DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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IN REPLY REFER TO

5800
Ser 00/0111
4 Aug 09

FIRST ENDORSEMENT on Captain D. E. O'Toole, JAGC, USN, ltr 5800 Ser 08/001 of 31 July 2009

From: Judge Advocate General
To: Distribution

Subj: REPORT ON THE STATUS OF MILITARY JUSTICE IN THE NAVY

1. The subject report describes and assesses how the Navy JAG Corps executed its statutory mission of military justice over the course of the past 20 years, with particular focus on the competence of the key participants, counsel and judges. Of most significance, it describes how an environment developed in which a case such as *United States v. Foster* languished without proper post-trial attention. As such, this report is an essential reference and will be made required reading for all those in the JAG Corps who have responsibility for military justice and court-martial litigation. I commend the working group for its hard work, insight and frank assessment.

2. I specifically concur in the conclusion that the principal lesson learned is that the JAG Corps has not maintained a consistent focus on military justice and the litigation of courts-martial. This is so despite the fact that there have been warning signs of institutional weakness in how we have supported and advanced military justice, and litigation expertise in particular. These warning signs include examples of failure in individual cases. Going forward, the Navy JAG Corps must be able to competently and fairly prosecute and zealously defend any charges referred for trial by court-martial. This encompasses the investigation and preferral of charges to final disposition on appeal, and includes the simplest to the most complex cases. With respect to appeals, military service members are entitled to receive diligent and timely review of their cases. To accomplish this, we must stay focused on military justice as our statutory mission. This can only be accomplished through regular, periodic assessments of our competence and a mindset of continuous improvement.

3. I also concur that actions taken prior to the case of *United States v. Foster*, and which led to it being identified and disposed of, have given us a current trial and appellate bench and bar that is competent, dedicated, and eager to serve. Initiatives such as continuous reassessment of Naval Justice School curriculum, the evolution of Naval Legal Service Command, advances in electronic case management and tracking, the Sea Enterprise Panel on the Trial Judiciary, our Reserve Total Force construct, the Judicial Screening Board, and the Military Justice Litigation Career Track have placed our Navy JAG Corps in a position to correct the remaining institutional deficiencies noted in the report, and to effectively and efficiently respond to military justice needs at both the trial and the appellate level.

4. Subject to the foregoing comments, the lessons learned and recommendations in the subject report are approved, and I direct implementation of those recommendations as set forth in enclosure (2) of the basic correspondence.

BRUCE MacDONALD

Distribution:
DJAG
DJAG (RA&O)
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AJAG (01)
AJAG (02)
AJAG (06)
Code 07
NJS

5810
Ser 08/001
31 July 2009

From: Captain Daniel E. O'Toole, JAGC, U.S. Navy
To: Judge Advocate General

Subj: REVIEW TO ENSURE COMPETENCY IN MILITARY JUSTICE PRACTICE

Ref: (a) Judge Advocate General ltr 5810 Ser 00/0057 of 4 May 09

Encl: (1) Report on the State of Military Justice - 2009
(2) Plan of Action and Milestones

1. Enclosure (1) is forwarded pursuant to reference (a).

2. Pursuant to your direction in reference (a), enclosure (1) focuses on military justice processes and policies, including the retrospective needed to understand the *Foster* case in context, and assesses the current level of competency in military justice and military justice litigation.

3. Enclosure (1) contains lessons learned and recommendations in each of its four parts. The recommendations are also consolidated in Appendix 14. Enclosure (2) is forwarded as a proposed means of implementing these recommendations.

4. Finally, I take this opportunity to thank the outstanding officers whom you appointed to assist in researching and assembling this report.

D. E. O'TOOLE

Report on the State of Navy Military Justice

01 July 2009

Introduction

On May 4, 2009, the Judge Advocate General of the Navy established a panel to conduct a review of the actions, policies, and procedures necessary to ensure the Navy JAG Corps is always able to perform its military justice functions in a competent, professional manner. Appendix 1. This report responds to that charter.

The event that triggered this review is the decision of the Navy-Marine Corps Court of Criminal Appeals in *United States v. Foster*, 2009 CCA LEXIS 62 (N.M.Ct.Crim.App. 17 Feb 2009). Appendix 2. In that case, a Marine was convicted of spousal rape and assault, and he began serving a lengthy sentence to confinement on December 3, 1999. The post-trial process ultimately resulted in the rape conviction being overturned for lack of evidence, but it took nearly ten years while the appellant remained confined. The concurring opinion of the court noted "a failure at every level" of military justice in this case, but particularly during post-trial processing and appeal. In response to this case, and to fulfill the broader charter, this report provides an in-depth review of post-trial and appellate practice, including the role of the Navy-Marine Corps Court of Criminal Appeals, and it examines military justice competence across the JAG Corps.

This report is organized according to each phase of a court-martial, from pretrial, through trial, post-trial processing, and appellate review. Each section will describe the policies, practices and other actions that affect the competence of those individuals responsible at each phase. This will begin with a retrospective, identifying key events that most influenced competence in military justice and which led to an environment in which a case such as *United States v. Foster* was permitted to happen. This report will describe those positive changes that have already been made in an effort to re-focus the Navy JAG Corps on its statutory mission of military justice, and provide an assessment of the current status of competence at each phase, including of those responsible for oversight. Each section concludes with recommendations to further strengthen and institutionalize positive change. For ease of reference, all recommendations are also compiled in the last Appendix.

Finally, in the process of gathering material for this report, the panel obtained copies of several prior reports pertaining to military justice. These are referenced and discussed *infra*. See also Appendix 3. In reviewing these preceding reports, it became clear that, over time, the JAG Corps has not consistently remained focused on the findings and recommendations of our predecessors. Even those recommendations that were implemented had no long-term plan for evaluating their continuing efficacy as circumstances changed. As a result, the panel's single most important recommendation is that a critical evaluation of military justice competence must be undertaken as an on-going effort. This report should serve as an integral part of the JAG Corp 2020, Accountability Focus Area, and the Chief Judge of the Navy should provide annual reports on the state of military justice to the Judge Advocate General of the Navy.

I. Pretrial Phase

II. Trial Phase

Appendices

I. Pretrial Phase

A. Overview. This section discusses the competence of counsel engaged in pretrial preparation, beginning with their training. Counsel are primarily assigned to one of three pretrial roles: as Staff Judge Advocates (SJAs) or "command services" attorneys providing military justice advice to line commanders convening courts-martial (the convening authority or CA); trial counsel preparing the prosecution of charges; and defense counsel preparing the defense of accused Sailors and Marines in anticipation of courts-martial. Prosecutors and defense counsel have typically been first-tour judge advocates (JAGs), while SJAs are usually second-tour lieutenants and more senior officers. A complete, detailed historical review of training and staffing has proven difficult because individual command histories are not always consistent or are incomplete on these topics. However, sufficient information and data was available from certain years to permit reconstruction of an instructive historical perspective. The years selected were not, by themselves, significant. Rather, they are representative years with the best available information from which to review caseloads, training, and personnel management structures. This section will describe key facts or events, historic trends, highlight differences over the years, and conclude with lessons learned and recommendations.

B. Retrospective: Key Facts and Events

1. Naval Justice School Training Opportunities

In the mid-1980s, Navy JAGs began their careers, as they do today, attending Naval Justice School (NJS) in Newport, RI. There they spent nine weeks in the Basic Lawyer Class (BLC). The criminal law and trial advocacy programs were largely lecture-based. For example, the BLC then offered significantly more classroom time than today: 39% more criminal law instruction; 23% more criminal procedure; and 13% more evidence.[1] As a result, the BLC offered new JAGs fewer practical exercises than are offered today.

Trial Advocacy, however, received consistent emphasis in the NJS curriculum over the years. Trial advocacy skills accounted for roughly 51 hours of instruction time in the mid-1980s, and that number had risen to 62 hours in 2000. There has also been a shift to more practical instruction of trial advocacy. The curriculum moved from a lecture-heavy offering to more interactive sessions in the classroom. NJS introduced seminars, offering students the opportunity to apply the knowledge gleaned from lectures to specific fact patterns, and to discuss issues in a forum with their instructors. This provided greater familiarity with the application of criminal law, criminal procedure and the Rules of Evidence, and increased the value of the more realistic mock trial exercises added to the end of the BLC.

By 2005, NJS had increased its emphasis on trial advocacy skills by adding five more hours of practical instruction to the BLC curriculum. Aside from the eight "core" BLC courses, NJS offered 31 other courses for attorneys, nearly half of which focused on some aspect of trial advocacy. These courses were taught by in-house Navy JAG attorneys, as well as visiting lecturers from nationally recognized prosecution and defense organizations.

[1] These percentages do not include "self-paced study" hours calculated in other measures of curriculum.

In October, 2007, a Military Justice Litigation Career Track (MJLCT) working group conducted an exhaustive review of the NJS curriculum in cooperation with NJS instructors. The MJLCT program is discussed in detail in Part II. At the end of their review, the MJLCT working group suggested significant changes to the litigation curriculum, designed to specifically target the needs of our litigators at the appropriate times in their careers. Along with the BLC, the working group members suggested the following additional classes: Specialist Litigator Course; Expert Litigator Course; Litigation Legalman Course; Military Judges Course; and the New Developments in Criminal Litigation Course. These courses would include the specialized training offered in existing courses such as computer crimes, prosecuting and defending complex cases, and others, but would be tailored to the students' experience level.

Today, the BLC is offered four times annually, and the curriculum has remained similar to that offered in 2005. Trial advocacy training continues to receive major emphasis. 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. The instructors have continued to refine the BLC based on feedback from students and the MJLCT community. For example, students now argue pretrial motions the week prior to their mock trial, rather than only a day prior to trial. This allows the students to adapt their trial strategy to the rulings, much as they would during a real trial.

Training will be a key component to the future success of the MJLCT. To assess training from a seasoned practitioner's perspective, the Criminal Law Division (Code 20) of the Office of the Judge Advocate General (OJAG) hired two senior civilian litigation experts, at a pay grade equivalent to a Navy captain. Both have outstanding credentials in criminal litigation, and sexual assault litigation in particular. Upon their arrival in May of 2009, they began a complete military justice review – a Case Evaluation Project (CEP) – designed to assess and correct deficiencies in the JAG litigation community's training and performance. Through the review of actual case files, and direct observation of practitioners in court, the CEP team has identified areas of weakness in which additional training would be beneficial. The team has suggested changes to the NJS curriculum, many of which mirror the suggestions of the 2007 MJLCT working group.

Finally, as minimum standards are set for admission into the MJLCT, minimum standards for admission into training classes should be developed to match the admission criteria for both Specialist and Expert. Currently, there is no minimum experience required to attend an NJS course, regardless of the sophistication of the content. Routinely, JAGs without basic litigation experience attend sophisticated trial skills courses. The failure to employ minimum standards limits course effectiveness for an under-qualified attendee, as well as the classmates who are paired with such an attendee for exercises. The general level of training is also diluted to the lowest common denominator. Instructors must devote disproportionate time explaining and assisting an under-qualified attendee. As the MJLCT develops into a community of accomplished trial lawyers, NJS must become more selective about whom, when, and how it trains. Accordingly, there must be training available and focused for all levels of experience. Appendix 4 lists the suggested new courses, and the recommended course updates needed to prepare highly skilled litigators to prosecute and defend complex courts-martial.

2. Organization of SJA Community

Certain military commanders are empowered to initiate formal criminal investigations, convene courts-martial, and take final action on the findings and sentences of those courts. Courts-martial are generally either special courts-martial (SPCM) or general courts-martial (GCM). SPCMs have essentially misdemeanor level jurisdiction, with sentences limited to not more than one year of confinement and a bad-conduct discharge. GCMs exercise essentially felony level jurisdiction under which a dishonorable discharge, confinement for life, or even death, may be authorized sentences. GCM CAs – usually flag and general officers – have SJAs on their staffs, as do many units and installations commanded by Navy commanders and captains who serve as SPCM CAs.

Historically, Navy O-3s and O-4s were assigned as SJAs to individual units and installations. These "independent" SJAs fell under the authority of the unit or installation commanding officer (CO), and provided legal advice to the CO, including military justice advice when that CO was contemplating action as a CA. Other, more senior, SJAs were assigned to operational and flag staffs. Under this decentralized organizational structure, the SJA was accountable to a single client-commander. Most junior SJAs had the ability to coordinate with prosecutors and more senior SJAs. Some, however, were geographically remote from easy access to assistance. Depending on their respective geographic locations, there was an informal oversight capability by more senior SJAs over their junior SJA colleagues as they worked with criminal investigators and advised subordinate commanders. However, there was no formal "legal" oversight in the rendering of pretrial legal advice. In the absence of an SJA taking the initiative to reach out to other legal resources, and successfully doing so, the fidelity of pretrial advice by junior SJAs was dependent on their training and, generally, still limited experience with potentially serious, complex fact patterns. Commands without SJAs received legal advice, including military justice advice, from a Naval Legal Service Command (NLSC) office on an as-needed basis.

3. Evolution of Naval Legal Service Command

Prior to 1997, NLSC was composed of Naval Legal Service Offices (NLSOs), which provided a wide range of legal services to Sailors and to commands without SJAs. Services were provided through various departments, including the "command services" department, which provided military justice advice to commanders serving as CAs. Command services attorneys were generally officers in their first tour of duty, as were many of the prosecution and defense attorneys who were also assigned to the NLSOs. As a result of locating command services, prosecution and defense counsel in a single command, the CO and Executive Officer (XO) of such consolidated NLSOs had to remain isolated from litigation to allow them to fairly evaluate their officers, and to ensure that they did not inadvertently and unfairly assist one side in the preparation or trial of courts-martial. When deemed necessary, the CO and XO would assist counsel on opposing sides of a case, careful not to overbear the judgment of the lead counsel or intrude into an attorney-client relationship. This usually meant participation by senior leaders was limited to general suggestions, but not in-depth participation in case development.

In 1997, NLSC was reorganized in an effort to elevate the level of pretrial and trial practice, by allowing more direct involvement in litigation by senior judge advocates, and to address criticism by Congress and the American Bar Association (ABA). Ethical concerns were raised regarding prosecution and defense counsel being assigned to the same command, under the same CO, and regarding prosecutors and defense counsel working in the same physical location. In particular, there was concern that defense counsel would feel pressure to use trial strategy and tactics that might not be in the best interest of their clients.

In the NLSC reorganization, command services and prosecution activities moved from the consolidated NLSOs to newly established Trial Service Offices (TSOs). To support the new organizational structure, 30 billets were added to JAG Corps end strength. TSOs functioned much like a district attorney's office, but with the added command services function, including advising CAs pretrial. This is because, unlike civilian criminal practice, the military prosecutor does not have authority to initiate or dispose of charges. The Uniform Code of Military Justice (UCMJ) invests responsibility for good order and discipline in the line commander, authorizing certain commanders to convene courts-martial. The TSOs provided pretrial military justice advice and support to commands without SJAs, as did the command services departments of the formerly consolidated NLSOs. These services included legal advice during the investigation of incidents, the drafting and preferral of charges, the formal pretrial investigation under Article 32, UCMJ, and the referral of charges to a court-martial. After the establishment of TSOs, the NLSOs continued to provide defense counsel services to accused Sailors, generally from the time charges were preferred or when pretrial restraint was imposed.

In 2006, the TSOs were reorganized and realigned within the Commander Navy Installation Command (CNIC) Navy Region construct. TSOs were renamed Region Legal Service Offices (RLSOs). Consistent with the consolidation of assets within functional areas, which is a principal driver of efficiency in the regionalization concept, the RLSOs acquired installation SJAs and their responsibilities. Under the new RLSOs, installation SJAs were no longer independent or isolated; they were incorporated into and supported by the RLSO and its chain of command. The new RLSO offices continue to provide command services, including pretrial advice and prosecution services, but also provide a broader range of SJA advice to client commands within its service region. The NLSOs continue to provide defense counsel services, personal representation, and legal assistance services to individual Sailors. Some operational and senior staffs continue to have independent SJAs, typically more senior officers.

4. Mentoring and Oversight of Counsel in Pretrial Phase

The formerly consolidated NLSOs were less than efficient and effective in providing oversight of command services and defense preparation. For reasons already articulated, the command leadership of a consolidated NLSO was limited in the level of direct participation and oversight they could provide in the advice and preparation of any specific case. Sometimes, in urgent circumstances, one member of the command leadership, such as the CO, would have to assist because junior counsel simply lacked the experience to correctly advise or prepare. That participation would preclude the CO from engaging with the opposing counsel in the command, who would have to consult the XO or some other supervisory counsel. This was an awkward, ineffective basis for developing command services counsel or defense counsel. It was similarly

ill-suited to providing the best pre-trial military justice advice to commanders who had no SJAs, or to clients facing a formal investigation or prosecution. In the main, command services counsel and junior defense counsel were supervised and mentored by department heads who were typically other junior officers with only marginally more experience. In locations with large NLSOs, oversight and mentoring could include an O-4 or O-5 department head who might, or might not, have adequate military justice experience.

With the establishment of TSOs, command services attorneys had a more direct chain of command for oversight. The whole command mission was focused on military justice. As a result, the senior leadership could, and did, engage in active oversight of counsel during the pretrial phase. A similar refocusing occurred in the NLSOs. The CO and XO were no longer prohibited from direct oversight of defense counsel doing pretrial preparation, except as client confidentiality and conflicts of interest would require. But, while freed of the ethical concerns raised by supervising both prosecuting and defense counsel, the leadership was not able to be as accessible to their counsel as their TSO counterparts. The mission of the NLSO remained broader than that of the TSO, including substantial responsibility for claims and legal assistance. As a result, NLSO oversight remained somewhat less frequent and less direct than at a TSO. Though leadership was clearly more involved in mentoring and oversight of pretrial preparation, NLSOs continued to rely on the defense department head for day-to-day oversight and mentoring. It remains unclear whether either model was more successful at developing counsel. This is because, at both TSO and NLSO, the dilemma of department heads and senior leadership without the requisite military justice experience persisted. Additionally, there remained detachment offices located remotely from the NLSOs and TSOs, requiring both organizations to depend on a local officer-in-charge (OIC) for direct supervision. This officer was usually an O-4, but O-3s were not uncommon. Despite the continuing challenges for mentoring and supervision, there is little question that the split of NLSOs and TSOs provided a better organizational structure for the development of junior counsel, and the timely delivery of correct pretrial legal advice to commands and to individual clients. The current oversight of counsel engaged in pretrial activities in today's RLSOs and NLSOs is discussed in section C, below.

5. Reserve Interface and the Total Force Concept

Reserve JAGs have become an increasingly important part of the Navy JAG Corps. Under the former paradigm, a reserve unit typically drilled as a group one weekend a month. This limited the types of projects that could be undertaken, as well as the interaction between the active and reserve components. Several changes in policy and culture have made it easier to harness reserve JAGs' talent and extensive experience. "Flex-drilling," the ability to drill on an as-needed basis during the week and in the evenings, is now authorized and is actively embraced by many reserve units and the commands they support. Flex-drilling enables reserve assets full integration as a force multiplier. For example, reserves regularly handle physical evaluation board cases, administrative boards, and weekday legal assistance clients. Additionally, while reserve JAGs have always directly filled deploying positions, changes to funding allow the ordering of reserves to active duty for extended periods of time to backfill positions vacated by active duty members on deployment. Deploying positions now include individual agumentees (IAs) who serve from six months to a year in critical positions supporting forward deployed U.S. forces in Afghanistan and Iraq. Working side-by-side enables reserve attorneys to mentor and train junior officers more

effectively in all types of cases, including courts-martial. Drawing on their active duty and civilian specialties, reserve judge advocates have become a crucial part of the mentoring process for active duty attorneys, including trial and defense counsel.

While flex-drilling and extended active duty opportunities have strengthened the relationship between active duty and reserve attorneys generally, the new policy recently promulgated by the JAG solidifies the Total Force Navy JAG Corps. See Appendix 5. Under this program, reserve component (RC) JAGs will be aligned to three pillars of practice: (1) military justice litigation; (2) command services and legal assistance; and (3) specialty practices in international law, environmental law, and admiralty law. Subject to the needs of the Navy, RC JAGs will be assigned to a practice pillar based on their military and civilian experience, education, and demonstrated competency, and remain in their assigned pillar throughout the remainder of their careers. JAGs in the first pillar, military justice litigation, will develop and maintain experience in all facets of military justice litigation. Billet assignments will support the core capability area of accountability as set out in the JAG Corps' strategic plan, "*JAG Corps 2020*." See Appendix 6. RC JAGs will serve in support of all phases of the military justice process, including as trial counsel, defense counsel, appellate counsel, members of the trial and appellate judiciary, teaching and mentoring positions, and in other roles which support the development and implementation of policy and practice in the military justice litigation area. A net increase in RC JAGs assigned to military justice litigation billets will also be accomplished under the Total Force reorganization of the RC. Billet assignments under this reorganization will emphasize placing experienced RC JAGs in positions where they can mentor and teach less experienced active component (AC) attorneys. Less experienced RC JAGs will be placed in positions where they can maximize their education and experience in military justice and litigation, including as clerks for the judges of the Navy-Marine Corps Court of Criminal Appeals.

Experienced RC JAGs who have specialized in litigation as civilian practitioners, in U.S. Attorneys offices, as Federal Public Defenders, in private practice, and on the bench, will be positioned to assist in all aspects of the pretrial phase, including pretrial investigative advice, pretrial confinement review hearings, Article 32 hearings, and review of charge sheets. Bringing to bear their civilian and military experience, they will be able to fill gaps in knowledge, provide training, mentor junior officers, and serve as valuable resources to senior AC JAGs. In addition to the military justice litigation pillar, RC JAGs assigned to the command services and legal assistance pillar will bring continuity and depth of practical knowledge to the SJA community, including military justice aspects of SJA practice. This will reduce pretrial and post-trial processing errors and the delay that they cause.

C. Current Status

1. Oversight of Counsel Engaged in Pretrial Activities

RLSOs incorporate the former TSO command services attorneys and the former installation SJAs in a command services division or directorate, which includes new JAG officers, as well as more experienced O-3s and O-4s. Some RLSOs have remotely located detachments, which also include command services attorneys. The senior SJA at a RLSO is generally the command services division director, and is a senior officer with prior SJA experience.

Functionally, the attorneys assigned to provide pretrial legal service as "SJAs" fall within the Division Director's line of authority, with the latter providing direct mentoring, leadership, and guidance. That officer might, or might not, have significant litigation experience.

