.*

The Departments differ in their statutory construct in the positioning and duties of the Judge Advocates General. In the Department of the Army, the JAG is part of the Army Staff,[649] and in the Department of the Air Force, the JAG is part of the Air Staff.[650] The Army and Air Force JAGs, as members of their respective Service Staffs, are responsible to and report directly to their respective Service Chiefs.[651] By statute, they are also legal advisers to their respective Service Secretaries and to all the officers and agencies of their respective Departments.[652] And both the Army and Air Force JAGs, by statute, provide independent legal advice to their respective Secretaries and Service Chiefs.[653]

The Army JAG, by statute: "shall direct the members of the Judge Advocate General's Corps in the performance of their duties,"[654] and the Air Force JAG, by statute, "shall direct the officers of the Air Force designated as judge advocates in the performance of their duties."[655] They also make all judge advocate assignments for their respective Services, exercising the authority of a "Judge Advocate General" under Articles 1 and 6 of the Uniform Code of Military Justice (UCMJ).[656]

Unlike the Army JAG or the Air Force JAG, by statute the JAG of the Navy is a part of the Office of the Secretary.[657] The JAG of the Navy performs duties and functions specifically

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[649] *Id.* § 3031(b).
[650] *Id.* § 8031(b).
[651] *Id.* §§ 3033(d), 8033(d).
[652] *Id.* §§ 3037(c)(1), 8037(c)(1) (2010).
[653] *Id.* §§ 3037(e)(1), 8037(f)(1).
[654] *Id.* § 3037(c)(2). In the Army, the JAG Corps is a special branch of the Service, as that phrase is defined under 10 U.S.C. §§ 3064-3065 (2010).
[655] *Id.* § 8037(c)(2). The Air Force JAG is the official that designates qualified officers in the Air Force to perform functions as judge advocates, as provided in statute. 10 U.S.C. § 8067(g) (2010); U.S. Air Force Instruction (AFI) 51-102, *The Judge Advocate General's Department Air Force Instructions*, ¶ 2.4., at 1-2 (19 Jul. 1994); U.S. Air Force Instruction (AFI) 51-103, *Designation and Certification of Judge Advocates*, ¶ 1., at 1-2 (7 Dec. 2004).
[656] *Id.* §§ 801-806.
[657] In 1986, Senator Denton offered an explanation of the Department-level placement of the JAG in the DON, as part of a larger discussion of governance of two Services within a single Department. U.S. Senate, Committee on Armed Servs., *Department of Defense Reorganization Act of 1986 to Accompany S. 2295* (S. Rep. No. 99-280, at 169), Washington: Government Printing Office, 1986. Senator Denton expressed concern during the conference committee's consideration of the Department of Defense Re-organization Act of 1986 that using the Department of the Army's statutory construct as a model for the Department of the Navy would produce anomalous results. He stated,

> [T]he attempt to provide uniformity fails to accommodate the diversity among the Departments and the military services. For example, the Department of the Navy includes two services . . .

"under the direction of the Secretary," to include even those duties assigned under the Uniform Code of Military Justice.[658] The JAG is not part of Headquarters, Marine Corps,[659] and is only part of the Office of the Chief of Naval Operations by regulation, not statute.[660] Also, unlike the Army JAG or the Air Force JAG, the JAG of the Navy lacks statutory authority to "direct" judge advocates in their performance of duties.[661] The JAG is the Chief of the U.S. Navy JAG Corps only by regulation,[662] and while the JAG makes all judge advocate assignments in the U.S. Navy by statute, under that same statute, the Commandant makes all assignments of Marine judge

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> Functions that may, in the other Departments, fall properly under the Chief of Staff must, in the Navy, fall under the Service Secretary. That is, for example, the case with the Judge Advocate General . . ..

Id.

In addition, the JAG explained to the Panel that,

> The [JAG] . . . has both statutory and regulatory assignments at the Departmental level that transcend both Services and operate across the Department of the Navy as well as . . . Service responsibilities . . . for example, . . . the JAG's authority under Article 6 UCMJ to make inspections of military justice process in the field and to provide advice to the Secretary on matters of military justice . . . where the JAG would have a Departmental role as well as a Service role in terms of executing military justice functions.

VADM Houck Testimony, *supra* note 107, at 23-25.

[658] 10 U.S.C. § 5148(d). The Uniform Code of Military Justice (UCMJ) (Chapter 47, title 10) establishes independent statutory authority for each JAG to exercise certain military justice functions. The JAG of the Navy establishment statute provides that the JAG shall perform these UCMJ functions "under the direction of the Secretary." *Compare* 10 U.S.C. § 5148(d) ("The Judge Advocate General of the Navy, under the direction of the Secretary of the Navy, shall . . . perform the functions and duties and exercise the powers prescribed for the Judge Advocate General in chapter 47 of [title 10]), *with* §§ 3037 (Army), 8037 (Air Force) (not requiring the JAG to perform UCMJ functions under direction of the Secretary concerned).

[659] The SJA to CMC is part of Headquarters, Marine Corps.

[660] *See* SECNAVINST 5430.27C, *supra* note 15, ¶ 5., at 4; OPNAVNOTE 5430, *supra* note 24, enclosure (1). Under Secretarial instruction and CNO instruction, the JAG is the Special Assistant for Legal Services to the CNO. SECNAVINST 5430.27C, *supra* note 15, ¶ 5., at 4; OPNAVNOTE 5430, *supra* note 24, enclosure (1). In fact, the U.S. Navy is the only Service without a senior legal adviser designated by statute to serve within the Service Staff.

[661] *Compare* 10 U.S.C. § 5148(d) (Navy) (not providing the JAG of the Navy with the authority to direct judge advocates in the performance of their duties), *with* §§ 3037(c) (Army), 8037(c) (Air Force) (the JAG shall direct judge advocates in the performance of their duties). The JAG of the Navy supervises the provision of legal services by operation of Secretarial instructions. All of these instructions include defined roles for the JAG, but this does not mean that the JAG provides all legal advice in all of these areas. The JAG also exercises supervision and oversight of judge advocates in the U.S. Navy by operation of instruction from the CNO. *See* OPNAVNOTE 5430, *supra* note 24, enclosure (1).

[662] Article 0103 of Navy Regulations provides that: "United States Navy Regulations is the principal regulatory document of the Department of the Navy, endowed with the sanction of law, as to duty, responsibility, authority, distinctions and relationships of various commands, officials, and individuals." NAVREGS, *supra* note 17, art. 0103.

advocates.[663] By statute, the JAG provides independent legal advice to the Secretary of the Navy and to the CNO, but not to the Commandant.[664] By statute, the SJA to CMC provides independent legal advice to the Commandant, but not to the Secretary.[665]

2. JAG's Departmental Role under Statute

At the outset, the Panel notes that in describing the JAG's Departmental role, there is not always a clear demarcation between Departmental and Service functions. While recognizing the difference is more than just academic, the Panel believes for purposes of this study, it is unnecessary to make such definitive distinctions in every case. Rather, the Panel will refer to a function broadly and generally as "Departmental" if it is either inherently Departmental in nature (e.g., serve as Staff Assistant to the Secretary) or if it is assigned to the JAG for Department-wide application, regardless of whether it could be assigned or performed at the Service level (e.g., conducting inspections in the field in the supervision of the administration of military justice). The Panel will refer to a function as Service level when it is either assigned at the Service level (e.g., designating the JAG as the Special Assistant for Legal Services to the CNO), or when it is performed in every significant aspect at the Service level (e.g., the assignment of judge advocates).[666]

Chapter 513 of title 10 of the United States Code provides that there is, in the executive part of the Department of the Navy, a JAG who shall be appointed from judge advocates of the Navy *or* the Marine Corps.[667] There is also within the executive part, a Deputy JAG who shall

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[663] 10 U.S.C. § 806(a) (under the UCMJ, assignments of Marine judge advocates are made by direction of the Commandant of the Marine Corps, while Navy, Army, and Air Force judge advocate assignments are made upon recommendation of the JAG of the applicable Service).
[664] *Id.* § 5148(e).
[665] *See id.* § 5046(c).
[666] The Panel notes that while it is difficult to clearly delineate between the JAG's Departmental functions and Service-level functions, it appears to the Panel that the JAG does not, today, directly perform functions at the Service-level within the U.S. Marine Corps. Also on this point, the Panel notes that the Commandant of the Marine Corps has not assigned Service-level functions to the JAG.
[667] 10 U.S.C. § 5148(b) (stating that "The Judge Advocate General shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. He shall be appointed from judge advocates of the Navy or the Marine Corps who are members of the bar of a Federal court or the highest court of a State and who have had at least eight years of experience in legal duties as commissioned officers. The Judge Advocate General, while so serving, has the grade of vice admiral or lieutenant general, as appropriate.").

be appointed from judge advocates of the Navy *and* the Marine Corps,[668] and Assistant JAGs, one of whom may be detailed from judge advocates of the Navy[669] and one of whom may be detailed from judge advocates of the Marine Corps,[670] and an Office of the Judge Advocate General (OJAG).[671] The Deputy JAG and Assistant JAGs are discussed separately in Section VI.A.6., *infra*.

By statute, the JAG, while so serving, has the grade of vice admiral or lieutenant general (three stars).[672] Also by statute, under regulations prescribed by the Secretary of Defense, the Secretary of the Navy, in selecting an officer for recommendation to the President for appointment as the JAG, shall ensure that the officer selected is recommended by a board of officers that, insofar as practicable, is subject to the procedures applicable to selection boards convened under chapter 36 of title 10.[673]

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[668] *Id.* § 5149(a)(1) (2010) (stating that "There is a Deputy Judge Advocate General of the Navy who is appointed by the President, by and with the advice and consent of the Senate, from among judge advocates of the Navy and Marine Corps who have the qualifications prescribed for the Judge Advocate General.").

[669] *Id.* § 5149(b) (stating that "An officer of the Judge Advocate General's Corps who has the qualifications prescribed for the Judge Advocate General in section 5148(b) of this title . . . may be detailed as Assistant Judge Advocate General of the Navy.").

[670] *Id.* § 5149(c) (stating that "A judge advocate of the Marine Corps who has the qualifications prescribed for the Judge Advocate General in section 5148(b) of this title . . . may be detailed as Assistant Judge Advocate General of the Navy.")

[671] *Id.* § 5148(b) (stating that "There is in the executive part of the Department of the Navy the Office of the Judge Advocate General of the Navy.").

[672] *Id.* § 5148.

[673] *Id.* § 5148(b). The Secretary of the Navy instruction governing the selection of an officer for recommendation for appointment as the JAG provides in pertinent part that if the Secretary elects to use board procedures, U.S. Dep't of Navy, Sec'y of Navy Instr. 1401.3A, *Selection Board Membership*, ¶ 12., at 11 (Dec. 20, 2005), then the board shall be composed of five officers from the active-duty lists of the Navy and the Marine Corps, all serving in grades higher than that of the officers under consideration. *Id.* enclosure (3). Three of the officers must be unrestricted line officers in the U.S. Navy, one from each major warfare specialty. *Id.* One or more members may be Marine Corps officers and one or more members shall be officers of the Navy JAG Corps. *Id.* The Panel notes that the reference to one "or more" Marine Corps officers appears, on its face, to be irreconcilable with the requirements that the board be composed of only five members, three of whom must be Navy unrestricted line officers and one of whom must be a Navy JAG Corps officer.

As the JAG testified to the Panel, under the existing Secretarial policy, "The board to select the judge advocate general has been a one of one board" in which only the Deputy JAG is considered for selection. VADM Houck Testimony, *supra* note 107, at 418. For historical purposes, the first "JAG" is considered to have been a Marine Corps officer, Colonel William Butler Remey, who served from 1880-1892. *See* MajGen Ary Testimony, *supra* note 242, at 419. No Marine Corps officer has served in that position since that time, and since the establishment of the Navy JAG Corps in 1967, there has been only one instance in which Marine judge advocates were considered by a JAG selection board. VADM Houck Testimony, *supra* note 107, at 418-19; *see also* Letter from MajGen Vaughn A. Ary, USMC, Staff Judge Advocate to the Commandant, to Mr. Daniel J. Dell'Orto, Chairman, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy,

The JAG's primary statutory Departmental responsibilities and authorities are established in chapters 47, 53, 503, and 513 of title 10. As noted earlier, under chapter 503, section 5014 of title 10, the JAG is part of the Office of the Secretary of the Navy. The principal function of the Office is to assist the Secretary of the Navy in carrying out his responsibilities.[674]

Chapter 513, section 5148 of title 10 provides that the JAG shall, under the direction of the Secretary:

- perform duties relating to legal matters arising in the DON as may be assigned to him, and perform such other duties as may be assigned to him;
- perform the functions and duties of, and exercise the powers prescribed for, a Judge Advocate General in chapter 47 of title 10; and
- receive, revise, and have recorded the proceedings of boards for the examination of officers of the naval service for promotion and retirement.[675]

Subj: Follow up Comment on Proposed Authorities, enclosure (1), at 1 (27 Sep. 2010) [hereinafter MajGen Ary Authorities Letter]; Letter from General (Gen) James F. Amos, USMC, Commandant of the Marine Corps, to Mr. Daniel J. Dell'Orto, Chairman, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy (Oct. 29, 2010) [hereinafter Gen Amos Letter of Oct. 29, 2010].

The reference to using selection board procedures [to select a JAG] must be understood in the context of the Defense Officer Personnel Management Act (DOPMA) as it is implemented in chapter 36 of title 10. Under DOPMA, military officers are not considered by selection boards for promotion to general or admiral (O-10) or lieutenant general or vice admiral (O-9). Rather, officers are temporarily appointed to positions of importance and responsibility under 10 U.S.C. § 601, and, while serving, hold the temporary grades of general, admiral, lieutenant general, or vice admiral. Such officers typically have permanent grades at the two-star level (O-8) as a result of previous selection board action under DOPMA. Stated differently, under DOPMA, officers are considered by selection boards for promotion only through grades of major general or rear admiral (O-8). Thereafter, they may be temporarily appointed, without selection board action, to "601 positions" of importance and responsibility, and serve in grades O-9 or O-10. While serving in "601 positions" they continue to hold their permanent grades, which typically are at the two-star level (O-8).

In the case of the DON JAG, there are additional permutations. By statute, the JAG holds the grade of O-9 "while so serving." 10 U.S.C. § 5148. If a U.S. Navy or Marine judge advocate is appointed to serve as the JAG after serving previously as the Deputy JAG, then he or she would hold a permanent grade of O-8 from that prior service as the Deputy JAG. *See* 10 U.S.C. § 5149. However, if an officer is appointed as the JAG immediately after serving as the SJA to CMC, the JAG would most likely have the permanent grade of colonel. This is because the SJA to CMC statute provides that the SJA to CMC holds the grade of major general "while so serving." *Id.* § 5046.
As will be discussed in Section VI.B.1(a), *infra*, the Panel believes that the SJA to CMC should serve in a permanent grade of major general. This recommendation stands on its own, without regard to whether the SJA to CMC should be considered for appointment as the JAG.

[674] *Id.* § 5014(a).

[675] *Id.* § 5148(d).

Section 5148 also provides that the JAG is responsible for providing independent legal advice and opinions to the Secretary of the Navy (SECNAV).[676]

Chapter 47 of title 10 addresses the role of the JAG under the UCMJ,[677] and provides, in part, that the JAG or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice, and that the assignment for duty of judge advocates in the U.S. Navy shall be made upon recommendation by the JAG.[678] The JAG is also responsible for certifying military judges as "qualified for duty," (Article 26),[679] certifying trial and defense counsel as "competent to perform such duties," (Article 27),[680] establishing a court of criminal appeals (Article 66),[681] ordering cases for review by that court or the Court of Appeals for the Armed Forces (Articles 67 and 69),[682] and modifying or setting aside the findings or sentence in individual cases (Article 69).[683]

Chapter 53, section 1044 of title 10, U.S. Code, addresses the role of the JAG in the establishment and supervision of legal assistance programs.[684] It provides, in pertinent part: "Under such regulations as may be prescribed by the Secretary concerned, the Judge Advocate General (as defined in section 801(1) of this title), under the jurisdiction of the Secretary is responsible for the establishment and supervision of legal assistance programs under this section."[685]

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[676] *Id.* § 5148(e) (stating that "No officer or employee of the Department of Defense may interfere with - (1) the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Navy or the Chief of Naval Operations; or (2) the ability of judge advocates of the Navy assigned or attached to, or performing duty with, military units to give independent legal advice to commanders."). The provision of independent legal advice to the CNO is considered a Service-level function and is discussed further in Section VI.A.5., *infra*.
[677] *Id.* §§ 801, 806. Under Article 1 of the UCMJ: "The term 'Judge Advocate General' means, severally, the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security." *Id.* § 801(1). Article 1 also provides that "The Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy, shall be considered as one armed force." *Id.* § 801(2). That definition applies only within the context of chapter 47 of title 10. This means that the SJA to CMC is not a "JAG" for purposes of the UCMJ and has no original statutory authority to perform any of the functions assigned to the JAG.
[678] *Id.* § 806(a).
[679] *Id.* § 826(b).
[680] *Id.* § 827(b).
[681] *Id.* § 866(a).
[682] *Id.* §§ 867(a), 869(a).
[683] *Id.* § 869(b).
[684] *Id.* § 1044 (2010).
[685] *Id.* § 1044(b).

3. JAG's Departmental Role under Regulation

The Secretary of the Navy has prescribed Departmental responsibilities for the JAG, exercising his (the Secretary's) original authority under section 6011 of title 10,[686] as well as his authorities as provided for in chapters 47, 53, 503, and 513 of title 10. Specifically, the JAG reports directly to the Secretary[687] and serves as a Staff Assistant to the Secretary.[688] As a Staff Assistant, the JAG "provides or supervises the provision of all legal advice and related services throughout the Department of the Navy, except for the advice and services provided by the General Counsel,"[689] and he "provides legal and policy advice to [SECNAV] on military justice, administrative law, claims, operational and international law, and litigation involving these issues."[690]

SECNAV has also assigned JAG responsibilities for providing and supervising the provision of legal advice and related services throughout the Department of the Navy in the following areas: military justice; operational and international law; administrative law; legal assistance; and civil law; and, jointly with the General Counsel, in the areas of Freedom of Information Act (FOIA) and Privacy Act; intelligence oversight; and litigation.[691] Together with

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[686] *Id.* § 6011 (stating that the Secretary of the Navy shall issue United States Navy Regulations (NAVREGS)); *see also* NAVREGS, *supra* note 17, art. 0102.

[687] SECNAVINST 5430.27C, *supra* note 15, ¶ 7., at 4.

[688] NAVREGS, *supra* note 17, art. 0310; SECNAVINST 5430.7Q, *supra* note 5, ¶ 3.a.(2)(e), at 2, ¶ 7.c.(5), at 18; SECNAVINST 5430.27C, *supra* note 15, ¶ 4., at 2.

[689] NAVREGS, *supra* note 17, art. 0331, ¶ 1.(a). NAVREGS do not amplify what is meant by "supervises the provision of" legal advice and services; *see also* SECNAVINST 5430.27C, *supra* note 15, ¶ 4., at 2 (stating that "the JAG is responsible for providing and supervising the provision of legal advice and related services throughout the Department of the Navy. . .").

[690] NAVREGS, *supra* note 17, art. 0331, ¶ 1.(c); *see* SECNAVINST 5430.7Q, *supra* note 5, ¶ 7.c.(5)(b), at 18; *see* SECNAVINST 5430.27C, *supra* note 15, ¶ 7., at 4-5.

[691] SECNAVINST 5430.27C, *supra* note 15, ¶ 4., at 2-4. NAVREGS article 0331 and SECNAVINST 5430.27C both refer to the responsibility of the JAG to *supervise the provision* of legal services and advice. NAVREGS, *supra* note 17, art. 0331, ¶ 1.(a); SECNAVINST 5430.27C, *supra* note 15, ¶ 4., at 2. Although not amplified in NAVREGs, in SECNAVINST 5430.27C "Supervision of Legal Services," includes ensuring the ethical and professional practice of law (i.e., professional responsibility); certifying trial and defense counsel and military judges; commanding OJAG; and at the Navy Service-level, serving as the Chief of the JAG Corps. SECNAVINST 5430.27C, *supra* note 15, ¶ 3.a., at 1. Supervision of legal services may also include the implementation, execution, management, and oversight of the military criminal justice system at the trial and appellate levels, and inspecting Naval Legal Service Command offices, but this is less clear. *See id.* ¶ 4.a., at 2. Although the meaning of "supervising the provision of legal advice and related services" is subject to interpretation, it is clear that the concept does not allow the JAG to exercise plenary authority over judge advocates of the Navy and the Marine Corps, or to exercise direct supervision of U.S. Navy or Marine judge advocates outside OJAG. *See id.* ¶ 7., at 4-5; *see also* Section VI.A.7., *infra*, discussing decentralized command and control in the naval Services.

the General Counsel, the JAG provides legal advice on government ethics, standards of conduct, environmental law, and civilian personnel law.[692]

SECNAV has also assigned the JAG the primary responsibility for ensuring the ethical and professional practice of law by judge advocates and other covered U.S. Government (USG) and non-USG attorneys practicing under the cognizance of the JAG.[693]

In addition, SECNAV has also issued numerous instructions addressing Department-wide policies in specific functional areas, which include legal requirements and associated responsibilities for the JAG.[694] The JAG has responsibilities for, *inter alia*, the following: the Navy-Marine Corps Trial Judiciary; the Victim and Witness Assistance Program (VWAP); the clemency and parole systems; the law of war program; legal reviews of weapons systems; compliance with arms control agreements; international agreements; status of forces policies; consular protection of foreign nationals subject to the UCMJ; oversight of intelligence activities; special access programs, covert action activities, and sensitive activities; tax law matters; the Department's Privacy Act Program and FOIA Program; equal opportunity; publications in the Federal Register; and various environmental law regulations.[695]

In the Department of the Navy, "professional supervision" of judge advocates is akin to the function a state bar performs in establishing rules of professional responsibility and enforcing those rules through censure and debarment. In SECNAVINST 5430.27C, this concept is referred to as "ensuring the ethical and professional practice of law." SECNAVINST 5430.27C, *supra* note 15, ¶ 3.a., at 1.

A separate but related concept – "certification" of counsel under Article 27(b) of the UCMJ – is concerned with ensuring counsel are trained and licensed to practice law, and have successfully completed the prescribed training and education requirements to practice in military courts (e.g., completion of the Basic Lawyer Course at Naval Justice School).

[692] *Id.* ¶ 7., at 5. The Panel notes that since a principal purpose of this study is to examine authorities of the JAG, we have made little attempt to discuss authorities of the General Counsel. In some cases, authorities are clearly jointly performed by the General Counsel and the JAG, e.g., environmental law and ethics; in others cases, one or the other plays the predominant role, even though both have been assigned the same general responsibility.

[693] *Id.* ¶ 3.a., at 1-2. The JAG's responsibility extends to active-duty and reserve judge advocates in the Navy and Marine Corps. *Id.* It also extends to the following attorneys when they practice under the cognizance of the JAG: uniformed attorneys from other Services, civilian U.S. Government (USG) attorneys, and non-USG attorneys. *Id.* The JAG has issued rules and procedures on professional responsibility through JAGINST 5803.1C of Nov. 2004. JAGINST 5803.1C, *supra* note 635.

[694] All of the following instructions, *infra* note 695, issued by SECNAV include defined roles for the JAG, but this does not mean that the JAG provides all legal advice in all of the described areas.

[695] *See* U.S. Dep't of Navy, Sec'y of Navy Instr. 3300.1C, *Department of the Navy Law of War Program* (28 May 2009); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5840.8A, *Tax Law Matters Affecting Department of the Navy Military Personnel* (9 Apr. 2009); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5720.45C, *Publication of Department of the Navy Directives and Other Documents in the Federal Register* (25 Mar. 2009); *see* U.S. Dep't of Navy, Sec'y of

The Secretary of the Navy also approves the *Manual of the Judge Advocate General (JAGMAN)*, which is a Department-wide regulation, applicable to the Navy and Marine Corps, that implements the Uniform Code of Military Justice and sets standards for administrative investigations, legal assistance, the release of government information, certain international and environmental legal matters, admiralty law matters, and matters relating to the investigation and payment of claims and compliance with customs laws.[696]

Pursuant to Navy Regulations and Secretarial instructions, the JAG commands OJAG.[697] The JAG sets the organization, missions, and functions of OJAG.[698] OJAG supports the JAG in his execution of Departmental responsibilities.[699]

The JAG oversees, in conjunction with senior Navy and Marine judge advocates, the process whereby Department-wide standards are set for the training of judge advocates (and

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Navy Instr. 5000.34D, *Oversight and Management of Intelligence Activities, Intelligence-Related Activities, Special Access Programs, Covert Action Activities, and Sensitive Activities within the Department of the Navy* (3 Dec. 2008); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5000.2D, *Implementation and Operation of the Defense Acquisition System and the Joint Capabilities Integration and Development System* (Oct. 16, 2008); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5350.16A, *Equal Opportunity (EO) Within the Department of the Navy (DON)* (18 Dec. 2006); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5090.8A, *Policy for Environmental Protection, Natural Resources, and Cultural Resources Programs* (Jan. 30, 2006); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5090.7A, *Access to Ships and Shore Facilities, and Release of Information Regarding Navy Oil Spills* (Jan. 26, 2006); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5800.11B, *Victim and Witness Assistance Program* (Jan. 5, 2006); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5211.5E, *Department of the Navy (DON) Privacy Program* (28 Dec. 2005); *see* SECNAVINST 5400.40A, *supra* note 346; *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 1752.4A, *Sexual Assault Prevention and Response* (1 Dec. 2005); U.S. Dep't of Navy, Sec'y of Navy Instr. 1752.3B, *Family Advocacy Program (FAP)* (10 Nov. 2005); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 3820.3E, *Oversight of Intelligence Activities within the Department of the Navy (DON)* (21 Sep. 2005); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5090.6A, Environmental Planning for Department of the Navy Actions (Apr. 26, 2004); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5815.3J, *Department of the Navy Clemency and Parole Systems* (Jun. 12, 2003); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5710.23C, *Implementation of, and Compliance with, Arms Control Agreements* (21 Sep. 2002); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5720.42F, *Department of the Navy Freedom of Information Act (FOIA) Program*, (6 Jan. 1999); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5710.25B, *International Agreements* (23 Dec. 2005); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5820.4G, *Status of Forces Policies, Procedures, and Information* (14 Jan. 1990); *see* U.S. Dep't of Navy, Sec'y of Navy Instr. 5820.6, *Consular Protection of Foreign Nationals Subject to the Uniform Code of Military Justice* (5 Nov. 1968).

[696] *See generally JAGMAN*, *supra* note 341.

[697] NAVREGS, *supra* note 17, art. 0331; SECNAVINST 5430.7Q, *supra* note 5, ¶ 7.c.(5), at 18; SECNAVINST 5430.27C, *supra* note 15, ¶ 3., at 1.

[698] *See* JAGINST 5400.1A, *supra* note 351, ¶¶ 101.-102.a., at 1-1.

[699] OJAG also supports the JAG in his execution of Navy Service-level responsibilities: "As a staff office within Navy Secretariat, the Office of the Judge Advocate General's Corps [sic] (OJAG's) primary mission is to support the Judge Advocate General (JAG) in providing legal and policy advice to the Secretary of the Navy. In addition, OJAG supports JAG in advising and assisting the Chief of Naval Operations in formulating and implementing policies and initiatives pertaining to the provision of legal services within the Navy." http://www.jag.navy.mil/organization.htm.

other legal professionals) at the Naval Justice School, including the training of trial and appellate judges.[700] Navy and Marine judge advocates achieve their certifications to perform duties as trial or defense counsel, or to perform legal assistance services, upon successful completion of the Basic Lawyer Course at Naval Justice School.[701]

4. JAG's U.S. Navy Service Role Under Statute

Although the JAG's U.S. Navy Service-level functions are established primarily by regulations and instructions issued by SECNAV or the CNO, two functions are established directly by statute. Under section 806 of title 10, the assignment for duty of U.S. Navy judge advocates shall be made upon the recommendation of the JAG; under section 5148(e) of title 10, the JAG provides independent legal advice to the CNO.[702]

5. JAG's U.S. Navy Service Role Under Regulation

Under Navy Regulations and Secretarial instruction, the JAG is the Chief of the U.S. Navy JAG Corps.[703] As the head of the JAG Corps, the JAG is the principal advisor and sponsor on matters concerned with officers in the JAG Corps and enlisted personnel in the legalman rating, and serves as the spokesperson for professional matters within the military and civilian communities.[704]

Under Secretarial instruction and CNO instruction, the JAG is the Special Assistant for Legal Services to the CNO.[705] As the Special Assistant for Legal Services, the JAG is responsible for advising and assisting the CNO in formulating and implementing policies and

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[700] The Mission of the Naval Justice School (NJS) is to: "Train all Sea Service (Navy, Marine Corps and Coast Guard) judge advocates, and enlisted and civilian legal professionals to deliver quality legal services, promote justice, and enhance Sea Service fleet readiness." http://www.jag.navy.mil/njs.htm; *see also* COMNAVLEGSVCCOMINST 5450.3B, *supra* note 636, ¶ 3.a., at 1. NJS is overseen by a board of advisors, which approves the curricula for each academic year. CAPT Boock Testimony, *supra* note 381, at 171. Although NJS is primarily funded by the U.S. Navy, and is carried within the U.S. Navy command echelon, its faculty is composed of U.S. Navy and Marine judge advocates and enlisted personnel, and the Marine Corps provides some funding. *Id.* at 151, 175-76; *see also* VADM Houck Memorandum (Ser 00/0098), *supra* note 172, ¶ 4.c., at 5-6; CAPT Boock Presentation, *supra* note 382, at 4-5.

[701] *See* CAPT Boock Testimony, *supra* note 381, at 153-54.

[702] 10 U.S.C. § 5148(e). The JAG also, by statute, provides independent legal advice to the Secretary, but not to the Commandant.

[703] NAVREGS, *supra* note 17, art. 0331; SECNAVINST 5430.7Q, *supra* note 5, ¶ 7.c.(5), at 18; SECNAVINST 5430.27C, *supra* note 15, ¶ 3., at 1.

[704] NAVREGS, *supra* note 17, art. 1009.

[705] SECNAVINST 5430.27C, *supra* note 15, ¶ 5., at 4; OPNAVNOTE 5430, *supra* note 24, enclosure (1).

initiatives pertaining to the provision of legal services within the U.S. Navy.[706] The CNO, in turn, has assigned 15 specific Service-level functions to the JAG, and assigned him a general responsibility to act on matters as directed. Included within the 15 specific Service-level functions, the JAG:

- oversees and supervises the provision of legal services by Naval Legal Service Command, the OJAG, and Navy SJA Offices[707] in support of CNO operating forces and shore activity commanders;
- administers and supervises the Navy's legal assistance program;
- advises the CNO on military personnel law matters;
- supervises U.S. Navy judge advocates serving as ethics counselors;
- administers and supervises the investigation and adjudication of claims;
- conducts legal reviews of weapons and weapons systems;
- advises CNO and shore activity commanders on international agreements;
- acts as the point of contact for CNO operating forces and shore activity commanders to ensure consistency of legal compliance, guidance, policies, procedures, objectives, training, and support;
- serves as liaison for CNO with DoD components, governmental agencies, and agencies outside the government on legal services matters affecting the Navy; and
- represents CNO in the interagency process and at international organizations (e.g., the International Maritime Organization), regarding international and operational law issues.[708]

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[706] *See* discussion *supra* in note 666 for a discussion of the blurring between the JAG's Departmental functions and Service-level functions.

[707] As noted earlier, unlike the Army JAG, the Navy JAG does not "direct the members of the Judge Advocate General's Corps in the performance of their duties." *See* 10 U.S.C. § 3037(c); *see also* 10 U.S.C. § 8037 (providing that the Air Force JAG "shall direct the officers of the Air Force designated as judge advocates in the performance of their duties"). In contrast to the Army and Air Force JAGs, the Navy JAG, through CNO Instruction, oversees and supervises the provision of legal services by U.S. Navy judge advocates. *See* OPNAVNOTE 5430, *supra* note 24, enclosure (1).

[708] OPNAVNOTE 5430, *supra* note 24, enclosure (1).

Under both Secretarial instruction and CNO instruction, the JAG has responsibilities as a "capability sponsor" within the U.S. Navy.[709] The Secretarial instruction provides: "As the capability sponsor for the Navy legal community, the JAG is responsible for building a coherent legal community and determining the best possible allocation of personnel assets."[710] The CNO instruction provides: "As the JAG Corps capability sponsor, [the JAG is] responsible for building a coherent legal community, monitoring staffing levels and workload trends, and advising CNO concerning the appropriate distribution of assets to ensure the effective and efficient provision of legal services."[711]

As discussed in Section VI.A.7., *infra*, while the JAG has been assigned responsibility by the Secretary and the CNO to build a coherent legal community in the U.S. Navy, he has not been assigned commensurate authorities to execute that responsibility.

6. Deputy JAG and Assistant JAGs – Departmental and Service Roles

Under chapter 513 of title 10, within the executive part of the Department, there is an Office of the Judge Advocate General (OJAG) that includes within it a Deputy JAG and Assistant JAGs (AJAGs).[712] The Deputy JAG shall be appointed from among judge advocates of the Navy and the Marine Corps who have the qualifications prescribed for the JAG.[713] The Deputy JAG is appointed in the permanent grade of rear admiral or major general.[714]

By statute – as with the JAG – under regulations prescribed by the Secretary of Defense, the Secretary of the Navy (SECNAV), in selecting an officer for recommendation to the President for appointment as the Deputy JAG, shall ensure that the officer selected is

[709] SECNAVINST 5430.27C, *supra* note 15, ¶ 3., at 1; OPNAVNOTE 5430, *supra* note 24, enclosure (1), ¶ 14.
[710] SECNAVINST 5430.27C, *supra* note 15, ¶ 3., at 1.
[711] OPNAVNOTE 5430, *supra* note 24, enclosure (1), ¶ 14.
[712] 10 U.S.C. § 5149.
[713] *Id.* The qualifications to be the JAG are: be a member of the bar of a Federal court or the highest court of a State and have at least eight years of experience in legal duties as a commissioned officer.
[714] *Id.* § 5149(a)(1).

recommended by a board of officers that, insofar as practicable, is subject to the procedures applicable to selection boards convened under chapter 36 of title 10.[715]

By statute, an officer of the Navy JAG Corps who has the qualifications prescribed for the JAG may be detailed to serve as Assistant JAG, and a judge advocate of the Marine Corps who has the qualifications prescribed for the JAG may be detailed as Assistant JAG.[716] That construct reflects an original Congressional intention that there be two Assistant JAGs within the Department of the Navy – one a Navy judge advocate and the other a Marine judge advocate.[717]

By statute, an Assistant JAG, while so serving, shall hold the grade of rear admiral (lower half) or brigadier general, if he is appointed to such grade by the President, by and with the advice and consent of the Senate.[718] The statute also recognizes that an Assistant JAG may serve in a grade lower than rear admiral (lower half) or brigadier general.[719] In such circumstances, if the officer concerned has served at least twelve months as an Assistant JAG, the officer may, in the discretion of the President, be retired with the rank and grade of rear admiral (lower half) or

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[715] *Id.* § 5149(a)(2). The same Secretarial instruction and board membership rules that apply to the JAG selection board apply to the Deputy JAG selection board. *See supra* discussion at note 673.

[716] *Id.* § 5149(c)-(d).

[717] Section 5149 of title 10 was part of the JAG Corps Act of 1967, and was a product of compromise between the House and the Senate. An Act to Establish a Judge Advocate General's Corps in the Navy, Pub. L. No. 90-179, 81 Stat. 545 (1967). The House proposed the creation of two Assistant JAG (AJAG) positions – one Navy and one Marine Corps – both of which were required to be filled by officers in a flag or general officer grade. H.R. 12910, 90th Cong. (1st sess. 1967), at 113 Cong. Rec. 27483, 27484 (daily ed. Oct. 2, 1967). The Senate, reacting to the Navy's concerns about whether there were enough flag officer "numbers" to accommodate two positions, wished to create a single AJAG position, which would be filled by either a Navy or Marine flag or general officer. S. Rep. No. 90-748, 90th Cong. (1st Sess. 1967), *reprinted in* 1967 U.S.C.C.A.N. 2113, 2116. Senator Ervin sponsored a compromise amendment that created two AJAG positions – one Navy and one Marine – whose incumbents could serve as a flag or general officer and/or could retire in the higher grade. Senator Ervin noted that he viewed the Navy and Marine Corps as being "somewhat shortsighted in their unwillingness to share the flag and general officer positions with uniformed lawyers." S. Rep. 90th Cong. (1st sess. 1967), at 113 Cong. Rec. 32764 (daily ed. Nov. 16, 1967),

The concerns of Navy leadership about flag officer numbers refers to the unofficial Senate Armed Services Committee (SASC) limits on flag numbers, the so-called "Stennis Ceiling." The "Stennis Ceiling" was the popular name for an accord among members of the SASC to not recommend the confirmation of flag or general officers for any of the Services beyond agreed-upon numbers, regardless of statutory authorization. Jay M. Siegel, *Origins of the Judge Advocate General's Corps: A History of Legal Administration in the United States Navy, 1775-1967*, Government Printing Office (1997), at 678 n.12-117 (citing statement of Senator Richard B. Russell of Georgia).

[718] 10 U.S.C. § 5149(b)-(c).

[719] *Id.*

brigadier general.[720] The President has delegated to SECNAV the authority to retire an AJAG in the grade of rear admiral (lower half) or brigadier general.[721]

Under Secretarial instruction, there are currently four Assistant JAG positions within the Department of the Navy, as follows: AJAG (Civil Law); AJAG (Operations and Management); AJAG (Military Justice); and AJAG (Chief Judge).[722] As a matter of current administrative practice, U.S. Navy judge advocates serve as the AJAGs for Civil Law, Operations and Management, and Chief Judge, and a Marine judge advocate is detailed as the AJAG (Military Justice).[723]

The Assistant JAGs, under Secretarial instruction, are competitively selected by flag and general officer selection boards, which employ statutory procedures applicable to promotion selection boards to the maximum extent practicable.[724] As a matter of policy, as reflected in Secretarial instruction, the Assistant JAGs do not serve in the grades of rear admiral (lower half) or brigadier general while on active duty, even though the Assistant JAG positions are recognized by the Secretary to be "flag and general officer equivalent positions, with duties and responsibilities commensurate with those grades."[725] The DON has opted to have the Assistant JAGs serve in lower grades due to the numerical limitations of flag and general officers.[726]

Also by Secretarial instruction, an officer serving as an Assistant JAG may not be retired in the grade of rear admiral (lower half) or brigadier general, unless he or she has served in an

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[720] *Id.*

[721] U.S. Dep't of Defense, Dir. 5160.59, *Delegation of Authority Under Executive Order 11390* (Apr. 14, 2004); *see* Exec. Order No. 11390, 33 Fed. Reg. 841 (Jan. 22, 1968).

[722] U.S. Dep't of Navy, Sec'y of the Navy Instr. 1800.3, *Retirement of the Assistant Judge Advocate General of the Navy* (3 Feb. 2009) [hereinafter SECNAVINST 1800.3].

[723] Letter from VADM James W. Houck, JAGC, USN, Judge Advocate General of the Navy, to Mr. Daniel J. Dell'Orto, Chairman, Independent Review Panel (Ser 00/0106), 1 (Sep. 29, 2010) [hereinafter VADM Houck Letter (Ser 00/0106)]. The Panel notes that SECNAVINST 1800.3, itself, does not identify individual AJAG positions with officers from particular Services.

[724] SECNAVINST 1800.3, *supra* note 722, ¶ 2.b., at 1.

[725] *Id.* ¶ 3.a., at 2.

[726] VADM Houck Letter (Ser 00/0106), *supra* note 723, at 1 (providing that "Section 5149 of title 10, U.S. Code, creates two statutory positions, both titled AJAG of the Navy. Per section 5149, one JAG of the Navy is an officer of the [JAG] Corps and the other is a judge advocate of the Marine Corps. Each AJAG of the Navy may hold the grade of O-7 while so serving, or, in the alternative, at the discretion of the Secretary of the Navy, may retire with the rank and grade of O-7 after at least 12 months of satisfactory service in a lower rank or grade. Based on numerical limitations of flag and general officers, the Department of the Navy has opted for the alternative practice of promoting AJAGs upon retirement.").

Assistant JAG position for at least three years, and for at least one year has been detailed as a "statutory" Assistant JAG of the Navy.[727] The construct of having officers serve in a "regulatory" Assistant JAG position for three years while being detailed to a "statutory" Assistant JAG position for at least one of the three years, permits the DON to rotate the "statutory" U.S. Navy Assistant JAG position among three officers. The "statutory" Marine Corps Assistant JAG position is not rotated among officers. The Marine judge advocate detailed as the Assistant JAG (Military Justice) is selected by a Marine Corps general officer promotion selection board and serves a full three years detailed as a "statutory" Assistant JAG of the Navy.

The JAG advised the Panel that, in his view, it is imperative that the judge advocate leadership structure include four Assistant JAGs, eligible for O-7 retirement.[728] In his testimony, the JAG also stated that he was open to the idea of rebalancing the detailing of U.S. Navy judge advocates and Marine judge advocates to the four Assistant JAG positions and to using the Marine Corps Assistant JAG statute on a rotational basis as is done with the Navy JAG Corps Assistant JAG statute.[729]

The JAG also advised the Panel that in 2008, the DON developed a legislative proposal to have the Assistant JAG positions modified into permanent one-star (O-7) positions with off-setting relief provided against the overall numerical limitations for flag and general officers. This proposal was made with the support of SECNAV and the CNO, in recognition of the importance of those positions. The proposal was submitted to the Office of the Secretary of Defense (OSD), but OSD took no further action on it.[730]

The Deputy JAG and the Assistant JAGs do not have specific functions assigned to them by statute, other than succeeding to the position of the JAG in certain circumstances.[731] However, by U.S. Navy service instruction, the Deputy JAG performs

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[727] SECNAVINST 1800.3, *supra* note 722, ¶ 3.b., at 2; VADM Houck Letter (Ser 00/0106), *supra* note 723, at 1-2.
[728] VADM Houck Letter (Ser 00/0106), *supra* note 723, enclosure (1).
[729] VADM Houck Testimony, *supra* note 107, at 443.
[730] *Id.* at 179-80. VADM Houck opined that a legislative proposal to make the Assistant JAGs permanent one-stars, today, was not realistic given the existing budgetary climate, and in view of SECDEF's scrutiny of flag and general officer positions. *Id.* at 180-81.
[731] 10 U.S.C. § 5149(d)-(e) (providing that: "(d) When there is a vacancy in the Office of the Judge Advocate General, or during the absence or disability of the Judge Advocate General, the Deputy Judge Advocate General shall perform the duties of the Judge Advocate General until a successor is appointed or the absence or disability

a significant U.S. Navy Service-specific function as Commander, Naval Legal Services Command (NLSC).[732] NLSC has principal responsibilities within the U.S. Navy for the delivery of courts-martial services, legal assistance services, and the provision of command advice to commands lacking their own dedicated staff judge advocate.[733] Also, with regard to the NLSC command structure, the Assistant JAG (Operations and Management) serves as the NLSC Deputy Commander for Region Legal Services Offices.[734]

The JAG has assigned to OJAG an additional function to support the JAG in the execution of his role as the Special Assistant for Legal Services to the CNO.[735] It

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ceases. (e) When subsection (d) cannot be complied with because of the absence or disability of the Deputy Judge Advocate General, the Assistant Judge Advocates General, in the order directed by the Secretary of the Navy, shall perform the duties of the Judge Advocate General.").

[732] NLSC is an echelon 2 command in the U.S. Navy under the cognizance of the CNO. *See* OPNAVNOTE 5400, *supra* note 34, enclosure (4); *see also* OPNAVINST 5450.189B, *supra* note 34, ¶ 3.b., at 1. The latter instruction was signed by the JAG under his authority as the Special Assistant to the CNO for Legal Services. It states that the Secretary of the Navy directed that the Deputy JAG be assigned as the Naval Legal Service Command (NLSC) Commander on January 31, 1989 in order to permit the JAG to perform his primary duty of providing advice and support to the Secretary of the Navy, the CNO, and the Commandant; and to separate the formulation of Navy legal policy from the provision of legal services in the field. The Panel notes that the JAG's statutory role to provide advice to the Commandant was eliminated subsequent to the 1989 designation of the Deputy JAG to serve as the NLSC Commander. As noted earlier, currently the SJA to CMC is the only uniformed lawyer with statutory responsibility to advise the Commandant.

[733] *See* OPNAVINST 5450.189B, *supra* note 34, enclosure (1); *see also* VADM Houck Testimony, *supra* note 107, at 79-80, 105-08; VADM Houck Presentation, *supra* note 4, at 30-38.

[734] VADM Houck Testimony, *supra* note 107, at 104-05; VADM Houck Presentation, *supra* note 4, at 37. The Assistant JAG (Operations and Management) used to serve as the NLSC Vice Commander, but those duties were changed as part of NLSC realignment on October 1, 2010. VADM Houck Testimony, *supra* note 107, at 102-03. The Vice Commander position was eliminated and separate Deputy Commanders were established for RLSOs and NLSOs, in order to enhance the independence of the defense function (which resides within NLSOs) and the accountability for both the prosecution (RLSO) and defense (NLSO) functions. DoD IG Report, *supra* note 377, ¶ 8., at 62. As briefed to the Panel, the JAG has established separate chains of command within NLSC for the defense and prosecution functions, and is considering establishment of a separate Trial Defense Command. VADM Houck Testimony, *supra* note 107, at 99-100; VADM Houck Presentation, *supra* note 4, at 36. Currently, the U.S. Navy is the only Service that does not have a separate defense function. DoD IG Report, *supra* note 377, at 61-62; *see also* VADM Houck Testimony, *supra* note 107, at 99-100 (stating that the Trial Defense Command "isn't a novel concept. All the other services have this, and I believe . . . that we need to go there.").

[735] "As a staff office within Navy Secretariat, the Office of the Judge Advocate General's Corps (OJAG's) [sic] primary mission is to support the Judge Advocate General (JAG) in providing legal and policy advice to the Secretary of the Navy. In addition, OJAG supports JAG in advising and assisting the Chief of Naval Operations in formulating and implementing policies and initiatives pertaining to the provision of legal services within the Navy." http://www.jag.navy.mil/organization.htm; *see also* JAGINST 5400.1A, *supra* note 351, ¶¶ 101.-102.a., at 1-1. The Panel notes that, technically, the JAG is in the Office of the Secretary and OJAG is in the executive part of the Department.

follows, therefore, that all the Assistant JAGs support the JAG in fulfilling his assigned U.S. Navy Service functions.

Before turning to the question of whether the JAG requires any additional authority over manpower policies or assignments, the Panel desires to take this opportunity to comment on both the rank and composition of the Assistant JAG positions within the Department of the Navy.

The Panel strongly supports the JAG's view that these positions are vitally important to the Department. The Panel also concurs that the Assistant JAG positions are "flag and general officer equivalent positions, with duties and responsibilities commensurate with those grades."[736] Accordingly, the Panel believes these positions warrant flag/general officer rank. The Panel notes that there are only three active-duty flag/general officer judge advocate positions within a Department that includes two military services, and currently has more than 1,200 active-duty judge advocates. This is a ratio of less than one-quarter of one percent of active-duty judge advocate end-strength.[737] The Panel further believes that the existing scheme, whereby the Assistant JAGs receive "tombstone" promotions upon retirement after having served as captains or colonels, has a tendency to undermine both the integrity of the offices of the Assistant JAGs, and the credibility of the Navy and Marine judge advocate communities as a whole. In a less constrained fiscal environment, consistent with the DON's previous legislative proposal, the Panel would recommend that the Assistant JAG positions be converted into permanent O-7 positions with off-setting relief from flag and general officer numerical limits.[738] However, given the existing budgetary climate the Panel believes it is unrealistic to make such a recommendation at this time.

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[736] SECNAVINST 1800.3, *supra* note 722, ¶ 3.a., at 2.

[737] Although inter-Service and inter-Department comparisons have limited utility in defining requirements, to the extent they provide relevant benchmarks, the Panel notes that the Army has 5 active component general officers for an active component judge advocate inventory of more than 1,800 officers, and the Air Force has 6 active component general officers for an active component judge advocate inventory of more than 1,200 officers. *See* Tables 2 & 8, *supra* Section I.D. and Section III.A.

[738] *See* VADM Houck Testimony, *supra* note 107, at 178-81; *see* VADM Houck Presentation, *supra* note 4, at 65; *see* VADM Houck Letter (Ser 00/0106), *supra* note 723, enclosure (1).

Lastly, the Panel applauds the JAG's willingness to consider rebalancing the four Assistant JAG positions between the U.S. Navy and the Marine Corps. In the view of the Panel, two of the Assistant JAG positions should be filled by Marine judge advocates and two filled by U.S. Navy judge advocates. Accordingly, the Panel recommends that the DON consider adopting the rotational process now being used by the U.S. Navy[739] to support the service of two Marine judge advocates and two U.S. Navy judge advocates in four "regulatory" Assistant JAG positions, with each Service rotating the formal "detailing" of its respective officers to the "statutory" Assistant JAG positions in order to make the officers eligible to retire as a rear admiral (lower half) or brigadier general.

7. Whether Additional Authority for the JAG Over the Manpower Policies and Assignments of Navy Judge Advocates is *Warranted*?

In answering the foregoing question, the Panel believes it especially important to emphasize three bedrock principles of authority within the Department of the Navy, which are founded upon law, regulation, and doctrine. One, naval forces, of necessity, are organized and operate under decentralized command and control.[740] This decentralized organization requires a culture in the sea Services in which responsibility and authority are pushed to the lowest practical level.[741] Two, delegation of authority is an essential element of decentralized command and control.[742] And three, authority must be commensurate to responsibility.[743]

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[739] *See* VADM Houck Testimony, *supra* note 107, at 178-81; *see* VADM Houck Presentation, *supra* note 4, at 65; *see* VADM Houck Letter (Ser 00/0106), *supra* note 723, enclosure (1).

[740] *See* Office of the Chief of Naval Operations, *Naval Command and Control (NDP 6)*, 54 (19 May 1995) [hereinafter *NDP 6*] ("The pace, complexity, and dispersed nature of modern naval warfare demand that command be decentralized during execution. The on-scene commander must be free to exercise initiative based on his understanding of the situation and his knowledge of the commander's intent.").

Within DoD "command and control" means: "The exercise of authority and direction by a properly designated commander over assigned and attached forces in the accomplishment of the mission. Command and control functions are performed through an arrangement of personnel, equipment, communications, facilities, and procedures employed by a commander in planning, directing, coordinating, and controlling forces and operations in the accomplishment of the mission." Joint Chiefs of Staff, Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms*, 65 (8 Nov. 2010, as Amended Through 31 Dec. 2010). Doctrinally, the Naval Services have adopted the DoD definition. *See generally* NDP 6, *supra*.

[741] Admiral John C. Harvey, Jr., Commander, U.S. Fleet Forces, *Serial 002 - Command and Control*, ¶ 2., at 1 (undated).

[742] *See* NAVREGS, *supra* note 17, art. 1022 (stating that: "The delegation of authority and the issuance of orders and instructions by a person in the naval service shall not relieve such person from any responsibility imposed upon him or her. He or she shall ensure that the delegated authority is properly exercised and that his or her orders and instructions are properly executed."). Under Navy Regulations article 0312, the Secretary has

With that as background, the Panel finds that the Secretary and the CNO have assigned the JAG responsibilities as a "capability sponsor," to include a specific responsibility – "to build a coherent legal community."[744] That specific responsibility – "to build" – is identified separately from the responsibilities to monitor staffing levels and advise the CNO on the distribution of judge advocate assets.[745] It appears, in short, that the responsibility "to build" entails more than merely monitoring the judge advocate community and making recommendations to the CNO concerning the distribution of manpower assets.

As we discussed in detail in Section II of the report, *supra*, under the Navy's governing manpower regulation, the JAG is not a Budget Submitting Office (BSO)[746] and he has no authority to generate or modify judge advocate manpower determination made by BSOs. In addition, while the JAG has influence in the judge advocate manpower determinations made by BSOs and in the management of the judge advocate community within the Bureau of Naval Personnel, his input is informal and non-binding.

The JAG's lack of authority within the Navy's manpower management system is not entirely remedied by his standing "organizational authority" as a Staff Assistant to the Secretary, or by his command authority within OJAG, or by his delegated authority as the Chief of the JAG Corps. Simply stated, those latter general authorities do not extend to or include specific authorizations within the Navy manpower management system, commensurate to the assigned responsibility to build a coherent legal community.

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promulgated standing delegations of authority to his staff assistants — within prescribed limits — to organize their commands or offices. "Subject to the approval or guidance of the Secretary of the Navy, the Civilian Executive Assistants, the Chief of Naval Operations, the Commandant of the Marine Corps and the *Staff Assistants* are individually authorized to organize, assign and reassign responsibilities *within their respective commands or offices*, including the establishment and disestablishment of such component organizations as may be necessary . . . ." *Id.* art. 0312 (emphasis added).

[743] Article 0702 of the Navy Regulations provides in pertinent part: "Commanders shall be responsible for the satisfactory accomplishment of the mission and duties assigned to their commands. *Their authority shall be commensurate with their responsibilities*." *Id.* art. 0702 (emphasis added.)

[744] SECNAVINST 5430.27C, *supra* note 15, ¶ 3., at 1; OPNAVNOTE 5430, *supra* note 24, ¶ 14. of enclosure (1).

[745] OPNAVNOTE 5430, *supra* note 24, ¶ 14 of enclosure (1) (providing in pertinent part: "As the JAG Corps capability sponsor, [the JAG is] responsible for building a coherent legal community, monitoring staffing levels and workload trends, and advising CNO concerning the appropriate distribution of assets to ensure the effective and efficient provision of legal services.")

[746] *See generally* OPNAVINST 1000.16K, *supra* note 47. In response to Panel questioning, the JAG stated that he did not need to be a Budget Submitting Office (BSO) within the Navy and that if he were a BSO it would entail significant investment in overhead. VADM Houck Testimony, *supra* note 107, at 241-43.

The Panel recommends, therefore, that the Secretary and the CNO identify, in coordination with the JAG, the specific authorities that are required to fully execute the JAG's assigned capability sponsorship duties, including his assigned responsibility to build a coherent legal community.[747] Once those authorities are identified, they should be assigned to the JAG by instruction or regulation, or both.

With regard to the assignment of U.S. Navy judge advocates, the JAG already has all the authority necessary, by operation of Article 6 of the Uniform Code of Military Justice (UCMJ).

8. Whether Additional Authority for the JAG Over the Manpower Policies and Assignments of Marine Judge Advocates is *Warranted*?

With regard to the authority of the JAG over the manpower policies and assignments of Marine judge advocates, the Panel notes that currently the JAG's authority is limited to:

- command authority over Marine judge advocates assigned to OJAG;
- certification of trial and defense counsel and military judges, under Article 27(b) of the UCMJ;
- certification to perform legal assistance services, under chapter 53, section 1044 of title 10;
- designation of Marine officers as "judge advocates" under Secretarial regulation;[748] and

[747] The Panel notes that the role of a "capability sponsor" is not defined in the Navy's Manpower Management System. However, the terms CAPABILITY and SPONSOR are separately defined as follows:

• "CAPABILITY: The ability to execute a specified course of action." OPNAVINST 1000.16K, *supra* note 47, appendix B to enclosure (1), at B-3.

• "SPONSOR: A broad term covering responsibilities assigned a command, bureau, or office in support of a designated project. Sponsor responsibility may include: justification of funds, program objectives, technical guidance, procurement, manpower, training, and other means." *Id.* appendix B to enclosure (1), at B-17. Although OPNAVINST 1000.16K provides that the Chief of Naval Personnel is the "Single Manpower Resource Sponsor" for CNO, it also recognizes and assigns to warfare enterprises and enablers, formal authorities for influencing manpower policies across BSOs. *Id.* ¶ 6. of enclosure (1), at 1-4. The Panel notes that such a system may serve as a model for the JAG.

[748] U.S. Dep't of Navy, Sec'y of Navy Instr. 1120.9A, *Designation of Officers of the Regular Marine Corps and Marine Corps Reserve as Marine Corps Judge Advocates*, ¶ 4., at 2 (25 Oct. 1988). This regulation delegates authority to the JAG to determine whether an officer may be designated a "judge advocate" within the Marine Corps, and thereby practice law in general, irrespective of practice area. *Id.* ¶ 6.g., at 3. The requirements for designation are: (1) to be recommended by the Commandant, and (2) to be certified by the JAG under Article 27(b). *See id.*

- professional supervision (i.e., establishing and enforcing standards of professional conduct) under Secretarial regulation.[749]

The JAG has no authority or direct role in the Marine Corps manpower management system or in the assignment of judge advocates in the Marine Corps.

The JAG testified that he did not believe that new or additional authority for the JAG with respect to manpower policies and assignments was warranted, arguing instead that his indirect oversight role at the Department level was adequate. Specifically, the JAG stated,

> Within the Marine Corps, I do not believe that the JAG needs additional authority. What I do believe is that there is a close dialogue required with the [S]taff [J]udge [A]dvocate to the Commandant to include an aggressive Article 6 inspection program[750] that the SJA is able to carry out and has the authority to carry out.
>
> If we were properly configured within the Marine Corps - and I believe that we are not, and I also believe that there [are] some delegations that we can do productively at the [S]ecretariat level - if we were to do those things, which are within our power to do and we are on the threshold of doing, irrespective of any other changes that could be contemplated, I believe that we would have the right authority for the JAG, the right authority for the SJA to CMC, and that in those events where the JAG observed that things in the Marine Corps were not to the JAG's liking in terms of the delivery of legal services, that, in those extreme – and I believe they would be extreme – circumstances, that the JAG has the ability to go to the Secretary and to raise these issues with the Secretary, who certainly has the ability to then speak to the Commandant about it and to deal with it that way. So I don't believe, to be specific about it, that the JAG needs a direct line of authority over the [S]taff [J]udge Advocate to the Commandant.[751]

The Panel concurs that, to the extent the JAG's departmental responsibilities require oversight of manpower management and assignments of Marine judge advocates, he can adequately exercise that role with his current title 10 and regulatory authorities.

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[749] SECNAVINST 5430.27C, *supra* note 15, ¶ 4.c., at 3.
[750] The SJA to CMC conducts Article 6 inspections in the Marine Corps under longstanding agreement with the JAG. *LEGADMINMAN*, *supra* note 46, ¶ 22004., at 22-5.
[751] VADM Houck Testimony, *supra* note 107, at 244-45.

The Panel further finds that additional authority for the JAG over Marine judge advocate manpower policies and assignments is not necessary or warranted. The responsibility for manpower policies and assignments within the Marine Corps has historically been assigned to the Commandant by both statute and regulation.[752] The Panel believes the Commandant, with the assistance of the SJA to CMC, is effectively managing judge advocate manpower (i.e., structure, inventory, and assignments) to meet Service, Departmental, and Joint legal requirements, and to ensure community health (i.e., recruiting, retention, and education) and proper career progression (i.e., promotions) for Marine judge advocates.[753] Moreover, the JAG is not in the best position to exercise additional authority in these areas within the Marine Corps, given the Service's unique requirements for community health and career progression of Marine judge advocates.[754] Lastly, transferring authority from the Commandant to the JAG could marginalize the SJA to CMC as a legal voice within his Service. This marginalization would be contrary to the Panel's view, as described later in this report, that the role of the SJA to CMC needs to be clarified and strengthened.

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[752] *See* U.S. House Conference Report, *Goldwater-Nichols Department of Defense Reorganization Act of 1986 to Accompany H.R. 3622* (H. Rep. No. 99-824) (1986). Congress recognized that "each service should have a separate military headquarters staff within the executive part of its Military Department" which should "continue to conduct the functions for which the effective representation of the military point of view is invaluable . . . . Key among these functions are: (1) manpower and personnel. . .." *Id.* at 151. Congress grants authority to the Commandant for organizing, training, administering and maintaining Marine forces, to be executed under Secretarial direction and control. 10 U.S.C. §§ 5013, 5042. The Secretary has also delegated specific manpower functions to the Commandant by regulation, including the ability: "To plan for and determine the present and future needs, both quantitative and qualitative, for manpower, including reserve and civilian personnel, of the United States Marine Corps." NAVREGS, *supra* note 17, art. 0505., ¶ 2.e., at 31. With respect to judge advocates specifically, Congress provides: "The **assignment** for **duty** of judge advocates of the Marine Corps shall be made *by direction of the Commandant of the Marine Corps*." 10 U.S.C. 806(a) (emphasis added).

[753] *See* Section II, *supra*, and VI.B.3., *infra*, for further elaboration on the effectiveness of the Marine Corps' manpower policies and assignments of judge advocates.

[754] *See generally* Chairman, Joint Chiefs of Staff Report, *Roles, Missions, and Functions of the Armed Forces of the United States*, III-48 to -49 (Feb. 1993) (stating: "Moreover, while judge advocates have common legal skills, they serve first as officers of their particular Services, subject to the same performance standards, regulations, policies, and procedures as all other officers of their Service. Their practice of law is predicated upon, and intertwined with, the unique force structure, operational context, and policy decisions of their Service.").

B. Staff Judge Advocate to the Commandant

1. Departmental and Service Role

a) Statutory Role

In chapter 506, section 5046 of title 10 – the SJA to CMC establishment statute – Congress provides that the SJA to CMC shall be appointed by the President from amongst judge advocates of the Marine Corps, and *while so serving* hold the grade of major general.[755] Appointments will be based on a recommendation from the Secretary of the Navy (SECNAV), which in turn will be based on a recommendation of a board of officers, constituted and convened by SECNAV.[756]

The statutory position of the SJA to CMC is found in chapter 506, which addresses the composition and function of Headquarters, Marine Corps, one of the four military Service staffs presided over by the respective Service Chiefs – in this case the Commandant.[757] As with any staff officer within Headquarters, Marine Corps, the SJA to CMC can furnish professional assistance to the Secretary and perform duties under the authority, direction, and control of the Secretary of the Navy – if the Secretary were to so prescribe. The SJA to CMC's position on the Service staff is consistent with that of the Judge Advocates General of the Army and Air Force.[758]

Beyond these general duties to support the Commandant and the Secretary of the Navy, section 5046(c) of title 10 provides that the SJA to CMC shall serve as legal advisor to the Commandant, stating: "No officer or employee of the Department of

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[755] 10 U.S.C. § 5046(a) (emphasis added). The language *while so serving* will be discussed further, *infra*.
[756] *Id.* § 5046(b).
[757] *See id.* §§ 5041-5046 (establishing Headquarters, Marine Corps, and the leadership positions within Headquarters, Marine Corps, and are structured within title 10 under chapter 506 entitled "Headquarters, Marine Corps").
[758] *Compare* 10 U.S.C. § 5046 (2010) ("No officer or employee of the Department of Defense may interfere with . . . the ability of the Staff Judge Advocate to the Commandant of the Marine Corps to give independent legal advice to the Commandant of the Marine Corps"), *with* 10 U.S.C. §§ 3031, 8031 (the function of the Army and Air Staffs, of which the judge advocates general are a part, is to assist the respective Secretary in carrying out his responsibilities).

Defense may interfere with – (1) the ability of the [SJA to CMC] to give independent legal advice to the Commandant of the Marine Corps . . . ."[759]

Also, as a "Staff Judge Advocate" the SJA to CMC has the statutory authority under Article 6 of the UCMJ to communicate directly with the Commandant and subordinate judge advocates.[760]

Apart from these duties, Congress does not expressly assign any other functions to the SJA to CMC. As such, the SJA to CMC has no statutory role with respect to supervision, manpower policies, or assignments.[761] As the Marine Corps' *Legal Service Support Master Plan 1990-2000* expressed it: "The Staff Judge Advocate to the Commandant has no express statutory duties other than those which any Staff Judge Advocate has under the UCMJ."[762]

Before turning to the SJA to CMC's regulatory role, the Panel notes that the operative "while so serving" language in section 5046 of title 10 has resulted in Marine Corps officers serving as the SJA to CMC in a permanent grade of colonel and a temporary "while so serving" grade of major general or brigadier general.[763] This construct is inconsistent with the general statutory framework for promotion of officers to major general (O-8) rank within the DoD. Generally, under chapter 36 of title 10, other officers considered for promotion to the grade of O-7 (brigadier general) or O-8 (major general) are selected by a board convened by the respective Secretary and, if nominated and confirmed, they are promoted to the permanent grade of O-7 or O-8 as appropriate.[764] Marine officers, like their counterparts in the Army and Air Force, may be temporarily promoted to general (O-10) or lieutenant general (O-9) ranks *while serving* in

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[759] 10 U.S.C. § 5046(c).
[760] *Id.* § 806(b).
[761] The Senate report accompanying the 1986 legislation enacting 10 U.S.C. § 5046 suggests that Congress had a different intent for the role of the SJA to CMC. It states: "this position serves as the legal advisor to the Commandant, as well as oversees those Marine Corps officers designated as judge advocates by the Judge Advocate General of the Navy." USMC *SAP*, *supra* note 42, at 12 (quoting S. Rep. No. 99-331, at 223 (1986), 1986 U.S.C.C.A.N. 6413, at 6418).
[762] U.S. Marine Corps, *Legal Service Support Master Plan 1990-2000*, ¶ C04. of annex C, at C-II (21 Dec. 1989) [hereinafter *1990 Master Plan*].
[763] 10 U.S.C. § 5046(a). The SJA to CMC position was made a temporary major general (O-8) position in 2008. Previously, the position was a permanent brigadier general position. Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4356 (2008); SJA to CMC *Submission*, *supra* note 38, at 54-55.
[764] *See* 10 U.S.C. § 611(a).

positions "of importance and responsibility" under section 601 of title 10.[765] Such officers typically continue to carry their permanent major general (O-8) appointment *while serving* in the temporary grades of O-9 or O-10 in the designated "601 position."[766] The Panel also notes that all judge advocates of any Service who are promoted to the grade of O-8 to serve as Deputy JAG within their respective Services and Departments are promoted by permanent appointment.[767] For example, today, the Deputy JAG of the Navy is a permanent rear admiral (O-8), having been promoted to that position from the grade of captain (O-6). In comparison, the SJA to CMC is a temporary major general (O-8) who still holds his permanent rank of colonel. Finally, the Panel notes that section 525 of title 10 excludes the position of SJA to CMC from the numerical limits for general officers within the Marine Corps.[768] Accordingly, the Panel recommends legislation to amend section 5046 of title 10 to allow for the permanent appointment of the SJA to CMC to the grade of O-8.

b) Regulatory Role

The Secretary of the Navy has assigned the SJA to CMC certain Service-level duties through Secretarial regulation. The foremost among these duties are to:

- advise the Commandant in military justice, civil and administrative law, operational law, legal assistance matters, and any other matters as directed by the Secretary and the Commandant;
- act as the legal advisor to Headquarters, Marine Corps, and all other offices of the Marine Corps, for matters under the cognizance of the SJA to CMC;
- serve as Director, Judge Advocate Division (JAD), including direct supervisory authority over all active and reserve judge advocates, civilian attorneys, and legal support personnel assigned to JAD;
- serve as the Occupational Field Manager for all active-duty Marine judge advocates and advise the Deputy Commandant, Manpower and Reserve Affairs, regarding which Marine judge advocates are best suited to fill particular billets;

[765] *Id.* § 601(a).
[766] *Id.* § 601(b)(1).
[767] *Id.* §§ 5149(a)(1), 3037(a), 8037(d)(1).
[768] *Id.* § 525(b)(1)(B) (2010).

- oversee the Chief Defense Counsel of the Marine Corps;
- conduct annual inspections to ensure that Marine Corps law centers are functioning properly and efficiently;
- serve as Rules Counsel for matters of professional responsibility involving Marine judge advocates or civilian attorneys under his cognizance and reports to the JAG regarding oversight of professional responsibility matters in the Marine Corps; and
- provide legal advice on standards of conduct and government ethics, together with the Counsel for the Commandant.[769]

The SJA to CMC, in his Service level role and as part of Headquarters, Marine Corps, may address the delivery of legal services in the Marine Corps by acting through the broad statutory authority of the Commandant. For example, the SJA to CMA may sponsor Service regulations, but only to the extent such action does not impinge on, and remains consistent with, the JAG's exclusive authorities under the UCMJ, chapter 53 of title 10, Navy Regulations, and Secretarial instructions.[770]

Service regulations establish the SJA to CMC as the Occupational Field Manager and Functional Advocate for the legal community within the Marine Corps manpower management system, including the duties to:[771]

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[769] SECNAVINST 5430.27C, *supra* note 15, ¶ 8., at 5-6.

[770] *See* 10 U.S.C. §§ 5043 (establishing the statutory duties of the Commandant); *see also* MajGen Ary Testimony, *supra* note 242, at 388-94. The SJA to CMC aptly illustrated the extent of this authority during his testimony to the Panel on September 1, 2010, stating,

> When I released a couple MARADMINs earlier . . . on the Case Management System, I relied on the general authority of the Commandant . . . I don't want to get into a debate about whether the specific authority of the Navy JAG under Chapter 47, the UCMJ, outweighs the Service requirement of the Commandant and general authority. Arguably, the specific does control and the Navy JAG, if I release something on a post-trial checklist and he comes out with another one two weeks later, applying it to all the Service[s] . . . then I guess mine is outdated, you know, a few weeks later.

MajGen Ary Testimony, *supra* note 242, at 388.

[771] MCO 5311.1D, *supra* note 47, ¶ 8. of enclosure (1), at 25.

- serve as the principal point of contact between the Commandant and the total force with regard to capabilities and force structure, intended structural changes, training, and unique operational considerations pertaining to the 44XX occupational field;
- advise the Commandant on derivation of capabilities and force structure; and
- assist in the classification, training, and career progression of personnel within the 44XX occupational field.

However, these Service regulations do not expressly assign the SJA to CMC any supervisory role over judge advocates as a whole, beyond the limited role already provided in Secretarial instruction. As succinctly stated in the *Legal Service Support Master Plan 1990-2000*:[772]

> Although [the SJA to CMC] serves as the occupational field sponsor for judge advocates, legal services officers and enlisted, he does not exercise any supervisory authority over such personnel. Such authority remains with the chain of command, except [where] ultimate authority lies with the Judge Advocate General.[773]

2. Deputy SJA

Within JAD, Headquarters, Marine Corps, the SJA to CMC is assisted by the Deputy SJA to CMC (DSJA to CMC). The position of DJSA to CMC is not established by statute, but rather is established by Headquarters, Marine Corps Table of Organization. The billet is structured for a Marine judge advocate in the grade of colonel. The Deputy SJA to CMC reports to the SJA to CMC and in the absence of the SJA to CMC, the Deputy acts as the SJA to CMC.[774] The DSJA to CMC has no statutory role; the authorities and responsibilities of the billet are determined by the SJA to CMC. Generally, the DSJA to CMC's duties are to assist the SJA to CMC with the execution of all of his respective responsibilities. His duties include serving as the reporting

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[772] *1990 Master Plan, supra* note 762, ¶ 4. of annex C, at C-III. *See generally* U.S. Marine Corps, *Marine Corps Legal Services Study* (May 1969) (The Commandant made a conscious decision to continue with a de-centralized model and only a Service Chief legal advisor role for the Staff Legal Officer and Director of JAD).

[773] *1990 Master Plan, supra* note 762, ¶ 4. of annex C, at C-III.

[774] By way of example, the Panel notes that the current SJA to CMC, MajGen Ary, was previously assigned as the Deputy SJA to CMC, in the grade of O-6, and in that position he was required to serve as Acting SJA to CMC from August 2009 until March 2010, after the retirement of the previous SJA to CMC, but before a selection board was convened, conducted, and the nominee appointed to be the next SJA to CMC.

senior and providing direct supervision over all of the Marines and civilians and their respective functions within JAD.

As explained in Section VI.C., *infra*, the Panel recommends "clarifying and strengthening the role of the SJA to CMC for supervision of the administration of military justice in the Marine Corps, for the delivery of legal assistance services within the Marine Corps, and for the professional and technical supervision of Marine judge advocates."[775] If the role of the SJA to CMC is clarified and strengthened,[776] the Panel believes it will be important for the Marine Corps to review the role and functions of the DSJA to CMC, to ensure that the DSJA to CMC is positioned to effectively assist the SJA to CMC in fulfilling a greater role in the supervision of the delivery of legal services within the Marine Corps.[777]

3. Whether Additional Authority for the SJA to CMC Over the Manpower Policies and Assignments of Marine Judge Advocates is Warranted?