Individual legal questions previously answered on an ad hoc basis by command services attorneys under the TSO structure are today being directed to "installation" judge advocates in the RLSO. Given the expansiveness of some regions, and the number of Fleet (Active and Reserve) components, command services attorneys under the RLSO construct provide advice to more than one assigned installation. In some instances, this change in structure might lead to a diminution in services as RLSO attorneys respond to numerous client commands, and responses to legal questions might not be as instantaneous as when TSOs augmented independent SJAs. To address this, RLSOs typically provide for redundant coverage. If a particular installation SJA is unable to provide advice to an assigned tenant command, another SJA from the command services division is made available.

The strength of the RLSO model is its ability to provide command legal service at a level equivalent to the former TSO, but with more efficiency. And, it retains an equivalent level of supervision over command services counsel, with two caveats: First, the senior SJA and regional counsel hold a far broader portfolio than the former CO of the TSO, who was solely focused on military justice. Second, the efficacy of supervision and mentorship of command services counsel, who are advising on matters of military justice, continues to depend not just on the availability of oversight, but on the military justice and litigation experience of the oversight officer.

The NLSO model has not changed dramatically in structure or roles for oversight of new counsel. Though the NLSO senior leadership is more engaged in mentoring defense counsel than when the NLSOs were consolidated with prosecutors, a defense department head still generally provides day-to-day oversight. There has been greater attention paid to the on-going improvement of litigation skills, including the early representation of clients accused of misconduct. The senior leadership of NLSOs, and their defense department head, increasingly make the time necessary to be involved in a case from "cradle to grave." As with the RLSOs, the effectiveness of oversight continues to be dependent on the military justice and litigation experience of those providing the oversight. Some NLSO defense department head are simply the most senior of the O-3s assigned in their first tour of duty at the NLSO. Some COs and XOs have sterling environmental or international law credentials, but little or no in-depth or recent defense litigation experience, or particularly up-to-date knowledge of how to properly investigate and prepare a complex case, such as a sexual assault including forensic evidence or computer crimes.

As discussed in Part II, to bring more current litigation expertise to bear during the pretrial phase, RLSO and NLSO CO and XO billets will be progressively filled with MJLCT officers, as will key supervisory counsel billets. See *infra* at 17, 27-29.

2. Competence of Counsel

The current structure of the RLSO enhances consistency in legal advice and opinions across the enterprise, under the direction provided by the regional SJA or senior SJA. While

individual RLSO organizations vary somewhat to meet local requirements, all have a senior officer who serves as SJA to the local regional commander, typically a flag officer who is a general court-martial convening authority. This regional counsel assists in the formulation of "legal policy" for the regional commander, who then promulgates it to installation COs. This approach allows a unity of effort along the legal and line chains of command. While this organizational structure facilitates the provision of consistent command legal advice, as has been previously noted, the structure alone does not ensure that military justice and pretrial advice is correct. This is because the majority of RLSO and NLSO billets are filled by new JAGs with little or no litigation experience. Indeed, several current NLSO COs noted that, during their tenure, only first tour, inexperienced lieutenants were assigned to their commands. The quality of pretrial legal advice is dependent, then, on the military justice expertise of more senior counsel who are supervising and assisting junior counsel. Placement of MJLCT officers in designated billets in the RLSOs and NLSOs will provide the needed level of military justice experience within these organizations.

The integration of MJLCT officers into RLSOs and NLSOs will also address the negative impact the declining number of courts-martial have had on the professional development of the new counsel. Since 2005, GCMs have declined nearly 25%, while SPCMs have dropped by 45%. So, there are fewer opportunities available for new counsel to gain experience, and to hone their investigative and trial preparation skills. It is also more difficult for a more senior officer to regain currency after an absence from litigation preparation. This combination of factors – the need for military justice experience and fewer opportunities to obtain it – highlights the need for access to supervisory counsel who are highly skilled in military justice and litigation. Pretrial advice and sometimes strategic decisions, must be made early in the military justice process by both the command counsel and defense counsel; their advice and decisions must be correct, or the viability of a case – or its successful defense – can be placed in jeopardy.

As noted above, a case evaluation process (CEP) is underway in the Criminal Law Division, including a review of actual cases by two new senior civilian litigators. As the CEP nears completion, it is apparent that the forward motion of many criminal cases is significantly impacted by command decisions. Many charges are resolved by a command decision to dispose of the case by administration of nonjudicial punishment (NJP), or not to go forward with any disciplinary action. Understanding that decisions made at the command level are impacted by a variety of considerations, timely and correct pretrial advice is key to assisting the commander in making well-reasoned decisions regarding good order and discipline within a command, especially when confronted with allegations of significant wrong-doing. It is not clear whether a lack of sophistication in investigation, pretrial preparation, and military justice advice in complex cases, such as computer crimes and sexual assault, has contributed to decisions to defer prosecution to civilian authorities, to use alternate nonjudicial dispositions, or to take no disciplinary action. What seems clear is that command services attorneys and the remaining independent SJAs, who are consulted on pretrial decisions at the command level, must have sufficient criminal law experience to be able to distinguish a viable case from a non-viable case, which can depend on subtle nuances of evidence amidst increasingly technical forensic procedures. In this regard, the command services attorneys have one advantage over SJAs assigned to operational and senior staffs: they have the RLSO structure to augment their experience. SJAs do not necessarily have convenient access to a senior supervisory counsel or an experienced prosecutor, and they might, or

might not, have sufficient criminal law and litigation experience to counsel a commander on a significant investigation or pretrial matter.

In *United States v King,* charges of espionage were preferred against a Sailor in the fall of 1999 for improper disclosure of highly classified national security information. The case initially appeared straightforward and relatively uncomplicated. The Government had a signed confession by the accused with what was thought to be adequate corroborating evidence to prove the charge of espionage, and a reliable witness to prove the separate charge of wrongfully passing classified information. The court-martial CA, his SJA, and Government counsel all expected quick resolution, probably with a negotiated guilty plea. Instead, 17 months were consumed with multiple defense-requested delays (3 months), including two petitions for extraordinary relief to the appellate courts and numerous pretrial investigation hearings. Ultimately the Article 32 investigating officer recommended dismissal of charges. Although the Navy and Marine Corps have successfully prosecuted a number of national security cases at general courts-martial, the *King* case clearly demonstrates the difficulty of prosecuting complex cases. The *King* case resulted in a comprehensive and extensive study outlining areas of weakness in preparing and prosecuting complex cases, and national security cases in particular, and proposed corrective measures. *National Security Case Commission Report* of June 29, 2001.

An SJA who does not have a solid understanding of how evidence must be developed and what is necessary to prevail at trial is going to be less capable of recognizing whether the results of an NCIS investigation provide a viable prosecution. The SJA's legal portfolio must be broader than litigation, so they will not be required to be MJLCT qualified under the MJLCT instruction. See Appendices 7 and 8. However, attorneys should meet minimum military justice requirements in order to qualify for an SJA billet. To supplement litigation experience gained in the prospective SJA's initial duty at a NLSC command, NJS should continue to provide SJA training as one of its core courses, and should incorporate litigation and evidence training into the SJA curriculum, tailored to investigation, pretrial and other SJA issues.

D. Lessons Learned

1. NJS training provides a solid training foundation through the BLC and other more advanced courses, but there remains need for military justice and specialized litigation training available for counsel at all levels of experience.

2. Military justice is only one mission area for JAGs assigned to NLSOs. The evolution of Naval Legal Service Command from NLSOs and TSOs to RLSOs and NLSOs also broadened the RLSO portfolio beyond the TSO's single-mission focus on military justice.

3. The effectiveness of oversight of command services, and of trial and defense counsel performing pretrial tasks, is dependent on the military justice and litigation experience of those providing the oversight.

4. The continuing decline in courts-martial means there are fewer opportunities for junior counsel to become proficient or for more senior counsel to regain currency in pretrial

tasks, such as investigating criminal cases, providing pretrial military justice advice, and preparing the prosecution and defense of courts-martial.

5. SJAs assigned to operational and senior staffs might not have significant investigative or litigation experience, but they do have access to the RLSO support structure and Code 20 "reach back" expertise to assist in advising a commander on a significant investigation or pretrial matter.

6. Decisions made at the command level are impacted by a variety of considerations, so timely and correct pretrial advice is essential to assisting the commander in making well-reasoned decisions regarding good order and discipline, especially when confronted with complex fact patterns implicating significant wrong-doing.

E. Recommendations

1. Coordinate and implement the NJS curriculum changes described in Appendix 4.

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.

II. Trial Phase

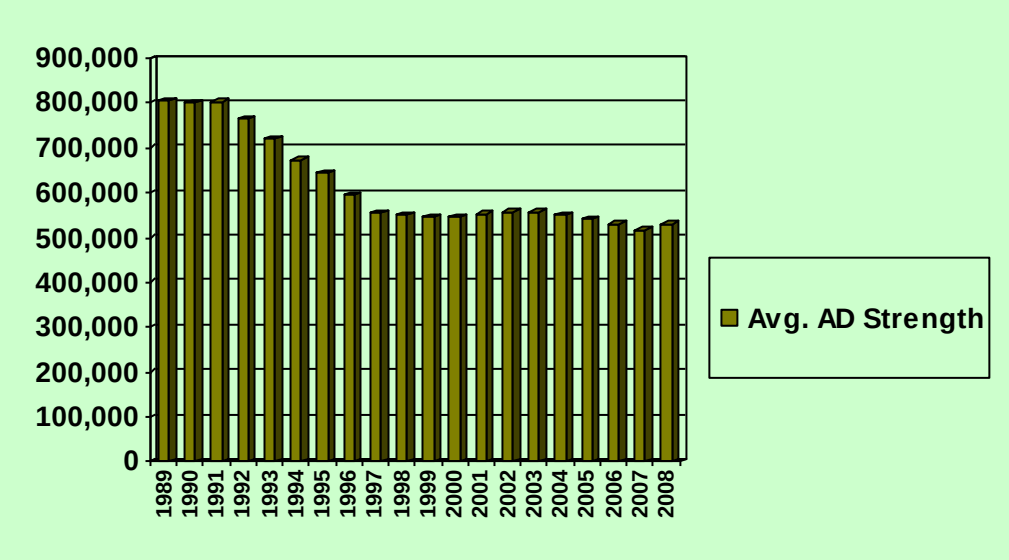
A. Overview. This section discusses trial and defense counsel, those who supervise them, and those who interface with them, including Code 20, and the military judges.

B. Retrospective: Key Facts and Events

1. Historic Caseload Structure

The litigation landscape was quite different in the late 1980s from practice today. The Department of the Navy (DON) included just over 800,000 personnel, of which 570,000 were Naval officers and Sailors, supporting a fleet of 571 ships. By 2005, the DON had reduced to about 540,000, of which 366,000 were Navy personnel, supporting 282 ships. At the end of 2008, the DON personnel reduction had slowed, retaining about 530,000 personnel, of which approximately 329,000 were Navy, supporting 281 ships.

Figure 1 - Average DON Active Duty Strength: Navy and Marine Corps Last 20 Years



The Navy and Marine Corps disposed of 10,735 courts-martial in 1989. By the year 2000, the number of GCMs decreased by 18%, while the number of SPCMs decreased by almost one-third. Since 2005, GCMs declined 25%, while SPCMs dropped by 45%. Figure 2 illustrates the number of courts-martial generated per 1,000 personnel. This misconduct rate resulted in the number of courts-martial depicted in Figure 3, with a notable and persistent decline beginning in 2004. Significantly, while both GCMs and SPCMs continue to decline, the larger percentage reduction is occurring with SPCMs. Part of the SPCM decline is reflected in the increasing use of SCMs. See Figure 4. It is also important to note that, although the overall GCM trend is downward, since 2004 the number of GCMs has increased twice -- in 2005 and 2007. Additionally, the total of summary courts-martial (SCM) and SPCMs – representing "misdemeanor" offenses – also increased in 2008. So, in describing the total caseload structure as

"declining," it must be understood that fluctuations upward are still occurring and, considering a total force of over half a million personnel, those fluctuations could rapidly reflect significant numbers of courts-martial at both the trial and appellate levels.

Figure 2 - Courts-Martial Generated Per 1000 Average End Strength

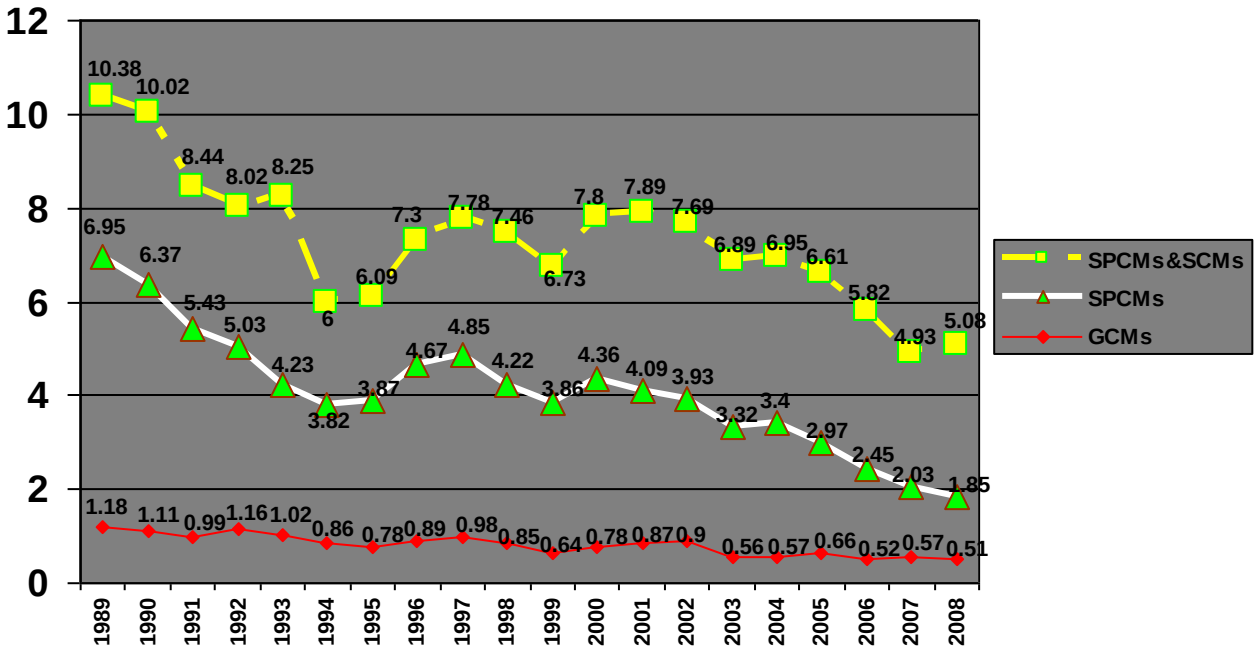
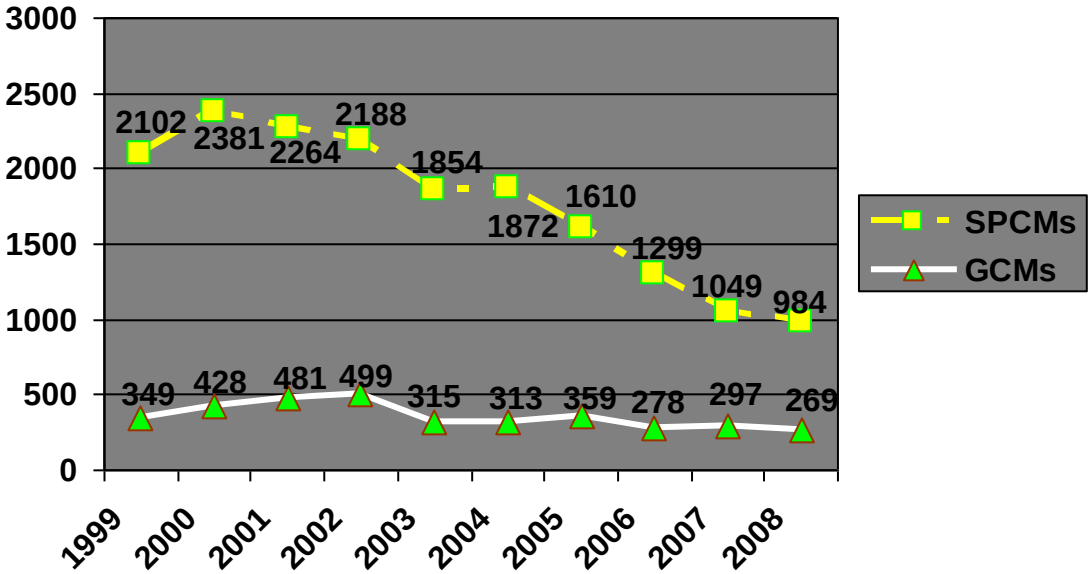
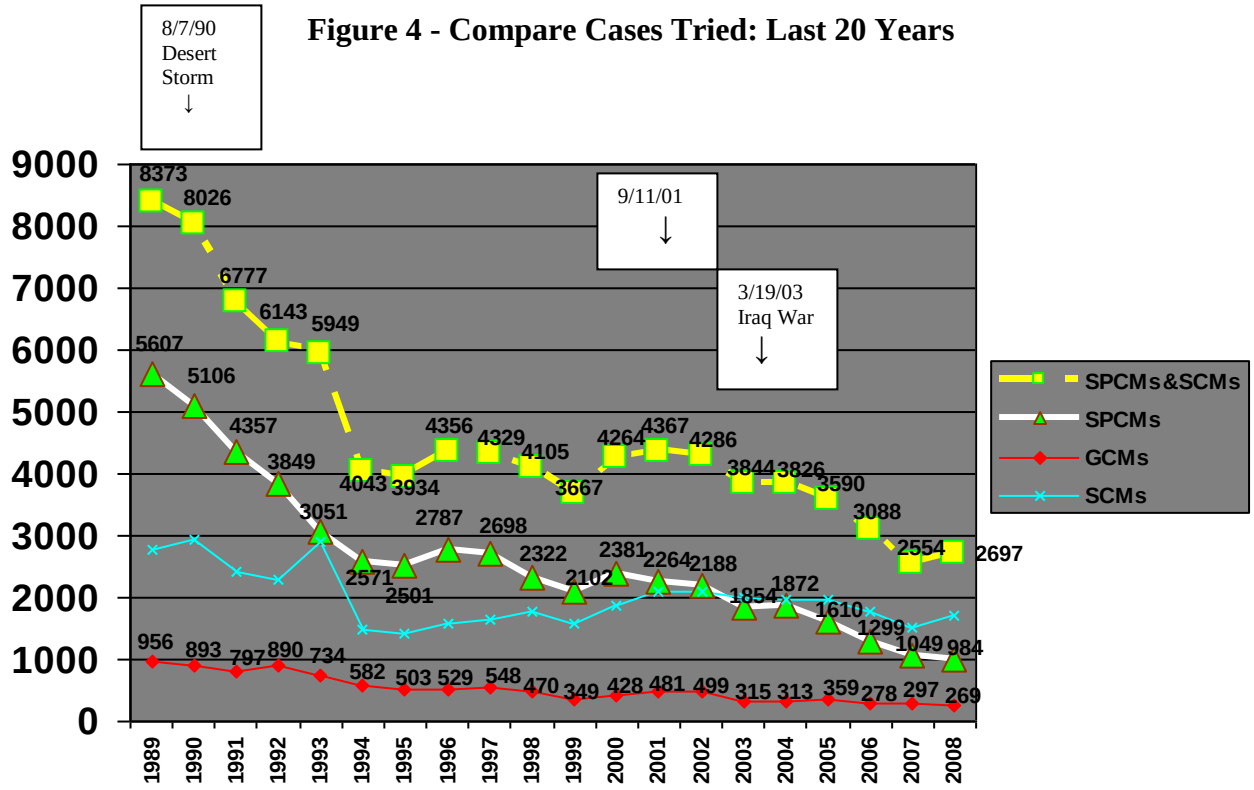


Figure 3 - Cases Tried Over the Last 10 Years



An important aspect of the reduction in courts-martial is that it is greater than would result from end-strength reductions alone. The additional reduction factors might well be related to the impact of key events, such as the Gulf War, the 9/11 attacks, the resulting shift in Naval Criminal Investigative Service (NCIS) assets from investigation of general crime to anti-terrorism and force protection (ATFP), the commitment of troops to Afghanistan and Iraq, and most recently, the economic downturn. Another apparent factor is the increasing use of SCMs, which might reflect a conscious change in line commanders' choices of forum for "misdemeanor" misconduct away from SPCMs.

Figure 4 - Compare Cases Tried: Last 20 Years



2. Evolution of NLSC Structure to Support Litigation

In 1985, new JAG attorneys were generally assigned to one of the offices in Naval Legal Service Command (NLSC) upon graduation from the NJS. In the late 1980s, NLSC was comprised of 427 officers, 231 legalmen, and 245 civilians. Though the new JAGs also likely worked in legal assistance or claims divisions during their initial tours of duty, virtually all were assigned for part of their first tour to prosecute or defend military justice cases. A larger NLSC than today meant that supervisory and senior officers were more readily available to mentor junior attorneys. At the time, the JAG Corps' service obligation was three years, as compared to the current four-year obligation. So, attorneys not intending to be released from active duty upon fulfillment of their initial obligation often stayed in their NLSO for three years, serving some time in most or in all divisions. In the main, junior counsel had more time as prosecutors and defense counsel than NLSC JAGs today, and many did both in their initial tour of duty.

The greater caseload in the mid-to-late 1980s provided more opportunity to litigate cases. Attorneys enjoyed the benefit of sharpening their trial skills in significant numbers of "misdemeanor" cases tried by SPCMs, which were of less complexity and which exposed clients to a limited range of punishment. Punitive discharges were unavailable in certain special court-martial cases. There were 2,653 of these "non-BCD special" courts-martial, and they accounted for almost 50% of the total number of SPCMs disposed of in 1985. Additionally, SPCM sentences to confinement were limited to six months until 2002. So, while specialized training was not available, junior counsel had more time in litigation divisions and more cases than their counterparts today.

While junior counsel had the opportunity for more supervision in the larger NLSC organization, the supervisors and "mentors" were not as well-trained as they are today. NJS offered only seven courses beyond the BLC. Litigation training options from within the community were nonexistent, limiting higher-level development of senior mentors and their young litigators. Some attorneys took advantage of civilian programs outside of the JAG Corps, but these were the exception, not the rule. The lack of a litigation career path, coupled with the lack of focused training opportunities, limited the development of high-level advocacy skills in the JAG Corps. Additionally, those in supervisory positions, including COs and XOs, were less likely to have significant litigation experience. This is because JAGs who served more frequent duty within NLSC, and in the courtroom, were less likely to promote to commander or captain. The pool of O-5s and O-6s was largely composed of judge advocates whose service included advising line commanders in a progression of increasingly responsible positions, usually as SJAs. Their records contained Fitness Reports from senior Navy line officers, including three and four star flag officers. JAGs who spent more time in NLSC and in military justice generally had little such "flag paper." As a result, they were at a disadvantage competing for promotion to senior grades, and were not in a position to be considered for command within NLSC. Indeed, for this reason, many JAGs with interest in litigation were actively discouraged by their mentors from pursuing litigation even within a broader career path. As a result, those with the interest and skill to be strong litigators were redirected to other areas, such as international or operational law, or they simply moved to the private sector. The net result is the JAG Corps lost its best and most promising litigators.