As discussed, the SJA to CMC has no statutory authority with respect to manpower policies and assignments, but does have a regulatory role as the 44XX Occupational Field Manager and Functional Advocate. As discussed in Section II, *supra*, of the report, the Marine Corps has institutionalized the Occupational Field Manager and Functional Advocate role such that the SJA to CMC has an effective voice in the formulation and application of manpower policies and the assignments of judge advocates.

The Panel heard testimony and received written statements, studies, and policy documents, all of which confirmed that the Marine Corps has an effective manpower management system that deliberately and systematically identifies legal requirements within the organizational structure of the Marine Corps, then funds and builds an active-duty inventory to support those requirements. This system effectively integrates the SJA to CMC as the 44XX

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[775] *See* discussion *infra* in Section VI.C.

[776] As discussed further in Section VI.C., *infra*, there is widespread agreement that the role of the SJA to CMC needs to be clarified and strengthened. The Secretary of the Navy has advised the Panel that he is committed to pursuing both regulatory and statutory changes to clarify and strengthen the role of the SJA to CMC.

[777] The Panel notes, as a point of reference, that all of the JAGs have Deputies who are permanent flag or general officers serving in rear admiral (upper half) or major general (O-8) grades, with significant duties, which are expressly established by regulations, orders and instructions. *See* 10 U.S.C. §§ 3037, 5149, 8037.

Occupational Field Sponsor and Functional Advocate. Largely as a result of the SJA to CMC's active role, this system has produced the following results over the last 10 years:

- identifying, validating, funding, and building an inventory for an additional 32 structured billets to address enduring augmentation requirements for operational units deployed in support of Overseas Contingency Operations;
- adding 27 billets to address additional permanent operational law requirements;
- re-coding unstructured legal requirements to reflect permanent 4402 requirements;
- re-aligning organizational legal structure to better meet mission requirements; and
- re-coding 60 of an eventual 408 total structured 4402 billets to require advanced formal legal education.[778]

This same manpower management system also effectively assigns the right judge advocate to the right billet. This deliberate, systematic staffing process assigns judge advocates to properly established Service, Department, and Joint legal requirements, and to a proportionate share of B-Billets, to ensure proper career development and to meet the broader mission requirements of the Marine Corps. This system seems to give heavy weight to the recommendations of the SJA to CMC, as the 44XX Occupational Field Sponsor, as illustrated by the testimony of the Director of Manpower Planning and Policy for Headquarters, Marine Corps. The Director testified that the Officer Assignments section within Headquarters, Marine Corps historically adopts between 98-99% of the SJA to CMC's assignment recommendations, and most recently in FY 10 adopted 100% of his recommendations.[779] Further, the system effectively integrates SJA to CMC initiatives to improve the assignment process, such as the initiative to re-code important 4402 leadership and practice area billets to require the staffing of these billets with judge advocates who have obtained formal specialized legal education. As a result, the Panel does not believe additional authority for the SJA to CMC over manpower policies and assignment of Marine judge advocates is warranted.

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[778] *See* MajGen Ary Testimony, *supra* note 242, at 328-36; *see* SES Applegate Testimony, *supra* note 155, at 127-34; *see* SJA to CMC *Submission*, *supra* note 38, at 10-11, 27.

[779] SES Applegate Testimony, *supra* note 155, at 156-57; *see also* Col Ewers Testimony, *supra* note 155, at 145-46.

C. *Potential Statutory or Regulatory Changes to the Roles and Functions of the JAG and the SJA to CMC*

At its initial hearing on September 1, 2010, both the JAG and the SJA to CMC advised the Panel that the role of the SJA to CMC needed to be clarified and strengthened to ensure the effective delivery of legal services within the Marine Corps. Specifically, the JAG agreed that the SJA to CMC needed authority necessary to "unify the Marine Corps legal community," and to "establish policies and procedures within the Marine Corps legal community . . . to include overseeing the execution of UCMJ responsibilities within the Marine Corps, as well as the delivery of legal assistance services . . .."[780] There was also a consensus that the SJA to CMC needed "to have a prominent role in the professional ethics and supervision of Marine Corps attorneys."[781]

There was disagreement, however, over the historical root causes for why the role of the SJA to CMC needed to be clarified and strengthened, as well as over the best method to clarify and strengthen the role of the SJA to CMC. While both the JAG and SJA to CMC commented favorably on their collaborative efforts to clarify and strengthen the role of the SJA to CMC in a revision to Secretarial instruction,[782] there was disagreement over whether a Secretarial instruction, alone, was a sufficient basis upon which the SJA to CMC could exercise additional authority or whether it was also necessary to base additional authority in statute. Following the September 1, 2010 hearing, the Panel sent a letter dated September 27, 2010 to the Secretary of the Navy requesting the DON position on potential regulatory and legislative changes concerning the role and functions of the SJA to CMC. The Panel also invited the Secretary to include the positions of the CNO and the Commandant on this matter.

The Secretary of the Navy replied to the Panel by letter of November 5, 2010, and in that letter he included the written comments of the CNO (dated October 21, 2010) and the Commandant (dated October 29, 2010). The Secretary's response also referenced the draft report of the DoD IG. At that point in time, the Panel did not have access to the draft DoD IG Report. However, on December 10, 2010, the Panel received and considered the Final Report of

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[780] VADM Houck Testimony, *supra* note 107, at 248.
[781] *Id.*
[782] As a technical matter of administrative law, the Panel notes that the role of the SJA to CMC could be strengthened by regulatory action and delegations of authority.

the DoD Inspector General (IG), titled *Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy (DoD IG Report)*.

The Panel has decided that the best way to present the issue of the roles and functions of the SJA to CMC is to recite the respective positions of the principals in roughly the same order in which they were received by the Panel. Thus, the Panel will present first the position of the SJA to CMC, then the position of the JAG, the CNO, the Commandant, and the Secretary of the Navy, respectively. Finally, the Panel will present those portions of the *DoD IG Report* that address potential changes to the role and functions of the SJA to CMC.

The Panel advises the reader to note that the following positions are presented in the voices of the respective proponents.

1. The SJA to CMC's Position

The SJA to CMC stated that the chronic systemic challenges in post-trial processing within the Department that are of concern to Congress were caused by fundamental leadership issues, rather than resource constraints.[783] These fundamental leadership issues include: lack of balance in the leadership billets within the Office of the Judge Advocate General (OJAG), lack of well-defined leadership roles and authorities for the SJA to CMC, and complete de-centralization of legal services.[784]

The SJA to CMC stated his belief that these leadership issues resulted, in large part, from the anomalies in the current Departmental legal organization. The SJA to CMC pointed out that in the Army and Air Force, responsibilities, authorities, and accountability for the legal mission

[783] MajGen Ary Authorities Letter, *supra* note 673, enclosure (1), at 1.

[784] SJA to CMC *Submission*, *supra* note 38, at 52-55; *see* USMC *SAP*, *supra* note 42, at 11-13. The SJA to CMC noted that, within the Marine Corps, "a theory of *complete* de-centralization of legal services" has developed, in which the "commander's SJA office comprises a distinct 'independent' legal entity." SJA to CMC *Submission*, *supra* note 38, at 52-53. The SJA to CMC stated that this theory "results from the statutory authority of commanders to communicate directly with the SJA;" *id.* at 53, the default delegation of the JAG's Chapter 47 duties; the lack of any statutory leadership role for the SJA to CMC; and the Corps' operational and cultural preference for de-centralization of legal services." *Id.* The SJA to CMC also noted that, "To a large degree this is consistent with the service culture and operational doctrine of the Marine Corps which emphasizes the primacy of the commander in maintaining discipline and readiness, the commander's prerogative to task-organize resources based on mission requirements, independence of the staff judge advocate's office, mission-oriented orders, and de-centralized execution." *Id.* The SJA to CMC stated that while this model has served the Corps well for decades, "emergent operational demands, increased force size, and the complexity of military justice requirements . . ." have strained this model. *Id.*

are clearly established by statute in a Service-level JAG. This construct recognizes that the uniformed legal mission is largely performed at the Service level, and accounts for the requirement in each Service for a uniformed legal leadership billet that is accountable for supervising the legal mission. In a single-Service Department, issues of balance and clarifying lines of authority within the uniformed legal community do not arise, whereas in a dual-Service department with different Service-level missions and legal organizations, unique challenges do arise. The SJA to CMC observed that the statutory construct for the JAG and OJAG intended to create a balanced Departmental legal organization, with each Service holding a fair share of departmental leadership billets, including the position of the JAG. As depicted by the SJA to CMC, the positions of JAG and DJAG would rotate from time to time between U.S. Navy judge advocates and Marine judge advocates, and there would be only two Assistant JAG positions – one filled by a U.S. Navy judge advocate and the other by a Marine judge advocate.

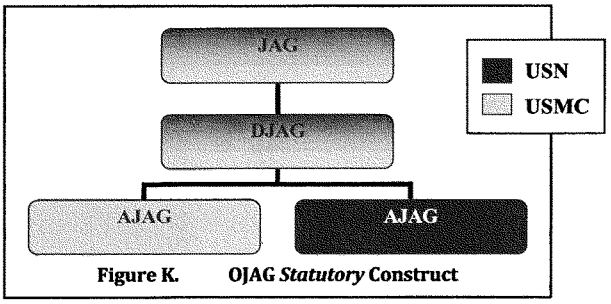

Figure K. OJAG *Statutory* Construct

The preceding construct would ensure that the two Services were equal partners, fully integrated into, and oriented to, the Departmental mission. Departmental integration would necessarily include an equal Service voice in the formulation of Departmental policy, oversight, and budgetary decision on legal matters, as well as an equal voice in the formulation of legal advice provided to the Secretary of the Navy.

The SJA to CMC observed that the U.S. Navy, lacking a statutory Service-level billet, has been forced to use a regulatory construct to assign a U.S. Navy Service-specific role for the JAG and OJAG, in order to meet the challenges of operating an effective legal community in the U.S. Navy. The SJA to CMC pointed out that this regulatory role perpetuates a need for the U.S.

Navy to maintain control of the Departmental JAG and Deputy JAG billets, and an expanded number of AJAG billets. The SJA to CMC noted that this regulatory construct departs from the statutory construct, results in a lack of balance, creates leadership gaps within the Department's uniform legal organization, and is ultimately an impediment to successful execution of the legal mission from the Department level. The SJA to CMC offered the following chart, which depicts OJAG as it stands today under regulatory instruments. Currently, as shown in Figure L, below, there are five positions filled by U.S. Navy judge advocates, and one filled by a Marine judge advocate.

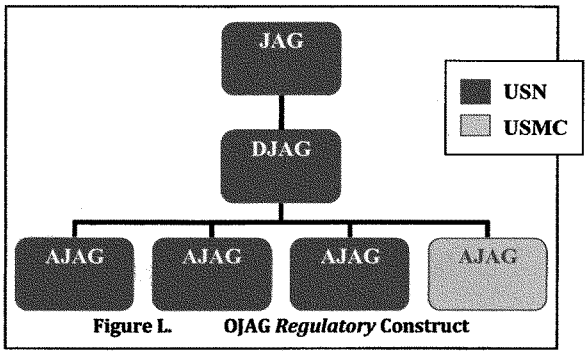

Figure L. OJAG *Regulatory* Construct

The SJA to CMC also noted that, "Historically, the Marine legal services community has been much less formally organized and led than the JAG Corps of the other armed services."[785] To illustrate his point, the SJA to CMC referenced the Marine Corps' *Legal Service Support Master Plan 1990-2000 (Plan)*, which provides that:

> The [SJA to CMC] has no express statutory duties other than those which any staff judge advocate has under the UCMJ.
>
> . . . .

[785] USMC *SAP*, *supra* note 42, at 11.

> The [SJA to CMC] has no Departmental responsibilities whatsoever . . . he does not exercise any supervisory authority . . . [s]uch authority remains with the chain of command . . ..[786]

The *Plan* further provides: "Staff Judge Advocates (SJAs), LSSS OICs, and senior judge advocates have exclusive cognizance throughout the Marine Corps over military law."[787]

The SJA to CMC noted that this approach, while consistent with the Corps' Service culture at the time, "failed to recognize a gap in service authority over the practice of law in the Marine Corps, and resulted in a wide range of disparate procedures for the delivery of legal services in our Corps."[788]

The SJA to CMC stated his belief that these fundamental leadership issues have contributed to challenges in post-trial processing, and the delivery of legal services overall, including:

- lack of technical supervision, such as,
    - establishing uniform, Service-wide policies and procedures;
    - establishing uniform, Service-wide performance standards;
    - oversight and accountability, including inspections to standards and mechanisms for accountability; and
- lack of professional supervision.[789]

The SJA to CMC stated that these historical challenges were exacerbated by the increasing quantity and complexity of legal requirements, coupled with emergent legal requirements resulting from operations in OEF and OIF. [790] The SJA to CMC believes that for the Marine legal services community to overcome these challenges, they need to enhance the professional practice of law through more effective professional and technical supervision. The

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[786] *1990 Master Plan*, *supra* note 762, ¶ C04., annex C, at C-II to -III.
[787] *Id.* at 3-5.
[788] USMC *SAP*, *supra* note 42, at 13; *see also* SJA to CMC *Submission*, *supra* note 38, at 53.
[789] *See* MajGen Ary Authorities Letter, *supra* note 673, enclosure (1); *see* SJA to CMC *Submission*, *supra* note 38, at 55-56.
[790] SJA to CMC *Submission*, *supra* note 38, at 53.

latter suggestion includes establishing and inspecting to uniform, Service-wide performance standards.[791] The SJA to CMC warned that such uniform, Service-level solutions must maintain the strengths of a command-driven legal system, which relies on de-centralized execution and on judge advocates who are unrestricted officers, fully integrated into the Marine air-ground team.[792] The SJA to CMC believes that establishing and implementing such solutions requires a Service-level judge advocate leadership billet that has the necessary responsibility and authority.[793] Such a billet would provide the consistent accountability that Congress contemplated in identifying the need to overcome the systemic challenges that led to cases like *U.S. v. Foster*.[794]

The SJA to CMC suggested that the Panel recommend amendments to title 10 of the U.S. Code to provide an independent statutory basis for clarifying and strengthening the role of the SJA to CMC, as opposed to relying only on a proposed Departmental regulation.

The SJA to CMC stated that proposed regulatory changes were insufficient and unlikely to have the lasting impact necessary to restore the intended statutory balance to the Department and meet the legal requirements of both Services. The SJA to CMC believes the historic U.S. Navy Service orientation and focus of the JAG and OJAG has diluted the Marine Corps' Service voice in the formulation of Service-level legal solutions, and in matters of Department-wide legal policy, oversight, and budgetary decisions. The SJA to CMC points out that this imbalance and U.S. Navy-centric paradigm evolved from a statutory framework intended to create balance.[795] Therefore, he stated, one must ask whether any regulatory remedy can succeed where past statutory schemes failed. The SJA to CMC opined that a Departmental legal system built on collaboration and cooperation may work some of the time; however, lasting success depends on clearly defined and consistently interpreted leadership roles.[796] The SJA to CMC pointed out that since the creation of the UCMJ in 1950, Congress has consistently found it preferable to codify roles and functions with respect to administration of military justice and to define the

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[791] *See* MajGen Ary Authorities Letter, *supra* note 673, enclosure (1); *see* SJA to CMC *Submission*, *supra* note 38, at 56.
[792] MajGen Ary Authorities Letter, *supra* note 673, enclosure (1), at 2; SJA to CMC *Submission*, *supra* note 38, at 56.
[793] MajGen Ary Authorities Letter, *supra* note 673, enclosure (1), at 2-3.
[794] *Id.* enclosure (1), at 3.
[795] MajGen Ary Testimony, *supra* note 242, at 391, 396.
[796] *Id.* at 391-93.

roles and functions of the senior uniformed attorney positions in statute. The SJA to CMC also pointed out that, over the past seven years, Congress has taken legislative action to further define the role of the Air Force JAG, to elevate the grade of all of the JAGs and that of the SJA to CMC, and to add non-interference provisions with respect to each of these billets. Thus, the SJA to CMC concludes that Congress has demonstrated a consistent intent to clarify and strengthen the role of the law in each of the Services to meet an increasingly critical demand for quality legal advice and support.[797]

2. The JAG's Position

The JAG submitted a written statement to the Panel, in which he averred that he is "personally committed to enhancing the authority and prestige of the SJA to CMC within the Marine Corps consistent with the needs and culture of the Marine Corps."[798] More specifically, the JAG testified to the Panel that he supported strengthening the role of the SJA to CMC for the execution of the military justice function within the Marine Corps, the delivery of legal assistance services within the Marine Corps, and the professional and ethical supervision of Marine judge advocates.[799] The JAG testified that he believed such changes were best accomplished by regulatory means and delegations of authority, because it minimized the risk of unintended consequences that can occur in the legislative process. Specifically, the JAG stated,

> I believe that [the SJA to CMC] does need the authority to unify the Marine Corps legal community in a way that he does not have right now. I believe that he needs to be able to establish policies and procedures within the Marines Corps legal community in a way that he doesn't fully have right now, to include overseeing the execution of UCMJ responsibilities within the Marine Corps, as well as the delivery of legal assistance services, for example.
>
> I believe that he needs to have a prominent role in the professional ethics and supervision of Marine Corps attorneys. I also believe that all of these changes can be required – can be accomplished through regulatory means which are within our control, and it's not that I'm opposed, per se, to statutory change, but I believe when you begin to look at some of the statutory changes – proposed statutory

[797] MajGen Ary Authorities Letter, *supra* note 673, enclosure (1), at 3.
[798] VADM Houck Memorandum (Ser 00/0098), *supra* note 172, at 7-8; *see also* VADM Houck Testimony, *supra* note 107, at 246 (testifying that "the SJA needs to be strengthened within the Marine Corps.").
[799] VADM Houck Testimony, *supra* note 107, at 247-48.

> changes that are on the table, that they begin to create branches and offshoots of complexities and potential unintended consequences by doing it in a statutory way that are not present, I feel confident, if we do it in a regulatory way within the Department.[800]

The JAG testified further that he opposes any efforts to strengthen the position of the SJA to CMC at the expense of the authority of the Secretary of the Navy, or the role of the JAG as the leader of the Navy JAG Corps, or the ability of the JAG to provide legal advice and assistance to the CNO and the operating forces and shore establishment of the U.S. Navy. The JAG testified,

> I do think the SJA needs to be strengthened within the Marine Corps. It's not clear to me through the years why the SJA has – as a matter of practice within the Marine Corps, in my estimation, has declined in influence. So I'm completely supportive of that proposition, but . . . I do believe we can do that and not do violence to some other important things: One, the Secretary of the Navy's authority, either structural or within the Secretary's discretion to administer and run the Department as the Secretary sees fit to do that. So I don't think we want to do violence to that. Number 2, I don't think we want to do violence to the Judge Advocate General's ability to lead and manage the Navy JAG Corps. And, thirdly, I don't think we want to do violence to the ability to give quality legal advice to the CNO, and that is a function not only of direct legal advice, but for all the fleet commanders, all the Navy-specific functions that take place.[801]

The JAG asserted that he is as "equally committed to maintaining a well-integrated Navy-Marine Corps partnership at the Departmental level . . ." as he is to increasing the authority of the SJA to CMC.[802] Therefore, in his testimony, the JAG addressed some of concerns raised by the SJA to CMC regarding the imbalance of Navy and Marine Corps representation in OJAG and the positions of the JAG, Deputy JAG, and Assistant JAGs, noting that the balance can be shifted pursuant to discussion between the concerned parties.[803] He described the current balance in the military justice structure as "pretty good."[804] He also clarified that the relatively low representation of Marine judge advocates in OJAG is "not the desire of the Navy JAG Corps. That is nothing that we imposed, and no policy of any Judge Advocate General to have

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[800] *Id.* at 248-49.
[801] *Id.* at 246-47.
[802] VADM Houck Memorandum (Ser 00/0098), *supra* note 172, at 8.
[803] VADM Houck Testimony, *supra* note 107, at 441-44.
[804] *Id.* at 441-42.

that kind of imbalance."[805] With respect to the fact that the Navy has three Assistant JAGs while the Marine Corps has one, the JAG testified that, "If the Marine Corps wanted to use the Marine Corps statute perhaps in a different way, or if we wanted to look at rebalancing who serves in some of these positions, we can always do that."[806]

According to the JAG, "The partnership between the Navy JAG Corps and the Marine Corps legal community has been, and continues to be, essential to fulfilling the Department of the Navy's legal mission."[807] The JAG detailed some of the JAG Corps' contributions to that partnership, noting that ". . . the Navy JAG Corps has historically provided, and continues to provide, a significant share of legal support in Departmental billets[,]" including Navy-Marine Corps Trial Judiciary, Navy-Marine Corps Appellate Review Activity, OJAG, and Naval Justice School.[808] He also noted that the U.S. Navy JAG Corps provides support to Marine Corps Service missions such as courts-martial, legal assistance, and augmentation of Marine Expeditionary Forces with U.S. Navy judge advocates for combat deployments.[809] Rather than impairing the ability of the two services to integrate, "dual hatting" enables the JAG to ensure that the U.S. Navy JAG Corps functions as a cohesive, efficient team.

3. The CNO's Position

By correspondence to the Panel dated October 21, 2010, the CNO noted that as the proposed regulatory changes were intended to strengthen military justice within the Marine Corps, he would defer to the Secretary on the manner in which changes were implemented.[810] However, he stated his desire to review specific proposals to ensure that delivery of legal services within the U.S. Navy would not be affected.

With regard to the perceived Departmental imbalance, the CNO wrote that having a Marine judge advocate serve as the JAG or Deputy JAG would change what the CNO regarded as a logical and efficient construct that had served the Department and the Navy extremely

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[805] *Id.* at 442.
[806] *Id.* at 443.
[807] VADM Houck Memorandum (Ser 00/0098), *supra* note 172, at 1.
[808] *Id.* at 1-4.
[809] *Id.* at 4-5.
[810] Chief of Naval Operations Memorandum, *Subj: Role and Authority of the Judge Advocate of the Navy*, 1 (Oct. 21, 2010).

well.[811] Mindful of the potential impact of this issue on the Department and the U.S. Navy, the CNO made the following points and observations:

- within the Department, because the U.S. Navy held the preponderance of effort by measures such as force structure and bases, it makes sense for the JAG advising the Secretary to be a U.S. Navy judge advocate;
- having Navy officers serve as the JAG and Deputy JAG has not thrown the Department "'out of balance' from a legal perspective" as some have opined;
- U.S. Navy judge advocates have been vocal advocates of having all three legal organizations in the Department coordinate activities and improving coordination throughout the Department;
- the JAG already testified to the Panel that the JAG would welcome additional Marine Corps representation within OJAG;
- the Department does not measure effectiveness primarily by comparing the number of senior Navy officers to the number of senior Marine officers assigned, and if balance was the concern, the ratio of active-duty judge advocate flag or general officers to active-duty judge advocates is approximately 1 to 400 for both Services;
- the Department gained efficiencies from the Secretary of the Navy assigning the JAG additional duty as a Special Assistant to the CNO, and attempting to limit the JAG to a Department-only role would bring neither effectiveness nor efficiency to the Department;
- the U.S. Navy benefits from having the most senior officer in the JAG Corps also serve as the leader of the JAG Corps;
- the JAG leads a 2,300-strong Navy JAG legal community, and must have an intimate knowledge of the community and its personnel to properly exercise his statutory responsibility for the assignment of U.S. Navy judge advocates;
- familiarity in the U.S. Navy budgeting process and U.S. Navy personnel system was critical to securing resources needed by the JAG Corps;

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[811] *Id.*

- the existing BSO model permits the Deputy JAG to lead the Naval Legal Service Command, support the JAG in supporting both the Secretary and the CNO, and learn from the JAG how to manage the complexities associated with leading the community; and
- it has long been within the statutory authority of the Secretary of the Navy to limit the JAG's Navy Service-specific responsibilities, and to allow selection boards to consider Marine judge advocates for JAG and Deputy JAG (DJAG).[812]

Based on the foregoing rationale, the CNO recommended that, with respect to whether Marine judge advocates should compete for the position of JAG, one should keep in mind "the fundamental issue of whether the Department as a whole will be better served."[813]

4. The Commandant's Position

By correspondence dated October 29, 2010, the Commandant wrote that he considered the execution of uniformed legal functions to be an essential Service-level mission, as reflected in the Marine Corps' commitment to fielding a legal community of Marine judge advocates who share the Corps' unique ethos and culture. The Commandant wrote that a Marine officer responsible to the Commandant should supervise the Marine Corps legal community in accomplishing that mission, and that the SJA to CMC was the appropriate officer for that role and should be given the responsibility and authority necessary to carry out that function in the Marine Corps. The Commandant also stated that he believed that the SJA to CMC should advise the Secretary of the Navy directly on military justice matters that impact the Corps.

As to the means for accomplishing these goals, the Commandant noted that senior uniformed legal officers of the Marine Corps' sister Services are assigned duties by statute and, thus, statutory change to clarify the role, duties, and authority of the SJA to CMC appears appropriate.

The Commandant also wrote that as an equal partner in the Department of the Navy, the Marine Corps is committed to ensuring that the "'Navy-Marine Corps team' remains strong and

[812] *Id.* at 1-3.
[813] *Id.* at 3.

relevant."[814] Accordingly, the Commandant also wrote that he was deeply committed to ensuring that the Marine Corps would play a more consistent and institutionalized leadership role at the Departmental level. The Commandant wrote that he was strongly in favor of Marines competing for the JAG and DJAG positions and other Departmental leadership positions. Leaving aside the benefit that would likely accrue to the Marine Corps, the Commandant concluded that such competition could only make the Department a stronger and better-integrated team.

5. The Secretary of the Navy's Position

On November 5, 2010, the Secretary of the Navy replied to the Panel and attached the Service perspectives of the CNO and the Commandant.[815] The Secretary wrote that he had concluded that both regulatory and legislative action was warranted to enhance efficiency, effectiveness, and accountability for the mission performed by the Department's uniformed legal officers. He also stated that he would take regulatory action immediately and propose legislation to ensure that the improvements endure and that the SJA to CMC reports to him in addition to continuing to support the Commandant. The Secretary of the Navy wrote that the revision to SECNAV Instruction 5430.27C would reflect assessments conducted by the DON and the DoD Inspector General's (IG's) draft report on post-trial processing.

The Secretary of the Navy further provided that he would propose legislation that would establish a direct relationship between the Secretary and the SJA to CMC and provide the SJA to CMC with the authority to supervise the administration of military justice and legal assistance in the Marine Corps. The legislation would enhance accountability by clarifying that the SJA to CMC is the uniformed officer within the Marine Corps responsible for those functions. The Secretary wrote that, importantly, the legislative proposals would not alter the Commandant's title 10 responsibilities with regard to assigning Marine judge advocates, and would permit the SJA to CMC to set and maintain standards for the provision of uniformed legal services in the Marine Corps, consistent with the JAG's existing title 10 authorities. The Secretary also wrote that Congressional enactment of the proposals would further institutionalize efforts to close gaps

[814] Gen Amos Letter of Oct. 29, 2010, *supra* note 673, at 1.
[815] Letter from the Honorable Ray Mabus, Secretary of the Navy, to Mr. Daniel J. Dell'Orto, Chairman, Independent Review Panel (Nov. 5, 2010).

in authority and accountability, particularly with respect to post-trial processing of courts-martial and management of the Marine judge advocate community.

6. DoD IG Report

Subsequent to receiving the testimony of the SJA to CMC and the JAG, and the correspondence from the Secretary of the Navy, the CNO, and the Commandant, the Panel received the final report of the DoD IG with respect to post-trial processing of courts-martial within the Department of the Navy. Among the recommendations made by the DoD IG, two (recommendations 5 and 9) directly apply to the Panel's charter. They are reprinted below.

> 5. We recommend the Secretary of the Navy, Commandant of the Marine Corps, and Judge Advocate General of the Navy take appropriate steps to authorize the Staff Judge Advocate to the Commandant of the Marine Corps to:
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> a. exercise professional supervision over Marine judge advocates and the legal services they deliver; and
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> b. conduct Article 6, Uniform Code of Military Justice inspections in the Marine Corps.[816]
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> . . . .
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> 9. We recommend the Secretary of the Navy initiate a legislative proposal(s) to amend statute as appropriate to authorize the Staff Judge Advocate to the Commandant of the Marine Corps to certify a Marine judge advocate's competence to perform duties as trial or defense counsel.[817]

With regard to recommendation 5 reprinted above, the DoD IG reported that the Department of the Navy concurred in the recommendation, stating:

> (1) The Navy JAG and Marine Corps SJA, in coordination with the DON General Counsel, have been directed to revise SECNAVINST 5430.27C to increase Marine Corps SJA responsibility and authority to set and maintain standards for administering military justice and providing uniformed legal services in the Marine Corps. The revision will expressly delegate the Navy JAG's Article 6, UCMJ, inspection responsibilities within the Marine Corps to the Marine Corps SJA.

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[816] DoD IG Report, *supra* note 377, at 60. Please note that recommendation 5 in the final report was recommendation 6 in the draft report to which DON submitted its responses. Thus, DON concurred in draft recommendation 6, which was reported as DON's concurrence in final recommendation 5.
[817] *Id.* at 62.

> (2) Legislation will be proposed to establish a direct relationship between the Secretary of the Navy and the Marine Corps SJA to enhance oversight and accountability over the new Marine Corps SJA authority.
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> (3) A legislative change to 10 U.S.C. §806 will be proposed to make the Marine Corps SJA responsible and accountable for conducting Article 6, UCMJ, inspections in the Marine Corps.
>
> (4) The changes all will be drafted to ensure consistency with the Navy JAG's Title 10 authorities.[818]

The DoD IG found the DON comments to be responsive.[819]

With regard to recommendation 9 (legislative proposal to authorize the SJA to CMC to certify Marine judge advocates' competence to perform duties as trial or defense counsel), the DoD IG reported that the DON responded as follows:

> The DON agreed that a statutory change is needed to enhance and clarify the Marine Corps SJA's authority over delivery of professional legal services in the Marine Corps. However, the DON believes modifying 10 U.S.C. §§ 5041, 5046, 1044, and 806 (to be implemented through revisions to relevant DON and Marine Corps regulations) will best accomplish the needed change and make amendment of Article 27(b) unnecessary.[820]

The DoD IG found the DON comments to be responsive, and made the following additional comment:

> Although we believe pursuing a direct amendment to Article 27(b), Uniform Code of Military Justice, should continue as an active option during this process, we have modified our original recommendation to eliminate mention of Article 27(b). This modification provides DON greater latitude in pursuing changes needed to enhance and clarify the Marine Corps SJA's authority.[821]

In the "findings and analysis" section of its report, the DoD IG made the following observation about the need to clarify and strengthen the role and functions of the SJA to CMC:

> Through statute and Secretary of the Navy instruction, the Navy JAG is responsible for military justice matters in the Marine Corps. In reality, however,

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[818] *Id.* at 60.
[819] *Id.*
[820] *Id.* at 62-63.
[821] *Id.* at 63.

> neither the current nor previous Navy JAGs have generally exercised this responsibility vis à vis the Marine Corps, as evidenced by the longstanding post-trial delay problems. The operating paradigm has been to "trust" the Marine Corps to manage issues, in effect ceding responsibility without granting corresponding authority. Whether this situation resulted from respect for the Marine Corps' autonomy, or was a default result from overall time consuming demands on the Navy JAG, it produced a leadership vacuum in the Marine Corps.[822]

The DoD IG also observed that:

> The operations tempo and heavy demand for legal services in all disciplines has expanded the requirements for judge advocate functions in all Services. In this operational environment, the Navy JAG must rely on the Marine Corps SJA to exercise functional supervision and leadership in the Marine Corps judge advocate community, either on the Navy JAG's behalf or under direct authority that must be created.[823]

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[822] *Id.* at 54.

[823] *Id.* at 55. In addition to the quotation cited above in the main text, the DoD IG made the following points:

> The Marine Corps SJA does not have departmental responsibilities and supervises only those functions and personnel assigned to the Judge Advocate Division, Headquarters, Marine Corps. His role is advisory at the headquarters level, except as the Secretary of the Navy, the Navy JAG, or the Commandant of the Marine Corps may otherwise direct. From an overall perspective:
> • Marine Corps field legal organizations do not have any supervisory legal organization monitoring their activities. They function totally autonomously.
> • The Marine Corps SJA serves as the occupational field sponsor for judge advocates, legal services officers, and enlisted members, but does not have supervisory authority over these personnel. This authority remains within the non-JAG chain of command.
> • The Navy JAG, by statute, holds exclusive authority to certify judge advocates as competent to perform duties as trial and defense counsel.
> • The Marine Corps SJA is not authorized to conduct Article 6 inspections, or exercise professional supervision over legal services delivered in the Marine Corps.
> • Not having field supervisory authority impacts the Marine Corps SJA's stature as the military legal community's leader in the Marine Corps. Recent legislation increasing the Marine Corps SJA's grade to Major General suggests some intent for the position to have greater leadership and supervisory responsibilities.

Id. at 54-55.

With regard to the above points, it is worth noting that the SJA to CMC conducts inspections in the field in the Marine Corps by operation of longstanding agreement between the JAG and the Commandant of the Marine Corps as reflected in the *LEGADMINMAN*, which provides: "per agreement with JAG and CMC, the SJA to CMC conducts UCMJ, Article 6 visits to Marine Corps commands on behalf of [t]he JAG[,]" *LEGADMINMAN*, *supra* note 46, ¶ 22004., at 22-5, and as provided in SECNAVINST 5430.27C, which states: "The SJA to CMC conducts annual inspections to ensure that Marine Corps law centers are functioning properly and efficiently[,]" SECNAVINST 5430.27C, *supra* note 15, ¶ 8.f., at 6.

The administrative delegations of inspection authority encompassed in the JAG-Commandant agreement and the SECNAVINST do not, on their face, comprise a complete delegation of the full authority and responsibility entailed

The DoD IG also noted that,

> In meetings, the Navy JAG, Vice Admiral James Houck, and the Marine Corps SJA, Major General Vaughn Ary, candidly assessed the post-trial delay problems triggering this review. In their words, there was a culture shift away from military justice to operational law, most significantly during Gulf War I and thereafter. They are implementing many initiatives to address outstanding issues, in addition to numerous initiatives dating to about 2005, which are now in force. As Major General Ary commented, they must set standards, train to standards, and inspect to standards.[824]

In summary, while the DoD IG found that the JAG must rely on the SJA to CMC to exercise supervision and leadership of the legal community within the Marine Corps, the DoD IG emphasized that the SJA to CMC lacks the necessary authority to effectively exercise such supervision and leadership. Thus, the DoD IG recommended that the SJA to CMC be granted such authority through both regulatory and legislative action.

7. Panel's Recommendations

The Panel recommends clarifying and strengthening the role of the SJA to CMC for supervision of the administration of military justice in the Marine Corps, for the delivery of legal assistance services within the Marine Corps, and for the professional and technical supervision of Marine judge advocates. Consistent with the Secretary of the Navy's response and the *DoD IG Report*, the Panel believes that establishing a direct relationship between the Secretary and the SJA to CMC, and providing the SJA to CMC with the authority and responsibility to supervise the administration of military justice and legal assistance in the Marine Corps is warranted.[825] Further, the Panel believes that the SJA to CMC should be responsible for the professional and technical supervision[826] of Marine judge advocates, consistent with the JAG's existing title 10

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in Article 6 of the UCMJ. Specifically, Article 6, on its face, addresses the requirement for "frequent inspections in the field *in supervision of the administration of military justice*." 10 U.S.C. § 806(a) (emphasis added). While the *LEGADMINMAN* and SECNAVINST 5430.27C reflect a partial delegation of authority, (i.e., the authority to inspect and visit), they do not, by their express terms, include a delegation of authority to supervise the administration of military justice.

[824] DoD IG Report, *supra* note 377, at 56.

[825] The Panel emphasizes that establishing a direct reporting relationship with the Secretary need not, and should not, alter the statutory position of the SJA to CMC as a member of Headquarters, Marine Corps. This positioning of the statutory billet benefits the supervision and execution of the Service-level legal mission, as well as the community health and career progression of Marine judge advocates.

[826] It is important to distinguish "technical supervision" from other supervisory functions associated with "command authority" or "professional supervision." Command authority is exercised by a commander or officer-

authorities and the role of the General Counsel.[827] The Panel believes that clarifying and strengthening the role of the SJA to CMC, as described, will improve the delivery of legal services within the Marine Corps, and in particular post-trial processing at the Service level, by institutionalizing clear lines of authority and accountability.

The Panel agrees with the dual regulatory and statutory approaches described by the Secretary of the Navy in his correspondence of November 5, 2010. The Panel agrees that legislation would provide the more enduring, institutional basis for clarifying and strengthening the role of the SJA to CMC. The Panel defers, however, to the Departments of the Navy and Defense as to which particular functions need to be statutory, regulatory or both. The Panel believes that those Departments are best able to make the technical judgments and compromises that would be essential in drafting such legislation and regulations.

Finally, the Panel notes that under sections 5148 and 5149 of title 10, the JAG is appointed from qualified judge advocates of the Navy or the Marine Corps and the Deputy JAG is appointed from qualified judge advocates of the Navy and the Marine Corps.[828] The Panel does not take any position on whether there should be competition for the JAG or Deputy JAG positions among Navy Judge advocates and Marine judge advocates. The Panel notes that the Secretary of the Navy did not address the issue, nor did the Panel request that he take a position on the issue. Although the Panel has great respect for the strongly held positions of the CNO and the Commandant, in light of our statutory mandate, the Panel does not feel it is appropriate to take a position on this issue.

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in-charge over those subordinates assigned to his command; it includes the authority to issue binding orders to perform specific duties and tasks, and enforce those orders through disciplinary and administrative action. Command authority follows the operational chain of command. Technical supervision, as the term is used by this Panel, does not include command or control over subordinates, and does not necessarily follow the operational chain of command. Rather, it consists of providing guidance and standards, of a technical nature, within a particular occupational field. For example, a Marine infantry division SJA may provide guidance directly to SJAs within subordinate infantry regiments. Technical supervision may only be binding in the sense that it establishes a standard of performance against which performance may be evaluated. Specific violations of technical guidance generally do not form the basis for disciplinary action under the UCMJ for non-compliance. However, non-conformity could form the basis for a commander to issue an adverse performance evaluation or to relieve a judge advocate of his duties, or it may provide cause for the JAG to revoke a judge advocate's 27(b) certification.

[827] The Panel recognizes that the General Counsel is responsible for certain areas of practice in the Department, either exclusively or jointly, and that some Marine judge advocates are assigned to the Office of the General Counsel, principally in the Office of Counsel to the Commandant. The Panel is not proposing that any of these existing roles, authorities, or relationships be changed.

[828] 10 U.S.C. §§ 5148-5149.

VII. Panel's Conclusions and Recommendations

This final section is intended to consolidate the Panel's conclusions and recommendations, made throughout the report. The presentation corresponds with duties assigned the Panel by section 506 of the *National Defense Authorization Act for Fiscal Year 2010.*

A. The Panel shall "carry out a study of the policies and management and organizational practices of the Navy and Marine Corps with respect to the responsibilities, assignment, and career development of judge advocates for purposes of determining the number of judge advocates required to fulfill the legal mission of the Department of the Navy."

- The Department of the Navy (DON) requires approximately 950 active-duty U.S. Navy judge advocates and a target inventory of approximately 550 active-duty Marine judge advocates to fulfill the legal mission of the Department. The Marine Corps target inventory is based on a recommended minimum of 400 structured Service, Department, and Joint legal billets, a proportionate number of non-legal billets (B-Billets), and a sufficient number of P2T2 billets to ensure community health and proper career progression.
- The Marine Corps's bottom-up, top-down, requirements-driven manpower determinations, along with the studies directed by the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC), proved realistic and useful. The recent steps taken by the Marine Corps to increase both the number of structured judge advocate billets and its inventory of judge advocates on active duty are applauded. The Marine Corps' programmed target inventory of approximately 550 judge advocates over the next five years will be sufficient to fulfill the legal requirements of the Marine Corps, as well as to preserve the ability of Marine judge advocates to serve in non-legal billets, maintaining their role as well-rounded Marine Air-Ground Task Force (MAGTF) officers and contributing to the broader Marine Corps mission.
- The anticipated reduction in demand for Marine judge advocates task-organized to regiments and battalions in OEF and OIF, along with the addition of 32 billets to the Marine Corps' 4402 structure, should alleviate the associated strain on the Marine Corps' judge advocate force and the military justice mission.

- The recommended Marine Corps judge advocate requirement may be affected by: (1) a significant increase in the military justice mission once Marines redeploy from Afghanistan; (2) structured operational law requirements continuing to increase at or near the same rate as has been experienced since September 11, 2001; (3) the SJA to CMC being provided additional authority to supervise Marine judge advocates and the delivery of legal services; or (4) a significant reduction in Marine Corps total officer and enlisted end-strength.
- In contrast to the Marine Corps – which is implementing a process of structured growth within its judge advocate community – the U.S. Navy is planning to reduce its judge advocate community. The U.S. Navy finished Fiscal Year 2010 (FY 10) with 811 active-duty judge advocates, and programmed a reduction in authorized end-strength from 801 in FY 11 to 747 in FY 16.
- The Judge Advocate General of the Navy (JAG) provided a command-by-command analysis of existing Navy judge advocate requirements and found that 926 U.S. Navy judge advocates are required to meet requirements today. The JAG's assessment is an accurate description of the requirements today; however, it did not address likely future requirements including: additional Individual Augmentation (IA) growth, additional requirements if the DON decides to affirmatively provide counsel at the earliest stages of the Disability Evaluation System, additional manpower requirements that will arise if the U.S. Navy establishes an independent Trial Defense Command, and a continued increase in permanent operational law requirements at current rates. Thus, while the JAG's assessment of 926 judge advocates is an accurate description of the requirements today, the requirements over the next five years will be larger than 926. The Panel concludes that the JAG's assessment will have to be adjusted upward to approximately 950 judge advocates by 2015.
- Given the existing budgetary programming authorizations for the Navy JAG Corps over the next five years, there will be a significant shortage of active-duty judge advocates in the U.S. Navy by 2015. The current shortage poses a significant level of legal risk to the DON and the Joint force, and a significant level of professional risk to the Navy JAG Corps. The DON and the U.S. Navy should act to mitigate these risks.

B. The Panel shall "review the emergent operational law requirements of the Navy and Marine Corps, including requirements for judge advocates on joint task forces, in support of rule of law objectives in Iraq and Afghanistan, and in operational units;"

- The demand signal for judge advocates with expertise in operational law will continue to grow at least at the same rate as it has since September 11, 2001, despite the current and anticipated redeployment of forces from Iraq and Afghanistan. This means that the permanent operational law billets can be expected to approximately double over the next decade for the Navy and Marine Corps, and there will likely be continued growth in the demand signal for judge advocates in contingency operations.
    - Judge advocates who fill operational law billets will require levels of education, training, and experience commensurate with the increasingly complex and intense legal and policy environment in which they and their commanders will operate.
- As operational law requirements continue to grow, particularly within Joint commands, it will become increasingly important for U.S. Navy and Marine judge advocates to serve in those commands, including in senior billets. Both Services should ensure that their judge advocates receive Joint Professional Military Education (JPME), and that there are deliberate and robust manpower processes in place to nominate highly qualified judge advocates for service in Joint billets.
    - Marines do not currently hold any senior, Joint SJA positions, and historically Marines have held a disproportionately small number of these positions. Service in senior legal positions within the Joint community provides individual senior Marine judge advocates important career enhancing experience, provides the Marine Corps the benefit of O-6 (colonel) judge advocates with senior-level Joint experience, and provides the Joint community the Service perspective of the Marine Corps legal community. The Marine Corps should consider measures to expand opportunities for senior Marine judge advocates to compete for senior legal positions within the Joint community.
    - Judge advocates are waived from the Joint Specialty Officer provisions of the *Goldwater-Nichols Department of Defense Reorganization Act of 1986*; consequently, the U.S. Navy does not consider JPME a requirement for U.S. Navy

judge advocates. Conversely, Marine judge advocates are required to complete JPME as part of their general PME requirement. The U.S. Navy should develop and fund a requirement for its judge advocates to receive JPME.

- The Department of Defense should develop options for formalizing judge advocate participation in the joint officer management program and joint qualification system.

C. The Panel shall "review new requirements to support the Office of Military Commissions and to support the disability evaluation system for members of the Armed Forces;"

- Manning requirements to support the Office of Military Commissions (OMC) are accounted for through December 2012. If support is required past that date, then the Deputy Secretary of Defense should extend the manning requirement.
- If a majority of the pending 34 cases are referred to military commissions, then the OMC will request that more experienced and accomplished litigators be assigned, and Navy and Marine Corps leadership will need to balance Service needs with the needs of the OMC.
- The existence of the OMC and the prospect for future military commissions underscores the need to develop and retain experienced, expert litigators in the U.S. Navy and Marine Corps judge advocate communities.
- The DON has taken satisfactory steps to fulfill new training and manning requirements related to legal representation of Wounded, Ill, or Injured (WII) service members in the Disability Evaluation System.
- An anticipated increase in the number of Formal Physical Evaluation Boards (FPEB) will result in a requirement for one more attorney to represent members before the FPEB.
- The Marine Corps and Army are affirmatively exercising the discretion to provide legal counsel to WII service members prior to the decision of the Informal Physical Evaluation Board, while the Navy and Air Force are not. The Panel recommends that this difference be examined by the Department of Defense and DON for the purpose of considering the balance of interests in providing early representation and to consider the implications of having the Services provide different levels of legal support to these service members.

D. The Panel shall "review the judge advocate requirements of the Department of the Navy for the military justice mission, including assignment policies, training and education, increasing complexity of court-martial litigation, and the performance of the Navy and Marine Corps in providing legally sufficient post-trial processing of cases in general courts-martial and special courts-martial;"

- Military justice is a primary statutory mission of U.S. Navy and Marine Corps judge advocates.
- While, over the past 10 years, there has been a significant decline in the total number of general and special courts-martial within the DON, the number of disciplinary cases initiated in the DON has remained relatively constant; cases resolved at forums other than courts-martial still require the services of judge advocates.
- The majority of the decline in the courts-martial caseload is attributable to a reduction in the number of special courts-martial. The general courts-martial caseload, generally the forum for more serious, complex, and high-profile offenses, has declined more slowly and appears to have stabilized since FY 06.
- Maintaining a cadre of experienced personnel is increasingly difficult where there are fewer, less complex special courts-martial involving less serious misconduct, and fewer cases overall, on which judge advocates may gain experience and maintain their perishable litigation skills. Both Services must have sufficiently trained and experienced litigators, supervisory attorneys, and judges to handle increasingly complex cases.
- DON post-trial processing has steadily improved since 2006. With the exception of *U.S. v. Foster* in February 2009, no DON case docketed on appeal after (and thus controlled by) *U.S. v. Moreno* (June 2006) was granted appellate court relief for a due process violation resulting from post-trial delay.
- With regard to the military justice mission, the judge advocate requirement is not necessarily just about numbers; more accurately, engaged leadership and effective oversight are the keys to ensuring continued accomplishment of the DON's military justice mission.
- The three initiatives aimed at improving the DON military justice process and most responsive to ensuring engaged leadership and effective oversight are: implementation of

a single court-martial case tracking system; requiring an annual report on the state of military justice to the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps (the Commandant); and, continuing the Military Justice Oversight Council (MJOC). Both the annual report requirement and the MJOC should be institutionalized in a Secretary of the Navy Instruction.

E. The Panel shall "review the role of the Judge Advocate General of the Navy, as the senior uniformed legal officer of the Department of the Navy, to determine whether additional authority for the Judge Advocate General over manpower policies and assignments of judge advocates in the Navy and Marine Corps is warranted;"

- The Panel determined that, under its authority to review, evaluate, and assess such other matters and materials as the Panel considers appropriate for the purposes of this report, it should more broadly consider the role and responsibility of the JAG and the SJA to CMC.
- In general, unlike the Army and Air Force Judge Advocates General that are by statute part of their Service staffs and report directly to their Service chiefs, the Navy JAG is, by statute, part of the Office of the Secretary and reports directly to, and performs assigned duties under the direction of, the Secretary of the Navy. The JAG has both Department of the Navy and U.S. Navy roles and responsibilities. The JAG is part of the Office of the Chief of Naval Operations by regulation, not statute, and is also not part of Headquarters, Marine Corps. The JAG is Chief of the U.S. Navy JAG Corps by regulation, and makes all assignments of U.S. Navy judge advocates by statute. The Commandant makes all assignments of Marine judge advocates. The JAG, by statute, provides independent legal advice to the Secretary of the Navy and to the Chief of Naval Operations, but not to the Commandant.
    - Under both Secretarial and Chief of Naval Operations instruction, the JAG is a "capability sponsor" with the responsibility for "building a coherent legal community." However, the JAG has no specific authorities assigned within the U.S. Navy's manpower management system to fulfill this responsibility. The Secretary of the Navy and the Chief of Naval Operations, in coordination with the JAG, should

identify and assign the authorities necessary to execute the responsibility to build a coherent legal community.

- The JAG has all the authority necessary under Article 6 of the Uniform Code of Military Justice with regard to assignment of Navy judge advocates.
- To the extent the JAG's Departmental responsibilities require oversight of manpower policies and assignments of Marine judge advocates, he can adequately exercise that role with his current title 10 and regulatory authorities. Additional authority is not necessary or warranted. The Commandant, with the assistance of the SJA to CMC, is effectively managing judge advocate manpower (i.e., structure, inventory, and assignments) to meet Service, Departmental, and Joint legal requirements; and to ensure community health (i.e., recruiting, retention, and education) and proper career progression (i.e., promotions) for Marine judge advocates. Moreover, the JAG is not in the best position to exercise additional authority in these areas within the Marine Corps, given the Marine Corps' unique requirements for community health and career progression of Marine judge advocates. Lastly, transferring authority from the Commandant to the JAG could marginalize the SJA to CMC as a legal voice within his Service, contrary to the Panel's view that the role of the SJA to CMC needs to be clarified and strengthened.
- The existence of four Assistant Judge Advocate General (AJAG) positions - AJAG (Civil Law), AJAG (Operations and Management), AJAG (Military Justice) and AJAG (Chief Judge) - are vitally important to the DON's uniformed legal community and are flag/general officer equivalent positions, with duties and responsibilities commensurate with those grades. The DON should consider adopting the current rotational process to support two Marine judge advocates and two U.S. Navy judge advocates for these regulatory AJAG positions, vice the current mix of three U.S. Navy judge advocates and one Marine judge advocate.

- Similar to the statutory positions of the Judge Advocates General of the Army and Air Force, the SJA to CMC, by statute, is part of Headquarters, Marine Corps and reports directly to the Commandant. However, the SJA to CMC is not expressly assigned any other function by statute other than to provide independent legal advice to the

Commandant. The SJA to CMC has no statutory role with respect to supervision, manpower policies, or assignment of Marine judge advocates. The Secretary of the Navy has assigned certain Service-level duties through Secretarial regulation; however, these regulations do not expressly assign the SJA to CMC any supervisory role over the Marine judge advocate community as a whole.

- The SJA to CMC is appointed by the President and holds the grade of major general "while so serving" as the SJA to CMC. This "while so serving" construct is inconsistent with the general statutory framework for promotion to major general within the Department of Defense. Generally, for promotions to major general, an officer selected by a board, nominated, and then confirmed is promoted to the permanent grade of major general. Legislation to amend section 5046 of title 10 to allow for the permanent appointment of the SJA to CMC to the grade of major general should be considered.
- The Marine Corps has an effective manpower management system that identifies legal requirements, then funds and builds an active-duty inventory to support those requirements. This system effectively integrates the SJA to CMC as the Occupational Field Manager and Functional Advocate for Marine judge advocates. This system also effectively assigns judge advocates to properly established Service, Department, and Joint legal requirements, and to a proportionate share of B-Billets, to ensure proper career development and to meet the broader mission requirements of the Marine Corps. No additional authority for the SJA to CMC over manpower policies and assignment of Marine judge advocates is warranted.
- Consistent with the Secretary of the Navy's position and the Department of Defense Inspector General's Report, establishing a direct relationship between the Secretary of the Navy and the SJA to CMC, and providing the SJA to CMC with the authority and responsibility to supervise the administration of military justice and legal assistance in the Marine Corps, is warranted. Further, the SJA to CMC should be responsible for the professional and technical supervision of Marine judge advocates, consistent with the JAG's existing title 10 authorities and the role of the General Counsel. Strengthening the role of the SJA to CMC, as described, will improve the delivery of

legal services within the Marine Corps, and, in particular, post-trial processing at the Service-level, by institutionalizing clear lines of authority and accountability.

- The dual regulatory and statutory approach described by the Secretary of the Navy is appropriate. Legislation would provide the more enduring, institutional basis for strengthening the role of the SJA to CMC. However, the Panel defers to the Departments of the Navy and Defense as to which particular functions need to be statutory, regulatory, or both. Those Departments are best able to make the technical judgments and compromises that would be essential in drafting such legislation and regulations.

F. The Panel shall "review directives issued by the Navy and the Marine Corps pertaining to jointly-shared missions requiring legal support;"

- Appropriate common directives, guidance, and training exist, allowing U.S. Navy and Marine judge advocates to work together in support of the DON.

G. The Panel shall "review career patterns for Marine Corps judge advocates in order to identify and validate assignments to nonlegal billets required for professional development and promotion;"

- Marine judge advocate inventory is built to account for the assignment of Marine judge advocates to non-legal billets, and Marine judge advocates have competed, and continue to compete, favorably on selection boards for promotion, resident schools, and command.
- Within the Marine Corps, having Marine judge advocates serve as unrestricted line officers, expected to maintain themselves as well-rounded MAGTF officers, makes for not only a better Marine officer, but also a more effective Marine judge advocate.

H. The Panel shall "review, evaluate, and assess such other matters and materials as the panel considers appropriate for purposes of the study."

- The quality, or health, of the Navy and Marine judge advocate communities is strong and rests on three pillars: recruiting, retention, and professional education and training.
- Key factors in maintaining strong judge advocate communities are the continued focus on recruiting; support for the Navy's Judge Advocate Continuation Pay program and the

Marine Corps' Law School Education Debt Subsidy program; and continued support for post-graduate school education.

I. "In carrying out the study . . . the panel may review, and incorporate as appropriate, the findings of applicable ongoing and completed studies in future manpower requirements, including the two-part study by CNA Analysis and Solutions entitled: 'An Analysis of Navy JAG Corps Future Manpower Requirements.'"

- Even at the most stressful workload level considered by the Center for Naval Analyses (CNA) in its 2007 study of U.S. Navy judge advocate requirements, the 50-hour workweek, the U.S. Navy required a significant increase in judge advocate manning, particularly within the area of operational law. The study was a valuable and good faith effort at quantifying workload. However, the data in the study is now over three years old, the prediction about the military justice caseload has proven inaccurate, and CNA was not asked to consider more nuanced approaches. Consequently, while informed by the *CNA Study*, the JAG's manpower estimate is more current and nuanced.
- A review of internal Marine Corps studies, as well as a CNA study of Marine Corps manpower systems, reflects favorably on the Marine Corps' efforts to actively manage legal requirements, including: its use of a "bottom-up" structure review, careful assessment of increasing demands from operations and force growth, effective incorporation of the SJA to CMC as the Occupational Field Manager into the manpower process, and building active-duty judge advocate inventory in support of approved structure increases.

References

The attached DVD contains references for this report.

Abbreviations and Acronyms

A

ABA
American Bar Association

AC
Active Component

ACE
Air Combat Element

ADP LAW
Advance Degree Program - Law

AFRICOM
United States African Command

AIRS
Automatic Inspection Reporting System

AJAG
Assistant Judge Advocate General

ALMAR
All Marine Message

ALNAV
All Navy Message

AMOS
Additional Military Occupational Specialty

ARR
Arraignment

ASR
Authorized Strength Report

B

BA
Billets Authorized

BCR
Billet Change Request

BGen
Brigadier General

BLC
Basic Lawyer Course

BMOS
Billet Military Occupational Specialty

Bn
Battalion

BOLT
Basic Operational Legal Training

BSO
Budget Submitting Office

BUPERS
U.S. Navy Bureau of Naval Personnel

C

CA
Convening Authority

CAA
Convening Authority's Action

CAAF
Court of Appeals for the Armed Forces

CAPT
Captain

CAR
Capabilities Assessment Review

CCC-I
Central Criminal Court of Iraq

CDC
Chief Defense Counsel

CDP
College Degree Program

CG
Commanding General

CGIP
Commanding General's Inspection Program

CJCS
Chairman of the Joint Chiefs of Staff

CJCSI
Chairman of the Joint Chiefs of Staff Instruction

CJDON
Chief Judge, Department of the Navy

CLAMO
Center for Law and Military Operations

CLS
Career Level School

CMC
Commandant of the Marine Corps

CMS
Case Management System

CMTIS
Court-Martial Tracking and Information System

CNA
Center for Naval Analyses

CNO
Chief of Naval Operations

CO
Commanding Officer

COA
Central Operating Activity

COCOM
Combatant Command

COIN
Counterinsurgency

Col
Colonel

COMDTINST
Commandant Instruction

COMNAVLEGSVCCOMINST
Commander, Naval Legal Services Command Instruction

COP
Communities of Practice

CR
Court Reporter

CSC
Command and Staff College

D

DC CD&I
Deputy Commandant for Combat Development and Integration

DC M&RA
Deputy Commandant for Manpower and Reserve Affairs

DC
Defense Counsel

DCAP
Defense Counsel Assistance Program

DES
Disability Evaluation System

DoD
Department of Defense

DoDI
Department of Defense Instruction

DoD IG
Department of Defense Inspector General

DON
Department of the Navy

DON/AA
Department of the Navy, Assistant for Administration

DONCJIS
Department of the Navy Criminal Justice Information System

DOPMA
Defense Officer Personnel Management Act

DOTMLPF
Doctrine, Organization, Training, Materiel, Leadership and Education, Personnel and Facilities

DSJA
Deputy Staff Judge Advocate

DTM
Directive Type Memorandum

E

EFDS
Expeditionary Force Development System

ELP
Excess Leave Program

e-ROT
Electronic Record of Trial

EUCOM
U.S. European Command

F

FLEP
Funded Law Education Program

FMOS
Free Military Occupational Specialty

FOIA
Freedom of Information Act

FPEB
Formal Physical Evaluation Board

FSA
Field Support Activity

FSRG
Force Structure Review Group

FSSG
Force Service Support Group

FTS
Full-Time Support

FWD
Forward

FY
Fiscal Year

FYDP
Future Years Defense Program

G

GAR
Grade Adjusted Recapitulation

GCE
Ground Combat Element

GCM
General Court-Martial

GEN
General (U.S. Army)

Gen
General (U.S. Marine Corps)

I

IA
Individual Augmentation
Individual Augmentee

IDES
Integrated Disability Evaluation System

IG
Inspector General

ILS
Intermediate Level School

IO
Investigating Officer

IPEB
Informal Physical Evaluation Board

IRR
Inactive Ready Reserve

IST
Interservice Transfer

J

JACP
Judge Advocate Continuation Pay

JAD
Judge Advocate Division

JAG
Judge Advocate General of the Navy

JAGC
Judge Advocate General's Corps

JAGINST
Judge Advocate General Instruction

JAGMAN
Manual of the Judge Advocate General

JAI
Judge Advocate Division, Information, Plans, and Programs Branch

JAL
Judge Advocate Division, Legal Assistance Branch

JAM
Judge Advocate Division, Military Justice Branch

JAO
Judge Advocate Division, International and Operational Law Branch

JAR
Judge Advocate Division, Research and Civil Law

JAS
Judge Advocate Division, Support Branch

JCS
Joint Chiefs of Staff

JMD
Joint Manning Document

JOMO
Joint Officer Management Office

JPME
Joint Professional Military Education

JSO
Joint Specialty Officer

JTF
Joint Task Force

JTF-HOA
Joint Task Force – Horn of Africa

L

LCE
Logistics Combat Element

LEGADMINMAN
Marine Corps Manual for Legal Administration

LEP
Law Education Program

LL.M.
Legum Magister (Master of Laws degree)

LOAC
Law of Armed Conflict

LOD
Line of Duty

LSAT
Law School Admission Test

LSEDS
Law School Education Debt Subsidy

LSSS
Legal Service Support Section

LSST
Legal Service Support Team

LtCol
Lieutenant Colonel

LtGen
Lieutenant General

M

M&RA
Manpower and Reserve Affairs

M&RA (MM)
Manpower and Reserve Affairs (Manpower Management)

M&RA (MP)
Manpower and Reserve Affairs (Manpower Plans)

MAGTF
Marine Air-Ground Task Force

MajGen
Major General

MANMED
Manual of the Medical Department

MARADMIN
Marine Administrative Message

MarDiv
Marine Division

MARFOR
Marine Forces

MARFORRES
Marine Forces Reserve

MAW
Marine Air Wing

MCAGCC
Marine Corps Air Ground Combat Center

MCCLL
Marine Corps Center for Lessons Learned

MCDP
Marine Corps Doctrinal Publication

MCM
Manual for Courts-Martial

MCO
Marine Corps Order

MCRC
Marine Corps Recruiting Command

MCRCO
Marine Corps Recruiting Command Order

MEB
Marine Expeditionary Brigade
Medical Evaluation Board

MEB-A
Marine Expeditionary Brigade – Afghanistan

MEF
Marine Expeditionary Forces

MET
Mission Essential Tasks

MEU
Marine Expeditionary Unit

MFT
Mission, Function and Task

MJ
Military Judge

MJLCT
Military Justice Litigation Career Track

MJOC
Military Justice Oversight Council

MLG
Marine Logistics Group

MM
Manpower Management

MMPR
Manpower Management Promotion Branch, Manpower and Reserve Affairs

MNC-I
Multi-National Corps - Iraq

MNF-I
Multi-National Force - Iraq

MNF-W
Multi-National Force - West

MOC
Maritime Operations Center

MOS
Military Occupational Specialty

MP
Manpower Plans

MROC
Marine Requirements Oversight Council

MSC
Major Subordinate Command
Military Service Coordinator

MTF
Medical Treatment Facility

N

NAMARA
Navy-Marine Corps Appellate Review Activity

NAVADMIN
Navy Administrative Message

NAVREGS
Navy Regulations

NCIS
Naval Criminal Investigative Service

NDAA
National Defense Authorization Act

NITA
National Institute for Trial Advocacy

NJP
Nonjudicial Punishment

NJS
Naval Justice School

NLSC
Naval Legal Service Command

NLSO
Navy Legal Service Office

NLSO NC
Navy Legal Service Office North Central

NMCCA
Navy-Marine Corps Court of Criminal Appeals

NMCTJ
Navy-Marine Corps Trial Judiciary

NMOS
Necessary Military Occupational Specialty

NWP
Naval Warfare Publication

O

OCC
Officer Candidates Course

OccFld
Occupational Field

OCM
Officer Community Management

OCS
Officer Candidates School

OEF
Operation Enduring Freedom

OGC
Office of the General Counsel

OIC
Officer In Charge

OIF
Operation Iraqi Freedom

OJAG
Office of the Judge Advocate General

OMC
Office of Military Commissions

OP
Operational

OPA
Officer Programmed Authorizations

OPNAV
Office of the Chief of Naval Operations

OPNAVINST
Office of the Chief of Naval Operations Instruction

OPNAVNOTE
Office of the Chief of Naval Operations Notice

OPR
Office of Primary Responsibility

ORB
Officer Retention Board

OSD
Office of the Secretary of Defense

OSO
Officer Selection Officers

P

P2T2
Patient, Prisoner, Trainee, or Transient

PCS
Permanent Change of Station

PDE
Physical Disability Evaluation

PDLT
Pre-Deployment Legal Training

PEB
Physical Evaluation Board

PEBLO
Physical Evaluation Board Liaison Officer

PFR
Petition for Relief

PLC
Platoon Leaders Course

PLC (Law)
Platoon Leader's Course-Law

PMAS
Programmed Manpower Authorizations System

PME
Professional Military Education

PMOS
Primary Military Occupational Specialty

POM
Program Objectives Memorandum

PPBES
Planning, Programming, Budgeting, and Execution System

Q

QDR
Quadrennial Defense Review

R

RAD
Return to Active Duty

RADM
Rear Admiral (upper half)

RC
Reserve Component

RCM
Rule for Courts-Martial

RCT
Regimental Combat Team

RDC
Regional Defense Counsel

RFF
Request for Forces

RFI
Request For Information

RLS
Request for Legal Services

RLSO
Region Legal Service Office

RLSSS
Reserve Legal Service Support Section

RO
Review Officer

ROE
Rules of Engagement

ROT
Record of Trial

S

SAP
Strategic Action Plan

SASC
Senate Armed Services Committee

SASO
Security and Stability Operations

SCM
Summary Court-Martial

SECNAV
Secretary of the Navy

SECNAVINST
Secretary of the Navy Instruction

SEP LAW
Special Educational Program - Law

SES
Senior Executive Service

SJA
Staff Judge Advocate

SJAR
Staff Judge Advocate Review

SJA to CMC
Staff Judge Advocate to the Commandant of the Marine Corps

SLRP
Student Loan Repayment Program

SME
Subject Matter Expert

SMR
Statement of Manpower Requirements

SN
Strategic National

SPCM
Special Courts-Martial

SPMAGTF
Special Marine Air-Ground Task Force

SPP
Strategic Planning Panel

ST
Strategic Theater

T

T/O
Table of Organization

T/O&E
Table of Organization and Equipment

TA
Tactical

TBS
The Basic School

TC
Trial Counsel

TCAP
Trial Counsel Assistance Program

TDC
Trial Defense Command

TECOM
Training and Education Command

TF
Task Force

TFMMS
Total Force Manpower Management System

TFSD
Total Force Structure Division

TJAG
The Judge Advocate General

TJAGLCS
The Judge Advocate General Legal Center and School

TLS
Top Level School

TOECR
Table of Organization and Equipment Change Request

TOS
Time On Station

TTECG
Tactical Training Exercise Control Group

U

UCMJ
Uniform Code of Military Justice

UJTL
Universal Joint Task List

URB
Uncompensated Review Board

USA
U.S. Army

USAF
U.S. Air Force

USCENTCOM
U.S. Central Command

USCG
U.S. Coast Guard

USG
U.S. Government

USMC
U.S. Marine Corps

USN
U.S. Navy

V

VA
Department of Veterans Affairs

VADM
Vice Admiral

VASRD
Veteran's Administration Schedule for Rating Disabilities

VWAP
Victim Witness Assistance Program

W

WHS
Washington Headquarters Service

WII
Wounded, Ill, or Injured

Senator WEBB. Finally, today's hearing will also consider efforts by the Secretary of Defense to reduce the numbers of flag and general officers. On March 14, 2011, Secretary Gates approved the elimination of 102 general and flag officer authorizations, 21 of which are Air Force authorizations. Three of these are Air Force judge advocate brigadier general positions that will be downgraded to colonel positions—the Staff Judge Advocates for Air Mobility Command, Air Combat Command, and Air Materiel Command.

Senator Graham informed me that he has real concerns about this reduction, and right on cue, he enters the hearing. Welcome, Senator Graham.

Senator GRAHAM. I apologize.

Senator WEBB. As I mentioned earlier, we waited until quarter after and as a courtesy——

Senator GRAHAM. We got hung up with the Republicans, which is hard to believe. [Laughter.]

Senator WEBB. These are trying times. But you walked in just at the right moment. I will continue and then hand it over to you.

Senator Graham informed me he has real concerns about this reduction. We are discussing the reduction in general officer authorizations in the Air Force JAG.

I have also collected data on the numbers of general and flag officers in each Service, the number of JAG and flag officers, and court-martial and discharge data. I would like, actually, to take a little bit of time on this data.

Since it was passed out while people were waiting for us to begin the hearing, I am sure there has been a little bit of buzz about the information on it. But let me start with the first slide, and I would like to just talk my way through it.

[The slide referred to follows:]

JAG GFO Comparisons

Services	FY11 Authorized End Strength (ES)	Number of General and Flag Officer (GFO)	Ratio GFO to ES	JAG GFO Positions	Ratio JAG GFO to ES	Number of Active Duty JAGs
Army	569,400	Total: 315 O-10: 11 O-9: 43 O-8: 117 O-7: 144	1/1,808	1 O-9 1 O-8 3 O-7 1 O-7 temporary position in Afghanistan	1/94,900 (includes the temporary position) 1-113,880 (without temporary position)	1,870
Navy	328,700	Total: 257 O-10: 11 O-9: 43 O-8: 74 O-7: 129	1/1,279	1 O-9 1O-8 3 O-6 positions with tombstone promotion to O-7 upon retirement	1/164,350	866 (includes 31 Reserve on Active Duty)
Marine Corps	202,100	Total: 86 O-10: 4 O-9: 17 O-8: 30 O-7: 35	1/2,350	1 O-8 1 O-6 position with tombstone promotion to O-7 upon retirement	1/202,100	508
Air Force	332,280	Total: 314 O-10: 13 O-9: 43 O-8: 107 O-7: 151	1/1,058	1 O-9 1 O-8 4 O-7	1/55,380 (1/110,760 with planned reduction of 3 O-7s)	1,235

Senator WEBB. This slide was put together at my request, which goes from left to right, with the end strengths of each of the military Services, then the number of general and flag officers in the Service, a ratio showing how many general or flag officers per

servicemember, an outline of the JAG positions—general flag officer positions—and a ratio, and the number of Active Duty JAGs in each Service. It is a fairly interesting comparative chart. I believe strongly that the best way to have policy discussions is to start with facts.

On this chart, you will see that the Army has 569,400 people, its authorized end strength. They have 315 flag officers, for a ratio of 1 general officer to every 1,800 soldiers.

The Navy has 328,700 people on Active Duty and a total of 257 admirals, flag officers, a ratio of 1 to every 1,279.

The Marine Corps has 202,100 people in Active Duty, 86 general officers, a ratio of 1 to every 2,350.

The Air Force has 332,280 people on Active Duty, and 314 general officers, for a ratio of 1 for every 1,058.

You will see in this chart that the Air Force has presently 13 four-star generals, which is more than any of the other Services. It has 43 three-stars, which is the same as the Army and the Navy, the Navy being almost identical in size to the Air Force, by the way.

The Air Force has 107 two-stars, compared to Navy's 74. The Army has 117, and it has 151 general officer brigadier generals, which is actually more than any other Service.

If you look at the JAG general flag officer positions, you will see that the Army has one 0–9, one 0–8, three 0–7s, and one 0–7 temporary position, for a total of six.

The Navy has one 0–9, one 0–8, and then three 0–6s that are tombstar retirements to 0–7 upon retirement. So it has two flags.

The Marine Corps has one 0–8, one two-star, and one colonel position that with a tombstone promotion to 0–7 upon retirement.

The Air Force has six general officer flags as JAGs.

If you could get the second chart, please?

[The slide referred to follows:]

Courts Martial/Discharge Data

Service	Number of Courts-Martial	Non-judicial Punishment	Punitive Discharges (Dishonorable Discharge /Bad Conduct Discharge /Dismissals)	Other Than Honorable Discharges	General Discharges	Honorable Discharges
Army						
FY10	1,741	36,624	1,026	2,666	8,606	20,155.
FY09	2,194	35,210	612	3,114	7,907	21,913
FY08	2,441	46,063	723	3,421	6,725	23,852
Navy						
FY10	434	10,066	142	2,205	2,620	16,042
FY09	498	11,145	153	2,450	2,631	16,409
FY08	738	11,353	161	3,102	2,569	17,528
Marine Corps						
FY10	2,541	10,425	1,110	3,094	1,020	23,679
FY09	2,485	11,772	851	2,742)	850	4,435
FY08	2,228	11,774	701	2,212	778	3,715
Air Force						
FY10	789	6,722	307	156	2,380	10,247
FY09	758	6,912	325	152	2,270	8,846
FY08	681	7,085	338	69	1,280	3,179

Senator WEBB. I actually asked for this data out of curiosity. As many of you know, I spent 5 years in the Pentagon. I believe that if you can go from the facts, you can have a better discussion of what the policy discussions should be.