As was discussed in the preceding section, prosecution and defense litigation resources were co-located in consolidated NLSOs prior to 1996. Beginning in that year, the TSOs were established. Prosecution and command services moved from the NLSOs, to the new TSOs, which functioned much like district attorney offices. One purpose in establishing this model was to renew the focus on litigation, and to increase trial advocacy expertise by having more senior counsel, including COs and XOs, actively engaged in litigation. Separating the prosecution and defense functions removed any ethical impediment that prevented senior leaders from engaging in direct support of junior litigators. For NLSO counsel, there remained some limits presented by issues of client confidentiality. There was no such impediment on the TSO officers. Despite this, while most COs were more actively engaged in the litigation process, few actually tried any courts-martial. More XOs went into court than COs, but not in substantial numbers. This is because the new paradigm anticipated senior leaders litigating, but those leaders were selected from among candidates who left NLSC duty as junior officers for the reasons discussed above, principally that litigation was not career enhancing. Before returning to NLSC, most of these

senior officers spent years away from the courtroom practicing in other areas of the law, such as operational, international, environmental, health care, and labor. Upon being selected to lead a NLSO or TSO, these senior officers found themselves in the uncomfortable position of lacking currency, if not competency, in the courtroom and being called upon to lead junior counsel that were more current, even though they lacked a depth of experience.

Additionally, those senior officers who did have litigation experience and relative currency were frequently not among those chosen for command. COs continued to be selected under the traditional detailing policy, which focused on leadership and career progression. For example, the promotion precept for selection to flag rank included a requirement for successful completion of a command tour. As a result, all competitive senior officers wanted to command a NLSO or TSO. However, as already noted, the majority of O-6s had not made rank based on litigation expertise. Among them, those officers who were flag competitive "needed" command, but were far less likely to have strong litigation experience. Yet, they were predominantly chosen for command. There was somewhat more flexibility in the selection of XOs, but the pool of candidates still suffered from a lack of highly qualified litigators, for the reasons already noted.

While the selection to command of highly competitive senior officers, who were outstanding attorneys and leaders, may have had benefit to the JAG Corps, the absence of seasoned litigators in these leadership positions perpetuated a circumstance in which the respective department heads (often called "senior trial counsel" and "senior defense counsel") were the principal day-to-day mentors to junior counsel and the supervisors of litigation, particularly at the tactical level. These counsel were sometimes O-4s, but increasingly common through the 1990s they were O-3s in their second litigation tour of duty. Sometimes, they were only the most senior of first-tour O-3s. This limited level of experience was not conducive to success in complex litigation, such as a capital murder case.

United States v. Quintanilla, 60 M.J. 852 (N.M.Ct.Crim.App. 2005), *aff'd* in part and *rev'd* in part (on other grounds) 63 M.J. 29 (CAAF 2005). NMCCA held that the military judge abused his discretion in granting two government challenges for cause in this 1996 capital murder case. The military trial judge granted the government's challenge for cause of a member whose religious beliefs the military trial judge found would cause the member to have a difficult time considering the entire range of punishments, which included death. NMCCA held that was an inaccurate test to apply and set aside the findings and sentence. The Court of Appeals for the Armed Forces (CAAF) affirmed there was error, but disagreed in the relief provided. Noting that the error only had an impact on the sentence, CAAF authorized rehearing on sentence. This case also included findings of prosecutorial misconduct on the part of the Marine Corps prosecutor, but these were not held to have prejudiced the appellant's trial.

In 2000, new JAG accessions were still generally assigned to NLSC commands, but NLSC was split between NLSOs and TSOs, and was significantly smaller, including 293 attorneys, 204 legalmen, and 238 civilians. Most new attorneys still litigated cases immediately, and had direct access to senior leadership. However, as in earlier eras, senior leadership did not engage in significant amounts of litigation or mentoring of trial tactics. While there were few senior supervisory counsel available with significant litigation experience, there were increasing opportunities to pursue litigation training within the JAG Corps. NJS had added six litigation

courses, covering topics ranging from capital litigation to computer crimes. Counsel were better trained, but still lacked a career path and tactical-level mentoring designed to foster the identification and development of talented litigators. Additionally, for NLSO counsel assignment time was split among a range of legal services to afloat and ashore commands, active duty Navy personnel, family members, and retirees. NLSO JAGs provided counsel for courts-martial, administrative boards, physical evaluation boards, legal assistance, as well as assistance for claims processing and adjudication, and training. TSO counsel were more focused on command services related to military justice and the prosecution of courts-martial. Increasingly, however, litigation within NLSC competed for time, attention, and resources with other mission areas, such as legal assistance, seasonal tax assistance, operational law, including the need to provide JAGs to Amphibious Ready Groups and other deploying units or staffs, and the relatively new, but fast-growing field of environmental law. This resource competition, viewed through the eyes of JAGs who were not litigators, at a time in which the number of courts-martial continued to decline, led to a misperception that litigation was no longer "as important" as the growing need for counsel in these other mission areas.

In 2002, the Navy and Marine Corps conducted only about 45% of the number of general courts-martial as in 1985, and only 40% of the special courts-martial. As noted earlier, though still substantial in certain locations, and in relation to the total number of NLSC counsel litigating the courts-martial, this smaller caseload began limiting opportunities to gain or to refresh trial advocacy skills, and it continued to contribute to litigation being perceived as less of an urgent mission priority. Simultaneously, however, the gravity of the cases had increased. There were no longer "non-BCD special" courts-martial, so clients faced a BCD in every case. Additionally, in 2002, the jurisdiction of SPCMs was increased to adjudge confinement of up to one year.

> *United States v. Abdirahman*, 66 M.J. 668 (N.M.Ct.Crim.App. 2008), is a 2003 Navy rape case, which the NMCCA reversed for cumulative error, including:
> -Trial counsel's repeated references to the evidence as "undisputed" during closing argument was error, when only the appellant could have disputed the details of the rape as testified to by the alleged victim.
> - Military judge's errors included: allowing a nurse practitioner to improperly testify as an expert on rape trauma; improper admission of evidence under the excited utterance exception to the rule against hearsay; and allowing a government witness to improperly bolster the alleged victim's character for truthfulness.

In 2005, NLSC was comprised of NLSOs, TSOs, and the newly transitioning RLSOs. NLSC included 265 attorneys, 203 legalmen, and 255 civilians. Though there had been an increase of about 40 GCMs over the preceding year, total courts-martial cases continued to decline. See Figure 3, *supra* at 12. Additionally, NLSC's 58 offices world-wide – eight NLSOs, five TSOs, two RLSOs and NJS – continued to provide a wide range of legal services to afloat and ashore commands, and to active duty naval personnel, family members, and retirees. Like their NLSO counterparts, RLSO counsel no longer focused on military justice as a single mission. As RLSOs came on line, they expanded the former TSO mission of military justice and litigation to

include a broader range of installation legal advice, which had formerly been provided by the SJAs who matriculated to the RLSOs under the reorganization.

Today, JAG accessions arrive for their initial tour of active duty in a larger NLSC that includes 349 attorneys, 193 legalmen and 241 civilians. NLSC commands still provide the same wide range of legal services from 99 offices world-wide. There are eight NLSOs, nine RLSOs and NJS. The number of attorneys in NLSC has increased by 50% over the past four years, but the courts-martial caseload has continued to drop to about 984 SPCMs and 269 GCMs in 2008. See Figure 4, *supra* at 13. This anomaly – more NLSC counsel, but fewer cases – potentially provides more opportunity to interface with senior counsel, but all counsel have less practical trial experience. Additionally, the RLSO's expanded mission portfolio, including general installation legal advice to COs, combines with the decreasing number of courts-martial to alter the mission focus from the former TSO single-mission of military justice and litigation, to the broader range of services, of which military justice is a part. As a consequence, military justice, and litigation in particular, has a smaller portion of the mission footprint within NLSC. These circumstances present a particular challenge: How to develop and retain highly skilled litigators in an era of declining cases.

In response to these circumstances, in May of 2007, the Judge Advocate General (the JAG) implemented the Military Justice Litigation Career Track (MJLCT) as the means by which to ensure continued development and availability of skilled litigators. See *infra* at 27-29 for a discussion of the MJLCT. Briefly, the JAG formally established a litigation career track as part of the *JAG Corps 2020* Strategic Transformation initiative. See Appendix 6. This MJLCT is designed to identify, develop, and retain JAGs with significant military justice knowledge and litigation skills. Candidates may apply for entry into the career track as "Specialists," once they have demonstrated superior advocacy skills during five or more contested trials. Specialists may apply for redesignation as an "Expert" when they have accumulated the requisite experience (20 or more contested cases) and demonstrated superior leadership of junior counsel in litigation. This will typically occur at the O-5 or O-6 pay grade. MJLCT qualification will generally be required for the detailing of officers into billets requiring significant litigation experience or the supervision of officers performing military justice litigation. These billets include senior trial and defense counsel, as well as COs and XOs within NLSC. See Appendices 7 and 8.

Despite the evolution of NLSC into a more effective and efficient organization for the delivery of military justice services, the former unity of command problem encountered in the former consolidated NLSOs has not been entirely remedied. It has been partially pushed "up stream" to the Assistant Judge Advocate General (AJAG) (Operations and Management), who also serves as the Vice Commander, NLSC. Doing so did allow local command leadership to have more ability to participate in litigation. And, while the AJAG, Vice Commander, NLSC, can provide resources on an equitable basis, and can formulate uniform policy, he is somewhat constrained in providing specific advice or resources to either the RLSO or NLSO in a specific case, such as a national security case or capital litigation. As related to litigation, the RLSOs and NLSOs still reflect the traditional decentralized Navy command structure, and the geographically dispersed and higher caseload of former eras. Today's courts-martial are still geographically dispersed, but are far fewer in number. As a result, a highly complex case can originate in any location, including one that has traditionally had few cases, and has few highly skilled local

resources. Effective marshalling of prosecution and defense litigation resources across the enterprise, when and where needed to meet the challenge of a specific case, particularly in a location that does not currently have MJLCT resources, is the result of liaison between and among COs.

3. The National Security Case Commission

Perhaps the seminal event in modern military justice in the Navy was the case depicted above, *United States v. King*. See Part I *supra* at 9. As has been described, this case never proceeded to court-martial because of pretrial errors by SJAs, prosecutors, and others. The convening authority dismissed all charges without prejudice, in part to protect multi-agency classified information from further disclosures to those involved in the trial process. The JAG directed a review of the case, and the circumstances that led to it. The report that followed identified a number of failings in the military justice process. Structural failings within NLSC included that the commanding officer of TSO East had retired without relief, leaving the XO, a commander, in command. While he was a highly regarded officer, his background was not military justice or litigation, but international and operational law. To complicate oversight by the acting CO, the case was developing in the Washington, D.C., detachment of TSO East, under the direction of an Officer-in-Charge who was also a commander. She had solid military justice training, which was superior to the acting CO's, but she had little actual trial experience. She was assisted by a lieutenant. The AJAG (Civil Law) had recently closed the division within the Office of the Judge Advocate General designated Code 11, which provided technical support in matters involving classified information. The SJAs involved were not skilled litigators, and the military judge appointed to serve as the Article 32 investigating officer was not a military justice litigator, but had an international law background. The detailed defense counsel included a lieutenant and a lieutenant junior grade. Petty Officer King hired a law professor familiar with national security litigation, and, 18 months after charges were preferred, the case collapsed without proceeding past the Article 32 investigation.

The National Security Case Commission Report concluded that "Navy and Marine Corps judge advocates, *with sufficient training and support* are fully capable of performing all duties associated with the prosecution of national security cases" (emphasis added). The Report also identified areas of weakness, including inadequate trial preparation, and that the staff judge advocate failed to anticipate logistical and evidentiary requirements. The Report made nearly two dozen recommendations, all of which were accepted by the JAG and implemented. These included the re-establishment of the former Code 11 – now Code 17; a directive to Commander, NLSC, to ensure experienced counsel with proper clearances are available, including the detailing of officers holding trial advocacy professional codes (the precursors to MJLCT officers) on each coast for the purpose of litigating these cases; and a number of tactical steps to be considered in such cases, including the assembly of a multi-disciplinary prosecution team. Of particular note, the Report recommended that the CO or XO of every NLSO and RLSO have significant military justice litigation experience.

4. Evolution of Electronic Case Management and Tracking Systems

From the 1980s to 2006, NLSC tracked cases internally through a variety of electronic systems: JAGMIS (Judge Advocate General Management Information System) (1985-1998), MJMIS (Military Justice Management Information System) (1999-2000), Time Matters (2000-2003), and HELM (Homeport Electronic Legal Management) (2003-2006).

JAGMIS, MJMIS, and Time Matters allowed for the tracking of the number of cases, certain other data, such as the dates of preferral and referral, and time spent by counsel working on courts-martial. But, none of these earlier systems had the ability to monitor work performed or the status of individual cases as they progressed. HELM offered a command-level case tracking function, but it did not allow for headquarters-level monitoring. To compensate, from 1999 through 2005, commands were required to provide quarterly court-martial Situation Reports (SITREPS) using Microsoft Excel software. Even using HELM and Excel SITREPS, only the number of cases was tracked and reported, with limited detail on the status of individual cases.

In 2006, the Court-Martial Tracking and Information System (CMTIS) was deployed to NLSC, NAMARA, and NMCCA to replace existing systems. As a result, individual Navy cases are now tracked at the field level and reviewable by headquarters from investigation through trial, sentencing, record of trial authentication, SJA recommendation, CA's action, and receipt by Navy-Marine Corps Appellate Review Activity (NAMARA). NAMARA tracks cases from receipt to NMCCA, then to archive; while NMCCA tracks cases from receipt of the case until it is closed by the court's action. This all occurs in one system, with more precise monitoring and reporting capabilities on pending and completed cases than was previously possible. CMTIS contains standardized reports, allowing the sorting and tracking of cases based on speedy trial parameters (e.g., 120 days from preferral of charges or pretrial restraint) and post-trial process dates, including those time parameters set forth by the CAAF in *United States v. Moreno* (e.g., CA's action taken within 120 days of trial; appeal completed within 18 months of docketing). NAMARA and NMCCA are able to monitor all cases through the appellate system. As a result, CMTIS represents a significant improvement in court-martial tracking and monitoring by providing a contemporaneous cradle-to-grave view of all Navy court-martial cases for local commands, headquarters, and during the appellate process.

The "Case Management" aspect of CMTIS affords Navy counsel an integrated system that not only tracks their work and time from the very beginning of each case, but also provides a central location in which to record every aspect of case development through the entire court-martial process. In addition, CMTIS provides supervisors a means by which to view the progress of each case, and to interject assistance when required. The Marine Corps does not yet utilize CMTIS at the trial level. Military judges presiding over Marine Corps cases enter limited data into CMTIS upon concluding a case, either after sentencing or upon acquittal. This permits the consolidation and tracking of all DON cases post-trial and through appeal in CMTIS.

5. Trial Counsel Assistance Program

The Appellate Government Division (Code 46) provides advice in support of the Navy and Marine Corps Trial Counsel Assistance Program (TCAP). Attorneys are assigned to weekly

rotations during which they answer calls from the field. Practitioners are also free to call specific attorneys who may be familiar with an issue based on a specific appellate case. The Criminal Law Division (Code 20) also provides assistance to prosecutors and defense counsel in the field. Typically, Code 20 receives 60 calls a month with questions covering a variety of issues from both prosecutors and defense counsel. Code 20 action officers discuss the issues – research them if necessary – and provide an answer as soon as possible.

Unlike the Army's Defense Counsel Assistance Program (DCAP), defense counsel in the Navy and Marine Corps must consult either Code 20 or the Appellate Defense Division (Code 45). Defense counsel are generally reticent to solicit much advice from these divisions. When consulting Code 20, defense counsel are reminded that privilege will not apply to any of the conversations. This sometimes makes it difficult to provide the specific assistance needed in a case. Code 45 provides some assistance to defense counsel in the field, with the caveat that the appellate defense counsel might have divergent interests from the trial defense counsel. Assertions of ineffective assistance of counsel are routinely alleged by appellate defense counsel against their trial defense colleagues. Development of a DCAP, to which privilege would extend, would correct this situation by providing routinely accessible, reliable and specific defense assistance.

6. Military Justice Stressor – Individual Augmentees and "Split-Touring"

Though new JAG accessions now have a four-year obligation, most junior officers have typically stayed only 24 months at their first assignment, usually at a NLSC command. Once new JAGs have satisfied their initial two-year "time on station" requirement, they often "split-tour" – that is, they accept permanent change of station (PCS) orders to another assignment to complete their initial four-year obligation. The perception among first tour judge advocates is that they will be more competitive if they have a broader range of experience sooner in their careers, and fitness reports from multiple senior officers. This common practice of "split-touring" limits the time a new JAG is in a NLSC command and available to gain trial experience. Further limiting time for trial practice is the fact that even 24-month tours of duty are sometimes interrupted by service as an IA for seven to 12-months.

IAs are active duty and reserve Sailors, including JAG Corps officers, who deploy individually, or as part of a small group, to augment a need in a forward area such as Iraq or Afghanistan, often serving with an Army or Marine Corps unit. IAs have stressed NLSC in two ways. First, the billet that the officer vacated during an IA was not filled because that officer generally returned. So, during the IA, there are fewer and less-experienced lieutenants available to perform the bulk of the work, including military justice. Second, for those who perform IAs, an initial tour of duty in NLSC became 18 months or less. Briefly stated, IAs reduced the time the officer spent in NLSC and in court.

The limited opportunity for trial experience resulting from split-tours, and tours shortened or interrupted by an IA, has impacted a significant percentage of new JAGs. Additionally, whether affected by an IA or not, the impact of spit-tours will continue to be exacerbated by the challenge of having to rotate junior officers through a variety of duties during the course of their first two years on active duty. RLSO junior officers must divide time between litigation and an

increased range of command services, including installation legal advice other than military justice. The challenge may be greater at NLSOs, where JAGs perform legal assistance and other personal representation functions. For example, counsel at NLSO North Central in Washington, D.C., represent over 64 "wounded warriors" facing physical evaluation boards each month. With the significant drop in the number of military justice cases in the Navy, the short time on station, and the need to expose junior officers to as many roles as possible, lieutenants are leaving NLSC with little or no court-room experience.

One of the often understated missions of NLSC is to serve as a training command, much like a teaching hospital affords new physicians the opportunity to practice in a dynamic environment, but under the supervision of residents and senior staff. Navy JAGs must learn about the Navy and the Navy personnel they serve, while learning the practical application of legal theory, rules, and procedure. In an effort to ensure officers have sufficient development in NLSC, some officers have remained in their initial assignment for the balance of their initial obligated service time upon their return from an IA. This has been done when the command leadership and the officer believe the officer has not received adequate training or professional development at the two-year mark (e.g., no litigation experience). This, however, is an exception to the common practice. In the future, reduced NLSC time-on-station is likely to continue as junior counsel depart with fewer than 24 months of service, either for personal career achievement, or to fill priority billets outside of NLSC, such as IAs. As a result, "split-touring" and serving as an IA will continue to stress NLSC's ability to evenly balance workloads, and to train new JAGs, particularly in the court room.

7. Military Justice Stressor – Reduced Opportunities to Litigate

One of the unintended consequences of separating the trial and defense functions in TSOs and NLSOs was that movement between prosecution and defense offices, possible within the consolidated NLSOs, became a PCS move. This diminished the ability to easily shift attorneys from one trial billet to another within one command. Early imbalances in experience appeared almost immediately, as TSO attorneys would often spend two to three years in a prosecution billet, while defense counsel would typically spend much less time actively defending cases.

Adding to the difficulty of defense counsel gaining litigation experience was that many of the NLSO defense billets were filled with first tour officers who were expected to complete a rotation in each of the other three common NLSO departments – legal assistance, claims and defense. This meant that officers would expect to spend an average of from one year to 18 months in a defense litigation billet, depending on whether the NLSO included a claims office. Even where claims offices were closed due to the consolidation and civilianization of the claims function, officers still rotated between the remaining two departments. The increasing requirement to staff Amphibious Readiness Groups during deployment, combined with IAs and "split-touring," led to an ever-decreasing tenure in many defense litigation offices. The average tenure of defense attorneys in Norfolk during 1999-2002, for example, was less than six months, and at times, dropped below three months. San Diego reported similar experience levels as recently as 2006 and 2007. A major contributing factor for a lack of trial experience was, of course, the decline in the number of courts-martial discussed above and reflected in Figures 2, 3, and 4, *supra* at 12-13.

8. Military Justice Stressor – Reduced Promotion Opportunities

Examination of Navy promotion board statistics confirms the longstanding and widely held belief in the JAG Corps that being assigned to successive military justice billets, or even being assigned to one at a key career flow point – such as pending a promotion board – is not a career enhancing choice. As a stark example, few officers serving as a military judge at the time of a promotion board have ever been selected for promotion. In part because of this, the *Sea Enterprise* Panel on the Trial Judiciary recommended that Navy lieutenant commanders no longer be assigned to the trial bench. For a description of the *Sea Enterprise* Panel, see *infra* at 25-26. However, it is not only promotion from O-4 to O-5 that has been negatively impacted, but also promotion from commander to captain. The large majority of O-6-selects have substantial operational and international law backgrounds, not military justice. Selection to flag rank has been virtually foreclosed to those whose careers focused on military justice.

The limited promotion opportunity for military justice litigators is, in part, a function of having less experience working for, and being evaluated by, senior line and flag officers. As a litigator, a lieutenant commander would likely have been evaluated by a Navy JAG captain. That officer's operational and international law colleagues would likely have been evaluated by a one or two star flag officer. As a commander, the XO of a NLSO or TSO would again be evaluated by a Navy JAG captain, while that officer's senior staff SJA colleagues would receive fitness reports from a three or four star flag officer. As noted elsewhere in this report, when reviewed by a promotion board, officers with such "flag paper" have historically been at a considerable competitive advantage. This contributed to a lower promotion selection rate and reinforced the perception of a career in military justice as undesirable.

The 2005 *Sea Enterprise* Panel on the Trial Judiciary addressed the perception of a military justice career, and service in the judiciary, specifically. That panel concluded "(t)here is an undeniable perception that the judiciary is not a career enhancing assignment for Navy judge advocates. The career path of most senior Navy judge advocates convincingly supports the perception that, while one can in fact spend too much time in military justice billets, one cannot spend too much time in operational/international law assignments. At some point, perception becomes reality, and deters fully qualified judge advocates -- who would otherwise be very interested -- from seeking appointment to the trial judiciary." For the same reasons, those with talent, interest and ability as litigators have historically been deterred from developing their experience base and trial advocacy skills through service in multiple military justice assignments, including in the judiciary.

Another contributing factor to the adverse perception of military justice litigation is that the JAG Corps historically sought to develop well-rounded general practitioners, able to respond quickly to the Fleet on a wide-range of topics anywhere in the world. Despite concern about military justice competence, and countless discussions over the past 20 years about how best to meet the only statutorily mandated JAG Corps practice area – military justice – specialization through a litigation track was viewed with significant skepticism. It was contrary to Navy and JAG Corps traditions of developing officers and attorneys as versatile general practitioners. And, as caseloads declined, military justice was not perceived with the same institutional urgency as the rapidly developing areas of international and environmental law, and the increasing need for

expeditionary lawyers on Amphibious Ready Groups, Carrier Battle Groups, and a variety of other deployable and operational positions, including IAs. As a result, JAG attorneys shied away from multiple litigation billets, justifiably fearing that a litigation "specialization" would limit future opportunities and promotion. This precluded the identification of good, young litigators and the development of those litigators from within the organization. There would be no formal commitment to the development of a professional trial bar and judiciary until *JAG Corps 2020* and the establishment of the Military Justice Litigation Career Track (MJLCT) in May of 2007. See Appendices 6 and 7.

By 2009, the MJLCT had begun to reduce the perception that only general practitioners with significant international and operational law experience will promote. There have been improvements in the selection rate of litigators at some of the recent promotion boards (the FY10 Captain board selected all three of the in-zone MJLCT officers). But, it is too early – and the numbers of candidates are still too small – to determine if the promotion rates for MJLCT officers has improved sufficiently to support a viable community and meet the needs of the Navy for skilled litigators. However, given the early perception of improvement, more control grade officers are volunteering to fill important litigation billets.

9. Military Justice Stressor – Detailing of Trial Judges

Based on the JAG Corps' traditional view of military justice practitioners discussed above, duty in the Navy-Marine Corps Trial Judiciary (NMCTJ), or the Navy-Marine Corps Court of Criminal Appeals (NMCCA), came to be universally viewed as a signal that an officer was going to retire, desired geographic stability, that the officer wanted or needed "time out" from the rigors of Fleet duty, or simply that the officer was available and the billet needed to be filled. In all but a few cases, detailing to the bench was not viewed as an appointment based on expertise in military justice, litigation expertise, and judicial temperament. As should be expected, this detailing process did not produce a bench of highly qualified judges. To the contrary, it negatively impacted military justice, and it reinforced the perception that service in military justice billets was not career enhancing.

Though candidates for the bench have historically been screened for judicial qualification, that screening was conducted *after* a candidate was identified for a judicial billet by detailers, who often selected the candidate on the basis of the non-judicial factors discussed above: desire for geographic stability, retirement, or other non-judicial considerations. The Judicial Screening Board (JSB) membership has generally included the Assistant Judge Advocate General (Military Justice) as the Chairman; the Deputy Director, Judge Advocate Division, Marine Corps Headquarters; the Chief Judge of the Navy-Marine Corps Court of Criminal Appeals; the Chief Judge of the Navy-Marine Corps Trial Judiciary; the Deputy Assistant Judge Advocate General (Criminal Law), and a senior Navy or Marine Corps Reserve Judiciary Member. While the membership has been well-qualified, the JSB's effectiveness has been limited by the small number of records presented for review, including those few candidates either already selected for detailing, or in discussions with detailers. Under these circumstances, the JSB focused on determining not whether an officer was among the best qualified of a group of candidates, but whether there was anything that would preclude the candidate's service on the trial bench. As discussed below, the JSB process was revised in January, 2008. See *infra* at 29.

10. Military Justice Stressor – Detailing of COs and XOs

The JAG selects officers for command as a part of the personnel slating process. Historically, COs and XOs were selected based on their experience and leadership. Though military justice is a statutory mission and core capability of the JAG Corps, it was not the only function of a NLSC command, the leadership of which was historically perceived as requiring the ability to effectively manage an organization, provide guidance and advice in a range of other substantive areas (e.g., ethics, command services, legal assistance), and to recruit and develop junior officers. As a result, fitness for command has traditionally been the primary factor considered in command slating decisions, not whether the officer possesses any particular legal specialty or designation. Officers selected for command were generally those who had achieved a high level of success in a range of positions of increasing responsibility, but generally not litigation positions. As has been previously discussed, military justice and litigation have generally not been 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. Rather, they had successful operational or international law careers, including service on three and four-star staffs. Many were selected for command as a necessary step to compete for flag rank. Litigation expertise was a little considered factor.

Adding to the effect of selecting COs and XOs from among those who generally did not have strong military justice or litigation experience was the growing misalignment between the assumptions underlying the CO/XO detailing policy and the evolving needs of NLSC. As TSOs were split from NLSOs, both were smaller, and TSOs had a focused military justice mission. The smaller NLSO mission also continued to evolve, with greater focus on personal representation and defense. The claims adjudication function was removed from NLSOs, civilianized and consolidated under the Claims Division of the Office of the Judge Advocate General. Though legal assistance continued to be provided by NLSOs, civilian practitioners were added as subject-matter experts, reducing the need for uniformed supervision in this service area. With the advent of RLSOs, the former TSO mission broadened somewhat to include installation legal advice, but they remained predominantly command services and prosecution oriented organizations. As NLSC commands evolved into these smaller, more specialized organizations, with military justice as a larger mission component, the former detailing policy did not evolve to address the changing skill sets required to lead them. COs were still predominantly selected based on the perception that they would lead large organizations with multiple service components, and because a command tour was necessary to attain flag rank.

While the approach to detailing COs, and to a lesser extent XOs, historically well-served the JAG Corps, the misalignment between the nature of the modern NLSC and the former detailing policy for COs, led to instances in which the lack of military justice litigation experience by NLSC leadership was problematic, the aborted case of *United States v. King*, being the most notable example. See *supra* at 9. The National Security Case Commission reviewing NLSC following the *King* case recommended that either the CO or the XO of certain NLSC commands be an experienced military justice practitioner. That remains a sound position as the MJLCT moves forward in implementation. The initial 2007 MJLCT implementing instruction provides for litigation "Experts" to serve in CO and XO billets at NLSC commands in locations that have

historically had a substantial or challenging caseload, such as Norfolk, San Diego, Jacksonville, and Yokosuka, Japan. See *infra* at 27-29 for a more complete discussion of the MJLCT.

11. Initiatives to Improve Military Justice and Litigation Competence

a. *Sea Enterprise* Panel on the Navy-Marine Corps Trial Judiciary

In 2005, the Chief Judge, NMCTJ, commissioned a panel of experienced active and reserve Navy and Marine Corps trial judges to evaluate the NMCTJ within the ***"Sea Enterprise"*** paradigm, a fundamental tenet of the Navy's "*Sea Power 21*" strategy. More specifically, the panel was charged with evaluating the business of managing the NMCTJ, with a goal of improving organizational alignment, reducing overhead, streamlining processes, promoting efficiency, and creating incentives for positive change. The principal focus of the panel included assessing whether the combined trial judiciary was composed of the right people, in the right places, at the right times, to perform the mission of bringing judicial services to the Navy and Marine Corps.

Following a comprehensive study, the panel addressed six business practice focus areas. These included: 1) geographic alignment; 2) staffing of judicial circuits; 3) caseload distribution among the circuits; 4) use of terms of court; 5) the use of technology; and 6) the role of inter-service integration of Army, Air Force, Coast Guard and Navy-Marine Corps judicial assets. The panel report also addressed five additional focus areas that supported best business practices by encouraging efficiency, promoting excellence, and creating incentives for positive change. These additional focus areas included: 1) integration of the Navy and Marine Corps components of the combined trial judiciary; 2) the selection of trial judges (judicial screening board process); 3) the Navy promotion board process (as it relates to trial judges); 4) the training of trial judges; and 5) the establishment of a flag/general officer judicial billet within the trial judiciary.

The primary recommendations of the panel were nearly all accepted and implemented by the JAG. These included:

- Reduction of twelve worldwide judicial circuits to six by combining Navy and Marine Corps Judicial Circuits;

- Reduction of 17 Navy trial judges to 11;

- Improvement of military judge selection process;

- Improvement of Navy precept language to include importance of favorable military justice litigation practice;

- Greater integration between Navy and Marine Corps trial judges including alternating appointment of Chief Trial Judge between Navy and Marine Corps, and cross assignment of Navy and Marines within newly combined judicial circuits;

- Use of terms of court to ensure judicial services when and where needed in areas without a resident military judge;

- Through changes in the UCMJ, Rules for Courts-Martial, and Military Rules of Evidence, incorporate technology into the trial process, through the use of video teleconference technology in specified circumstances, consistent with due process;

- Greater training opportunities provided to trial judges including bi-annual training at National Judicial College; and

- Creation of a capstone position for the military justice community, by implementing a billet for the Assistant Judge Advocate General (Chief Judge of the Navy), in the model of the other Navy AJAGs, eligible to retire in the pay grade of O-7 upon completion of three years service.

In August 2008, the original tenets of *Sea Enterprise* were again examined by the Chief Judge, NMCTJ. In particular, the update focused on the general reorganization of circuits, personnel and budget. In brief, the update validated the original assumptions of the *Sea Enterprise* Panel, and but for an adjustment in the allocation of certain judge billets to areas requiring greater on-site judicial support, the original conclusions of the *Sea Enterprise* Panel remained unchanged. The adjustments to the resident location of circuit military judges included a 2009 reassignment of a Marine Corps military judge in the Southern Circuit, from Jacksonville, Florida, to Parris Island/Beaufort, South Carolina. In 2010, a Navy trial judge will return to Bremerton, Washington, having been re-allocated from San Diego. The Navy end strength for the Trial Judiciary will remain unchanged at 11 active duty military judges.

b. Defense Pilot Project

In 2006, the JAG recognized the need to ensure that the structure of NLSC, its focus, and resources, are appropriately aligned to support the JAG Corps' statutory military justice mission, with particular concern that defense representation be zealous. To evaluate NLSC alignment, a Defense Pilot Project was begun in Europe. The purpose was to examine whether a different command structure would enhance the efficiency, training, skills, and autonomy of defense counsel, thereby enhancing military justice throughout the Navy. In October 2007, the Defense Pilot Project was expanded to include the NLSO in Jacksonville, Florida, and the Southeast Region it serves. Under the pilot, NLSOs would structurally mirror the Army's Trial Defense Service. Legal Assistance would be reassigned from the NLSO to the RLSO, leaving the NLSO responsible only for personal representation and defense services. A second assumption underlying the pilot was that more senior and experienced defense counsel would be more efficient, and could handle more cases with fewer personnel. Accordingly, only "second tour" or more senior counsel were assigned to the pilot.

In July 2009, the JAG reviewed the performance metrics and concluded that they demonstrated only slight increases in efficiency and quality of practice. The pilot also highlighted challenges presented by mentoring defense counsel over a large geographic area, and the difficulty of providing IA opportunities to trial and defense counsel in small offices. Balancing the slight

benefit against these challenges, and the investment of organizational energy involved in making a change of this magnitude, the JAG concluded the benefits not significant enough to warrant such a wide-sweeping change for NLSC. A reintegration of the former TDC sites into the NLSOs and RLSOs is now underway.

c. *JAG Corps 2020* and the Military Justice Litigation Career Track

In preparing the Navy JAG Corps strategic plan, senior leadership traveled around the world and met with nearly every member of the JAG Corps, either individually or in "town hall meetings." This process led to their identifying four mission capabilities that were essential to the Fleet in the 21st century. The *JAG Corps 2020* Strategic Transformation initiative, published in 2006, identifies "Accountability" as one of these four mission areas. See Appendix 6. A fair, efficient and highly effective system of military justice is an essential, if not the most essential, component needed to ensure personnel accountability. In recognition of the various stressors on military justice practitioners, and the need to develop and maintain highly skilled litigators, the JAG established "a career track enabling selected judge advocates to specialize in military justice litigation." *JAG Corps 2020* anticipates that a cadre of seasoned litigators will be created to "improve the quality of military justice litigation by keeping experienced and effective counsel in the courtroom, providing expert supervision and mentoring for new counsel."

The litigation career track initiative of *JAG Corps 2020* was formally implemented in the Military Justice Litigation Career Track (MJLCT) instruction of May 2007. See Appendix 7. The instruction creates the career path needed to retain talented litigators, and to hone and expand their experience. It also tasks senior litigators with identifying and developing those judge advocates who have demonstrated significant military justice knowledge and trial advocacy skills. A robust community of military justice litigators will not only improve the effectiveness and efficiency of the courts-martial process, but also will form the nucleus for reach-back capability for trial practitioners and SJAs.

Applicants, generally senior O-3 and O-4 officers, may apply for entry into the career track through annual selection boards consisting of the top litigators in the Navy. To qualify for selection, an applicant must demonstrate proficiency in at least five contested courts-martial, and present favorable endorsements from at least two military judges and from the applicant's CO. Additionally, a successful applicant must present an outstanding academic and professional record of accomplishment. A judge advocate who has demonstrated the requisite quantitative and qualitative experience in military justice litigation may be selected for the MJLCT and designated with the Specialist Military Justice Litigation Qualification (MJLQ). A judge advocate designated as a "Specialist" will be required to fill one or more of 24 designated litigation billets, including department heads in those locations with a traditionally high caseload, such as Norfolk, San Diego, Jacksonville, Pensacola, and Yokosuka; and in those locations in which oversight of junior counsel is needed, but where an "Expert" has not been assigned, including Washington, D.C., Bremerton, Pearl Harbor, and Naples. See Appendix 7, Enclosure 2 for a listing of the originally designated billets.

At any time after completing three years of duty in one or more of the designated billets, a "Specialist" may apply for redesignation as an "Expert." The Expert MJLQ, generally an O-5 or

O-6, will signify a litigator with an outstanding record of accomplishment in the courtroom, including at least 20 contested courts-martial, and demonstrated leadership of subordinate litigators. Expert MJLQ officers will serve in designated litigation leadership billets. Under the first iteration of the MJLCT instruction, CO billets are designated for MJLCT Experts at the NLSOs in Norfolk, San Diego, and Jacksonville; with O-5 or XO billets in the same locations, plus in Pensacola and Yokosuka, Japan. XO or O-5 "Expert" billets are located in the RLSOs in Norfolk, San Diego, Pensacola, Jacksonville and Yokosuka. In June 2009, the MJLCT instruction was updated, with additional direction by the JAG to modify the original billet designations to include an additional O-5 Expert at the RLSO in San Diego. In all, the MJLCT program designated 49 billets that will be filled by MJLCT officers, with the planned end-strength of 65 officers needed to sustain the community being selected within 5 years. See Appendix 8.

As of June 2009, the MJLCT community included 47 attorneys – 20 "Experts" and 27 "Specialists." The selectees were chosen over the course of five selection boards from a pool of approximately 150 applicants. Those officers are now being assigned to the designated billets as they become available during the assignment cycle. "Experts" are expected to stay in the courtroom, try some courts-martial, manage and develop "Specialists." "Specialists" are to hone and expand their skills, trying as many cases as possible, with those who do not have an LL.M. participating in the JAG Corps' post-graduate education program, in which a "Specialist" may pursue an LL.M. in a trial advocacy curriculum. Post-graduate school eligibility in the MJLCT is more fully described below. See *infra* at 31.

Developing and maintaining increasingly technical litigation skills will require advanced education and progressive assignment to trial litigation billets. This is likely to limit the opportunity for assignment to sea duty billets, and will reduce the variety of billet assignments in a career. Under the traditional paradigm for promotion, such a career would not be perceived as upwardly mobile. A key consideration for the viability of the MJLCT was how to ensure a fair rate of promotions within the career track for those who must "specialize" as against those who remain more general "Fleet" practitioners. If litigators continued to fail to promote – career track or not – promising attorneys who dream of being trial attorneys would continue to divert to other practice areas in the JAG Corps, or leave to pursue a litigation career. Perhaps the most significant programmatic element during the early stages of establishing the MJLCT was the inclusion of the following promotion board precept language:

> 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.

As an additional important program element, the MJLCT includes the opportunity for promotion to a new capstone position, Assistant Judge Advocate General (Chief Judge of the

Navy). Upon completing qualifying service in this new billet, the incumbent may be authorized by the Secretary of the Navy to retire in the pay grade of O-7. See *infra* at 31.

Expected benefits of the new MJLCT include a larger pool of litigators capable of prosecuting or defending complex, high-visibility cases; a systematic method of identifying and developing junior litigators for the future; enhanced "reach back" capability for non-MJLCT counsel, including SJAs; and enhanced development of senior officers tasked with formulating criminal law policy within the Navy or the Department of Defense, or in other substantial roles in which criminal law and policy of national or international importance is discussed, influenced, or made. Additionally, as more capable and experienced litigators fill designated billets, they will be more efficient in the management and disposition of cases. This efficiency will permit a reduction in the numbers of resources devoted to litigation, particularly the number of counsel. As a result, more JAGs will be available to support other mission areas, such as operational law, including serving as IAs, international environmental law, or the newly emerging fields of computer and intelligence law.

d. Judicial Screening Boards

As recommended by the *Sea Enterprise* Trial Judiciary Panel, the selection process for new military judges was improved in January of 2008 through the implementation of a new JAG instruction (JAGINST 5817.1C). See Appendix 9. The JSB now involves a greater depth of review of qualifications and suitability of judicial candidates. While the actual membership of the screening board has not changed, the minimal requirements of review have become more stringent. Navy candidates are required to be in pay grade O-5 or above, have at least three years litigation experience, a leadership tour in litigation, broad military justice experience, and submit two written and specialized recommendations, including one from a military judge, law school transcripts, Officer Summary Record, history of assignments, listing of litigation experience, and a personal statement. These submissions facilitate selection of candidates based on experience, military justice litigation proficiency, and proven ability, rather than detailing prerogatives.

e. Total Force Concept

Historically, many JAG Corps accessions joined the Navy to gain litigation experience. As previously discussed, in the mid-to-late 1980s, there were many opportunities to try cases, allowing new attorneys to develop their trial advocacy skills, gain experience on relatively simple cases, and gradually work up to more complex ones. At the same time, however, a career in military justice was neither viewed as career enhancing, nor was it encouraged. As a result, those who wanted to specialize as litigators often left active duty to remain in the courtroom. This left a void in experienced trial advocates. The MJLCT is an important tool to fill that void. An important complementary tool is the use of Reserve Component (RC) JAGs through the Total Force construct.

The new Total Force construct of the RC within the JAG Corps was instituted in June 2009. See Appendix 5. Consistent with *JAG Corps 2020*, the JAG has aligned RC expertise into three pillars of practice: military justice litigation; command services and legal assistance; and specialty practices in international law, environmental law, and admiralty law. RC JAGs will be

assigned to a practice pillar based on their military and civilian experience, education, and demonstrated competency. As discussed in Part I, many of the current senior RC JAGs have spent their careers litigating in private practice at the state and federal level. Many have served as judges in the civilian community. Briefly stated, through the Total Force construct, the MJLCT community will be augmented by military justice litigation experienced RC JAGs, who will offer real world experience, and a broad litigation perspective to military criminal practice. The wealth of RC litigation experience will be more closely aligned through Total Force, and will be more readily available to the active duty JAGs, who are preparing, prosecuting, defending, and presiding over courts-martial, and in litigation leadership positions.

Under Total Force, experienced litigators will be assigned to Pillar I, military justice litigation, to develop and maintain experience in all facets of military justice litigation, particularly complex courts-martial. This will include service as trial and defense counsel, appellate counsel, as an instructor at NJS, and other litigation related billets, including as CO and XO of Reserve Legal Service Offices and RLSOs, and as members of the trial and appellate judiciary. The Total Force program anticipates judge advocates will be assigned to a pillar within 48 months of affiliation into the RC or promotion to O-5, whichever occurs first. JAGs in pay grades O-4 and below with less than 48 months in the RC may apply for pillar assignment. Assignments will be made at the direction of the Deputy JAG for Reserve Affairs and Operations, in consultation with Navy Reserve Law Program Manager, and the Deputy Assistant JAG for Reserve Affairs. RC JAGs will then be assigned to billets, normally in their assigned pillar, through the annual Screening and Assignment (APPLY) Board program. A sample career progression for Pillar I (military justice litigation) has been developed to guide RC JAGs assigned to that pillar. See Appendix 5.

f. Reinvigorated OJAG Criminal Law Division

In 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. As a result of the revitalization effort, Code 20 has dramatically increased "reach back" capability for litigators through the development of an extensive community of practice. This includes a new, robust website on Navy Knowledge Online (NKO), which contains checklists, forms, training modules, and a discussion forum for questions and answers. This website currently exceeds 300 visitors a week and has had over 22,000 visitors since its creation. Additionally, Code 20 re-established the email publication of monthly "Newsmailers" – short, but detailed, articles discussing current topics in military justice. Once published to the field, all Newsmailers are archived and available on the Code 20 NKO website.

Code 20 has also improved training and litigation support by hiring a civilian deputy director who is a former civilian prosecutor with over 120 contested jury trials. She previously served as the founding Director of the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART) at the U.S. Department of Justice. Code 20 also hired a sexual assault litigation specialist with more than 25 contested jury trials, who previously served as the Senior Policy Advisor for the Office of the Secretary of Defense, Sexual

Assault Prevention and Response Office (OSD SAPRO). Upon their arrival these civilian litigation experts began a thorough review of the Navy's military justice litigation training program, in order to assess and correct deficiencies. This Case Evaluation Program (CEP) was noted in Part I. The CEP, which includes a survey of actual case files and observation of Navy JAG practitioners in court, has already identified areas that can be improved with additional training. See *supra* at 2, and Appendix 4.