Again, if we are looking at the number of JAGs in the military, it is a good starting point to look at the legal proceedings over the past couple of years, just to see what they look like Service by Service. I am not going to spend a lot of time going through each one of these numbers, but the most interesting point for me on this is that the numbers seem to be wildly disparate.

The Army doesn't have information available for the types of discharges that it ordered. If you read this chart, left to right, it is number of courts-martial, number of nonjudicial punishments (NJPs), the number punitive discharges as a result of courts-martial, the number of other than honorables (OTH) discharges due to administrative procedures, number of general discharges, and then the number of honorable discharges.

Several things jump out, and I am saying this to make a point, as the chairman of this subcommittee, not simply for the hearing today, but as a continuation of the concern that I have with the data that we have been able to receive from DOD in a number of different cases.

I asked, when the Assistant Secretaries for Manpower were testifying here, if they could give us some data on percentages of discharges—how many honorables, how many generals, how many OTHs, et cetera. There was a general response that they didn't know, which really stunned me, to be quite frank.

I have a chart here where the Army—with plenty of advance notice—doesn't have the information. The Marine Corps, in terms of honorable discharges, we had a chart 2 days ago, where they said they had in fiscal year 2010 3,700 honorables, and then today we got a chart that said they got 39,862 honorables.

This kind of fits into a pattern. When I first started working on data to try to support the GI bill, when I introduced it, one of my questions was since the GI bill is principally designed to help people in their readjustment to civilian life after the military, what percentage of people in the different Services leave with honorable discharges before the end of their first enlistment? It took me a year to get that data.

We asked in one hearing how many contractors were in DOD? Nobody seemed to be able to give us an answer. I asked for historical data on the different commands and DOD headquarters units, and it took us over a month. I think it took us 3 months to get that data.

Just as someone who has done this for a long time, I have to compare that kind of reaction to when I was committee counsel up here in 1977, when we had some very complex legislation on what was called the Carter Discharge Review Program, it dealt with the number of bad discharges that were given during the Vietnam era.

At one point in those hearings, I asked DOD, can you give me the number of discharges by category, by year during the Vietnam era, by Service? I had it in 24 hours. I had from DOD a multiyear breakdown by Service, by discharge in 24 hours.

I asked them the next week, can you give me the casualties in Vietnam, year-by-year, by Service and by ethnic groups? I had that in 24 hours.

I don't think the computer systems back then were any better than they are now, and I don't think people were particularly any less challenged than they are right now. So it just raises a huge question for me for how we are communicating between DOD and the U.S. Congress and whether DOD is tabulating this kind of data.

It is vital data. If you can't figure out where your discharges are, you really can't speak broadly to the nature of discipline in your Services.

So I am taking some time to lay that out because it affects a lot of other things we are going to be doing in this subcommittee.

With that, Senator Graham, you asked for this hearing, and I am going to just turn it over to you.

Senator GRAHAM. Thank you, Mr. Chairman.

I appreciate you bringing this to our attention. Obviously, we need another hearing on why you can't provide information in a timely manner.

Senator WEBB. We will just keep raising it until they start giving us answers.

Senator GRAHAM. I join with you in that regard.

But this hearing is about the role of the judge advocate in the 21st century. Our military has been deployed since September 11, 2001, almost continuously. I have had a chance to see in action on the ground judge advocates in Iraq and Afghanistan, doing things that didn't even exist 5 years ago.

I don't know about the court-martial load here. I hope it is down. I think it probably is because you have the most motivated, well-trained, highly-educated force, so I would expect it to go down.

But in terms of the workload of the judge advocate, it has just been amazing what the Navy and the Air Force have been doing to help our Army brethren over there with detainee review boards. The number of prisoners that have gone through American military custody in Iraq at one time was over 40,000, and all of them had to have some form of representation. They have been producing law of war detention boards literally under fire.

So I am very proud of the JAG Corps officers who have provided great counsel and advice. Keeping these bad people off the battlefield is great for the warfighter because when the marines roll them up, if they are getting out in a week, that is bad for morale. Quite frankly, when the marines roll up people that shouldn't have been caught, it is bad for our ability to win over the population.

So we have had a pretty robust legal presence in the war on terror, unlike any time I have ever seen.

Mr. Chairman, I really respect you. But I can tell you one thing that happened without any doubt, in my view, is that during the initial invasion of Iraq, people in the Pentagon were not listening as closely as they should about detainee operations and that the military legal community's voice wasn't as strong as it should have been.

Rank matters, you know better than anyone. The reason that the JAGs today are three-stars is because now they are guaranteed a

seat at the table. When they were two-stars, their advice pretty well got canned. So it is pretty hard to ignore a lieutenant general.

But the independent panel we asked to be impaneled was to look at a Navy-Marine Corps manning problem. So, if I could, Mr. Chairman, can I just open it up to our witnesses and have them tell us, if you don't mind, their general findings? Maybe we can learn from their experience. Is that okay?

Senator WEBB. We can do that. Welcome the witnesses in the first panel, and I appreciate your patience in having sat through a waiting period and my long intro.

Senator GRAHAM. Yes, well, that is my fault. I apologize.

Senator WEBB. First we have retired Colonel Daniel Dell'Orto, former Principal Deputy General Counsel for DOD, and retired Lieutenant General Pete Osman, who served as Deputy Commandant for Manpower and Reserve Affairs in the U.S. Marine Corps.

Gentlemen, welcome. Your report is a very comprehensive review, and we look forward to hearing your observations.

STATEMENT OF COL DANIEL J. DELL'ORTO, JAGC, USA, RET., CHAIRMAN, INDEPENDENT PANEL REVIEW OF JUDGE ADVOCATE REQUIREMENTS OF THE DEPARTMENT OF THE NAVY

Colonel DELL'ORTO. Good afternoon, Mr. Chairman, members of the committee. On behalf of Lieutenant General Osman, thank you for the opportunity to appear before the committee today.

We are here to discuss the congressional mandate contained in section 506 of the National Defense Authorization Act for Fiscal Year 2010 to "carry out a study of the policies and management and organizational practices of the Navy and Marine Corps with respect to the responsibilities, assignment, and career development of judge advocates for the purposes of determining the number of judge advocates required to fulfill the legal mission of the Department of the Navy."

In full compliance with the Federal Advisory Committee Act, the panel conducted 5 public meetings and posted more than 200 documents on a Web site for review by interested persons.

In addition to Lieutenant General Osman, the panel included a number of distinguished former public servants and former colleagues of mine who have served our Nation in the past and continue to serve in a variety of roles. They include the Honorable Judith A. Miller, former DOD General Counsel; Rear Admiral James E. McPherson, U.S. Navy, retired, former JAG of the Navy; and William R. Molzahn, former Deputy General Counsel for the Department of the Navy.

Each of these persons volunteered for service on the panel and devoted considerable hours to the panel's work. They should be commended for stepping forward yet again to provide selfless service to our DOD and to our Nation.

The panel received outstanding support from the Department of the Navy, including extremely professional administrative support from the Office of the Secretary of the Navy and the Office of the General Counsel of the Navy. The Navy provided the panel with a first-rate staff of Marine and Navy judge advocates, civilian at-

torneys, and administrative staff, all of whom are acknowledged in our report.

We received tremendous support and cooperation from numerous witnesses from both inside and outside the DOD legal community. General David Petraeus; Vice Admirals Harry Harris, John Bird, and Robert Harward; and Marine Lieutenant Generals John Kelly and Richard Natonski provided invaluable insight into the critical role that judge advocates play in today's fluid operational environment in both regions of conflict and regions of apparent calm.

Vice Admiral James Houck, the JAG of the Navy, and Major General Vaughn Ary, the Staff Judge Advocate to the Commandant of the U.S. Marine Corps, provided the panel with comprehensive testimony and other information regarding the organization, missions, and staffing of the uniformed legal community in their Services.

The panel completed its 217-page report on February 22, 2011, and delivered it to Secretary Gates and to the chairmen of the Senate Committee on Armed Services and the House Armed Services Committee.

The panel addressed each of the areas of review mandated by the statute. By way of summary, the panel believes that the demand for judge advocate support will continue unabated, as Chairman Webb has already indicated, driven by the increasing complexity and intensity of the legal and policy environment in which commanders are required to operate.

In addition, their contribution to good order and discipline, by supporting a just and functional military justice system, is equally noteworthy and essential to the overall well-being of the Navy and Marine Corps.

Military justice, from complex, high-profile general courts-martial to due process advice and representation during administrative proceedings, needs to remain an important and necessary core function for the Navy and Marine judge advocates. In the end, proper manning, resourcing, training, and retention of judge advocates in the Navy and the Marine Corps is both a necessity and a cost-effective force multiplier that contributes to the ultimate mission success of both Services.

I would request, Mr. Chairman, that our report also be made a part of today's record.

Senator WEBB. Yes, it has been entered as a part of the record.

Colonel DELL'ORTO. I would like to then offer General Osman the opportunity to add his comments. Upon completion of those comments, we are prepared to address your questions.

Senator WEBB. Let me also say at this point that your full statement, if it is different than what you gave, also will be entered as part of the record.

[The prepared statement of Colonel Dell'Orto follows:]

PREPARED STATEMENT BY COL DANIEL J. DELL'ORTO, USA (RET.)

Good afternoon, Mr. Chairman and members of the committee, and on behalf of Lieutenant General Osman, thank you for the opportunity to appear before the committee today.

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rine Corps with respect to the responsibilities, assignment, and career development of judge advocates for purposes of determining the number of judge advocates for purposes of determining the number of judge advocates required to fulfill the legal mission of the Department of the Navy."

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Lieutenant General Osman and I are prepared to address your questions. Thank you.

Senator WEBB. General Osman, welcome.

STATEMENT OF LT. GEN. PETE OSMAN, USMC, RET., PANEL MEMBER, INDEPENDENT PANEL REVIEW OF JUDGE ADVOCATE REQUIREMENTS OF THE DEPARTMENT OF THE NAVY

General OSMAN. Mr. Chairman, I can only echo what Colonel Dell'Orto has said with regards to the panel's activities and the support that we received. I can tell you that as a marine infantryman and the only non-attorney on the panel, it was an honor and quite an education.

Senator WEBB. Lending dignity to what otherwise would have been a vocal brawl, I am sure.

General OSMAN. The Commandant had a reason for putting me there, I think, and I hope I fulfilled that for him.

Really, it was a pleasure and an honor to be able to serve on the panel, and I look forward to the questions that you may have for us, sir.

Senator WEBB. Thank you very much. If you have a written statement, it will be entered in the record at this time.

General OSMAN. Sir, I think that Dan would agree this is our written statement right here.

Senator WEBB. Thank you, and it is a part of the record.

Senator Graham, I am just going to let you go ahead and ask questions.

Senator GRAHAM. In a couple minutes, tell us what you concluded.

Colonel DELL'ORTO. I think if you look at the report——

Senator GRAHAM. Assume we are all infantrymen up here.

Colonel DELL'ORTO. Except for myself, who was an artillery man in my earlier days, Senator Graham.

I think we took a look at a wide array of issues, as the statute directed that we do. I think certainly, as has already been mentioned, judge advocates today perform a much broader array of duty, legal duties, than perhaps at any point in their history.

I can certainly say from my personal experience as a judge advocate for 20 years that the judge advocates of today, in this environment—and certainly, I don't limit that to the combat environment in which so many of them are serving—the nature of the issues, the variety of issues go well beyond the focus that I had as principally a military justice practitioner.

The people who preceded me and many of my generation focused much of their career principally on military justice, administrative law in the traditional sense, things of that nature. Today, when you look at Navy JAGs and all that they have responsibility for, with respect to maintaining their operational exercise areas free from litigation in our civil courts to what is being done on battlefields in Iraq and certainly now in Afghanistan with respect to rule of law, that goes well beyond purely legal practice.

Senator GRAHAM. Do you know how many Navy JAGs and Marine Corps JAGs have been deployed in Iraq and Afghanistan?

Colonel DELL'ORTO. There have been significant numbers, Senator Graham. I don't know the numbers. We certainly talk about the numbers who are performing and have been performing different types of duties with respect to, I think, rule of law functions, operational law functions, things like that.

I know on my own trips to the theater, when I was still in the department, I ran across a number of Navy JAGs operating in support of either Marine units or serving in command elements as part of the legal staffs there. So, certainly, a number of them have been deployed.

I would say that certainly—so the variety of duty that they perform is far broader than ever before. I would say that I think the expectations that they will be able to deliver their advice very quickly at a time when the information flow that commanders deal with, the information flow the senior leaders deal with is such a fast-paced environment that there is a premium on getting advice to commanders and senior civilian officials at an ever-increasing pace.

I think that that, in addition to the variety of work that they do, puts a premium on having great amount of expertise embedded in each and every JAG, when he or she is performing duties at any level of command, at any location.

Senator GRAHAM. In terms of numbers, do we have enough? Do we need more?

Colonel DELL'ORTO. Again, our mandate, Senator Graham, was to look at the Navy and the Marine Corps. We believe, at the moment and as we look into the near term, on the Marine Corps side, we believe that the Marine Corps has programmed billets for enough judge advocates to meet current and immediate future missions.

We have concerns on the Navy JAG side. If you assume that we will continue at the current pace of operations, the current pace of deployments for the fleet, if you look at the decision that has been made since the panel wrote its findings with respect to military commissions, we believe that you put all that together and the Navy program for the immediate 3, 4 years down the road, I would say, is probably about 200 attorneys short.

I think we forecast about 950 attorneys for the Navy, and I think they are at about 750 or plan to be at about 750. Whereas the Marines, I think, are looking at—we fixed the requirement at about 550, and we believe the Marines have planned for that.

Senator WEBB. Maybe you can clear up one thing for me, and then I am going to move to others who may want to ask a question. To what extent does the Foster case represent something that was endemic to the system, and to what extent was that an anomaly?

Colonel DELL'ORTO. One of the problems with the Foster case, in and of itself, was that it followed on the heels of other episodes of similar delay in the process associated with review of a court-martial.

I think my own experience as an appellate advocate in the Army would indicate that sometimes—I mean, things can happen, even in a system that is built to be as foolproof as we would like to think that these systems are. But I think the biggest problem for Foster is that we had a wakeup call in Moreno several years earlier, and one would have hoped that a case like Foster would not have suffered from the same fate.

I didn't look at the record of trial in Foster. My assumption is that it was principally a case in which there was testimony going back and forth between the defense and the prosecution. I doubt that there was much in the way of forensics. I am making an assumption. Perhaps I shouldn't.

But if you assume that—and I think the record of trial may have been 700, 800 pages or so. But again, in the absence of a highly complicated, science-based evidentiary issue—and it appears that there was not any—I would say, real esoteric law involved—it was a straight-up, factual—bust for factual insufficiency—it would seem to me that that is a case that should have been handled a little bit more cleanly.

Senator WEBB. In the normal circumstance, how long would that have taken?

Colonel DELL'ORTO. I don't know what the normal circumstance would be for the Marines, Mr. Chairman, and for the Navy appel-

late review authority or for the Navy-Marine Corps Court of Criminal Appeals. But we have multiple enlargements for the case once it gets to the appellate court. At some point, someone has to say hold it. We have gone too long.

I would have hoped that someone would have seen fairly early on in the appellate process that this was going to be a factual sufficiency case and that there was some chance that it might get overturned on review. But again, I can't talk to how systematic this problem is or was.

But we do know that we had at least one previous incident that members of this committee, we believe, were concerned about with Moreno, and yet Foster followed at some point on the heels of it.

Senator WEBB. Thank you.

Senator Brown.

Senator BROWN. Thank you, Mr. Chairman.

Just for purposes of disclosure, I am a JAG and have been for a while. I have recognized the old caveat that you never want a JAG until you actually need one, when your you-know-whats are in the wringer and you need some guidance as to whether to go or not to go.

Especially in this ever-changing world of war and conflict that we are in, the problem can potentially be that if you don't get the proper guidance, you are on the front page of the newspaper or on CNN, and you have created an international incident.

So that is really where my head is at as to: are we going to make some cuts to save some money, or are we going to make some cuts and potentially start another worldwide incident? That is how basic it is for me.

In your report, you spoke about the legal risks of failing to provide the right numbers of judge advocates with the right training and experience, and I reference especially in this complex legal environment. I guess the question for today is what effect precisely would result from lowering the number of operational lawyers, particularly in the Navy and Marine Corps?

I know personally the effect I think it would have on individual servicemen, but can you comment on how it would affect our operations around the world, particularly with your perspective as a former infantry officer and commander?

That would probably be you, General, and then I will certainly refer back to the artillery man.

General OSMAN. Certainly, Senator Brown.

As Mr. Dell'Orto explained, once a lot of these things had come to light, I will coin a phrase that the Commandant used. He saw a "call to action" and began to take—through the Total Force Structure Division within the Marine Corps, take a look at the number of judge advocates that were needed.

It was determined to be 550, and as Mr. Dell'Orto said, the committee agreed with that number. The Marine Corps has begun quite a ramp-up to get there. In fact, if you look, back in September, I believe they had 438 judge advocates. Today, they have 510. So they are moving very quickly to get to that 550. So that is good.

The Navy faces a challenge. Again, the panel had determined they needed about 950. I believe Vice Admiral Houck had figured

somewhere around 925, something like that. It looks like the Navy is on a glide slope to go down to as few as 750. That would be a concern for me.

The Navy does have a lot of lawyers involved in operational law, probably—certainly more than the Marine Corps has involved in operational law. If you look at the military justice piece, interestingly, the Marine Corps probably has a higher demand in that area than the Navy does. In fact, that may be one of the challenges that the Navy is going to face is ensuring they have the experienced litigators they need to address the military justice issue.

So there are challenges out there, Senator Brown. That is the bottom line. Watching these numbers closely and the concern that this committee has for that is probably well founded.

Senator BROWN. So do you think it would affect our operations around the world, the lack of proper counsel?

General OSMAN. Again, having listened to the testimony of Vice Admiral Houck, as well as a number of commanders in the field, the increasing requirement for lawyers in operational law is definitely there.

In fact, when I did my interview with General Petraeus, asking how many judge advocates he had on his staff, he said, "Not enough." He had way more than he rated at that time, but nonetheless, he said he used them in a lot of positions that were out of the judge advocate community because, as he said, they are very good critical thinkers. That is what he needed.

So the requirement is out there from the operational commanders in the field.

Senator BROWN. That is interesting because my next question was, could you comment on how the general feels or felt, actually, about his lawyers? But do you know how he would feel about terminating Active Duty military lawyers, as the Navy apparently is planning on doing?

General OSMAN. Again, in the interview I had with him, he made it quite clear that he would take as many judge advocates as he could get to put on his staff. So, obviously, if there was a reduction in the numbers, he would not have liked that.

Senator BROWN. So when you were doing your report, did you speak to the Navy and determine what the discrepancy was between your numbers and their numbers and what the reasoning was? I know I am obviously going to ask the same question. What was your opinion on why? I mean, why do they think—is it just numbers driven? Do they need to save money?

General OSMAN. I think that Vice Admiral Houck can probably better address how the Navy goes about determining the numbers that it needs of judge advocates.

Again, as I said, in the Marine Corps, they have a thing called a Total Force Structure Division that sits down as the honest broker and literally works the numbers and came out with the 550. Again, the panel, after reviewing it, said that made a lot of sense.

Senator BROWN. I guess, Mr. Dell'Orto, just one final question. Can you comment on the relative strengths and weaknesses that struck you the most regarding how each Service provides judge advocate support?

Colonel DELL'ORTO. Again, Senator, when you talk about each Service, you are about the Marines versus the Navy?

Senator BROWN. Yes, each Service. Those two Services. So, yes.

Colonel DELL'ORTO. I think both are doing an awfully good job of providing support where their commanders believe they need support. I think when the Marines determined that they were going to put judge advocates at battalion and regimental level for their deployed forces, I thought that was a significant commitment on the part of the Marine leadership to ensure that commanders, I mean, at the lowest levels had access to legal advice.

I think the Navy certainly has, in terms of supporting the Marine Corps in some of the prosecutions that have taken place where the Marine Corps needed additional counsel in support of its freedom of navigation efforts and, as I alluded to earlier, some of the environmental battles they are fighting to maintain their ranges or their exercise areas, I think the Navy JAG community and the leadership has been doing a very good job in deploying their JAGs where they think they have some significant needs.

I think they have been utilizing their JAGs correctly. I think the question is, at least with respect to the Navy, whether they are going to have enough to do all that they are being asked to do.

Senator BROWN. Thank you, Mr. Chairman.

Colonel DELL'ORTO. May I add one additional comment in response to Senator Brown and General Osman?

We highlighted the number of general and flag officers who provided information to us and were interviewed by us. We didn't have to go soliciting that. One of the things that I think we found remarkable, they came to us. They wanted to talk to us about the value that they find in the presence of their JAGs.

So, believe me, I mean, as great as it was to have General Petraeus come in and do that for us or Admiral Harris, whom I know well from the multiple assignments he has had, we didn't have to go beg them to do that. We didn't have to ask them. They just came to us because they—it was a testament to the value they placed on the role—they place on the role of JAGs in their responsibilities.

Senator WEBB. Thank you, Senator Brown.

Just as an observation from General Osman's comment about the different functions of the JAGs in different disciplinary environments in the Service, if you look at this data sheet that we have here, the Marine Corps had six times as many courts-martial as the Navy did last year. If you figure that the manpower is about two-thirds, that that force has about two-thirds, that means the Marine Corps had nine times the rate of court-martial as the Navy did last year.

Senator Ayotte?

Senator AYOTTE. Thank you, Mr. Chairman.

I want to thank both of you for coming here today. This is a very important issue. It is so important that we respect the rule of law and that particularly those who serve are afforded the presumption of innocence.

It is a fundamental of our constitutional rights. I think that the JAG Corps performs such an important function in our armed services. So I really appreciate the analysis that both of you have done.

Can you help me understand the Foster case, an understanding that that was just an egregious situation. Are there proper systems in place to avoid that happening again, in your opinions?

Colonel DELL'ORTO. I think the Navy and Marine Corps have certainly taken steps to correct the failures in that. We outlined several things in the report that have already been done to take into account an administrative responsibility for watching these cases as they move through the system.

I think more is being done. The Navy, I know, is having a study done that will take a look at what the Army and the Air Force have done over the years with respect to tracking cases from cradle to grave, if you will.

I know my experience, when I was a trial counsel, I had a retired E–9 as my paralegal. When I was the chief of military justice, and if we didn't move a case quickly, he was getting a call from Washington and the clerk's office about where this case is, why isn't it moving more quickly?

This was prior to the computer age, with databases and systems that would automatically trigger a request for information. There were people literally looking at the reports and asking questions if a case didn't appear to be moving quickly.

As a military judge in Korea in the 1990s, I had to fill out a report at the conclusion of every case I tried that triggered the tracking of that case back in Washington. So, you had parallel paths for reporting of the cases taking place. Judiciary was tracking the case, and certainly, the command had responsibilities coming back into the Army Legal Services Agency for tracking a case.

I always felt that system held up pretty well. I can't say that the Army was immune from having a Foster-like case.

But I have commended that to Vice Admiral Houck, and I know—and his response to me is that they are already looking at that and looking at the systems in place in the other Military Departments and Services to see whether they can learn from those and adapt some of those systems. Because there are systems that work, in my view.

Senator AYOTTE. Particularly, as you point out, in the Army and the Air Force and then also, obviously, on the civilian side of how things are tracked. How far off are they from implementing an actual system that would be similar or have similarities to what the Army and the Air Force have in place?

Colonel DELL'ORTO. Senator, as we point out in the report, certain things have already taken place. They are not necessarily tied to, I think, the assessment or review of what the other Services are doing. That piece is underway right now, and I don't know how close they are to completing that assessment to determine whether those systems are transferable into the Navy-Marine Corps situation.

Senator AYOTTE. Did you get a good sense of urgency? Because this seems like a very urgent situation, in my opinion.

Colonel DELL'ORTO. I did. But I will let General Osman speak for himself on that.

General OSMAN. As Colonel Dell'Orto said, both Services have taken some initiative with respect to tracking. The Navy has their court-martial tracking and information system that they are uti-

lizing now, and the Marine Corps has a case management system that they are using to help track cases.

I think the panel would say that both of those still need some work. They would not stand alone as they are. But nonetheless, DOD is looking at what the Air Force and Army do; so they are pursuing alternative case tracking systems that will assist them in this.

Senator AYOTTE. Can I ask you both about the military commission system? I am a strong supporter particularly of using the military commission system to try individuals at Guantanamo. I am very pleased that the administration, for example, has changed their position on individuals like Khalid Sheikh Mohammed because I think it is important for the security of the American people.

What is your assessment of the litigation teams with respect to handling military commissions? Again, I want to also emphasize the importance of the military commissions points out the importance of having a robust and sufficient JAG Corps because it shouldn't just be the military commissions. We don't want our soldiers to be given short shrift because we have to focus all the resources there. Sufficient resources have to be there to cover all of this.

Colonel DELL'ORTO. As one who was there at the inception of military commissions and has been part of the effort to help get the right staffing in place for military commissions, I strongly support the view that we need to put first-class talent in the roles of prosecutors, defense counsels and judges. I similarly believe that for our courts-martial, regardless of the number, we need to ensure that we have first-rate lawyers as prosecutors, as defense counsels, and as judges.

We face an interesting dilemma at this point. As the numbers that the chairman has requested are examined, you see that the numbers of courts-martial that are being tried continues to decline. Certainly from my time as a prosecutor and defense counsel in the 1970s and 1980s, in both the continental United States (CONUS) assignments and in European assignments, our numbers were significantly higher.

All of us who were military justice practitioners then tried a lot of cases. Our predecessors who served in Vietnam, Germany, Europe, and overseas assignments during that era and immediately following tried far more cases than I did and my contemporaries.

You get better as a military justice practitioner the more you practice that craft, whether you are a trial counsel, a defense counsel, or even a judge. That is not to say every case you try needs to be a general court-martial to get better.

An Article 15 turndown where both sides are going at each other tooth and nail is a great opportunity to learn your craft as a trial counsel, whether you are trying or prosecuting or defending. You learn that in series of plateaus.

You may try your first 20 cases, and the bulk of them as a trial counselor are guilty pleas. You go in there and you are sweating that that defendant is going to bust providency on that case, and you are scared to death you are going to have to try that case.

By the time you get to that 40th or 50th case—and I don't want to be cynical about this—but you are almost hoping that he busts providency because you can't wait to try that case.

I will confess that I sort of went kicking and screaming to be a defense counsel. But once you get in the saddle and you get the hang of it, you appreciate, as you go through a series of plateaus in your development as a counsel and get significant numbers of cases under your belt, you gain a full appreciation for the importance of that role not only for the client, but also the importance of the role for that system of justice.

So how do we handle this now? How do we handle the needs to have highly qualified, skilled counsel trying cases where there aren't that many cases to be tried?

How do we ensure that we have the right set of trial counsel, defense counsel, and judges to be thrown into military commission mix, when perhaps they are still not quite done developing that skill set in the court-martial realm?

We have struggled with that. We struggled through it the whole time, as post-September 11, 2001, when the President's order on military commissions came out. It was a constant battle, particularly with the lurching back and forth about whether we were going to try cases at military commissions.

We took testimony from retired Vice Admiral MacDonald, who is now the convening authority for military commissions. He told the panel that he has been assured by each of the Judge Advocates General that he will get first-rate counsel to fill those billets as we go forward, if and when the decision was made to go forward with military commissions, as that decision has since been made.

He is also counting on support from the Department of Justice, where, presumably, you have people who have spent a little bit more time in the courtroom, who will also fill in and be part of the mix of attorneys on the trial counsel side, on the prosecution side.

Certainly, my experience, when I was there, the defendants were getting a lot of highly skilled lawyers from the defense bar stepping forward, as we expected and hoped they would, to step forward and defend people in the military commission.

So I don't know that we will ever be completely satisfied that we have all the right people, but I know a lot of commitments have been made to ensure that the right people are there.

Senator AYOTTE. Thank you.

Senator WEBB. Thank you, Senator Ayotte.

Gentlemen, thank you for appearing before us today. We appreciate your work in this vital area. Again, I apologize for having been late in opening this hearing.

I will now welcome our second panel, consisting of Lieutenant General Dana Chipman, JAG of the Army; Vice Admiral James Houck, JAG of the Navy; Lieutenant General Richard Harding, JAG of the Air Force; and Major General Vaughn Ary, Staff Judge Advocate to the Commandant of the Marine Corps.

We look forward to your assessment of and response to the DOD IG's report and the independent panel's review of JAG issues and your assessment of the manning and structure of your respective JAG Corps.

Without objection, again, your full written statements will be included in the record of the hearing. We will ask each of you to make an oral statement of your choosing once you get seated.

General Chipman, we will start with you and move across the table. Welcome.

STATEMENT OF LTG DANA K. CHIPMAN, JAGC, USA, JUDGE ADVOCATE GENERAL OF THE U.S. ARMY

General CHIPMAN. Thank you, Senator Webb.

Mr. Chairman, members of the subcommittee, thank you for the opportunity to discuss the provision of legal services by the outstanding members of the Army JAG's Corps—Active, Guard, Reserve, and civilian—both in deployed environments and at home station.

Before I begin, I would like to thank you and the members of this body for your support of the men and women of our Armed Forces. I note that everyone in this room uniquely exemplifies our joint team commitment.

Sir, you served on Active Duty. We have members of the Air Reserve, the Army Guard, the JAG Corps. We have the military spouses, because we recruit individuals and yet we retain families.

I would like to thank all of you for your service to our joint team.

The Army JAG Corps is comprised of about 1,900 judge advocates, 100 warrant officers, and 1,800 enlisted paralegals. Currently, we have in excess of 140 Army judge advocates deployed to Afghanistan, in excess of 100 in Iraq, and 300 more serving in 19 other countries overseas.

We have five Active component general officers providing strategic oversight of our corps, while ensuring that the Army's most senior leadership receives the trusted and experienced counsel it demands. On a temporary basis, we have a sixth general officer. He serves in a joint billet in Afghanistan, providing support to rule of law operations.

In addition, we have two brigadier generals in the Army Reserve and one in the Army Guard. They play an essential role in ensuring the effective integration of approximately 5,000 Reserve and Guard legal personnel into a unified team, without which we could not provide the support we give to our commanders, soldiers, and their families.

Army commanders expect our judge advocates to be highly versatile and proficient in the core legal disciplines and, when deployed, to be fully competent in a variety of subjects ranging from detainee operations, foreign claims, to interagency collaboration in support of rule of law operations.

When they return to home station, the focus shifts, and our judge advocates are called upon to advise on such diverse matters as disability evaluation system, Federal litigation, environmental law, and civilian personnel law.

To improve the responsiveness of our legal support, judge advocates are now embedded at the brigade level and, in some cases, even at battalion level. Army judge advocates are committed members of the joint team. There is no doubt in my mind that serving alongside our colleagues from the Air Force, Navy, Marine Corps, and Coast Guard makes us more effective.

Military justice remains our core competency. Although our court-martial rates have remained relatively stable in recent years, with the exception of summary courts-martial, which have decreased substantially in the last year, the complexity of those cases we try is increasing.

We have invested considerable resources in training our trial counsel and our prosecutors, to better prosecute cases involving crimes of sexual assault. This has included the appointment of 15 special victim prosecutors (SVP), with another 8 on the way, and 5 highly qualified experts training, coaching, and teaching those SVPs. While much work clearly remains to be done in this area, I firmly believe we are now on the right track.

I am also committed to improving the training of our defense counsel to ensure that the soldiers they represent receive effective representation.

Finally, our appellate docket is carefully managed to ensure that we timely dispose of those cases, those courts-martial on appeal. The success of our legal operations depends heavily on the support of our warrant officers and our enlisted paralegals.

I would also like to highlight the phenomenal work being done by our civilian attorneys and paraprofessionals, who provide essential continuity and subject matter expertise to our home station legal offices.

In conclusion, the state of the Army JAG Corps is strong. Recruiting and retention are at all-time highs. Morale remains high, in spite of the fact that the Army is well into its 10th year of sustained combat operations.

Commanders have great confidence in their judge advocates and value the contributions they make to mission accomplishment. I am confident in our ability to meet the changing needs and requirements of our Army.

I am pleased to submit a more detailed written statement for the record. Again, thank you, and I would be pleased to answer any questions you may have.

Senator WEBB. Thank you, General. Your full written statement will be entered into the record at this point.

[The prepared statement of General Chipman follows:]

PREPARED STATEMENT BY LTG DANA K. CHIPMAN, JACG, USA

INTRODUCTION

Mr. Chairman and members of the subcommittee: Thank you for the opportunity to discuss the provision of legal services by the outstanding members of the Army Judge Advocate General's Corps—Active, Guard, Reserve, and civilian—in deployed locations and at home station. Before I begin, I want to thank you and members of this body for your support of the men and women of our Armed Forces.

PERSONNEL OVERVIEW

The Active Army JAG Corps is comprised of 1,870 Judge Advocates, 99 warrant officers, and 1,831 enlisted paralegals. The number of Judge Advocate position allocations has increased by 329 since September 11. This is the result of an unrelenting demand for legal support from commanders who operate in an increasingly complex and legally intensive environment. Currently, there are 142 Army Judge Advocates deployed to Afghanistan and 113 Army Judge Advocates still serving in Iraq. In addition, there are 304 Judge Advocates serving in more than 19 other countries in support of our Army deployed overseas.

The JAG Corps continues to attract talented lawyers through its aggressive on-campus recruiting program, and recruited at 199 of the American Bar Association

(ABA) accredited law schools during the fiscal year 2010 and fiscal year 2011 on-campus recruiting seasons. In fiscal year 2010, we welcomed 164 attorneys into the Regular Army, 94 attorneys into the Army Reserve, and 93 attorneys into the Army National Guard. As of July 15, 2011, we have accessed 151 attorneys into the Regular Army, 79 attorneys into the Army Reserve, and 74 attorneys into the Army National Guard.

Diversity in the JAG Corps has continued to remain at high levels, with women now accounting for approximately 25 percent of all Active Duty Judge Advocates. Minority officers comprise about 15 percent of the JAG Corps' active duty strength.

We have five Active component general officers providing critical strategic oversight of our Corps while ensuring the Army's senior leadership receives the trusted and experienced counsel it demands. On a temporary basis, we have a sixth general officer serving in a joint billet in Afghanistan as the Deputy Commander, Combined Joint Interagency Task Force 435 and Commander, Rule of Law Field Force, Afghanistan. He will soon assume new duties as the Chief Prosecutor, Office of Military Commissions. In addition, we have two Brigadier Generals in the Army Reserve and one in the Army National Guard. They play an essential role in ensuring the effective integration of approximately 5,000 Reserve and Guard legal personnel into a unified team without which we could not provide the support we give to our commanders, soldiers, and families.

DELIVERY OF LEGAL SERVICES

Army commanders expect their Judge Advocates to be highly versatile and proficient. They must operate effectively within our six core legal disciplines: military justice; international and operational law; administrative and civil law; contract and fiscal law; claims; and legal assistance. In addition, Army legal personnel, when deployed, must be fully competent in a variety of subjects ranging from detainee operations and foreign claims to interagency collaboration in support of Rule of Law operations. When they return to home station, the focus shifts and Judge Advocates are called upon to advise on such diverse matters as our disability evaluation system, Federal litigation, environmental law, and civilian personnel law.

To improve the responsiveness of our legal support, Judge Advocates are now embedded at the Brigade level and, in some instances, at the Battalion level. They are trusted advisors who proactively address issues before they become problems. Army Judge Advocates are also committed members of the Joint Team. There is no doubt in my mind that we are most effective when serving alongside our colleagues from the Air Force, Navy, Marine Corps, and Coast Guard, and with our dedicated civilian attorneys as well.

The Judge Advocate General's Legal Center and School (TJAGLCS) plays a critical role in preparing Army legal personnel to deliver competent legal services across the spectrum of Army operations. TJAGLCS' resident program continues to educate almost 5,000 students per year and, in combination with non-resident programs, including distributed learning, and onsite training for Army Reserve component attorneys, TJAGLCS educates an increasing number of lawyers and legal paraprofessionals annually, totaling over 18,000 students in fiscal year 2010. In addition to teaching three Judge Advocate Officer Basic Courses for new Judge Advocates each year, TJAGLCS conducts the ABA recognized Graduate Course that awards a Master of Laws degree in Military Law to career Judge Advocates, and provides continuing legal education in over 70 functional area courses.