While Code 20 has been reinvigorated and now provides a much higher level of support to the field, there remains a potential conflict of interest when providing technical assistance, sometimes called "reach back," to both trial and defense counsel. Providing information and assistance through a consolidated staff in Code 20 to both sides of litigators in the field, elevates the risk of ethical conflicts, and limits the confidence of counsel in the field, particularly defense counsel, when consulting Code 20. Corrective action should be explored, such as creating a Defense Counsel Assistance Program (DCAP), or its equivalent, and the establishment of secure NKO websites for NLSOs and RLSOs.

g. MJLCT Post-Graduate School Opportunities

The MJLCT program permits only those attorneys who have previously been selected as a "Specialist" or "Expert" to pursue a trial advocacy LL.M. through Navy sponsorship. The JAG Corps has established a relationship with California Western School of Law, which allows the Navy to send MJLCT officers to the school, where they will not only receive a high quality education, but also have the opportunity to practice law in the office of the Federal Public Defender in San Diego as part of an externship program. MJLCT officers are also attending excellent trial advocacy programs at Temple University, and The George Washington University. Mandating prior acceptance in the MJCLT in order to participate in one of these programs ensures students will have the requisite interest in a litigation career, and the potential to excel in it.

h. Capstone Flag for the Military Justice Litigation Career Track

As recommended by the *Sea Enterprise* Panel on the Trial Judiciary, and in recognition of the importance of access to flag rank to the viability of the new MJLCT community, a new Assistant Judge Advocate General (Chief Judge of the Navy), has been authorized. Consistent with the other Navy AJAG positions, this incumbent must serve three years, and may then be authorized by the Secretary of the Navy to retire in the grade of Rear Admiral (Lower Half). The first AJAG Chief Judge was selected on June 18, 2009.

The importance of having an AJAG position as the capstone to the new MJLCT community cannot be overstated. When the MJLCT was announced, junior and field grade officers watched intently to see if the community would be viable. Access to flag rank, albeit as a retirement "tombstone" promotion, has established the MJLCT community as legitimate, has solidified the commitment of those who have applied, and has renewed interest by those who remained skeptical of returning to military justice as litigators.

C. Current Status

1. Competence of Trial and Defense Counsel

Each NLSC command has a program for indoctrinating and developing counsel. For example, NLSOs commonly start new attorneys in the area of legal assistance, and gradually transition them into handling personal representation and defense cases. However, each NLSO approaches this transition somewhat differently. Some have a set period of time that each new accession must spend in legal assistance before that attorney is assigned to defense cases. Some view the transition between departments as part of a training continuum in which new attorneys are assigned defense cases when the senior leadership determines those attorneys are ready. Nevertheless, some assignments continue to be dictated by staffing and geographic dispersion. For example, solo attorneys in small offices, such as NLSO branch offices in Millington, Tennessee, and Earle, New Jersey, are required to provide the full range of services immediately upon assuming their duties. The NLSO commands under the Trial Defense Command (TDC) pilot have new attorneys immediately begin their service in personal representation and defense, because the TDC does not provide legal assistance services. RLSOs use an approach similar to NLSOs, assigning new accessions to command services, under the supervision of a more senior counsel, until that accession is sufficiently familiar with military justice to begin to prepare and prosecute cases. All NLSC commands monitor counsel and assign only those cases determined to be within the technical competence of the assigned counsel.

The NLSC process of developing the litigation skill of counsel is based on two assumptions: First, that there will, in fact, be simple, moderate, and then more complex cases to assign. Unfortunately, as the numbers of courts-martial decline, NLSC is faced with the dilemma of having to develop new counsel to handle serious, complex cases without a significant number of misdemeanor cases to assign first. Unfortunately, counsel must be assigned to cases as they arise, and sometimes this means they must litigate cases that tax their experience level. The second assumption is that there are skilled, litigation-experienced counsel supervising and assisting the new accessions. While there are more senior counsel and senior leadership in the headquarters of the RLSOs and NLSOs than in the recent past, outlying detachments and branch offices must be supervised remotely. Even when more senior counsel are available, they might not be experienced litigators. As previously noted, some "senior" counsel are merely the most senior among the first tour lieutenants.

Training is used to augment the lack of courts-martial experience and to speed development of counsel. As discussed above, counsel litigating cases have access to more training at the NJS than their predecessors. NLSOs and RLSOs generally also develop or sponsor local litigation training. Providing personal representation advice helps the new defense attorney understand the disciplinary system at different levels. Through representation of Sailors pending formal administrative discharge proceedings, new JAG accessions have the opportunity to prepare administrative cases, and develop their advocacy skills through the formal board process, which includes examination and cross examination of witnesses, and advocating for their client before an administrative panel. NLSC commands also provide their attorneys access to courses offered by local bar associations (e.g., the District of Columbia bar offers an evening evidence refresher

course). Further, attorneys utilize the Code 20 website on NKO. This site contains a wealth of litigation information.

Finally, as counsel prepare for trial in both RLSOs and NLSOs, they are encouraged to seek assistance from the senior prosecutor or defense counsel, other NLSO attorneys, the XO, or the CO. Prior to the trial of each contested case, most commands routinely hold a "murder board" in which the other office attorneys, including the CO and XO, participate and provide input and advice on strategy, feedback on attorney presentation, and overall guidance regarding a case. After the trial is concluded, attorneys request a debrief with the military judge, and then share lessons learned from the trial with the entire command. The efficacy of many of these procedures remains, as it always has, on the experience level of the senior counsel advising the junior counsel. Until sufficient MJLCT officers are detailed into key billets, the effectiveness of mentoring will be inconsistent.

Despite the effort toward a deliberate development process and the increased availability of more advanced training, the fact that the majority of prosecutors and defense counsel are first-tour lieutenants remains a challenge within NLSC. These officers have little experience in the courtroom, and even less experience with the military justice system. Inexperienced and inadequately supervised prosecutors commit errors related to speedy trial, inappropriate charging decisions, lack of disclosure during discovery, and poor advocacy on the merits and in sentencing cases. On the defense side, inexperienced counsel are at risk of inadequately investigating cases, failing to identify available strategies and the tactics to make them work, they are less able to anticipate or obtain helpful evidence and witnesses, they do not prepare highly effective sentencing cases, they concede when they should not, and fail to object when they should. While all of these issues persist in reported and unreported appellate cases, the available information does not indicate a level of error by prosecutors or ineffective assistance by defense counsel that reflects general incompetence. To the contrary, counsel are exceedingly bright, motivated, and generally handle their cases well. Nevertheless, the errors of record, and those preserved in anecdotal reflections of practice, indicate the continuing need to place highly qualified and experienced counsel in the right places to litigate highly complex cases, and to train and supervise junior counsel. There is also empirical evidence that supports these observations.

In December 2006, a military justice survey was commissioned by the JAG. It was developed and implemented by Whitney Bradley & Brown, Inc., and University of North Carolina Professor Dan Cable. The survey was developed with significant input from OJAG staff personnel, a senior Navy trial judge, and a senior Marine Corps trial judge (respectively, the Chief Judge, Navy-Marine Corps Trial Judiciary, and the Circuit Judge, Eastern Judicial Circuit and future Chief Judge, NMCTJ). The survey was intended as a base-line, anticipating future assessments. It was initially addressed to 313 respondents, including appellate and trial judges, counsel, and NLSC commanding officers. The response rate was a statistically significant 85%.

The results of the survey indicated that:

- JAGs are not proficient at voir dire (merits or sentencing), instructions on the merits, pretrial investigation and preparation, sentencing instructions and evidence.

- When supervisory personnel are present, or actively mentor counsel, the overall performance level of counsel improves.

- Judges view many and varied skills sets as necessary, and that these skills require concentrated focus to be an effective litigator; while counsel believe far fewer skills are required.

- Judges view the performance of counsel in court as more important than do counsel.

The MJLCT was established to address these weaknesses. After only two years, the community has been sufficiently populated that the detailing of control grade officers to RLSOs and NLSOs has begun to fill the MJLCT-coded billets listed in Appendices 7 and 8 at Enclosure (2). The detailing process will continue to place more MJLCT officers in coded billets at each personnel cycle. One of the difficulties in achieving rapid success is that officer rotations are not entirely synchronized with billet availability, requiring billets to be filled by non-MJLCT officers, until a sufficient pool of MJLCT officers can be created.

2. Oversight of Trial and Defense Counsel

The senior trial counsel (STC) or officer-in-charge (OIC) structure is common in the construct of the RLSO and former TSO organizations. Historically, the STC or OIC operated in the role of senior litigator. Some RLSOs have designated the STC as the Director of Military Justice (DMJ). Within the RLSOs, the DMJs or STCs have varying ranks, including four lieutenants, four lieutenant commanders, and one commander. These officers are charged with the ultimate responsibility for the military justice processing of courts-martial cases through completion of trial and post-trial matters. The DMJ is responsible for all military justice cases until the case is dismissed or finally adjudicated. The DMJ reports the progress of the case docket and highlights issues, if any, to the CO and XO on a regular basis. The STC and the XO will litigate individual cases when necessary to assist and train junior counsel, but their primary role is to provide hands-on guidance and leadership. As with the previous TSOs, the frequency and effectiveness of the senior personnel participating in litigation depends on their degree of experience. Thus far, there are only two MJLCT officers serving in RLSOs. Until these key roles are adequately populated with MJLQ officers, the efficacy of supervision in complex cases will remain inconsistent.

Every NLSO has three common senior leadership positions relevant to defense services: CO, XO, and senior defense counsel (SDC). These leadership positions are located at the headquarters office of each NLSO. The CO and XO are responsible for overseeing the entire administration of legal services within the command. These duties include ensuring adequate training for all defense counsel, promulgating command policy and advice on defense matters, and providing specific legal services to senior clients. The SDC is the officer directly responsible for the administration and conduct of all defense cases within each NLSO command. The SDC reviews requests for counsel, assigns cases to attorneys, provides professional guidance on defense matters, and tracks each case from attorney assignment through appellate matters. Each detachment office with sufficient manning will have an OIC who may or may not also serve as the detachment's SDC, depending on the experience level of the junior officers. The SDC and OICs

typically have prior military justice experience, either as a prosecutor or defense counsel. Every SDC will eventually be a MJLCT officer. Until that occurs, the effectiveness of oversight in complex cases, as with the RLSO, will be inconsistent.

3. Competence of Military Trial Judges

All members of the Navy-Marine Corps Trial Judiciary (NMTJ) have successfully completed a graded Military Judge Course at The Army Judge Advocate General's Legal Center and School, Charlottesville, Virginia. This course includes a graded moot court guilty plea, and graded exercises requiring the drafting of instructions. In addition, the Chief Judge, NMTJ, is an MJLCT designated Expert, and eight of the Navy's 11 trial judge billets have been coded for assignment to Military Justice Litigation Qualified (MJLQ) personnel. During the summer of 2009, two additional MJLCT Experts and one Specialist will be in place on the Navy trial bench. By 2011, six Navy MJLQ military judges will be assigned to the trial bench.

In 2006, the NMCTJ entered into a continuing training relationship with the National Judicial College (NJC), University of Nevada at Reno. The NJC is the nation's premier judicial training facility. In cooperation with the other Services, the annual Inter-Service Military Judges' Seminar (IMJS) of judicial training is now held in alternating years at the NJC and at the Air Force JAG School. This arrangement has proven to be fiscally prudent, and has provided outstanding training at NJC from nationally renowned judges and professors. It has been widely applauded by the military judges as indispensable advanced judicial training. Additionally, many members of the trial judiciary have expanded their own advanced training at the NJC. Of particular note, five current members of the NMCTJ have been awarded a Certificate of Judicial Development in General Jurisdiction Trial Skills, with 10 other judges pursuing this recognition of advanced judicial training. The certificate requires graduation from the Military Judge Course, completion of a course in Advanced Evidence, and 20 additional hours of elective courses. Satisfactory completion of courses including a graded examination may be used for credit in the NJC Masters or Ph.D. degree program. Reflecting an increasingly advanced level of proficiency, three Navy judges have been invited to join, and have accepted appointments as adjunct faculty at the NJC.

Advancements in technology have also enhanced the competence of military trial judges. All are now able to collaborate through NKO, which hosts "In Chambers," a secure electronic bulletin board on which trial judges may exchange thoughts on emerging legal issues, as well as share forms, drafts, and other courts-martial related materials. This new tool is an experience multiplier, allowing any judge access to the experience of other judges by posting a question, and then receiving a posted response in near real time. This is particularly effective in providing access to other judges by those who are remotely located, such as in Japan.

Finally, unprecedented levels of cooperation between the Service trial judiciaries is both an acknowledgement of competence, and a means by which to enhance military trial judges' experience base. Cross-service detailing of NMCTJ judges to courts-martial in the other Services has been delegated to the Chief Trial Judge, who has authorized Navy and Marine Corps trial judges to preside over multiple other-Service courts-martial – garnering universally high praise. Additionally, NMCTJ judges preside over numerous public meetings required by the National

Environmental Policy Act (NEPA). Four NMCTJ officers also presently serve as Military Commission judges in Guantanamo Bay, Cuba.

One area of concern is the training and experience of military trial judges in conducting fact finding *DuBay* hearings. This concern extends to the proficiency of SJAs, trial and defense counsel in the post-trial arena. *DuBay* hearings are ordered by the NMCCA or CAAF with the court returning the record of a completed trial to the Judge Advocate General of the Navy (Code 40). In turn, the case is returned to the cognizant convening authority to conduct the fact finding hearing into a matter such as the ineffective assistance of trial defense counsel. Lack of SJA familiarity with the procedures to be followed, and the urgency of action, often results in unacceptable delay. Imprecise communication among Code 40, NLSOs, RLSOs, and military trial judges, often results in confusion regarding who is to take action, when to take action, and what action is necessary. In particular, when military judges are not immediately notified, they are not able to take decisive action to advance the case to hearing. Once at hearing, many military judges are not experienced in conducting and documenting fact finding proceedings.

This exceptional circumstance aside, the trial bench has never been better trained, and is generally competent, including some accomplished military trial judges. There remain a few military judges who are the product of former detailing and screening practices, and who are not well-suited to presiding over complex litigation. As with the trial bar, until the MJLCT has generated career litigators matriculating from the well of the court room to the bench, competence of military trial judges will remain inconsistent in complex cases.

D. Lessons Learned

1. The Navy and Marine Corps personnel end strength has historically generated significant numbers of SCMs, SPCMs and GCMs, including complex cases such as capital murder and national security cases. Though the total number of courts-martial has declined faster than end strength, there are complexities in the details of this decline that raise three important caveats for military justice: 1) with end strength remaining at more than one-half million personnel, a small change in the factors affecting rates of misconduct and choice of disposition can very rapidly generate significant numbers of courts-martial; 2) with fewer misdemeanor and felony cases to develop litigation skill, the average counsel and military judge are less experienced in complex litigation; and 3) despite the decline in total numbers of cases, serious and complex cases have declined less and can occur at any location.

2. Evolution of the NLSC structure from consolidated NLSOs, to NLSOs and TSOs, was prompted by litigation-related concerns and, as a result, had a generally positive impact on military justice and litigation, though less benefit for the defense counsel who continued to perform across more mission areas than their TSO counterparts. The continued evolution of TSOs to RLSOs has leveled the field in terms of all NLSC counsel spreading time across multiple mission areas. The declining number of courts-martial, however, has slowed the development of litigation skills for both NLSO and RLSO counsel.

3. Nearly ten years ago, the National Security Case Commission identified the need for experienced counsel with proper clearances, to be available to litigate complex cases, including counsel qualified with the professional code which was the precursor to the MJLCT. That need was met and continues to be met through the MJLCT, which was implemented in 2007.

4. Either the CO or XO of every NLSO and RLSO should have significant military justice litigation experience.

5. Providing technical assistance, sometimes called "reach back" to both trial and defense counsel creates a potential for conflict of interest within Code 20.

6. Since 2006, the tracking of courts-martial within NLSC and through NAMARA and the NMCCA has been consolidated in the Court-Martial Tracking and Information System (CMTIS). This system is not yet used by the Marine Corps at the trial level. Upon sentencing or acquittal in Marine Corps cases, limited courts-martial data is entered into CMTIS by the presiding military judge, so as to provide tracking information post-trial and through appeal.

7. The competence of litigators and military judges is directly proportional to their training and trial experience. Though counsel and judges have access to more advance training than in years past, in some instances they have only the experience needed to competently prepare and dispose of the cases most commonly encountered. The delay in detailing MJLCT counsel and trial judges, based on availability during a personnel cycle, has resulted in certain counsel and judges in some locations being well-trained, but not yet experienced enough to litigate complex cases.

8. There are multiple stressors on military justice and litigation. These were well-recognized, first by the National Security Case Commission, and thereafter by the *Sea Enterprise* Panel on the Trial Judiciary, and in *JAG Corps 2020*, which has addressed these stressors with the establishment of the Military Justice Litigation Career Track and its multiple program elements, including the coding of key billets for "Expert" and "Specialist" litigators, and a capstone "tombstone" flag position.

9. A Judicial Screening Board that considers only the limited range of records proposed through the detailing process is not able to focus on the selection of the most highly qualified officers from within a pool, but is limited to determining whether the few proposed candidates meet minimum requirements.

E. Recommendations

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.

III. Post-Trial Phase

A. Overview. This section discusses the competence of those entrusted with the post-trial process, from sentencing through the docketing at the NMCCA; the tracking and processing of appeals by Navy Marine Corps Appellate Review Activity (NAMARA); the staffing and effectiveness of the Appellate Division in addressing the appellate caseload; and the processing and tracking of mandates by NAMARA for corrective post-trial action.

Once a court-martial is adjourned by the military judge, the process proceeds with the transcription and assembly of the record of trial, followed by review and authentication of it by the military judge. Thereafter, the record is delivered to the convening authority (CA). Prior to the CA taking action, the record is ordinarily reviewed by the CA's legal officer or SJA, who provides a legal officer's or staff judge advocate's recommendation (SJAR) to the CA. That SJAR accompanies a recommended CA's Action and Promulgating Order. In the event that the CA's Action approves findings and a sentence including at least one year of confinement or a punitive discharge, the case is forwarded to NAMARA. There the record is reviewed for completeness, and forwarded to NMCCA, where it is docketed, and copies are provided to the Appellate Defense and Government Divisions (Codes 45 and 46, respectively), where briefs and other pleadings are prepared prior to the case being submitted for consideration to a panel of the NMCCA. In some cases, the NMCCA panel will return a case through NAMARA to the CA for corrective post-trial processing, or to a military judge for a fact-finding *DuBay* hearing. These are directed by the NMCCA issuing a mandate for the required action. When that additional post-trial action is completed by the CA, the case is again forwarded to NAMARA for redocketing with the NMCCA.

B. Retrospective: Key Facts and Events

1. Decentralized Convening Authorities

In addition to those positions listed in Articles 22 (a) (5) through (7), and 22 (a) (9), Uniform Code of Military Justice, there are an additional 32 officers designated by the Secretary of the Navy to be general court-martial convening authorities. These are generally, but not exclusively, flag and general officers. In addition, there are literally dozens of special court-martial convening authorities, including the COs of all Marine Corps battalions and squadrons; COs and OICs of organic combat service support organizations providing combat service support to Marine Expeditionary Brigades, Marine Expeditionary Units, or comparable Marine Air-Ground Task Forces; the COs of Marine Expeditionary Units and Marine Expeditionary Unit Service Support Groups; all commanders and COs of units and activities of the Navy, including precommissioning units commanded by lieutenant commanders (O-4) or above. See JAGMAN Sec. 0120a. Though the specific officers designated as convening authorities have varied somewhat over the course of years, the decentralized grant of authority to convene courts-martial has been a characteristic of the Navy and Marine Corps, providing the degree of authority needed at the appropriate level to maintain good order and discipline. That necessarily entails post-trial action by those decentralized convening authorities for the courts-martial they convene.

As discussed in Part I, prior to 1997, many Navy installation commanding officers and other convening authorities had SJAs or legal officers to assist in the pre- and post-trial process. The rank and experience level of SJAs varied with the level of responsibility presented by the position to which they were assigned. For example, a Navy lieutenant would be assigned as SJA for a Naval Air Station, a lieutenant commander would typically serve as the SJA for an aircraft carrier, while commanders and captains were generally assigned as SJAs on Type Commander and Fleet staffs. Those convening authorities that did not have SJAs assigned, such as aviation squadrons, received post-trial assistance from the command services division of the formerly consolidated Naval Legal Service Offices (NLSOs). Command services attorneys were generally officers in their first tour of duty, as were many of the prosecution and defense attorneys who were also assigned to these consolidated NLSOs.

Courts-martial were usually conducted in courtrooms located in the consolidated NLSOs and were litigated by the trial and defense counsel assigned to the NLSO. The records of trial were generally produced and assembled by NLSO legalmen assigned as court reporters. In the event a court-martial was conducted elsewhere, such as on an aircraft carrier, a trial team, including a military judge, trial and defense counsel, and a court reporter, were dispatched to the trial location. In either event, once a record of trial was transcribed and assembled, it was authenticated by the military judge whose chambers were generally in the same physical facility as the NLSO preparing the record. The record was then transmitted to the convening authority, by courier or on-base correspondence systems, by mail, or contract carrier, depending on the location of the convening authority. While there was a centralized authority and chain of command within Naval Legal Service Command (NLSC) for the production and assembly of the records of trial, and for those few convening authorities who received command assistance from the NLSO during post-trial processing, a significant number of other convening authorities and their SJAs remained outside of NLSC. There was no clear "legal" chain of command or centralized authority to track post-trial actions or to monitor completeness or legal adequacy of those actions. Each independent SJA provided advice and recommendations to their respective convening authorities, some of which were overseas or forward deployed. If the case was subject to appellate review, once the CA's action had been taken, the record of trial was generally mailed by the CA to NAMARA. If there was error in the post-trial processing, the case was either returned to the CA by NAMARA or the NMCCA.

Despite the joint CNO/JAG management goals for processing courts-martial promulgated as early as 1984 (See JAGINST 5810.1), the decentralized structure of CAs and independent SJAs produced such a significant number of post-trial processing errors that the JAG promulgated a post-trial checklist in 1992 (See JAGINST 5814.1). Noting that post-trial processing had been the subject of "a significant amount of appellate litigation," the checklist was designed to improve the quality of post-trial processing and reduce the process time. It explicitly applied "to all judge advocates and legal officers" as well as all of NLSC. Yet, by 1997, there remained sufficient post-trial process errors and delays as to draw the comment and corrective action of the appellate courts.

United States v. Santoro, 24 M.J. 429 (C.A.A.F. 1997) is a Navy case tried at Naval Base, Norfolk, Virginia, in 1988. The record forwarded to the NMCCA consisted of a copy of the verbatim transcript of the proceedings, authenticated more than 8 years after the fact by the judge who tried the case. There was no convening order. There was no charge sheet. There was no staff judge advocate's recommendation. All of the 14 Government exhibits and all of the 18 defense exhibits were missing. There was a copy of the convening authority's action and promulgating order. The NMCCA noted that "[t]his is another record of trial reaching us many years after sentence was adjudged in a condition that can only be described as horrible." The NMCCA dismissed all but one charge and mitigated the sentence. In affirming, the CAAF characterized the NMCCA decision as containing "radical surgery on the findings and sentence" as relief from the post-trial errors and delay. The CAAF further stated, "We have repeatedly denounced unexplained delays in the post-trial processing of courts-martial." To emphasize the point, the CAAF cited two prior Navy cases: *United States v. Sowers*, 24 M.J. 429 (C.M.A. 1987)(summary disposition); and *United States v. Shely*, 16 M.J. 431 (C.M.A. 1983).