The U.S. Army Litigation Division provides representation to the Army and Army officials in four areas of civil litigation: Military Personnel Law, General Litigation, Civilian Personnel Law, and Tort Litigation. The Army has approximately 925 active civil cases. During the first 6 months of 2011, Litigation Division received 170 new cases and successfully closed 162 cases. We continue to see a large number of cases challenging military personnel decisions, official decisions by government officials via Bivens suits, and government information practices. The nature of our practice continues to be highly complex as we face due process, First Amendment, and equal protection litigation, frequent filings for information under government information practices statutes, challenges to the Feres doctrine and the Department of Defense's Homosexual Conduct Policy, and complicated jury trials in employment discrimination law.

Army legal assistance services remain in high demand. During fiscal year 2010, we opened 187,239 cases. Our largest areas of service remain in the area of Estate Planning (54,078) and Divorce/Separations (33,671). In assisting our clients, Army legal offices prepared a significant number of legal documents. Powers of Attorney were the most frequently prepared document (324,272). In addition, our legal assist-

ance offices prepared 41,482 wills and 2,969 separation agreements. They also provided 328,939 notarizations and referred 2,044 clients to civilian attorneys.

Army legal assistance personnel, together with unit tax advisors, temporary employees, and volunteers prepared and filed 121,834 Federal and 76,697 State income tax returns during the tax filing season. More than 90 percent of the Federal income tax returns were filed electronically. The soldiers, retirees, and family members who visited our Tax Assistance Centers saved over $32,750,000 in tax preparation and filing fees last year. Every year, legal assistance services collectively save our clients substantial fees they would otherwise incur if purchasing the advice and services. Using average national costs of selected services provided by the ABA Standing Committee of Legal Assistance for Military Personnel, legal assistance offices saved our clients over $86,250,000 in legal fees (including the above mentioned over $32,750,000 in tax return preparation fees) in fiscal year 2010.

Enhancing legal support to soldiers processing through the Medical Disability Evaluation System (DES) remains an important focus area. In fiscal year 2010, we had 26 counsels serving as Soldier's Physical Evaluation Board Counsel and 23 serving as Soldier's Medical Evaluation Board Counsel (SMEBC). They were supported by 36 paralegals. Of these, 27 counsel and 16 paralegals are Reserve component soldiers mobilized to support this critical mission. The recent establishment of the SMEBC function has been extremely successful. By providing counsel earlier in the DES process, we more clearly identify the medical conditions to be addressed in the process, ensure appropriate documentation of the conditions, assist Soldiers in better understanding the system and help them have reasonable expectations of the likely results of their case. This has resulted in more complete case files moving forward for adjudication, better results for soldiers and a reduction in the number of formal Physical Evaluation Boards being requested by soldiers.

The U.S. Army Claims Service (USARCS) and claims offices worldwide continue to vigorously examine and settle meritorious claims against the U.S. Army brought under the Federal Tort Claims Act, the Personnel Claims Act, the Foreign Claims Act, and other statutory authority. In fiscal year 2010, USARCS oversaw payment of over $8.6 million in claims to Iraqi civilians under the Foreign Claims Act, a $31 million decrease from the previous year. In fiscal year 2010, USARCS administered the payment of over $3.1 million in claims to civilians in Afghanistan under the Foreign Claims Act, a significant increase from the previous year when less than half this amount was paid. Also during fiscal year 2010, USARCS paid more than $5 million in household goods claims and over $21 million in tort claims. Army claims offices also processed a total of $22.4 million in medical care recovery claims in fiscal year 2010.

MILITARY JUSTICE

Military justice remains our core competency. During fiscal year 2010, there were 620 trials by general court-martial and 454 trials by special court-martial. In addition, there were 667 trials by summary court-martial. The number of non-judicial punishments completed during fiscal year 2010 was 36,624.

	Fiscal Year				
	2006	2007	2008	2009	2010
General Court-Martial (CM)	750	811	674	631	620
Special CM	583	639	488	523	454
Summary CM	1,160	1,223	1,279	1,040	667
Total CM	2,493	2,673	2,441	2,194	1,741
CM Rate Per 1,000 Soldiers (Not incl SCM)	2.64	2.78	2.16	2.11	1.90
Nonjudicial Punishment (NJP)	43,813	45,239	46,063	35,210	36,624
NJP Rate Per 1,000 Soldiers	86.69	86.66	85.60	64.37	64.70
Army Active Duty Strength	505,402	522,017	538,128	547,000	566,045

Although court-martial rates have remained relatively stable in recent years, with the exception of Summary Courts-Martial, the complexity of cases is increasing. We have invested considerable resources in training our Trial Counsel to better prosecute cases involving crimes of sexual assault. This has included the appointment of 15 Special Victim Prosecutors (SVPs), with an additional 8 SVP positions recently approved, and 5 highly qualified experts. While much work clearly remains to be done in this area, I firmly believe we are now on the right track.

I am also committed to improving the training of U.S. Army Trial Defense Service (TDS) counsel so that our soldiers receive the effective representation they deserve. Currently, more than 400 Active and Reserve component attorneys serve in TDS

worldwide, to include over 20 in U.S. Central Command deployed to Iraq, Afghanistan and Kuwait and over 30 mobilized in support of defense operations worldwide. The Defense Counsel Assistance Program plays a centralized role in ensuring that defense counsel and paralegals have the necessary skills and knowledge base to represent their clients in an effective manner.

Finally, our appellate docket is carefully managed to ensure the timely disposition of courts-martial cases on appeal. The Army Court of Criminal Appeals post-trial processing systems and those of the Government and Defense Appellate Divisions are adequate to comply with the standards contained in the Uniform Code of Military Justice and applicable case law.

CONTRIBUTIONS OF OTHER MEMBERS OF JAG CORPS TEAM

The success of our legal operations relies heavily on the outstanding support of our warrant officers and enlisted paralegals. Their selfless dedication and commitment are truly impressive. I would also like to highlight the phenomenal work of our civilian attorneys and legal paraprofessionals who provide essential continuity and subject matter expertise in our home station legal offices.

CONCLUSION

In conclusion, the state of the Army JAG Corps is strong. Recruiting and retention are at all-time highs. Diversity is expanding as more women and minorities serve as Judge Advocates. Morale remains high in spite of the fact that the Army is now entering its 10th year at war. Commanders have great confidence in their Judge Advocates and value the contributions they make to mission accomplishment. We are a flexible and adaptive Corps. I am confident in our ability to meet the changing needs and requirements of our Army.

I would like to thank you again for the opportunity to appear before you today and your continued support for the soldiers and families of America's Army.

Senator WEBB. Admiral Houck, welcome.

STATEMENT OF VADM JAMES W. HOUCK, JAGC, USN, JUDGE ADVOCATE GENERAL OF THE U.S. NAVY

Admiral HOUCK. Good afternoon, Mr. Chairman and Senator Graham, and thank you both for your interest in holding this hearing and your concern for our uniformed legal communities.

Also thank the members of the 506 panel, Chairman Dell'Orto, General Osman, and the other members of the panel who dedicated pro bono hundreds of hours to the project, and we were very grateful for their support.

I would like to make three points briefly this afternoon. The first one being, I think it is imperative that we get the right number of judge advocates in all the Services, but in my case, in the Navy JAG Corps. I think there are risks if we don't. There is a risk if we have too many. In this climate today, I know that our Secretary and our Chief of Naval Operations (CNO) and many others are working very hard to reconcile a lot of competing demands.

Having said that, I think there are also risks in having too few. I think the risks are relatively obvious, and I won't belabor those. I see my job, as precisely and carefully as I can, to assess the requirement for judge advocates. Then as clearly and, when necessary, as forcefully as I can to articulate that requirement to decisionmakers to make sure that they are aware of that.

The second area that I think really bears emphasis is not only the number of judge advocates we have, but the things that go into making up the health of our community—things like the recruiting and retention, things like the resources and time that we have to do education and training for our judge advocates, and as we in the Department of the Navy and as the committee may look at various structures for how we address the authorities and alignment for

the provision of our legal services, that whatever option we adjust, that we make sure that we maintain a leadership structure in place that is adequate for a law firm the size and scope of our Navy JAG Corps.

I think the last thing I would like to touch on is to the imperative that we account for and adjudicate in a timely way all our courts-martial cases, from the moment charges are brought to the very last day of the last appeal. We are doing that in the Department of the Navy today. We are doing that through case tracking systems that—I would echo General Osman's comments—they are working for us today.

There are things we can improve in them, but the combination of these systems, as well as the focused, hands-on, eyes-on leadership at senior levels on these cases is—and to respond to your question, Senator, there is a sense of urgency to make sure that the debacle which was the Foster case never happens again.

We have also made great progress in the time in which we adjudicate cases. There are different metrics to look at this, but I think one which is significant is that in 2004, which was right before the Court of Appeals for the Armed Forces decided the Moreno case, it was taking the Department of the Navy over 800 days from the time somebody was convicted to the time their appeal was finished. Today, that number is just above 300 days, and that is against a standard that is close to 700 days—about 690 days as established by the Court of Appeals for the Armed Forces.

So, from a variety of different ways, we could talk about the measurements of it. But the point that I want to make is that we take in the Navy, and I take personally as the JAG of the Navy, our trusteeship of the military justice system seriously and personally, and we are very focused on it.

I guess by way of final note and to just respond to a couple of the questions that you all put to the panel that was here, I would note that we are looking very carefully at case tracking systems and have learned a lot from a study that was done for us by the Center for Naval Analysis. We are in the process of looking at options right now, but it is very much a priority for us to get a common case tracking system in the Department of the Navy. I know the Secretary is committed to it, and we are looking at it hard and moving forward on that front.

Our courts-martial rate is obviously the lowest of the Services. But I think the Foster case taught us, and I agree with Mr. Dell'Orto on this point, that it doesn't matter what number of cases that you have, if you don't handle one of them properly, and Foster is the best object lesson of that that we have seen, it casts a shadow over the entire military justice system. So, again, we have taken many steps, which I can respond to in the questions, to address this issue.

Thank you, Mr. Chairman.

[The prepared statement of Admiral Houck follows:]

PREPARED STATEMENT BY VADM JAMES W. HOUCK, JACG, USN

Thank you for inviting me to testify before your committee on the requirements of the Navy Judge Advocate General's Corps, the status of implementation of the recommendations of the Independent Review Panel to Study Judge Advocate Re-

quirements of the Department of the Navy ("the Panel"), and post-trial review processes within the Department of the Navy.

Over the past decade, the Navy JAG Corps has experienced an increased demand for our legal services. I believe this is consistent with the aggressive operational tempo of our force as well as an overall increased sensitivity to legal concerns. In the face of this increasing demand, the Navy must have enough judge advocates to meet the complete spectrum of legal missions it faces today. Without sufficient judge advocates, commanders run the risk of failing to have important legal issues recognized and addressed in a timely manner. There is also a risk that analysis will lack rigor and ingenuity because existing assets are spread too thin, and, that judge advocates will not have sufficient time to continue their education and training.

Based on the Navy JAG Corps' current missions, and, consistent with my testimony before the Panel last September, I believe the Navy requires a base force of 821 judge advocates, plus, the judge advocates necessary to meet the demands posed by assignments to Individual Augmentee (IA) missions and the Office of Military Commissions (OMC). Currently, 73 Active component and 31 Reserve component judge advocates are assigned to IA and OMC missions.

Today, there are 866 judge advocates on active duty. This consists of 835 Active component judge advocates, plus 31 Reserve component judge advocates serving under active duty orders in support of IA and OMC assignments. Under the current Navy program, the Navy budgeted for 801 Active component judge advocates on active duty by the end of the fiscal year. This is based upon community endstrength as determined by the Chief of Naval Personnel through the budget process.

The Department of the Navy intends to increase the number of Active component JAG Corps billets to 821 across the Future Years Defense Program (FYDP). This increase does not require statutory authority, only funding. In fiscal year 2011, the Navy's program of record was to decrease our JAG Corps officers from 801 to 745 by fiscal year 2016. Navy leadership has now indicated an intent to fund, within the Navy's baseline budget, an additional 31 JAG Corps billets through fiscal year 2015 which are currently detailed to the OMC at least through the end of fiscal year 2012, and to provide the additional increases necessary to fund the 821 JAG Corps officers required to meet baseline requirements over the FYDP.

I realize that essential JAG Corps growth must be weighed against other important requirements, especially in the current fiscal environment. I believe that 821 is the minimum number of officers needed to meet emerging requirements and mitigate legal risk to the Navy. We continue to look for internal structure changes that will allow us to realign resources to meet demand. In addition, we have also begun to train enlisted members of the Legalman rating to obtain certification through the American Bar Association as paralegals, which will gradually ease the administrative burdens currently levied on JAG Corps officers. To address the expanded rights to legal assistance for wounded, ill, and injured servicemembers processed through the Disability Evaluation System, for fiscal year 2012, we are hiring permanent civilian attorneys to ensure sustained legal support and assistance to our wounded, ill, and injured sailors. These civilian attorneys will be augmented by Reserve judge advocates in fiscal year 2012, but we are working to fully civilianize the support over the next several fiscal years. We are focused on making a smooth transition and ensuring compliance with the law and Department of Defense direction.

The Panel commented that maintaining a strong judge advocate community will require continued focus on recruiting; continued support for Navy Judge Advocate Continuation Pay (JACP); and continued support for post-graduate education. Even in a challenging budget environment, Navy leadership has strongly supported all of these important programs.

The JAG Corps received $70,000 in support from Commander, Navy Recruiting Command in fiscal year 2011 and our applications for commissions have, since fiscal year 2009, remained at historically high levels (over 900 annually). I also note that we ask our judge advocates to devote a considerable amount of time to personally participate in recruiting activities. Law school administrators—and, more importantly—law students, tell me our judge advocates are the best representation of our Corps.

The Chief of Naval Personnel approved funding for JACP at existing levels through fiscal year 2012. In addition, the Navy will fund postgraduate education for 25 judge advocates in the 2011–2012 academic year at the very best law schools in the United States. I testified before the Panel that increases in JACP and providing postgraduate education opportunity for 30 judge advocates annually would be optimal. However, the amount of funding for these programs in fiscal year 2012 is sufficient to meet our immediate requirements. Especially when viewed in the context of potential future Navy budgets, I believe the amount that will be funded in fiscal

year 2012 represents a strong commitment from Navy leadership to maintain a first-rate, mission-ready JAG Corps.

For years, we have stressed the value of obtaining Joint Professional Military Education (JPME). In the coming months, I intend to formalize JPME guidance through JAG Corps Instruction, placing emphasis on and strongly encouraging judge advocates to complete JPME Phase I as part of JAG Corps training requirements. Our approach will be geared toward meeting the Chairman's learning objectives as well as assisting Navy leadership in assessing the desire to formalize judge advocate participation in the joint officer management program and joint qualification system.

Our Navy JAG Corps has no more important mission than providing a fair, effective, and efficient military justice system for our commanders and personnel. Military justice is our statutory mission. We are intensely focused on upholding this special trust.

Within the Department of the Navy, effective court-martial post-trial processing is being fully achieved at the local level in Navy and Marine Corps legal offices, and at the appellate level in the Navy and Marine Corps Appellate Review Activity, and the Navy Marine Corps Court of Criminal Appeals.

Improvements over the course of the last several years in post-trial and appellate case processing have been institutionalized in standing. On 25 April 2011, the Secretary of the Navy approved Secretary of the Navy Instruction 5430.27D, "Responsibility of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps for Supervision and Provision of Certain Legal Services." The instruction formalized the requirement for the Judge Advocate General to provide an annual report to the Secretary of the Navy, the Chief of Naval Operations and the Commandant of the Marine Corps on the state of military justice within the Department of the Navy. This directive also institutionalized the Military Justice Oversight Council, which we initiated in November 2009. The Council is chaired and convened by the Judge Advocate General and co-chaired by the Staff Judge Advocate to the Commandant of the Marine Corps. The Council meets monthly to evaluate the practice of military justice and the effectiveness of the military justice system. The Council monitors individual cases through reports about any case at risk to exceed processing guidelines promulgated by the Court of Appeals of the Armed Forces (CAAF). Likewise, we have reinforced this process with a series of uniform policies and standards to ensure consistency across the force.

Given the improvements in structure, operating procedures, case tracking and oversight, I am confident we have a military justice process that works as intended. The Navy and Marine Corps now consistently process cases within the CAAF guideline of 150 days from sentencing to docketing at Navy-Marine Corps Court of Criminal Appeals. Those few cases that have not met that guideline are individually tracked and the reasons for delay are documented for consideration by the appellate courts. At the Navy-Marine Corps Court of Criminal Appeals, no case in fiscal year 2010 exceeded the 18-month appellate processing timeline from docketing to decision by that court, and none of the cases decided or docketed and pending review in this fiscal year exceed that time.

As a result of the actions we have taken over the past several years, I am confident we know the status of all Active Navy and Marine Corps court-martial cases in the trial and post-trial process. We are successfully tracking all our cases.

The Navy monitors its post-trial process at the local level through the Case Management Tracking Information System (CMTIS). The Marine Corps tracks post-trial processing of courts-martial using the Case Management System (CMS). The processing of appeals is a departmental mission. Both Navy and Marine Corps cases pending appellate review are monitored with CMTIS, which tracks each case throughout the appellate process, from docketing to final disposition. The overlap of CMTIS and CMS provides the department with visibility over all courts-martial cases from sentencing to appellate decision, but it is not optimal in that these systems do not provide a consolidated view of the status of all cases pending within the department.

The Secretary of the Navy has committed to development of a unified case-tracking system for the Navy and Marine Corps. A joint effort is currently underway to formally establish a new acquisition program in the departmental budget process for a common case-tracking system. On 4 November 2010, the Assistant Secretary of the Navy (Research, Development and Acquisitions) (ASN (RDA)) assigned the Program Executive Office for Enterprise Information Systems (PEO EIS) the program management and acquisition responsibility for development of a web-based information system that includes a single case tracking system. ASN (RDA) directed PEO EIS to work with stakeholders within the Department of the Navy to validate system requirements; establish roles and responsibilities; develop an acquisition

timeline and activities; conduct market research in support of Business Case Analysis approach; and prepare the required acquisition documentation in support of the POM 13 budget cycle. I look forward to working with the Marine Corps and other stakeholders to achieve the Secretary's goal.

In summary, we need to ensure sufficient numbers and quality of our judge advocates so that we are able to fulfill all our missions effectively and efficiently. In particular, we remain steadfastly committed to ensuring that our military justice system operates to the highest standards. I thank the committee for its continued interest in the legal practice within the Department of the Navy, your support of our men and women in uniform, and I look forward to taking your questions.

Senator WEBB. Thank you, Admiral Houck, and your bold statement will be entered into the record at this point.

General Harding, welcome.

STATEMENT OF LT. GEN. RICHARD C. HARDING, JAGC, USAF, JUDGE ADVOCATE GENERAL OF THE U.S. AIR FORCE

General HARDING. Thank you, Mr. Chairman.

Mr. Chairman, members of the subcommittee, thank you for the opportunity of testifying this afternoon.

I am very proud to lead the Air Force JAG's Corps with over 4,000 outstanding judge advocate, civilian attorney, enlisted and civilian paralegals, and civilian support staff. Our mission is to deliver professional, candid, and independent counsel and full-spectrum legal capabilities to the command and commanders and to the warfighter.

The committee's invitation to testify today asked that I offer my opinion on the effect of the recent organizational changes eliminating judge advocate brigadier general officer, or 0–7, billets in the Air Force. Therefore, I will offer my personal opinion regarding the 14 March 2011 the Office of the Secretary of Defense-directed elimination of three of our four Air Force JAG 0–7 positions.

My opinion is identical to that of my Service's chief of staff. We both believe that the three 0–7 positions in question should be held by officers at the grade of brigadier general.

These three general officers support at a corporate leadership level three centers of gravity for our Air Force—first, the Air Force's logistics and maintenance complex; second, its combat air forces; and third, its mobility air forces. The three general officer positions are staff judge advocates for Air Force Materiel Command, Air Combat Command, and Air Mobility Command. Their job descriptions are contained in my statement, which was previously submitted to the committee.

These three 0–7s provide more than just routine administrative legal advice to their major command commanders. They provide corporate legal advice on weighty issues facing the Air Force in the three centers of gravity I mentioned earlier.

Their advice shapes strategy and planning at very high levels in the Air Force. They sit on their commanders' senior staffs, joining between 8 and 11 other general officers and civilian equivalents, depending on the major command, in corporate leadership settings. Their 0–7 rank assures they have a seat at the table during sensitive important deliberations of their commanders' senior staff.

Additionally, the three 0–7 positions provide professional supervision to over 1,500 JAG Corps personnel, delivering legal services to 300,000 total force personnel assigned to those three Air Force centers of gravity.

The effect of the general officer cuts on the Air Force is significant. Career progression opportunities in the Air Force JAG's Corps has been significantly degraded by the elimination of these three 0–7 billets. As a direct consequence, the cuts will increase attrition among our best retirement-eligible colonels on whom we must rely to lead significant field legal operations.

As a result of the elimination of these three 0–7 billets, Air Force JAG colonels have noted that their chances of making 0–7 have been reduced by 75 percent, leaving behind a single 0–7 position to be selected every 4 years as the JAG's and the Deputy JAG's statutory tours end. The incumbent brigadier general is likely selected for promotion, resulting in a single brigadier general vacancy.

If not selected for the single 0–7 billet, rather than wait another 4 years for another opportunity to compete for promotion, many of our best JAG colonels will elect to retire, leaving the Air Force without the legal leadership it needs and, frankly, deserves.

By having only a single brigadier general position remaining in the Air Force JAG Corps, the incumbent in the remaining 0–7 billet essentially becomes the TJAG in waiting, the heir apparent. Optimal force models are structured like a pyramid. They provide competition——

Senator WEBB. General Harding?

General HARDING. Yes, sir?

Senator WEBB. No offense, but let the record show that you personally don't like this new policy. Do you have any sort of official presentation to give us?

General HARDING. The official presentation was offered in my statement earlier, sir.

Senator WEBB. All right. Thank you very much.

Your official statement will be entered into the record.

[The prepared statement of General Harding follows:]

PREPARED STATEMENT BY LT. GEN. RICHARD C. HARDING, JAGC, USAF

I have served as the Air Force's 16th Judge Advocate General since 23 February 2010. I am pleased to report to you today that the state of the Air Force JAG Corps is strong. This past year has been one of the most rewarding of my career as I have watched our Corps flourish in the execution of our mission for the Air Force.

The Air Force JAG Corps is currently comprised of 4,390 total force personnel. Of this total, 3,126 are either active duty personnel or full-time civilian personnel. The remaining 1,264 are judge advocate and paralegal members of the Air Force Reserve and Air National Guard.

The Air Force JAG Corps' mission is to deliver professional, candid, independent counsel and full spectrum legal capabilities to Air Force and joint commanders and their staffs. Members of the Air Force JAG Corps are involved in the full range of operations from peacetime, through war, to stabilization and reconstruction efforts. Our varied fields of practice demand that we apply the Air Force's traditional ability to adapt quickly to changing requirements. Our fields of practice include military justice, contract law, environmental law, labor law, Federal administrative law, defense of tort and other civil suits against the Air Force, legal assistance for airmen and their families, international law, and operations law to include the law of air, space and cyberspace.

Today's uncertain international security and evolving legal environment requires the Air Force JAG Corps adopt a balance-driven approach. We must overcome today's challenges while simultaneously preparing for tomorrow's. At present, Air Force judge advocates and paralegals are deployed all over the world in support of combatant commanders' requirements. We provide timely, responsive, and thorough legal advice to Air Force commanders and their airmen whether in austere conditions half a world away or at their home stations.

The Air Force is organized into functional major commands (MAJCOMs) led by 0–10 commanders. MAJCOM Staff Judge Advocates (SJAs) serve as the most senior, ranking attorney on a MAJCOM Commander's staff. They advise on a myriad of legal issues that face the MAJCOM Commander and his staff. MAJCOM SJAs are some of our most seasoned legal professionals, each possessing 20+ years of JAG experience. Three of our four Air Force JAG 0–7s (brigadier general) serve as SJAs in three of the Air Force's most vital MAJCOMs: Air Combat Command (our functional lead command for combat air forces), Air Mobility Command (our functional lead command for mobility air forces) and Air Force Materiel Command (our functional lead command for procurement of major weapons systems, logistics, and sustainment). These SJAs provide valuable legal advice on the most complex legal issues facing the Air Force today:

The ACC SJA advises the ACC Commander, who serves as the combat air forces lead agent for all combat forces across the Air Force. Those forces are engaged in on-going combat operations; The SJA provides counsel on such matters as the law of armed conflict, international agreements, disciplinary matters, contract law, environmental law, civilian personnel law, and any other legal issue confronting this vital command, all while providing professional supervision to over 600 JAG Corps personnel, who deliver legal services to over 133,000 personnel assigned to ACC.

The AMC SJA advises the AMC Commander on joint operational and policy matters such as command responsibilities for developing and maintaining a national industrial mobilization base for airlift and aerial refueling. The AMC SJA also serves as legal advisor to the general officer level Commercial Airlift Review Board, which by statute is charged with safety oversight and DOD certification of over 150 U.S. and foreign carriers under contract with the Department of Defense. In addition, the AMC SJA provides professional supervision to over 465 JAG Corps personnel, who deliver legal services to over 135,000 personnel assigned to AMC.

The AFMC SJA serves as legal advisor to the AFMC Commander and provides legal oversight in the Air Force acquisition process for major weapons system procurement, sustainment, and research. It is vitally important that the Air Force maintain the highest scrutiny over our acquisition processes and programs including international systems acquisitions. The AFMC SJA is responsible for providing legal advice on the expenditure of enormous financial resources and assists in the prevention of fraud, waste, and abuse of resources. In addition, the AFMC SJA provides professional supervision to over 448 JAG Corps personnel, who deliver legal services to over 75,000 personnel assigned to AFMC.

The fourth Air Force JAG 0–7 is the Commander of the Air Force Legal Operations Agency (AFLOA), a worldwide field operating agency. AFLOA is comprised of over 800 total force JAG Corps personnel. Accordingly, AFLOA is the parent command for approximately 24 percent of our worldwide JAG Corps personnel and is responsible for supervising the administration of military justice senior trial counsel (prosecutors), defense counsel, and appellate counsel; 11 field support centers; civil litigation counsel; the Air Force JAG School; and the Air Force Legal Information Services Directorate.

The other seven MAJCOM SJAs are senior JAG colonels. Those MAJCOMs are Air Education and Training Command; Air Force Global Strike Command, Air Force Reserve Command, Air Force Space Command, Air Force Special Operations Command, Pacific Air Forces, and U.S. Air Forces in Europe.

In closing, I would like to emphasize that our Nation has achieved much success in international armed conflict because we bring four crucial elements to every conflict. First, we recruit some of our best citizens into our Armed Forces. Second, we give them the best military training available anywhere on the planet. Third, we provide them the best available equipment to win in war. But those are only three legs of a four-legged table. Without the fourth leg, the table wobbles and falls. The fourth leg is discipline. Without discipline, great people, great training, and great equipment are not enough to win in war. Military discipline is an indispensible element for any effective fighting force. As the stewards of the Uniform Code of Military Justice, whose purpose is to protect and enhance good order and discipline, judge advocates the servicemembers, their training and their equipment together with military discipline. The Air Force JAG Corps and the JAG Corps of our fellow Services safeguard good order and discipline in the U.S. Armed Forces, take care of the legal needs of airmen, soldiers, sailors, and marines, and ensure that our Services carry the rule of law with them wherever they deploy. In that very real sense, we are combat force multipliers, upon whom the Nation's success in armed conflict relies.

Thank you for the opportunity to appear before you today.

Senator WEBB. General Ary, welcome.

STATEMENT OF MAJ. GEN. VAUGHN A. ARY, USMC, STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS

General ARY. Good afternoon, Mr. Chairman, Senator Graham, and distinguished members of the subcommittee.

Thank you for the invitation to testify this afternoon. I am happy to be here representing our corps and the over 1,400 remarkable men and women who make up our Active, Reserve, and civilian Marine legal community.

In the summer of 2009, Congress expressed serious concerns about the Navy-Marine Corps legal community, directed the DOD IG to evaluate our post-trial processes and procedures, and directed the convening of the independent panel, the 506 panel.

The Marine Corps interpreted your concerns as a call to action. We immediately began a hard, honest assessment of our legal community, who we are, how we lead and are organized, and how we deliver legal services to commanders, marines, sailors, and families.

Our assessment validated that the most effective legal model for our corps relies on marine judge advocates and legal service specialists who are marines first, fully integrated into the marine ethos and culture. Our basic model for the provision of legal support is strong, but we identified challenges that needed to be addressed.

We continue to believe in a command-driven system, but recognized that complete decentralization poses unacceptable risk. To reduce that risk, we need unified direction for our practice, striking a balance between uniformity of policies and procedures and decentralized execution. We have chosen to emphasize efficiency, with a focus on institutional processes and supervision that will produce enduring results.

To accomplish this, we also needed to adapt our organizational leadership model. We accepted responsibility for what the DOD IG found to be "failures in leadership, supervision, and oversight at all organizational levels."

For the Marine Corps, the Staff Judge Advocates (SJA) to Commandant, U.S. Marine Corps (CMC) could no longer act simply as a staff judge advocate to a Service Chief. The billet had to take on a greater role leading the Marine legal community.

As part of assuming that role, my office published a strategic action plan in July 2010, setting a course to elevate the practice of law throughout the Marine Corps. We set five strategic goals: set standards, train to those standards, inspect to those standards, examine and adapt the force to achieve those standards, and memorialize what we have learned in doctrine.

Our goals were designed to achieve our essential mandate—to provide quality legal services to every commander, marine, sailor, and family member and, in particular, to ensure that every marine who enters our military justice system receives the due process to which they are entitled.

Over the past 18 months, the Marine Corps has implemented a number of initiatives that are designed to accomplish these five goals. There are four that best illustrate our direction: our case

management system, an enhanced inspection program, a military justice counsel assistance program, and doctrine development.

We first set out to guarantee accountability for each military justice case. We developed a case management system over the course of 6 months, at a cost of roughly $60,000. We implemented it Marine Corps wide in February 2010.

Our case management system provides a secure, Web-based, real-time case tracking database that has produced immediate results by providing a common operating picture, with complete visibility over every case at every stage of the service level process and by eliminating gaps previously caused by a variety of incompatible systems.

To enhance transparency and accountability, we created a more robust inspections regime. We developed more exacting Article 6 inspection requirements, and for the first time, we instituted a legal office inspection program into the Commanding General's Inspection Program (CGIP).

The CGIP inspections, conducted by subject matter experts, provide commanders and their staff judge advocates metrics by which to gauge the performance of their legal organizations. By the end of this year, I will have personally inspected almost every Marine legal office worldwide.

We focused another initiative on strengthening our courts-martial practice in our primary statutory mission. Declining numbers of special courts-martial and competing operational demands have degraded this core competency as the complexity of the cases we are trying continues to increase.

Our chief defense counsel responded to this trend by leveraging technology to establish a worldwide virtual law firm and create a community of practice that has elevated the defense organization.

On the prosecution side, we followed suit, and by using the Army's TCAP as a guide, we stood up a Trial Counsel Assistance Program. Our TCAP provides training and resources to assist Marine prosecutors using a number of tools, including onsite training, video teleconferencing, and a SharePoint litigation support Web site.

Lastly, to ensure that we institutionalize the lessons learned and best practices in all legal services areas, we began the process of updating our doctrine for the provision of legal services in the Marine Corps. Concurrent with our assessment of legal services, we continued to assess our manpower requirements, including realigning and increasing structure and shaping and increasing inventory.

The independent panel recommended a target total Active component inventory of 550 judge advocates. That includes both certified judge advocates and our student judge advocates.

Today, our total Active component inventory of certified and student judge advocates exceeds the panel's recommended target and includes 508 certified judge advocates, the largest number we have ever had.

We have taken the initiative within the Service to address deficiencies that required immediate attention. If these and other initiatives are to endure, I believe there must be institutional reform.

In the future, it should be clear who is accountable for supervising the provision of legal support in the U.S. Marine Corps, and

the accountable officer should be the SJA to CMC. This billet must be clearly assigned responsibility and authority for supervising the service legal mission.

In closing, I would say that the future of our Marine legal community is bright. The current generation of judge advocates and legal service specialists is uniformly better qualified than we were a generation ago.

I believe we owe it to them to maintain a professional legal community dedicated to meeting the high standards of our corps with strong, enduring mechanisms for responsibility and accountability. Moreover, we owe our commanders and marines the best possible advice, representation, and legal services.

Based on the direction we are taking, I am firmly convinced that we are positioning ourselves to best serve the Marine Corps, the Department of the Navy, and DOD.

I have submitted a more detailed statement for the record, and I look forward to any questions that you might have.

Senator WEBB. Thank you very much, General. Your full written statement will be entered into the record at this point.

[The prepared statement of General Ary follows:]

EXECUTIVE SUMMARY

A Call to Action

In August 2009, Congress's direction to convene an Independent Panel to Review Judge Advocate Requirements in the Department of the Navy ("506 Panel") and a contemporaneous Department of Defense (DOD) Inspector General's (IG) inquiry served as a clear call to action for the Marine Corps. In response, we conducted a comprehensive study of the provision of legal support within the Service, leading to several overarching conclusions.

First, the Marine Corps needs command-oriented, organic legal support, provided by Marine judge advocates, who are integrated, unrestricted Marine Air-Ground Task Force officers. As uniformed legal support requirements are command-driven, and execution is command-oriented, there is an inherent, intangible benefit to having a legal organization of Marines providing legal support that is responsive to the Service's unique history, leadership philosophy, and operational characteristics. Second, over the past two decades our legal mission has evolved in scope, intensity, and complexity. Legacy structure and doctrine, a philosophy of maximum decentralization, and a limited role for the Staff Judge Advocates (SJA) to Commandant, U.S. Marine Corps (CMC) have limited our ability to adapt and respond to evolving requirements. Third, to meet the challenges of a more complex, future legal environment, we need to develop higher levels of individual proficiency and organizational efficiency, which in turn requires a greater degree of supervision, centralization and uniformity.

The conclusions of our assessment are captured in our July 2010 Strategic Action Plan, which establishes a series of initiatives to accomplish five overarching goals: (1) set standards, (2) train to those standards, (3) inspect to those standards, (4) examine and adapt the force to achieve those standards, and (5) memorialize what we have learned in doctrine.

THE 506 PANEL REPORT

The conclusions in the 506 Panel's report of 22 February 2011 are largely consistent with our own determinations. To the extent the Panel recommended action at the Service level, the recommended reforms are underway in the Marine Corps. Implementation of the remaining recommendations require Departmental action.

Manpower Requirements

The 506 Panel concluded that "[t]he Marine Corps' programmed target inventory of approximately 550 judge advocates over the next 5 years will be sufficient to fulfill the legal requirements of the Marine Corps, as well as to preserve the ability of Marine judge advocates to serve in non-legal billets, maintaining their role as well-rounded Marine Air-Ground Task Force officers and contributing to the broader Marine Corps mission."

JAG Authority over USMC Manpower Policies and Assignments

The Marine Corps concurs with the 506 Panel's recommendation against providing additional authority for the JAG over manpower policies and assignments of judge advocates in the Marine Corps.

Court-Martial Case Tracking System

The DOD IG and the 506 Panel each concluded that the DoN should employ a single case tracking system that can track cases from the preferral of charges or imposition of pretrial restraint through appellate review. The Marine Corps currently has a single, Service-wide case tracking system that effectively accomplishes its singular goal—to protect the due process rights of every accused Marine through accurate and reliable case tracking. Although currently limited to Marine Corps cases (75 percent of DON total), the Marine Corps Case Management System (CMS) could be adapted to track all DON cases through completion of appellate review. CMS was developed in 6 months and implemented at a total cost of $60,000. Its use was mandated Service-wide on 1 February 2010 CMS effectively and efficiently accomplishes the purpose for which it was designed. Since implementation, the average processing time for Marine Corps cases from date of sentencing to receipt of the record of trial by the appellate court has gone from 119 days to 87 days, and the number of cases in the post-trial process that exceeded 120 days from the completion of trial to convening authority's action has dropped from 41 cases in February 2010 to less than a handful today.

Military Justice Oversight

The Secretary of the Navy signed SECNAVINST 5430.27D on 25 April 2011 institutionalizing the annual military justice report requirement and the Military Justice Oversight Council, consistent with the 506 Panel's recommendation.

Requirements for Complex Cases

The Marine Corps stood up the Trial Counsel Assistance Program (TCAP) in May 2010, and has since sponsored three regional TCAP Training Conferences. Since fiscal year 2010, the SJA to CMC has sponsored an annual Victim-Witness Assistance Program (VWAP) Training Conference, attended by VWAP representatives from every Marine Corps base. JAD is actively involved in developing policy and advising and training judge advocates with respect to the prevention of and response to allegations of sexual assault.

Operational Law Requirements

The 506 Panel concluded that operational law requirements can be expected to double over the next decade, and recommended that the Marine Corps consider measures to expand opportunities for senior Marine judge advocates to compete for senior legal positions within the joint community. The SJA to CMC is proposing measures within the Marine Corps to enhance the joint experience base and, thus, create greater opportunities for senior Marine judge advocates to compete for senior-level joint billets.

Support to the Office of Military Commissions

The Deputy Secretary of Defense directed the extension of Office of Military Commissions (OMC) manning requirements through the end of fiscal year 2015. By September 2011, there will be 13 Active and Reserve Marine Corps judge advocates at the OMC, including one of our most experienced colonels who is serving as the Chief Defense Counsel for OMC.

Support to the Disability Evaluation System

The Marine Corps has mobilized eight Reserve component Marine judge advocates to support Disability Evaluation System (DES). In conjunction with Navy JAG, we are currently examining a long-term plan for providing DES support. The Navy JAG anticipates hiring civilian Informal Physical Evaluation Board attorneys. Additionally, the SJA to CMC is proposing the addition of five permanent structured billets at wounded warrior regiments.

Clarifying and Strengthening the Role of the SJA to CMC

The 506 Panel recommended providing the SJA to CMC "authority to supervise the administration of military justice and the delivery of legal assistance services within the Marine Corps"; providing the SJA to CMC "authority to exercise professional and technical supervision over all Marine judge advocates"; and establishing a "direct relationship between the SJA to CMC and the SECNAV."

The 506 Panel concluded that these measures "will improve the delivery of legal services within the Marine Corps, and in particular post-trial processing at the

Service level, by institutionalizing clear lines of authority and accountability." The 506 Panel recommended a dual statutory and regulatory approach, noting that "legislation would provide the more enduring, institutional basis for clarifying and strengthening the role of the SJA to CMC."

The challenges in accomplishing the DON's legal mission are about far more than the number of judge advocates. The greatest obstacles are decades-old systemic lack of Service-level leadership and supervision, as well as deficiencies in Departmental oversight, which stem from gaps inherent in the DON's unique uniformed legal organization.

By positioning the respective Judge Advocate Generals (JAGs) within the Service military staffs, Congress provided the Army and Air Force with Service-level legal leadership positions with commensurate supervision authority and accountability. Congress simultaneously provided for a direct relationship between the Service JAGs and the Department Secretaries. The dual-Service DON does not readily lend itself to the efficient construction of the Army and Air Force. A single JAG was placed at the Department level, presumably to provide for efficiency and integration. To this end, Congress legislated that the DON JAG and DJAG would be selected from officers of both the Navy and Marine Corps, and provided for two AJAGs—one Navy, one Marine Corps. While this statutory construct accounted for the requirement for Departmental oversight, it did not provide for the requisite Service-level leadership position and authorities.

As recommended by the DOD IG and the 506 Panel, and as articulated by the Secretary of the Navy, strengthening and clarifying the role of the SJA to CMC will provide this requisite Service-level leadership.

Assistant Judge Advocate Generals

The 506 Panel recommended that two of the Department's four Assistant Judge Advocate General (AJAG) positions be filled by marines and two be filled by the U.S. Navy. We have recommended that the AJAG billets be re-examined, and in the interim, the existing regulatory AJAG billets be filled in a manner that ensures departmental balance and integration.

PREPARED STATEMENT BY MAJ. GEN. VAUGHN A. ARY, USMC

INTRODUCTION

Thank you for the opportunity to speak with you today about the requirements for your Marine Corps' uniformed legal mission. I would like to first take this opportunity to recognize the many men and women wearing the eagle, globe, and anchor today performing that mission. Currently we have 508 active duty Marine judge advocates serving around the globe; the largest number we have ever had. In addition, there are 19 legal administration officers and 542 enlisted legal services specialists in the Active component, and another 328 Marine judge advocates and 167 enlisted legal services specialists in the Reserve component. They have responded to the increased demand for legal services across the spectrum of traditional and nontraditional legal missions. We are extremely proud of the job they are doing for our Corps and our Nation.

We believe in command-oriented, organic legal support, provided by Marine judge advocates, who are integrated, unrestricted Marine Air Ground Task Force (MAGTF) officers. There is an inherent, intangible benefit of providing legal support that is responsive to the Service's unique history, leadership philosophy, and operational characteristics. These strengths are indispensible to our continued success.

We recognize, however, that some characteristics of our model (e.g., legacy organizational structures and legal services doctrine, a philosophy of maximum decentralization, and a limited role for the Staff Judge Advocate to the Commandant) have limited our ability to respond to the evolving requirements of our legal mission. Over the past 20 years, and more acutely in this past decade of war, our legal mission has evolved in scope, intensity, and complexity. If we are to effectively address challenges associated with increased courts-martial complexity, post-trial processing of courts-martial, and sustained levels of deployments, we need higher levels of individual proficiency and organizational efficiency, which in turn require a greater degree of supervision, centralization and uniformity.

A CALL TO ACTION

In August 2009, Congress directed the convening of the Independent Panel to Review Judge Advocate Requirements in the Department of the Navy (hereinafter "506 Panel") and a contemporaneous Department of Defense (DOD) Inspector General's

(IG) inquiry. These Congressional directives were the result of appellate court decisions addressing delays in post-trial processing. In directing these inquiries, Congress expressed a concern that:

> ... cognizant legal authorities in the Department of the Navy have not taken necessary and appropriate steps to ensure that the resources, command attention, and necessary supervision have been devoted to the task of ensuring that the Navy and Marine Corps post-trial military justice system functions properly in all cases.

These congressional directives served as a clear call to action for the senior leadership within Headquarters, Marine Corps. I want to assure this subcommittee that the Commandant and the rest of the senior leadership in our Corps have heard this call, and have moved forward with genuine resolve to address the challenges you have identified.

In late 2009, the Marine Corps began addressing these challenges by conducting a comprehensive study of the provision of legal support within the Service (e.g., training, organization, leadership, authorities, et cetera). Our study led us to two overarching conclusions.

First, we concluded that aspects of our historical approach to providing legal support, including a philosophy of maximum decentralization and a limited role for the Staff Judge Advocate (SJA) to the Commandant, U.S. Marine Corps (CMC), had created gaps in our practice and degraded unity of effort. Over time, outdated doctrine, a lack of policy and procedural guidance, and limited professional supervision had rendered performance standards unclear or unenforced. Simply stated, we did not have the accountability to ensure proficiency in our core legal competencies.

Second, we concluded that to meet the ever-increasing scope, intensity, and complexity of the legal mission, the philosophy of maximum decentralization had to evolve, in a reasonable and balanced way, to greater supervision and uniformity in policies, practices, and processes. In a word, we needed to establish relevant common standards of practice, ensure all of our marines were trained and equipped to those standards, and then inspect and enforce those common standards. This would ensure:

- effective professional supervision,
- transparency and accountability,
- unity of effort,
- training efficiencies, and
- proper apportionment of resources.

We remained acutely aware that uniformed legal support requirements are largely command-driven, and execution is largely command-oriented. Therefore, centralized solutions must remain responsive and relevant to the particular needs of the individual commands, and should reflect the history, leadership philosophy, and operational characteristics of the Service. Accordingly, the Marine Corps determined that any such solutions require supervision by a Service-level senior officer who is best positioned to provide efficient and responsive leadership, has authority commensurate with his responsibility, and who can be held accountable for the performance of the legal mission.

Thus, while proceeding to address the deficiencies in our approach to the supervision of the administration of military justice and the delivery of legal services, we decided to seek specific responsibility and authority for the SJA to CMC for those functions. We recognized that this would dictate changes in the Department of the Navy's (DON) unique legal organization, which invests the specific responsibility and authorities for supervising the legal mission in a single Department-level Judge Advocate General (JAG), rather than in a Service-level officer as in the Army and the Air Force. While seeking this responsibility and authority, we stepped out, relying on de facto responsibility.

The conclusions of our study, and our way ahead, are captured in our Strategic Action Plan (SAP) 2010–2015. Published in July 2010, the SAP establishes five overarching goals, and describes specific Service-wide initiatives intended to implement these goals. Although they are addressed more robustly in the SAP report itself, the goals can be distilled down to the following five principles:

(1) set standards,
(2) train to those standards,
(3) inspect to those standards,
(4) examine and adapt the force to achieve those standards, and
(5) memorialize what we have learned in doctrine.

Over the past year, we have focused on addressing those goals and creating new initiatives. We continue to use these five principles to ensure that we are directing our resources and energy precisely to the requirements identified in the SAP.

THE DOD IG AND 506 PANEL REPORTS

The findings, conclusions, and recommendations in the DOD IG Report of 10 December 2010 and the 506 Panel Report of 22 February 2011 were largely consistent with our own determinations. These reports tended to validate that the Marine Corps was moving in the right direction with appropriate alacrity.

The DOD IG report, released in December 2010, found:

> There have been consistent failures in leadership, supervision and oversight at all organizational levels, impacting military justice in both the Navy and Marine Corps. The failures resulted in inadequate institutional vigilance to ensure process health and, in many instances, failures to exercise the diligence and competence required of legal professionals. Serious post-trial processing problems persisted for at least the last two decades.

The 506 Panel's final report included over forty separate conclusions and recommendations. Addressing its primary statutory mandate—manpower requirements—the Panel favorably noted the Marine Corps' efforts to increase judge advocate structure and inventory. The Panel opined that the Marine Corps' bottom-up, top-down, requirements-driven manpower determinations were realistic and useful, and agreed that a target inventory of 550 judge advocates over the next 5 years was sufficient.

Moving beyond manpower requirements, the 506 Panel found it necessary to focus primarily on senior-level leadership, authority, and oversight within the DON's uniformed legal communities. Notably, the 506 Panel echoed findings contained in the DOD IG Report, opining that:

> . . . the challenge presented to the leaders of the Navy and Marine judge advocate communities, with respect to their core military justice function, has as much to do with ensuring engaged leadership and effective oversight as it does with numbers of judge advocates.

The 506 Panel's conclusions and recommendations also addressed operational law support, support to the Disability Evaluation System and the Office of Military Commissions, community health, and the assignment of Marine judge advocates to non-legal billets.

To the extent the 506 Panel recommended action at the Service level, the recommended reforms are underway in the Marine Corps. These include a deliberate and responsible realignment and increase in judge advocate force structure and inventory, the institution of a cost-effective, rapidly-fielded, and proven case tracking system, and the establishment of a Corps-wide inspection standard for the delivery of legal services. These and other Service-level initiatives are discussed in greater detail below. Implementation of the remaining recommendations, the most important of which would address the lack of Service-level supervision and accountability, would require departmental action, including legislative proposals and implementing regulations. Increased personnel inventories and focused initiatives are partial, often temporary solutions. Enduring solutions require an institutional mechanism for holding leaders accountable for the mission.

Below I will discuss the major areas of concern from both the DOD IG report and the 506 Panel's report, and how the Marine Corps is seeking to address them.

Military Justice Requirements

Court-Martial Case Tracking System

The DOD IG recommended that "the Department of the Navy develop and field a single Navy and Marine Corps military justice case processing and tracking system that satisfies user requirements and achieves system-wide visibility over the entire court-martial process, including capability for an accused to monitor his/her appellate case status directly through web access."

The 506 Panel noted recent significant improvements in post-trial processing of courts-martial within the DON, and concluded that for such improvements to continue "it is critical that the DON employ a single case tracking system." The requirement for any system, as identified by the 506 Panel, is to "track cases from the preferral of charges or imposition of pretrial restraint at the Service level through the appellate review at the Department level."

The Marine Corps currently has a single, Service-wide case tracking system that effectively accomplishes its primary goal: to achieve complete and expeditious processing of every Marine Corps case from a command's Request for Legal Services to

arrival at the appellate courts in order to ensure the due process rights of each and every Marine. Although limited to those cases referred to courts-martial by Marine Corps commands, those cases represent 75 percent of all courts-martial processed by the Navy and Marine Corps Trial Judiciary in fiscal year 2010. The Marine Corps Case Management System (CMS) could be adapted to track the remaining 25 percent of cases originating within the U.S. Navy, as well as tracking all cases through completion of appellate review at little cost and without significant delay.

Development. Conceptually, a single DON-wide case tracking system is an attractive goal. As yet, a single system has not been fielded or developed. Recognizing the urgency identified by the appellate courts, and that the Marine Corps' then existing methodology for courts-martial tracking was inadequate, the SJA to CMC began identifying the requirements for an effective case tracking and management system within the Marine Corps in the summer of 2009.[1] With the singular goal of ensuring the due process rights of every accused Marine through accurate and reliable case tracking, SJA to CMC sought a case management system that would:

- provide a cradle-to-grave common operating picture for military justice practitioners and supervisors to manage and oversee case processing at all levels of the Marine Corps;
- provide easy, non-redundant data entry, retrieval, and report generation capability for military justice clerks;
- generate multiple views and reports;
- use affordable, off-the-shelf technology supportable by Marine Corps IT systems;
- allow expeditious implementation throughout the Marine Corps;
- provide total visibility of inbound cases from the Marine Corps to the Navy and Marine Corps Appellate Review Activity (NAMARA);
- accommodate expanding requirements; and
- provide up-to-date real-time data for commanders and legal leadership to identify trends.

Several systems were evaluated, including the Federal Case Management/Electronic Case Filing system (CM/ECF) and the Navy JAG Corps' Case Management, Tracking and Information System (CMTIS). CMS, a Lotus Notes-based, web-enabled software application, was ultimately selected.[2]

After successfully testing CMS at various Marine legal offices, the SJA to CMC mandated its use in MARADMIN 062/10 of 1 February 2010. The implementation of a common, integrated, real-time case tracking database produced immediate results by providing complete visibility over every case at every stage of the Service-level process and eliminating gaps caused by a variety of incompatible systems throughout the Marine Corps. CMS is currently being expanded to provide a separate module for administrative law (i.e. review of administrative separations and command investigations) and legal assistance (i.e. case management and client conflict checks).

Notably, CMS went from development to Marine Corps-wide implementation in 6 months (August 2009–February 2010) at a total cost of $48,480. (contracted database development and training). Since February 2010, the Marine Corps has spent approximately $10,250 on CMS training ($5,250 on technical support training for personnel of the Judge Advocate Division, Headquarters Marine Corps (JAD) and approximately $5,000 on fleet-wide user training conducted by JAD personnel). There are two full-time DOD civilian IT professionals and one Marine Staff Sergeant (MOS 4421) currently administering all legal IT requirements for the Marine Legal Community, including centralized administration of CMS.

The DOD IG Report noted:

> The recently-fielded Marine Corps CMS appears to have substantially greater potential than the Navy CMTIS. Specifically, CMS appears to offer better and more complete capability for management to maintain visibility over individual case processing and status in the field, including post-trial processing in the field. However, CMS is still new, relatively untested and has yet to develop all the needed capabilities.

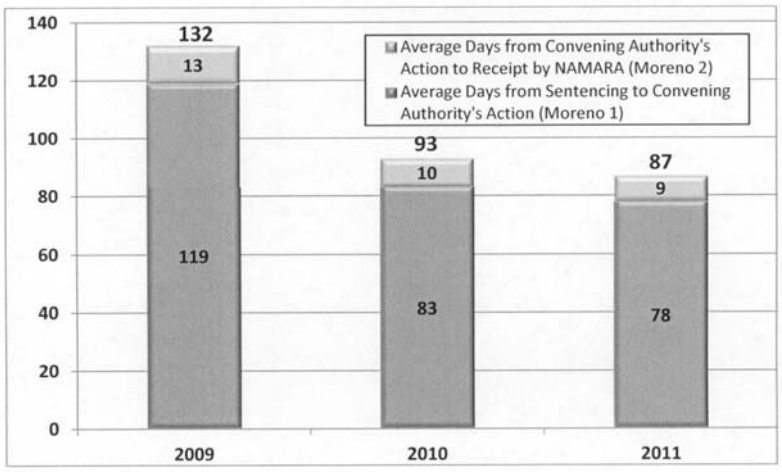
Effective vs. Exquisite. It is worth noting the DOD IG Report was issued in December 2010 and based on evaluations of CMS the previous May. Since then, JAD has made significant upgrades and revisions to CMS, such as the addition of data

[1] To minimize the demands on the case management system, SJA to CMC chose to use SharePoint for the Marine legal community's knowledge management platform, simplifying the evaluation criteria for potential case management systems.

[2] Lotus Notes is the same software application the Army uses to track its military justice and administrative law matters.

fields, validation of required fields, capturing VWAP information, and updating reports and views. The majority of these upgrades were based on user feedback. Admittedly, CMS reflects the austere and expeditionary character of the Marine Corps. It lacks the appearance and feel of a more expensive software solution that one might associate with, say, an "iPad." CMS also does not track cases from the inception of a command or law enforcement investigation. However, such capabilities do little to ensure effective courts-martial processing, and ultimately only serve to add cost, complexity, and delay in delivery of any case tracking system.

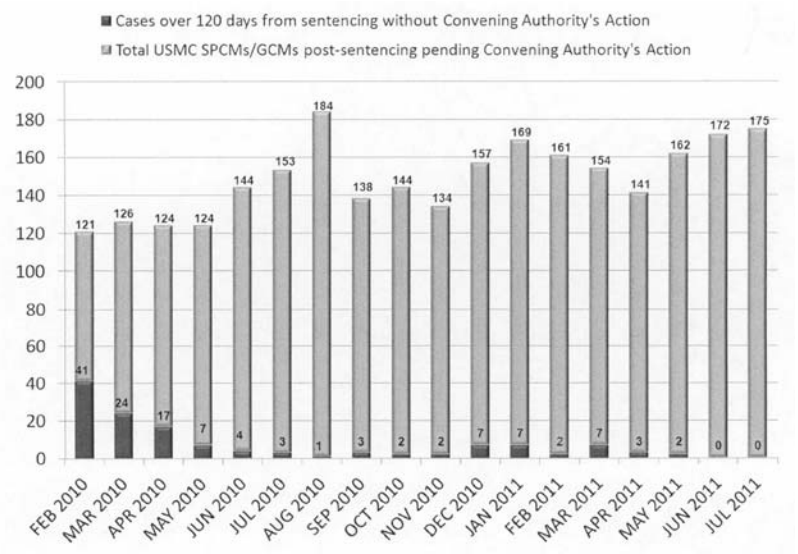
Initial Results. CMS effectively and efficiently accomplishes the purpose for which it was designed. *United States* v. *Moreno*[3] established a presumption of unreasonable delay where the convening authority's action is not taken within 120 days of the completion of trial or when the record of trial is not docketed by the Service Court of Criminal Appeals within 30 days of convening authority's action. This presumption may be rebutted by the government with evidence showing the delay was reasonable under the circumstances. As depicted in the graph below, since the implementation of CMS the average processing time for Marine Corps cases from date of sentencing to receipt of the record of trial by NAMARA has gone from 119 days in fiscal year 2009 to 83 days in fiscal year 2010 and is currently 78 days for fiscal year 2011.[4]



In addition, on 24 February 2010, 1 week after the effective date of implementation of CMS, 41 of the 121 total cases in the post-trial process exceeded 120 days from the date of trial (sentencing) to convening authority's action. As depicted in the graph below, on 12 July 2011 none of the 175 total Marine Corps cases in the post-trial process violate the presumption of delay standards created in *Moreno*.

[3] *U.S.* v. *Moreno*, 63 M.J. 129, 142 (2006).

[4] Receipt by NAMARA marks the conclusion of the service-level post-trial processing mission. On average, those cases that are ultimately docketed with NMCCA, are docketed 1–3 days from the date NAMARA receives the record.



The institutionalization of active monitoring at all supervisory levels, through a single database real-time tracking system ensures that every law center, LSSS, and SJA office consistently meets timely post-trial processing requirements. The decrease in post-trial cases over the *Moreno* time limit is largely the result of this increased oversight. Cases that are over 90 days are flagged on CMS via an automatic alert system and reported to the SJA to CMC. Because CMS is a real-time case tracker, JAD is able to identify issues as they occur and to offer assistance as the need arises.

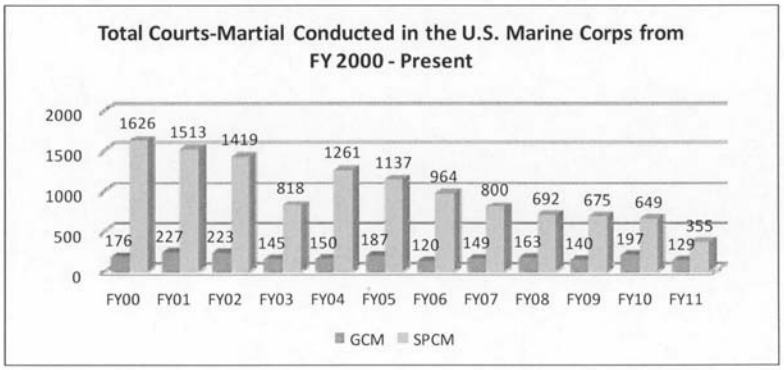
Military Justice Oversight Council and Annual Military Justice Report

The 506 Panel recommended that the current annual military justice report requirement and the Military Justice Oversight Council (MJOC), created in 2010, be institutionalized in a Secretary of the Navy Instruction. This was accomplished in SECNAVINST 5430.27D, signed by Secretary of the Navy on 25 April 2011.

In making this recommendation, the 506 Panel noted that the military justice mission remained the core statutory mission for the uniformed legal community, and that the requirement for this mission is not just about numbers of judge advocates. The 506 Panel stated " . . . more accurately, engaged leadership and effective oversight are the keys . . . ."

Case Load

As depicted below, over the past decade there has been a significant decline in general and special courts-martials from 1,802 total cases tried in fiscal year 2000 to 846 total cases tried in fiscal year 2010. The majority of the decline is attributable to a reduction in the number of special courts-martial, from 1,626 in fiscal year 2000 to 649 in fiscal year 2010. The general courts-martial caseload has remained more constant, from 176 cases tried in fiscal year 2000 to 197 in fiscal year 2010. As of 12 July 2011, the Marine Corps has tried 129 general courts-martial and 355 special courts-martial this current fiscal year. At the current rate, the Marine Corps is on pace to try approximately 600 total cases in fiscal year 2011, with the general courts-martial numbers again remaining steady and another decrease in the total number of special courts-martial cases.



Although the number of courts-martial has continued to decline, the demand for military justice support has not declined. Allegations of misconduct have remained steady, with an average of approximately 12,000 allegations reported annually from fiscal year 2000 through fiscal year 2008, reflecting a continued trend in the disposition philosophy of our commanders to dispose of less serious misconduct at alternative forums (e.g. summary courts-martial, nonjudicial punishment, et cetera). Historical data and local assessments indicate that the court-martial caseload is sufficient to provide Marine judge advocates and support personnel the opportunity to gain proficiency and build an experience base for the development of a professional military justice practice.

Requirements for Complex Cases

Trial Counsel Assistance Program. The increasing complexity of courts-martial requires today's judge advocates to have a greater breadth and depth of knowledge while still remaining proficient in the basics. Based on the success of the Defense Counsel Organization supervised by the Chief Defense Counsel of the Marine Corps, the Marine Corps stood up the Trial Counsel Assistance Program (TCAP) in May 2010 within Judge Advocate Division. The TCAP is comprised of one field grade officer and one company grade officer. The TCAP provides training and resources to assist Marine prosecutors using a number of tools, including onsite training, video teleconferencing, and the TCAP SharePoint litigation support Web site that contains practice advisories, a military justice blog, a motions bank, and other useful documents and links. In fiscal year 2011, the SJA to CMC sponsored three regional TCAP Training Conferences at Camp LeJeune, Camp Pendleton, and Kaneohe Bay.

Victim Witness Assistance Program. The Military Justice Branch (JAM) within JAD oversees the Victim Witness Assistance Program (VWAP) for the SJA to CMC in his role as the Marine Corps' responsible official for VWAP. Beginning in fiscal year 2010, the SJA to CMC sponsors an annual VWAP Training Conference, hosted by JAM and attended by VWAP representatives from every Marine Corps base. The training is tailored to provide the base program managers (Victim Witness Liaison Officers) with the tools to manage their respective programs and provide local training to their installation VWAP personnel. The conferences featured briefs from nationally recognized victim assistance and advocacy trainers, DON and Marine Corps agency heads, Naval Criminal Investigative Service agents, Family Advocacy Program victim advocates, and law enforcement and corrections personnel.

Sexual Assault Prevention and Response Program. JAM continues to be actively involved in assisting Headquarters Marine Corps in developing policy and advising and training judge advocates with respect to the prevention of and response to allegations of sexual assault. The policy focuses primarily on providing a robust support system for victims of sexual assault. JAM is responsible for ensuring that all judge advocates receive initial and periodic refresher training on sexual assault response policies, victim rights, victimology, sex offenders, current scientific standards for evidence, recantations and false information, and deployment issues, including remote location assistance.

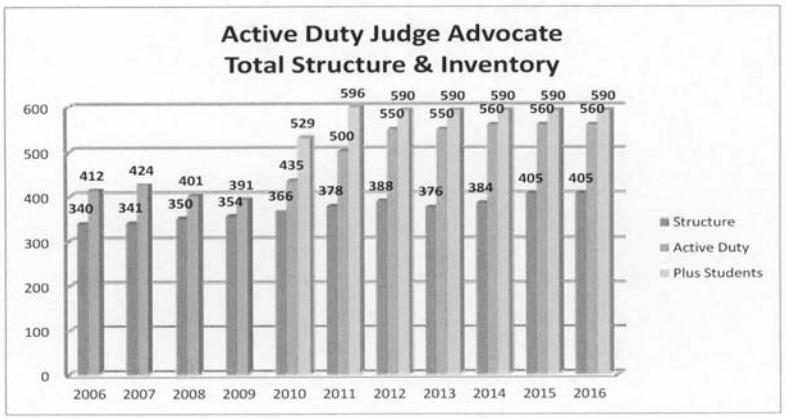
Overall Number Of Judge Advocates Required

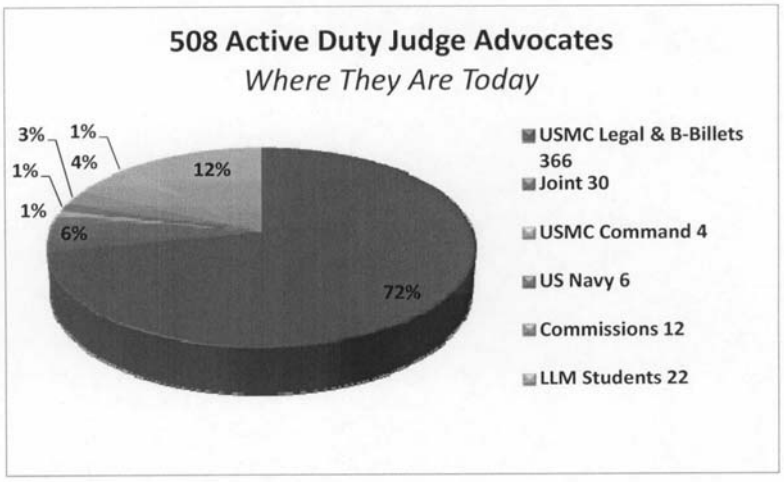
The 506 Panel concluded that "[t]he Marine Corps' programmed target inventory of approximately 550 judge advocates over the next 5 years will be sufficient to ful-

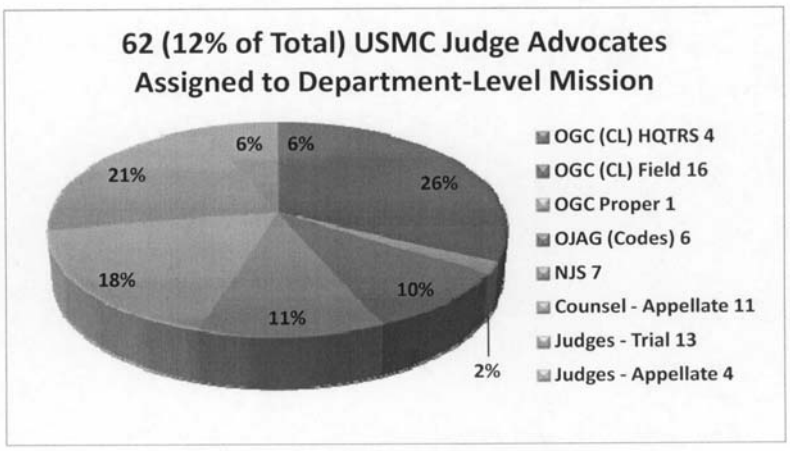
fill the legal requirements of the Marine Corps, as well as to preserve the ability of Marine judge advocates to serve in non-legal billets, maintaining their role as well-rounded MAGTF officers and contributing to the broader Marine Corps mission."

The Marine Corps will continue to ensure that judge advocate structure, inventory and assignments are effectively managed to meet evolving mission requirements. As the 506 Panel noted:

> A review of internal Marine Corps studies, as well as a CNA study of Marine Corps manpower systems, reflects favorably on the Marine Corps' efforts to actively manage legal requirements, including: its use of a "bottom-up" structure review, careful assessment of increasing demands from operations and force growth, effective incorporation of the SJA to CMC as the Occupational Field Manager into the manpower process, and building active-duty judge advocate inventory in support of approved structure increases.
>
> . . .
>
> [The] Marine Corps has an effective manpower management system that deliberately and systematically identifies legal requirements within the organizational structure of the Marine Corps, then funds and builds an active duty inventory to support those requirements.







Operational Law Requirements

The 506 Panel concluded that "permanent operational law billets can be expected to approximately double over the next decade for the Navy and Marine Corps, and there will likely be continued growth in the demand signal for judge advocates in contingency operations." The 506 Panel recommended that the Marine Corps consider measures to expand opportunities for senior Marine judge advocates to compete for senior legal positions within the joint community.

Permanent Operational Law Assignments. Within the Marine Corps, operational law advice and services have been, and continue to be, provided primarily by SJAs permanently assigned to the command elements of the MAGTFs and the headquarters of the Marine Forces component commands (e.g., Marine Forces Europe, South, Central, et cetera).[5] Additionally, there are structured requirements for Ma-

[5] The MAGTF is the Marine Corps' principle organization for all missions across the range of military operations. MAGTFs are general purpose combined arms units that can be tailored (task-organized) to the requirements of a specific situation. Regardless of size or mission, each MAGTF has four core elements: a command element (i.e., headquarters), ground combat element (e.g., units of infantry, artillery, or tanks), aviation combat element, and logistics support element. The command element provides the command and control for planning and executing all military operations, and as such serves as the headquarters. Id. There are both standing

rine judge advocates to be permanently assigned to operational law billets at service headquarters,[6] Office of the Judge Advocate General (OJAG),[7] Joint Staff,[8] and training commands.[9] Marine judge advocates also compete for permanent assignment to joint operational law billets on the staff of the combatant commands that are not structured and aligned to be filled by any particular Service. The requirements for permanently assigned judge advocates to provide operational law support has steadily increased over the years, rising 135 percent from 2000 through 2012, as portrayed below.

These numbers include seven Marine judge advocates assigned to Marine Expeditionary Units. These rotational units have traditionally served as the "first responders" to regional crises, such as aviation support to combat operations in Libya and humanitarian assistance to Pakistan. Further, our judge advocates serving at Marine Forces component commands, which are assigned to the geographic and functional combatant commands, provide the most senior Marine operational commanders with legal advice concerning international agreements, security cooperation, and contingency operations. We are proposing measures within the Marine Corps to enhance the joint experience base and, thus, create greater opportunities for senior Marine judge advocates to compete for senior-level joint billets.

Marine Judge Advocate Support to Deployed Marine Units. In addition to the judge advocates permanently assigned to deploying Marine Corps units, there is a significant requirement to temporarily augment these units with additional judge advocates for deployments. There are currently 39 Active and 8 Reserve Marine judge advocates forward deployed with Marine units in support of combat and other contingency operations around the world. These deployed judge advocates provide critical operational legal advice to commanders. While future manning requirements for judge advocates assigned to our traditional legal functions, such as military justice and legal assistance, are more easily projected, aligning our judge advocate manning requirements to support contingency operations is more complicated due to the unpredictable nature of global crises.

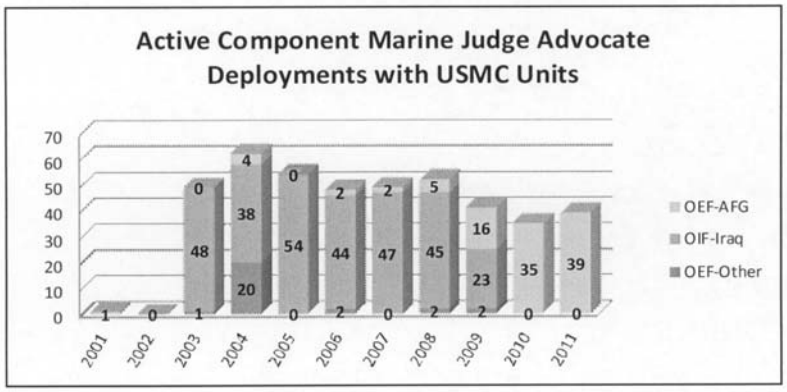
MAGTFs (e.g., Marine Expeditionary Units (MEU) and Marine Expeditionary Forces (MEFs)) and mission-specific, contingency MAGTFs (e.g., Marine Expeditionary Brigade-Afghanistan (MEB–A)). There are three standing MEFs (I, II, and III MEF), and seven standing MEUs (11, 13, 15, 22, 24, 26, and 31st MEU).

[6] E.g., Branch Head, Operational and International Law Branch (Code JAO), Judge Advocate Division (JAD), Headquarters, Marine Corps.

[7] E.g., International Law Officer, Code 10, Office of the Judge Advocate General.

[8] E.g., Non-Proliferation Planner, Office of Legal Counsel, Chairman of the Joint Chiefs of Staff.

[9] E.g., Instructor/Trainer/Advisor at Naval War College, Marine Corps University, The Army Judge Advocate General's Legal Center and School (TJAGLCS), and Marine Air Ground Combat Center (MCAGCC), Twentynine Palms.



Marine Judge Advocate Support to Joint Task Forces. There are requirements for individual augments (IA) to provide legal services to various Joint and Combined Task Forces, Joint forces and NATO commands. Marine Corps judge advocates currently serve as IAs with NATO's International Security Assistance Command-Afghanistan, U.S. Forces-Afghanistan, Combined Joint Interagency Task Force – 435 in Afghanistan, Combined Joint Task Force-Horn of Africa in Djibouti, and Joint Task Force Guantanamo Bay. One high-profile example of the importance of IAs was the selection of a Marine colonel to serve as the senior legal advisor to General Petraeus in Afghanistan. While there has been no shortage of active duty volunteers, IA billets are also being filled with volunteers from the Marine Corps Reserve. Currently there are four Active component, and three Reserve component judge advocates serving in IA billets.

Support to the Office of Military Commissions (OMC)

The 506 Panel noted the requirement for support to the OMC. This requirement was formally revalidated by the Deputy Secretary of Defense in April 2011. Specifically, the Deputy Secretary of Defense directed the extension of OMC manning requirements through the end of fiscal year 2015. The 506 Panel also anticipated that if the majority of pending cases are referred to military commissions, the OMC would request more experienced and accomplished litigators.

By September 2011, there will be 13 Active and Reserve Marine Corps judge advocates at the OMC, including one of our most experienced colonels who is serving as the Chief Defense Counsel for OMC. Each judge advocate at OMC is screened on the basis of their military justice skills and experience prior to being assigned to the OMC.

Support to the Disability Evaluation System (DES)

The Wounded Warrior Act of 2008 and the DOD implementing memorandum provide that government legal counsel shall be made available:

- on a discretionary basis prior to the servicemember's receipt of the decision of an Informal Physical Evaluation Board (IPEB),
- on a mandatory basis, to consult about rights and elections, after receipt of the decision of the IPEB, and
- on a mandatory basis, for full representation at the Formal Physical Evaluation Board (FPEB).