2. Evolution of NLSC to Support Post-Trial Processing of Courts-Martial

As discussed in Part II, NLSC divided into NLSOs and TSOs in 1997. This allowed the TSO to have a single-mission focus on military justice. While a major impetus behind the TSO model was to improve litigation proficiency by allowing senior leadership of NLSC into the courtroom, it also placed more senior officers, including XOs and COs, in a position to provide command service support to commands without SJAs. Many, if not most, COs and XOs – in the ranks of commander and captain – had significant SJA experience. As a result, they were also in a position to provide support to other area SJAs who, prior to establishing TSOs, would not have solicited advice or assistance from the junior officers assigned to provide command services in the formerly consolidated NLSOs. Thus, with TSOs, there was the opportunity for more leadership, coordination, and oversight of post-trial processing of cases shepherded inside and outside of the NLSC chain of command. The command services mission of the TSOs was specifically set out in the revised Naval Legal Service Command Manual of 2002 (COMNAVLEGSVCCOMINST 5800.1E). TSOs were tasked with assisting client commands in carrying out their post-trial responsibilities. If personnel resources permitted, this assistance included preparing SJARs. Nevertheless, while there was more command support for post-trial processing from the TSOs than from the former NLSOs, there remained a significant number of independent SJAs serving convening authorities at both the special and general court-martial level who did not utilize the TSOs.

With the regionalization of Navy shore infrastructure and the corresponding "roll-up" of shore installation SJAs into RLSOs in 2005 - 2006, the RLSOs began providing legal services to the commands formerly served by the SJAs who are now assigned to RLSOs. This moved responsibility for post-trial processing of courts-martial for those commands into the RLSOs. Currently, the CO of the RLSO also serves as the Program Director for Legal Services, providing an enhanced ability to interface with subordinate installation commanders, either directly or through the command services counsel assigned to a specific client command. While the convening authorities resident within shore infrastructure are now aligned to RLSOs for post-trial processing of their records of trial, many operational units, Type Commander, Fleet and other nonshore-based CAs are not "clients" of the RLSO, and continue to be serviced by their independent SJAs. To bring more support and oversight to bear on the post-trial process, the JAG directed that the new RLSOs track and retain control of records of trial, forwarding completed

records of trial to NAMARA after the CA's action is complete. This includes the records of trial from commands with SJAs. As a result of the RLSOs asserting control over records of trial, actively engaging in the post-trial process even with those commands having SJAs, and through the fidelity of modern electronic case information management systems, most post-trial process now takes place directly in RLSOs or with RLSO oversight. However, the overall manner of engagement is not uniform across the RLSOs. As shown in Appendix 10, some RLSOs use court reporters for post-trial tracking, others use the SJA office, others use the trial department, and some place the ultimate responsibility on the counsel who tried the case.[2] Some RLSOs split the function between the trial department and the SJA office, with the trial department handling all matters through authentication of the record of trial and the SJA office assuming responsibility for all matters post-authentication. Finally, as discussed below, RLSOs utilize different methods for tracking mandates received from Code 40.

3. Evolution of Post-Trial Case Tracking

As has been noted elsewhere in this report, from 1985 to 2000, JAGMIS and MJMIS were the NLSC information systems that were used to track the number of cases and certain date parameters. These were principally used at the field office level. There was no centralized NLSC headquarters interface, and no data reported to or shared with NAMARA. Reports to NLSC headquarters were generated in printed form. There was no requirement for NLSOs or TSOs to track cases beyond delivery to convening authorities, though TSOs were to assist commands without SJAs with post-trial processing. SJAs and legal officers were principally responsible for the post-trial review, the SJAR, and timely and legally correct action. In so doing, they remained outside NLSC and did not use the NLSC information systems.

Time Matters and a tailored version of it called HELM were used from 2000 to 2006. These systems expanded the ability to catalogue professional time within NLSC, but these continued to be field activity tools that did not interface with NAMARA or NLSC headquarters for tracking of cases post-trial. TSOs were required to provide quarterly court-martial Situation Reports (SITREPS) using Microsoft Excel spreadsheets. Even using a combination of reporting tools, only the number of Navy cases was tracked and reported to NLSC headquarters, with limited detail on the status of individual cases. Aside from the continuing mission of assisting commands with the post-trial process, there was no requirement for TSOs to track cases beyond delivery of the record of trial to the convening authority. Independent SJAs did not use Time Matters.

The Trial Judiciary used an information management system called TRIMIS. But, the trial judges' jurisdiction over a case ended with authentication of the record of trial. TRIMIS did not capture or track post-trial processing. Similarly, prior to 2006, NAMARA and the NMCCA used an Oracle-based information system, NAUTILUS, which was separate from Time Matters and HELM. Tracking of cases began in NAUTILUS when the convening authority delivered the completed record of trial to NAMARA, usually by mail.

[2] Appendix 10 is a summary of the post-trial processes utilized by each RLSO. It also includes a summary of the post-trial processes used by some TYCOMs, but they are not intimately involved in post-trial processing for general courts-martial. Their involvement is usually limited to Article 64(a), UCMJ, reviews.

Formerly, NAUTILUS tracked cases upon receipt, through the NMCCA, and to archive of a case upon completion of the appellate process. Entries indicated when the case was docketed at the NMCCA, and when it was closed by the court. When a case was returned by the court with a mandate for a fact-finding *DuBay* hearing, or corrective post-trial action, an entry closing the case at NMCCA was made, and NAMARA continued tracking. NAMARA sent mandates directly to the cognizant CA. Pending compliance with the mandate and return of the case, NAMARA was able to track the open case pending response from the field, but had difficulty ensuring timely compliance and return of cases from the decentralized CAs. This was, in part, due to the delegation of responsibility for tracking of "mandates" within NAMARA to enlisted and civilian staff as one of several duties, and insufficient oversight by senior military leadership. It was also due to the lack of any clear chain of command authority between NAMARA and CAs or their SJAs. From 2003 to 2005, there was increased emphasis on the tracking and timely compliance of mandates, including the regular intervention of the NAMARA Division Director and Deputy Director, as well as a change in personnel at NAMARA. These changes, combined with the introduction of CMTIS in 2006, improved the tracking and return of mandates, but have not entirely resolved issues of timely compliance and return.

In 2006, CMTIS consolidated and replaced the information systems used by NLSC, the Trial Judiciary, NAMARA, and the NMCCA. Though SJAs and the Marine Corps do not use CMTIS, the RLSOs now report all trial data for Navy cases from investigation through trial, sentencing, record of trial authentication, SJAR, CA's action, and mailing of the record to NAMARA. A more limited scope of data for Marine Corps cases is put into CMTIS by the military judge upon acquittal or sentencing. As a result, any office with CMTIS capability can track any DON case from sentencing to NAMARA, and throughout the post-trial process. These offices include, but are not limited to, NLSOs, RLSOs, NLSC Headquarters, NAMARA, the Appellate Government and Defense Divisions, NMCCA, the Criminal Law Division (Code 20), and the Assistant Judge Advocate General (Criminal Law). In the case of mandates, entries similar to those made in NAUTILUS are made in CMTIS, annotating that a mandate has been issued, so that it can be tracked until returned.

Though CMTIS contains a significant amount of litigation-related data and allows the tracking of cases throughout the post-trial and appellate process through a series of individual data screens and standardized reports, it was recently found to be configured in a less than optimum format to facilitate the user's retrieval of the data most relevant to post-trial processing falling under each user's cognizance. For example, each case file in CMTIS contains confinement data that can be accessed by a user, but there is no standard report a user may select to display the information. Additionally, the RLSOs make entries about the various steps of the post-trial process into CMTIS, but generally use either a spreadsheet or a database to track key events. NAMARA also uses a spreadsheet to track some post-trial data, including mandates. As noted *infra* at 48, the user interface of CMITS is in the process of evaluation and modification.

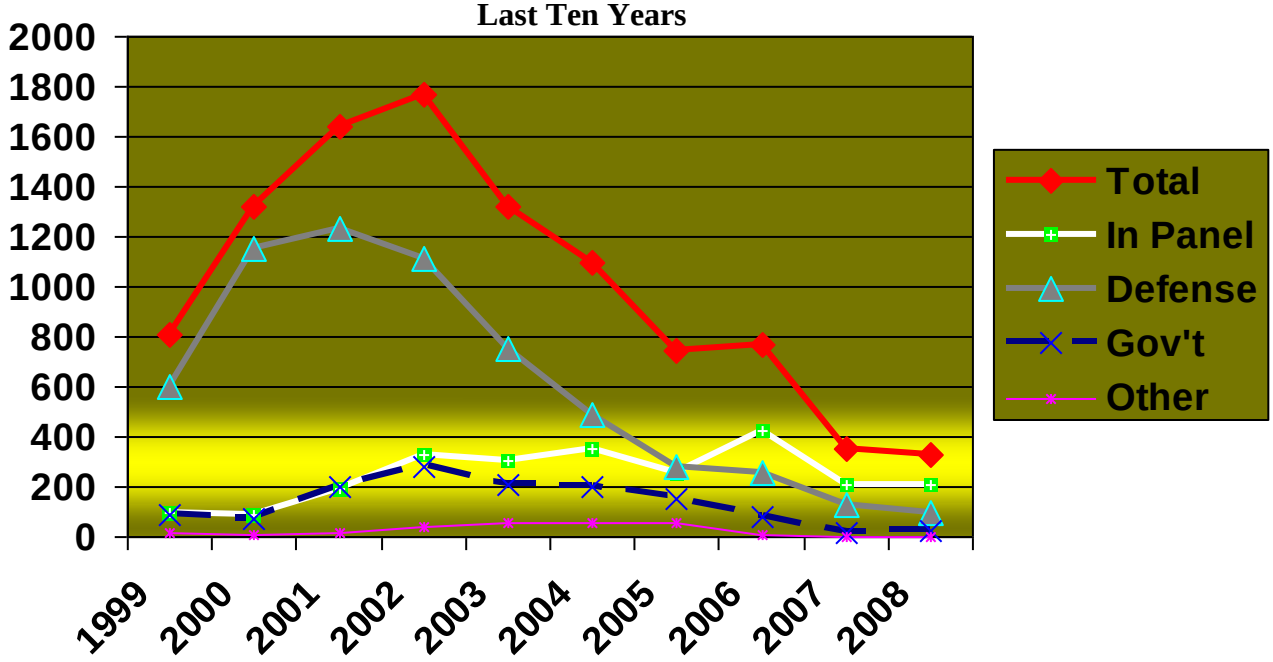
4. Caseload and Appellate Division Staffing

As indicated in Part II, Figures 1 and 4, *supra* at 11 and 13, after nearly a decade of personnel reductions, and a generally corresponding reduction in courts-martial, there were three years in which courts-martial increased: 1996, and more importantly, 2000 and 2001. Though

courts-martial began to decline again in 2002, the number would not return to the pre-2000 levels until 2005. The increase in caseload beginning in 2000, and its impact on the appellate process, were quite significant.

In 2001, there were 17 counsel assigned to the Appellate Defense Division, each with an average caseload of 50 cases. These counsel included an experienced Navy captain as the division director, an O-5 deputy director, and four O-4 branch heads. Figure 5 shows that, with the increase in courts-martial beginning in 2000, the number of cases in the Appellate Defense Division pending briefing rose from 603 in 1999 to 1,233 in 2001.

Figure 5: Cases Pending at CY End
Last Ten Years



At the request of the division director, a staffing review was conducted by the OJAG Management and Plans Division (Code 63) of the Appellate Defense Division. That review concluded that no additional staff was needed. However, the JAG altered detailing policy to address the increasing volume and complexity of appellate litigation. It was no longer permissible to detail first tour lieutenants to the Appellate Defense Division. A second staffing review was conducted by Code 63 in 2002. This review assessed the need for increased personnel in NAMARA (Code 40). Like its predecessor, this study concluded in a point paper that no additional staff was needed.

United States v. Brunson, 59 M.J. 41 (C.A.A.F. 2003). CAAF noted that the present case, as well as a number of others coming from the Navy-Marine Corps Appellate Defense Division, reflected a "serious pattern of delay." During a review of CAAF's Petition Docket, the Clerk of Court's Office discovered 26 cases, including Appellant's, in which timely petitions had been filed, but where the supplements to the petitions had not been filed within specified timelines. C.A.A.F. R. 19(a)(5)(B). Following an inquiry from the CAAF Clerk of Court's Office, the Appellate Defense Division filed motions to file supplements to petitions out of time in all 26 cases. As of August 1, 2003, the CAAF's petition docket contained a total of 43 cases in which petitions were filed, but in which no timely supplements had been filed. In 35 of these cases, counsel filed motions to file supplements "out of time"; in three cases, counsel filed "out of time requests" for enlargement of time; and in five cases, counsel filed neither. The motions to file out of time were filed anywhere from six to 26 days beyond the due dates.

By 2003, the number of counsel in the Appellate Defense Division had fallen from 17 to 13. Among these, the director was no longer an O-6, but an O-5. There was another O-5 deputy director, and only one O-4 branch head. The average caseload had risen to 70, including three capital cases. To assist with the complexity of the capital cases, two senior officer reserve counsel were recalled to active duty. Despite the assistance, the need for serial enlargements of time to file defense briefs led to an agreement by the Appellate Government Division to not oppose the first eight defense requests for enlargements of time, and would determine on a case-by-case basis whether to oppose requests between eight and 14. Only beginning with the 15th request for an enlargement would the Government interpose a standing objection.

Diaz v. JAG of the Navy, 59 M.J. 34 (C.A.A.F. 2003), is a Navy case in which the service member filed a petition for extraordinary relief, asserting that his case was on its 11th period of enlargement and had yet to receive any substantive review by his appellate counsel. He was confined post-trial for more than two and one-half years, and his case was then in the hands of a second detailed appellate defense counsel. In her 10th request for enlargement, the service member's first appellate defense counsel cited her caseload commitments as cause for the requested enlargement. The service member asserted that the increasingly long period of continuing appellate delay, during which he had actively pursued his appeal, was grounds for extraordinary relief. On review, the Court of Appeals for the Armed Forces found the service member was not being afforded an appellate review that comported with the requirements of U.C.M.J. The court granted the appellant's writ and remanded the case to NMCCA, directing expedited review.

In addition to directing NMCCA to expedite review in the case of *Diaz v. JAG of the Navy*, the CAAF also took the extraordinary step of directing the NMCCA to submit a report to the CAAF, within 60 days, specifying the steps taken to comply with the provisions of the *Diaz* opinion as to the petitioner, and as to other appellants awaiting appellate review. This prompted the Chief Judge of the NMCCA to request that the JAG direct a process review, particularly focused on the number of counsel assigned, and provide that information to the NMCCA for transmittal to the CAAF.[3] The AJAG (Criminal Law), responding on behalf of the JAG reported

[3] The focus of the review was on appellate defense counsel because these counsel must review every record, whereas the Appellate Government Division counsel principally respond to pleadings filed by the defense. As such, it was estimated that the Appellate Government work load was about 40% that of the defense. Indeed, as the bulk of the backlog cleared through Appellate "government, no appreciable additional backlog developed in that division.

that the staffing review indicated a need to increase the number of counsel in the Appellate Defense Division from 14 in May of 2003 to 20, and that these counsel would be "second tour" counsel, with experience at a field command. In addition, three reserve counsel were activated for an extended period, and 11 reserve counsel volunteered to work additional reserve drills to work on the case back log, which in September of 2003 was 1,099 cases. Training of appellate counsel, and of those in the field, was conducted. Earlier checking of records for missing documents was implemented, and renewed focus on prioritization of cases was emphasized. Finally, an experienced Navy captain with a strong military justice background assumed duty as the Appellate Defense Division Director.

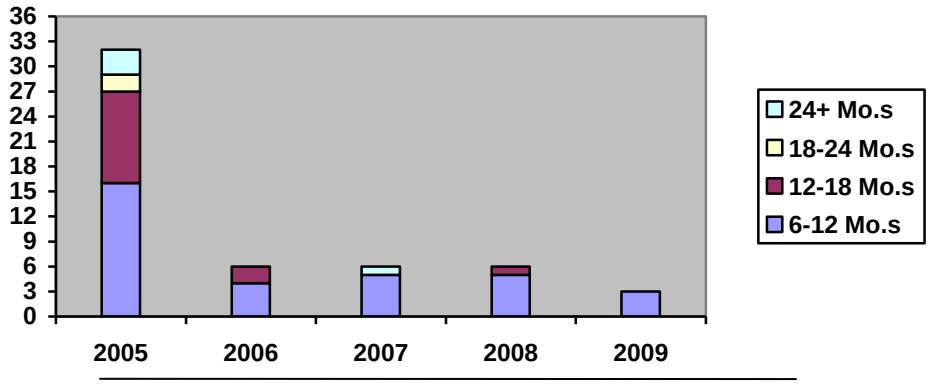
Despite the corrective actions, the delay embodied in the processing of such a large backlog could not be remediated quickly, especially when the incoming caseload remained high. And, as will be discussed in Part IV, there was insufficient early action to staff the NMCCA to deal with the backlog of cases as they moved from the Appellate Defense Division to the court.

United States v. Moreno, 63, M.J. 129 (C.A.A.F. 2006), is a Marine Corps case in which four years, seven months and fourteen days, (1,688 days) elapsed between sentencing and completion of review by the NMCCA. The United States Court of Appeals for the Armed Forces held that it will apply a presumption of unreasonable delay when the action of the convening authority is not taken within 120 days of a court-martial. The court will apply a similar presumption of unreasonable delay when the record of trial is not docketed by the service Court of Criminal Appeals within 30 days of the convening authority's action, and when appellate review is not completed and a decision is not rendered within eighteen months of docketing the case.

United States v. Toohey, 63 M.J. 353 (C.A.A.F. 2006) (*Toohey II*): After the NMCCA denied relief after the remand of *Toohey I*, the CAAF expressed "concern over the NMCCA's apparent conclusion that Toohey's case is not among 'the most extraordinary of circumstances.'" CAAF found the delays prior to docketing at the NMCCA were "extreme, unjustified, and unexplained." Additionally, the court found the delays to be such that tolerating them would adversely affect the public's perception of the fairness and integrity of the military justice system. CAAF remanded the case a second time to the NMCCA to address the issue of meaningful relief.

After the decisions in *Moreno* and *Toohey II*, both the Navy Reserve and Marine Corps Reserve provided surge support, as well as funding for full-time support from the Navy Reserve Law Program, assisting the Appellate Defense Division in eliminating the remainder of a backlog of cases. On October 1, 2005, there were 32 cases 6 months or older pending initial pleading, including 5 pending longer than a year. By October 1, 2006, there were only 2 cases pending over a year and only 6 pending longer than 6 months. The chart below documents the decrease in case processing times that the appellate divisions have sustained since 2005.

Figure 6: Cases Docketed & Pending Initial Pleadings at NMCCA 30JUN08



5. Lean Six Sigma Project on Receipt and Docketing of Appellate Cases

In 2007, the receipt, processing, delivery, and docketing of records of trial by NAMARA consumed as much as a month, including the docketing process by the NMCCA. In an effort to streamline and standardize this process, NAMARA and the NMCCA conducted a Lean Six Sigma project, coordinated by a "Black Belt" Lean Six Sigma facilitator. Other participating stakeholders included representatives of the Trial Judiciary and the Navy-Marine Corps Appellate Leave Activity (the unit to which the majority of those awaiting appellate review of their punitive discharges are administratively assigned until discharged). All value streams, processes and documentation were reviewed and assessed for effectiveness and efficiency. As a result of implementing recommended changes, case processing times within NAMARA have been reduced from an average of 17 days to one day. The docketing process, which formerly averaged eight days, has been reduced to one. Other positive results include a pilot program of uploading of appellate briefs into CMTIS and electronic filing with the NMCCA; the scanning of smaller records of trial for electronic transmission to reserve counsel, saving an average of four days mailing time and approximately $56.00 per record; and the establishment of a working group to explore implementation of electronic records of trial.

C. Current Status

1. Oversight and Tracking of Post-Trial Process

A survey of 60 cases disposed of by the NMCCA in the first 90 days of 2007 indicated that as many as 41 involved claims of post-trial error. On 23 May of 2007, the JAG issued a Memorandum to Staff Judge Advocates, on staffs or as part of a RLSO, and including supervisory counsel. The memorandum noted that "[e]rrors in post-trial paperwork are not new and continue to plague both Navy and Marine Corps courts-martial." See Appendix 11. The memorandum directed the attention of counsel to Rule for Courts-Martial 1106, and Appendix 16 of the Manual for Courts Martial, and directed all to renew efforts to eliminate careless draftsmanship and reemphasize the critical importance of accurate post-trial processing. Finally, the JAG requested that the NMCCA begin to include the name of the SJA providing post-trial advice in the title of each case the court reviews, as it does with the names of other key personnel, such as the military

judge and counsel. This was done by the NMCCA. A survey of 222 cases disposed of by the NMCCA between April and June 2009 indicate there were only 10 mandates issued for corrective post-trial action. Though not a statistically significant survey, this spot check indicated a significant improvement in post-trial actions over the spot check of 2007.

When mandates must be issued, they are now transmitted to CAs through the servicing RLSO or Marine Corps Legal Service Support Offices (LSSS), with copies provided to the CA. This ensures that both the CA, and the counsel that must prepare needed action, are informed of the mandate. Once issued, NAMARA actively tracks the mandates until they are returned. The NAMARA Division Director is continuously involved in the oversight of the mandate process and in ensuring timely responses. This is accomplished through various means, including the Director's liaison with counsel and CAs, and the intervention of the AJAG (Criminal Law) or the Vice Commander, NLSC, both of whom now participate in the oversight and coordination of mandates with RLSOs and the LSSS.

To assist in the oversight process, a new appellate case tracking display for CMTIS data has been created that more precisely presents post-trial information than does CMTIS as presently configured. See Appendix 12. The key CMTIS data fields, such as the date of trial, the appellant's confinement status, and the status of a pending appeal, or a mandate, are presented in a consolidated spreadsheet format that quickly allows action officers and leadership to monitor relevant post-trial data on all cases. The AJAGs review this new consolidated report on a monthly basis, briefing the JAG regarding items of interest or concern. The Chief Judge of the NMCCA also reviews the report and, to the extent permitted by considerations of judicial independence, participates in any briefing to the JAG. In the long term, CMTIS will be modified to display these tailored post-trial reports without the need of preparing a separate spreadsheet.