The 506 Panel noted that the Services differ in exercising the discretion to provide legal counsel to wounded, ill, and injured (WII) servicemembers prior to the decision of the IPEB. The 506 Panel recommended that this difference in approach be examined by the DOD and DON.

IPEB Representation. Currently, Reserve Navy JAG attorneys provide IPEB legal advice to WII sailors and marines at the following locations: Bethesda, Norfolk, Jacksonville, Pensacola, San Diego, Bremerton, and Great Lakes. The Marine Corps has mobilized five Reserve judge advocates to support both mandatory and discretionary IPEB counseling requirements. Three are located on the East coast (Camp Lejeune and Bethesda Naval Hospital/MCB Quantico) and two are on the west coast (Camp Pendleton and Naval Hospital San Diego), fully devoted to pre and post-IPEB consultations.

FPEB Representation. An additional two mobilized Marine judge advocates are representing both marines and sailors at the FPEBs alongside their Navy JAG counterparts. They are operationally assigned to the Navy Legal Services Office-North Central (NLSO–NC). NLSO–NC is tasked with all Navy FPEB representation. The need for these additional judge advocates became apparent when in March 2011 the Navy's Physical Evaluation Board (PEB) increased the number of scheduled weekly formal PEB (FPEB) hearings from 16 to 24. Continued funding for all seven (IPEB and FPEB counsel) Marine Reserve mobilizations is expected through fiscal year 2012 and is likely to be continued through fiscal year 2013.

Long-Term Solution. In conjunction with Navy JAG, we are currently examining the DES architecture, including civilian and military counsel, to develop a way ahead on providing legal counsel to our WII marines and sailors. An additional Marine Reserve judge advocate serves within the JAD's Legal Assistance Branch to supervise Marine IPEB counsel and coordinate with OJAG (Code 16) in developing the Department's DES program. The Navy JAG anticipates hiring civilian IPEB attorneys to provide a long-term solution for representation to the WII. Additional civilian IPEB counsel are contemplated to ultimately replace the mobilized Reserve judge advocates by fall of 2013. As part of the FSRG, the SJA to CMC is proposing the addition of five permanent structured billets at wounded warrior regiments. The requested structure includes one Major (O–4) and one Captain (O–3) on each coast, with another Captain in the National Capital Region. The proposal is based on IPEB counsel field experience, which continues to demonstrate that the provision of legal counsel earlier in the process than the release of a member's IPEB results reduces processing time, produces more accurate IPEB results, and then reduces the number of formal hearings.

JAG Authority over USMC Manpower Policies and Assignments.

The Marine Corps concurs with the 506 Panel's recommendation against providing additional authority for the JAG over manpower policies and assignments of judge advocates in the Marine Corps, and agrees with the 506 Panel that additional authority is neither "necessary nor warranted." The 506 Panel provided several compelling bases for their recommendation, stating:

> [t]he Commandant, with the assistance of the SJA to CMC, is effectively managing judge advocate manpower (i.e., structure, inventory, and assignments) to meet Service, Departmental, and joint legal requirements; and to ensure community health (i.e., recruiting, retention, and education) and proper career progression (i.e., promotions) for Marine judge advocates. Moreover, the JAG is not in the best position to exercise additional authority in these areas within the Marine Corps, given the Marine Corps' unique requirements for community health and career progression of Marine judge advocates. Lastly, transferring authority from the Commandant to the JAG could marginalize the SJA to CMC as a legal voice within his Service, contrary to the 506 Panel's view that the role of the SJA to CMC needs to be clarified and strengthened.

Enduring Institutional Accountability

The DOD IG Report of 10 December 2010 concluded that:

> Longstanding process failures stemmed from inadequate leadership, supervision and oversight in organizations suffering from many policy and structural impediments . . . . Overall, the Navy JAG and senior leadership did not satisfactorily identify, address, or fix the severe post-trial processing problems that recurred over two decades despite many warnings and trouble signs.

The DOD IG Report recommended the SJA to CMC be given greater authority to conduct Article 6, UCMJ, inspections and to exercise professional supervision over Marine judge advocates. The 506 Panel echoed findings contained in the DOD IG Report, opining that:

> the challenge presented to the leaders of the Navy and Marine judge advocate communities, with respect to their core military justice function, has as much to do with ensuring engaged leadership and effective oversight as it does with numbers of judge advocates.

The 506 Panel recommended clarifying and strengthening the role of the SJA to CMC, by:

- providing the SJA to CMC "authority to supervise the administration of military justice and the delivery of legal assistance services within the Marine Corps",

- providing the SJA to CMC "authority to exercise professional and technical supervision over all Marine judge advocates", and
- establishing a "direct relationship between the SJA to CMC and the SECNAV."

The 506 Panel concluded that these measures "will improve the delivery of legal services within the Marine Corps, and in particular post-trial processing at the Service level, by institutionalizing clear lines of authority and accountability." The 506 Panel recommended a dual statutory and regulatory approach, noting that "legislation would provide the more enduring, institutional basis for clarifying and strengthening the role of the SJA to CMC."

Both the DOD IG and the 506 Panel reports, as well as our internal study, suggest that the challenges facing the DON in the delivery of uniformed legal support are about far more than the number of judge advocates in the Navy and Marine Corps. Their conclusions suggest that the greatest obstacles to accomplishing the DON's legal mission are decades-old systemic lack of Service-level leadership and supervision, as well as deficiencies in Departmental oversight.

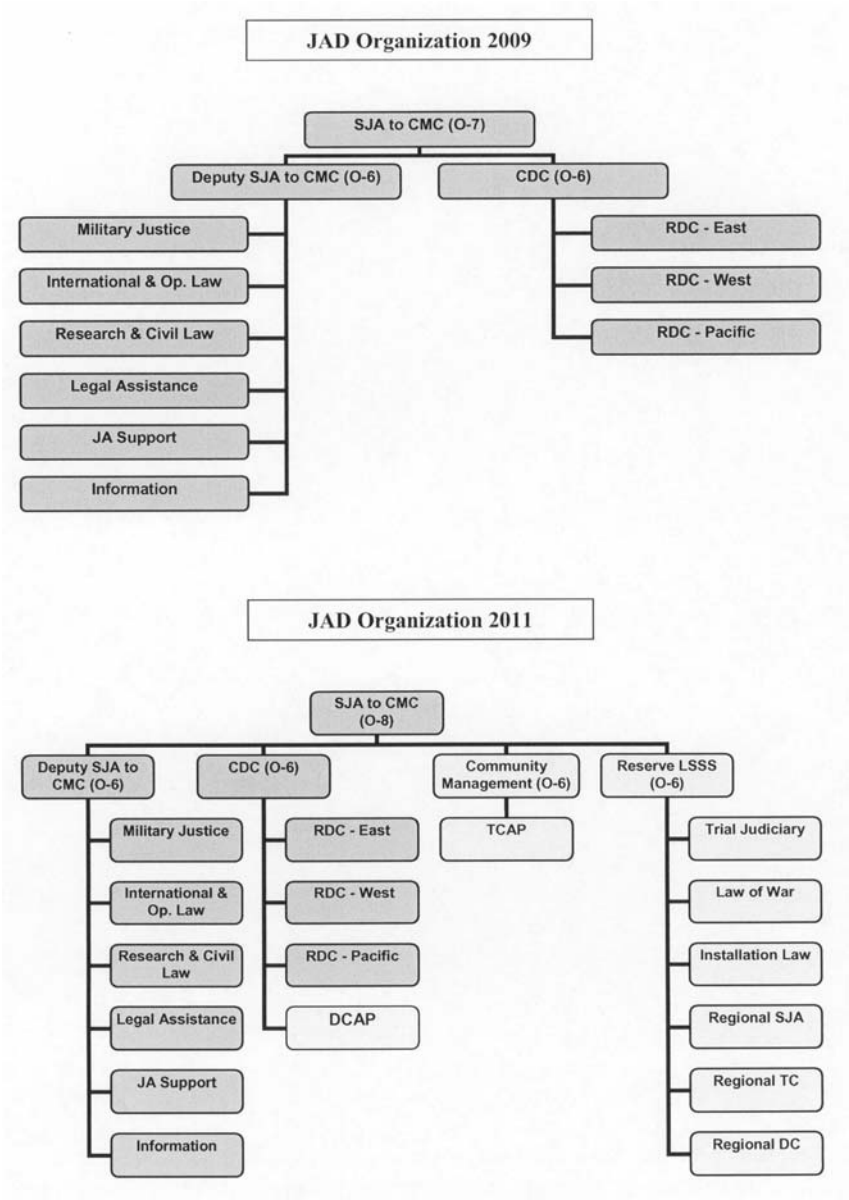
Over the past few decades, several JAGs have implemented measures and dedicated precious time and resources to address these unique DON challenges. However, as the DOD IG noted, "[w]hen curative measures were taken, they were often short-lived or insufficiently institutionalized to endure past the incumbency of individuals who resolved problems at the time." This suggests that systemic deficiencies stem not from personal leadership failures but rather from gaps inherent in the DON's unique uniformed legal organization.

By positioning the respective Judge Advocate Generals within the Service military staffs, Congress provided the Army and Air Force with Service-level legal leadership positions with commensurate supervision authority and accountability. Congress provided for a direct relationship between the Service JAGs and the Department Secretaries. In a single-Service Department, the JAGs can seamlessly provide Service-level leadership and supervision while remaining accountable to their Secretaries to facilitate Departmental oversight.

The dual-Service Department of the Navy does not readily lend itself to the efficient construction of the Army and Air Force. A single JAG was placed at the Department level, presumably to provide for efficiency and integration. To this end, Congress legislated that the DON JAG and DJAG would be selected from officers of both the Navy and Marine Corps, and provided for two AJAGs—one Navy, one Marine Corps. While this statutory construct accounted for the requirement for Departmental oversight, it did not provide for a Service-level officer within each of the naval Services to exercise responsive Service-level leadership and supervision.

As recommended by the DOD IG and the 506 Panel, and as articulated by the Secretary of the Navy, strengthening and clarifying the role of the SJA to CMC will provide this requisite Service-level leadership.

In the meantime, we have begun providing Service-level leadership and supervision based on de facto responsibility. We have used the authority vested in the SJA to CMC through the Commandant of the Marine Corps to reorganize and reorient the Judge Advocate Division to effectively lead and supervise our legal community. That orientation is illustrated in the changes depicted below.



Assistant Judge Advocate Generals (AJAGs). The 506 Panel recognized that, while the statutory scheme provided for only two AJAG positions, to be balanced with one position filled by a U.S. Navy JAGC officer and the other a Marine judge advocate, the regulatory scheme provides for four AJAGs, with three positions filled by U.S. Navy JAGC officers and one filled by a Marine judge advocate. As a result, the current regulatory scheme only allows for one Marine to serve among the six Departmental JAG-related flag and general officer positions. The 506 Panel recommended that two of the Department's four AJAG positions be filled by Marine judge advocates and two be filled by U.S. Navy judge advocates, using the rotational

process now being used by the U.S. Navy so that the four regulatory AJAG positions rotate through the two statutory positions.

We have recommended to the Secretary of the Navy that the AJAG billets and their responsibilities and authorities be re-examined. In the interim, I have recommended to the Secretary that the existing regulatory AJAG billets be filled in a manner that ensures departmental balance and integration as recommended by the 506 Panel.

CONCLUSION

Again, I would like to thank Congress for its interest in the health and well-being of our mission. Congress's interest in our mission was received as a call to action by our community and the leadership within our Corps and I am proud of our response. More importantly, as I travel around to our bases and stations visiting and inspecting our legal services community, the officers and Marines, both senior and junior, are excited about the direction in which our legal community is headed.

The future of our Marine judge advocate community is bright. Recruiting trends indicate that incoming judge advocates and legal service specialists are uniformly better qualified than we were a generation ago. I believe we owe it to them to maintain a professional legal community dedicated to meeting the high standards of our Corps, with strong, enduring mechanisms for responsibility and accountability. Moreover, we owe it to our commanders and individual marines to ensure they continue to receive the best possible advice, representation, and legal services.

Based on the direction we are taking in our SAP and in response to the DOD IG Report and the 506 Panel, I am firmly convinced that we are positioning ourselves to best serve the Marine Corps, the Department of the Navy, and DOD.

Senator WEBB. I appreciate all of your testimony.

General Ary, let me just start by asking if you could give us a rundown on this Foster case, I mean, the chronology of it, how it got so out of synch.

General ARY. I would say that it is hard to assess one single event. In most of these things, it is a cascade of events, and it usually starts with leadership and ends with leadership.

I can tell you that the U.S. Marine Corps, the service-level mission, from date of trial and the post-trial processing until arrival at the court, took 739 days, a completely unacceptable length of time.

Today, we are tracking 164 cases. We have total visibility of them in the post-trial process. There are 25 over 90 days, and none of those have exceeded 120-day timeline of the Moreno standard.

We also provide the Navy and Marine Corps appellate review activity with an account receivable of cases that are inbound to that court. They have total visibility of cases from date of trial. So it is a push-pull system in the Department of the Navy, as far as the Marine Corps side in our case management system.

This is not hard, but it requires an attention to detail that just did not exist at the time Foster occurred.

Senator WEBB. I am going to just ask you as a former Marine. How did something like that get lost for 9 years? At least that is the word that we have here, that it languished for 9 years.

Was this systemic? Was it somebody sticking it in a drawer? I just don't understand it.

General ARY. I would not say that it was unique, sir. I would say that there was an institutional—I think the DOD IG was right on when they talked about failure of oversight at all levels, about lack of proper visibility and case tracking systems.

We just lost sight of the accountability that we needed, and it was inexcusable, sir.

Admiral HOUCK. Sir, if I may join General Ary, because this wasn't an exclusively Marine Corps problem. This was a Navy and Marine Corps problem.

The problem, as he alluded to, started at the Service level in the Marine Corps, but it continued when it reached the Navy-Marine Corps Court of Appeals.

I agree with General Ary. First and foremost, I think it was a management-leadership issue. I also think it was a resourcing issue. I think that the court was not adequately resourced at the time, and I think the people that were on the court did a poor job of managing the resources that they had.

We have today, as I mentioned earlier, by any measure, by several different measures, most of which are set by the Court of Appeals of the Armed Forces, we are meeting their gates and then some. We have done that, I think, through three ways.

We have, first of all, it starts with the two of us. We are personally focused on this problem. We meet in a military justice oversight council once a month. The two of us are always there and with several of our assistants to talk about case tracking in the department.

We have also put good qualified, motivated military justice people on our courts and within the system, I mean, from the appellate court to the trial level. The judiciary is no longer a place, as it was sometimes in the past the Navy and the Marine Corps, where people go because there is no other good place for them to go. We have a judicial screening board, and we don't pick everybody that applies to be a judge these days.

We, because of our small number of cases in the Navy, have set up a military justice career track, which is designed to ensure that for the cases that we have, that we get our experienced prosecutors and defense counsel on those cases, and that they continue to work cases so they can build their experience within the caseload that we have.

So there are a number of people in JAG Corps alumni that said we would never do that and never make that work, and it is working today. It is fully populated and operational.

So I think the third thing that General Ary has alluded to are systems that we have in place that we did not have and weren't overseeing adequately back in the day. So I just wanted to join in.

Senator WEBB. I thank both of you. It is refreshing to see people just kind of step up and accept responsibility. I think the numbers that you both gave in terms of where you are now on timelines is really encouraging. So I thank you for that.

Senator Graham.

Senator GRAHAM. Mr. Chairman, I want to thank you for having the hearing because let it be said that Congress cares. We watch. We follow, and the Foster case was the reason for us to have the independent panel review.

We now have a better understanding of what the many requirements are for the Navy and the Marine Corps, and I think we have two people in positions of leadership for the Navy and Marines that are not going to let this ever happen again. For that, I thank you.

From the Army's point of view, Lieutenant General Chipman, what happens? We are trying to figure out what force we need,

what we can afford, and how the Defense Department fits in the overall budget woes of the country.

If we reduce the Army by 49,000 people, how does that affect the JAG Corps? Do you have any idea how this will affect your ability to perform?

General CHIPMAN. Senator Graham, I think it would affect us in a couple of different ways that I can identify in particular. First, many of our judge advocates now are embedded in the units they advise. For example, to the extent that we take down 49,000 soldiers in force structure, we will lose the corresponding judge advocate billets that accompany those formations.

We have two judge advocates assigned to every brigade in the Army. When they deploy, typically, there is a third judge advocate because of the need to conduct rule of law operations, as you saw in your own deployments at U.S. Central Command (CENTCOM).

Second, if we take down 49,000 soldiers overall, I see more focus on the headquarters-level functions to deal with how do we respond to surge requirements that may accompany different and evolving missions. BRAC has increased our legal workload. That turbulence in taking 49,000 soldiers out of our inventory, I can imagine, will generate another set of legal issues, as we figure out the authorities and the personnel actions needed to effect that reduction.

Senator GRAHAM. So we just need to know that as you draw down the Army, your workload probably goes up.

General CHIPMAN. Senator, I think that is an accurate statement.

Senator GRAHAM. Now, Admiral, I am very confident after this hearing, that you have a grip on what needs to happen in terms of monitoring military justice activity, particularly appellate review. The 950 number, is that the right number, and are you going to get the people?

Admiral HOUCK. Sir, the way that I arrived at my estimate for—I think it is the right number. It is close to the right number.

The way I arrived at my assessment last year before the 506 panel met was very simply to look at what I believe to be the needs of our base force for judge advocates would be, and that would be the people to do the traditional things that judge advocates do.

I also recognize that we have the missions right now of individual augmentees in the global war on terror that you spoke of earlier, as well as the Office of Military Commissions.

Senator GRAHAM. Do you know how many Navy personnel have been assigned to Iraq or Afghanistan as individual augmentees (IA)?

Admiral HOUCK. It is close to 500 judge advocates, Active and Reserve. Our Reserve component has been spectacular in helping us meet these demands.

I looked at our base force, did a lot of shoe leather, a lot of phone calls, a lot of travel, a lot of discussions, and came to a number. Then adding on top of that base force number, which I judged to be and still judge to be about 820 judge advocates in the Active component, add to that number those necessary to fulfill the IA and Office of Military Commission numbers.

Today, July 20, that number adds up to be 925 people, by coincidence, as it was about a year ago. The Navy program for this year

has us at 801. That delta between 925 and 801 is mitigated by a couple of things.

The first one is we are being allowed to over execute, which is to say we probably will carry about 30 extra attorneys beyond that 801 number by the end of the fiscal year. We have done that 13 out of the past 20 years.

The second thing is our Reserve component, reservists that are mobilized, where they have come on for Active Duty for special work. That is about another 60 attorneys. So that begins to close that gap. To be precise, it is 895 today versus what I believe is a requirement of 925.

Is there some risk that is still in that delta? I think there is. But I think it is——

Senator GRAHAM. My question is, is it going to close?

Admiral HOUCK. Judging by the Navy program, the Navy program is designed to get lower over the next couple of years and then to build back up toward that number across the Future Years Defense Program of 821. I think the delta is going to depend a lot on what we see real time in the demand for the IA mission and the Office of Military Commissions.

Senator GRAHAM. Okay.

Admiral HOUCK. It is difficult for me to predict what that is going to be going forward.

Senator GRAHAM. Okay. Lieutenant General Harding, can you tell us what effect being a three-star has had in terms of your ability to do your job versus two stars?

General HARDING. Yes, sir. It has had a huge effect. Again, it is all about a seat at the table, and it has produced a seat at the table.

Now, I had not served earlier as a two-star, had served as a one-star and was promoted to three. I will tell you the difference between those two worlds is huge. It is galactic, and as is the difference between serving as a one-star and a colonel.

Progressively, you are in a situation, certainly as a judge advocate, where you can hear planning and strategizing ongoing. If legal advice is required—and you may be the only one in the room that understands that there is a legal issue that has now been raised—you are present to do so.

So it is awfully important to have a seat at those tables.

Senator GRAHAM. If we have too many generals, I want to know about it. I want to make the Pentagon more efficient.

Mr. Chairman, the reason I wanted to have this hearing not only because of the Navy-Marine Corps problem, it is because I have been in the Air Force, and consider my interest parochial, I can't imagine combat commanders at the level we are talking about not having access to general officer legal advice. I mean, it is just not the Air Force that I know.

I guess I maybe am biased here. I just know what rank means when it comes to having entre. I just wanted the committee to understand that this is a major change. I mean, this is a fundamental, seismic change in terms how the Air Force delivers legal advice.

I have a letter from the Air Force Chief of Staff who recommended not to go this way when it came to replacing these three stars. I would like to introduce that in the record.

I just appreciate my colleagues listening. With that, I will turn it over to anyone else.

Senator WEBB. Your letter will be put in the record at this point.

[The information referred to follows:]

DEPARTMENT OF THE AIR FORCE
OFFICE OF THE CHIEF OF STAFF
UNITED STATES AIR FORCE
WASHINGTON DC 20330

JUN 16 2011

HQ USAF/CC
1670 Air Force Pentagon
Washington, DC 20330-1670

Senator Lindsey O. Graham
United States Senate
290 Russell Senate Office Building
Washington, DC 20510

Dear Senator Graham:

Thank you for asking for my personal and professional views on the Department's decision to eliminate three Air Force active duty Staff Judge Advocates (SJAs) flag officer billets at Air Force Materiel Command (AFMC), Air Combat Command (ACC) and Air Mobility Command (AMC).

While I am committed to support the reductions of the general and flag officer efficiencies review, we asked the department leadership to reconsider the decisions to restructure the grade from O-7 to O-6 for our three headquarters major command level staff judge advocate positions. My view is that these general officers serve more than just administrative law experts, each is tied to capabilities beyond their Major Command responsibilities and those responsibilities merit having a general officer in the seat.

As support for my view, I offered that the AFMC SJA provides legal oversight to the Air Force Acquisition process to include Air Logistics Centers, Test Centers, Product Centers and the Air Force Research Laboratory. As you are aware, our Air Force must maintain the highest scrutiny over our acquisition processes and programs including international systems acquisitions. The AMC SJA advises on joint operational and policy matters, such as command responsibilities for developing and maintaining a national industrial mobilization base for airlift, aerial refueling and other matters which are affected by statutes, executive orders, National Security Decision Directives, and other directives. In essence, this officer is the DoD operational expert in aeronautical and transportation related law. The ACC SJA advises the ACC commander/Combat Air Forces lead agent for all combat forces across the Air Force and supported combatant commands. These forces are engaged in ongoing combat operations requiring general officer oversight of the numerous legal matters stemming from time sensitive targets, Law Of Armed Conflict (LOAC) and Rules of Engagement (ROE) interpretations.

Finally, if these positions are restructured, it will alter career progression opportunities in the JAG field and the pool from which we select the service The Judge Advocate General. Furthermore, this could have the unintended consequence limiting the diversity of our pool of

proven and competent general officers competing for the Air Force Judge Advocate General and Deputy Judge Advocate General position in the future, implying that the officer holding the O-7 billet will be the heir apparent for those positions.

Again, I offer these insights in the context of your request for my personal and professional opinion.

Very Respectfully,

NORTON A. SCHWARTZ
General, USAF
Chief of Staff

cc:
SECDEF
SECAF
CJCS

Senator WEBB. I, also for purposes of objectivity here, would like to emphasize the chart that we showed at the beginning of this hearing. If you look at the Army with 569,000 Active Duty people, they have a total of 6 JAG general officers.

The Navy has 328,700. They have a total of two.

The Marine Corps has 202,000 people. They have one and he is sitting at our table.

The Air Force has 332,000 people, and they have 6.

So, General, I appreciate your adamant belief in this point. But at the same time, I think there is a decision that has been made over in DOD, and at least from my perspective, it will take a lot to turn it around.

General HARDING. Yes, sir. May I comment about the chart, sir?

Senator WEBB. Is this your personal opinion again?

General HARDING. No, sir. This is, I think, documented in the 506 panel as well. I know for a fact it is.

Senator WEBB. All right. By all means.

General HARDING. To a degree, to ensure that we are comparing apples to apples, I think it is important to take a look at the various mission sets of those three JAG Corps. They are not coterminous. They are not equal.

For example, in the 506 panel, they depict the Senior Executive Services (SES) billets for the Army Materiel Command, which is separate and apart from the Army JAG Corps. In the Air Force, the Air Force Materiel Command is supported legally with one of those one-stars that we are talking about today.

If you take a look at the Navy side, you will see that their model is very different, far afield from the Army's and the Air Force's model. Their Navy Legal Services largely is run by their Navy general counsel. In fact, there are 22 SES equivalent positions there.

So I think it is important to look at mission as well as——

Senator WEBB. General, I take your point. I am sorry to interrupt, but you have taken a lot of time on this.

For the record, let me just say I grew up in the Air Force. I know where you are coming from here.

Senator Hagan.

Senator HAGAN. Thank you, Mr. Chairman.

I think this is very interesting, and I appreciate you all having this hearing today.

I just wanted to talk a little bit about the expansion of services. As many of our troops are returning home after deployment, after a year's deployment, they are welcomed home to a life they didn't leave, that is very different from the year prior before they left.

Some of them are facing divorce. Some of them are facing custodial battles. Some are challenged by financial issues, such as bankruptcy. These legal issues can also be the cause of so much stress and financial complications, which ultimately will be distracting to their ability to perform their mission.

Although military members can receive legal assistance on post, many military attorneys, from what I understand, are recent law school graduates who are licensed in States other than where they actually are assigned for duty. Understandably, the JAG Corps is not equipped to handle the scope and the breadth of attention for each of these personal matters.

I am from North Carolina, and our State bar association has a standing committee on legal assistance for military personnel, whose Web site, it is actually North Carolina Legal Assistance for Military Personnel (NCLAMP). They have valuable legal information available for military servicemembers.

This initiative provides a network of legal assistance attorneys to provide prompt and professional advice. Since 1983, they have also produced handouts to educate clients and military legal assistance teams on the relevant areas of law, of North Carolina law. The committee also keeps tracks of unique problems that are primarily military in nature to inform the North Carolina bar about these particular issues.

I believe this initiative offers a template for a successful integration between local and State communities around military installations, and I understand that many States have similar programs like this NCLAMP for military personnel.

Do you know if any evaluation has been done to look at formal partnerships at the local and State levels to complement gaps in legal care for our servicemembers?

General CHIPMAN. Senator, I would like to start with that question.

Senator HAGAN. Okay.

General CHIPMAN. But first, I would like to say that Mark Sullivan is not just a North Carolina asset. He is a national asset, and he has greatly affected our legal practice nationwide with his devotion to legal assistance needs of our servicemembers.

There are, in fact, partnerships. There are places where we have what is called an expanded legal assistance program. Georgia comes to mind. Texas, in particular, is very aggressive in supporting soldier and veterans' needs for legal assistance services.

I don't know of any formal institutional framework by which those have been pursued. But I can say that I and my colleagues will be in Toronto in a couple of weeks for the American Bar Asso-

ciation (ABA) convention, and it is certainly a topic we could raise with the LAMP Committee, as well as the Standing Committee on Armed Forces Law. I think that would be a great topic to look at their expertise in.

Senator HAGAN. Great. Anybody else?

Admiral?

Admiral HOUCK. No, ma'am. I was just going to make the ABA point before General Chipman did. They have taken a pretty active role in the pro bono business and in trying to get us linked up with local bar associations and pro bono efforts.

General HARDING. I would throw my hat in the ring with the ABA. They have done superb work, and we have supported them wherever we can. They don't supplement, they augment what we do in our legal assistance program. So it is important that that program remain.

To the extent that we can expand legal assistance with our meager resources, we would. But, frankly, we are a little resource constrained on legal assistance.

General ARY. I might add that legal assistance has always sort of been viewed as a luxury, that that is where you put your excess capacity. Our Commandant has a priority that we keep faith with all marines. He has made that a priority and that is the piece, the one piece, that we are concerned about.

I know we have spent a lot of time talking about military justice, but we look at the legal community as an area in which we need balanced excellence across all of the areas. It is a bit of a challenge, especially when you have new missions, like the disability evaluation system. But it is something that we have to position the legal communities across the board to cover those and make sure that we execute in a proper manner.

So, thank you.

Senator HAGAN. Thank you.

Senator WEBB. Thank you, Senator Hagan.

Senator Brown.

Senator BROWN. Thank you, Mr. Chairman.

General Chipman, as the Army actually draws down, I agree the workload will definitely increase. The Guard seems to be a unique investment in today's force. Do you think the Guard will play an expanded role in helping reduce the actual workload?

General CHIPMAN. Senator, I do. We have actually recently resourced a Guard trial defense service initiative. It is in its first year of operation. We have about 100—in excess of 100 National Guard judge advocates performing trial defense service in support of that new team.

But we have more than 50 National Guard judge advocates mobilized right now in support of various requirements and have had that number over the last several years. In fact, we have nearly 5,000 individual augmentee and unit mobilizations since September 11. So we have gotten great support from both the Army Reserve and National Guard.

I certainly see the Guard assisting as we transition—whatever change we effect within the Army, I see the Guard playing an integral role there and not the least of which is their role in our civil support operations, which we have so many guardsmen mobilized

right now with the Southwest border mission and with natural disaster response.

Senator BROWN. Do you think that we have enough commissioned officers in the Guard who are qualified in the legal profession? Do you think there is a breakdown there at all?

General CHIPMAN. Senator, that is an interesting question, because I look at the relative size of our two components. For an Army Reserve of roughly 205,000, we have about 1,800 judge advocates. For a National Guard of about 360,000 or a little bit more than that, we have around 800 National Guard judge advocates.

So I think there is perhaps some room to grow our Guard legal capacity more.

Senator BROWN. General Harding, do you have any thoughts on that?

General HARDING. We are 80 percent manned in our Reserve category B, those are our individual mobilization augmentees. We try mightily to get closer to 100 percent, but I think the economy has driven some of the folks to kind of stay at home.

Having said that, the rest of our Air Reserve component is very strong. In fact, they are taking a substantial part of the burden of deployment for JAG billets in the CENTCOM area of responsibility off the shoulders of their Active Duty brethren. They are backfilling the home station and by way of home station support those that do deploy forward.

As a matter of fact, one of our brigadier generals is deployed forward in Afghanistan right now, has been there for almost a year, and backfilled with an Air Force reservist. So we rely on them heavily.

Senator BROWN. Thank you.

Admiral, I am just trying to kind of wrestle a little bit with the report that was made about the number and then, the fact that you are not near that number. I understand you are talking about augmenting, and I am still not quite there, though, as to seeing if the Navy actually has enough folks to cover their needs.

Can you just talk a little bit more about that? I am not quite clear on it.

Admiral HOUCK. Yes, sir. I think two points to start with. My estimate, as I said earlier, is that we need about 925 judge advocates right now. I mean, I can't sit here and tell you that I have a computer or a calculator that gives me that number. It is my best estimate.

Senator BROWN. Right. But you only have 800 and something.

Admiral HOUCK. Yes, sir, 895 today.

Senator BROWN. So what is the plan, I guess, to get up to that number?

By that I mean to say are you planning on getting up to that number?

Admiral HOUCK. The Navy's plan would be to—and going back to my description of our base force, about 820, which is what I need steady state right now, given our force. The Navy's plan reaches that, but reaches it in—at the end of the 5-year defense plan.

Senator BROWN. So, in the interim, you are going to be basically down a fair amount of JAGs?

Admiral HOUCK. Yes, sir. The question going forward, I think, real time will be how much of that difference I make up through over execution, being allowed to keep more people on Active Duty than the plan calls for, as well as to augment it with reservists, to your earlier point.

If I was in an ideal world, I would have 925 full-time, steady-state, Active Duty judge advocates to meet that demand signal. I can't say otherwise.

Senator BROWN. I guess my next question would be then, that being said, I think the other question you need to ask yourself is, if you don't have a JAG when you need one, are you prepared to take the consequences of a poor decision by one of the combat commanders?

I guess that is the balancing act that you have to do, it is not dissimilar than our State district attorneys when they are understaffed or police forces back home who are being reduced and cut. At what point is it hurtful, potentially, to the mission and to the safety and security of our soldiers and also the political/legal ramifications of that?

I know you are wrestling with that. Certainly, if there is something that we can do in this committee to—is it a resource issue? I mean, do you need additional billets?

I mean, we are not just here to kind of throw bombs, I don't think, or get answers. We are here to find out how we can help, too, I think. Especially, you have two JAGs right here who kind of get it.

Admiral HOUCK. I think for our leadership, they are—to state the obvious, they are trying to reconcile many demands. The Secretary of the Navy is a lawyer.

Senator BROWN. So that is the problem. [Laughter.]

Admiral HOUCK. So he understands the value of legal services.

The CNO has served with lawyers at all levels of command, and I have met with him many occasions. I have complete access to him, and he understands the value of legal services.

I think all that I can say is that I see my job is to assess the requirement and then tell them what I think it is. Then they have to reconcile and make the decisions based on the larger picture that they have.

I think that in 99 percent of cases, we will provide a legal answer. I don't think having—I don't think we will not provide a legal answer.

I think the risks are a little more subtle. I think they go toward the amount of time we are able to devote toward maintaining and attending to some of the legal program administrative requirements that come up. I think it goes to the amount of time we have to devote to education and training. Those are more subtle, but I think those are some areas where risk comes into not having enough people.

Senator BROWN. Just a final thought, do you anticipate in this shortfall you are going to have of making the requirements cross-branch requirements, so the Army or Air Force, and getting that type of assistance? Is that something that happens at all?

Admiral HOUCK. We do some of that. My colleagues may want to comment on it—but we do it, particularly, obviously, with the

Marine Corps. Less so with the Army and the Air Force. We do it. We have some joint basing initiatives where we work together.

Senator BROWN. I would think, especially on the Services in CONUS, obviously, when you are dealing with just legal assistance issues, I mean, those are pretty standard throughout. Take that pressure off.

I agree with you. Some of the most important and helpful cases I have worked on have been in the legal assistance field because that is when things are most dire.

A husband and wife getting divorced. There is so much pressure. That is the pressure point, and that is the morale issue, quite frankly.

Take shift resources on those lower type of really not high-end appeal cases and technical cases. Just grind them out. Get them done.

Admiral HOUCK. We routinely see servicemembers from the other Services, and I know they do for ours as well. So that is a big area of cooperation for us.

Senator BROWN. Well, I can just make one final conclusion. One of the biggest challenges that many guardsmen have is the length of deployment, in that there are many soldiers in the Guard who would be happy to do backfill tours of 3 to 6 months voluntarily.

Is there any effort in that, to reach out to do those types of tours and say, "Hey, listen, we have a guy who has been deployed. He needs a break, and he needs 3 months."

Do you send those feelers out—because we don't get them too much, I know, in our unit. Anybody can comment on that.

General HARDING. We have done that before, daisy-chaining a deployment link to send somebody over there for 90 days, in a succession of 90 days.

Senator BROWN. Even in CONUS, just to backfill here.

General HARDING. Certainly, yes, Senator, we do bring folks in, as I say, home station support to support legal offices that are a little shy because they have some folks down range. But certainly. Certainly.

For adjustable periods of time so they can certainly find a spot that is right for their employer as well. So we have done that.

Senator BROWN. Great. Thank you all.

Thank you, Mr. Chairman.

Senator WEBB. Thank you, Senator Brown.

I would like to express my appreciation to Senator Brown and Senator Graham for their continued service in uniform, as well as here in the Senate, and Senator Graham for having recommended this hearing.

He is one of the great lawyers up here in the Senate. There is nobody up here who is better on law of war and those sorts of issues. Tremendous admiration and respect for Senator Graham, and it is a great pleasure to work with him.

Senator GRAHAM. Thank you, Mr. Chairman.

You have been terrific. It has been one of the few bipartisan areas left in the Senate, if I could put it that way. [Laughter.]

Senator WEBB. I would like to again thank all of you for your testimony today and for your continued service to our country. Again,

I appreciate your having had the patience to wait for us, as we got a little bit of a late start.

But thanks again. This is very valuable testimony not only for the Senators who were here, but a lot of staff work goes into this, a lot of thought goes in from digesting what came out of this testimony. So it has been very valuable to this committee, and I thank all of you.

This hearing is adjourned.

[Whereupon, at 4:00 p.m., the subcommittee adjourned.]

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