2. Personnel

A number of actions have recently been taken to ensure that individuals assigned to NAMARA and the Appellate Government and Defense Divisions continue to have the appropriate level of experience. Presently, based on the decline in caseload, the Appellate Defense Division is staffed at 12 counsel, including the division director, a Navy captain who is an MJLCT expert. The following chart indicates the effect of personnel changes on the progress of the case backlog over the past four years, through the appellate divisions, to the NMCCA.

Figure 7: Total Number of Cases Docketed and Pending Review

	30 Jun 2005	**30 Jun 2006**	**30 Jun 2007**	**30 Jun 2008**	**30 Jun 2009**
Pending Appellate Defense Briefing - not filed	434	546	94	184	104
Pending Appellate Government Answer - not filed	120	207	39	27	25
NMCCA All pleadings filed ("in panel")	362	288	273	153	173
TOTAL PENDING REVIEW	916	1041	412	364	302

The following summarizes recent actions taken:

- In the past year, experienced appellate civilian counsel have been hired as the deputy directors of both Appellate Government and Defense divisions. These civilian counsel provide sophisticated appellate legal advice and guidance to uniformed counsel and other personnel.

- The JAG directed that only experienced counsel be assigned to the appellate divisions. Additionally, these counsel are not eligible for duty as IAs. Similarly, it is established policy within the Marine Corps that a first tour judge advocate will not be assigned to Code 45 or Code 46.

- Navy officers assigned to one of the appellate divisions are first detailed to the NMCCA for a year to serve as appellate law clerks. This provides insight and experience in appellate practice and procedure prior to the officer reporting for duty as an appellate counsel for either the Government or the defense. Currently, NMCCA has five Navy JAGs assigned as judicial law clerks.

- With the projected loss of the Navy Limited Duty Officer (LDO) legal community, AJAG (Criminal Law) is exploring the option of creating a Marine Corps Chief Warrant Officer billet to serve as the NAMARA Division Director, currently served by a Navy LDO.

- In the past, junior enlisted Marines who had just completed Naval Justice School were assigned to NAMARA. Judge Advocate Division now sends only second tour enlisted Marines to NAMARA.

- The directors of the Appellate Government and Defense Divisions are required to provide monthly activity reports, and to notify the AJAG (Criminal Law) if appellate counsel are not meeting processing timelines.

- Current NMCCA Rules of Procedure permit enlargements only upon a showing of good cause.

D. Lessons Learned

1. SJAs, on staff or serving in RLSOs, have been unable to maintain the timeliness and quality of post-trial processing of courts-martial.

2. Though the establishment of RLSOs and the "roll-up" of installation SJAs has improved the opportunity for oversight of timeliness and quality of post-trial legal work, the decentralized nature of CAs continues to present a challenge regarding the work of independent SJAs and the integrity of records of trial that must sometimes be transported long distances.

3. "Soft" directives such as "providing assistance" to "achieve goals" are not as effective in motivating positive change as direct tasking to individuals with more precise parameters for deliverables.

4. RLSOs are aligned to provide oversight and quality assurance for Navy post-trial processing, but lack direct supervisory authority over the remaining independent SJAs.

5. The direct intervention of the JAG and other senior leaders, such as the AJAG (Criminal Law) and Vice Commander, NLSC, and the NAMARA Division Director, combined with NMCCA and CAAF opinions, has refocused the legal community on the need for timely and correct post-trial action, and has provided a needed level of support and supervision.

6. Actions such as directing that RLSOs assert control over records of trial, the identification of SJAs in NMCCA opinions, the transmittal and return of mandates through the RLSOs and LSSS, and direct liaison by NAMARA regarding mandates, have been effective in improving the timeliness and quality of post-trial processing even without direct supervisory authority over SJAs falling outside the NLSC claimancy and their CAs.

7. CMTIS provides the ability to monitor the post-trial process of courts-martial from sentencing until a case completes appellate review and is archived. The user interface and display options are not yet optimal.

8. Successful appellate practice is dependent on having the right number of counsel with the needed skill and experience.

9. A developing case backlog is a lagging indicator of insufficient resources, either in numbers of counsel or in their experience.

E. Recommendations

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; and

    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.

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.

IV. Appellate Practice

A. Overview

This section reviews appellate practice before the NMCCA, including the external policies and stressors that have impacted both the quality and timeliness of adjudication of cases on appeal. Since the large majority of cases reviewed by the NMCCA are initial reviews pursuant to Article 66, UCMJ, this section will discuss processing of those cases. Other cases reviewed by the NMCCA, such as Government Appeals, Petitions for Extraordinary Relief, Remand Cases, and Petitions for New Trial require somewhat different processing, but not such as would alter the discussion, which focuses on the caseload and case tracking systems, staff levels, and the selection, training and oversight of appellate judges.

Once a record of trial is complete, NAMARA (Code 40) delivers it to the NMCCA docket clerk for docketing. "Docketing" is the formal process of accepting a case for appellate review. Docketing triggers the 60-day period in which the appellate defense counsel must review a case to identify any assignments of error, or determine there are no errors to assert. If the latter, the appellate defense counsel submits a memorandum to the court that the case is "submitted on its merits" for appellate review. The case is then ready for adjudication. In the alternative, when appellate defense counsel assign error, and file a supporting brief, the Government is permitted 30 days in which to file an answer. When all pleadings are complete, the case is "in panel" for adjudication before one of the NMCCA's three-judge panels. The senior judge of the panel assigns a "lead judge," who is principally responsible for action on the case. Actions include ruling on motions, such as for oral argument, the issuing of non-dispositive orders, such as returning a case to the convening authority for a corrected action, or ordering a *DuBay* hearing to resolve a factual issue. When all pleadings are received and all preliminary matters resolved, the lead judge will draft the adjudication, typically a brief "per curiam" decision, or a longer unpublished or published opinion. Occasionally, on the motion of a party or the motion of a judge, the court may elect to consider a case by sitting *en banc*. The Chief Judge then assigns the lead judge from among those considered as being in the majority.

While these general processes mirror those typical of an intermediate appellate court, there are some unique aspects of the NMCCA, including the statutory obligation to consider all cases in which a punitive discharge or confinement for one year or more has been adjudged. In so doing, the court must review for both factual and legal sufficiency. Thus, the NMCCA – and the other Service Courts of Criminal Appeals – differ from state or federal intermediate appellate courts, which generally only review those legal errors raised by the parties, based on stipulated sections of a record. The NMCCA reviews the entire record of every eligible record of trial. The court considers the factual sufficiency of all convictions; and considers not only the errors of law assigned by the parties, but also reviews the record for error not identified by the parties. This is a laborious, time consuming, and exacting duty.

The following sections of this report review how well the court processes, and the external policies and practices that affect them, have served – or failed – the court in discharging its duty in a timely and efficient manner.

B. Retrospective: Key Facts and Events

1. Historic Caseload

The NMCCA has historically disposed of more cases than each of the other Service Courts of Criminal Appeals, and prior to 2006 disposed of more than all the others combined. See Figure 8. Figure 9 tracks the total number of cases decided by NMCCA over the last 10 years, by category.

Figure 8 - CCA Cases Decided - All Services

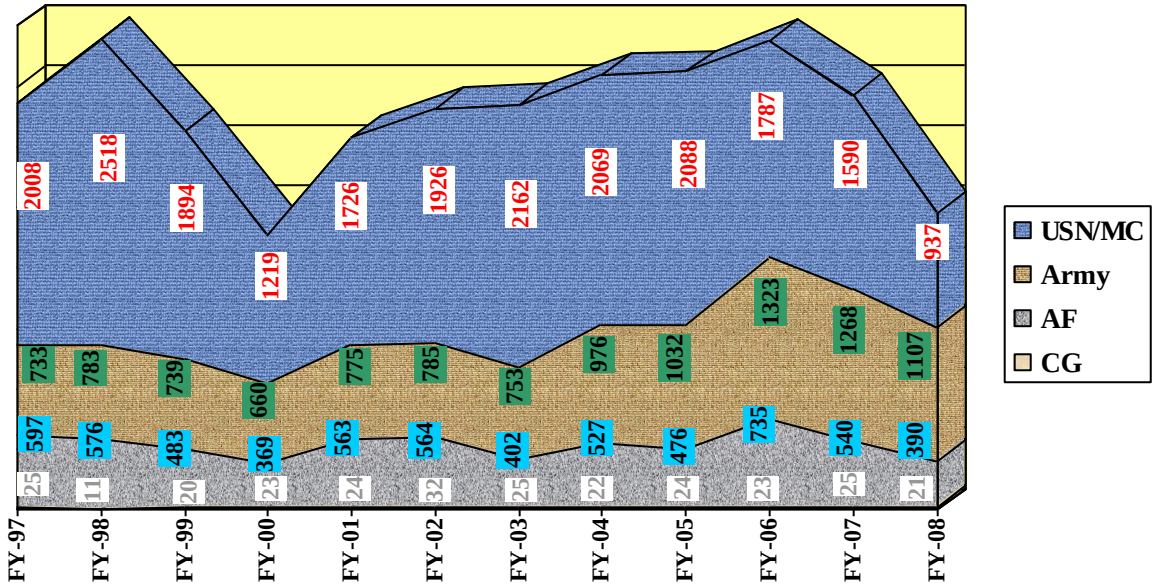
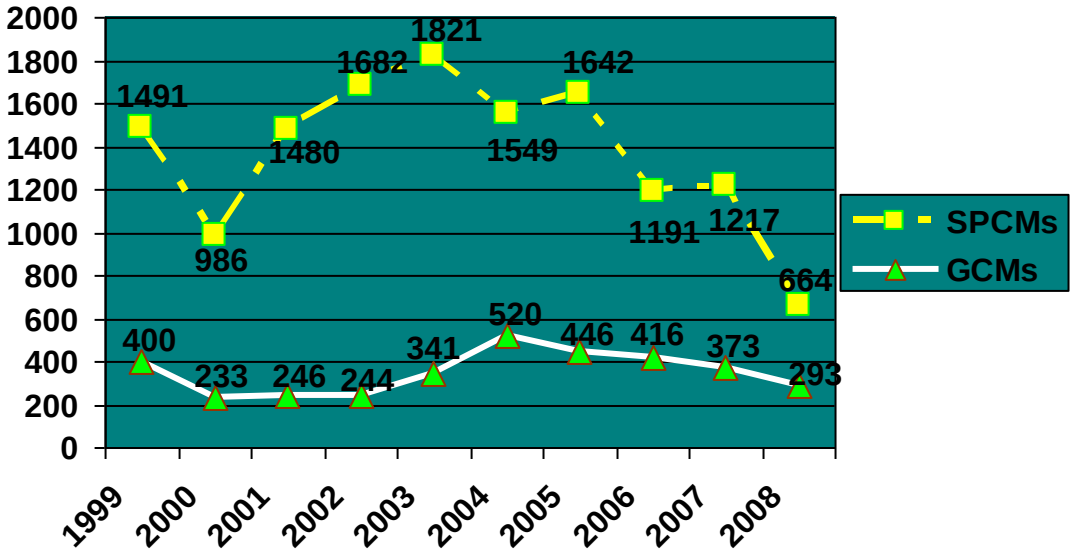


Figure 9 - NMCCA Cases Decided Over the Last 10 FYs



The number of cases over which the NMCCA has appellate jurisdiction is, of course, a percentage of the number of courts-martial convened annually in the field. See Figure 3, *supra* at 12. Large numbers of courts-martial have been a characteristic of the Navy-Marine Corps for more than two decades. See Figure 4, *supra* at 13. However, there has also been a persistent decline in courts-martial over the course of the last two decades. This is, in part, related to reductions in personnel end-strength. See Figure 1, *supra* at 11. As previously noted, there appears to be a greater drop in courts-martial than would result only from end-strength reductions. The additional reduction factors might well be related to the impact of key events, such as the Gulf War, 9/11 and the resulting shift in Naval Criminal Investigative Service (NCIS) assets from investigation of general crime to anti-terrorism and force protection (ATFP), the invasion of Iraq, and, most recently, the economic downturn. Compare Figures 1 and 4, *supra* at 11, 13.

As operational tempos increase, service members are positively motivated, busy, and there is less time and inclination to engage in minor misconduct. Fewer fraud and drug cases are investigated when NCIS agents must be shifted from general crimes to the ATFP mission. Furthermore, as alternative economic opportunities become more limited, service personnel are motivated to maintain good behavior and to re-enlist. The combination of these factors seems to have reduced the incidence of courts-martial per 1,000 end-strength by about 50%, from slightly more than 10, to about 5. Of note, the greatest decline is in SPCMs. The increase of SCMs over SPCM that occurred in 2004 appears to reflect a decision by commanders in the field to use a summary disposition, often followed by administrative discharge, instead of a SPCM.[4] Even though there has also been a decline in GCMS over 20 years, that number has remained relatively constant over the course of the last six years, likely because the seriousness of crimes disposed of in that forum precludes use of a SCM or administrative proceedings. Nevertheless, the combination of reduced end-strength, lower incidences of misconduct, and commanders' dispositional decisions continue to drive down the number of cases on appeal at the NMCCA, with two caveats: First, there remain a stubbornly consistent number of serious and complex felony cases; second, because the active duty end-strength remains at more than half a million personnel, a small percentage increase in misconduct, or a change in the forum preferred by commanders, can rapidly generate very significant numbers of special courts-martial.

2. Selection and Assignment of Appellate Judges

Candidates for the appellate bench have traditionally been selected through the assignment ("detailing") process. When a vacancy on the NMCCA is projected, the personnel divisions (Navy and Marine Corps, independently) develop a list of nominees to fill the vacancy from which the JAG ultimately selects. The "unwritten policy" criterion was that any captain or colonel could serve on the NMCCA based on an assumption that a Navy or Marine Corps O-6 would have the skills, initiative, and experience to be successful based on the diverse and already successful career that merited promotion to the rank of captain or colonel. As a result, few nominees were selected for the appellate bench based on prior litigation or judicial experience. More often, senior officers were selected because they were available for reassignment, they were willing to move to Washington, D.C., or were already posted there and desired not to move again, and were either

[4] It is beyond the scope of this report to document the reasons for the shift from special courts-martial to summary courts-martial and administrative separation. The shift is, however, noted as significant, and as a factor contributing to the recent decline in cases pending before the NMCCA.

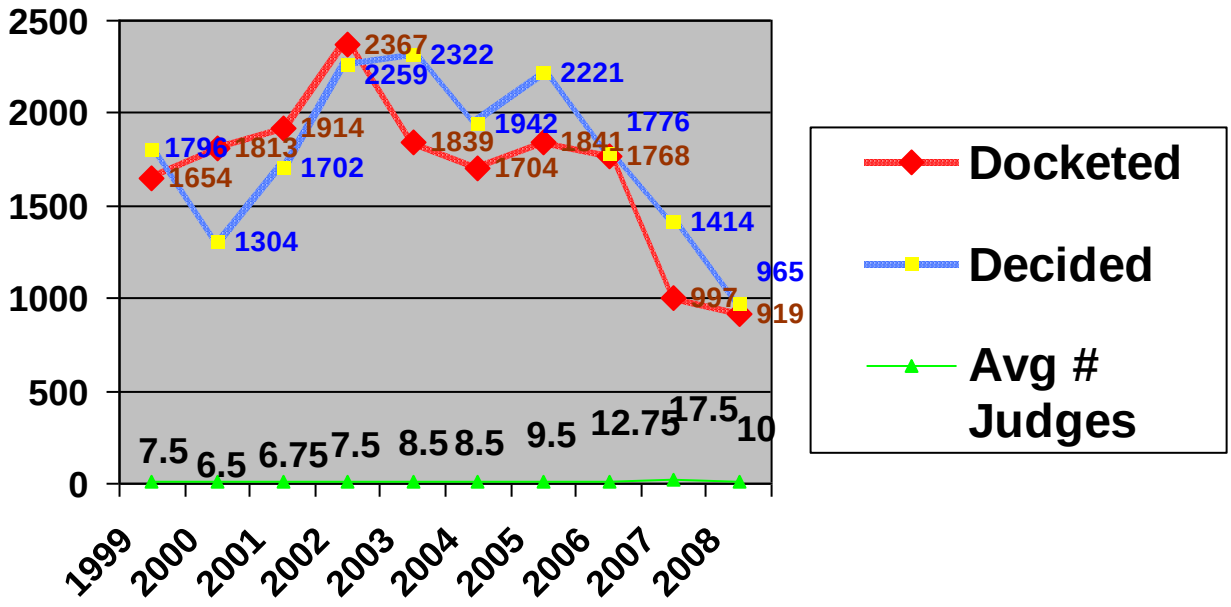
willing to serve as an appellate judge, or at least did not object. For many, if not most, the NMCCA was the officer's last position before retirement. Fortunately, the assumption underlying the detailing process proved true in most cases. Over the course of the last two decades, the NMCCA has had many excellent, if not legendary, judges from both the Navy and Marine Corps. However, over the course of those years, there have been a number of judges detailed to the NMCCA who were not well-suited to the appellate bench. Some of those who were ill-suited were nevertheless dutiful, if not particularly productive; others were not. In some cases, officers were not required to attend the Military Judges Course sponsored by The (Army) Judge Advocate General's Legal Center and School in Charlottesville, Virginia. A particularly damaging combination of circumstances occurs when a judge is selected pending retirement, and has little ability or interest in the work of the court.

> In *United States v. Jenkins*, 60 M.J. 27 (C.A.A.F. 2004), CAAF reversed the NMCCA because the court's opinion replicated large portions of the statement of facts, analysis, and conclusions of law from the Government's Answer. CAAF concluded that it could not disaggregate the Government's argument from the NMCCA's review, and could not determine that appellant received the review to which he was entitled by law. 31 of 45 paragraphs in the NMCCA judge's opinion were virtually or wholly verbatim from the Government's Answer, without attribution. CAAF subsequently reversed numerous NMCCA opinions on the same rationale citing *Jenkins*.

3. Case Backlog of 2000 - 2007

A crisis began in 2000, when the court's productivity still seemed high in comparison to other Service courts, but nevertheless a backlog of cases began to develop with the court deciding 1,304 cases of the 1,796 that were docketed.

Figure 10: Cases Docketed and Decided
Last 10 Years



In retrospect, the productivity statistics masked an additional flaw in case processing. It was not simply a lack of staff or effort, though both factors contributed to the building backlog. The problem was that the judges, aware that a high number of cases were coming to the court, worked to dispose of an equally high number of cases, so as not to fall farther behind. The approach adopted by some judges was to work on cases that could be disposed of quickly, while leaving more complex work on the shelf, both because the larger cases took longer, and because these cases contained hard, complex issues of trial practice and procedure. While there is substantial evidence that the Chief Judges worked to provide both the resources needed and the guidance needed to correctly dispose of cases, including emphasis on older cases, the *practice* became as indicated, with some judges avoiding the large, complex and difficult cases, to dispose of the easier, smaller cases.

Not only was the court slipping behind in total cases, having adjudicated several hundred cases fewer than were docketed in the years 2000 through 2002, the building backlog was composed of an increasingly disproportionate number of the larger, more complex felony cases. Compare the number of GCMs tried with the number reviewed on appeal as depicted in Figure 11.

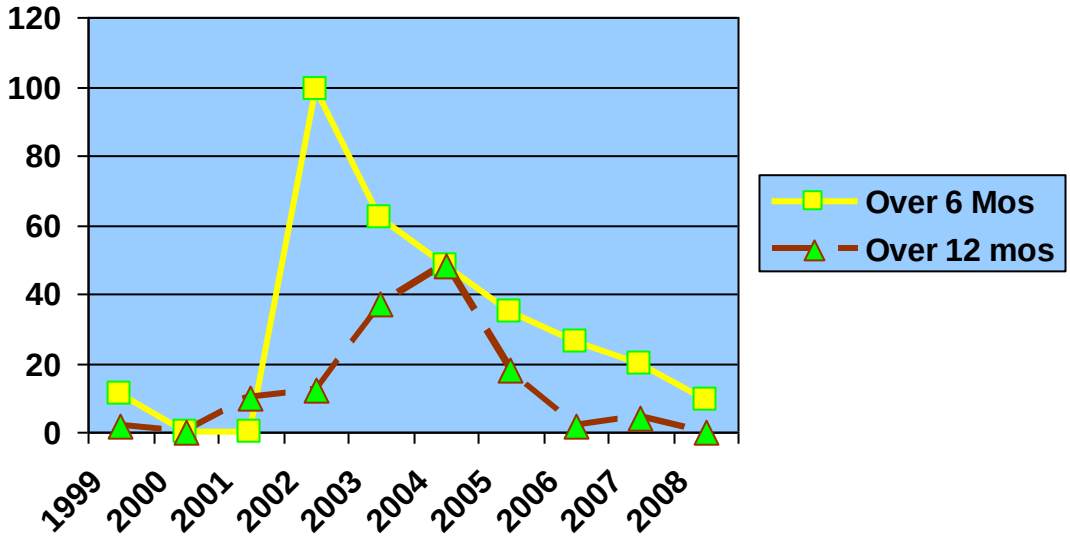
Figure 11: Cases Tried, Docketed and Reviewed by Forum 1999-2008

Year	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
SPCMs Tried	2102	2381	2264	2188	1854	1872	1610	1299	1049	984
GCMs Tried	349	428	481	499	315	313	359	278	297	269
Cases Docketed	1654	1813	1914	2367	1839	1704	1841	1768	997	919
SPCMs reviewed	1411	986	1480	1682	1821	1549	1642	1191	1217	664
GCMs reviewed	400	233	246	244	341	520	446	416	373	293
Total Reviewed	1811	1219	1726	1926	2162	2069	2088	1607	1590	965
Judges	7.5	6.5	6.75	7.5	8.5	8.5	9.5	12.75	17.5	10

In 2000, significantly fewer GCMs were disposed of (233) than the preceding year (400), and far fewer than were tried that year (428). This trend continued into 2001, when only 246 GCMs were adjudicated by the NMCCA, while the disposition of special courts-martial rose from 986 to 1,480, then to 1,682 the following year. Disposition of GCMs remained low in 2002 at 244, compared to nearly double the number of GCMs tried in those years, at 481 and 499, respectively. Even adjusting for the small percentage of acquittals and GCMs that did not result in a sentence requiring review by the NMCCA, the discrepancy between GCMs tried, and those adjudicated by the NMCCA, indicates the growing backlog was composed of serious cases. This conclusion is further supported by the increasing number of judges without a commensurate increase in the total number of cases decided. Though the number of judges more than doubled between 2000 and 2007, the total number of cases decided actual went down -- but in every year beginning in 2003, the court disposed of more GCMs than were tried during the same year.

The stress on the court can also be seen beginning in 2001 in the increasing time cases remained in panel, pending adjudication. See Figure 12.

Figure 12: Cases In Panel: Over 6 & 12 Months
CY End - Last 10 years



The backlog, however, was not entirely a function of the practices of some NMCCA judges. As previously discussed, the bulk of cases docketed, but not adjudicated, was in the Appellate Defense Division due, in part, to a lack of staffing. As Figure 12 indicates, in 2001, the court already had 10 fully briefed cases pending in-panel longer than a year before the majority of backlog cases moved to the court. By 2004 the number of cases pending longer than a year had swollen to nearly 50. It would take the appellate divisions and the court until 2008 to work through this backlog.

4. Initiatives to Address the Case Backlog

In 1996, NAMARA initiated an Oracle based tracking system called NAUTILUS. As of the initiation of NAUTILUS, there was a means for electronically tracking cases and generating limited productivity statistics for the court. And, if it was not abundantly clear through other means, as of 1996 it was obvious that the appellate divisions and the NMCCA had an enormous caseload. Significantly, however, the NAUTILIUS system did not automatically flag cases in which the accused remained confined. As a result, the court could "sort" cases by the trial date, the date docketed, or the date cases were assigned to panels, but it was not possible to tell which of these cases concerned a confined appellant, other than by reference to the case file and estimating the expected release date. Given the very substantial number of cases, and of cases pending in panel for a long period of time, the management emphasis over the next ten years appears to have focused primarily on a "macro-level" approach of tracking cases by the date they were assigned to a panel, trying to reduce the number of older cases, and eliminating the backlog.

In June of 2000, upon the retirement of the former non-attorney Clerk of Court, the position description was completely rewritten and a former judge of the NMCCA was hired as the Clerk of Court. This was done in an effort to streamline the appellate review process, expedite the editing and promulgation of dispositions, provide the judges a resource to assist in addressing

complex matters, and to generally enhance the overall functioning of the court as it began to struggle with the increasing backlog. Unfortunately, the number of judges remained at or below eight. See Figure 12.

Aside from annual reports to the ABA and to the Court of Appeals for the Armed Forces, which included NMCCA productivity data, there is little archival documentation regarding what the NMCCA was doing institutionally to cope with the increasing backlog. For example, there are no studies and no surviving requests for increased judges or staff until 2004.

> *Toohey v. United States*, 60 M.J. 100 (C.A.A.F. 2004) (*Toohey I*), is a Marine Corps case which was docketed at the NMCCA 805 days after sentencing. The appellant filed a *pro se* petition for extraordinary relief more than five years and ten months after he was sentenced, because his case was still pending disposition before the NMCCA. The Court of Appeals for the Armed Forces concluded that the petitioner made a threshold showing of facially unreasonable delay. The court directed the NMCCA to "use its best efforts" to render a decision on Petitioner's appeal without delay and invited the petitioner to notify the CAAF if a decision was not rendered within 90 days.

In 2004, the JAG promulgated the Navy JAG Corps Strategic Plan for 2004 – 2006. One of the focus areas was military justice as a statutory responsibility and a core competence. In order to execute to the Strategic Plan, a number of studies were initiated to develop measures of effectiveness or "metrics."

On May 23, 2005, Chief Judge (Col) C. W. Dorman authored a Memorandum to the Judge Advocate General describing the court's backlog and recommending the means needed to address it. This memorandum was followed by his July 7, 2005 Memorandum to Senior Executive Board, which included the results of a "Metric Study and Trend Analysis." The July memorandum indicated that the number of judges was inadequate, having dropped to 7 due to the routine transfer of judges and the common circumstance of one or more detaching without relief on station. The study also correctly identified the source of the backlog in 2000, and that it was due substantially to a lack of appellate defense staff.

This report previously discussed the JAG's response of increasing the number of counsel in the appellate divisions and insulating them from other tasking, including service as IAs. As more appellate counsel were available to process cases, the bulk of the backlog moved from appellate defense to the NMCCA. There it again met a choke point due to a lack of judges, a lack of highly qualified judges, and shortages in court staff. Chief Judge Dorman recommended four options for gaining control of the backlog. These included an increase in active duty and reserve judges and clerks. The memorandum was punctuated with citations to two cases in which relief was granted to appellants because of post-trial delay. *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005) and *United States v. Oestmann*, 61 M.J. 103 (C.A.A.F. 2005).

United States v. Jones, 61 M.J. 80 (C.A.A.F. 2005), is a Marine Corps case that is 37 pages in length, but which took over 6 months to be transcribed, authenticated, and served on Appellant's trial defense counsel. The convening authority did not take action until 290 days after trial. The NMCCA did not receive the record of trial for an additional 74 days after the convening authority acted and two days short of a year from the date of trial. The NMCCA granted no relief for the post-trial delay. The CAAF set aside that decision and remanded for reconsideration. NMCCA again granted no relief, finding the delay "excessive" but holding the appellant had not sustained his burden of proving prejudice. The CAAF set that decision aside, concluding there was prejudice when the appellant was denied employment because he had no DD-214 while his case was pending appellate review for an unreasonable length of time. On May 10, 2005, the CAAF disapproved the appellant's bad-conduct discharge as relief.

The JAG responded by increasing the number of judges from 9 to 12. This was done by activating three reserve judges to serve Active Duty for Special Work (ADSW). The number of clerks was increased from two to five, and two civilian staff attorneys were added. Additional reserve judges were added to the reserve unit supporting the NMCCA.

As the bulk of the case backlog moved from the appellate divisions to the NMCCA, a pilot law clerk program was initiated in 2006 (increasing law clerks to nine judge advocates – 4 active-duty and 5 ADSW reservists). This continues to be a success. The first class of clerks has "graduated." Two former clerks are now assigned as appellate Government and appellate defense counsel, and a third was selected for the JAG Corps' new litigation career track as a "Specialist." He is in Jacksonville, Florida, as a supervisory defense counsel.

By 2008, the NMCCA and appellate divisions had successfully disposed of the bulk of the case backlog, and the court began reducing its staff. From a high of 18 appellate judges, the NMCCA reduced to 12 judges through the summer of 2008 (10 active-duty and 2 ADSW reservists). By the fall of 2008, the court reduced by two more judges, for a total of 10, including one remaining ADSW officer. That officer will be demobilized in September 2009, and he will be replaced by an active duty judge, leaving the court at 10 judges. The number of clerks declined more rapidly, reaching a low of 4, including the Senior Clerk, who also serves as the court's military administrative officer. This number allows only one clerk per three-judge panel. In early 2009, upon the recommendation of the Chief Judge, the JAG authorized an increase in the number of law clerks to two per panel. By the fall of 2009, the court will have 10 judges (three panels of three, plus the Chief Judge) and seven law clerks (two per panel, plus the Senior Clerk).

C. Current Status

1. Staffing and Competence of Judges

In 2006, the leadership of the JAG Corps developed *JAG Corps 2020*, a strategic plan including a detailed Strategic Transformation Execution Plan (STEP). Both documents address military justice as a Transformation Focus Area and a core competency necessary to support accountability. Most significantly, *JAG Corps 2020* proposed the establishment of the Military Justice Litigation Career Track (MJLCT) to improve the quality of military justice litigation, in

part, by developing and keeping qualified judges in the courtroom and on the appellate bench. Among the more than 30 discrete STEP items related to the establishment of the new MJLCT community, all have been completed, included the capstone of this community: a new flag officer selected to serve as the Chief Judge of the Navy.

Of more immediate impact on the NMCCA was the increase in active duty judges to 13 in January 2006, combined with an increase from 8 to 11 in the number of reserve judges assigned in support of the court. The reserve judges use "flex drills" – roughly equivalent to telecommuting – to serve as lead judge in the disposition of a substantial number of appellate cases that are submitted for adjudication without assigned error. These are most often guilty plea cases of less than 100 pages. Additionally, during regular drill periods (approximately every other weekend, plus two weeks each year), reserve judges are assigned to a standing panel to assist in disposing of larger, more complex cases. Though the majority of cases contributed by the reserves are those without assigned error, the contribution is nevertheless significant, accounting for 25% of the cases disposed of by the court in calendar year 2008.

As previously discussed, in 2007 the number of NMCCA judges was increased to 17 until the reduction in the case backlog allowed the NMCCA to begin to reduce the number of judges and clerks in 2008. More important than the increase in the numbers of judges, the JAG directed an increase in the number of former trial judges. Of the 11 judges assigned in the summer of 2007, only one was a former trial judge, and that judge was not the Chief Judge. Additionally, the JAG directed that up to 4 of the court's billets must be "coded" for officers designated as MJLCT officers. This is accomplished in the community implementing instruction. See Appendix 8. Additionally, in 2009, the JAG clarified that one appellate judge on each panel is to be a former trial judge. The NMCCA, as presently composed, meets these criteria. As of July 1, 2009, there are four former trial judges on the NMCCA (3 Navy and 1 Marine Corps), including one who is also an MJLCT "Specialist" and a second, the Chief Judge, who is both a former trial judge and a designated MJLCT "Expert." While a substantial number of cases on appeal involve issues of pretrial and post-trial procedure, which are readily handled by non-career litigators who have significant experience as SJAs, the history of the NMCCA supports a conclusion that the most difficult cases on appeal involve evidentiary, criminal law, and procedural issues for which former trial judges are the more competent to correctly and efficiently resolve.

2. Current Caseload

The status of the NMCCA's caseload as of July 1, 2009, includes 302 docketed cases, the lowest in the court's history. 129 cases are in the appellate divisions for briefing and 173 are in panel. No case pending in panel has been pending longer than one year, and only seven have been pending more than six months – none of which involve an appellant who is confined.

3. *United States v. Foster* in Context

In *United States v. Foster*, 2009 CCA LEXIS 62 (N.M.Ct.Crim.App. 2009), the accused Marine was charged with rape, aggravated assault, and communicating a threat. Charges were preferred after his wife's divorce attorney contacted military authorities and told them that the servicemember had assaulted his wife. As witnesses, the Government called the servicemember's wife, son, and two of the wife's friends and a doctor. The NMCCA found that the military judge erred when he allowed the doctor's hearsay testimony about incidents the wife related, which the doctor described as though they were a medical diagnosis. The minor son was permitted to testify regarding incidents that occurred before he was born, which the members were subsequently instructed to disregard. In addition, the evidence presented by the Government to prove rape – which consisted primarily of the wife's testimony about an incident that occurred five years earlier, and testimony by a friend that the wife told her about the incident two years after it occurred – was insufficient to prove the charge. The court expressed great concern about the fact that more than nine years passed from the time the servicemember was tried until the date the court issued its decision, including substantial time pending appellate processing. In dismissing the rape charge with prejudice, and limiting any new sentence on the remaining charges, the majority opinion characterized the delay as "judicial negligence." The concurring opinion by the Chief Judge noted "failure at every level" of the military justice process. See Appendix 2.

Several observations should be made regarding the context in which this case arose. First, once the case had been docketed in 2001, it was entered into the NAUTILUS system for tracking. Second, as has been discussed in preceding sections, from 2000 forward, a lack of staffing in the Appellate Defense Division was contributing to a large and growing backlog. Partly as a result, what can be characterized as an inordinate number (25) of delays, principally by the appellate defense counsel (20), were requested and granted by the court between 2001 and 2004.

Third, a likely predisposition of the NMCCA for the granting these 25 delays is that the NMCCA was understaffed to manage the large and growing caseload. The judges of the court 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. Moreover, some appellate judges were struggling with the length, complexity and number of cases assigned to them. Some deferred action on those cases in favor of faster, easier cases. What is clear in this regard is that the lead appellate judge originally entrusted with the *Foster* case, a Navy captain, did not have an adequate military justice litigation background, he never attended the Military Judges Course, he was not well-suited to the appellate bench, he did not take action on the *Foster* case for nearly 18 months, and upon his retirement, he left it and a number of other large and complex cases essentially abandoned. Other investigations have addressed whether there was individual judicial misfeasance or malfeasance by this or other judges. For purposes of this review, it is of greater import to examine what structural and procedural processes failed. Two are clear at this juncture: there were too few, well trained judges and staff, and too many cases.

From 2004 to 2006, as the number of judges and support staff increased in both the Appellate Defense Division, and subsequently on the court, a major emphasis was placed on reducing the case backlog. As discussed above, it is clear that the Chief Judge was actively involved in trying to secure resources and manage the court as it worked through the backlog.

In *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005), the appellant was convicted of unauthorized absence, disobeying an order, and disrespect. The 96-page record of trial was not transcribed and authenticated until 7 months after the trial, and the staff judge advocate's recommendation (SJAR) was not completed until 1 April 2005, almost 28 months after trial. In an *en banc* opinion the court exhaustively considered the issue of post-trial delay, setting out a list of non-exhaustive factors under Article 66, UCMJ, to be used in determining whether and what part of the findings and sentence should be approved in a case involving post-trial delay. In this case, such delay merited relief. Of note, the concurring judges included Chief Judge Dorman, Judge Suszan, and Judge Feltham.

There is little doubt that the court as a whole, and the judges entrusted with disposing of *Foster* in particular, were well-aware that post-trial delay could adversely affect appellants' rights. Yet the *Foster* case appears to have been largely ignored by the lead judge and unnoticed by the supervisory judges. This is despite the fact that NAUTILUS, and later CMITS, each provided the ability to track cases during the time *Foster* was in panel. The data and case listings were apparently not used to identify specific case processing priorities other than to track progress on the goal of reducing the backlog. Moreover, as noted above, the metrics that were being tracked do not appear to have been properly understood as indicative of not just a growing backlog, but a problem with the more complex, longer cases. While the supervisory judges did engage in periodic, if not regular, panel and senior judge meetings at which the backlog and individual cases were discussed, there were inadequate inquiries into the status and priority for specific cases. And, the lead judge apparently voiced no concern about *Foster*. Based on these factors, this report concludes that the Chief Judge and panel senior judge lost situational awareness of *Foster* as they grappled with the larger caseload and staffing issues. Finally, there was inadequate implementation of a plan to ensure the lead judge completed his cases or that they were reassigned prior to his retirement. It was not until he actually retired that the *Foster* case was reassigned and that action was taken to advance it toward disposition. That action, in July 2006, returned the case to the trial court for a fact-finding *DuBay* hearing on potential ineffective assistance of counsel. Upon completion of the *DuBay* hearing, *Foster* was redocketed at NMCCA on June 12, 2007.

Though the *Foster* case did not suffer the same length of delay it had prior to the *DuBay* hearing when it returned to the court, there was additional delay. The Chief Judge, who had been invested in August of 2007, had no prior experience as a trial judge, and was not an MJLCT qualified officer. See Appendix 13. When the *Foster* case was sent to panel in October of 2007, it was initially assigned to a judge who was transferred on short notice, after having had the case about five month. In March of 2008, the case was reassigned to an experienced judge, but one who was scheduled to retire. He was unable to complete a draft opinion during the 90 days he had the case. In mid-April 2008, a new Chief Judge was invested who was a former trial judge and an MJLCT Expert. The *Foster* case was returned to panel in June of 2008, and the panel senior judge, responsible for assigning cases within his panel, assigned himself as lead. He had been the

lead judge of the *Foster* case for approximately four months prior to it being sent for a *DuBay* hearing. The new Chief Judge conducted monthly meetings with all senior panel judges, reviewing reports of pending cases generated from CMTIS, sorted by date of trial, and by the date cases went into panel. He also reviewed productivity reports for all judges, and case assignments. CMTIS reports reflect panels or judges that have too many cases, or too many large cases, and indicate when a judge is not as productive as their individual caseload requires. Over the course of the early summer, CMTIS reports indicated that the senior judge assigned to *Foster* was such a judge. He was a Marine Colonel who did not have significant litigation experience, and who had not been involved in criminal litigation for more than 15 years. Despite having previously been assigned to the *Foster* case, after three months without a disposition, the new Chief Judge removed that senior judge from his panel, and reassigned the case to a former trial judge and MJLCT Specialist. That judge completed it, authoring the opinion at Appendix 2.

To summarize, the context in which the *Foster* case arose was that of an understaffed and overburdened court with excessively long times in panel. Even if cases were properly prioritized, the long times in panel meant that new cases must wait while older cases were completed. But, cases were not always properly prioritized because the judges' focus was too often on the number of cases they decided, particularly toward the end of a month, in an effort to reduce the case backlog. This led to a practice by some of deciding "easy" short cases rather than maintaining a disciplined priority of working on cases. More specifically, delay in the *Foster* case reflects the impact of judges with inadequate litigation experience, unable to recognize that 25 enlargements of time required remedial action by the court, and unable to resolve a case of moderate complexity within a reasonable time. Finally, the failure of those with oversight responsibility to effectively use information and case management systems, and to adequately plan for and ensure completion of cases prior to a judge departing from the court also contributed to unacceptable delay.

D. Lessons Learned

1. The caseload at NMCCA has historically been very high. Until 2008, the NMCCA decided more cases than all the other Services combined. Though the caseload has continued to decline, given that the DON end strength remains at more than half a million personnel, a small change in the rate of misconduct or the choice of disposition by field commanders could rapidly generate significant numbers of appellate cases.

2. The complexity of felony litigation, and even some misdemeanor litigation, is such that a judge without significant litigation experience will be ineffective in addressing difficult evidentiary and procedural appellate issues in a timely manner.

3. The understaffing of the NMCCA, and assignment of under-qualified judges was a persistent historic characteristic of the court, until corrected by the influx of judges beginning in 2006, and the emphasis on assigning MJLCT qualified officers and former trial judges, initiated in 2007.

4. In 2008, the terms of some highly qualified, productive NMCCA judges were extended. This maintained continuity, a high level of expertise, and productivity as other military judges rotated in the normal course of duty assignments.

5. Case tracking tools are sufficient to allow active case management by the senior judges and the Chief Judge.

6. There is a negative influence to tracking monthly case productivity numbers: it encourages action on the easiest or fastest cases, particularly at the end of the month, "to get the numbers up."

7. The lack of effective planning for completion of cases prior to a judge departing from the court, either to retirement or reassignment, contributed to needless delay in the disposition of cases.

E. Recommendations

1. Unless the caseload 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.

Plan of Action and Milestones – Military Justice Report 2009

Part I

Recommendation: 1. Coordinate and implement the NJS curriculum changes described in Appendix 4.

Course of Action: Code 20 will develop and provide NJS with recommended curriculum changes based on Appendix 2.

Action Code: 20/NJS

Action Date: 1 Oct 09

Cognizant AJAG: 02

Status:

Recommendation: 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.

Course of Action: Develop priority for filling MJLCT billets, and develop target percentages to be filled by designated target dates. Track through the STEP.

Action Code: 20/61/PERS-4416

Action Date: 30 Sep 09

Cognizant AJAG: 06

Status:

Plan of Action and Milestones – Military Justice Report 2009

Part II

Recommendation: 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.

Course of Action: Submit STEP action project to evaluate recommended action, costs and benefit. Track and complete as a STEP action item.

Action Code: 20

Action Date: 30 Sep 09

Cognizant AJAG: 02

Status:

Recommendation: 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.

Course of Action: Submit STEP proposal including targets for the size of the pool, and percentages to be achieved with goal dates. Track and complete as STEP action item.

Action Code: 20/05/07

Action Date: 30 Sep 09

Cognizant AJAG: Chief Judge of the Navy

Status:

Recommendation: 3. Commission a follow-on to the 2006 survey of military judges and supervisory counsel to assess the relative level of litigation competence.

Course of Action: Same as stated.

Action Code: SAT/20/07

Action Date: 1 Nov 09

Cognizant AJAG: Chief Judge of the Navy

Status:

Recommendation: 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.

Course of Action: Develop and submit training/guidance proposal for implementation by cognizant AJAGs or their designee.

Action Code: 20/07

Action Date: 1 Sep 09

Cognizant AJAG: 02/06/Chief Judge of the Navy

Status:

Plan of Action and Milestones – Military Justice Report 2009

Part III

Recommendation: 1. Update the NLSC Manual and the JAGMAN to require:

- That all records of trial be forwarded to NAMARA by a servicing RLSO or LSSS; and

- 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.

Course of Action: As stated.

Action Code: 20/63

Action Date: 15 Dec 09

Cognizant AJAG: 06/02

Status:

Recommendation: 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.

Course of Action: Draft instruction as stated.

Action Code: 40

Action Date: 30 Sep 09

Cognizant AJAG: 02

Status:

Recommendation: 3. Explore feasibility of a uniform method for RLSO tracking of the post-trial process, and if feasible, include it in the NLSC manual.

Course of Action: Submit

Action Code: 40/63

Action Date: 30 Sep 09

Cognizant AJAG: 02/06

Status:

Recommendation: 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.

Course of Action: Draft recommended instructions and submit for approval to CNO and CMC via the JAG.

Action Code: 20/40/05

Action Date: 30 Sep 09

Cognizant AJAG: 02

Status:

Recommendation: 5. Incorporate the format of the new NAMARA post-trial case and mandate tracking spreadsheets into a standard CMTIS report.

Course of Action: Modify CMTIS Crystal Reports to incorporate relevant data fields and include in drop down menu of reports.

Action Code: 65/40/05

Action Date: 30 Oct 09

Cognizant AJAG: 06/02/Chief Judge of the Navy

Status:

Recommendation: 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.

Course of Action: Develop detailed information on data and case tracking requirements, current CMTIS capabilities, capabilities and cost for use of PACER system, including interface with or impact on CMTIS and DONCJIS. Provide analysis of alternatives to JAG.

Action Code: 46/05/63/65/SAT

Action Date: 30 Dec 09

Cognizant AJAG: 02/06/Chief Judge of the Navy

Status:

Plan of Action and Milestones – Military Justice Report 2009

Part IV

Recommendation: 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.

Course of Action: Maintain the status quo. Review with the JAG quarterly.

Action Code: 07/61

Action Date: 1 Sep 09

Cognizant AJAG: Chief Judge of the Navy

Status:

Recommendation: 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.

Course of Action: Maintain status quo. Review during development of annual detailing slate.

Action Code: 07/61

Action Date: 15 Feb 10

Cognizant AJAG: 09/06

Status:

Recommendation: 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.

Course of Action:

Action Code: 07/61

Action Date: 15 Feb 10

Cognizant AJAG: Chief Judge of the Navy

Status:

Recommendation: 4. All appellate judges must attend the Army-sponsored Military Judges Course in Charlottesville, and then maintain a continuing judicial education regime.

Course of Action: Include requirement for Army Military Judges Course and continuing education in NMCCA instruction.

Action Code: 07

Action Date: 15 Aug 09

Cognizant AJAG: Chief Judge of the Navy

Status:

Recommendation: 5. Active case management must be a clearly designated responsibility of the Chief Judge and the senior judges of the court.

Course of Action: Include requirement as responsibility of Chief Judge in NMCCA instruction.

Action Code: 07

Action Date: 15 Aug 09

Cognizant AJAG: Chief Judge of the Navy

Status: