

Comprehensive Review of The Department of the Navy's Uniformed Legal Communities

9 December 2019



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Section 1

Executive Summary

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1. EXECUTIVE SUMMARY

1.1 INTRODUCTION

Every day around the world, the Navy and Marine Corps uniformed legal communities provide commanders, Marines, Sailors and their families timely, appropriate legal advice. These communities are composed of talented, resourceful professionals, who are committed to delivering effective and legally sound recommendations. The services they provide are critical to the Department of the Navy's (DON's) ability to provide ready and capable forces and to conduct effective combat operations. It is precisely because these communities provide vital services, necessary to promote the readiness of the force and successful mission accomplishment, that periodic review is warranted.

In August 2019, the Secretary of the Navy (SECNAV) appointed an Executive Review Panel (ERP) of civilian legal, academic, and business professionals from the public and private sectors (see Section 1.7) to conduct a Comprehensive Review (CR) of the Navy Judge Advocate General's Corps (JAG Corps) and Marine Corps Judge Advocate (JA) communities. Leveraging the findings of previous reviews, the ERP documented organizational, procedural and resource-related issues that limit the efficiency and effectiveness of legal services. Respecting the fundamental differences between Navy and Marine Corps organizations and processes, the contents of this report reflect independent analyses and conclusions regarding the respective communities. Where possible, the report addresses common themes and recommendations, recognizing that each Service may ultimately elect to implement solutions differently.

Although the ERP found areas for systemic improvement, it also recognizes that, at the individual level, Navy and Marine Corps uniformed legal professionals are providing outstanding support to their respective Services. This report is intended to inform institutional and organizational corrective actions to enable optimum effect from the work of these dedicated professionals.

1.2 BACKGROUND

A series of recent events directly led to the convening of this review. While refraining from specific comment on legal substance, outcomes, or any specific cases still in litigation, it is important to understand the background of the decision to undertake this CR.

The criminal investigation of husbanding services provided to the Navy by Glenn Defense Marine Asia (GDMA) in the Western Pacific revealed conduct that ranged from intentional corruption to a lack of adherence to bedrock standards of ethical conduct expected of all Government personnel. This ethics failure was wide-spread, involving hundreds of officers, enlisted, and civilian personnel of the DON, over an extended period of years. The subsequent review and adjudication of cases of those individuals implicated in the GDMA investigation raised questions regarding the role and involvement of designated ethics counselors. There were some documented instances of judge advocates failing in their responsibility to provide timely, effective advice. Of particular concern to senior leadership was the lack of a systemic Navy JAG Corps response to the issues raised by GDMA. Other Navy communities, such as the Supply Corps, undertook a vigorous, transparent self-assessment to identify and effectively remedy organizational and cultural shortfalls. While the Navy JAG Corps convened an Ethics Counselor Working Group in 2016 and developed recommendations to improve training, delivery of advice and program assessments, this effort did not spark a community-wide discussion and several initiatives have yet to be implemented. The Navy JAG Corps does not have processes in place or an organizational structure that fosters a culture of continuous, critical self-assessment focused on professional performance and accountability. This is an urgent concern given the seriousness of the issues leading to this review.

Additionally, beginning in the Fall of 2018, a succession of judicial rulings suggested systemic problems. In the case of *United States v. Barry*, decided in September 2018, the Court of Appeals for the Armed Forces ruled that a former Deputy Judge Advocate General of the Navy (DJAG) had unlawfully influenced a Convening

Authority during the post-trial process.¹ In the case of *United States v. Benson*, a senior Flag Officer Convening Authority was disqualified for having taken actions, based on advice from his designated legal advisor and trial counsel, that the military judge found to be an abdication of the convening authority's neutral role in favor of a prosecutorial role.² In the case of *U.S. v. Gallagher*, a senior trial counsel was disqualified from further participation in the case for prosecutorial misconduct.³

These decisions involved different cases, different practitioners, and different aspects of the court-martial process. However, each resulted in a judicial finding of legal error requiring corrective action to ensure public confidence in the fairness of the military justice system. Each of these instances warranted timely analysis, identification of lessons learned, and dissemination of guidance to commanders and the judge advocates who support them in order to continuously improve the military justice process. The constraints regarding commenting on cases in active litigation notwithstanding, the Navy JAG Corps community does not have processes in place that ensure continuous introspection and self-improvement.

While these particular events focus on traditional areas of judge advocate practice, senior Navy leadership also recognizes the increasing demand for legal support in new and complex operational environments, to include space, cyber and information warfare domains, all in the context of a National Defense Strategy refocused on inter-state strategic competition. At the same time, the handling of sexual assault cases and the associated victim legal services continue to draw public and Congressional attention. Many of these factors contributed to Congress undertaking its 2016 reform of the Uniform Code of Military Justice (UCMJ), the most substantive in 50 years.⁴

¹ Although the court indicated that it did "not question [the DJAG's] motives or believe he acted intentionally," the court rejected the dissent's position that unlawful influence must be intentional. *United States v. Barry*, 78 M.J. 70, 78 (C.A.A.F. 2018).

² Ruling on Def. Mot. to Disqualify the Convening Authority at 17-18, *United States v. Benson* (N-M. Trial Judiciary, Northern Jud. Cir. Jan. 22, 2019).

³ Findings of Fact and Conclusions of Law on Def. Mot. to Dismiss for Prosecutorial Misconduct and Unlawful Command Influence at 21, *United States v. Gallagher* (N-M. Trial Judiciary, Southwest Jud. Cir. June 7, 2019).

⁴ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5001 *et. seq.*, 130 Stat. 2000, 2894-2968 (2016).

In response to the above events, the Secretary of the Navy established this review and included the Marine Corps uniformed legal community. Like the Navy, the Marine Corps has experienced highly publicized cases of unlawful command influence, by both uniformed and civilian legal advisors.⁵ The Navy and Marine Corps are equally impacted by increased support requirements in the practice areas identified above.

This report includes detailed findings and recommendations to ensure that the Navy and Marine Corps uniformed legal communities are best organized, manned, trained, and equipped to support the Department of the Navy's mission.

1.3 CORE THEMES — THE PANEL “LENS”

As the Panel reviewed Navy and Marine Corps legal community performance, with particular focus on the areas directed by SECNAV, the Panel identified many specific issues, which are detailed in this report. These issues can be generally categorized into five key areas.

Culture. The Navy JAG Corps should implement changes necessary to refocus its culture to one that values self-assessment, rapid feedback of lessons learned, introspection and accountability for its professional performance. In other words, it needs to embrace a learning culture. Navy judge advocates are members of two honorable professions: the profession of arms and the profession of law. As uniformed attorneys, judge advocates support the profession of arms by enhancing personnel and unit readiness, ensuring good order and discipline, and providing sound legal advice in support of the commanders and units they serve. A clearer understanding of Navy culture and values, and a judge advocate's role as both a Naval officer and attorney, is required and must be continually reinforced throughout the community.⁶

⁵ *United States v. Chamblin*, No. 201500388, 2017 CCA LEXIS 694 (N-M. Ct. Crim. App. Nov. 8, 2017).

⁶ In 2005, the U.S. Navy realigned many shore-based judge advocates in order to gain administrative efficiencies and build a coherent legal community. See U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS, NAVY ADMIN. MESSAGE 064/05, NAVY JUDGE ADVOCATE GENERAL CORPS MANPOWER ALIGNMENT (Apr. 8, 2005) [hereinafter NAVADMIN 064/05]. However, this realignment inadvertently created organizational structures incentivizing JAG Corps officers to align their efforts with their immediate JAG Corps leaders' priorities, rather than line commanders' priorities.

The Marine Corps legal community has a generally healthy learning culture, with processes in place. The Marine Corps can still benefit from improvement.

Both the Navy and Marine Corps legal community Professional Responsibility programs lack regular, structured training and the proactive incorporation of lessons learned based on disciplinary actions and close calls, as well as formal follow-up, and accountability actions when their performance is found to be below standards. Finally, both the Navy and Marine Corps legal communities must continue to build and strengthen existing relationships with other uniformed legal communities and interagency partners, to include fostering a relationship of professional exchange with the Department of Justice.

In contrast to their Navy counterparts who belong to a corps of staff officers, Marine Corps judge advocates are unrestricted officers. They compete for promotion with all other unrestricted officers. The most competitive officers complete service-wide resident professional military education requirements, and serve in assignments outside their military occupational specialty. Thus, it is a challenge to develop officers who are, simultaneously, fully-ready to serve as both legal professionals and as Marine Air-Ground Task Force officers. At Colonel selection boards, the Marine Corps must reconcile its need for legal expertise and experience with the competing need for well-rounded Marine Air-Ground Task Force officers, in order to select judge advocates who will facilitate the most effective delivery of legal services.

Organization. Several Navy JAG Corps organizational constructs contribute to inefficiency. First, JAG and DJAG have roles and responsibilities in both the larger DON and in the Navy service branch, causing blurred lines of responsibility and accountability and confusion among senior leaders. Second, judge advocates assigned to the personal staffs of both SECNAV and Chief of Naval Operations (CNO) have direct access to these principals to assist and advise them on legal matters over which the JAG, Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC), and General Counsel of the Navy have responsibilities, adding to the confusion at the headquarters level. Third, the responsibilities of DJAG as Commander, Naval Legal Service Command (CNLSC) are not reasonably within his or her span of effective

control, given the position's other significant DON duties. Moreover, the reasons for DJAG's assignment as CNLSC are not well understood in the DON. Finally, the current construct of the Region Legal Service Office (RLSO), which provides prosecution, command services, ashore staff judge advocates (SJAs), legal assistance, and professional development of all first tour judge advocates, results in a diffusion of RLSO leadership focus as well as unclear lines of accountability between Region Commanders and their SJAs, and to a lesser extent, some commanders and their SJAs.

Education and Training. While it is imperative, there is no structured, standardized approach to ensure that commanders and judge advocates receive relevant, timely legal instruction over the course of their careers. Commanders must become more informed and demanding clients with each incremental increase in responsibility, through education, experience, and interaction with the judge advocate communities. Judge advocates must receive appropriate training and professional development before taking positions of increased responsibility in order to best serve their clients and the best interests of the Navy and Marine Corps.

Resourcing. The respective legal communities have been under-resourced. This must be corrected. The military justice data collection, case management, and court reporting systems currently employed by the Navy and Marine Corps are inefficient, and in some respects, ineffective. Additionally, they fail to meet Congressional requirements defined in the Military Justice Act (MJA) of 2016. Further, physical security within Navy and Marine Corps courtrooms is inadequate. Navy courtroom security is largely provided by ad-hoc and inconsistent sharing of host base security forces. Marine Corps courtroom facilities suffer from material deficiencies.

With respect to personnel, student debt loads carried by junior Navy and Marine Corps judge advocates threaten retention. The Naval Service should fully leverage retention incentives to address this problem. Navy JAG Corps manpower, training, and equipment requirements are insufficiently defined and poorly supported within Navy budget processes. JAG Corps and legal enlisted communities are adversely affected by an unclear division of responsibilities between the Bureau of Naval Personnel and

the Office of the Judge Advocate General (OJAG). This has resulted in a sub-optimized organizational structure and inaccurate manpower requirements, as well as skill sets and development paths that do not meet Navy needs. These factors also extend to civilians under JAG cognizance.

Unlawful Command Influence. Recent high-profile Navy and Marine Corps courts-martial have led to judicial findings of both actual and apparent unlawful influence involving senior line and JAG Corps officers. The military justice system expects that commanders will exercise their broad discretion over the disposition of charges independently and without interference from superiors. Unlawful command influence (UCI) undermines the fairness and credibility of the system and interferes with the proper administration of justice. Commanders and judge advocates at all levels must honor and respect convening authorities' independence and scrupulously refrain from, deter, and report any improper attempt to influence the exercise of their discretion.

Both commanders and judge advocates require clear, current, and consistent guidance and training on what constitutes unlawful influence. To sustain confidence and integrity in military justice matters, it is imperative that all cases, including high visibility cases, be litigated free from UCI or other potential tainting. Judge advocates, convening authorities, commanders and military judges are empowered to achieve that end, to include using the enhanced military judge authority to ensure fair court-martial proceedings provided in the Military Justice Act of 2016. At the same time, commanders need to exert lawful influence over their commands in the interest of maintaining good order and discipline. The balance between these competing requirements requires leadership, situational awareness, and character, all of which are familiar and expected aspects of military officership. Clear guidance, continuous training and vigilance are expected to prevent any inappropriate influences outside the courtroom on a case.

While this report covers many aspects of the Navy and Marine Corps legal programs, unlawful command influence is an over-arching concern. It has shaped views on a host of issues and lends urgency to the corrective measures recommended.

1.4 REPORT STRUCTURE

This report contains separate Navy and Marine Corps assessments. Section 2 outlines the scope and methodologies employed by both the Navy and Marine Corps Working Groups in conducting this CR. Section 3 addresses the current posture of the Navy JAG Corps and Section 4 provides findings and recommendations for the Navy. Sections 5 and 6 address the current posture of the Marine Corps legal community and list findings and recommendations for the Marine Corps. Section 7 provides a consolidated list of recommendations, as well as appendices and acronyms.

1.5 FINDINGS & RECOMMENDATIONS

The Panel endorses the Service-specific findings and recommendations reflected in this report, summarized for both services in Section 7. While there are issues common to both services, solutions vary given differences in Navy and Marine Corps organizational structure and processes.

All recommendations in this report are important and, if implemented, can be expected to improve the performance of the Navy and Marine Corps legal communities. In general, the Panel refrained from recommending timelines and assignment of responsibility for corrective actions, believing that the Services are better positioned to assess ownership, prioritization, and timelines. The Panel recommends the following specific findings as most significant and recommends prioritizing their implementation:

Culture and Self-Assessment (Navy). Navy JAG officers must understand Navy culture and values, and their roles as both Naval officers and attorneys. This must be continually reinforced throughout their careers. JAG Corps leadership must issue governing principles for their community that establish and emphasize the critical importance of this dual role that they perform. As outlined in Section 1.3, the Navy JAG Corps must instill processes that foster a culture of learning and continuous improvement. In addition to Article 6 compliance-based reviews, the Navy JAG Corps must implement a continuous self-evaluation process that is informed by Navy requirements, determines if the JAG Corps is meeting those requirements, identifies the standards used to measure success, and shares lessons learned in a systematic

manner to enable continuous JAG Corps community improvement. Further, the Navy JAG Corps must communicate and emphasize its members' identities as both naval officers and judge advocates.

Organizational Structures (Navy). The structure of OJAG, Naval Legal Service Command (NLSC) Headquarters elements, and RLSO lines of operation require review. Upon completion of the Center for Naval Analyses (CNA) study into the OJAG and NLSC organizations, the JAG must provide his detailed recommendations to improve lines of authority, responsibility and accountability of the JAG Corps to SECNAV and CNO. The Navy should also consider establishing an additional active-duty Flag Officer billet as CNLSC. This change will enable clear and distinct lines of authority for both OJAG and NLSC. Additionally, consideration should be given to reestablish independent Trial Service Offices (TSOs), in order to achieve the single mission focus of providing court-martial prosecution services. The reestablishment of TSOs should be considered along with realigning SJA billets Navy-wide to the officers they serve.

Organizational Structures (Marine Corps). The Marine Corps legal community is generally well-organized. The Commandant responded to Congressional concerns and reorganized the Marine Corps legal community in 2012. There is, however, a lack of clear understanding within the Marine Corps regarding the appropriate provider of legal advice, particularly at the headquarters level. The Secretary of the Navy issued instructions defining the roles and responsibilities of the Navy JAG and SJA to CMC, Instruction 5430.27E, dated May 13, 2019, and the Office of the General Counsel, including the Counsel to the Commandant of the Marine Corps, Instruction 5430.25F, dated March 26, 2019. The JAG, SJA to CMC, and the General Counsel of the Navy are responsible for providing legal advice in accordance with those instructions. The General Counsel of the Navy, a Presidentially-appointed and Senate-confirmed position, has assigned an Office of General Counsel (OGC) career civil servant position to serve as the Counsel to the Commandant, to provide specified legal services for the Marine Corps in accordance with the duties set forth in the Secretary's instructions. The governing instructions are clear, yet unnecessary confusion exists among senior Marine Corps leaders regarding roles and responsibilities. Specifically, legal advice to the

Commandant on matters of military justice and military personnel law are expressly reserved for the SJA to CMC, also a Presidentially-appointed and Senate-confirmed position.

Similarly, the SJA to CMC should serve as the ultimate authority to provide any alternate opinions and advice to Marine Corps judge advocates on matters of military justice if a commander in the field disagrees with the advice provided by their immediate SJA. The Panel recommends that SECNAV task Marine Corps senior leadership and the General Counsel of the Navy to clarify and implement instructions, including lines of authority on matters of military justice with respect to the Counsel for the Commandant. On a related issue, the Panel notes that a significant number of Marine Corps judge advocates are being used to support OGC mission sets. The Panel recommends that the Marine Corps replace these scarce officers with civilian attorneys and realign the judge advocate structure and associated educational resources to current Marine Corps requirements, including military justice, cyber, and international law.

Commander Training (Navy and Marine Corps). Commanders require, but are not currently receiving, systematic career-long education and training on military justice, operational law, and ethics. The Panel recommends that each Service review requirements for career milestone legal training for officers and senior enlisted personnel, focused on the legal requirements and challenges associated with incremental increases in leadership responsibilities. The Navy and Marine Corps legal communities must cooperatively develop standardized legal training for officers at all milestone levels that provides guidance on use of the military justice system, administrative accountability measures, and compliance with ethical standards of conduct. Commanders serving as Convening Authorities require scenario-based, lessons-learned training on military justice and ethics topics, specifically addressing unlawful command influence. Measures must be taken to ensure that, when instances of unlawful influence occur, those responsible are held accountable.

Military Justice Data Collection, Case Management, and Court Reporting Systems (Navy and Marine Corps). The DON legal community lacks modern, effective systems to simplify and streamline military justice data collection, case management,

and court reporting. Modern systems are essential to improve DON military justice system efficiency, mitigate the risks of legal errors, deliver accurate and informative responses to request for data, and enable effective trend analysis. The Panel recommends that SECNAV immediately resource the expedited acquisition of modern, secure commercial-off-the-shelf systems that are compliant with statute and Department of Defense (DoD) requirements, and coordinate with DON Chief Information Officer to expedite implementation.

1.6 IMPLEMENTATION OVERSIGHT

The Panel intends this report to support and assist the dedicated professionals in the Navy and Marine Corps legal communities in performing their duties. Barrier removal, implementation, and sustainment of these recommendations require dedicated oversight and management from outside the respective uniformed legal communities. The Panel recommends SECNAV and the Service Chiefs appoint an appropriate and timely oversight body for this purpose.

1.7 SUBMISSION OF REPORT

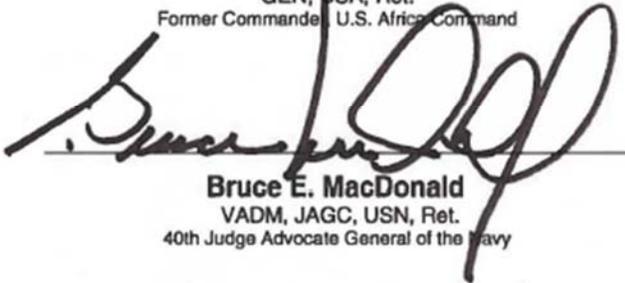
In accordance with your August 21, 2019 and August 29, 2019 memoranda establishing the Comprehensive Review and Executive Review Panel, this report is respectfully submitted.



Carter F. Ham
GEN, USA, Ret.
Former Commander, U.S. Africa Command



Hon. G. Patrick Murphy
District Judge, U.S. District Court for the Southern District of Illinois (Retired)



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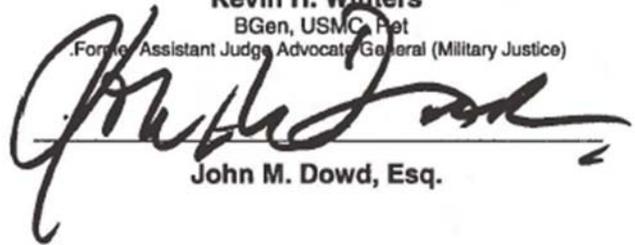
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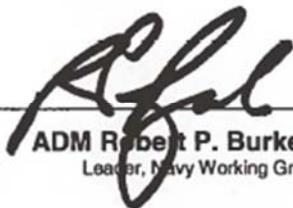
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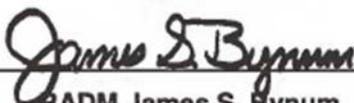
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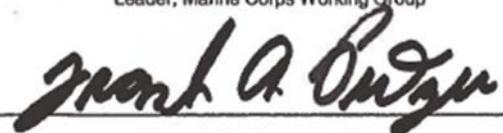
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Section 2

Review Scope and Methodology

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2. REVIEW SCOPE AND METHODOLOGY

2.1 SECNAV DIRECTION

SECNAV, in his memorandum of August 21, 2019, directed CNO and the Commandant of the Marine Corps (CMC) to conduct CRs of their respective uniformed legal communities. The memorandum directed the Navy and Marine Corps to provide detailed recommendations regarding relevant statutory and regulatory authorities, policies, resourcing and any corrective actions necessary to ensure Navy and Marine Corps uniformed legal communities are resourced and prepared to support the DON mission. SECNAV defined the scope of the review to include:

- Legal community training and professional development
- Organization and command relationships including oversight
- Efficiency and effectiveness of the delivery of legal services
- Sufficiency of staffing levels
- Evaluation of career progression
- Consideration of any potential effect of the Military Justice Act of 2016
- Any matter deemed appropriate that is directly related to the organization, leadership, oversight, and performance of the Navy and Marine Corps uniformed legal communities.

SECNAV, in his memorandum of August 29, 2019, further established an Executive Review Panel of experts and consultants with extensive experience from within the Government and private sector, to provide oversight to the Navy and Marine Corps CRs of their respective military legal communities. Panel members were appointed as Special Government Employees pursuant to 5 U.S.C. § 3109.

SECNAV directed the Vice Chief of Naval Operations (VCNO) and Assistant Commandant of the Marine Corps (ACMC) to oversee their respective services' reviews and to advise the CNO and CMC. Both services formed working groups led by experienced Flag/General Officers (non-attorneys) and comprised of both officer (attorneys and non-attorneys) and enlisted personnel, to compile and analyze information relevant to the training, professional development, career progression,

delivery of legal services, staffing levels, organization and performance of their respective judge advocate communities. In addition to information requested of and provided by the Navy JAG and SJA to CMC organizations, the Working Groups gathered:

- Personnel data from manpower authorities
- The views of supported Service and Joint commanders
- Assessments of individual judge advocates throughout the legal organizations
- Perspectives of outside organizations that regularly interact with the judge advocate communities to include various officials within the Department of Defense and the Department of Justice
- Insight gleaned from past reviews and responses of the Navy and Marine Corps to those reviews.

2.2 PREVIOUS REVIEWS

This review was informed by the work of previous studies of the Navy and Marine Corps judge advocate communities.

Section 574 of the Fiscal Year (FY) 2005 National Defense Authorization Act (NDAA) directed the Secretary of Defense to establish an independent review panel to study the relationships between military department General Counsel and Judge Advocate organizations.⁷ Relevant to the current mandate, the report recommended that the position of JAG in each Service be elevated to the rank of Lieutenant General/Vice Admiral (O-9), and that the position of SJA to CMC be elevated to the rank of Major General (O-8).⁸

Senate Report 111-35, which accompanied the FY 2010 NDAA, directed the Department of Defense Inspector General (DoD IG) to evaluate the post-trial review of courts-martial within the Navy and Marine Corps. The resultant report contained the

⁷ INDEPENDENT REVIEW PANEL TO STUDY THE RELATIONSHIPS BETWEEN MILITARY DEPARTMENT GENERAL COUNSELS AND JUDGE ADVOCATES GENERAL, LEGAL SERVICES IN THE DEPARTMENT OF DEFENSE: ADVANCING PRODUCTIVE RELATIONSHIPS 1-3 (2005) [hereinafter 574 PANEL REPORT].

⁸ *Id.* at 67.

following recommendations which have been implemented: establishing uniform post-trial processing procedures and time guidelines across the DON, authorizing and requiring RLSOs to monitor post-trial processing by independent SJAs, increasing the statutory authority of the SJA to CMC to supervise Marine judge advocates in the execution of military justice responsibilities, and requiring the JAG to provide annual military justice updates.⁹ The report further recommended the fielding of an electronic military justice case management system.¹⁰ This recommendation was partially implemented through adoption of the Case Management System (CMS), with follow-on effort to develop a comprehensive “Naval Justice Information System” (NJIS) which has suffered from numerous delays and is not yet operational.

Section 506 of the Fiscal Year 2010 NDAA directed the Secretary of Defense to appoint an independent panel (“506 Panel”) to review the Navy and Marine uniformed legal communities in order to determine the number of judge advocates required by the DON mission. Recommendations included increasing the size of the communities to 950 Navy judge advocates and 550 Marine judge advocates, providing specific statutory authority for SJA to CMC to supervise and inspect Marine judge advocates, enhancement of representation to service members within the Disability Evaluation System, and steps to build a more coherent legal community across assignments.¹¹

Since issuance of the 2011 Report of the 506 Panel, initiatives within the Navy JAG Corps such as the Military Justice Litigation Career Track and the Disability Evaluation System Counsel program have matured, as well as new legal requirements established, notably DoD-wide changes in the Sexual Assault Response Program and creation of Victims’ Legal Counsel. The Navy JAG Corps has grown by over 170 billets to support these and other efforts, with a projected strength of 940 judge advocates in FY 24. The Marine Corps response to the Congressional concerns that resulted in the 2011 review included legislation that provides the SJA to CMC statutory authority over the administration of military justice and legal assistance within the Marine Corps.

⁹ INSPECTOR GEN. OF THE U.S. DEP’T OF DEF., EVALUATION OF POST-TRIAL REVIEWS OF COURTS-MARTIAL WITHIN THE DEPARTMENT OF THE NAVY 56-65 (2010) [hereinafter DOD IG REPORT].

¹⁰ *Id.* at 56.

¹¹ INDEPENDENT REVIEW PANEL TO STUDY THE JUDGE ADVOCATE REQUIREMENTS OF THE DEPARTMENT OF THE NAVY, FINAL REPORT 211-220 (2011) [hereinafter 506 PANEL REPORT].

Additionally, in 2012, the CMC directed the largest reorganization of the Marine Corps uniformed legal community in 30 years.

A matrix of recommendations from the 2005, 2010, and 2011 reviews and their status as to accomplishment is included in section 7.3.

2.3 INFORMATION GATHERING

2.3.1 Navy Working Group Summary

The Navy team was composed of officers with diverse backgrounds. A Rear Admiral (Surface Warfare) led the team, while a retired Rear Admiral (JAG Corps), three Captains (Surface Warfare, Submarine, JAG Corps), three Commanders (Human Resources, Surface Warfare, JAG Corps), one Lieutenant (JAG Corps), and one Chief Petty Officer conducted research and analysis. The team conducted site visits in multiple geographic locations to gather both quantitative and qualitative data and interview officers, enlisted, and civilian personnel regarding all CR assigned tasks. The team gathered information from the Office of the Judge Advocate General (OJAG), RLSOs, Defense Service Offices (DSOs), Victims' Legal Counsel (VLC), Type Commanders, Region Commanders, Carrier and Expeditionary Strike Group Commanders, afloat and ashore commanding officers, and their respective SJAs.

The Navy Working Group began its review by obtaining information on JAG Corps community management and health, distribution procedures, and career progression from the JAG Corps Detailer and JAG Corps Officer Community Manager. The team first visited Naval Justice School (NJS) in Newport, RI. NJS staff participated in individual and group interviews to provide information on officer and enlisted accession processes, baseline training, professional and leadership development, milestone training, and course curricula. NJS staff members, based on their past experience, also provided information on JAG Corps career paths and specialty legal practices, as well as JAG Corps organization.

The Working Group next visited Navy JAG Corps offices in Washington, DC, Annapolis, MD, San Diego, CA and Norfolk, VA. During these multi-day visits, team members interviewed officer, enlisted, and civilian staff to assess command

organization, workload, manning, and caseload. The team also solicited information on working relationships between attorneys and paralegals. Working Group members closely examined all aspects of JAG Corps legal services and interviewed staff members assigned to each practice area in various offices. During the course of Navy Working Group visits to JAG Corps offices, team members interviewed operational and afloat commanders to solicit their views on the effectiveness and efficiency of the legal support provided by the JAG Corps community.

2.3.2 Marine Corps Working Group Summary

The Marine Corps assembled a team of officer and enlisted personnel with diverse career paths. The team consisted of a Major General (Infantry), a Brigadier General (Aviator), three Colonels (Judge Advocates) two Lieutenant Colonels (one Judge Advocate and one post-command Supply Officer), one U.S. Coast Guard Commander (Judge Advocate), one Major (Judge Advocate), a First Lieutenant (Adjutant), a Master Sergeant (Legal Services Specialist), and a government civilian from Deputy Commandant, Combat Development & Integration.

The Marine Corps Working Group began by studying past reviews and the U.S. Marine Corps' (USMC) responses to them. That context, set out in Section 5, is vital to a full understanding of the USMC's current findings and recommendations.

The Marine Corps Working Group gathered information and data from across a broad spectrum of sources, including other Services and Government agencies, industry, and military law experts external to the Marine Corps legal community. The Working Group assembled, developed, and reviewed data from the following sources:

- Marine General Officer Survey. The Working Group developed a 12-question survey for Marine General Officers to rate their satisfaction on a broad range of legal services. The Working Group viewed their input as essential in gathering information about the overall efficiency and effectiveness of the provision of legal support within the Marine Corps. The Working Group Leader presented the questionnaire during the September 2019 General Officer Symposium. Forty-six Generals completed the survey. The Executive Summary of the data is cited

throughout this report.¹²

- Marine Corps Legal Community Survey. The Working Group invited approximately 1,050 members of the uniformed Marine Corps legal community to complete an online survey. The Marine Corps legal community survey (internal survey) included 35 substantive questions and three demographic questions. Of the 35 substantive questions, 17 asked respondents to rate a specific issue on a scale from 1 to 5 (“Very Dissatisfied,” “Dissatisfied,” “Neutral,” “Satisfied,” “Very Satisfied”) or “No Opinion.” The 18 remaining questions called for open-ended, narrative responses. The Working Group received 341 “Full Responses” (32% completion rate) and 196 partial responses, for a total of 537 responses (51% response rate). The survey demographics had the following completion rates: 64% Active Duty Officers, 16.4% Active Duty Enlisted personnel, 16% Reserve Officers, and 2.35% Warrant Officers. The survey data, with extensive narrative comments, spanned 332 pages.

- Survey of Civilian Experts. The Working Group sought input from nine military law experts not currently affiliated with the Marine Corps.¹³ Eight of the nine offered narrative responses that covered a wide array of subjects related to the efficacy of legal service delivery, litigation practices, career progression, training, structure, and professional responsibility issues in the Marine Corps.

- Legal Community Leadership. The Working Group leader conducted in-person interviews with the SJA to CMC, two previous SJAs to CMC, the Assistant Judge Advocate General (AJAG) for Military Law, the Chief Defense Counsel for Military Commissions, and the Chief Defense Counsel of the Marine Corps.

- The Working Group leader conducted in-person interviews with the Counsel for the Commandant.

- Marine Corps Senior Leaders. The Working Group leader conducted in-person interviews with the Director of the Marine Corps Staff and the Deputy

¹² Marine Corps Working Group, General Officer Survey Results – Final Update (Sept. 2019) (on file).

¹³ The team contacted nine external sources. See U.S. DEP’T OF DEF., MANUAL 8910.01-M, DoD INFORMATION COLLECTIONS MANUAL: PROCEDURES FOR DoD PUBLIC INFORMATION COLLECTIONS, vol. 2, 20 (CH-2, Apr. 19, 2019) (requiring approval from the Office of Management and Budget for information obtained by public collection from more than nine persons) [hereinafter DOD 8910.01-M].

Commandant for Manpower and Reserve Affairs.

2.3.3 Executive Review Panel Sessions

During the course of Navy and Marine Corps efforts, Panel members conducted six collaborative forums and participated in twice-weekly conference calls in support of review of Working Group presentations and panel deliberations. Panel actions included discussions with:

- The Navy JAG and the SJA to CMC
- Commander, Naval Legal Service Command (CNLSC)
- The 31st Chief of Naval Operations
- A senior Consolidated Disposition Authority (CDA)
- Senior officer representatives from the Army and Air Force judge advocate communities
- The Senior Enlisted Advisors of the Army, Air Force, Navy, and Marine Corps legal communities
- Joint Staff and U.S. Fleet Forces Command SJAs
- The Naval Criminal Investigative Service Division Chief for Investigations and Operations Compliance
- Commanding Officer of NJS
- Navy and Marine Corps Rules Counsel (pertaining to judge advocate Professional Responsibility programs).

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Section 3

Current Posture of the Navy JAG Corps

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3. CURRENT POSTURE OF THE NAVY JAG CORPS

3.1 INTRODUCTION

The Department of the Navy's mission is to recruit, train, equip, and organize to deliver combat ready naval forces to win conflicts and wars while maintaining security and deterrence through sustained forward presence.¹⁴

Navy Core Values of ***Honor, Courage, and Commitment*** guide Sailors at all levels. The Navy Judge Advocate General's Corps (JAG Corps) provides commanders, as well as individual Sailors, with legal advice in alignment with these values and the rule of law. In providing legal services, the Navy JAG Corps legal community must continually evaluate how to improve the delivery of the legal services the Navy needs and do so with a sense of urgency. This requires discipline, integrity and focus on people, capabilities, and processes.

Assessment of the current posture of the Navy JAG Corps contained in this section follows the Secretary of the Navy's direction of August 21, 2019 to review how the Navy JAG Corps is organized, manned, trained and equipped to support the Department of the Navy's mission.

3.2 MISSION & FUNCTIONS OF THE NAVY JAG CORPS

Secretary of the Navy Instruction (SECNAVINST) 5430.27E sets forth the responsibilities of the Judge Advocate General of the Navy (JAG). This instruction reflects both the JAG's statutory authorities¹⁵ as well as specific authorities assigned by the Secretary as a matter of Departmental regulation.

The JAG is responsible for providing and supervising the provision of legal advice and related services throughout the Department of the Navy (DON) in the areas of military justice, national security law, naval administration, and legal assistance.¹⁶

¹⁴ U.S. DEP'T OF NAVY, SECNAV MISSION, VISION, & PRIORITIES STATEMENT (2019).

¹⁵ See, e.g., 10 U.S.C. §§ 806, 1044, 1044e, 8088 (2018).

¹⁶ Specific responsibilities are further detailed and defined in U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5430.27E, RESPONSIBILITY OF THE JUDGE ADVOCATE GENERAL OF THE NAVY AND THE STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS FOR SUPERVISION AND PROVISION OF CERTAIN LEGAL SERVICES, para. 1 (May 13, 2019) [hereinafter SECNAVINST 5430.27E].

The JAG also advises the CNO in formulating and implementing policies and initiatives pertaining to legal services within the Navy, and acts as the Office of the CNO (OPNAV) point of contact for CNO operating forces and shore activity commanders to ensure consistency of legal compliance, guidance, policies, procedures, objectives, training, and support. The JAG also serves as the Chief of, and capability sponsor for, the Navy JAG Corps, responsible for maintaining the community and determining the best possible allocation of available JAG Corps community assets.

3.3 ORGANIZATION OF THE NAVY JAG CORPS LEGAL COMMUNITY

The DON is unique among the Military Departments in that it oversees two Services, the Navy and Marine Corps. This has resulted in organizational constructs to provide legal services and support at the Departmental level as well as within each Service.

3.3.1 Legal Organization at the DON Level

Judge Advocate General of the Navy. The JAG is established by Section 8088 of Title 10, U.S. Code, and serves under the direction of the Secretary of the Navy as a member of the Office of the Secretary of the Navy.¹⁷ The JAG's duties are defined in statute and DON regulation, as outlined in section 3.2.

Deputy Judge Advocate General. The DJAG is established under Section 8089 of Title 10, U.S. Code. The DJAG is authorized to perform the duties of the JAG during the absence or disability of the JAG.

Assistant Judge Advocate General Positions. Assistant Judge Advocate General of the Navy (AJAG) positions are also established in Section 8089 of Title 10, U.S. Code. The statute provides for the detail of both Navy and Marine Corps judge advocates to AJAG positions. As directed by the Secretary, an AJAG is authorized to perform the duties of the JAG during the absence or disability of the JAG and DJAG.

Office of the Judge Advocate General. The JAG, DJAG, and AJAGs lead the Office of the Judge Advocate General (OJAG). Consistent with its DON mission, OJAG

¹⁷ 10 U.S.C. § 8014 (2018).

is manned by Navy and Marine Corps judge advocates, civilian attorneys practicing under the cognizance of the JAG, and civilian support personnel. Twelve percent of Navy JAG Corps judge advocates serve within OJAG (106 judge advocates). Thirty-seven percent of JAG Corps civilians serve within OJAG (144 civilian employees, including attorneys and support personnel).

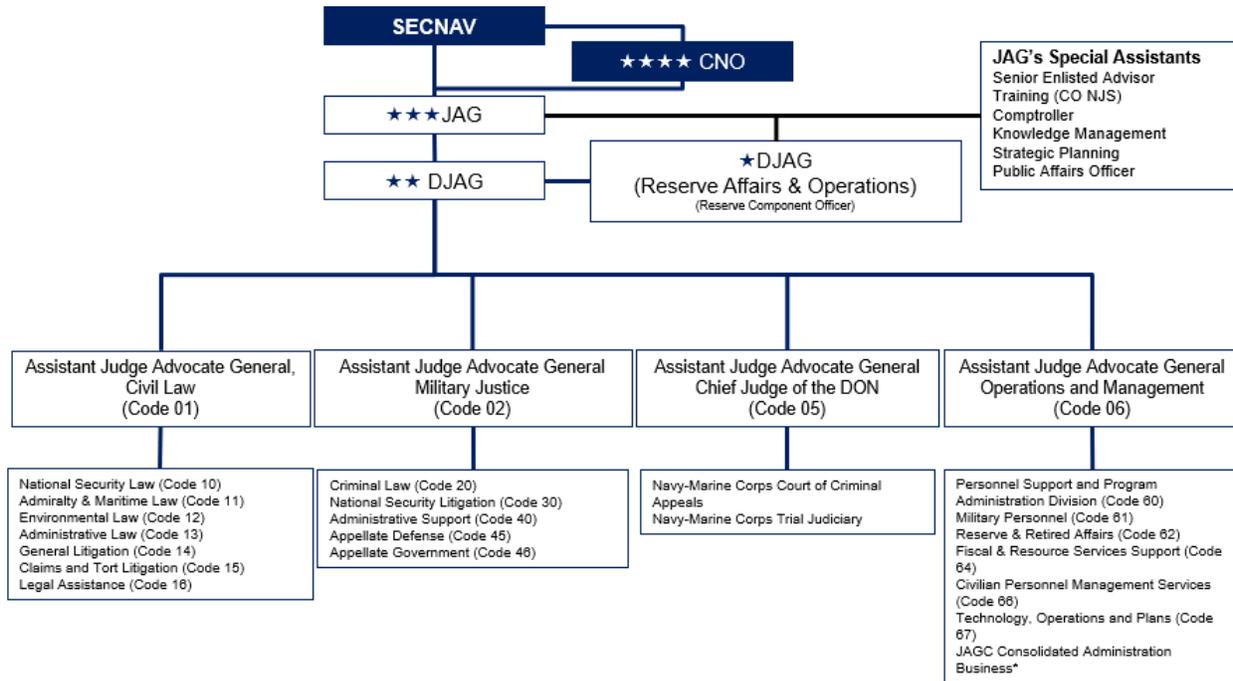


Figure 1: Organization of the Office of the Judge Advocate General.

Four AJAG positions have been designated by the Secretary to assist in overseeing the operations of OJAG: the AJAG for Civil Law, the AJAG for Military Justice, the Chief Judge of the DON, and the AJAG for Operations and Management.¹⁸

The AJAG for Civil Law leads those OJAG Codes providing advice and support in the followings areas: national security law, admiralty law and associated litigation, environmental law, administrative law (to include military personnel actions, Government ethics, administrative investigations, litigation associated with military personnel actions, Freedom of Information Act (FOIA) policy, appeals, and associated litigation), tort claims and associated litigation, legal assistance, as well as advising and representing Sailors and Marines in the Integrated Disability Evaluation System.

¹⁸ U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 1800.3A, RETIREMENT OF THE ASSISTANT JUDGE ADVOCATE GENERAL OF THE NAVY (Oct. 5, 2018) [hereinafter SECNAVINST 1800.3A].

The AJAG for Military Justice leads OJAG Codes that review Navy and Marine Corps records of court-martial proceedings, provide appellate representation to Sailors and Marines who have been convicted at court-martial, provide appellate representation of the Government’s interest in court-martial appeals, formulate military justice policy and procedures within the Navy and Marine Corps, and support the handling of national security litigation and the attendant classification issues in such cases.

The Chief Judge of the DON leads the worldwide “Judicial Enterprise,” to include functions of both the U.S. Navy–Marine Corps Court of Criminal Appeals and the Navy and Marine Corps Trial Judiciary.

The AJAG for Operations and Management leads OJAG personnel responsible for business functions required to support OJAG and the Navy JAG Corps community. This includes military and civilian personnel resource management, financial management, facilities management, information technology and operational planning.

OJAG also has several Special Assistants that support the JAG in execution of responsibilities at both the Department and Service (Navy) level, to include Inspector General, Knowledge Management, Public Affairs, Strategic Planning, Training, and Senior Enlisted Advisor.

3.3.2 Legal Organization Under the Chief of Naval Operations

JAG. As noted previously, the JAG serves as Special Assistant for Legal Services to the CNO (OPNAV N09J) to advise and assist the CNO in formulating and implementing policies and initiatives pertaining to legal services within the Navy.¹⁹ The JAG acts as the OPNAV point of contact for CNO operating forces and shore activity commanders to ensure consistency of legal compliance, guidance, policies, procedures, objectives, training, and support.²⁰

DJAG/CNLSC. DJAG reports to the CNO as CNLSC, a U.S. Navy Echelon II command responsible for providing and overseeing Navy-wide legal services, including prosecution and defense, legal services to individuals and legal support and training to

¹⁹ U.S. DEP’T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 5450.352A, MISSION, FUNCTIONS, AND TASKS OF THE OFFICE OF THE CHIEF OF NAVAL OPERATIONS, para. 7.c.(27) (Apr. 23, 2018).

²⁰ SECNAVINST 5430.27E, *supra* note 16, para. 1.f.

commands worldwide. DJAG also reports to the JAG on all matters affecting the provision of legal services to the Navy.²¹

NLSC Headquarters. The NLSC Headquarters element is composed of three separate Chiefs of Staff (CoS), each representing a core functional mission of NLSC, who assist CNLSC in overseeing mission execution. These are: CoS for Region Legal Service Offices (RLSOs), CoS for Defense Service Offices (DSOs) and CoS for Victim Legal Counsel (VLC). A Trial Counsel Assistance Program (TCAP) and Defense Counsel Assistance Program (DCAP) are overseen by CoS RLSO and CoS DSO respectively. TCAP²² and DCAP²³ support their respective Chiefs of Staff and NLSC field offices by providing advice and assistance to trial and defense counsel throughout every phase of court-martial litigation to include motion drafting, expert witness preparation, trial strategy, post-trial matters and professional responsibility issues.

Both the Commanding Officer (CO) of Naval Justice School and the NLSC Inspector General report to CNLSC. Reflecting a longstanding blending of OJAG and NLSC Headquarters, the AJAG for Operations and Management provides business services and support to the NLSC Headquarters element as well as the component parts of the NLSC organization.

²¹ U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 5405.189D, MISSION, FUNCTIONS, AND TASKS OF NAVAL LEGAL SERVICE COMMAND (Mar. 2019).

²² U.S. DEP'T OF NAVY, COMMANDER, NAVAL LEGAL SERV. COMMAND INSTR. 5800.1G, NAVAL LEGAL SERVICE COMMAND MANUAL, ch. 15 (Feb. 25, 2013) [hereinafter CNLSCINST 5800.1G].

²³ *Id.* at ch. 12.

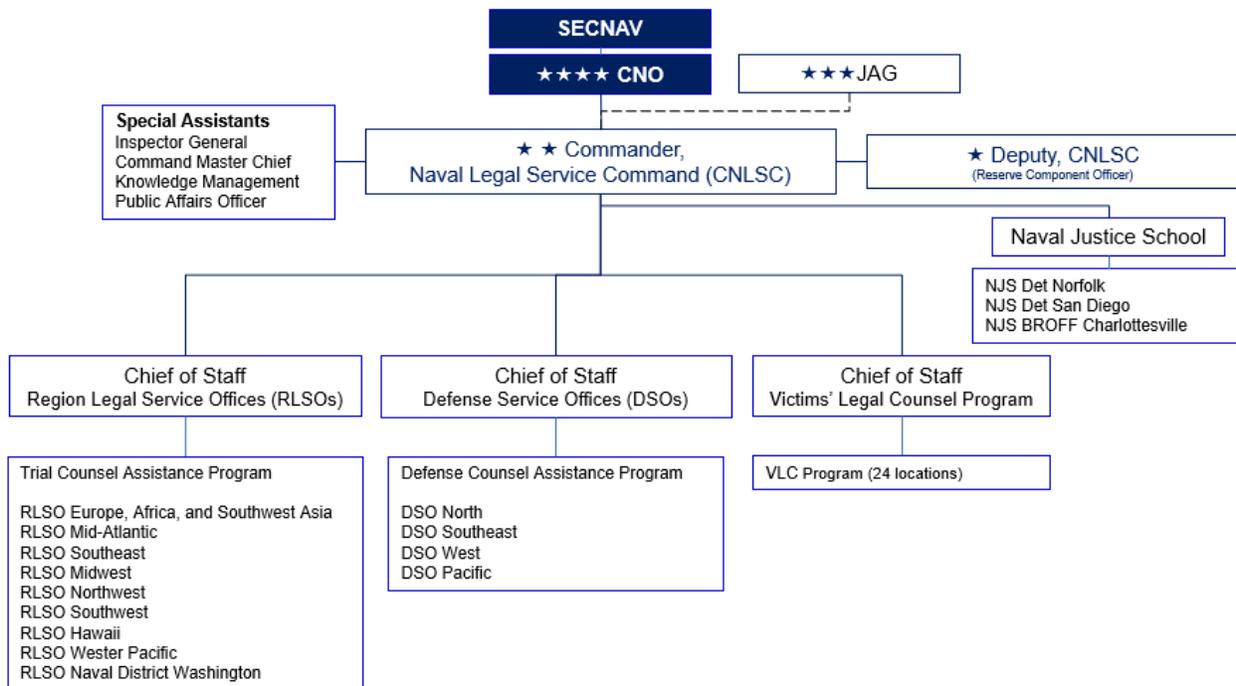


Figure 2: Organizational chart for Naval Legal Service Command.

RLSOs. Nine RLSO commands, with offices in 55 CONUS and OCONUS locations, provide prosecution, command advice and legal assistance services to the Fleet and shore establishment. As the result of a 2005 CNO-approved alignment, Navy Region, installation and certain other designated staff judge advocate (SJA) billets are consolidated under the administrative control of the RLSOs. Additionally, Command Services Departments at RLSOs provide advice to commands in the RLSO's area of responsibility (AOR) that do not have a dedicated judge advocate. All RLSOs with the exception of RLSO Midwest have an AOR that mirrors the AOR of a Navy Region Commander under Commander, Navy Installations Command (CNIC).²⁴

DSOs. Four DSO commands, with offices in 18 CONUS and OCONUS locations, provide representation and advice to military personnel pending courts-martial as well as other disciplinary or administrative proceedings.

²⁴ In 2014, Navy Region Midwest was disestablished and aligned under Navy Region Mid-Atlantic. However, the volume of administrative and legal matters associated with Naval Service Training Command, Recruit Training Command and other training commands on board Naval Station Great Lakes warrants the presence of a full-service Region Legal Service Office.

VLCs. Five Officers-in-Charge oversee VLC services at 23 CONUS and OCONUS locations. These services include representation and advice to victims of sexual offenses.²⁵

The component parts of NLSC – Headquarters, RLSOs, DSOs, VLC, and NJS – are manned with 48% of the Navy JAG Corps judge advocate strength (450), and 38% of Legalmen end strength (193).

Independent Staff Judge Advocates and Legalmen. NLSC is not the sole provider of legal services and support to the U.S. Navy. A significant number of Navy judge advocates and Legalmen are embedded with the Fleet/Joint Force, comprising 38% of judge advocates (358) and 61% of Legalmen (314). Most of these billets are within dedicated SJA offices, and are aligned with and provide direct support to commanders.

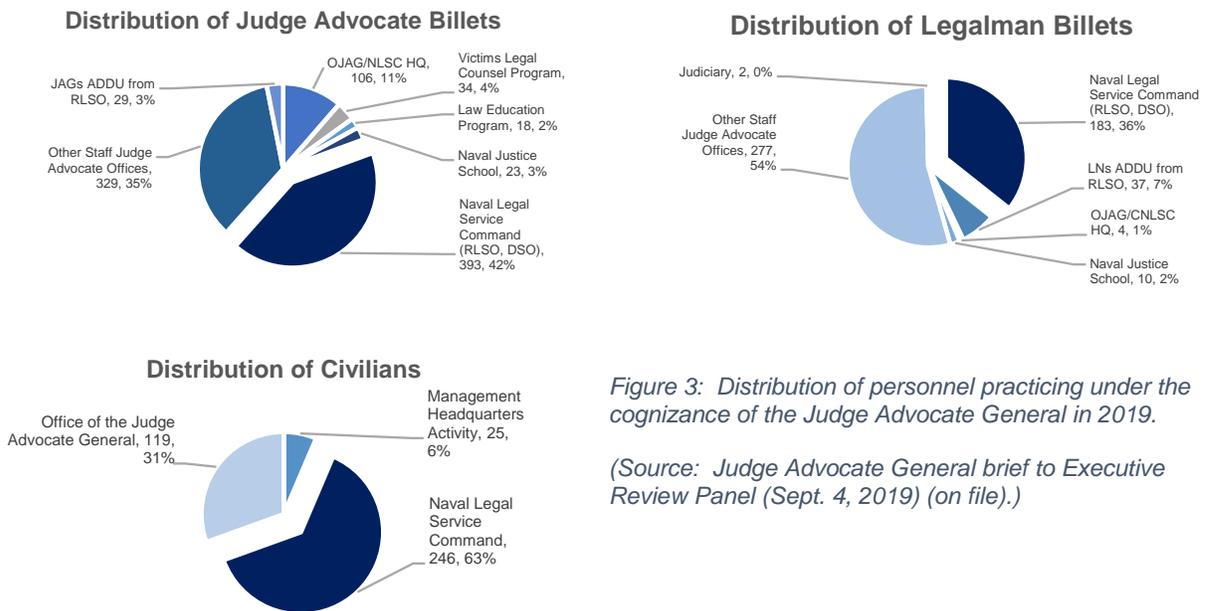


Figure 3: Distribution of personnel practicing under the cognizance of the Judge Advocate General in 2019.

(Source: Judge Advocate General brief to Executive Review Panel (Sept. 4, 2019) (on file).)

²⁵ U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5810.3A, NAVY VICTIM'S LEGAL COUNSEL PROGRAM MANUAL (Apr. 23, 2018) [hereinafter JAGINST 5810.3A].

3.3.3 Assessment Processes for the JAG Corps Community

The NLSC Inspector General inspects every command within NLSC on a two-year cycle. Inspection teams, which include subject matter experts in each substantive service area of the command, conduct inspections pursuant to JAG's responsibilities under Article 6 of the UCMJ,²⁶ as well as review administrative areas of responsibility.²⁷ Prior to the inspection, RLSO, DSO, and VLC leaders complete a self-assessment in response to questions prepared by the inspection team. The inspectors review those responses and conduct their own assessment of these areas, providing informal feedback during the site visit. A detailed report is prepared and provided to the unit CO and CNLSC.²⁸ Although the Article 6 inspection process is intended as the "primary means to evaluate the effectiveness of OJAG and NLSC activities and non-NLSC SJA offices," the process as implemented has inspected NLSC activities only.²⁹

Article 6 inspections address the general quality of legal services provided, as well as command compliance with Navy and JAG Corps requirements. This is accomplished through work product spot checks, interviews with command members and interviews with stakeholders, such as supported commanding officers, Naval Criminal Investigative Service (NCIS), Region Commanders, Military Judges and Sexual Assault Response Coordinators. However, Article 6 inspections are not a substitute for either regular system-wide reviews or reviews of specific cases. As an Article 6 inspection is limited in scope to one command at a time, the process does not address broader systemic issues in the JAG Corps. Also, since the process is meant to provide general feedback, it is not an in-depth assessment of performance in individual cases.

²⁶ 10 U.S.C. § 806 (2018).

²⁷ U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN./COMMANDER, NAVAL LEGAL SERV. COMMAND INSTR. 5040.1B, COMMAND EVALUATION, ARTICLE 6 LEGAL OFFICE ASSESSMENTS, AND MANAGEMENT INTERNAL CONTROLS (May 17, 2013) [hereinafter JAG/CNLSCINST 5040.1B].

²⁸ Naval Legal Service Command Inspector General, Article 6 Inspection Reports (2018-2019) (on file) (The Navy Working Group reviewed reports from Article 6 inspections of seven NLSC commands) [hereinafter Review of Article 6 Reports].

²⁹ JAG/CNLSCINST 5040.1B, *supra* note 27, para. 8.a.(2). In 2020, the Article 6 Inspection Program will inspect all RLSO, DSO, and VLC commands, as well as, for the first time, two independent SJA offices. The Article 6 program does not extend to OJAG elements. U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN./COMMANDER, NAVAL LEGAL SERV. COMMAND NOTICE 5040, FY-20 ARTICLE 6 INSPECTION PROGRAM (Sept. 22, 2019) [hereinafter JAG/CNLSCNOTE 5040].

In addition to Article 6 inspections, NLSC commands are also required to complete standard Navy assessments, including annual Defense Equal Opportunity Management Institute (DEOMI) command climate surveys and reviews under the Navy-wide Managers' Internal Control (MIC) program.³⁰ RLSO, DSO, and VLC leadership provide quarterly reports to their respective CoS that include charts tracking the compliance of each of their major programs and departments.

Supplementing these regular inspections, the Navy JAG Corps has conducted more than 20 internal and external assessments of various aspects of JAG Corps organization, manning, and operations over the past decade. Outside organizations, including Naval Postgraduate School (NPS), Center for Naval Analyses (CNA), US Fleet Forces (USFF) Command and the DoD and DON Inspector General, have conducted or facilitated over a dozen of these studies. Assessments underway include a CNA study examining OJAG/NLSC Headquarters structure and functions, as well as NPS-facilitated Strategically Aligned Leadership Team (SALT) and Legal Community Assessment workshops. Some assessments were externally directed, for example, post-trial processing delays resulted in a Congressional-directed DoD IG review in 2010, but most were self-initiated by the JAG to address a specific issue.

During Working Group interviews, some senior members of the OJAG headquarters staff were familiar with the findings of these numerous assessments ordered by JAG. However, few other judge advocates knew of the studies.³¹ Communication with the greater JAG Corps is generally accomplished through memoranda distributed by email or posted to a JAG Corps SharePoint site. General narrative descriptions of assessments are available, but not accounts of lessons learned and initiatives implemented.

3.3.4 Organizational Issues

The Navy Working Group noted the following issues in their review of the Navy JAG Corps legal community's provision of Departmental and U.S. Navy legal services:

³⁰ See, e.g., U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN./COMMANDER, NAVAL LEGAL SERV. COMMAND NOTICE 5040.2, MANAGERS' INTERNAL CONTROL PROGRAM (Jan. 26, 2015).

³¹ Working Group site visit to OJAG and supported elements (Sept.-Oct. 2019).

(1) Relationship Between OJAG and NLSC.

(a) Senior Leader Relationships. Because JAG and DJAG/CNLSC advise both the Secretary and the CNO, there has been confusion over the relative roles and limitations in advising these principals regarding military justice matters. This uncertainty over the JAG and DJAG/CNLSC role in military justice also extends to communications with subordinate convening authorities, as well as communications with and between the SJAs advising commanders. The finding of unlawful influence in the *U.S. v. Barry* case illustrates this issue. Navy Region Commanders convene the vast majority of general courts-martial in the Navy. They cite a lack of legal guidance from JAG and senior Navy leadership after *Barry* as an issue for themselves and their SJAs in the administration of military justice.³²

(b) Lack of Distinction between OJAG and NLSC Headquarters. OJAG and NLSC headquarters elements are blended, with OJAG Codes supporting NLSC headquarters operations as well as serving as subject matter experts and advisors to NLSC activities and independent SJA offices. This blending of roles and responsibilities may result in manpower efficiencies, but causes blurred lines of authority and responsibility. For example, the organizational alignment of counsel providing personal representation to Sailors and Marines in the Disability Evaluation System under the OJAG Directorate that oversees legal assistance policy has led to confusion within the Secretary's Council of Review Boards over whether communications from OJAG offer the position of JAG or a form of advocacy benefiting individual clients.³³

(c) Ongoing CNA Study. The JAG initiated a Center for Naval Analyses (CNA) study specifically to consider the organizational construct of OJAG and NLSC Headquarters. This review is scheduled to be completed in April 2020. The statement of work requires CNA to determine current and anticipated demands on OJAG and NLSC Headquarters, identify specific constraints, assess the effectiveness of the current organization, and evaluate customer satisfaction with its efforts and adequacy of

³² Working Group interviews of Commanders for Navy Region Southwest, Navy Region Mid-Atlantic, Navy Region Japan, and Navy Region Europe/Southwest Asia (Sept. 2019). This sentiment was specifically echoed by CNIC during her Working Group interview of Oct. 11, 2019.

³³ Working Group interview of President, Physical Evaluation Board (Oct. 3, 2019).

resources. The results of this detailed study will best inform the DON in undertaking modifications to the OJAG and NLSC organizational constructs.

(2) Officers Assigned to the Secretary of the Navy's and Chief of Naval Operation's Personal Staffs. There are also additional control grade judge advocates assigned to the personal staffs of both SECNAV and CNO. These positions have direct access to the SECNAV and CNO, and assist and advise them with respect to legal matters over which the JAG, the SJA to CMC, and the General Counsel are assigned cognizance under SECNAV Instructions 5430.27E and 5430.25M.

However, there are no specific instructions or protocols regarding oversight of the legal advice provided by these judge advocates. In practice, they appear to perform many of the functions intended for the JAG and SJA to the CMC, without the benefit of the same global perspective. Oversight and approval by the JAG, SJA to CMC and General Counsel is vital to ensure consistency and accuracy of legal advice and opinions provided.

(3) RLSO Organization. Prior to 2005, NLSC executed delivery of Fleet and ashore legal services through two separate lines of command and control: Trial Service Offices (TSOs), responsible for prosecution and command services, and Naval Legal Service Offices (NLSOs), responsible for defense and legal assistance services. Staff Judge Advocate billets were assigned to the commanders they advised, and those commanders served as reporting seniors for their SJAs. In 2005, at Chief of Naval Operations direction, the RLSO organization was established, assuming the responsibilities of the TSOs and consolidating many shore establishment SJAs within the RLSO. The rationale for this realignment was to achieve personnel efficiencies and improve services to the Fleet at the Region level and allow JAG to “streamline the worldwide legal practice of the Navy Judge Advocate General's Corps.”³⁴ In 2012,

³⁴ See NAVADMIN 064/05 *supra* note 6. Later developments built upon this realignment. See, e.g., U.S. DEP'T OF NAVY, COMMANDER, NAVAL LEGAL SERVICE COMMAND INSTR. 1300.1B, FIRST TOUR JUDGE ADVOCATE PROGRAM (CH-1, Jan. 19, 2018) [hereinafter CNLSCINST 1300.1B]; U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN./COMMANDER, NAVAL LEGAL SERVICE COMMAND INSTR. 1500.1B, JUDGE ADVOCATE GENERAL'S CORPS MENTORING PROGRAM (Sept. 26, 2018) [hereinafter JAG/CNLSCINST 1500.1B]; U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN./COMMANDER, NAVAL LEGAL SERV. COMMAND INSTR. 1150.1E, RECRUITING, INTERNSHIP/EXTERNSHIP, STRUCTURED INTERVIEW, AND ACCESSIONS PROGRAMS (Oct 15, 2018) [hereinafter JAG/CNLSCINST 1150.1E].

NLSOs were realigned to four DSOs, and the legal assistance mission transferred to the RLSO, creating a separate organization focused solely on advising and defending service members in military justice and other administrative proceedings.³⁵ The VLC organization was established under NLSC in 2013. As RLSOs matured, the following observations became apparent:

(a) RLSO Missions, Tasks, and Functions. Separating defense and victims' legal counsel functions into their own organizational constructs has resulted in streamlined missions and refined command focus. In contrast, the RLSO command leadership is not only responsible for the prosecution function, but also Region and installation SJA and command services functions, and legal assistance. Each of these responsibilities represents a core JAG Corps mission. RLSOs are also the NLSC element that receives every first tour judge advocate and a large number of Legalman graduates of Naval Justice School, requiring significant leadership time and mentorship responsibilities. As of October 2019, only one RLSO executive officer was affiliated with the Military Justice Litigation Career Track (MJLCT) and no currently-serving RLSO commanding officer was MJLCT qualified.³⁶ The most experienced prosecutor at the RLSO is typically the senior trial counsel, who is responsible for directing and overseeing the prosecution of courts-martial.³⁷ This diffusion of senior leadership mission focus, and the detailing of non-MJLCT officers to RLSO leadership positions, indicates that Navy is putting itself at a prosecution disadvantage, and suggests that perhaps the prosecution function should be separately aligned to improve mission focus and performance. Further study is needed to determine the effects on judge advocate assignments and professional development, as well as the provision of command services advice to fleet and shore commands not having their own SJA.

(b) Region SJAs. Working Group interviews with judge advocates and Region Commanders reported high satisfaction with the performance of SJAs. They also

³⁵ U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS, NAVY ADMIN. MESSAGE 358/12, REALIGNMENT OF NAVAL LEGAL SERVICE COMMAND (Nov. 30, 2012).

³⁶ Officers in the MJLCT have assumed command of RLSOs in the past, but this occurs infrequently. Of the officers currently in the MJLCT, two previously served as COs of RLSOs while two previously served as executive officers of RLSOs. Five previously served as Officer-in-Charge of a RLSO detachment. Military Justice Litigation Career Track Officers (Oct. 2019) (on file).

³⁷ Email from Chief of Staff, Region Legal Service Offices (Oct. 21, 2019) (on file).

reported that while the relationship of the Region SJA reporting to the RLSO Commanding Officer with additional duty to the Region commander is working, neither judge advocates nor commanders understand why this organizational construct exists.³⁸ Working Group interviews fielded concerns regarding the relationship between the RLSO CO and the Region SJA due to the appearance and perception that the Region SJA may be influenced in advising the Region Commander given administrative alignment to the RLSO and the prosecution function.³⁹

(c) Shore Installation SJAs. Installation commanding officers reported an overall positive experience with their judge advocates, but some expressed concern over the frequent rotation of first tour judge advocates, as the constant turnover and training negatively impacted the supported command by placing continuous professional development demands on the commander, as well as a lack of legal continuity and experience built over time.⁴⁰

(4) Fleet Requirements Must Drive Organizational Structure. Fleet requirements must determine mission priorities and the implementation and communication of these priorities, both internally and externally. NLSC provides services essential to Fleet mission accomplishment. Any and all refinements to JAGC organizational structure must maximize the quality, efficiency, and timeliness of JAGC “customer service” to the commands, individual Sailors and families they serve. The top priority must be delivering the best support to the current and anticipated legal requirements of commanders and individual clients.

(5) JAG Corps Self-Assessment. Although the JAG Corps has commissioned and undergone numerous internal and external studies, there has been no formal, continuous self-assessment program put in place. An effective self-assessment

³⁸ Working Group interviews with Commander, Navy Installations Command and Region Commanders, and site visits to RLSO Southwest, RLSO Mid-Atlantic, and RLSO Naval District Washington (Sept.-Oct. 2019). “Additional duty” is a Navy term of art indicating that the RLSO commanding officer retains administrative control over the SJA for the purposes of various Navy requirements, most significantly in evaluation of performance, but the SJA operationally reports to the Region commander in providing direct legal advice and services.

³⁹ Working Group site visits to RLSO Southwest, DSO West, RLSO Mid-Atlantic, and DSO Southeast (Sept. 2019).

⁴⁰ Working Group site visits to RLSO Naval District Washington, RLSO Mid-Atlantic, and supported installations (Sept. 2019).

program would clearly identify the Navy's requirements for the JAG Corps, determine whether the JAG Corps is meeting those requirements, identify the standard used to measure success, and share lessons learned with members of the JAG Corps in a systematic manner. Similar to other Navy communities, the JAG Corps needs to inculcate introspection as a principled means of learning and improvement. While JAG Corps self-assessment may at times be complicated by ongoing litigation, JAG Corps community leaders at every level must develop ways of mitigating that risk while supporting self-reflection, analysis and community-wide discussion to achieve continuous learning and improvement.

(a) Recurring OJAG Self-Assessment Process. At the DON level, there is no routine, systemic, defined manner in which the delivery and quality of legal services and support provided by OJAG is assessed.

(b) NLSC Article 6, UCMJ Process. The Article 6 inspection process is not effective for determining if, and by what standard, NLSC units succeed in delivering legal services. Some aspects of the Article 6 process examine substantive legal work product and evaluate the delivery of legal services, in addition to providing a compliance-based inspection. However, the Article 6 process is too narrow to address systemic issues and too broad to assess individual cases. While the results of Article 6 inspections are reviewed at the command level, and are available to other commands, common lessons are not disseminated throughout NLSC in a deliberate manner. Further, as Article 6 inspections focus on an entire command, they are ill-suited to assess a particular case or incident. Future inspections must leverage assessment “best practices” and performance metrics utilized by other military/civilian legal service organizations.

(c) Assessment of Independent SJAs. Assessment of legal services and support provided by independent SJA Offices has not been conducted by JAG nor are supervisory SJAs regularly and systemically assessing their delivery of legal services or that of subordinate SJA Offices and activities.⁴¹

⁴¹ This is contrary to JAG/CNLSCINST 5040.1B, *supra* note 27, para. 8.a.(2), which provides that the “Article 6 Inspection process [is] the primary means to evaluate . . . non-NLSC SJA offices.”

3.4 MANNING OF THE NAVY JAG CORPS LEGAL COMMUNITY

3.4.1 Judge Advocates

Current Strength. As of September 30, 2019, there were 935 active duty judge advocates for an Officer Programmed Authorization (OPA) of 938 funded billets.⁴² The Navy judge advocate inventory is planned to increase to 940 in FY 24.⁴³ The number of Navy judge advocates is at its highest point in the past twenty years, but still below the 950 recommended in the 506 Panel.⁴⁴ As of October 2019, 87 judge advocates are affiliated with the MJLCT to fill 63 MJLCT billets.⁴⁵

Recruiting. The JAG Corps manages and resources a recruiting program that draws approximately 650 applicants per year from several applicant pools,⁴⁶ to access 55-75 new judge advocates per year.⁴⁷ The four sources of judge advocate recruitment are: students currently in law school (Student Program), candidates who have passed the bar and are practicing attorneys (Direct Appointment Program), the Navy officer community (Law Education Program) and the Navy enlisted community (In-service Procurement Program).

Approximately three-quarters of judge advocates commission into the JAG Corps directly from law school.⁴⁸ The typical applicant will apply for a professional recommendation in the applicant's second or third year of law school. If the applicant receives a "professional recommendation" from a selection board convened by the JAG, he or she may apply for a Navy commission through their local recruiting office. Over

⁴² Data provided by Navy Personnel Command (Oct. 23, 2019) (on file).

⁴³ Working Group brief to Executive Review Panel (Oct. 7, 2019) (on file) (containing data from Navy Personnel Command).

⁴⁴ 506 PANEL REPORT, *supra* note 11, at 211-220.

⁴⁵ Military Justice Litigation Career Track Officers (Oct. 2019) (on file). Of these, 12 are Captains, 28 are Commanders or Commander Selects, 38 are Lieutenant Commanders or selected for Lieutenant Commander, and nine are senior Lieutenants.

⁴⁶ From FY 16 to FY 19, the number of applicants across sources ranged from 572 to 682. Off. of Judge Advocate Gen., Mil. Personnel (Code 61), Recruiting and Diversity Data Call Brief (Sept. 12, 2019) (on file) [hereinafter Recruiting and Diversity Data Call Brief].

⁴⁷ The FY 19 accessions quota was 73 judge advocates, however, it is set to decrease to 58 judge advocates in FY 20 and 55 judge advocates in FY 21. This is due to current inventory meeting or exceeding OPA. Working Group brief to Executive Review Panel (Oct. 7, 2019) (on file) (containing data from Navy Personnel Command).

⁴⁸ Working Group brief to Executive Review Panel (Sept. 5, 2019) (on file) (containing data from Navy Personnel Command).

the past four years, selection boards gave professional recommendations to 13-19% of applicants.⁴⁹ If the Student Program applicant then successfully completes the Navy recruit screening and accession process, the officer attends Officer Development School (ODS) and NJS before being assigned to his or her first professional assignment as a First-Tour Judge Advocate (FTJA). The Student Program officer will enter ODS as an Ensign but promote to Lieutenant Junior Grade at the beginning of Naval Justice School, receiving up to three years of constructive service credit for law school.⁵⁰

The Direct Appointment Program targets licensed, practicing attorneys. A selection board convened by the JAG meets once per year. Over the past four years, the Board gave professional recommendations to between 6% and 15% of applicants.⁵¹ Like candidates in the Student Program, an applicant to the Direct Appointment Program separately applies for a commission through their local Navy recruiting office. If qualifying for and receiving a commission, the officer attends ODS and NJS before beginning their service as a FTJA. Direct Appointment Program officers start with slightly higher seniority than their Student Program counterparts, beginning ODS at the rank of Lieutenant Junior Grade.⁵²

Through the Law Education Program (LEP) and In-Service Procurement Program (IPP), currently serving Navy officers and enlisted Sailors may apply for selection to attend law school with Navy funding, while continuing to receive all pay and benefits, before commissioning into the JAG Corps upon graduation.⁵³ To apply for the LEP, an officer must have at least two years of active service, but no more than six years of service at the time he or she would start law school.⁵⁴ While all officers may apply for LEP, the time-in-service requirements in some warfare communities, for

⁴⁹ Recruiting and Diversity Data Call Brief, *supra* note 46.

⁵⁰ *Path of a JAG Officer*, U.S. NAVY JUDGE ADVOCATE GEN. CORPS, https://www.jag.navy.mil/careers_/careers/jagpath.html (last visited Oct. 18, 2019).

⁵¹ Recruiting and Diversity Data Call Brief, *supra* note 46.

⁵² *Path of a JAG Officer*, *supra* note 50.

⁵³ *Law Education Program*, U.S. NAVY JUDGE ADVOCATE GEN. CORPS, https://www.jag.navy.mil/careers_/careers/opportunities_lep.html (last visited Oct. 18, 2019); *In-service Procurement Program*, U.S. NAVY JUDGE ADVOCATE GEN. CORPS, https://www.jag.navy.mil/careers_/careers/opportunities_ipp.html (last visited Oct. 18, 2019). Enlisted Sailors who already have law degrees may also apply for a commission as a judge advocate through the IPP. These Sailors would not be reimbursed for their legal education.

⁵⁴ *Law Education Program*, *supra* note 53.

example, aviation, may exclude officers with lengthy obligated service requirements. On average, there are approximately 20 applicants for the LEP per year, from which five officers are selected by a board convened by the JAG. On average, one enlisted Sailor is selected for the IPP each year from approximately 20 candidates.⁵⁵ IPP candidates may have no more than ten years of service. Sailors from any rating may apply, provided they have a bachelor's degree and hold the paygrade of E-5/6/7. Officers commissioning in the JAG Corps through the LEP proceed directly to NJS. Their rank will be determined based on time served, with most entering the JAG Corps as senior Lieutenants and eligible for promotion to Lieutenant Commander after only one JAG Corps tour of duty. An officer commissioning through IPP enters ODS as a Lieutenant Junior Grade, followed by initial NJS training.⁵⁶

The Military Personnel Division of OJAG (Code 61) manages the recruiting process from OJAG, with support and execution of the mission by NLSC commanding officers. The COs of each RLSO and the CO of NJS coordinate recruiting in their respective areas of responsibility (AOR).⁵⁷ Personnel from these commands visit every American Bar Association accredited law school each year. A structured interview by two Navy judge advocates, including one control grade officer,⁵⁸ is conducted for each applicant. As part of the recruiting process, the JAG Corps also conducts an internship program for law school students.⁵⁹

⁵⁵ Recruiting and Diversity Data Call Brief, *supra* note 46.

⁵⁶ In-Service Procurement Program Handout, U.S. NAVY JUDGE ADVOCATE GEN. CORPS, https://www.jag.navy.mil/careers_/careers/docs/IPP_Handout.pdf (last visited Oct. 18, 2019).

⁵⁷ Responsibility is assigned to "NLSC Commanding Officers," but DSO commanding officers are given a supporting role. In practice, RLSOs are assigned to coordinate recruiting at 183 law schools throughout the United States. Naval Justice School is assigned 24 law schools in New England. JAG/CNLSCINST 1150.1E, *supra* note 34; *Guidance on Obtaining a JAG Interview*, U.S. NAVY JUDGE ADVOCATE GEN. CORPS, https://www.jag.navy.mil/careers_/careers/docs/Guidance_on_Obtaining_a_JAG_Interview_Jan2018.pdf (last visited Oct. 18, 2019).

⁵⁸ Paygrades O-4 through O-6 are referred to as "control grades" because the Defense Officer Personnel Management Act (DOPMA) limits the number of officers each Armed Service may have in those paygrades. See 10 U.S.C. § 523 (2018). One of the structured interviewers must be a Commander or Captain, or a Lieutenant Commander if that officer is serving as an executive officer. JAG/CNLSCINST 1150.1E, *supra* note 34, encl. (1) sec. 301.

⁵⁹ While most interns are unpaid, some paid positions were offered to rising 3Ls in 2018 and 2019. Interns were paid at the GS-9 level for eight weeks. In 2018, paid internships were offered in six locations and the Washington, D.C. area, while in 2019 paid internships were only offered in Washington, D.C. Job Announcements dtd 28 Mar 18 and 26 Feb 19. No paid internship positions are anticipated in 2020. See *Internship & Externship Programs*, U.S. NAVY JUDGE ADVOCATE GEN. CORPS, https://www.jag.navy.mil/careers_/careers/opportunities_internship.html (last visited Oct. 23, 2019).

An analysis of applicants professionally recommended to the Navy JAG Corps in FY 16 through FY 19 shows that the Navy attracts candidates from a geographically diverse range of law schools, including law schools that have competitive admission rates. In 2019, the pools of applicants selected through the Student Program and the LEP each had an average LSAT score of 159. Those in the Direct Appointment program had an average LSAT score of 156.⁶⁰ Between 30 and 44 percent of professionally recommended applicants each year reported minority heritage. Between 37 and 53 percent of professionally recommended applicants each year were women.⁶¹

Navy Judge Advocate Accession Sources

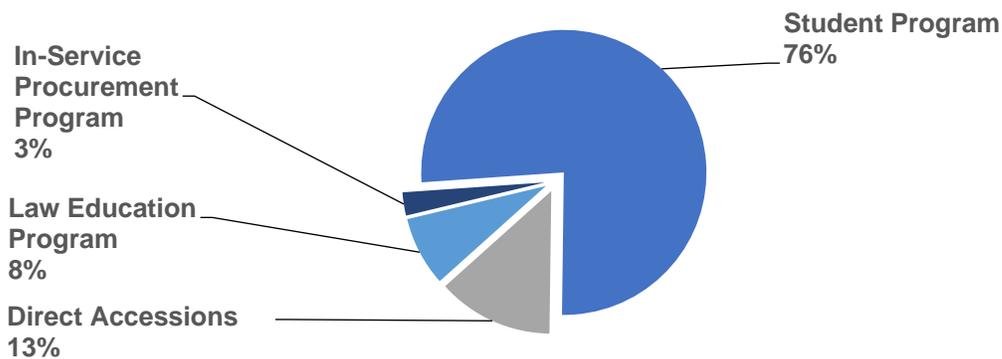


Figure 4: Accession sources of judge advocates.
 (Source: Working Group brief to Executive Review Panel (Sept. 5, 2019) (on file) (containing data from OJAG, Military Personnel Division (Code 61) and Navy Personnel Command).)

In summary, the JAG Corps maintains a robust recruiting program that currently attracts the talent needed to sustain the future of the JAG Corps. JAG Corps recruiters visiting every accredited law school in the country field five times as many applicants as

⁶⁰ Law Education Program, *supra* note 53; Student Program, U.S. Navy Judge Advocate Gen. Corps, https://www.jag.navy.mil/careers_/careers/opportunities_sp.html (last visited Oct. 23, 2019); Direct Appointment Program, U.S. Navy Judge Advocate Gen. Corps, https://www.jag.navy.mil/careers_/careers/opportunities_da.html (last visited Oct. 23, 2019). The average law school GPA of applicants in the Student Program and Direct Appointment program was 3.29, while LEPs achieved an average law school GPA of 3.34. Comparable data is not available regarding the IPP. An LSAT score of 159 represents the 77th percentile of LSAT takers, while an LSAT score of 156 represents the 67th percentile. Lisa Anthony, June 2014-February 2017 LSAT Score distributions, Law School Admission Council, <https://www.lsac.org/sites/default/files/legacy/docs/default-source/data-%28lsac-resources%29-docs/lSAT-score-distribution.pdf> (last visited Oct. 23, 2019).

⁶¹ Recruiting and Diversity Data Call Brief, *supra* note 46.

spots, resulting in a diverse group of high performing students. The Direct Appointment program provides necessary flexibility and opportunity to target specific skill sets, such as litigation experience. The investment associated with LEP and IPP are justified by the Fleet experience and perspective they bring to the JAG Corps community.

Retention. Overall, the JAG Corps retains sufficient numbers of officers to maintain force structure. A significant challenge to retention at the junior officer level is student loan debt. At the senior officer level, retention of experienced Captains (O-6) beyond minimum time in grade requirements is increasingly an issue. Both issues are discussed further below.

Retention: Community Health. “Community health” describes a given officer community’s effectiveness in accessing, retaining, promoting and force shaping its officer population in order to most effectively align inventory to the number of funded billets, called officer programmed authorizations (OPA), at each rank. Ensuring that the number of officers in a given community matches the number of funded billets is essential to meet Navy needs and officers’ career progression.

As Figure 5 illustrates, overall JAG Corps inventory is aligned to OPA requirements. Current Lieutenant inventory exceeds OPA based upon a concerted JAG Corps effort to mitigate Lieutenant Commander inventory shortages. To date, JAG Corps O-4 inventory has not yet increased to match O-4 OPA increases over the FY 14 to FY 18 timeframe. A notable difference in junior Commander inventory (relative to commander OPA) exists as a result of the FY 04 force shaping that caused a loss of 86 Lieutenants, and a corresponding inventory gap within commissioning year groups 2002 and 2003. That force shaping was instituted due to a then-abundant Lieutenant inventory (relative to Lieutenant OPA) during those fiscal years. Current JAG Corps mitigation strategies to this noted inventory gap include both the movement of some Lieutenant Commanders into promotion zone eligibility earlier than normal, and the focused retention of some senior Commanders who may be retirement eligible.

JAG Corps Captain inventory analysis reveals the majority of total inventory is composed of junior Captains (less than three years time in grade), and a shortage of Captains with 25 years of commissioned service (YCS) or more. This is attributable to

retention challenges at the senior Captain level and a community management decision to pull Commanders into Captain promotion zones at earlier YCS levels (16 or 17 YCS).

JAG Corps officer promotion zones, and other promotion policies, follow the same Defense Officer Personnel Management Act (DOPMA) rules governing other Navy officer communities. These rules mandate a pyramid-shaped officer community structure, where officers either promote to higher rank or face separation from the service (“up or out”), resulting in progressively fewer officers in the higher ranks.⁶² Eligibility for promotion occurs at discrete intervals based on years of service. In the past four years, JAG Corps officer promotion rates have exceeded the nominal rates established by DoD and DON policy.⁶³ For example, in FY 19 promotion rates for Captain, Commander, and Lieutenant Commander were 60%, 76%, and 85%, respectively.⁶⁴ These rates are attributable, in part, to addressing the inventory shortages described above. The FY 19 National Defense Authorization Act provides additional personnel management authorities (“DOPMA relief”). However, aside from the merit reorder procedure used to ensure that high-performing officers promote before their peers, the JAG Corps has yet to utilize any of these new authorities.⁶⁵

⁶² 10 U.S.C. § 523 (2018).

⁶³ U.S. DEP’T OF DEFENSE, DEP’T OF DEFENSE INSTR. 1320.12, COMMISSIONED OFFICER PROMOTION REPORTS, encl. 3 (Oct. 30, 2014). U.S. DEP’T OF NAVY, SEC’Y OF NAVY INSTR. 1420.3, DEPARTMENT OF THE NAVY COMMISSIONED OFFICER PROMOTION PROGRAM (Mar. 28, 2019).

⁶⁴ *Active Duty Officer Promotions*, NAVY PERSONNEL COMMAND, <https://www.public.navy.mil/bupers-npc/boards/activedutyofficer/Pages/default.aspx> (last visited 12 Nov 19).

⁶⁵ John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232 § 507 132 Stat. 1636, 1744 (2018).

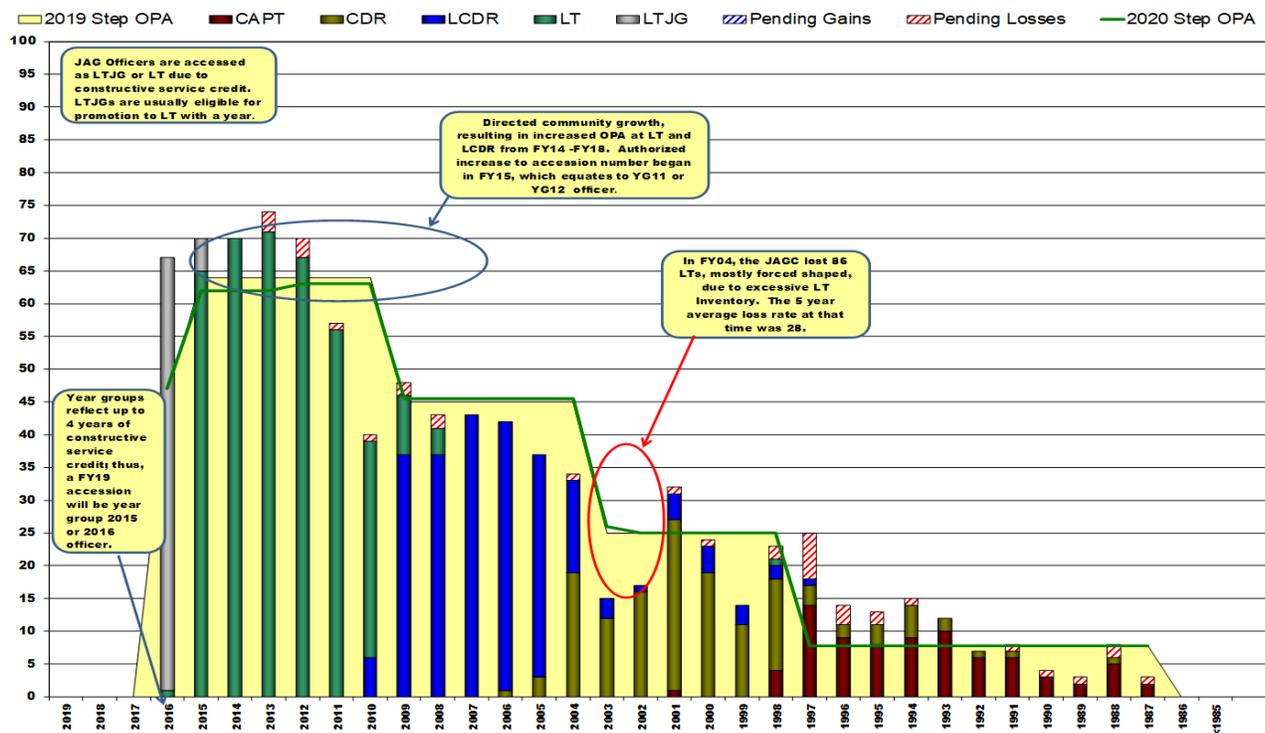


Figure 5: This figure represents a JAG Corps Length of Service (LOS) depiction of JAG Corps inventory versus OPA (funded JAG Corps billets) across all ranks as of September 30, 2019. LOS diagrams are the primary means by which Unrestricted Line, Restricted Line, and Staff Corps Officer Community Managers represent the health of their respective communities to Navy leadership. Within Figure 5, inventory levels are reflected by the vertical bars (color-coded by rank) and OPA is reflected by the solid green line, with steps to reflect the transition between ranks.

(Source: Chart provided by BUPERS-3 (JAG Corps Officer Community Manager) to Working Group (Oct. 2019) (on file).)

Retention: Judge Advocate Continuation Pay (JACP). JACP is the only retention and incentive pay currently utilized by the JAG Corps. The total amount, \$60,000, is codified by statute⁶⁶ and, per Navy policy, distributed over three phases: \$30,000 upon application and selection by a Career Status Board (CSB),⁶⁷ conducted within the judge advocate's initial period of obligated service (4 years), \$15,000 upon promotion to the rank of Lieutenant Commander and \$15,000 upon completion of 10 years of active duty

⁶⁶ 37 U.S.C. § 321 (2018); see also U.S. DEP'T OF DEFENSE, DEP'T OF DEFENSE INSTR. 1304.34, GENERAL BONUS AUTHORITY FOR OFFICERS (July 11, 2016).

⁶⁷ *Id.* The CSB is an administrative selection board intended to establish eligibility for JACP and can be used as a force-shaping tool. Judge advocates are eligible to apply for the CSB three years after graduation from the Basic Lawyer Course. U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN INSTR. 1212.2B, EXTENSION OF CAREER STATUS BOARD (Apr. 26, 2017). Since 2015, only two officers who have applied have not been selected for career status. Recruiting and Diversity Data Call Brief, *supra* note 46. JACP is available approximately one year after CSB selection.

service.⁶⁸ If the officer chooses to accept JACP, he or she incurs additional obligated service. Since FY 17, between 62% and 80% of judge advocates eligible for any of the phases have accepted JACP.⁶⁹

Retention: Public Service Loan Forgiveness (PSLF). PSLF is a Department of Education program that forgives qualifying student loans of employees working in public sector jobs, including the military.⁷⁰ If an individual makes ten years of monthly qualifying payments, the federal government forgives the balance of that employee's student loans. The amount due for a qualifying payment is based on income. Individuals with lower incomes stand to receive a larger loan forgiveness benefit at the end of the ten-year period.⁷¹

In 2017, the first cohort of public sector employees became eligible to request loan forgiveness.⁷² Most requests have been denied based on participants not having used particular income-based loan repayment plans or other technical requirements not clearly specified when the program was started.⁷³ In addition, recent legislative proposals have recommended terminating PSLF entirely.⁷⁴

The 2018 Navy JAG Corps Annual Student Loan Survey determined that 81% of Navy judge advocates in and below the grade of Lieutenant Commander carry student loan debt. Average total debt (college and law school) is \$160,000. The Survey further indicated that 90.6% of respondents currently participate in a PSLF program. It is clear that this program is essential to those in public service who carry heavy debt: the

⁶⁸ U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS, NAVY ADMIN. MESSAGE 187/17, JUDGE ADVOCATE CONTINUATION PAY (July 31, 2017). Note: officers accessing through the LEP or IPP programs are not eligible for JACP.

⁶⁹ Recruiting and Diversity Data Call Brief, *supra* note 46.

⁷⁰ 34 CFR § 685.219 (2019).

⁷¹ *Public Service Loan Forgiveness*, U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service> (Oct. 18, 2019).

⁷² Judge Advocate Gen., Public Service Loan Forgiveness Program, October 2018 Update (Oct. 2, 2018) (on file).

⁷³ Cory Turner and Ari Shapiro, *Data Shows 99% of Applicants for a Student Loan Forgiveness Program Were Denied*, NATIONAL PUBLIC RADIO (Sept. 21, 2018), <https://www.npr.org/2018/09/21/650508381/data-shows-99-of-applicants-for-student-loan-forgiveness-denied>.

⁷⁴ Anya Kamenetz, *Teachers, Lawyers and Others Worry About the Fate of Student Debt Forgiveness*, NATIONAL PUBLIC RADIO (Apr. 5, 2017), <https://www.npr.org/sections/ed/2017/04/05/522575533/teachers-lawyers-and-others-worry-about-the-fate-of-student-debt-forgiveness>.

Survey indicated that 92% of Lieutenant and 94% Lieutenant Commander respondents would likely leave Navy service if PSLF is eliminated.⁷⁵

PSLF interacts with JACP in a way that diminishes the value of JACP. As Phase I (\$30,000) and II (\$15,000) are typically delivered in lump sum payments between the fifth and ninth year of a judge advocate's time on active duty, this increases the judge advocate's taxable income during that year, thereby resulting in higher required loan payments under PSLF and, ultimately, less money being forgiven by PSLF.⁷⁶

Retention Incentives for Senior Officers. Beyond payment of JACP Phase III at the ten-year point in a judge advocate's career, there are no current retention incentives for senior JAG Corps officers. The only available incentive was recently eliminated in the National Defense Authorization Act of 2017, which modified the statutory authority relative to Navy and Marine Corps judge advocates who are board-selected to AJAG positions. The statute formerly authorized retirement of AJAGs at the rank and pay of a Rear Admiral (Lower Half) / Brigadier General (O-7). The revised statute retains the authority to promote an AJAG to O-7 rank upon retirement, but eliminated the pay benefit, meaning that the officer's retired pay is set in accordance with standard "high three" retirement pay calculations.⁷⁷ Since there is only one Navy Flag billet for which JAG Corps Captains may compete, DJAG, elimination of the AJAG retired pay authority removed a significant incentive for senior officers to remain in service.

Review of JAG Corps officer inventory shows that 54% of Captains are three or fewer years past retirement eligibility.⁷⁸ Senior JAG Corps officers, particularly those with experience in litigation, environmental law, cyber law, or other in-demand legal specialties, can translate military experience into civilian employment and may have little incentive to remain past the 20 years of service required to receive military

⁷⁵ Off. of Judge Advocate Gen., Mil. Personnel (Code 61), Info Memo (Aug. 28, 2019) (on file).

⁷⁶ *JAG Talk: Chapter 31, Public Service Loan Forgiveness: A JAG Community Success Story*, U.S. NAVY JUDGE ADVOCATE GEN. CORPS (Aug. 14, 2019), https://www.jag.navy.mil/news/jagradio/mp3/JAG_Talk_Chapter_31_PSLF.mp3.

⁷⁷ See 10 U.S.C. § 8089 (2019). National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 502(gg)(2), 130 Stat. 2000, 2102-03 (2016) removed the sentence stating that if an AJAG is "retired as a rear admiral (lower half), he is entitled to the retired pay of that grade, unless entitled to higher pay under another provision of law."

⁷⁸ Naval Register (Sept. 24, 2019) (on file).

retirement pay and the minimum time-in-grade requirements. The regular departure of Captains as soon as they can retire in grade carries a ripple effect throughout the ranks, requiring the JAG Corps to consider relatively junior Commanders for promotion to Captain.⁷⁹ This deprives the JAG Corps of senior uniformed attorneys to serve as subject matter experts and mentors. The lack of senior Captains (25 years of commissioned service and greater) warrants consideration of both tailored promotion planning to increase O-6 promotion flowpoint seniority (to produce Captains later in the career path), and tailored Captain retention incentives (to retain Captains longer).

Detailing, Slating, and Community Management. Responsibility for JAG Corps officer detailing, slating, and community management is divided between various offices within Navy Personnel Command and OJAG. Slating and detailing refers to determining what officers will rotate out of assignments each year and which officers will fill those assignments, while community management comprises the entire spectrum of human resource management practice. Unique among Flag Officer community leaders, the JAG has a statutory duty to oversee the assignment of judge advocates. Specifically, 10 U.S.C. § 806(a) provides that “the assignment for duty of judge advocates of the ... Navy ... shall be made upon the recommendation of the Judge Advocate General of the [Navy].”

General and long term JAG Corps personnel policies are developed by personnel assigned to OJAG’s Military Personnel Division (Code 61), JAG Corps detailers (assignments officers), the JAG Corps community manager, DJAG and JAG. This differs from other Navy officer communities that rely on consolidated community management teams to develop personnel policies for a given officer community.

⁷⁹ Analysis of JAG Corps officer inventory shows Commanders with 16-17 years of commissioned service being considered for promotion to Captain.

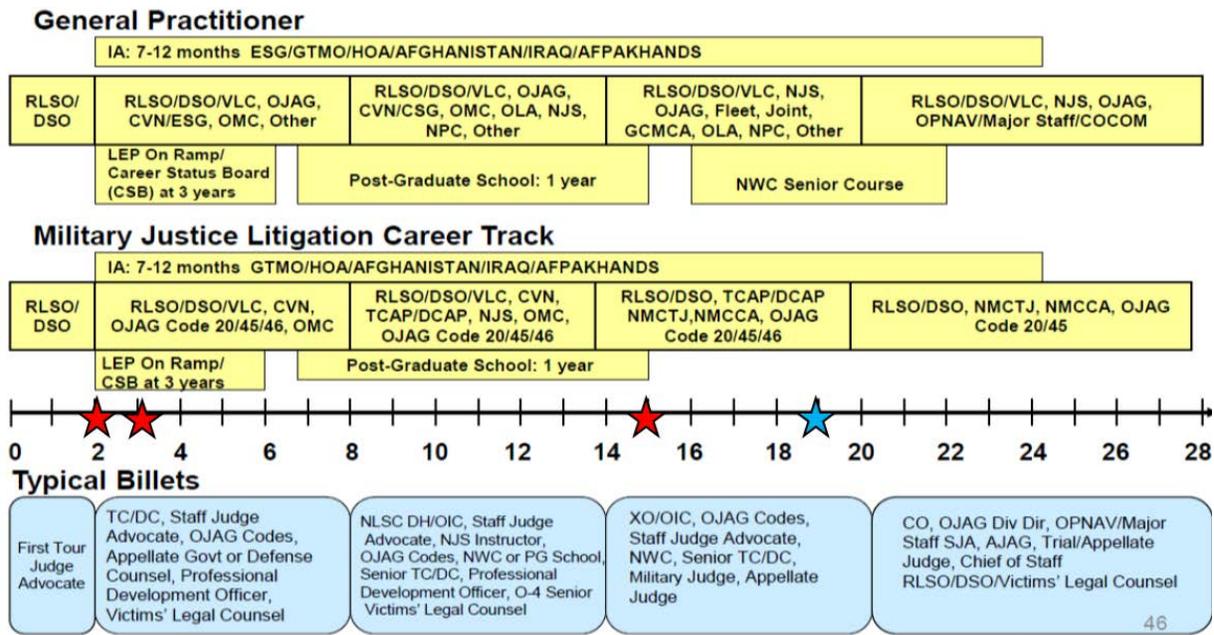


Figure 6: JAG Corps officer career path slide provided to promotion selection boards. (Source: JAG Corps Senior Detailer brief to Executive Review Panel (Sept. 5, 2019) (on file).)

There is no single source of JAG Corps career guidance. Although a career path slide (Figure 6) is provided to promotion selection boards and the JAG Corps community, it provides little career guidance for personnel outside of the military justice litigation community. Various sources, to include memoranda from detailers and occasional Flag Officer emails, describe ideal career paths and desired milestone billets.⁸⁰ Working Group interviews support the existence of a generalized JAG Corps community understanding of “nominal” career path descriptions but which may vary significantly (the exception being the Military Justice Litigation Career Track).

The JAG Corps position assignment processes vary based on a given officer’s paygrade and, in some cases, the assignment an officer is being considered to fill.⁸¹ Most officers rotate assignments after two or three years in a given location, based on Department of Defense and Navy officer assignment policies. Lieutenants are assigned

⁸⁰ JAG instructions provide further guidance on milestones for certain specialty areas. The guidelines on career development for JAGC officers supporting the information warfare community were adopted as advisory guidelines and their effect on officer community management is unknown. See, e.g., U.S. DEP’T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 1150.3, LEGAL SUPPORT TO THE INFORMATION WARFARE COMMUNITY (June 5, 2018); U.S. DEP’T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 3300.1A, JAG BILLETS REQUIRING SPECIAL OR DETAILED KNOWLEDGE OF THE LAW OF ARMED CONFLICT AND TRAINING OBJECTIVES FOR NAVY JUDGE ADVOCATES IN SUCH BILLETS (CH-3, Feb. 17, 2004) [hereinafter JAGINST 3300.1A].

⁸¹ Email memorandum from U.S. Navy Judge Advocate Gen. Corps Senior Detailer, People Talk 19-08 (March 12, 2019) (on file).

through a year-round detailing process. A list of available billets is published periodically and Lieutenants submit a detailing preference sheet.⁸² Generally, the JAG Corps senior detailer, a JAG Corps Captain assigned to Navy Personnel Command, reviews a list of proposed Lieutenant assignments and approves it. Certain Lieutenant assignments, including Flag Aide, Naval Special Warfare legal advisors, and Victims' Legal Counsel require the approval of the JAG.

Officers in the control paygrades of O-4 through O-6 are assigned through a different process referred to as slating. Each year the JAG Corps publishes a list of control grade assignments to be filled in the next fiscal year. Officers provide a detailed preference sheet describing past experience and education, preferred future assignments, and any other factors relevant to an officer's future assignments (e.g., exceptional family member program). The JAG Corps detailers review those sheets and prepare a tentative slate of assignments. The JAG, DJAG, AJAGs, and NLSC Chiefs of Staff then convene a series of meetings to review the slate of assignments to provide JAG with recommendations on the proposed assignments. JAG ultimately approves each individual assignment, with the exception of certain nominative assignments, such as Combatant Commander SJA or other senior officer assignments. For nominative assignments, JAG provides the name(s) of qualified nominees.

3.4.2 Reserve Community

The Navy Reserve Law Program comprises approximately 480 judge advocates and 140 Legalmen, led by the Deputy Judge Advocate General (Reserve Affairs and Operations), an O-7 Flag Officer in the Reserve Component.⁸³ Reserve judge advocates and Legalmen support all aspects of the JAG Corps, and are typically assigned to reserve units aligned to active-duty OJAG or NLSC offices and Fleet command SJA offices. In recent years, reserve JAG Corps officers have filled OJAG billets on a long-term basis, receiving orders to return to active duty for three-year tours.

⁸² DoD and Navy policy requires co-locating dual military couples and limiting the movement of personnel with family members requiring special medical treatment or support.

⁸³ Annual Report from the Judge Advocate General of the Navy to the American Bar Association 2 (2018) [hereinafter 2018 ABA Report].

Other reserve officers have filled individual augmentee assignments, serving overseas in expeditionary settings for six months to one-year assignments.⁸⁴

Most members of the Navy Reserve Law Program served on active duty as judge advocates or Legalmen, affiliating with the Navy Reserve after leaving active duty. A small number of reserve judge advocates laterally transfer from other officer specialties after earning law degree and passing a bar exam in their civilian careers. Similarly, some Navy Reserve Sailors convert into the Reserve Legalman community.⁸⁵

The Navy Reserve Law Program offers the JAG Corps access to legal professionals with levels of expertise that are valuable to the active duty community. For example, reserve judge advocates with civilian backgrounds in criminal litigation staff a full-time preliminary hearing unit, offering access to senior litigators to conduct complex Article 32 hearings. Other reservists have served as military commissions litigators, advised on specialized environmental law issues, conducted command investigations, and completed other assignments benefitting from their unique expertise.

3.4.3 Enlisted Community

Legalmen. The Navy has authorized 513 enlisted paralegal billets, with a current end strength of 466 active duty Legalmen.

Through education, training and experience, Legalmen possess knowledge and expertise regarding military and civilian legal systems and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney. Legalmen receive instruction in administrative and civil law, military justice (substantive and procedural), courts-martial, and nonjudicial punishment. Under the supervision of a Navy judge advocate or civilian attorney, Legalmen work in a variety of NLSC and SJA offices. Experienced Legalmen may be assigned to independent duty Legalman billets both ashore and at sea.⁸⁶

⁸⁴ DEPT OF NAVY, JUDGE ADVOCATE GEN. INSTR. 1001, RESERVE COMPONENT JUDGE ADVOCATE TOTAL FORCE STRUCTURE (June 17, 2009).

⁸⁵ *Reserve Judge Advocates & Legalmen*, U.S. NAVY JUDGE ADVOCATE GEN. CORPS, https://www.jag.navy.mil/careers_/reserve.htm (last visited Oct 29, 2019).

⁸⁶ There is no formal screening method or education required to receive orders as an independent duty Legalman.

Military justice duties include acting as trial paralegals for both trial and defense counsel, preparation of records and hearings, investigations, courts-martial and courts of inquiry, processing appeals and the coordination of nonjudicial punishment. In the area of legal assistance, Legalmen assist with wills and estates, consumer advocacy, landlord/tenant, immigration and naturalization, tax and family law, all of which include drafting and reviewing technical legal documents for attorney signature. Through performance of these and other taskings, Legalmen support and enable judge advocates to focus on legal-risk analyses of issues arising in SJA and litigation offices.

Within the Navy, the ratio of judge advocates to Legalmen is approximately 2:1. Compared to the other Services, the Navy has the fewest enlisted support personnel to judge advocates per capita.⁸⁷ The Legalman rating does not have an E-1 to E-3 paygrade, consistent with its creation as a conversion-only rating.

Recruiting. The Navy does not specifically recruit and train new recruits to be Legalmen or focus on directly accessing paralegals from the civilian community. Legalmen choose to convert from another rating, which differs from most other ratings. Sailors convert for a variety of reasons, ranging from specific interest in the Legalman rating, to a desire to develop new skill sets, to an aspiration for greater opportunity for education and advancement.

Figure 7 reflects the sources of successful conversions to the Legalman rating in the past four years. Twenty percent of the conversion candidates have been undesignated Sailors, suggesting that there may be opportunity to convert Sailors earlier in their career.

⁸⁷ Brief of Senior Enlisted Members of Legal Communities of Army, Air Force, Marines, and Navy to Executive Review Panel (Oct. 7, 2019).

Navy Legalman Accession Sources

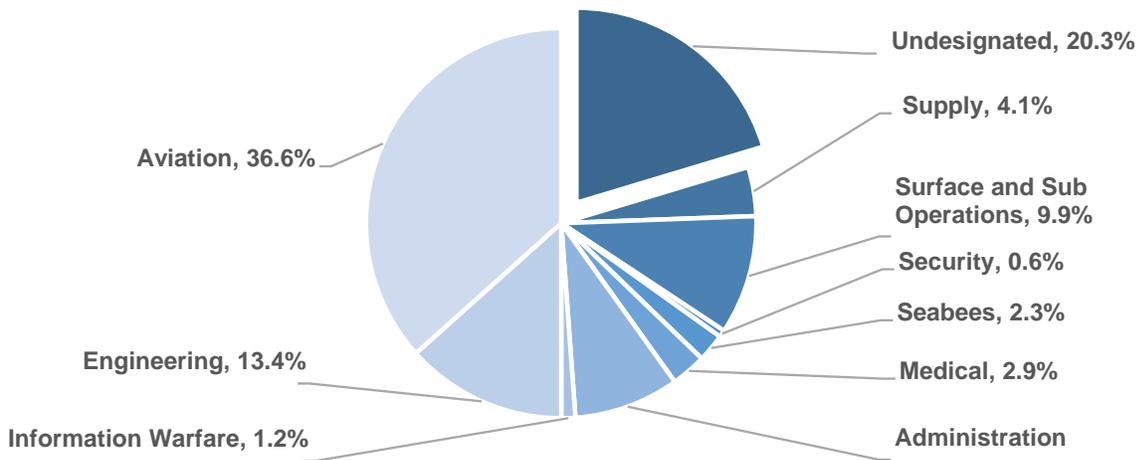


Figure 7: Approved Legalman accessions/conversions by source enlisted community for FY 16 through FY 19. (Source: Data provided by Naval Justice School to Working Group (Sept. 2019) (on file).)

Current practice is that Sailors from E-3 to E-5 (E-6 on a case-by-case basis) who have a minimum of 24 months of service are eligible to convert to the Legalman rating. This practice injects a diverse force of already experienced Sailors and Fleet perspective into the Navy JAG Corps. However, this practice also creates a talent-to-task shortfall at the E-4 level. With only three E-4s in the Legalman inventory despite requirements for 53, more senior Petty Officers at the E-5 level must man the E-4 billets longer than required or desired. Balancing the E-4 base is necessary to align inventory to authorizations at the appropriate paygrade.

During site visits, the Working Group noted a barrier to Legalman recruiting due to enlisted community managers' inability to release conversion candidates from their current rating because of inventory shortages in Enlisted Programmed Authorizations (EPA) levels within some rates.

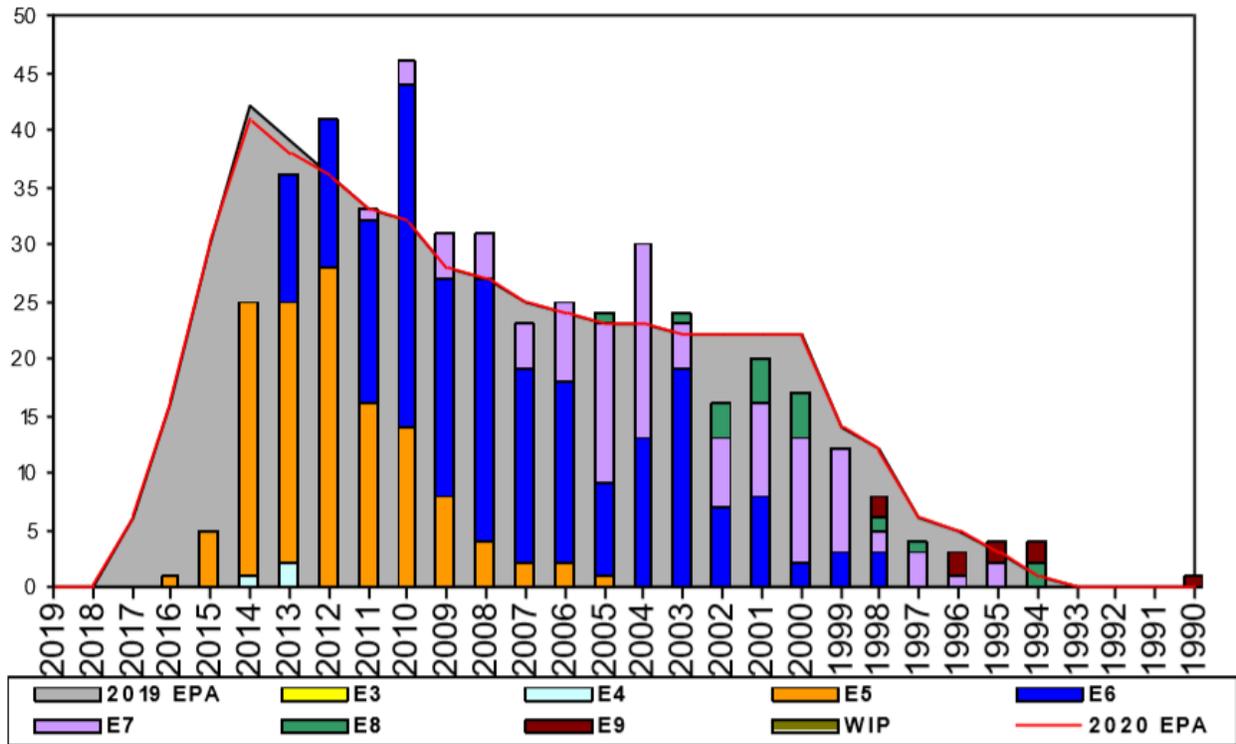


Figure 8: Navy Legalman Length of Service (LOS) depiction of Legalman inventory versus EPA (funded billets) across all ranks as of September 30, 2019. Inventory levels are reflected by the vertical bars (color-coded by rank) and EPA is reflected by the solid green line, with steps to reflect the transition between ranks.

(Source: Chart provided by Navy Personnel Command to Working Group (Oct. 2019) (on file).)

Community Health. Figure 8 indicates an experience gap in year groups 1996-2002, and notably a lack of personnel to fill year groups 2013-2017 and a complete lack of E-4s beyond the 2014 year group. The Legalman rating currently has no retention, conversion, or performance incentives.⁸⁸ Institution of targeted performance (E-7 and above) or conversion (E-4) incentives may assist in retaining more qualified Sailors at the senior ranks and attracting additional Apprentice Sailors at the E-4 level.

Detailing and Community Management. The JAG has limited authority to assign and manage the Legalman rating, which is consistent with enlisted distribution practices for the rest of the Navy. Navy Personnel Command (NPC) is responsible for all enlisted detailing/placement processes. While OJAG/NLSC officials can make recommendations to NPC to prioritize advertisement of RLSO/DSO/NJS billets, NPC makes the final decision.

⁸⁸ Working Group site visit to OJAG and supported elements (Sept.-Oct. 2019).

OJAG/NLSC has no authority to prioritize the advertisement or fill of non-NLSC Legalman billets (i.e., in support of operational SJA offices, such as aircraft carriers, and independent duty Legalman positions with ships or aviation squadrons). Inputs for at-sea billets are submitted by the parent Type Command (TYCOM) to the Fleet Commands, for ultimate decision by the Manning Control Authority (MCA). The MCA is the Chief of Naval Personnel (CNP), with duties executed by the Assistant Commander, NPC for Career Management (PERS-4). However, Fleet billet fills are generally always a higher priority for fill over ashore billets. Billets supporting Fleet operations, regardless of sea duty or shore duty characterization, take priority over non-operational shore duty billets. Although NLSC billets may be characterized as non-operational shore duty, Legalmen directly support military justice and legal assistance missions for afloat and deployed commanders, Sailors, and their families. Providing a process for JAG/CNLSC to articulate and balance priorities across the full spectrum of Legalman requirements would benefit both Fleet and shore commands.

The overall number of Legalman billets has slightly increased since 2010, reflecting additions and deletions across multiple Budget Submitting Offices (BSOs). As with assignments, JAG does not have authority over the creation or deletion of Legalman billets outside of NLSC, which constitutes more than half of the Legalman rating. Deletion of non-NLSC Legalman billets shifts legal support requirements to the RLSOs, and addition of Legalman billets places requirements to fill and grow to those positions. Affording JAG a voice in planning and prioritizing Legalman requirements in the Navy's budget process is necessary for proper community management.⁸⁹

Non-Deployable Sailors from other Navy Ratings. RLSOs and DSOs in Fleet concentration areas are supported by non-deployable Sailors temporarily assigned to those commands.⁹⁰ As of October 1, 2019, there were 107 non-deployable Sailors assigned to 10 of the 13 RLSOs and DSOs, with typical time onboard of 18 months.⁹¹

⁸⁹ Off. of Judge Advocate Gen., Mil. Personnel (Code 61), Response to Request for Information on Legalman Rating (on file).

⁹⁰ These personnel are reassigned to shore duty from operational units under U.S. DEP'T OF NAVY, CHIEF OF NAVAL PERSONNEL, NAVAL MILITARY PERSONNEL MANUAL §§ 1300-1306 (Active Duty Pregnancy Policy and Placement Procedures), 1306-1200 (Limited Duty) (Nov. 5, 2004 & Aug. 24, 2018).

⁹¹ Email from Chief of Staff, Region Legal Service Offices (Oct. 1, 2019) (on file).

During this period, these Sailors perform duties assigned by the RLSO or DSO leadership while being rehabilitated or recovering from the condition that prevents them from serving at sea. While these duties may involve some legal or administrative tasks⁹², the majority of duties are non-legal administrative, security and facility tasks.⁹³

Distribution of Non-Deployable Sailors in NLSC (Non-Legalsman Sailors)

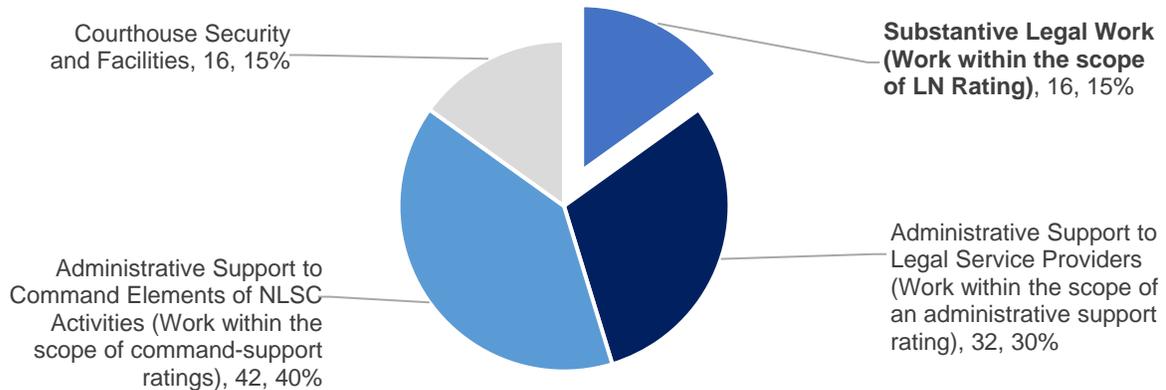


Figure 9: Distribution of Non-deployable sailors from NLSC activities by area of support to NLSC activities. 15% of non-deployable Sailors provide services within the scope of the Legalman rating, while 70% of non-deployable Sailors provide support within the scope of another administrative or command operational support rating (i.e. Yeoman, Personnel Specialist, Master-at-Arms, Information Systems Technician, etc.) The remaining 15% provide courthouse security (i.e. entry-control point, roving patrols of the courthouse).

(Source: Email from Chief of Staff, Region Legal Service Offices (Oct. 1, 2019) (on file) (containing estimate from survey of NLSC command leadership).)

This reliance on use of non-deployable Sailors is inefficient and masks actual RLSO or DSO manpower needs. RLSO and DSO leaders must repeatedly train non-deployable Sailors to perform myriad tasks in support of legal missions, as well as provide the support needed to return them to sea duty. Further, Working Group interviews revealed that using non-deployable Sailors to perform core NLSC missions prevents an accurate assessment of RLSO and DSO needs for uniformed or civilian paralegals, administrative specialists, security forces, information technology specialists, and Navy career counselors.⁹⁴ Because RLSOs and DSOs have relied on non-deployable Sailors to execute their missions, albeit inefficiently, they have not

⁹² E.g., performing receptionist and clerical duties in Legal Assistance, and in some cases as paralegals in Defense Service Offices.

⁹³ Email from Chief of Staff, Region Legal Service Offices (Oct. 1, 2019) (on file).

⁹⁴ Working Group site visit to OJAG and supported elements (Sept.-Oct. 2019).

registered an appropriate demand signal to the Navy's manpower system for the appropriate numbers or mix of properly-trained, permanently-assigned military and civilian personnel. NLSC attempted to remedy this deficiency in FY21 by requesting 18 additional enlisted billets through the Navy Budget Request Process, however, that request was not approved.⁹⁵

3.4.4 Civilian Employees

The OJAG/NLSC enterprise has 390 civilian billets. Of these, 119 are assigned to OJAG, 246 to NLSC, and 25 are designated Management Headquarters Activity billets, supporting both OJAG and NLSC Headquarters.

Within the OJAG/NLSC enterprise are 95 civilian attorney billets that provide legal services under the cognizance and supervision of the JAG. These are excepted service positions (GS-13 through GS-15), and advise and represent both organizational clients as well as individual Sailors and Marines. Within OJAG, two Division Directors are civilian attorneys, as are the majority of Deputy Division Directors. These individuals bring specialized experience and continuity essential in the supervision and mentoring of assigned Navy and Marine Corps judge advocates. As discussed in Section 3.7.4, the DON's tort, medical care recovery, and personnel claims processes have been civilianized, to include attorney positions. As discussed in Section 3.7.5, every RLSO located in the United States has civilian legal assistance attorneys who are licensed in the jurisdiction in which they are located. These attorneys provide subject matter expertise and advice to individual service members, retirees and their families. They also train, mentor and supervise FTJAs and Legalmen in legal assistance services. JAG also supervises representation services provided to Sailors and Marines who enter the Integrated Disability Evaluation System, and which is performed by civilian counsel employees.

During the period of FY 12 through FY 18, programmatic decisions by resource sponsors resulted in a reduction of 31 civilian billets (\$2.6 million) in the OJAG/NLSC enterprise, and two Management Headquarters Activity (MHA) civilian billets

⁹⁵ OJAG and NLSC Civilian and Military Manning and Support Funding Requests (Aug. 28, 2019) (on file); Email from the Executive Assistant to the Judge Advocate General (Oct. 16, 2019) (on file).

(\$336,000). During this same period, JAG identified increasing requirements for civilian positions in Congressionally mandated areas of Sexual Assault Prevention and Response (SAPR) and the IDES, of which most (but not all) civilian billets have been approved and funded. A USFF Shore Manpower Requirements Determination (SMRD) review of NLSC Headquarters was conducted in 2017, validating the requirement for additional civilian billets at NLSC Headquarters and noting that a more comprehensive manpower study is required given the intertwined organizational features of the five commands that support JAG and CNLSC at the Departmental level.⁹⁶ JAG submissions to various program budget review cycles have not yet resulted in approval or funding for these and other identified civilian employee requirements. Overall, JAG currently estimates that the OJAG/NLSC enterprise is under-resourced in required civilian personnel strength by 89 billets.⁹⁷

3.4.5 Manning Issues

The Working Group noted the following issues during their review of Navy JAG Corps manning:

(1) Assessment of Optimum OJAG and NLSC Manpower. The JAG recognized challenges in workforce composition at OJAG and NLSC headquarters and initiated a CNA study to optimize organizational and manpower requirements. Within NLSC field units, Working Group visits found judge advocates, Legalmen and civilian paralegals spend an unnecessary amount of time on non-legal tasks due to a sub-optimized manpower skills mix. To address this issue, CNLSC has requested USFF perform a

⁹⁶ U.S. FLEET FORCES COMMAND MANPOWER ANALYTICS TEAM, SHORE MANPOWER REQUIREMENTS DETERMINATION REPORT (Feb. 21, 2018). The five commands performing cross organizational support while operating five Unit Identification Codes across Budget Submitting Offices 11 and 12 are: OJAG; CNLSC Headquarters; Navy-Marine Corps Appellate Review Activity; Navy and Marine Corps Trial Judiciary; Navy Civil Law Support Activity. Taken together, these five commands are collectively thought of and referred to as “OJAG.”

⁹⁷ OJAG and NLSC Civilian and Military Manning and Support Funding Requests (Aug. 28, 2019) (on file); Off. of Judge Advocate Gen. Exec. Dir./Comptroller, Info Memo: Civilian Manning Deficiencies in Office of the Judge Advocate General and Naval Legal Service Command Enterprise (vers. 2, Sept. 11, 2019) (on file) [hereinafter Civilian Manning Info Memo]; Email from Assistant Judge Advocate General (Operations and Management) (Oct. 30, 2019) (on file). This number reflects requirements for 19 court-reporters; 34 additional personnel for the Disability Evaluation System Counsel program; eight IT support personnel at NLSC Headquarters and field offices; eight paralegals for RLSO and DSO offices; three physical security specialists; one attorney for VLC, one attorney for DCAP, and one attorney for PERS Counsel; and 14 legal assistants and administrative support specialists.

SMRD review of RLSOs, DSOs, and NJS.⁹⁸ Such review will assess the proper mix of military and civilians, attorneys, paralegals, and specialized support personnel who are necessary for NLSC units to effectively and efficiently meet Fleet requirements.

Inefficiencies include:

(a) Information Technology. NLSC commands do not have assigned information technology (IT) support staff. Although OJAG and NJS have civilian personnel dedicated to IT tasks, they are not equipped to plan, maintain and troubleshoot IT assets and services dispersed throughout NLSC. JAG Corps efforts to upgrade NLSC courtrooms to current “smart courtroom” technology is essential to modernizing Navy’s legal practice to that of civilian standards, but unsustainable without properly resourced and aligned IT resources.⁹⁹ Working Group visits to NLSC commands found that a significant number of legal professionals are performing IT tasks, often at the expense of their primary duties, because there is no one else to provide this support.

(b) Military Justice Administrative Requirements. There are significant administrative requirements in court-martial litigation, including coordination of witness travel, notice to victims and witnesses and detailed reporting requirements, particularly in connection with the high-profile issue of sexual assault reports. Judge advocates assume ultimate responsibility for these requirements, and personally perform them if there is inadequate administrative support.¹⁰⁰

⁹⁸ Letter from Commander, Naval Legal Service Command, Ser. 00/0134 (Oct. 16, 2019) (on file). In requesting this SMRD study, CNLSC notes that there is no record of an SMRD ever having been performed for such commands.

⁹⁹ Working Group site visits to RLSO Mid-Atlantic, DSO Southeast, RLSO Southwest, and DSO West, (Sept. 2019). RLSO Mid-Atlantic personnel commented to Working Group members, “Last week two attorneys spent a day and a half trying to set up a VTC among three RLSOs.”

¹⁰⁰ Working Group site visits to RLSO Mid-Atlantic, DSO Southeast, RLSO Southwest, DSO West, RLSO Naval District Washington, and DSO North (Sept. 2019). An example of reporting requirements added to the Trial Department within the past year is the requirement for to complete a form with the victim’s preference as to prosecution in the civilian court system and coordinate with local prosecutors as necessary. U.S. DEP’T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL, para. 0128.a (CH-2, Aug. 26, 2019) [hereinafter JAGMAN]. Other requirements resulted in increased responsibility to ensure reporting of offenses that would preclude owning firearms. See U.S. DEP’T OF NAVY, CHIEF OF NAVAL OPERATIONS, NAVY ADMIN. MESSAGE 076/18, GUN CONTROL ACT OF 1968 CRIMINAL JUSTICE INFORMATION REPORTING (March 29, 2018); U.S. DEP’T OF NAVY, JUDGE ADVOCATE GEN./COMMANDER, NAVAL LEGAL SERV. COMMAND INSTR. 5814.1D, POST-TRIAL PROCESSING (Sept. 6, 2019) [hereinafter JAG/CNLSCINST 5814.1D].

(c) Courtroom Security. Although NLSC has a small cadre of civilian physical security specialists,¹⁰¹ routine courtroom security duties are performed by judge advocates, Legalmen and non-deployable Sailors, none of whom are properly trained for such responsibilities. This represents unnecessary and avoidable risk to the security of NLSC facilities and the JAG Corps personnel, Sailors, families and members of the public who work and obtain services in such spaces.

(d) Reliance on Non-Deployable Sailors. Temporary assignment of non-deployable Sailors is essential to mission execution for several RLSOs and DSOs. This reliance masks actual manpower requirements, and further contributes to sub-optimal manning and organization.

(2) Community management of JAG Corps officers lacks a strategic focus. Current JAG Corps community management practices are not aligned with standard Navy officer community management programs. Relative to other communities, the roles and responsibilities of the JAGC “community health” stakeholders (JAG/DJAG, OJAG Military Personnel Division (Code 61), community manager, and detailers) involved in the development of policies affecting community health are not well defined. Specifically, the role of OJAG Code 61 relative to that of the Community Manager (the primary community health custodian for other communities) is confusing and requires clarification.

(3) Retention incentives must remain relevant and effective. Legal education and the legal job market have changed substantially since the Navy approved JACP in 2000.¹⁰² Considering the increased debt burdens of virtually all new law student

¹⁰¹ In 2016, NLSC received funding for seven civilian billets for courtroom security. Off. of Judge Advocate Gen. Exec. Dir./Comptroller, Info Memo: Office of the Judge Advocate General and Naval Legal Service Command Military Manning and Support Funding Requests (Aug. 28, 2019) (on file) [hereinafter Military Manning Info Memo].

¹⁰² The total number of law school applicants declined from 74,600 to 60,700 between 2000 and 2018, peaking at 100,600 in 2004. At the same time, the average debt carried by a law school graduate increased from \$82,400 to \$145,500. Only medical school graduates and other health profession graduate students carried higher debt when compared in 2016. AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 24, 34, 35 (2019). The Navy offers scholarship programs to certain health professionals that exceed JACP. This includes the Armed Forces Health Professionals Scholarship Program, in which the Navy pays tuition costs in addition to a monthly stipend for candidates, and the Health Services Collegiate Program (HSCP), in which candidates are placed on active duty and receive full pay and allowances as an E-6 or E-7 during the course of schooling. OFFICE OF THE CHIEF OF NAVAL

accessions and the uncertainty associated with the long-term viability of the PSLF, JACP (or “bonus”) dollar amounts and timing of payments must be reevaluated. The Blended Retirement System offers an alternative to remaining on active duty for 20 years.¹⁰³ This may further challenge retention of senior JAG Corps officers if JACP is not restructured. Our review found no existing strategies or incentives for retaining senior JAG Corps officers.

(4) Legalman Recruiting and Incentives. Legalman recruiting relies on accessing E-4s from other rates. The JAG Corps needs to consider accessing Sailors at lower paygrades to improve the structure of the Legalman rating, as well as incentives to access paralegals already certified in the civilian community. Further, the JAG Corps should evaluate targeted conversion and performance incentives to address current gaps in both apprentice and senior enlisted positions. The JAG Corps should also examine opening the window of prior enlisted service for Sailors eligible to convert.

OPERATIONS, DIRECTOR, MILITARY PERSONNEL PLANS AND POLICY (N13), PROGRAM AUTHORIZATION 130 (July 2019); OFFICE OF THE CHIEF OF NAVAL OPERATIONS, DIRECTOR, MILITARY PERSONNEL PLANS AND POLICY (N13), PROGRAM AUTHORIZATION 132 (July 2019).

¹⁰³ The Blended Retirement System (BRS) offers matching contributions to a retirement account monthly (Thrift Savings Plan) but a smaller pension upon retirement. Servicemembers who leave before retirement eligibility retain the matching contributions. Servicemembers who entered between 2006 and 2018 were given the choice to opt into BRS. Servicemembers entering on or after January 1, 2018 were enrolled in BRS and were not eligible for the legacy retirement system. *Frequently Asked Questions Regarding the Blended Retirement System*, MILITARY ONESOURCE, <https://www.militaryonesource.mil/financial-legal/personal-finance/retirement-planning/frequently-asked-questions-regarding-the-new-blended-retirement-system> (last visited Oct. 19, 2019).

3.5 TRAINING AND PROFESSIONAL DEVELOPMENT OF THE NAVY JAG CORPS

3.5.1 Judge Advocates

The Naval Justice School (NJS) in Newport, Rhode Island provides accession training for sea service judge advocates, along with an array of other courses focused on specific legal topics for more senior practitioners. NJS also provides training for civilian personnel, sea service commanders, legal officers, senior enlisted leaders, and other personnel in the administration of military law. A Navy judge advocate's career starts at NJS, and it remains a touch point throughout his or her career.

Basic Lawyer Course. The Basic Lawyer Course (BLC) is a ten-week course to provide U.S. Navy (USN), USMC, and U.S. Coast Guard (USCG) uniformed attorneys with training needed to serve as military justice counsel, legal assistance attorneys, and command legal advisors. It presents the minimum training required for the JAG to certify uniformed attorneys as competent to litigate courts-martial under Article 27(b) of the UCMJ. One-half of the current BLC curriculum is dedicated to military justice training, to include mock trial exercises.¹⁰⁴ The legal assistance portion provides an overview of issues that legal assistance attorneys may encounter during their first tour to include the Servicemembers' Civil Relief Act, landlord/tenant law, wills, notaries and powers of attorney, domestic relations, consumer law, and immigration law. The command services portion of the course focuses on subjects encountered during the routine administration of a military unit, including administrative investigations, non-judicial punishment, and administrative separation boards. The BLC also includes instruction specific to Government ethics and professional responsibility.

First Tour Judge Advocate (FTJA) Program. After graduating from the BLC, Navy judge advocates report to a RLSO in one of 12 designated locations where they commence the FTJA program. A FTJA is required to complete a structured series of assignments and training standards over the course of two years in order to ensure that all judge advocates achieve minimum levels of experience and proficiency prior to assignment in direct support of Fleet and individual client requirements. Professional

¹⁰⁴ Naval Justice School BLC 19030 Calendar (Aug. 2019) (on file).

Development Standards (PDS) – lists of required readings, tasks and experiences – form the core of the program, and take a FTJA through a six month assignment in legal assistance, a six month assignment in command services, and a 12 month assignment in either a RLSO Trial Department or a DSO.¹⁰⁵ Each RLSO has a Professional Development Officer (PDO) who oversees progression through the PDS and delivers Professional Military Education (PME) modules to junior attorneys assigned to the RLSO and DSO.¹⁰⁶ The PDO's responsibility is to train and mentor all junior personnel and “develop JAGs as both attorneys and officers, Legalmen as both paralegals and Sailors, and civilians as attorneys, managers, and technicians” in the RLSO's AOR.¹⁰⁷

With most Navy judge advocates entering service through the student program, this first tour is their introduction to the Navy and its culture. As RLSOs and DSOs are aligned with the shore enterprise, their COs, executive officers, and PDOs are responsible for identifying opportunities for FTJAs to interact with the Navy's operating forces. Typical experiences include embarking on ships for orientation purposes, supporting exercises, and performing legal assistance visits to ships or other expeditionary units. PDOs also deliver a series of service-orientation presentations supplemented by briefs from line officers. However, the content and frequency of these briefs depends on the availability of line officers and the PDO's connections to units willing to support.

Junior Officer. After the completion of the two-year FTJA rotation, most second-tour JAG Corps officers continue to support shore activities, typically serving as an installation or other shore activity SJA, remote location legal assistance attorney, Victims' Legal Counsel, or returning to a "core" litigation counsel position within a RLSO or DSO.

Most JAG Corps officers do not serve as an independent legal advisor to an operational commander until his or her third tour as an O-3 or first tour as an O-4. Typical opportunities include service on an aircraft carrier, a numbered fleet or TYCOM

¹⁰⁵ CNLSCINST 1300.1B, *supra* note 34.

¹⁰⁶ *Id.* See also JAG/CNLSCINST 1500.1B, *supra* note 34. These mandatory PME modules introduce judge advocates to other officer communities, the fleet, and leadership. Memorandum from the Judge Advocate General, Legal Community Assessment (July 11, 2019) (on file).

¹⁰⁷ CNLSCINST 5800.1G, *supra* note 22, para. 306.

staff, and Special Warfare units. Consequently, a JAG Corps officer will have less familiarity with the Fleet than a line officer of equivalent paygrade.

Although not formally codified, a senior O-3's or junior O-4's assignments will start to shape the path of his or her future career. Those assignments typically provide the foundational experience needed for future assignments requiring more specialized knowledge. Individual officers may gravitate through experience, education, and/or personal preference to a particular field, such as operational law, environmental law, or intelligence/cyber law assignments. However, these assignments are considered part of a "generalist" career path and even officers with extensive experience in a narrow field remain available for detail across a broad range of billets and positions in support of Navy and Joint Force requirements.

Military Justice Litigation Career Track (MJLCT). The one formally recognized exception to the "generalist" career path is that of the MJLCT. Officers who achieve the necessary qualifications to apply, and who are selected to become part of this specialized community, are primarily detailed to military justice billets throughout the remainder of their career. Therefore, MJLCT officers are less likely to serve at sea or in expeditionary assignments, given the need to build and maintain litigation skills in the courtroom.

The MJLCT was developed in 2007 to address the concern that skilled court-martial litigators did not promote in rank at a rate equivalent to those who pursued a more operational or diverse career path, leading many to leave the Navy to pursue litigation careers. Structures and policies at the time led to this result. Trial and Defense Counsel billets were designated as O-3 and O-4 billets, and promotion board precepts contained language that valued diversity of assignments and advising senior Navy leaders. If an officer intended to achieve higher rank, he or she needed to step away from court-martial litigation early in their career to pursue other career milestones, thereby allowing litigation skills to atrophy or perish, with rare opportunity to later return to the courtroom.

Consequently, the MJLCT was created to give officers with the desire and aptitude for litigation a viable career path in order to develop and retain courtroom

litigation skills that were necessary to meet Fleet requirements.¹⁰⁸ The Chief Judge of the Department of the Navy billet was created, in part, to provide the MJLCT specialty a capstone AJAG billet, recognizing that those who remain within the military justice litigation career track will not likely develop the broad Fleet/Joint policy experience and expertise necessary for the DJAG or JAG positions.

As initially conceived, the MJLCT community was to develop a cadre of career litigators, specifically to include senior officers capable of mentoring junior counsel by continuing to try cases. Further, by devoting experienced litigators to courts-martial practice, it was envisioned that cases could be processed faster and by fewer judge advocates.

Generalist Career Progression. As discussed in section 3.4.1 above, outside of the MJLCT, midlevel and senior judge advocates are not required to adhere to a specialized career progression. The guidance offered by Figure 6 envisions judge advocates assuming positions with an increasing level of both leadership responsibility and professional complexity over the course of their careers. Commanders and Captains in the generalist track may become NLSC commanding officers, executive officers and directors of OJAG Codes, as well as SJAs for Region Commanders, Fleet and OPNAV Staffs, and Combatant Commands.

Certain career progressions can be generally described, but are not formally designated or treated as a specialized track. An environmental law career may involve repeated environmental law-focused tours beginning at the Lieutenant Commander level, progressing to Fleet environmental counsel at the Commander level, and capstone Captain positions in OPNAV and OJAG.¹⁰⁹ Similarly, officers pursuing national security law-focused careers have a multitude of billets and opportunities to work as operational SJAs and legal advisors within the Fleet, Joint Force, and interagency, with increasing levels of responsibility through the grade of Captain.¹¹⁰ Most recently, requirements for developing legal expertise to support the Information

¹⁰⁸ U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 1150.2D, MILITARY JUSTICE LITIGATION CAREER TRACK (CH-1, Jan. 5, 2018).

¹⁰⁹ JAG Corps Senior Detailer brief to Executive Review Panel (Sept. 5, 2019) (on file).

¹¹⁰ *Id.* See also JAGINST 3300.1A, *supra* note 80. For further discussion of such opportunities, see Section 3.7.3, *infra*.

Warfare Community, to include focused progression of assignments, have been generally defined.¹¹¹ Beyond that described above, there is little formal definition and clearly communicated information on career milestones, experience, and training for control grade positions.

Continuing Legal Training. A Navy judge advocate will receive a variety of military legal training throughout his or her career. NJS, as well as the U.S. Army and U.S. Air Force JAG Schools, offer training opportunities on numerous military law topics. These include short course offerings for junior and senior SJAs, on topics including Law of Naval Operations, Law of Armed Conflict, legal assistance, government ethics, trial advocacy, fiscal and contracting law, intelligence and cyber law, and environmental law. There are also numerous training opportunities offered by a variety of DoD and DON entities (e.g., DoD FOIA training), as well as continuing legal education offered by State and local bar associations.

Navy judge advocates are required to complete mandatory training before receiving formal certification and authorization to perform the duties of an Ethics Counsellor,¹¹² Victims Legal Counsel,¹¹³ and Military Judge.¹¹⁴ Further, judge advocates reporting to operational assignments may be required to attend the Naval War College Maritime Staff Officer Course, Joint Targeting School, and interagency intelligence or cyber operations courses, typically in advance of reporting to the particular assignment. There are, however, few formal training tracks identified or required for Navy judge advocates in connection with specific assignments or over the course of their service.

Most career officers will have one opportunity for post-graduate education, either at a civilian law school, the U.S. Army Judge Advocate General's School, or the Naval

¹¹¹ U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 1150.3, LEGAL SUPPORT TO THE INFORMATION WARFARE COMMUNITY (June 5, 2018).

¹¹² U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN. MEMORANDUM, COMPLIANCE WITH DEPARTMENT OF THE NAVY ETHICS COUNSELOR CERTIFICATION AND TRAINING PROGRAM BY ETHICS COUNSELORS PRACTICING UNDER THE COGNIZANCE OF THE JUDGE ADVOCATE GENERAL OF THE NAVY (June 13, 2008).

¹¹³ JAGINST 5810.3A, *supra* note 25, encl(1) para. 3-2.

¹¹⁴ U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5817.1J, JUDICIAL SCREENING BOARD (Oct. 31, 2019) [hereinafter JAGINST 5817.1J]; U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5813.4J, NAVY-MARINE CORPS TRIAL JUDICIARY (Dec. 19, 2017).

War College. Completion of post-graduate education results in an officer receiving a specialty code such as national security studies, environmental law, trial litigation, or advanced military law. Current policies require officers to serve in a billet related to their post-graduate education after earning their degrees, typically the immediate follow-on tour.¹¹⁵

Subspecialty and Additional Qualifying Designator Codes. JAG Corps officers may earn subspecialty codes through their training and experience, although an officer who receives a subspecialty code will not necessarily continue to serve in assignments utilizing that specialty. The following subspecialty codes¹¹⁶ are currently available to Judge Advocates: Advanced Military Justice (1201), Military Justice Litigation (1202), International Law (1203), and Environmental Law (1207).¹¹⁷ Through post-graduate education, judge advocates can earn “P-codes” in each of these subspecialties.¹¹⁸ MJLCT officers earn Additional Qualifying Designator (AQD) codes upon reaching higher levels of experience within the career track. Practitioners with experience in cyber law, intelligence law, and admiralty law are also eligible for an AQD code.¹¹⁹

Officers who attend post-graduate school are required to perform one tour utilizing that subspecialty.¹²⁰ However, following that tour, generalist officers who have earned subspecialty codes remain available to be assigned to a broad range of positions. Filling senior SJA, NLSC and OJAG leadership billets requires the flexibility

¹¹⁵ U.S. DEP’T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 1520.1D, NAVY FULLY FUNDED POSTGRADUATE LEGAL EDUCATION AT CIVILIAN INSTITUTIONS PROGRAM AND SUBSPECIALTY COMMUNITY MANAGEMENT (Feb. 5, 2013) [hereinafter JAGINST 1520.1D].

¹¹⁶ An officer subspecialty code signifies “advanced education, functional training, and significant experience” in a given field or discipline. U.S. DEP’T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 1000.16L, NAVY TOTAL FORCE MANPOWER POLICIES AND PROCEDURES, para. 803 (CH-2, June 24, 2015).

¹¹⁷ U.S. DEP’T OF NAVY, NAVY PERSONNEL COMMAND, NAVPERS 15839I, MANUAL OF NAVY OFFICER MANPOWER AND PERSONNEL CLASSIFICATIONS, vol. I, part B (Oct. 2019) [hereinafter NAVPERS 15839I]. Titles are given as they appear in NAVPERS 15839I, but the 1201 subspecialty code signifies a subspecialty in command advice, while the 1203 code signifies a subspecialty in operational law. The 1205 (Health Care Law) subspecialty code is also listed, but there is currently no opportunity for post-graduate education.

¹¹⁸ JAGINST 1520.1D, *supra* note 115. A “P-code” is awarded upon completion of a master’s degree in a specialization, a “Q-code” is awarded upon completion of a Masters’ Degree and a follow-on assignment in a qualifying billet, while an “S-code” may be awarded for experience in a subspecialty without an accompanying degree. See *Education and Subspecialty*, NAVY PERSONNEL COMMAND (PERS 451), <https://www.public.navy.mil/bupers-npc/career/education/subspecialty/Pages/default.aspx> (last visited Oct. 31, 2019).

¹¹⁹ NAVPERS 15839I, *supra* note 117, vol. I, part D.

¹²⁰ JAGINST 1520.1D, *supra* note 115, para. 9.

that the generalist model supports. The JAG Corps' authorized end strength and diversity of billet requirements does not support narrow, specialized career fields over the course of an entire career, with the exception of MJLCT officers. This differs from civilian practice, where attorneys generally specialize in a narrow career field. It also differs from the Army and Air Force, which have larger judge advocate forces and additional areas of practice due to differences in how their respective Service's Offices of General Counsel are structured and resourced.¹²¹

Professional Military Education. Joint Professional Military Education (JPME) provides naval officers, to include judge advocates, with broadening education in topics relevant to the conduct of multi-service military operations and planning. JAG Corps leadership recognizes its value and includes precept language in promotion selection board convening orders encouraging completion of JPME Phase I before an officer is eligible for promotion to Commander.¹²² As of 2019, 44% of control grade Navy judge advocates have completed JPME Phase I.¹²³ Although the 2011 506 Panel recommended expanded JAG Corps participation in JPME, the Navy has not expanded quotas for JAG Corps officers to attend in-residence JPME at the Naval War College or other Service schools, nor does the JAG Corps have the force structure to support this. With few exceptions, JAG Corps officers' only opportunities to complete JPME Phase I are the Naval War College's Fleet Seminar Program and online courses. Some JAG Corps officers will complete in-residence courses at the Naval War College, but the JAG Corps typically receives no more than one or two quotas at the Senior and Junior courses.¹²⁴ Occasionally, a JAG Corps Captain will attend the National War College or another JPME Phase II course. However, there is no discernable pattern for Navy

¹²¹ Brief of the Deputy Judge Advocate General, U.S. Air Force to Executive Review Panel (Sept. 18, 2019); Brief of representative of Army Judge Advocate General's Corps to Executive Review Panel (Sept. 18, 2019).

¹²² See, e.g., ASSISTANT SEC'Y OF THE NAVY (MANPOWER AND RESERVE AFFAIRS), ORDER CONVENING THE FY-20 PROMOTION SELECTION BOARDS TO CONSIDER THE STAFF CORPS OFFICERS OF THE ACTIVE-DUTY LIST OF THE NAVY FOR PERMANENT PROMOTION TO THE GRADE OF COMMANDER (Mar. 22, 2019). Judge advocates are exempt from policies requiring completion of JPME before becoming eligible for selection to Flag Officer rank. Accordingly, Navy Personnel Command does not track judge advocate officer completion of JPME or accrual of joint experience, even though some judge advocates have extensive joint education and experience. See, generally, U.S. DEP'T OF DEF., DEP'T OF DEF. INSTR. 1300.19, DoD JOINT OFFICER MANAGEMENT PROGRAM (Apr. 3, 2018) [hereinafter DODI 1300.19].

¹²³ Email from Judge Advocate General (Sept. 3, 2019) (on file) [hereinafter JAG email (Sept. 3, 2019)].

¹²⁴ JAG Corps Officer Assignment Slates for FYs 15 through 19 (on file).

judge advocates attending JPME Phase II. By contrast, the Marine Corps, Army, and Air Force place a greater emphasis on sending their career judge advocates to Service schools in addition to post-graduate legal education.¹²⁵

Professional Responsibility. The JAG is responsible for ensuring the ethical and professional practice of law by judge advocates and other individuals who practice or perform functions under the cognizance of JAG. The JAG has promulgated Rules of Professional Conduct, based on model rules published by the American Bar Association and tailored to the practice of law in the military context.¹²⁶ Supervision of the professional responsibility program is assigned to three Rules Counsel: the SJA to CMC for judge advocates and attorneys within the USMC, the Chief Judge of the Department of the Navy for those in judicial positions and the AJAG for Civil Law for all others.¹²⁷ All judge advocates receive Professional Responsibility training during the BLC.¹²⁸ Continuing Professional Responsibility education requirements differ among the State Bars.¹²⁹

3.5.2 Legalmen

Legalman Accession Course. The Legalman Accession Course serves as the foundation for the Navy JAG community's paralegal professional development program. It is taught by enlisted paralegal instructors and JAG Corps officers at NJS who also serve as Roger Williams University (RWU) adjunct faculty, allowing students to receive 10 American Bar Association-approved credit hours toward a paralegal degree. The first five weeks of the curriculum covers military-specific topics to prepare the students for their first tour as Legalmen, followed by RWU courses in Introduction to Law, Legal Research and Writing, Emerging Technologies, and Legal Ethics.¹³⁰

¹²⁵ Brief of the Deputy Judge Advocate General, U.S. Air Force to the Executive Review Panel (Sept. 18, 2019); Brief of representative of Army Judge Advocate General's Corps to the Executive Review Panel (Sept. 18, 2019); 506 PANEL REPORT, *supra* note 11, at 125.

¹²⁶ U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5803.1E, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL (Jan. 20, 2015) [hereinafter JAGINST 5803.1E].

¹²⁷ *Id.* at para. 11.

¹²⁸ Naval Justice School BLC 19030 Syllabus (Aug. 2019) (on file).

¹²⁹ Some states require military attorneys to report continuing legal education requirements, while others waive the requirement to report continuing legal education.

¹³⁰ 2018 ABA Report, *supra* note 83, at 37.

Legalman Paralegal Education Program. The purpose of the Legalman Paralegal Education Program (LPEP) is to produce Legalmen who, having earned an associate's degree in paralegal studies, perform legal tasks consistent with the supervising attorney's legal and ethical responsibilities, thereby enabling judge advocates to focus on higher level requirements and/or those functions that specifically require attorney services. Legalmen enrolling in LPEP incur an obligation for an additional 36 months of service, executed upon completion of LPEP.¹³¹

After completion of initial accession training at NJS, Legalmen may be assigned to several different positions, at sea or ashore, depending on the grade at which they converted and the billets available. A Legalman's knowledge, skills, and abilities must be multi-faceted and tailored to Fleet requirements and the specific billet to which assigned. Like a judge advocate's skills, a Legalman's skills are perishable if not regularly performed and continuously developed.

Continuing Education. Applying Navy Ready Relevant Learning (RRL) analysis, the Legalman rate is fully compliant with respect to the delivery of "right training at the right time."¹³² Throughout a Legalman's career, there are continuing courses of instruction offered at NJS. These include the Mid-Level Legalman Course for second tour E-5 and E-6 Legalman, the Senior Legalman Course for newly selected Chief Petty Officers, and the Prospective Triad Course for NLSC Senior Enlisted Leaders. Other courses are specially tailored to Legalmen assigned to litigation offices, which provide instruction on current procedures, best practices, and considerations in sexual assault cases, major cases, and law office management. Legalmen may also attend courses designed specifically for judge advocates or paralegal courses offered by other Services. All Master Chief Petty Officers attend the Senior Enlisted Academy (SEA)¹³³,

¹³¹ DEP'T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 1500.2, LEGALMAN PARALEGAL EDUCATION PROGRAM (Apr. 26, 2017).

¹³² *Vision and Guidance for Ready Relevant Learning*, COMMANDER, U.S. FLEET FORCES COMMAND (Aug. 2017), <https://www.public.navy.mil/usff/rrl/Documents/PDFs/rrl-vision-and-guidance-final.pdf>. RRL is a Navy initiative to improve delivery of training to Sailors. See U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS, NAVY ADMIN. MESSAGE 075/16, ASSIGNMENT OF U.S. FLEET FORCES COMMAND AS EXECUTIVE AGENT FOR READY, RELEVANT LEARNING (Mar. 28, 2016).

¹³³ Completion of SEA is required for advancement to Master Chief Petty Officer (MCPO) for all Senior Chief Petty Officers (SCPO) who were selected for SCPO from the FY 17 or later SCPO board. U.S. DEP'T OF NAVY, CHIEF OF NAVAL PERSONNEL, NAVAL MILITARY PERSONNEL MANUAL § 1306-925 (Senior Enlisted Academies) (Sept. 11, 2016).

and are eligible to attend the Command Master Chief & Chief of the Boat Course offered by Naval Leadership and Ethics Center.

Career Progression. Legalmen develop increased in-rate proficiency between the E-4 and E-6 ranks, while Chief Petty Officers and Senior Chief Petty Officers are expected to assume leadership roles within NLSC commands. Capstone positions for Senior and Master Chief Legalmen are assignments within NLSC as Senior Enlisted Advisors, including the Senior Enlisted Advisor to the Judge Advocate General.¹³⁴

On-the-Job Training and Skills Utilization. In addition to the above formal training, Legalmen are expected to practice and develop their in-rate skills on the job. A number of programs currently in place assist Legalmen in this mission. Legalmen must complete a PQS that requires them to master topics such as NJP, administrative separations, search and seizure, investigations, FOIA and the Privacy Act, legal assistance, and government ethics.¹³⁵ Through the Legalman Professional Development Training Program, Legalmen deliver weekly training to each other at each RLSO and DSO. The Legalman Rate Training Episode series delivers concise training on topics of interest in the form of a weekly blog post.¹³⁶ Other recent initiatives to reinforce professional development opportunities include discretionary cross-deck rotations between RLSOs and DSOs to further in-rate knowledge and experience, as well as a Legalman Mentoring Program to strengthen a peer-network across the JAG community.¹³⁷

To be proficient, Legalmen must learn through experience. Working Group interviews suggest that the bulk of Legalman time is not spent on tasks that hone in-rate skills, such as preparing legal documents, conducting legal research, and analyzing

¹³⁴ Concurrently serves as Command Master Chief, Naval Legal Service Command.

¹³⁵ U.S. Dep't of Navy, Naval Educ. & Training Command, NAVEDTRA 43243, Personnel Qualification Standard for Legalman (Aug. 2017). To assist with the PQS, Legalmen may refer to U.S. Dep't of Navy, Naval Educ. & Training Command, NAVEDTRA 14351B, Legalman Nonresident Rate Training Course (Jan. 2017).

¹³⁶ Developed by a junior Legalman, written "episodes" in the form of questions and answers are posted on SharePoint as well as delivered via email.

¹³⁷ U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN./COMMANDER, NAVAL LEGAL SERV. COMMAND INSTR. 1500.6, JUDGE ADVOCATE GENERAL'S CORPS LEGALMAN MENTORING PROGRAM (Sept. 27, 2018).

cases in support of judge advocates.¹³⁸ As previously discussed, a sub-optimized manpower skills mix within NLSC activities leads to numerous inefficiencies, requiring Legalmen to perform necessary administrative, technical, and security tasks at the expense of legal duties. Legalmen are not afforded enough time performing tasks that develop in-rate skills and experience. The inefficient manning mix noted in other sections of this Review is one contributing cause. Another is the dynamic that FTJAs and Legalmen are often trying to learn the same skill sets and lack the necessary experience to rely on or cross-train each other. An unwillingness on the part of some judge advocates to assign tasks to and mentor Legalmen has led to underutilization and reduces opportunities for professional development.¹⁴² It is incumbent upon mid-career and senior officers, as well as senior Legalmen, to dedicate the time and energy to train, develop, and utilize Legalmen as the force multipliers they can be, thereby enhancing the efficient delivery of legal services to the Fleet.

3.5.3 Training and Professional Development Issues

The following issues were specifically noted during review of training and professional development within the Navy JAG Corps legal community:

(1) Lack of Formal Career Guidance. Because of the decentralized community management practices discussed in section 3.4.1, there is a lack of formal definition and clearly communicated information on career milestones, experience, and training for control grade positions. Information provided to the JAG Corps about the “generalist” career path is so broad as to be of no use in professional development or mentoring. Moreover, the JAG Corps does not optimally use officer subspecialty codes to cover the full spectrum of billets requiring specialized knowledge, and the matching of personnel to those billets. This lack of direction contrasts with the concrete ideas senior JAG Corps leaders have about what experience and education is needed by officers filling key O-5/O-6 billets. The disparity between vague published career guidance and the specificity of discussions held during the control grade slating process creates unnecessary confusion and avoidable anxiety in the JAG Corps community.

¹³⁸ Working Group site visits to RLSO Southwest, DSO West, RLSO Mid-Atlantic, DSO Southeast, RSLO Naval District Washington, and DSO North (Sept. 2019); Brief of Command Master Chief, NLSC to the Executive Review Panel (Oct. 7, 2019).

(2) Naval Officer Identity. The Navy JAG Corps must develop a culture where individual members perceive themselves as Naval Officers and judge advocates, in contrast to simply seeing themselves as attorneys.¹³⁹ A side-effect of the paucity of sea and independent duty SJA billets is that young JAG Corps officers may naturally focus on JAG Corps programs and priorities rather than Navy requirements, a disconnect leading to the assumption that JAG Corps community practices and needs are the same as the Fleet's.

(3) MJLCT Identity. MJLCT officers are likely to spend most, if not all, of their career within NLSC, which puts them at a higher risk of becoming insulated from Navy culture and Fleet priorities. This is significant, given their role in educating and mentoring junior officers on military justice and serving in military justice system leadership positions.

(4) Post-Graduate Education. Unlike the other Services, the Navy JAG Corps is not resourced for judge advocates to attend Service Schools in addition to civilian post-graduate legal education. Encouraging officers to complete JPME I on their own is not a substitute for in-residence attendance at a Service School. Increased opportunity for resident education would enhance participating judge advocates' development as well-rounded Naval Officers.

(5) Identification and Use of Skills. A review of officer subspecialty code structures and the billets that require or should require a subspecialty code would ensure proper identification of officers' experience and use of that experience. Additionally, judge advocates who require a shorter training course for an assignment will often be placed in the course only after reporting to the assignment. Placing a priority on training *en route* to billet assignment would ensure that judge advocates start new assignments on the right foot.

¹³⁹ Uniformed Navy lawyers balanced multiple identities even before the establishment of the JAG Corps. Law Specialists, the immediate predecessors of current JAG Corps officers, were "special duty officers affiliated with the line." However, they endured a tense relationship with the line community, and many felt control by line officers was infringing on their professional autonomy. The JAG Corps was created as a Staff Corps community in 1967 to address these and other concerns. See JAY SIEGEL, ORIGINS OF THE UNITED STATES NAVY JUDGE ADVOCATE GENERAL'S CORPS 540-41, 635, 683 (United States Government Printing Office, 1998).

(6) Professional Responsibility (PR) Program. There is a lack of continuing PR training and education throughout a Navy judge advocate's career. Tailored PR training should accompany every new assignment and every course of instruction at NJS. Further, there needs to be regular, on-going discussion of PR issues across the JAG Corps community, informed by Rules Counsel review of PR complaints and lessons learned.

(7) Standardization and Effective Community Messaging Regarding FTJA Program. Working Group findings revealed ineffective JAG Corps Community standardization and messaging regarding the design, intent, and execution of the FTJA Program and Professional Development Standards (PDS) completion. While the FTJA program was created to ensure preparedness for fulfilling constitutional and professional responsibility obligations of competency in representing clients, as well as to provide the breadth of exposure to core JAG Corps missions, this JAG Corps community investment in its junior officers is viewed by some of those very junior officers as a lack of confidence and respect, as well as a professional impediment.¹⁴⁰ Likewise, the PDS required during the FTJA program is viewed by many FTJAs as unnecessary and ineffective, as well as inconsistently executed across NLSC commands.¹⁴¹ Widely disparate viewpoints were expressed regarding FTJA program architecture. Significant variance regarding commanding officer and PDO involvement in the execution, administration, and completion of PDS were observed. JAG Corps community standardization and oversight of these programs must be enhanced and JAG Corps community messaging on the intent, standardization and importance of the program improved.

(8) Role of Professional Development Officer. The PDO's primary function is professional development across RLSO and DSO commands, and the effective tailoring and administration of the PDS program.¹⁴² Based upon current execution practices, the cost of detailing a Lieutenant Commander to perform PDO functions in a stand-alone

¹⁴⁰ Working Group site visits to RLSO Southwest, DSO West, RLSO Mid-Atlantic, DSO Southeast, RLSO Naval District Washington, and DSO North (Sept. 2019); Brief of Command Master Chief, NLSC to the Executive Review Panel (Oct. 7, 2019).

¹⁴¹ *Id.*

¹⁴² CNLSCINST 5800.1G, *supra* note 22, para. 306.

billet at each RLSO is an inefficient use of judge advocates and needs to be balanced against competing Fleet requirements.

(9) Naval Justice School Curriculum Review. The existing procedures to review NJS curriculum does not allow for agile incorporation of lessons learned and feedback from course graduates. There is no formal mechanism to interview Basic Lawyer Course graduates during their initial assignment to assess the relevance and effectiveness of NJS training. Similarly, there is no formal, continuous process to incorporate lessons learned from the JAG Corps Community into the NJS curriculum. The re-establishment of the NJS Education Department by the current NJS Commanding Officer is an important first step to improve the process.

3.6 RESOURCING OF NAVY LEGAL COMMUNITY

Certain manning and professional development issues and recommendations cited above carry resource requirements. In addition, the Navy JAG Corps faces significant facility and information technology resource challenges.

3.6.1 Facilities

Within NLSC, RLSOs are primarily responsible for the security and maintenance of legal service facilities. They depend upon host installations for infrastructure support and compete with other installation tenant commands for facilities resourcing. However, NLSC is responsible for the design, maintenance, and security of Navy courtrooms.

Few NLSC facilities were originally constructed to serve as legal centers. Rather, NLSC has traditionally relied on repurposed Navy buildings. Navy courtrooms, accordingly, vary greatly in size, access, and security configurations. Even in Fleet concentration areas, few courtrooms exist that will fully support general court-martial requirements.

Of primary importance is physical security of Navy courtrooms. While NLSC maintains a small cadre of Physical Security Specialists,¹⁴³ there is no standing, organic security force in support of Navy courtrooms, and non-deployable Sailors temporarily assigned to RLSOs, Legalmen, and judge advocates regularly provide security at many court-martial proceedings, a task for which they are not properly trained and qualified.

Navy courtrooms have benefited from technical upgrades, including modern collaboration technology to allow for better visual displays and video teleconferencing. In certain locations, OJAG has equipped trial practitioners with tablet computers that interface with various courtroom devices and that can be used to execute the mission on the road. OJAG has undertaken various efforts to use modern court-reporting technology, including speech-to-text transcription and other tools to eliminate the need

¹⁴³ U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN./COMMANDER, NAVAL LEGAL SERV. COMMAND INSTR. 5530.2D, OFFICE OF THE JUDGE ADVOCATE GENERAL AND NAVAL LEGAL SERVICE COMMAND PHYSICAL SECURITY PROGRAM (CH-4, Nov. 30, 2018) [hereinafter JAG/CNLSCINST 5530.2D].

for third party transcription.¹⁴⁴ However, these many technology upgrades, including the “smart courtroom” initiative, are challenged by the lack of information technology support at the command level. The full potential of this technology is not met because command personnel do not have the time or knowledge to troubleshoot problems. The incompatibility of many of these systems with NMCI causes further inefficiency.

3.6.2 Resourcing of Case Management Systems

Although the need for a modern military justice data collection and case management system has been long recognized by the JAG Corps, and the JAG Corps has made concerted efforts to acquire one since 2004, this has proven unsuccessful due to various program challenges.¹⁴⁵ The current Case Management System (CMS) is a single court-martial case tracking system used by the Navy and Marines. Practitioners report that CMS is frequently non-functional and has limited utility in preparing the analytical reports or data calls.¹⁴⁶

In civilian legal practice, case management software typically tracks the status and various business aspects of a case. Electronic filing systems used by civilian courts, e.g., the Public Access to Electronic Court Records (PACER) system used by Federal Courts, allow for the submission and tracking of court documents, as well as public access to those documents. DON’s case management system, however, must support more functions than any comparable civilian system. DON must develop a unique system that combines features of a case management system with an electronic filing system and collect various data about the military justice system, as defined by Congressional and DoD requirements.

¹⁴⁴ Off. of Judge Advocate Gen., Tech., Operations & Plans (Code 67), Info Memo: Navy JAG Community Technology Initiatives (Sept. 12, 2019) (on file). OJAG has pursued a number of initiatives to mitigate inadequacies in existing Navy-wide services, to include development of a cloud environment for the JAG community; however, it is not manned or equipped to execute major technology development projects.

¹⁴⁵ The initial effort to develop a department-wide system, the DON Criminal Justice Information System (DONCJIS), began in 2004, but was cancelled in 2010 after it was determined that the underlying software had developed severe performance issues. A subsequent effort, Naval Justice Information System (NJIS) began development in 2014, but the first module, a law enforcement and investigations module, has not been produced and the JAG Corps has given up on further participation in NJIS development.

¹⁴⁶ Working Group site visits to RLSO Southwest, RLSO Naval District Washington, and RLSO Mid-Atlantic (Sept. 2019).

The MJA 2016 required the DoD to develop uniform standards for military justice case management and data collection.¹⁴⁷ It specifically required DoD military justice case management systems to serve four standardized functions: 1) Collect data required by statute, 2) Manage courts-martial cases from initiation of investigation through appellate review, 3) Facilitate public access to court filings, court records, and court dockets, as well as, 4) Improve the efficiency of data collection and response to reporting requirements. These requirements, codified in UCMJ Article 140a, render past JAG Corps efforts to develop or acquire case management systems obsolete.

In December 2018, DoD issued formal definitions of the data fields required to be created under Article 140a. To execute these requirements, the JAG has initiated an acquisition action. In coordination with the SJA to CMC, judge advocates from the Navy and Marine Corps have established system requirements to be used for a statement of work to solicit proposals in accordance with a detailed plan of actions and milestones (“POAM”). As of the date of this report, four potential commercial vendors for case management software have been identified, but the request for proposals has not yet been published. Given known problems and issues with CMS, Navy and Marine Corps legal communities are cooperating in development of a SharePoint-based case management system as an interim step, utilizing the U.S. Marine Corps Enterprise Information Technology Systems Cloud (MCEITS) to ensure some level of transition between CMS and the new Article 140a compliant successor.

3.6.3 Equipping/Resourcing Issues

The following issues were specifically noted during review of the equipping and resourcing of the Navy JAG Corps:

(1) Integrated Data Collection and Case Management System. The DON legal communities require a fully-functioning integrated data collection and case management system that meets all Congressional requirements, in place by December 2020.

(2) Smart Courtrooms. Significant continued investment in courtroom technology is necessary to increase the efficiency and effectiveness of military justice

¹⁴⁷ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, Div. E, title LXI, § 5504(b)(2), 130 Stat. 2000, 2961-62 (2016).

and ensure that Navy courtrooms comply with modern civilian standards in the conduct of criminal proceedings.

(3) Court Reporting and Transcripts. The JAG Corps lacks the technological capability to efficiently produce timely, accurate transcripts of courts-martial and administrative proceedings. Changes implemented under MJA 2016 have not lessened the need for accurate transcripts during trial and appellate litigation.¹⁴⁸ Modern court reporting and transcription technology would improve the quality of litigation by giving judge advocates and civilian defense counsel real-time access to transcripts during trial, would facilitate appellate review by producing accurate records of trial, and would be more efficient than reliance on production of records by third-party contractors after trial.¹⁴⁹ Although the JAG Corps has long recognized this deficiency and opportunity, and has piloted several systems to include speech-to-text software, these pilot projects have not succeeded primarily because of NMCI and other government networks' (such as OCONUS Navy Enterprise Network (ONE-NET)) constraints.

(4) IT Support to IT Investments. Concurrent with investments in information technology, the JAG Corps needs to ensure adequate support personnel for those investments, whether through contract or hiring, to minimize use of legal personnel as technical support, as noted above in section 3.4.5(1).¹⁵⁰

¹⁴⁸ Although Rule for Courts-Martial (R.C.M.) 1112 made an audio or video recording of a trial the official record of the trial, R.C.M.1114(a)(1) requires verbatim transcripts "when the judgment entered into the record includes a sentence of death, dismissal of a commissioned officer, cadet, or midshipman, a dishonorable or bad-conduct discharge, or confinement for more than six months." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1112, 1114(a)(1) (2019) [hereinafter MCM]. Even if not required, a convening authority may direct a verbatim record of trial, if deemed appropriate.

¹⁴⁹ Email from Chief Judge, Department of the Navy (Oct. 25, 2019) (on file).

¹⁵⁰ It is noted that, given the reliance on NMCI systems, substantial technical support must be provided by NMCI.

3.7 MISSION EXECUTION

3.7.1 Role of the Commander

Assessment of legal mission execution must start by addressing the role of the supported commander. The responsibility of the commander for his or her command is absolute; the authority of the commander is commensurate with his or her responsibility.¹⁵¹ The commander is responsible for the health, welfare, and discipline of every Sailor in his or her command, and compliance with the rule of law is the commander's responsibility. It is imperative that the commander be informed and discerning, one who knows when to seek legal advice and what to expect from his or her judge advocate.

Legal Training of Commanders. Initial training on military justice and other legal topics varies by commissioning source. Officers who commission through the U.S. Naval Academy receive initial legal training from judge advocates assigned to the Law, Leadership, and Ethics Department, to include basic military justice and administrative investigations. Naval Reserve Officer Training Corps (NROTC) midshipmen receive instruction on basic legal topics from officers serving as NROTC instructors, while Navy Officer Candidate School candidates receive similar instruction from Officer Training Command staff.

Naval Justice School and its Detachments in Norfolk and San Diego provide legal training for Fleet personnel at various stages of their career, including training for collateral duty legal officers and legal clerks, in conjunction with courses of instruction offered at other schoolhouses in Newport, RI.¹⁵² To provide guidance for senior officers and enlisted personnel, NJS regularly conducts a Senior Leaders Legal Course focused on legal matters likely to be encountered by the command triad, including military justice, ethics, legal assistance and other administrative topics. NJS created a training module for convening authorities regarding the Military Justice Act of 2016, and the Navy JAG Corps conducted training for all convening authorities and officers authorized

¹⁵¹ U.S. DEP'T OF NAVY, U.S. NAVY REGULATIONS, Art. 0802 (1990).

¹⁵² These include Naval War College, Naval Leadership and Ethics Center, Surface Warfare Officer School, and the Senior Enlisted Academy.

to impose non-judicial punishment in the Fall of 2018.¹⁵³ NJS also publishes the USN/USMC Commander's Quick Reference Legal Handbook (QUICKMAN), which provides an overview and reference guide on 69 areas of legal concern to commanders, and the JAGMAN Investigations Handbook, a reference for commanders conducting administrative investigations.

While these training forums and resources are valuable, there is no structured, standardized approach to ensuring that line officers of the Navy receive legal instruction over the course of their careers or specific to assumption of responsibilities that attend to being a convening authority. This is now required under Article 137(c), UCMJ, and is particularly important for senior officers, in that the relatively small number of courts-martial that are now conducted within the Navy make it unlikely that they will develop any real experience with formal military justice matters prior to becoming a convening authority.¹⁵⁴

General Court-Martial Convening Authorities. As for the offenses referred to trial by general court-martial, a practice has developed within Navy that the Region Commander will serve as the convening authority. Direction provided in the Manual of the Judge Advocate General (JAGMAN) reads:

When a commanding officer, in taking action on charges, deems trial by general court-martial to be appropriate but is not empowered to convene such a court **or finds the convening of such court-martial impracticable**, the charges and necessary allied papers will, in the absence of specific direction to the contrary by a general court-martial convening authority superior in the chain of command, be forwarded to the Region Commander. [emphasis added]¹⁵⁵

The practice of having the nine Navy Region Commanders serve as the general court-martial convening authority (GCMCA) in the majority of cases removes administrative burdens from other area commanders, particularly operational deployable units. Navy

¹⁵³ Military Justice Act of 2016 (Smart Pack), NAVAL JUSTICE SCHOOL, https://www.jag.navy.mil/njs_mja16_training.html (last visited Nov. 5, 2019). 5 Nov 19; U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS, NAVY ADMIN. MESSAGE 281/18, MILITARY JUSTICE ACT OF 2016 TRAINING REQUIREMENTS FOR COURT-MARTIAL CONVENING AUTHORITIES AND OFFICERS AUTHORIZED TO ADMINISTER NONJUDICIAL PUNISHMENT (Nov 20, 2018).

¹⁵⁴ The MJA 2016 added a requirement that "officers with the authority to convene courts-martial or to impose non-judicial punishment shall receive periodic training regarding the purposes and administration of this chapter." National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5503, 130 Stat. 2000, 2960-61 (2016); Art. 137(c), UCMJ, 10 U.S.C § 937(c) (2018).

¹⁵⁵ JAGMAN, *supra* note 100, para. 0128.

Region Commanders and RLSOs are resourced to provide the necessary financial and personnel support in conducting courts-martial. A small cadre of GCMCAs also supports standardization of military justice court-martial practice by delivering controlled and consistent decisions regarding the referral and disposition of offenses.

However, when GCMCAs or subordinate commanding officers refer to the Region Commander potential court-martial cases that originate within their own chain of command, they cede not just the administrative burdens that attend to court-martial proceedings but also the responsibility for making appropriate accountability decisions. They are handing over the tool specifically provided to that commander to maintain good order and discipline within his or her unit. Each convening authority, in every case, should carefully consider the impact to their mission, and balance the equities of retaining or referring the case to the Region Commander. Region Commanders must also be conscious that they assume complete responsibility and accountability for cases they receive from other convening authorities.

Consolidated Disposition Authorities. There is a practice of appointing Consolidated Disposition Authorities (CDAs) to review and adjudicate potential disciplinary matters. There are situations that call for designation of a single senior officer to administer accountability actions in a consistent and disciplined manner, typically cases involving large numbers of individuals assigned to different commands, most recently demonstrated in the GDMA and Western Pacific ship collision investigations. However, the use of CDAs should not become a default procedure to resolve all future high-profile matters.

Decisions to assign a CDA need to balance regularity and administrative efficiency with the need of commanders to ensure good order and discipline within their organizations. Use of a CDA may shift the authority to impose military justice actions to an officer outside of the military organization where the alleged incident occurred. While necessary in certain cases, this contrasts with the general principle that commanders are responsible for the conduct of their units and ensuring accountability. Further, the nature of a CDA's role must be clearly defined and understood, particularly in high-visibility cases. CDAs may feel the "impulse" to assume and fulfill the traditional role of

“commander,” responsible for collecting information, conducting root cause analysis, identifying necessary and appropriate corrective actions, keeping superiors properly informed, all while attending to and preserving the rights of all individuals involved. Yet CDAs must be conscious of remaining neutral and detached in undertaking military justice responsibilities. Current lack of standardized guidance on how to serve as a CDA and the bounds of a CDA’s authority complicate the task of any CDA.

Understanding Unlawful Command Influence. The military justice system expects that commanders will exercise their discretion over the disposition of charges independently and without interference from superiors. Unlawful command influence undermines the fairness and credibility of the system and interferes with the proper administration of justice. Commanders and judge advocates at all levels must honor and respect convening authorities’ independence and scrupulously refrain from, deter, and report any improper attempt to influence the exercise of their discretion.

Recent high-profile Navy and Marine Corps courts-martial led to judicial findings of both actual and apparent unlawful influence involving senior line and JAG Corps officers. Commanders and SJAs expressed concern with avoiding actions that may give rise to unlawful influence of any kind, including unlawful command influence.¹⁵⁶ The legal doctrine surrounding unlawful command influence also applies to a variety of other senior officials, to include some civilians. There is a need for clearly stated JAG guidance on this topic, as to how to best conduct necessary business and communications without impeding the unbiased administration of military justice.

Both commanders and judge advocates require clear, current, and consistent guidance and training on what constitutes unlawful influence. That training must incorporate the important lessons to be learned from current case law. At the same time, commanders need to exert *lawful* influence over their commands in the interest of maintaining good order and discipline. The balance between these two competing requirements requires leadership, situational awareness, and character, all of which are familiar and expected aspects of military officership.

¹⁵⁶ Working Group site visits to RLSO Southwest, RLSO Mid-Atlantic, and RLSO Naval District Washington; interviews with Region Commanders and CNIC (Sept. 2019).

Deliberate Decision-making. Finally, high-profile investigations and military justice cases place significant burdens on commanders at various links in the chain of command, including significant public interest, Congressional inquiries, and the attention of senior civilian or military leaders, all of which pressurize already challenging matters of military justice. Particularly in high-profile cases with complex legal issues, decisions must be made in a deliberate, measured manner.

3.7.2 Navy Military Justice

The military justice system must provide fair processes and fora, recognized by Sailors and the American public as such. It must serve commanders in maintaining good order and discipline necessary for the Navy to fight and win wars. To support commanders in the exercise of their responsibilities, judge advocates must be prepared to offer effective, efficient advice and legal services, up to and including zealous representation before general courts-martial and on appeal. Over the past decade, the JAG Corps has made strides in improving the quality of litigation through the MJLCT, and in addressing the issue of sexual assault in the military. Challenges to the Navy's military justice mission over the same period include a decrease in the number of special courts-martial compared to a decade earlier, leading to fewer litigation opportunities for junior judge advocates, an increase in the complexity of and administrative requirements for the remaining cases, and insufficient administrative and technical support.

Decrease in the Number of Courts-Martial. Reporting in 2011, the 506 Panel noted the significant decrease in the number of general and special court-martial cases between 2000 and 2010, the majority of the decline attributable to a reduction in the number of special courts-martial.¹⁵⁷ In reviewing the number of cases tried by the Navy from 2010 to 2018, total numbers of courts-martial have plateaued at approximately 250 per year.

¹⁵⁷ 506 PANEL REPORT, *supra* note 11, at 98.

Navy General and Special Courts-Martial, FY 00-FY 19

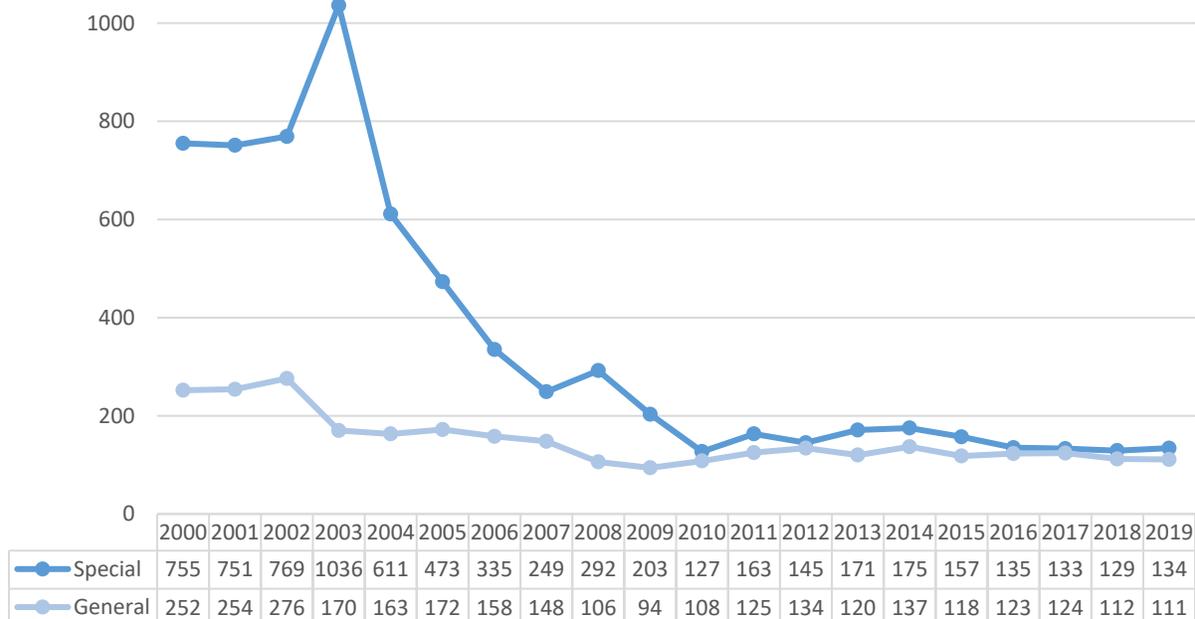


Figure 10: Special and general courts-martial from FY 00 through FY 19. In reviewing the number of cases tried by the Navy from 2010 to 2018, total numbers of court-martial have plateaued at approximately 250 per year.

(Source: 506 PANEL REPORT, supra note 11, at 89; Annual Reports Pursuant to the Uniform Code of Military Justice, COURT OF APPEALS FOR THE ARMED FORCES, https://www.armfor.uscourts.gov/ann_reports.htm (last visited Oct. 7, 2019); Off. of Judge Advocate Gen., Criminal Law (Code 20), Response to Request for Information (Sept. 25, 2019) (on file).)

The 506 Panel noted several factors in 2011 that seemed to explain this decreased use. Such factors have equal applicability in assessing the current court-martial rate in 2019.¹⁵⁸ First and foremost, the quality of Navy recruits remains high. The men and women of the Navy are a professional, well-disciplined force, with few disciplinary issues relative to overall military end strength. The 506 Panel described a cultural shift among U.S. Navy line commanders serving as convening authorities to use non-judicial and administrative processes rather than courts-martial to dispose of instances of minor misconduct, forcing problem Sailors out of the Navy.¹⁵⁹ While this

¹⁵⁸ *Id.* at 90-91.

¹⁵⁹ Working Group visit to RLSO Southwest and DSO West (Sept. 2019). The Secretary of Defense addressed this issue in 2018, telling commanders that administrative actions “should not be the default method to address illicit conduct simply because it is less burdensome than the military justice system.” U.S. DEP’T OF DEF., SEC’Y OF DEF. MEMORANDUM, DISCIPLINE AND LETHALITY (Aug. 13, 2018). While anecdotal evidence points to commanders choosing administrative separation over court-martial, administrative separation data shows a marked decline in the number of enlisted separations for misconduct over the past twenty years, during the same period as the decline in special courts-martial. Officer separations for misconduct remained constant. Email from Navy Personnel Command (Oct. 8, 2019) (on file).

culture appears to have become ingrained, it was also formalized by a policy published in a naval message (NAVADMIN) in August of this year.¹⁶⁰ Further, high operational tempo continues to reinforce the shift to lower forum resolutions, which require less time and fewer resources to adjudicate.¹⁶¹

While the impact of the Military Justice Act of 2016, effective January 1, 2019, which includes a new form of special court-martial, is not yet known, it appears reasonable to anticipate that convening authorities will continue to refer only the most serious and significant instances of misconduct to trial by court-martial.¹⁶²

In assessing workload, the total number of courts-martial tried does not reflect the entire military justice requirement. The number of incidents requiring disciplinary review is far higher. RLSO data over the past four years indicates that only 15% of cases initially reported to RLSO Trial Departments ultimately result in a verdict at court-martial. The remainder of the cases are resolved through administrative or non-judicial punishment actions.¹⁶³ However, even those cases that are disposed of through processes other than court-martial require the services of judge advocates in the DSO and RLSO, Victims' Legal Counsel, and Staff Judge Advocates.¹⁶⁴

¹⁶⁰ U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS, NAVY ADMIN. MESSAGE 188/19, ACHIEVING BEST-EVER PERFORMANCE (Aug. 9, 2019).

¹⁶¹ Judicial developments applying Constitutional requirements to introduction of laboratory reports may have also led to a decline in the number of special courts-martial by increasing the requirement for in-court testimony in prosecutions for wrongful drug use. In *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010), CAAF held that the Confrontation Clause of the Sixth Amendment prevented the introduction of certain signed memoranda in a laboratory report without in-court testimony.

¹⁶² This in no way intended to carry any characterization that this is somehow inappropriate; use of judicial processes that may deprive a Sailor of liberty and property, as well as carry the negative stigma associated with a punitive discharge, calls for careful and considered judgment on the part of convening authorities.

¹⁶³ Off. of Judge Advocate Gen., Criminal Law (Code 20), Response to Request for Information (Sept. 25, 2019) (on file) [hereinafter Code 20 RFI Response (Sept. 25, 2019)].

¹⁶⁴ Sailors facing any legal jeopardy may seek a "personal representation" (PERSREP) services from the DSO. PERSREP advice includes providing Sailors information prior to non-judicial punishment proceedings. Defense attorneys across NLSC offered 13,882 (PERSREP) consultations to Sailors in FY 18. Chief of Staff, Defense Service Offices, Response to Request for Information (Sept. 13, 2019) (on file). See CNLSCINST 5800.1G, *supra* note 22, para 104; *Limited Scope of Representation Agreement*, DEF. SERV. OFF. WEST, https://www.jag.navy.mil/legal_services/documents/STANDARD_DSO_INTAKE_FORM_WEST.pdf (last visited Nov. 5, 2019). Further, servicemembers facing administrative separation who are eligible for a separation board have the right to representation by military counsel at the board, and servicemembers may receive advice of counsel upon notification of separation procedures. U.S. DEP'T OF DEF., DEP'T OF DEF. INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, encl. (5), para. 3 (Jan. 27, 2014); U.S. DEP'T OF DEF., DEP'T OF DEF. INSTR. 1332.30, COMMISSIONED

Cases Opened vs. Alternate Disposition vs. Referred

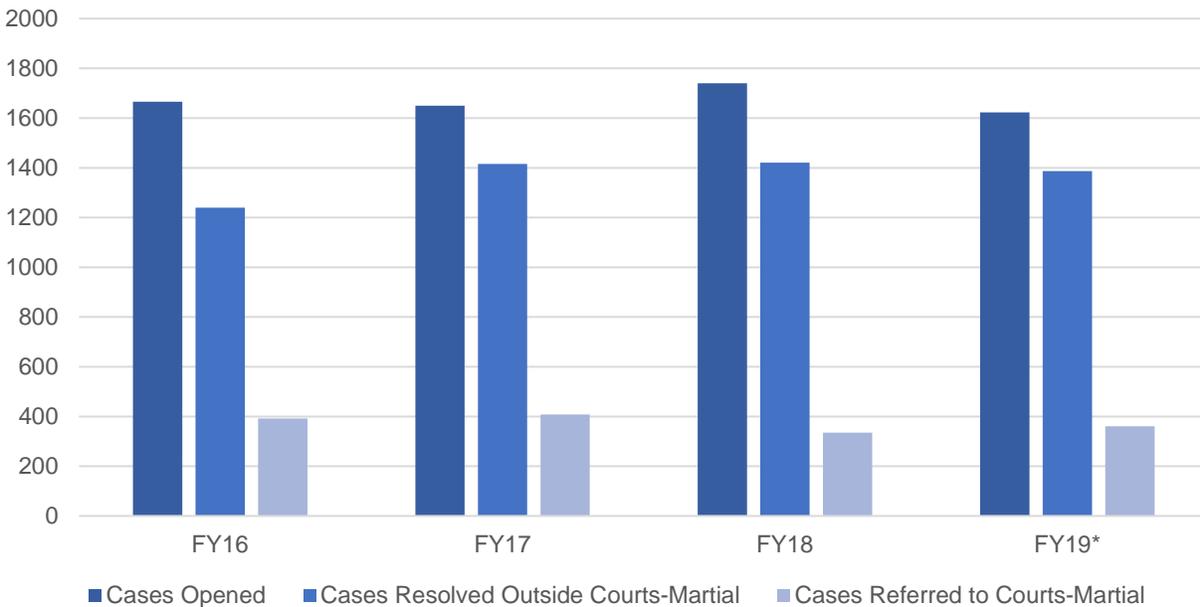


Figure 11: The number of cases reviewed by the RLSO Trial Departments is much larger than the number of completed courts-martial. Only 15% of cases proceeded to trial over the past four years, while the remainder were adjudicated through other means.

*FY 19 numbers include 1st through 3rd Quarter.

(Source: Off. of Judge Advocate Gen., Criminal Law (Code 20), Info Memo: General and Special Court-Martial Metrics (Sept. 13, 2019) (on file).)

Increase in Requirements for Sexual Assault Cases. Since the 506 Panel's Report in 2011, there are significantly more administrative and procedural requirements in adjudicating sexual assault offenses. Victims of qualifying sexual offenses have substantial rights during the investigative and adjudication phases of a case. As an issue that holds public and Congressional attention, DoD continues to focus on investigative and accountability processes, and ensuring due process for all parties.¹⁶⁵

Attention to this issue and resultant reforms to the military justice system have resulted in an increase in the number of sexual assault reports.¹⁶⁶ For Fiscal Years

OFFICER ADMINISTRATIVE SEPARATIONS, sec. 5-4 (CH-1, Apr. 12, 2019); U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 1920.6D, ADMINISTRATIVE SEPARATION OF OFFICERS (July 24, 2019).

¹⁶⁵ For a summary of legislative changes related to sexual assault since 2014, as well as the most recent DoD assessment and recommendations, see SEXUAL ASSAULT INVESTIGATION AND ACCOUNTABILITY TASK FORCE REPORT (2019) [hereinafter SAIATF REPORT].

¹⁶⁶ In 2006, the Department of Defense estimated that only six percent of servicemembers experiencing a sexual assault reported it. In 2018, the Department of Defense estimated that 30 percent of servicemembers experiencing a sexual assault reported it. *Id.* at 11.

2016, 2017, and 2018, 23% of Navy courts-martial tried to verdict brought at least one specification alleging sexual assault before the trier of fact.¹⁶⁷ Working Group visits estimate that sexual assault cases comprise over 60% of a given RLSO Trial Department workload.¹⁶⁸ Interviews with military justice practitioners described myriad responsibilities in each and every reported violation of Article 120, UCMJ and related offenses.¹⁶⁹ Within the RLSOs, these include trial counsel personally speaking with each victim, discussing their rights in the military justice process, and gathering preferences as to disposition.¹⁷⁰ Trial counsel are required to prepare a detailed Prosecution Merits Memorandum (PMM) in every sexual assault case.¹⁷¹ In those cases where prosecution is not recommended, trial counsel must submit a formal Prosecution Merits Review to the commanding officer of the accused.¹⁷² Victims are eligible to receive advice and representation of VLC counsel immediately upon reporting a sexual assault and indefinitely thereafter.¹⁷³ Alleged offenders may be eligible to consult with a DSO attorney, depending on the stage and course of the investigation. It

¹⁶⁷ Off. of Judge Advocate Gen., Criminal Law (Code 20), Info Memo: Courts-Martial Processing Times (Sept. 12, 2019) (on file) [hereinafter Code 20 Processing Times Info Memo].

¹⁶⁸ Working Group site visits to RLSO Mid-Atlantic and RLSO Southwest (Sept. 2019).

¹⁶⁹ Successive Department of Defense and Navy policies have increased reporting and tracking requirements for sexual assault cases over the last decade. See U.S. DEP'T OF DEF., DEP'T OF DEF. DIRECTIVE 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM (CH-3, Apr. 11, 2017); U.S. DEP'T OF DEF., DEP'T OF DEF. INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES (CH-3, May 24, 2017); U.S. DEP'T OF NAVY, SEC'Y OF NAVY, ALL NAVY & MARINE CORPS (ALNAV) MESSAGE 061/14, IMPLEMENTATION OF THE SEXUAL ASSAULT DISPOSITION REPORT (SADR) (Aug. 11, 2014); U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 1752.1C, NAVY SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM (Aug. 13, 2015); U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 1752.4C, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM PROCEDURES (Aug 10, 2018) [hereinafter SECNAVISNT 1752.4C].

¹⁷⁰ U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN./COMMANDER, NAVAL LEGAL SERV. COMMAND INSTR. 5800.4A, VICTIM AND WITNESS ASSISTANCE PROGRAM (VWAP) (Apr. 18, 2011).

¹⁷¹ PMMs document the reasons behind prosecutorial recommendations, enabling the prosecutor to respond to requests for information on sexual assault cases from members of Congress and others. The practice of drafting PMMs arose in every service as a result of the renewed focus on sexual assault. Although there is no requirement in statute or instruction, RLSOs implement the practice based on guidance from TCAP. Prosecutors also use PMMs for documenting decisions in other "special victim" cases such as domestic violence or child abuse. Instructions for drafting Prosecution Merits Memoranda (PMMs) and a standardized form are made available by TCAP.

¹⁷² In practice, a PMM for a case that will be referred may be more informal than one for a case where referral does not occur.

¹⁷³ JAGINST 5810.3A, *supra* note 25, at para. 5-1. Per the instruction, VLC services are extended to "active-duty and reserve personnel, other DoD service personnel, retirees, and DoD civilians when assaulted by an active-duty service member, dependent, including spouses and children of active-duty Navy members when assaulted by an active-duty service member." Clients must inform the VLC they are the victim of a qualifying offense and need not have made a restricted or unrestricted report.

is beyond the scope of this review to set forth the totality of reporting, investigative, and administrative requirements placed upon RLSO, DSO, and VLC practitioners, but it is appropriate to note that in all reports of sexual assault, military justice personnel must attend to significant, complicated administrative requirements in addition to those needed to adjudicate the case.¹⁷⁴

Complex Litigation. For those cases that are referred to court-martial, whether involving sexual assault offenses or not, military justice practitioners describe an increasing trend towards “complex” litigation, often involving voluminous electronic discovery requests, forensic analysis, multiple expert witnesses, extensive motions practice, the requirement for sensitive victim and witness preparation, and increased media attention.¹⁷⁵

Implementation of Military Justice Litigation Career Track. The dramatic decline in the use of special courts-martial, the seriousness of the offenses that are referred to courts-martial,¹⁷⁶ and the described complexity of the litigation practice clearly demonstrate the requirement for a cadre of trained, experienced, military justice litigation specialists. As described in Section 3.5.1 above, the Navy JAG Corps has been developing this cadre since 2007.

There are indications that the MJLCT improved the quality of military justice litigation. The JAG Corps has identified measures of effectiveness for military justice programs, to include: 1) offender accountability, and 2) due process, that being the

¹⁷⁴ From the period 2009 to 2018, the majority of reported sexual offenses within DoD were not ultimately referred to court-martial. Command action may not be possible for a number of reasons, including when the report involves pre-Service incidents and/or involves alleged offenders that are not subject to military jurisdiction, there is insufficient evidence of a crime to prosecute, the victim declines to participate in the justice process, the statute of limitations expires, or when the allegations against the alleged offender are unfounded. There are also differing degrees of alleged sexual assault, and offenses consider minor (e.g., one time unlawful touching) may warrant disposition at forums or through processes other than court-martial. See U.S. DEP’T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, app’x. C, (Apr. 26, 2019).

¹⁷⁵ Comprehensive Review Site Visit Summaries of September 2019. The challenge in prosecuting sexual assault and other “Special Victims” cases led to the requirement in SECNAVISNT 1752.4C, *supra* note 170, to establish targeted training to qualify personnel in handling these types of cases. This was implemented by the JAG Corps in U.S. DEP’T OF NAVY, JUDGE ADVOCATE GEN./COMMANDER, NAVAL LEGAL SERV. COMMAND INSTR. 5817.2, SPECIAL VICTIM INVESTIGATION AND PROSECUTION POLICY (May 22, 2019) [hereinafter JAG/CNLSCINST 5817.2].

¹⁷⁶ For Fiscal Years 2016, 2017 and 2018, adult sexual assault offenses constituted 23% of the courts-martial tried in the Navy. Code 20 Processing Times Info Memo, *supra* note 167.

promotion of the fair, impartial, and timely pursuit of justice culminating in results that are accurate and reliable. Regarding offender accountability, for the period FY 16 through FY 19, the conviction rate in those court-martial cases that result in a verdict averages 85% (91% in special courts-martial and 78% in general courts-martial).¹⁷⁷ These rates are consistent with those reported by the other Services and have not changed significantly since 2007.¹⁷⁸

Several metrics suggest an improvement in due process in Navy court-martial proceedings since implementation of the MJLCT specialty. Implementation of the MJLCT specialty increased the seniority and skill levels of those individuals filling senior trial counsel and senior defense counsel billets across NLSC as compared to 2007, providing comparatively more experienced counsel to supervise routine cases. According to the Chief Judge, Department of the Navy, the number of cases where appellate review has found error resulting in either the conviction being overturned or modification of the findings/sentence has dropped from 9.2% in 2007 to 2.5% in 2018.¹⁷⁹ The Court of Appeals for the Armed Forces (CAAF) granted petitions for review in only nine Navy and Marine Corps cases in 2018, out of 325 cases reviewed by the U.S. Navy - Marine Corps Court of Criminal Appeals (NMCCA) that year (2.8%).¹⁸⁰

¹⁷⁷ Code 20 RFI Response (Sept. 25, 2019), *supra* note 164. Conviction rate is provided simply as a point of analysis; it is an output of the military justice system that should not be “influenced” or considered as having a positive or negative valence in that doing so may be inappropriate or unlawful under military law.

¹⁷⁸ Chief Judge, Dep’t of Navy, Info Memo: U.S. Navy Military Justice Litigation Performance Measures & Court-Martial Data Collection (Aug. 20, 2019) (on file) [hereinafter Chief Judge Info Memo]. It is noted that analyzing data concerning offender accountability is complicated by the fact that in the military system, prosecutors do not make referral decisions. The imperatives of good order and disciplines require that every allegation of misconduct be addressed. There is belief among current military justice practitioners that this is particularly applicable in cases of alleged sexual offenses, and that the military justice system is conducting courts-martial in scenarios where charges are or would be declined in civilian jurisdictions. Working Group site visits to RLSO Southwest, RLSO Mid-Atlantic, and RLSO Naval District Washington (Sept. 2019).

¹⁷⁹ Chief Judge Info Memo, *supra* note 178.

¹⁸⁰ U.S. DEP’T OF NAVY, JUDGE ADVOCATE GEN., NAVY REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2018 (Dec. 31, 2018) [hereinafter 2018 NAVY ANNUAL REPORT]. Comparable data for 2018 is only available for the Air Force. Eight Air Force petitions were granted while 192 cases were reviewed by the Air Force Court of Criminal Appeals (4.2%). *Id.* In 2017, CAAF granted petitions to review 16 Navy and Marine Corps Cases out of 361 reviewed by NMCCA (4.4%). That year, CAAF agreed to review 200 Army petitions while 523 cases were reviewed by the Army Court of Criminal Appeals (38%), 25 Air Force Petitions compared to 145 cases reviewed by the Air Force Court of Criminal Appeals (17%), and to 3 Coast Guard petitions compared with 28 cases that were reviewed by the Coast Guard Court of Criminal Appeals (10.7%). COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 2016 TO SEPTEMBER 30, 2017 (2017) [hereinafter 2017 ANNUAL REPORT].

There have been only nine NMCCA findings of prosecutorial misconduct and ineffective assistance of counsel in the period FY 16 through the present.¹⁸¹ Finally, at the appellate level, NMCCA has eliminated the issues of untimely appellate review that led to the Congressionally mandated DoD IG study of 2010.¹⁸²

U.S. Navy-Marine Corps Court of Criminal Appeals Docketed and Decided FY 00-FY 19*

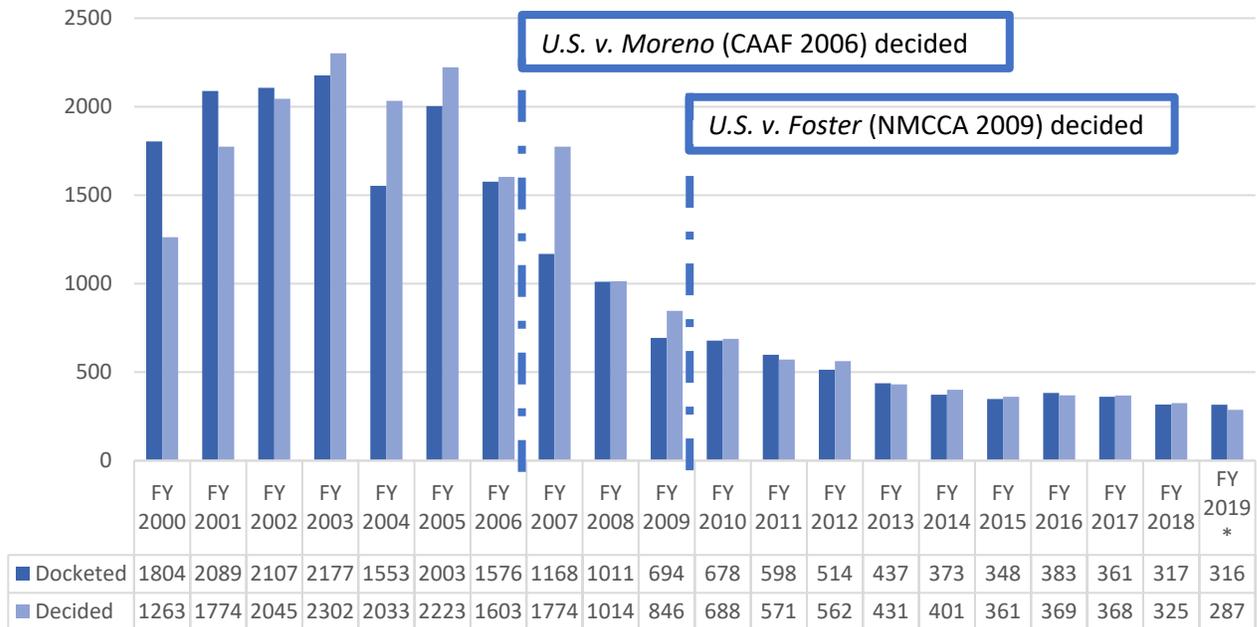


Figure 12: U.S. Navy-Marine Corps Court of Criminal Appeals docketed and decided cases.
*FY 19 numbers include 1st through 3rd Quarter.

(Source: Data provided by U.S. Navy-Marine Corps Court of Criminal Appeals to Working Group (Sept. 2019) (on file); Annual Reports Pursuant to the Uniform Code of Military Justice, COURT OF APPEALS FOR THE ARMED FORCES, https://www.armfor.uscourts.gov/ann_reports.htm (last visited Oct. 7, 2019).)

Military Justice Manning. The Navy JAG Corps devotes significant attorney, Legalman, and civilian paralegal resources to military justice litigation. Representing the Government interests in the prosecution of servicemembers at the trial level are 44

¹⁸¹ For the period FY 16 to the present, the NMCCA found prosecutorial misconduct in 3 Navy and Marine Corps cases; ineffective assistance of counsel in 6 Navy and Marine Corps cases; and no ethics violations. Chief Judge Info Memo, *supra* note 178.

¹⁸² In *United States v. Foster*, No. 200101955, 2009 CCA LEXIS 62 (N-M. Ct. Crim. App. Feb. 17, 2009), a Marine’s conviction was set aside because the conviction “could not withstand the test for legal and factual sufficiency.” However, the Marine had been confined for nine years awaiting automatic appellate review. See DOD IG REPORT, *supra* note 9, at 18. NMCCA granted relief in only one case for excessive post-trial processing since FY 16; CAAF has granted no relief based on *Moreno* violations. Chief Judge Info Memo, *supra* note 178; see *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

judge advocates, 35 Legalmen, and 8 civilian paralegals.¹⁸³ Defending individual servicemembers at the trial level are 50 judge advocates, 34 Legalmen, 4 civilian paralegals, and 8 civilian defense litigation support specialists.¹⁸⁴ Additional military and civilian personnel serve in dedicated military justice positions at the Trial Counsel and Defense Counsel Assistance Program Offices (four judge advocates, two civilian “highly-qualified expert” attorneys, and two Legalmen), the Navy-Marine Corps Trial Judiciary (12 Navy judge advocates), within the Appellate Government and Appellate Defense Divisions of OJAG (11 Navy judge advocates), and the NMCCA (eight Navy judge advocates serving as Judges or clerks). Within the VLC, there are currently 33 judge advocates and ten enlisted billets. Finally, approximately 80 FTJAs are assigned to trial and defense offices and, while not typically assigned lead counsel responsibilities in courts-martial, provide counsel services and assistance.¹⁸⁵

At first glance, the number of courts-martial prosecuted to verdict looks small compared with the number of personnel assigned to the effort. With 44 “core” trial counsel billets and 50 “core” defense counsel billets, this averages to five courts-martial cases litigated to verdict per trial or defense counsel per year.¹⁸⁶ However, complex and/or contested cases often have more than one trial and/or defense counsel assigned, and trial, defense, and VLC counsel are involved in providing legal services during a court-martial investigation stage, even if the case never goes to trial.¹⁸⁷

¹⁸³ Assistant Judge Advocate General for Military Justice brief to Executive Review Panel (Sept. 4, 2019) (on file). Of the 44 judge advocates prosecuting cases at the trial level, 17 are in the Military Justice Litigation Career Track.

¹⁸⁴ *Id.* Of the 50 judge advocates defending servicemembers at the trial level, 18 are in the Military Justice Litigation Career Track.

¹⁸⁵ *Id.*

¹⁸⁶ VLC Counsel seek to maintain average caseload of no more than 25 active cases. Chief of Staff, Victims’ Legal Counsel Program, Info Memo: Victims’ Legal Counsel Program Background and Status (Aug. 28, 2019) (on file).

¹⁸⁷ Through the 3rd Quarter of FY 19, there was a NLSC-wide average of 25.5 open cases per “core” trial counsel billets authorized. A case is considered “open” once RLSO receives a report that the investigation has been initiated. Trial Counsel Assistance Program, Response to Request for Information (Sept. 18, 2019) (on file). Defense Counsel are assigned clients later in the process, once charges are preferred against the accused, or the accused is notified of an administrative separation board. As of September 9, 2019, each “core” defense counsel in DSO SE, Norfolk was assigned to represent, on average, nine Sailors facing court-martial charges. Def. Counsel Assistance Program, Response to Request for Information (Sept. 13, 2019) (on file) [hereinafter DCAP RFI Response].

Further, as discussed above, each trial and defense counsel also provides services and support in cases outside of the court-martial realm.¹⁸⁸

Challenges associated with this relatively low number of courts-martial are not new, having been specifically identified and discussed in the 2011 506 Panel report:

The military justice challenge facing the U.S. Navy JAGC Corps today is that the total number of courts-martial has declined substantially, including, in particular, less serious cases, which used to make up the bulk of special courts-martial. Those less serious cases were the cases upon which newly reporting junior officers “used to cut their teeth.” Because the total cases tried at court-martial has fallen precipitously, there has been a dilution in trial advocacy opportunities, particularly at the junior officer level, and a reduction in overall litigation experience across the Navy JAG Corps community. And yet, the Navy JAG Corps must retain the capability to administer and try complex cases, such as capital cases, national security cases, and war crime cases, in a timely and professional manner, under a military justice system in which judge advocates have responsibilities at every level of the process, from initial investigation to final appeal.

*In the face of the declining courts-martial numbers, the JAG has re-evaluated the MJLCT and concluded that, while the MJLCT is still a key component in ensuring the professional and timely execution of the military justice mission, the MJLCT community will have to be sized to meet the current caseload*¹⁸⁹

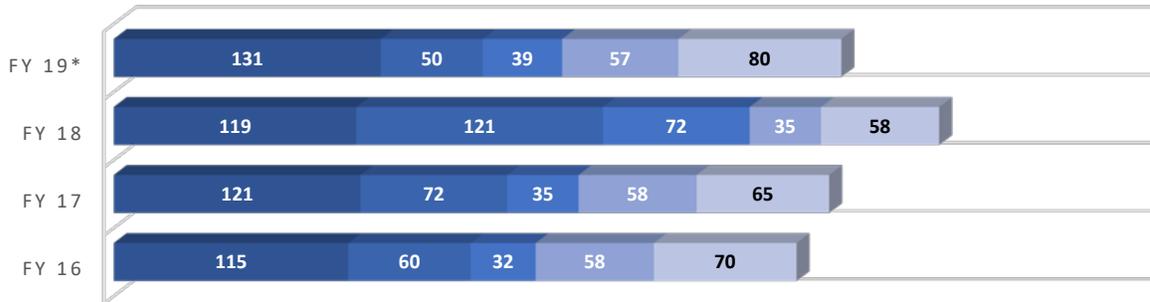
Case Processing Times. Despite implementation of the MJLCT, lengthy case processing times remain a stubborn feature of the military justice system. Court-martial data for FY 19 indicates that from the time that the RLSO receives a record of investigation, there is an average time of 146 days to assess the case, prefer charges, and refer the matter to court-martial. Once referred, the average special court-martial

¹⁸⁸ As of September 9, 2019, each “core” defense counsel in DSO SE, Norfolk, represented an average of three clients facing administrative separation, while each FTJA in Norfolk represented 14.5 clients facing administrative separation. Levels were similar across other fleet concentration areas. DCAP RFI Response, *supra* note 187. SJAs, trial counsel, and Legalmen serve as Recorders in Administrative Separation Boards and Boards of Inquiry. The responsibility of processing administrative separations constitutes a large part of the workload in SJA offices. Another responsibility incurred either by trial counsel or SJAs is prosecution in Federal Court of violations that occur on Navy installations. Since civilians cannot be court-martialed, Federal Court is often the only forum for adjudication of legal offenses. Judge advocates in 21 locations serve as Special Assistant United States Attorneys (SAUSAs). Typically, SAUSAs appear in the Federal Petty Docket and work with the US Attorney’s office to prosecute both misdemeanors and felonies. Chief of Staff, Region Legal Serv. Offices, Info Memo: Navy Locations with Active SAUSA Programs (Sept. 24, 2019) (on file).

¹⁸⁹ 506 PANEL REPORT, *supra* note 11, at 98-99.

takes 80 days to reach a verdict, while general courts-martial take 173 days. These processing times are generally consistent across FY 16, FY 17, and FY 18.¹⁹⁰

Case Processing Times (SPCMs) - All Types



	FY 16	FY 17	FY 18	FY 19*
■ Investigative Stage	115	121	119	131
■ NCIS ROI Complete to RLSO PMM (days)	60	72	121	50
■ RLSO PMM to Preferral (days)	32	35	72	39
■ Preferral to Referral (Days)	58	58	35	57
■ SPCM Referred to Trial Verdict	70	65	58	80

Figure 13: Average case processing times for special courts-martial. (Source: Code 20 Processing Times Info Memo, *supra* note 167.)

*FY 19 numbers include 1st through 3rd Quarter.

¹⁹⁰ Code 20 Processing Times Info Memo, *supra* note 167.

Case Processing Times (GCMs) - All Types



	FY 16	FY 17	FY 18	FY 19*
■ Investigative Stage	115	121	119	131
■ NCIS ROI Complete to RLSO PMM (days)	60	72	121	50
■ RLSO PMM to Preferral (days)	32	35	72	39
■ Preferral to Referral (Days)	58	58	35	57
■ GCM Referred to Trial Verdict	150	154	65	173

Figure 14: Average case processing times for general courts-martial. (Source: Code 20 Processing Times Info Memo, supra note 167.)

*FY 19 numbers include 1st through 3rd Quarter.

There are many reasons that may explain these processing times, including the increase of reports of sexual assault and the significant administrative requirements imposed in such cases. RLSOs have little, if any, control over the investigative stage of a case.¹⁹¹ A case's timeline is influenced by discovery requirements and availability of witnesses and defense counsel (including civilian defense counsel). Once a case is referred, docketing for trial and establishment of a trial management order is the responsibility of the military judge. Whatever the reasons may be, these processing times illustrate why a convening authority might handle incidents of misconduct through administrative and non-judicial procedures, rather than incur the delay in trial by court-martial.

Although the issue of properly sizing the MJLCT was noted by the 506 Panel report in 2011, the JAG Corps has not followed through on reviewing how to properly

¹⁹¹ As judge advocates have experienced increased administrative and notification requirements in sexual assault cases, so too have the Service criminal investigative agencies. U.S. DEP'T OF DEF., DEP'T OF DEF. INSTR. 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE (CH-2, Jan. 31, 2019).

optimize the MJLCT officer cadre to a Fleet demand signal of 250 courts-martial per year. The optimal mix of MJLCT judge advocates, core trial and defense counsel, military and civilian paralegals, and administrative support staff has not been achieved. The current manning model places significant administrative work on judge advocates, which is inefficient.

The JAG Corps must provide effective, timely military justice aligned with the Nation's expectations of fundamental fairness and Fleet and shore requirements. If commanders perceive that the military justice system is slow and unresponsive to their needs and are therefore disposing of serious cases through alternative means, this would seemingly come at the expense of overall good order and discipline.¹⁹² Lengthy case processing times may be due, in part, to Navy JAG Corps organizational constructs and internal assignment and professional development practices.

3.7.3 Navy and Joint National Security Law

The JAG is responsible for providing legal advice and training on a broad array of national security law issues as specified in SECNAVINST 5430.27E. These include, among others, principles of international and domestic law that affect U.S. naval operations, to include those that apply during armed conflict at sea and ashore,¹⁹³ matters of jurisdiction and sovereignty at sea, navigational rights of warships and aircraft, environmental compliance, protection of persons and property at sea, international agreements, counter-terrorism, counter-piracy, counter-proliferation, detention operations and military commissions, foreign criminal jurisdiction, humanitarian assistance and disaster relief, as well as, in coordination with the General Counsel of the Navy, intelligence and related activities. JAG also serves as the DoD Representative for Ocean Policy Affairs, responsible for monitoring trends in ocean law and policy to develop DoD positions, coordinating the Navy's Freedom of Navigation

¹⁹² It is not possible to definitively state the impact of timeliness on the types of cases referred to court-martial, and as stated earlier, a court-martial is not the proper forum for every offense. However, to the extent considerations of timeliness and expense inhibit referral of serious misconduct to court-martial, this negatively affects the metric of offender accountability. See ELAINE NUGENT-BORAKOVE, PERFORMANCE MEASURES FOR THE U.S. DEPARTMENT OF THE NAVY JUDGE ADVOCATE GENERAL PROGRAM 2 (Justice Mgmt. Inst. Dec. 2011).

¹⁹³ To include information operations and cyberspace operations.

program, cataloging and disseminating current information on foreign maritime claims and legal developments, and serving as DoD's interagency point of contact for ocean policy and maritime matters.¹⁹⁴

Legal support for these various mission areas is accomplished at the Departmental level by OJAG's National Security Law Division (Code 10) and Environmental Law Division (Code 12). Within the Fleet and Joint Force, such services and support are provided by control grade judge advocates assigned directly to the commander as Staff Judge Advocates.

During this comprehensive review, numerous Navy operational commanders were interviewed, as well as Combatant Commanders and Combatant Command (COCOM) SJAs (non-Navy). Without exception, these commanders and COCOM SJAs commended the levels of knowledge and experience, critical thinking abilities, personal dedication, and professionalism exhibited by Navy judge advocates.¹⁹⁵

While objective measures of effectiveness were not specifically identified during this review, it is noteworthy that since the initiation of a competitive board process for selection of the Legal Counsel to the Chairman of the Joint Chiefs of Staff, a Flag/General Officer position, three of the four Legal Counsel chosen to serve in this preeminent national security uniformed legal position have been Navy judge advocates.¹⁹⁶ Reflection on the professional development of these individual officers – who are representative of a wider cadre of Navy judge advocates – indicates significant operational opportunities over the course of a career, to include SJA assignments to carrier strike groups, numbered Fleets, joint assignments to include the Joint Staff and COCOM SJA positions, as well as the OJAG and OPNAV staff.

Through billeted requirements, and aggressive use of fellowships, Navy judge advocates serve in a variety of interagency, DoD staff, joint, and combined assignments. Navy judge advocates have served as the principal legal advisors to U.S. Indo-Pacific Command, U.S. European Command, U.S. Southern Command, U.S.

¹⁹⁴ SECNAVINST 5430.27E, *supra* note 16, para. 2.

¹⁹⁵ Working Group interviews with Combatant Commanders and COCOM SJAs (Sept. 2019).

¹⁹⁶ 10 U.S.C. § 156 (2018). Current incumbent is RDML Christopher French, JAGC, USN.

Northern Command, U.S. Central Command and U.S. Strategic Command. Further, they have served as staff members on the National Security Council, the National Security Agency, the Joint Staff and all Combatant Commands, and the North Atlantic Treaty Organization. Other assignments include the White House Office of Science and Technology Policy, the Department of State, the DoD General Counsel, the Defense Intelligence Agency, the Office of Military Commissions (OMC), National Defense University, the George C. Marshall European Center for Security Studies, the Asia-Pacific Center for Security Studies, the Defense Institute of International Legal Studies, and the Army Judge Advocate General's Legal Center and School. Navy judge advocates have also attended the Royal Navy's International Law Course at Oxford as well as Australia's Joint Operations Center for Joint Operations Law Training. An additional judge advocate serves as personnel exchange officer with the Royal Navy.¹⁹⁷ The benefits to the DON from this level of engagement and support include ensuring the interests of the Navy are factored into discussion and decision-making, a direct communication link between the Navy and these entities, and the experience and perspective that Navy judge advocates bring back to the Navy at the conclusion of their tours.

The 506 Panel Report of 2011 forecast increased demands for national security law support given trends that will require U.S. forces to have to deal within increasingly multi-dimensional or hybrid threats, threats to global commands including the cyber domain, growing anti-access/area denial capabilities, and weak or failed States that are not able, or are unwilling, to maintain the rule of law. The 506 Panel Report expected permanent operational law billets to double over a decade.¹⁹⁸ Since the publication of their report in 2011, the Navy JAG Corps has experienced billet growth in the national

¹⁹⁷ Navy Personnel Command, Joint-Interagency-Individual Augmentee-Global War on Terror Support Assignment listing (received Sept. 17, 2019) (on file) [hereinafter Joint-Interagency-IA-GSA listing]; Judge Advocate Gen., Legal Community Assessment (July 11, 2019) (on file); JAGINST 3300.1A, *supra* note 80; Email memorandum from U.S. Navy Judge Advocate Gen. Corps Senior Detailer, People Talk 19-44, FY 20 Slate for Publication (Nov. 1, 2019) (on file) [hereinafter 2020 Slate]; Email memorandum from U.S. Navy Judge Advocate Gen. Corps Senior Detailer, People Talk 19-43, FY 20 Downwind Billet List version 6 (Oct. 30, 2019) (on file) [hereinafter 2020 Downwind Billet List].

¹⁹⁸ 506 PANEL REPORT, *supra* note 11, at 67-70.

security law area, gaining 60 additional billets to support intelligence, information warfare/cyber law operations, special warfare requirements and Navy forces afloat.¹⁹⁹

The 506 Panel noted four enduring national security trends: “the rise of new powers; the growth of non-State actors; lowered barriers for dangerous technologies, including missile technologies and weapons of mass destruction; and competition for resources driven by demographics, climate change, and disease.”²⁰⁰ These trends endure today and will continue into the foreseeable future. As such, there will be continued demand signals and requirements for judge advocates, both permanently assigned across the National Security apparatus as well as in support of contingency operations.

3.7.4 Navy Administrative Law

General Administrative Law. The Administrative Law Division of OJAG (Code 13) supports the JAG in advising senior Department of the Navy Leaders on myriad issues related to the administration of the Navy as an agency of the Federal government, to include advice about Constitutional rights, review of regulations and instructions, administrative investigations, commanders’ authorities, the Freedom of Information Act and the Privacy Act.²⁰¹

Military Personnel Matters. OJAG (Code 13) also provides legal review of all Navy and Marine Corps officer promotion selection boards and records, as well as delays, withholds, promotions, and retirement grade determinations of individual officers. Additionally, OJAG (Code 13) reviews all complaints of wrongdoing by superior officers submitted under UCMJ, Article 138 and Navy Regulations Article 1150, as well as appeals from actions taken on formal Equal Opportunity complaints.²⁰²

¹⁹⁹ These are SJA billets embedded in the organizations they support and funded by the supported organization. Off. of Judge Advocate Gen., Mil. Personnel (Code 61), Judge Advocate General’s Corps Billet Growth and Manning over the Last Decade (Aug. 28, 2019) (on file).

²⁰⁰ 506 PANEL REPORT, *supra* note 11, at 67.

²⁰¹ JAG/CNLSCINST 5410.1C (encl 1), Standard Organization Manual, dtd 14 Jun 2012, at para. 107.2.

²⁰² *Id.* These complaints consist of individual Sailors or Marines filing grievances against commanding officers or other superior officers, respectively.

As the Secretary of the Navy’s uniformed legal advisor, JAG is responsible, by statute, to review promotion selection boards²⁰³ and, by direction of SECNAV, has duty to review all other aspects of officer promotions. OJAG also provides advisory opinions for the Board for the Correction of Naval Records (BCNR) and assists CNP in reviewing and administering military personnel policies. Generally termed “personnel law,” these subjects comprise a high-volume of individual cases, carry significant scrutiny within the Senate Armed Services Committee, and present litigation risk if not done in compliance with the Defense Officer Personnel Management Act and DoD/DON regulations.²⁰⁴ Uniformed SJAs assigned to Commander, Navy Personnel Command, CNP, the VCNO, the Special Counsel to the CNO, and the SECNAV’s Special Assistants for Legal and Legislative Matters all play a prominent role in processing and advising senior leadership on military personnel actions.

Each year since 2016, OJAG (Code 13) has reviewed on average 570-590 board proceedings and other individual military personnel actions. An average of 60 complaints of wrong are received per year. They typically involve lengthy fact patterns that require doing a detailed analysis of actions taken at lower echelons, and are briefed to the Assistant Secretary of the Navy (Manpower and Reserve Affairs).²⁰⁵

Working Group interviews of the SJAs who advise and support CNPC, CNP, VCNO, CNO, and SECNAV and who are regularly and routinely involved in military personnel law processes noted the importance of attention to detail and timeliness in the review of officer promotions, and that OJAG (Code 13) provides critical support in meeting all statutory requirements (e.g., DOPMA and Reserve Officer Personnel Management Act) and regulatory requirements.²⁰⁶ Interviews with the Offices of the Chief of Chaplains and the Chief of Information, both of whom are regular clients and

²⁰³ “The Judge Advocate General of the Navy, under the direction of the Secretary of the Navy, shall . . . (3) receive, revise, and have recorded the proceedings of boards for the examination of officers of the naval service for promotion and retirement . . .” 10 U.S.C. 8088(d) (2018).

²⁰⁴ Although the Department of the Navy has broad discretion in military personnel matters, it is still bound by general principles of Federal administrative law and must comply with its own regulations in personnel matters. *See, e.g., Barnes v. United States*, 473 F.3d 1356 (Fed. Cir. 2007).

²⁰⁵ Assistant Judge Advocate Gen. (Civil Law), Response to Data Request (Sept. 13, 2019) (on file) [hereinafter AJAG 01 Response to Data Request].

²⁰⁶ Working Group site visit to OJAG and supported elements (Sept.-Oct. 2019).

customers of OJAG (Code 13), noted high satisfaction with the support they receive in support of their responsibilities.²⁰⁷

Military Personnel Litigation. The General Litigation Division of OJAG (Code 14) provides litigation support to the Department of Justice (DOJ) for all civil cases except those involving admiralty, common-law torts, and matters reserved to the Navy General Counsel (e.g., contract, civilian labor law). In addition to litigation in which the United States is a party, OJAG (Code 14) attorneys and paralegals respond to requests for official Navy and Marine Corps information in litigation not involving the United States (“*Touhy*” requests).²⁰⁸ These requests include subpoenas or other written requests seeking the Navy to release documents or approve witnesses in litigation. The Division exercises delegated SECNAV authority in the adjudication of Freedom of Information Act (FOIA) and Privacy Act (PA) appeals for the Department of the Navy. The Division also reviews proposed regulations and legislation related to civil litigation and advises the JAG on litigation risks with respect to Departmental actions.

Eight Navy and Marine Corps judge advocates provide litigation support in excess of 100 lawsuits in federal district courts, courts of appeal, and the U.S. Court of Federal Claims. These lawsuits involve constitutional challenges to federal statutes, attempts to overturn Navy personnel and other policies and programs, attacks on the legality of Navy/Marine Corps personnel decisions, assorted personnel claims to correct records or obtain pay, and FOIA/PA appeals.²⁰⁹ The Division also assists Sailors, Marines and civilian employees in obtaining official government representation when they are sued for monetary damages in their personal capacity for official actions that allegedly violated another person’s constitutional rights.²¹⁰

²⁰⁷ Working Group Interview with Deputy Executive Assistant for the Chief of Chaplains (Oct. 10, 2019); Working Group Interview with Chief of Information (Oct. 11, 2019).

²⁰⁸ 32 C.F.R. pt. 725 (2019). In FY 19, The attorneys and paralegals of OJAG (Code 14) responded to 285 *Touhy* requests and adjudicated more than 300 FOIA/PA appeals. Email from Director, OJAG General Litigation (Code 14) (Sept. 23, 2019).

²⁰⁹ Some cases in which OJAG (Code 14) provided litigation support during FY 19 included individual and class-action suits by Navy chaplains alleging violations of the establishment and free exercise clauses of the First Amendment; suits challenging DoD policy on transgender service; gender integration into combat positions; a class-action suit involving disability benefits for service members discharged for Post-Traumatic Stress Disorder; and a class-action suit on behalf of disabled veterans regarding correction of military personnel records to reflect that disabilities are combat zone/combat related. *Id.*

²¹⁰ Referred to as “*Bivens*” lawsuits or constitutional torts. *Id.*

The Working Group conducted interviews with the DOJ attorneys in the Federal Programs and Commercial Litigation Branches of DOJ. DOJ attorneys expressed satisfaction with the services and support they receive from OJAG (Code 14), and positively noted the DON's practice of assigning more senior, experienced judge advocates to this function.²¹¹

Ethics. Navy judge advocates fill 137 billets throughout the DON that are specifically designated as ethics counselor positions.²¹² Typically serving on a Flag Officer's staff, ethics counselors advise Navy leaders on the Federal statutes, Office of Government Ethics (OGE) Regulations, and DoD Standards of Conduct²¹³ related to ethics. Ethics counselors may be OGC attorneys or Navy/Marine Corps judge advocates, but all must complete common training and certification requirements. Ethics counselors may satisfy training requirements through the U.S. Army's week-long ethics counselor course in Charlottesville, VA, the DoD Standards of Conduct Office's ethics counselor short course, or other equivalent course, and must be actually assigned to an ethics counselor billet before becoming certified.²¹⁴ Once certified, the advice provided by an ethics counselor may be relied on as proof of legal compliance and operates as "safe harbor" for individuals who act in good faith reliance on such advice in certain circumstances.²¹⁵

In response to questions regarding the performance of Navy ethics counselors in connection with the GDMA investigation, JAG convened an Ethics Counselor Working Group (ECWG) in 2016. Led by a JAG Corps Captain with significant experience advising Fleet Commanders, the ECWG sought to standardize ethics training for judge advocates and align JAG Corps ethics training with broad DoD and Navy trends shifting from compliance-based to values-based ethics. Of 16 ECWG recommendations, 15 were approved by JAG and 10 have been implemented, to include: requiring eight

²¹¹ Working Group interviews with DOJ attorneys supported by Code 14 (Sept. 25-26, 2019).

²¹² This figure does not include those SJAs assigned to Joint commands that provide ethics counselor services. Also, officers serving as ethics counselors are typically SJAs who advise on the full spectrum of legal matters, not just ethics. AJAG 01 Response to Data Request, *supra* note 205.

²¹³ U.S. DEP'T OF DEF., SEC'Y OF DEF. REG. 5500-7R, JOINT ETHICS REGULATION (Aug. 30, 1993).

²¹⁴ U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN. MEMORANDUM, COMPLIANCE WITH DEPARTMENT OF THE NAVY ETHICS COUNSELOR CERTIFICATION AND TRAINING PROGRAM BY ETHICS COUNSELORS PRACTICING UNDER THE COGNIZANCE OF THE JUDGE ADVOCATE GENERAL OF THE NAVY (June, 13, 2008).

²¹⁵ See 5 C.F.R. 2635.107(b) (2019).

hours of ethics instruction and a graded written exercise in the Basic Lawyer Class²¹⁶, revision of the FTJA PDS to require specific ethics practice qualifications conducted under the supervision of a certified ethics counselor, requiring an online ethics course and an additional five hours of classroom instruction for SJA Course attendees, requiring first-time Flag Officer SJAs to complete the Advanced SJA Course,²¹⁷ delivery of a specific three-day ethics counselor course to supplement Army and DoD offerings, inclusion of senior Legalmen in ethics course offerings, online ethics training for Flag Officer personal staff, and offering ethics counselors access to a central repository of resources, contact information for all ethics counselors, and a blog-type forum.²¹⁸

Of the ECWG initiatives that remain in progress or unexecuted the most significant is the proposed annual ethics program self-assessments of SJA Offices and the commands they support, conducted by supervisory judge advocates (Fleet and TYCOM SJAs for independent SJA Offices, and RLSO CO's for Region and ashore SJAs), to ensure consistency and accuracy in delivery of ethics advice and services. This latter requirement reflects a general trend noted throughout this review: the JAG Corps needs formal, recurring assessments of its provision of legal advice to ensure that it is effective, accurate, and relevant.²¹⁹ However, the inability of the JAG Corps to execute its own, self-identified goal of assessing ethics programs within and outside of NLSC demonstrates that the JAG Corps is not currently structured or resourced to conduct such self-assessments, even when it identifies the need for them.

The Director of the DoD Standards of Conduct Office indicated that the Navy JAG Corps maintains an effective ethics practice and has developed practices

²¹⁶ Of particular note, the 2016 Ethics Counselor Working Group recommended, and JAG approved, the end of the practice of providing ethics counselor certification upon completion of the BLC. Deputy Assistant Judge Advocate General (Administrative Law), Info Memo: Ethics Counselor Working Group (Oct. 17, 2018) (on file) [hereinafter ECWG Info Memo].

²¹⁷ This course includes ethics distance learning prerequisites and classroom instruction from the VCNO Legal Office. The VCNO publishes annual Standards of Conduct guidance for all Flag Officers. *E.g.*, U.S. DEPT OF NAVY, VICE CHIEF OF NAVAL OPERATIONS, MEMORANDUM FOR ALL FLAG OFFICERS, ANNUAL STANDARDS OF CONDUCT GUIDANCE (Apr. 22, 2019). Accordingly, the VCNO's legal counsel serves as OPNAV's ethics subject matter-expert.

²¹⁸ ECWG Info Memo, *supra* note 216.

²¹⁹ As of October 2019, Fleet and operational SJAs do not participate in assessment processes of subordinate commands, and that Fleet SJA Offices are not resourced to meet this annual oversight requirement. Deputy Assistant Judge Advocate Gen. (Admin. Law), Update for Comprehensive Review re JAG Corps ECWG Recommendations (Oct. 11, 2019) (on file).

recommended for adoption throughout DoD.²²⁰ Navy efforts to identify ethics counselor billets, formalize the training required by those billets and track the training of officers serving as ethics counselors were cited as examples. The Navy has also, through the VCNO and his Legal Office, emphasized values-based ethics for senior leaders in alignment with direction from the Secretary of Defense.²²¹ Further, the Navy JAG Corps actively supports DoD-wide ethics policy by participating in all coordination group meetings, contributing to service working groups, and providing officers to fill a rotational billet within the DoD Standards of Conduct Office. Within the Navy, the Director noted that line officer training needs improvement, particularly in introducing officers to DoD Standards of Conduct well before line officers enter the command leadership training pipeline and that all Armed Services should better emphasize, rather than simply comply with, the values underlying the DoD Standards of Conduct.

Admiralty Law and Litigation. The Admiralty and Maritime Law Division of OJAG (Code 11) is responsible for advising the Fleet and Navy leadership on maritime law matters, assertion and adjudication of admiralty claims, and supports DOJ in associated litigation.²²²

The Admiralty Law Division Director has delegated authority to adjudicate and settle claims by and against the Navy that fall within admiralty jurisdiction. This includes claims of personal injury, death, property damage and salvage resulting from Navy operations worldwide. Adjudication involves investigation, coordination of marine surveys, collection of damages information and legal analysis. This requires continuous engagement with Fleet staff and subordinate commands, other DoD components, OPNAV, Naval Sea Systems Command, Naval Facilities and Engineering Command, Supervisor of Salvage, and Military Sealift Command. In cases involving loss of life or major damage, this may require additional coordination with Coast Guard, National Transportation Safety Board, Office of Safety and Health Administration and other federal agencies. Support to DOJ in admiralty litigation includes coordination and

²²⁰ Working Group site visit to OJAG and supported elements (Sept.-Oct. 2019).

²²¹ U.S. DEP'T OF DEF., SEC'Y OF DEF. MEMORANDUM, REAFFIRMING OUR COMMITMENT TO ETHICAL CONDUCT (Aug. 19, 2019).

²²² Off. of Judge Advocate Gen., Admiralty and Maritime Law (Code 11), Info Memo: Mission, Functions, Cases and DOJ Relationship (Sept. 9, 2019) (on file).

participation in interviews and depositions; collection, organization, and coordination of security reviews of documentation; and agency representation at hearings and party conferences. Given the importance of this litigation, and to ensure a continuous level of admiralty litigation experience within the DON, one judge advocate from the Division is assigned to the Admiralty Section of DOJ on a full-time basis.

Aside from admiralty claims and litigation, the Division provides legal policy advice and perspective on all maritime law matters.²²³ The senior Captain judge advocate within OJAG (Code 11) serves as the Admiralty Counsel of the Navy. A civilian attorney Deputy and three Navy judge advocates provide all mission support (an additional judge advocate is assigned to DOJ Admiralty). Currently the judge advocates of the Division are assigned to 115 cases, constituting both affirmative and defensive claims, with 16 cases in active litigation.²²⁴

The Working Group conducted interviews with the Assistant Director, Admiralty Section, and the Attorney in Charge, West Coast and Pacific Rim Office, of the Aviation, Space, and Admiralty Section of DOJ. These officials are satisfied with the quality and professionalism of the support they receive from OJAG (Code 11), and the commitment of the judge advocates assigned over the many years of partnership between DOJ and DON, specifically noting the “masterful job” that Code 11 attorneys did in preparing the USS FITZGERALD collision damage analysis, resulting in a \$26 million recovery for the U.S. Navy.²²⁵

Claims. The OJAG Claims and Tort Litigation Division (Code 15) processes monetary claims on behalf of or against the Navy around the world. The Division

²²³ An illustration of recent issues include: collaborating with the Fleets, Office of Naval Research, DARPA, and Coast Guard on autonomous maritime systems; serving as part of the U.S. delegation to the United Nations International Maritime Organization Maritime Safety Committee’s regulatory scoping exercise for Maritime Autonomous Surface Ships; coordinating a DoD working group in support of the U.S. delegation in the review of the 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREGS); participating in a USFF working group assessing the provision of tug and pilot services, providing data on incidents reported to the Division and advising on admiralty tort and contract methods to enforce contract requirements; assessment of liability risks associated with naval operations and mitigation options; protection of sunken military craft; and, treatment of abandoned/derelict property on DON installations. AJAG 01 Response to Data Request, *supra* note 205.

²²⁴ *Id.*

²²⁵ Working Group interviews with Department of Justice Attorneys (Sept. 24-25 2019); Letter of Attorney-in-Charge, Department of Justice, Torts Branch, West Coast and Pacific Rim Office (Mar. 31, 2019) (on file).

processes approximately 45,000 claims each year, with claims paid and recovered totaling \$60-\$70 million, and provides support to the DOJ in any litigation related to the claims authorities for which the Code is responsible.²²⁶

Code 15 headquarters is located in the Washington Navy Yard. A Tort Claims Unit (TCU) and a Personnel Claims Unit (PCU) are in Norfolk, VA, and Medical Care Recovery Units (MCRU) are located in Norfolk, VA, Pensacola, FL, and San Diego, CA.²²⁷ In 2006, Navy JAG centralized these functions of the claims and litigation support practice as an efficiency, and civilianized the practice based on the assessment that services and support are most effectively provided through the single focus, subject matter expertise, continuity and corporate memory represented by a civilian (civil service) work force of attorneys and claims examiners.²²⁸

The TCU processes claims brought on behalf of or against the Navy and Marine Corps under the Federal Tort Claims Act²²⁹, the Military Claims Act²³⁰, the Foreign Claims Act²³¹ (FCA), the Federal Claims Collection Act²³², and the Nonscope Claims Act²³³. TCU attorneys provide advice to Fleet and ashore commands and SJAs regarding actual or potential claims, and authorities and procedures to appropriately investigate claims or the incidents that may give rise to claims against the DON. When cases are filed in Federal court under these authorities, the TCU provides litigation support to the DOJ and U.S. Attorney Offices in defending DON interests.²³⁴

The TCU is manned by 12 attorneys (12 GS-13 and two supervisory GS-14), six paralegals (GS-9), and four administrative support personnel (three GS-6 claims assistants and one supervisor GS-11).²³⁵ For the three-year period of FY 16 through

²²⁶ *Claims & Tort Litigation (Code 15)*, U.S. NAVY JUDGE ADVOCATE GEN. CORPS, https://www.jag.navy.mil/organization/code_15.htm (last visited Nov. 2, 2019).

²²⁷ *Id.*

²²⁸ See U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5890.1A, ADMINISTRATIVE PROCESSING AND CONSIDERATION OF CLAIMS ON BEHALF OF AND AGAINST THE UNITED STATES (June 18, 2005).

²²⁹ 28 U.S.C. §§ 1346(b), 2671-2680 (2018).

²³⁰ 10 U.S.C. § 2733 (2018).

²³¹ 10 U.S.C. § 2734 (2018).

²³² 31 U.S.C. § 3711 (2018).

²³³ 32 C.F.R. § 536.91 (2019); Off. of Judge Advocate Gen., Claims and Tort Litigation (Code 15), Response to Request for Information (Sept. 13, 2019) (on file) [hereinafter Code 15 RFI Response (Sept. 13, 2019)].

²³⁴ *Id.*

²³⁵ *Id.*

FY 18, the TCU processed an average of 1,477 claims per year and the average caseload is calculated at 40 cases per attorney and 55 cases per paralegal.²³⁶

The MCRUs assert affirmative claims under the Medical Care Recovery Act,²³⁷ the Third Party Payers Act,²³⁸ and TRICARE reimbursement,²³⁹ “for the cost of medical care provided to DON service members, retirees, and their dependents that result from the negligence of third parties or for which the medical beneficiary has applicable insurance.”²⁴⁰ These affirmative recoveries are returned to the military medical treatment facility or to TRICARE.²⁴¹ The MCRU provides support to the DOJ in any litigation filed pursuant to these authorities.

The MCRUs are manned with three attorneys (GS-13), 27 claims examiners (24 GS-8 and three supervisory GS-9), and nine administrative clerks (GS-6).²⁴² For the three-year period of FY 16 through FY 18, the MCRUs processed an average of 14,314 claims per year and the average caseload per examiner is 750 open claims. On average, the MCRUs return \$21 million to the Defense Health Agency and Navy MTFs.²⁴³

The PCU has worldwide responsibility for processing all claims for Sailors and Marines, as well as DON civilian employees, submitted under the Military Personnel and Civilian Employees' Claims Act²⁴⁴ (PCA). The PCA authorizes “gratuitous payments for damage to, or loss of, personal property incident to Government service.”²⁴⁵ Claims may arise incident to household goods (HHG) shipments during Permanent Change of Station (PCS) moves or property damaged on base or in assigned quarters. In addition

²³⁶ These statistics do not reflect the 4,450 FTCA claims from former residents of Camp Lejeune, NC, alleging injury/illness associated with water contamination, seeking \$63.5 billion in damages. These claims have been denied; initial litigation involving this issue has been consolidated and dismissed at the Federal district court level and affirmed by the 11th Circuit Court of Appeals; these plaintiffs have until December 2019 to seek review by the Supreme Court of the United States. Code 15 RFI Response (Sept. 13, 2019), *supra* note 233.

²³⁷ 42 U.S.C. §§ 2651-2653 (2018); 10 U.S.C. § 1095 (2018).

²³⁸ 10 U.S.C. § 1095 (2018).

²³⁹ 10 U.S.C. § 1079a (2018).

²⁴⁰ Code 15 RFI Response (Sept. 13, 2019), *supra* note 233.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ 31 U.S.C. § 3721 (2018).

²⁴⁵ Code 15 RFI Response (Sept. 13, 2019), *supra* note 233.

to adjudicating claims for loss, the PCU is responsible for asserting demands against contracted Transportation Service Providers that are alleged to cause damages to HHG's during PCS movements.²⁴⁶

The PCU is manned with one GS-13 supervisor (non-attorney), 15 claims examiners (12 GS-8 and three GS-9 supervisors), and three claims assistants (GS-6).²⁴⁷ For the three-year period of FY 16 through FY 18, the PCU processed an average of 3,666 claims per year. The average caseload per examiner is 75 open claims. During that three-year period, \$3.5 million was paid out to Sailors, Marines, and DON civilian employees to reimburse them for losses cognizable under the PCA.²⁴⁸

The PCU also carries a significant responsibility as the lead for executing OJAG's disaster relief plan, providing immediate support to DON personnel and their families impacted by natural or manmade disasters (e.g., loss or damage of personal property in on-base quarters or other authorized on-base locations due to hurricanes, fires, floods, mishaps, etc.) As necessary, the PCU operates as a fly-away team to support on-the-ground efforts in support of those affected with advanced payments under the PCA.²⁴⁹ In the three-year period FY 17 through FY 19, the PCU processed more than 1,400 PCA claims, and disbursed more than \$1.2 million, in responding to 20 separate incidents.²⁵⁰ Processing times for PCA claims associated with disaster response are under seven days.²⁵¹

The Working Group conducted an interview with DOJ counsel within the Environmental Torts Branch, given close involvement with OJAG (Code 15) attorneys in the long-standing claims and litigation associated with water contamination at Camp Lejeune, NC. DOJ counsel positively cited the responsiveness of DON attorneys, to

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ See U.S. DEP'T OF NAVY, COMMANDER, NAVAL LEGAL SERV. COMMAND SUPPORTING PLAN 3340-TFNF, CNLSC SUPPORTING PLAN (BASIC PLAN) TO TFNF FUNCPLAN 3440-N46 (JULY 8, 2014). This plan has "provided the framework for OJAG/NLSC response efforts following natural or manmade catastrophic events," even though no event required reestablishing TFNF. U.S. DEP'T OF NAVY, COMMANDER, NAVAL LEGAL SERV. COMMAND LETTER, COMMANDER NAVAL LEGAL SERVICE COMMAND SUPPORTING PLAN TO TASK FORCE NAVY FAMILY (TFNF) FUNCTIONAL PLAN (July 8, 2015).

²⁵⁰ Code 15 RFI Response (Sept. 13, 2019), *supra* note 233; Off. of Judge Advocate Gen., Claims and Tort Litigation (Code 15), Response to Request for Information (Nov. 5, 2019) (on file).

²⁵¹ *Id.*

include temporary augmentation of DOJ staff at the initiation of the claims and litigation process, and their efforts in facilitating DOJ outreach across various Navy and Marine Corps commands. DOJ counsel specifically noted the public and Congressional interest in this matter, and commended the OJAG (Code 15) attorneys' ability to clearly and accurately communicate the views of DON leadership to DOJ, and the legal assessments and positions of DOJ to DON leadership.²⁵²

3.7.5 Navy Legal Assistance

For many Sailors and their families, legal assistance provides the first, and most personal, exposure to the Navy JAG Corps. Legal assistance services ensure eligible clients and their families receive sound legal advice in resolving legal issues that could distract them from executing Navy's mission supports resiliency. Legal assistance is a statutory mission of the JAG Corps²⁵³ and is one of three core lines of operation identified in the 2025 JAG Strategic Plan and Framework.²⁵⁴

The RLSOs are primarily responsible for delivery of legal assistance to Fleet and shore commands. Judge advocates, civilian attorneys, Legalmen, civilian paralegals and both uniformed and civil service administrative personnel provide legal assistance. Service members on active duty for 30 days or more, their dependents and retirees are eligible for services.²⁵⁵ Key areas of legal assistance practice include consumer protection, landlord-tenant disputes, family law advice (divorce and child custody), rights and responsibilities under the Servicemembers Civil Relief Act, advice to crime victims, tax preparation assistance, foreclosure, indebtedness, naturalization and immigration, health care directives and estate planning (wills, trusts, etc.).²⁵⁶

During the three-year period from FY 16 through FY 18, 71 attorneys (11 civilians and 60 judge advocates) advised more than 35,000 clients per year and delivered more than 100,000 services in support of those clients.²⁵⁷ During that same period, RLSO

²⁵² Working Group interview with DOJ counsel within the Environmental Torts Branch (Sept. 24, 2019).

²⁵³ 10 U.S.C. § 1044(b) (2018).

²⁵⁴ *JAG Community Strategic Framework*, U.S. NAVY JUDGE ADVOCATE GEN. CORPS, <https://www.jag.navy.mil/framework.html> (last visited Nov. 15, 2019).

²⁵⁵ JAGMAN, *supra* note 100, para. 0705.

²⁵⁶ JAGMAN, *supra* note 100, para. 0128.

²⁵⁷ AJAG 01 Response to Data Request, *supra* note 205.

Legal Assistance Departments supported the legal assistance needs of an additional 33,000 customers per year.²⁵⁸

Providing pre-deployment services is a priority for legal assistance offices, with RLSO Legal Assistance Departments conducting nearly 600 pre-deployment evolutions in FY 19.²⁵⁹ Pre-deployment evolutions are typically conducted on the waterfront, in aviation hangars and in command spaces, and consist of briefs addressing Sailor/family legal readiness and preventive law issues, as well as ship visits by RLSO personnel for will and powers-of-attorney intake and execution. Judge advocates spend time underway in order to complete pre-deployment preparations.

Twelve civilian attorney positions, currently manned by eleven practitioners licensed in the jurisdiction in which they are located bring subject matter expertise, experience and stability to the RLSO legal assistance mission.²⁶⁰ In addition to carrying their own individual client caseload, these Subject Matter Experts (SMEs) are responsible for training, mentoring and supervising judge advocates providing legal assistance, a large number of whom are FTJAs undertaking their six-month rotation in this core practice area. Legal assistance is available through a total of 55 CONUS and OCONUS RLSO locations. Eligible individuals who are not stationed at or near a Navy legal assistance office location may seek services at other Service legal assistance offices and/or through arrangements for remote consultation with a Navy legal assistance provider.²⁶¹

Departmental policy and supervision of legal services in the Navy, is the responsibility of the Legal Assistance Division of OJAG (Code 16).²⁶² Code 16 attorneys regularly review legal assistance within NLSC through the Article 6, UCMJ inspection process and are responsible for evaluation and dissemination of best

²⁵⁸ *Id.* The distinction between “client” and “customer” services hinges on whether consultation and advice of an attorney is required. “Customer” services are those that can be provided by non-attorney legal assistance personnel, such as notaries and powers of attorney. U.S. DEP’T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5801.2B, NAVY LEGAL ASSISTANCE PROGRAM, para. 3-3 (Feb. 15, 2013) [hereinafter JAGINST 5801.2B].

²⁵⁹ AJAG 01 Response to Data Request, *supra* note 205.

²⁶⁰ *Id.*

²⁶¹ JAGINST 5801.2B, *supra* note 258, para. 5-11.

²⁶² *Id.* at para 2-4.

practices throughout the enterprise. Recent initiatives include a pilot program to procure and deploy self-service kiosks at 17 NLSC locations that enable Sailors to prepare Special Powers of Attorney, as well as offering customizable powers-of-attorney online.²⁶³ Informational pamphlets about a variety of legal matters are also available online.²⁶⁴

Working Group visits noted that FTJAs providing legal assistance services found the experience personally rewarding and professionally valuable in developing client relations skills.²⁶⁵ They recognize the importance of gaining the knowledge necessary for future assignments, including remote location SJA positions. However, some junior judge advocates expressed a relative lack of interest in legal assistance and questioned whether the mission should be performed entirely by civilian attorneys.²⁶⁶ Little data on client satisfaction with legal assistance services was available. A review of Article 6, UCMJ, inspection reports note that FTJA rotations require supervisory attorneys to spend significant time training the FTJAs. Errors noted in document sampling reviews underscore the importance and necessity for such supervision.²⁶⁷ The powers-of-attorney kiosks and on-line resources appear to have resulted in a measurably lower number of RLSO customer services in FY 19.²⁶⁸

Disability Evaluation System (DES). In meeting statutory and DoD/DON regulatory requirements,²⁶⁹ legal counsel are provided to advise and represent Sailors and Marines in the Integrated Disability Evaluation System (IDES) process.²⁷⁰ While

²⁶³ AJAG 01 Response to Data Request, *supra* note 205.

²⁶⁴ *Legal Assistance Handouts*, U.S. NAVY JUDGE ADVOCATE GEN. CORPS, https://www.jag.navy.mil/legal_services/LAH.htm (last visited Oct. 21, 2019).

²⁶⁵ Site visits to RLSO Mid-Atlantic, RLSO Naval District Washington, and RLSO Southeast (Sept. 2019).

²⁶⁶ *Id.*

²⁶⁷ Working Group review of Article 6 Inspection reports of seven NLSC commands (Aug. 2019) (on file).

²⁶⁸ AJAG 01 Response to Data Request, *supra* note 205. Legal assistance offices were on track to serve approximately one-third fewer clients seeking non-attorney services, such as powers of attorney, in 2019 compared to 2018.

²⁶⁹ See 10 U.S.C. §§ 1201-1222 (2018); U.S. DEP'T OF DEF., DEP'T OF DEF. INSTR. 1332.18, DISABILITY EVALUATION SYSTEM (CH-1, May 17, 2018); U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 1850.4F, DEPARTMENT OF THE NAVY DISABILITY EVALUATION SYSTEM (June 27, 2019) [hereinafter SECNAVINST 1850.4F].

²⁷⁰ "JAG shall provides [*sic*] Government DES counsel to advise and represent Service members during the DES process (IPEBs and FPEBs) and any subsequent appeals to the [Director, SECNAV Council of Review Boards] and the [Assistant Secretary of the Navy (Manpower & Reserve Affairs)] relating to the final disposition of Service member disability cases." JAG is further responsible for ensuring "appropriate

this program is organized and overseen by the Legal Assistance Division of OJAG (Code 16), this is not a traditional legal assistance mission but rather its own unique and specialized area of legal practice.

Services provided to Sailors and Marines include assistance with IDES/Medical Evaluation Board (MEB) process explanation, case assessment and document reviews, requests for medical treatment/documentation, non-medical assessment reviews, assistance with preparation of client statements, impartial medical review requests, Veterans Administration reconsideration petitions, representation before the Physical Evaluation Board (PEB), coordination with other entities to secure benefits, and training to commands regarding IDES matters.²⁷¹

Since June 2016, every Sailor and Marine referred into the IDES is required to consult with counsel within five business days of referral.²⁷² Government counsel are detailed to represent each service member upon their election to proceed to a Formal PEB (FPEB) hearing, representation that lasts through the member's discharge from active duty (separation or retirement) or return to duty.

For the period FY 16 to FY 19, civilian attorneys within the DES Counsel Program (DESCP) provided services to an average of more than 7,100 Sailors and Marines per year at the Informal PEB (IPEB) stage, and representation of an average of 980 Sailors and Marines per year before the FPEB in Washington, DC.²⁷³

staffing levels for Government DES Counsel advising and representing Service members in the DES process." SECNAVINST 1850.4F, *supra* note 269, encl (2), para. 8.

²⁷¹ *Department of the Navy Disability Evaluation System Counsel Program*, U.S. NAVY JUDGE ADVOCATE GEN. CORPS, <https://www.jag.navy.mil/ides/index.html> (last visited Nov. 2, 2019).

²⁷² U.S. DEPT OF NAVY, SEC^Y OF NAVY MANUAL M-1850.1, DISABILITY EVALUATION SYSTEM PROGRAM MANUAL (Sept. 23, 2019) [hereinafter SECNAV M-1850.1]; AJAG 01 Response to Data Request, *supra* note 205.

²⁷³ Off. Of Judge Advocate Gen., Legal Assistance (Code 16), Info Memo for Executive Review Panel (Aug. 28, 2019) (on file) [hereinafter Code 16 Info Memo].

Clients Served by Disability Evaluation System Counsel Program

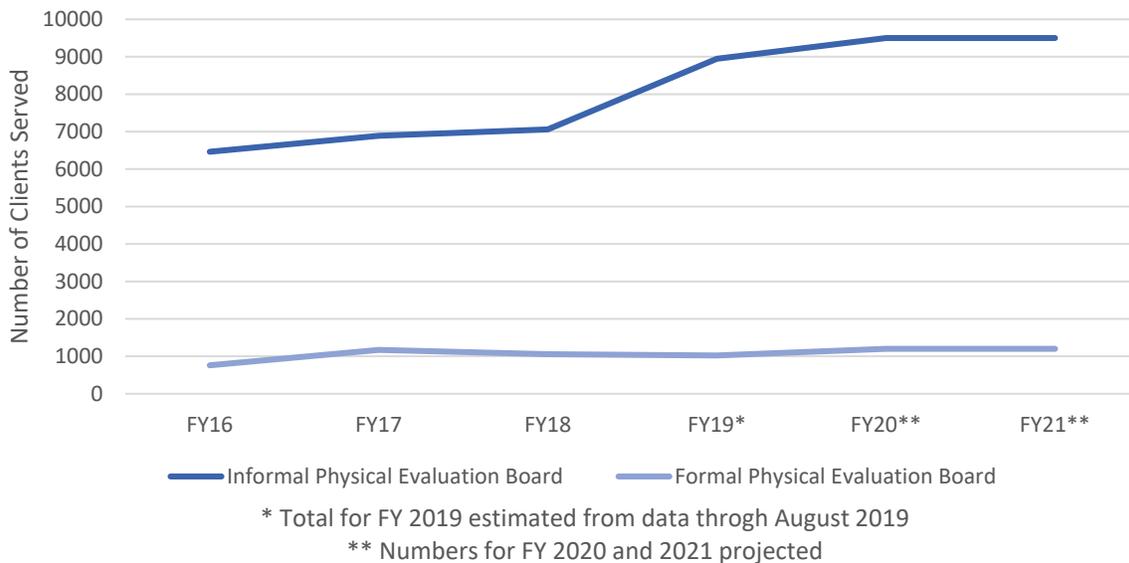


Figure 15: Clients served by the Disability Evaluation System Counsel Program. (Source: AJAG 01 Response to Data Request, supra note 205.)

The 506 Panel report documents the early development of the IDES program, and how the Navy and Marine Corps were endeavoring to comply with statutory and regulatory requirements in 2011. Since that time, provision of properly trained and qualified counsel has transitioned into a single organizational structure, with civilian counsel providing continuity and stability to this specialized area of practice which is outside the typical experience of uniformed judge advocates.²⁷⁴ As of August 31, 2019, the DESCP is manned with 21 civilian counsel co-located within or associated with major military treatment facilities (MTFs) at 10 CONUS sites for provision of IPEB support,²⁷⁵ and an additional 10 civilian counsel located in Washington, DC to support FPEB hearings.

The Secretary establishes maximum caseload requirements for IDES counsel. IDES counsel will not normally advise and represent more than 300 IPEB clients per

²⁷⁴ At the time of the 506 Panel, Navy and Marine maintained separate organizations for certain parts of the IDES process, and counsel manning reflected a mix of active duty and activated Reserve Navy and Marine Corps judge advocates, in addition to civilian counsel.

²⁷⁵ Bethesda, Portsmouth, Cherry Point, Camp Lejeune, Jacksonville, Pensacola, Great Lakes, San Diego, Camp Pendleton, Bremerton.

year, while IDES counsel advise and represent no more than six FPEB clients per week.²⁷⁶

As JAG has continued to develop and grow the DESC, average counsel caseloads have declined, but still remain above the maximum limits established by SECNAV. Pursuant to JAG's request for resources, the FY 20 and FY 21 Secretariat Review Boards (SRBs) approved the hiring of additional counsel and legal/clerical support personnel. Projected levels in FY 21 are 33 counsel supporting IPEB requirements at 15 Fleet and Marine Corps MTF locations²⁷⁷ and 12 counsel supporting FPEB operations at the Washington Navy Yard.²⁷⁸ Of JAG's SRB21 request for IDES resources, 10 billets and \$1.2 million remain unfunded.²⁷⁹

The President of the PEB indicated full support for JAG's growth of IDES counsel and associated support personnel, particularly at the IPEB stage. Given the complexity of the system, Sailors and Marines are often confused and misinformed regarding the process. DES counsel play a crucial role in educating, advising and managing expectations. Properly advising Sailors and Marines at the front end of the process can avoid time and expense at the FPEB stage. FY 19 caseloads – 10,000 in the MEB/IPEB stage and 1,000 at the FPEB – reflect steady state requirements and may increase due to policies requiring members who are not deployable for 12 months to be referred into the DES. Ensuring that counsel caseloads remain within SECNAV goals is important for the timely and effective functioning of the system, as well as the fairness of findings and benefit determinations for Sailors and Marines. As to the quality and effectiveness of legal advice and representation, the President of the PEB noted the zealotry of counsel in advocating for maximum benefits in every case.²⁸⁰

3.7.6 Mission Execution Issues

(1) Line Officer Training. Commanders require, but are not currently receiving, systematic career-long education and training on military justice, operational law, and

²⁷⁶ SECNAV M-1850.1, *supra* note 272.

²⁷⁷ In addition to the 10 existing sites, counsel will be affiliated with MTFs in Groton, Beaufort, Corpus Christi, 29 Palms, and Pearl Harbor.

²⁷⁸ AJAG 01 Response to Data Request, *supra* note 205; Code 16 Info Memo, *supra* note 273.

²⁷⁹ Civilian Manning Info Memo, *supra* note 97; Military Manning Info Memo, *supra* note 101.

²⁸⁰ Working Group interview with President of PEB (Oct. 3, 2019).

ethics. Interviews found that commanders' legal training varies widely by officer community and career path. Even officers with equivalent paygrades and similar duties do not receive standardized training. Training on the full spectrum of military justice, administrative and investigative options available for commanders' use is not consistent. Additionally, there are no decision aids that enable commanders to understand the interaction of military justice and administrative procedures and better equip them to know when to seek legal advice and what to expect from their judge advocates.

(2) Assessment of MJLCT. While fully supporting the military justice litigation specialty and recognizing the MJLCT as an improvement over past practices, the Navy JAG Corps' organizational construct and processes must be further optimized to provide both effective and efficient court-martial litigation support. The observation of the 506 Panel in 2011 remains true today: the Navy JAG Corps must retain the capability to administer and try complex cases in a timely and effective manner.

(a) Achieving a Leaner, More Effective Cadre of Litigators. There are too many judge advocates dedicated to the current Fleet requirement of 250 courts-martial per year. JAG and CNLSC must optimize the numbers and use of MJLCT officers to meet Fleet requirements while preserving a commitment to due process. Inefficient use of judge advocates and paralegals due to a deficit of support personnel, and the administrative burdens imposed by the FTJA program, must be considered when assessing the number of MJLCT officers required and how they are best organized and employed.

(b) Renewing Command-level Focus on Military Justice. As noted in section 3.3.4 above, RLSO leaders must supervise the delivery of legal services across multiple areas of practice, each of which requires specialized knowledge and dedicated attention to execute proficiently. RLSO COs cannot devote the same focused attention to military justice that DSO COs and supervisory VLCs can provide. Separating the trial function into its own command may achieve this focus, but carries second-order effects that must be carefully assessed.

(c) Increasing Ratio of Support Staff to Practitioners. As noted in section 3.4.5 above, the ratio of support staff to judge advocates within the military justice

mission is suboptimal. Providing more dedicated enlisted and civilian personnel to focus on information technology, maintaining case files and documentation, victim notification, witness travel and courtroom security would give trial practitioners greater focus and result in a more efficient and effective process.

(d) Developing Talent While Maintaining Effectiveness. The JAG Corps must develop junior litigators to maintain a healthy MJLCT community and provide all members of the JAG Corps community sufficient exposure to the military justice system to serve as effective legal advisors. However, JAG Corps professional development must be balanced with the Fleet's requirements for an efficient, effective court-martial process, and a Sailor's requirement for effective representation. With the number of special courts-martial considerably reduced compared to past decades, the JAG Corps must find new methods to train junior litigators while keeping its senior litigators in the courtroom during complex cases. Advances in training technology and methods can contribute. The Working Group identified institutions that use computer simulation, artificial intelligence as well as other exercises to develop skills, maintain proficiency, and team build, similar to the Navy's Ready Relevant Learning System.²⁸¹

(3) Recent Military Justice Developments. The Military Justice Act of 2016 (MJA 2016) was the most significant revision of the military justice system in a generation. Although there is insufficient data to assess its effects comprehensively, the Navy JAG Corps must remain alert to assess and respond to increasing or decreasing demands, as appropriate. This includes possible future requirements in providing VLC services beyond sexual assault cases. Additionally, many of the provisions in the MJA 2016, such as enhanced military judge authority to sanction any person who disturbs court-martial proceedings, will require developing and delivering training on these important changes.

²⁸¹ Contemporary legal training increasingly incorporates mock trials and simulations to improve practitioner skills. See, e.g., Graham D. Glancy, *The Mock Trial: Revisiting a Valuable Training Strategy*, 44 J. AM. ACAD. PSYCHIATRY LAW 19 (2016); Nicholas W. Allard and Heidi K. Brown, *Training Powerful Legal Communicators*, N.Y. STATE B. ASS'N J. (Sep. 2018), https://www.nysba.org/Journal/2018/Sep/Training_Powerful_Legal_Communicators/. Increased use of mock exercises outside of Naval Justice School would sharpen litigation skills.

(4) Defense Counsel Requests and Funding. Navy defense counsel expressed frustration with the requirement to file requests for funding, particularly witness travel and expert assistance, through trial counsel. Rule for Courts-Martial 703(b) states that each party is entitled to the production of any witness whose testimony would be relevant and necessary.²⁸² The convening authority is responsible for paying all expenses related to the court-martial.²⁸³

In most Navy general courts-martial, Navy Regions and, in turn, Commander, Navy Installations Command, fund expenses. If Navy defense counsel need the government to pay for anything necessary to defend a Sailor, for example, a medical or scientific expert, they submit a request to the convening authority, usually via trial counsel.²⁸⁴ Defense counsel are required to justify requests to the convening authority by explaining why such assistance is necessary.²⁸⁵ If the convening authority denies the request, the defense counsel may file a motion with the military judge.²⁸⁶ In many instances, defense counsel argue that commanders and trial counsel are inappropriately evaluating defense counsel requests solely on the basis of financial expense, and not upon their importance to a fair and impartial trial.

(5) Continuing Need for National Security Law Expertise and General Command Advice. Navy judge advocates bring sufficient levels of education, training and experience to meet the increasingly complex legal and policy environment in which they and their commanders operate. While this Review primarily focused on the provision of military justice, there is a strategic imperative that Navy leaders continue to support the Navy JAG Corps' positive efforts and success in organizing, manning, training and

²⁸² MCM, *supra* note 148, R.C.M. 703(b). A party is also entitled to the assistance of any necessary expert. R.C.M. 703(d)(1).

²⁸³ JAGMAN, *supra* note 100, para. 0146. The military does not have standing courts with their own budgets. Convening authorities usually issue one convening order per year, ordering certain personnel to sit as a court-martial and hear any case that may be referred to that court-martial. The composition of the panel may be amended through subsequent orders. See MCM, *supra* note 148, R.C.M. 504.

²⁸⁴ Defense counsel must submit requests for production of witnesses (e.g., funding for witness travel and issuance of subpoenas if necessary) to the trial counsel. *Id.* at R.C.M. 703(c)(2). Defense counsel must submit requests for expert funding to the convening authority with notice to the trial counsel. *Id.* at R.C.M. 703(d)(1).

²⁸⁵ *Id.* at R.C.M. 703(c)(2)(B), R.C.M. 703(d)(1).

²⁸⁶ Trial counsel determines whether a defense witness is required under the R.C.M.; the trial counsel's decision may be reviewed by a military judge. *Id.* at R.C.M. 703(c)(2)(D). The convening authority makes the initial determination on funding for experts, which also may be reviewed by the military judge. *Id.* at 703(d)(2).

equipping the judge advocates necessary to support National Security requirements and the broader command advice line of effort.

(6) Administrative Law and Civil Law Support. The same may be said for the manner in which the Navy JAG Corps supports the myriad legal and administrative requirements that pertain to the DON as an Agency of the Federal Government. In various areas of civil law, the Navy JAG Corps is providing effective and efficient legal services in support of critical DON requirements, such as military personnel law and claims litigation.

(7) Continuing Need for Government Ethics Advice. The Navy JAG Corps conducted a comprehensive review of the training, delivery and oversight of ethics advice within the Navy in 2016. Some recommendations and initiatives have been completed, primarily with respect to training of ethics counselors. However, the Navy has not implemented the most important part of the 2016 review – establishing a regular, systemic assessment of the delivery and quality of ethics advice and services within NLSC and SJA Offices throughout the Navy.

(8) Legal Assistance. Senior judge advocates acknowledge the critical importance of the legal assistance mission, while most junior judge advocates appear to understand that it is a foundational skill for future assignments. However, other junior judge advocates did not fully appreciate the uniformed attorneys' role in performing legal assistance. There must be clear and consistent communications from JAG and NLSC leaders that legal assistance is one of the JAG Corps' statutory missions and directly supports Fleet readiness by mitigating legal burdens on Sailors and their families. Fleet perspective must permeate this line of operation.

(9) Additional IDES Counsel. Through creation and continued resourcing of the DESCPC, JAG attorneys provide essential support to Sailors and Marines in the IDES. As noted, additional attorney resources, particularly in field MTFs that support the IPEB process, are required to meet SECNAV-mandated caseload limitations. JAG must continue to request the necessary resources for the DESCPC, and resource authorities must fund Navy and Marine Corps requirements.

Section 4

Navy Findings and Recommendations

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4. NAVY FINDINGS AND RECOMMENDATIONS

4.0 INTRODUCTION

The assessment of the current state of the Navy legal community described in Section 3 led to the recommendations contained in this section. These recommendations have been categorized into five key areas: culture, organization, education and training, resourcing and unlawful command influence. They are listed below along with a reference to the portions of Section 3 that support them.

4.1 CULTURE

4.1.1 Identity

The Navy JAG Corps officers are members of two honorable professions: the profession of *arms* and the profession of *law*. As Naval Officers, judge advocates accompany the Fleet to sea, abroad, and in expeditionary environments. As Naval Officers, judge advocates must at all times be conscious and supportive of Navy requirements, culture and values. This unique identity of a Naval Officer who practices law must be systematically emphasized at all times, not just through occasional communications from senior JAG Corps leaders. Legalmen, by virtue of converting from other ratings and participating in Navy-wide Sailor development practices, better understand and communicate their roles as Sailors. Increased understanding of and appreciation for Navy operations and Service culture would improve judge advocates' court-martial practice, especially in cases concerning operational deficiencies, as well as delivery of legal support across the enterprise.

Unlike the other Services, the Navy JAG Corps is not resourced to and does not provide both in-residence professional military education as well as in-residence advanced legal education (e.g., LL.M. degree programs) during the course of a judge advocate's career. While a career JAG Corps officer will likely receive the opportunity for an LL.M. to enhance their legal education, providing in-residence professional military education would facilitate the development of their perspective as a Naval

Officer, and benefit future commanders by building relationships with judge advocates earlier in their careers.

Recommendations:

a. Issue governing principles for the JAG Corps that establish and emphasize the judge advocate's status as both Naval Officer and attorney. Reinforce these principles through accessions training, each career education and training opportunity, prior to milestone assignments and promotions and generally throughout a judge advocate's career. [3.4.1, 3.5.1]

b. Expand the portion of JAG officer accessions from the Law Education Program (LEP) and In-Service Procurement Program (IPP) to both expand the size of the JAG Corps as required and develop an expanded cadre of judge advocates with Fleet perspective. [3.4.1]

c. Determine resources necessary to provide in-residence professional military education, in addition to advanced legal education, and deliver a plan to execute accordingly. [3.5.1]

d. Leverage modern training techniques to include practical application through simulations and exercises for the purpose of developing skills, maintaining proficiency, as well as team building for both generalist and litigation personnel. [3.7.6]

e. Sustain efforts in national security law, command advice, administrative law, legal assistance and claims that support naval operations and Sailors. Effectively communicate the need for, and value of, these missions to the entire JAG Corps organization. [3.7.6]

4.1.2 Assessment

The Navy JAG Corps conducts Article 6, UCMJ, inspections of NLSC units, and regularly performs internal community reviews of specific JAG Corps issues. However, as evidenced by the events that led to the convening of this comprehensive review, the community lacks an agile and effective self-assessment process by which lessons learned are promptly identified, communicated to the community, and corrective actions tracked to completion. Particularly in high-visibility cases, where the Navy JAG Corps

as an organization or individual members have not performed optimally, root cause analysis and timely correction are essential to continuous improvement of the entire organization. The NLSC Article 6 inspection program in and of itself is not adequate and does not extend to the execution of Staff Judge Advocate responsibilities or that of OJAG headquarters.

Recommendations:

a. Develop a formal, repeatable and continuous process to assess the effectiveness of all aspects of the Navy JAG Corps' legal practice, to include OJAG headquarters, staff judge advocates, Naval Justice School and the judiciary, and codify that process in a formal instruction. This self-assessment program must be founded on clear identification of Navy requirements, determination of whether the JAG Corps is meeting those requirements, identification of standards used to measure success, and employment of effective processes to share lessons across the legal community.

Coordinate with the Navy Inspector General to review the Commanding General Inspection Program (CGIP) administered by the Inspector General of the Marine Corps (IGMC) for the functional area of Legal Administration and apply it to the Navy JAG Corps. [3.3.3, 3.3.4, 3.5.3]

b. Improve the JAG Corps Professional Responsibility program to provide regular and proactive dissemination of lessons learned, including the use of case studies of recent and selected past disciplinary actions and "near misses." Consistent with the Privacy Act, provide information on matters leading to corrective actions and the publication of JAG and Rules Counsel ethics opinions. Coordinate with Naval Education and Training Command to incorporate lessons into judge advocate pipeline training as well as annual Professional Responsibility training for the JAG Corps. [3.3.3, 3.5.3]

c. Collaborate with the American Bar Association, State Bars, and the Armed Services to identify best practices for professional responsibility rules and processes. [3.3.3, 3.5.1, 3.5.3]

d. Establish a formal process to consult recipients of OJAG support, to include external agencies such as those sections of the Department of Justice that represent

the DON in litigation for matters under the cognizance of JAG, to ensure continuous evaluation of OJAG performance. [3.3.3, 3.7]

4.2 ORGANIZATION

4.2.1 The Roles and Responsibilities of JAG and DJAG/CNLSC

In the realm of military justice, the JAG holds specified statutory duties under the UCMJ that may limit or prohibit providing legal advice to senior Navy leaders in specific cases. A single officer executing authorities at the Department level as the DJAG and at the Service level as CNLSC has contributed to senior leader confusion over appropriate roles, responsibilities, and reporting relationships. Additionally, the span of responsibilities and workload inhibits meaningful leadership and oversight of the vital services provided by OJAG and NLSC.

The headquarters organizations that support the JAG and DJAG/CNLSC are, in various operational and administrative functional areas, combined. Many officers on the OJAG staff are dual-hatted to both organizations. This contributes to Navy JAG Corps community confusion over appropriate roles, responsibilities, and reporting relationships. The Center for Naval Analyses (CNA) is currently conducting an in-depth review of these headquarters organizations to inform decisions on changes. Adding to the confusion about the roles of JAG and DJAG, there are additional control grade judge advocates assigned to SECNAV's and CNO's personal staff. However, there are no specific instructions or protocols regarding oversight of the legal advice provided by these judge advocates. In practice, they appear to perform many of the functions intended for the JAG and SJA to CMC, without the benefit of the same global perspective. Oversight and approval by the JAG, SJA to CMC and General Counsel is vital to ensure consistency and accuracy of legal advice and opinions provided.

Recommendations:

a. Provide the Secretary and Service Chiefs clear guidance regarding appropriate roles and responsibilities of JAG and DJAG in providing information and advice to DON principal officials. [3.3.1, 3.3.2, 3.3.4]

b. Provide the results of the CNA study to the Secretary and Service Chiefs along with a detailed recommendation on organizational changes to improve lines of authority, responsibility and accountability. [3.3.1, 3.3.2, 3.3.4]

c. Pending completion of the CNA report, consider creating and resourcing an active duty Navy Flag billet to independently serve as CNLSC. [3.3.1, 3.3.2, 3.3.4]

d. Review Navy AJAG billets to determine whether the breadth and scope of these senior JAG Corps leadership positions warrant assignment of active duty RDMLs (O-7). If warranted, develop a legislative proposal to amend 10 U.S.C. § 8089 and create permanent active Flag AJAG billets. In the alternative, support reinstatement of retired pay authority for AJAGs who retire at the rank of Rear Admiral (Lower Half) or Brigadier General. [3.3.1, 3.4.1, 3.4.5]

e. Review the existing relationships between Chief of Staff-RLSO and TCAP, as well as Chief of Staff-DSO and DCAP, to ensure that they are properly aligned and focused on delivering efficient and effective legal services to the Fleet through their RLSO and DSO organizations. [3.3.2, 3.3.4]

f. Request CNA evaluate how judge advocates assigned to the SECNAV and CNO personal staffs, and the legal opinions and advice they provide, are overseen to ensure that the JAG, the SJA to CMC, and General Counsel remain the final approval authorities on advice provided to the DON's most senior leaders. [3.3.4]

g. Evaluate the Marine Corps Judge Advocate Board process (MCJAB) and propose a similar Navy organization. [3.3.2, see discussion in 5.9.3 below]

4.2.2 Region Legal Service Offices

Region Legal Service Offices (RLSOs) were first established in 2005, at CNO direction. Although the RLSO offers advantages over past structures – particularly in mentorship and supervision of junior personnel, improved administrative support focused on the needs of the JAG community, and flexibility to surge in support of Fleet needs – it has resulted in certain misalignments. The SJAs for Navy Region Commanders and installation commanding officers are administratively attached to RLSOs. Accordingly, the RLSO Commanding Officer reports on both the SJAs and

prosecutors within the Region. The rationale for this alignment is not understood by judge advocates and commanders, and has created an appearance and perception among some that administrative alignment to the RLSO and the prosecution function may influence SJAs' advice to clients. Working Group observations noted an internal focus that seemingly prioritizes NLSC on internal command matters rather than Fleet and other operational support. Ensuring that the RLSOs' priorities are closely attuned to and aligned with Navy and Fleet requirements is necessary to ensure the most appropriate legal solutions.

Review of recent high-profile cases, and interviews with supported commanders, indicate that the Navy's institutional interest in good order and discipline has not been adequately represented in some trials and administrative proceedings. Reestablishing Trial Service Offices would increase command-level focus on the prosecution function, demanding excellence from practitioners. The goal of the realignment would be to eliminate prosecutorial missteps and achieve an efficient system that supports commanders as needed.

Recommendations:

a. Assess overall NLSC alignment with Navy and Fleet priorities and issue a NLSC strategy document that redirects and reorients NLSC commands in line with governing principles established by recommendation 4.2.1.a. [3.4]

b. Consider an organizational change to reestablish Trial Service Offices (TSOs) in order to achieve the single mission focus of providing court-martial prosecution services. In the planning process, address the resulting organizational and resourcing effects on ashore SJA offices, legal services to Sailors and their families, Victims' Legal Counsel, the First Tour Judge Advocate program, and impact to command opportunities. [3.3.2, 3.3.4, 3.5.1, 3.7.2]

c. Coordinate the reestablishment of TSOs with alignment of Region SJA billets to the applicable Region Commanders, and alignment of other SJA billets to their respective commanders. [3.3.4]

d. Develop specific professional qualifications, to include minimum experience and training requirements for Region SJAs, given their role in the Navy's general courts-martial practice. [3.3.4, 3.5.1]

e. Review procedures for evaluating defense counsel support requests to emphasize the need for affording both defense and government counsel adequate access to resources as well as to ensure compliance with MJA 2016. [3.7.6(4)]

4.3 EDUCATION AND TRAINING

The responsibility of the commander for his or her command is absolute and the authority of the commander is commensurate with his or her responsibility.²⁸⁷ Compliance with the rule of law is the commander's responsibility. However, there is no structured, standardized approach to ensure that commanders receive relevant, timely legal instruction over the course of a career. Through education and experience with the judge advocate communities, commanders must become more informed and demanding clients with each incremental increase in scope of responsibility.

Appropriately tailored legal training must be delivered at the right time to enable commanders at every echelon to carry out their roles and responsibilities in ensuring compliance with legal requirements, and to identify those situations that require further consultation with a judge advocate. The Navy must review the training continuum for all line officers, to ensure that training on military justice and ethics is timely and appropriate, and provided in advance of the increased scope and responsibility of each milestone assignment.

Similarly, judge advocates must receive appropriate training and professional development before taking positions of increased responsibility in order to best serve their clients and the best interests of the Navy and Marine Corps. Judge advocate training must follow a structured, standardized approach that delivers relevant, timely training, tailored to each milestone assignment.

In particular, judge advocates advising general courts-martial convening authorities need training that enables them to advise commanders on the full spectrum

²⁸⁷ U.S. DEP'T OF NAVY, U.S. NAVY REGULATIONS, Art. 0802 (1990).

of accountability options. As a matter of practice, commanders forward all requests to convene general courts-martial to Navy Region Commanders, rather than retaining the case in the operational or administrative chain of command. While removing the administrative burdens of convening courts-martial from commanders, this practice also removed commanders' ownership over the general courts-martial process. All general court-martial convening authorities and their legal advisors, not just Navy Region Commanders, need training on the full spectrum of legal options available, and must be prepared to exercise those options as necessary to maintain good order and discipline in their commands.

Finally, commander and judge advocate training must address management of high-profile cases. In today's digital media environment, significant incidents involving naval forces or individual Sailors may draw instantaneous attention, heightened public and Congressional interest, and demands for information and/or action, all of which pressurize investigative and accountability actions. Particularly in these types of high-profile cases, commanders must resist those external pressures and proceed in a deliberate, measured manner to avoid missteps or failure. It is also precisely during these cases when the legal community needs to double-down on its responsibility to properly communicate with and advise the client – whether it be a commander or an individual Sailor.

Recommendations:

a. Formalize a relationship between Commander, Naval Education and Training Command and JAG to assess, develop, and deliver an improved career continuum legal training for line officers. Review requirements for career milestone-based legal training for officers and senior enlisted leaders, focused on the legal requirements and challenges associated with incremental leadership responsibilities. [3.7.1, 3.7.2, 3.7.6]

b. Develop and deliver through operational chains of command standardized legal training for commanders at all echelons that provides guidance on use of the military justice system, administrative accountability measures, and compliance with standards of conduct. Commanders serving as Convening Authorities require scenario-based training on military justice, ethics, and UCI, which incorporates lessons learned,

and ongoing assessments of implementation of the Military Justice Act (MJA) of 2016. [3.7.1, 3.7.2, 3.7.6]

c. *Develop standardized decision aids for legal matters that provide commanders flow charts of their basic legal options and decision points regarding personnel accountability, disciplinary actions, and investigative procedures. Decision aids should include administrative options, to include Show Cause Proceedings (Boards of Inquiry) and their potential impact on follow-on administrative or military justice proceedings. For example, “if a conviction is obtained at a court-martial and does not include a dismissal, subsequent convening of a board of inquiry has the following advantages and disadvantages...” These aids should be tailored to support commanders at each echelon.*²⁸⁸ [3.7.1, 3.7.2, 3.7.6]

d. *Revise the Manual of the Judge Advocate General (JAGMAN) to clarify, consistent with case disposition guidance,²⁸⁹ that general court-martial convening authorities are not required to forward cases requiring trial by general court-martial to Navy Region Commanders, but, in their discretion, may convene general courts-martial locally, as required, to maintain good order and discipline within their commands.* [3.7.1, 3.7.2, 3.7.6]

4.4 RESOURCING

4.4.1 Community Management and Professional Development

Unlike other line and staff communities, responsibility for JAG Corps officer detailing, slating, and community management is divided between various offices within Navy Personnel Command and OJAG, and is accomplished as a collateral duty by already overburdened JAG officers. Although these offices work to deliver coordinated reports to the JAG and other community leaders, they tend to operate independently and without unity of effort. As a result, community management of the JAG Corps is inconsistent and does not take full advantage of the personnel processes, programs and resources utilized by other Navy communities. With the exception of a recent effort

²⁸⁸ These decision aids are intended as tools for commanders' risk calculus and to facilitate discussions with legal advisors. They are not substitutes for commanders' good judgement and responsibility.

²⁸⁹ MCM, *supra* note 148, app'x 2.1; see Art. 33, UCMJ, 10 U.S.C. § 833 (2018)

to develop a plan to support the Information Warfare community, the JAG Corps has not evaluated Fleet requirements and established training and experience milestones for personnel filling those billets. While the size and disparate responsibilities of the JAG Corps may not allow for creating dedicated career tracks and specialties, nominal milestone billets or some type of equivalent need to be identified and JAG-unique career objectives by paygrade defined. Not only will this standardize community management processes, but it will also inform the JAG Corps regarding career progression (a noted complaint and deficiency). The U.S. Army Judge Advocate General's Corps Publication 1-1 provides, as an example, a starting point for how personnel assignment, career development, and community management policies can be formalized and communicated to an entire organization.

The Navy JAG Corps officers frequently report to key billets without having completed prerequisite courses, with the expectation that the gaining command will send the officer to school some time over the course of their tour. This does not best support the judge advocates or the commanders they advise.

Recommendations:

a. Align JAG Corps community management practices to meet Navy officer community management practices. This includes developing a strategic plan accounting for current and future Fleet demands and formal definition of career paths, milestones, education, training, and professional development. Navy experience has proven this requires a dedicated, integrated community management team, not a collateral duty responsibility. Establishing formal community management practices is not to interfere with the JAG's authority under 10 U.S.C. § 806 to direct the assignment (detail) of judge advocates. Rather, it is to establish a Fleet-focused, strategic JAG Corps human resources program. [3.4.1, 3.4.5]

b. Formally define career and competency expectations by paygrade and communicate those expectations to the JAG Corps in a formal policy document. [3.4.1, 3.4.5]

c. *Review officer subspecialty code structures and review all billets that require or should require a subspecialty code to ensure proper identification of officers' experience and use of that experience. [3.4.1, 3.4.5]*

d. *Ensure to the maximum extent practicable that all judge advocates receive required milestone training prior to or en route to billet assignment, rather than on an ad hoc basis. [3.5.1]*

e. *Explore, in coordination with the Army and Air Force, the feasibility of developing a VLC certification course at NJS to ensure greater flexibility in VLC certification and assignment. [3.7.2]*

4.4.2 Manpower

The 506 Panel recommended that the JAG Corps grow to 950 attorneys based on 2011 requirements. As of the time of this report, the JAG Corps has grown to 935 officers. However, the JAG Corps has assumed additional missions since the 506 Panel convened, including Victims' Legal Counsel, Special Victims' Prosecution teams,²⁹⁰ emerging Naval Special Warfare, Information Warfare, Cyber and Space community requirements, and continued demand for operational environment law expertise. The JAG Corps must continuously assess how many judge advocates and Legalmen are required to meet current and future missions and formally register those demand signals in the Navy's personnel system.

The Navy JAG Corps manpower challenges have been exacerbated by the execution of the FTJA program. The FTJA program's goal of producing competent judge advocates in all core mission areas within two years of accession, ready for future assignments, is laudable. However, short rotations in mission areas and limitations on practice imposed by the FTJA program reduce the utility of FTJAs while they are in this two-year professional development pipeline. If this current FTJA model remains, the Navy JAG Corps needs to be properly resourced to the model and ensure that these billets do not come at the expense of meeting Fleet requirements.

²⁹⁰ See JAG/CNLSCINST 5817.2, *supra* note 175.

With regard to judge advocate recruiting, the JAG Corps attracts and retains sufficient numbers of officers to maintain force structure and support OPA requirements. A significant challenge to retention of junior officers is student loan debt. At the senior officer level, retention of experienced Captains beyond minimum time in grade requirements is an issue.

With regard to Legalman recruiting, there are challenges associated with a community entirely dependent upon voluntary conversions of Sailors from other Fleet ratings with more than 24 months service. This recruiting model has created a talent-to-task degradation, with more senior petty offices being required to man more junior billets, which slows advancement rates and adds to the recruiting challenge. Institution of targeted performance incentives for E-7s and above, and conversion incentives at the E-4 level, may assist in retaining more qualified Legalmen at senior ranks and garner additional apprentice-level Legalmen in support of Fleet requirements.

The Navy JAG Corps does not employ enlisted legal support personnel to their full potential. This is due to inefficient manpower allocation within NLSC resulting in suboptimal paralegal utilization. Commander, NLSC's request for a Shore Manpower Requirements Determination review of NLSC field offices is the first step in establishing requirements and determining the appropriate mix of military and civilian, officer and enlisted, legal and technical expertise, and administrative support that is needed to most effectively and efficiently execute NLSC missions. The current manning structure of NLSC is inefficient because it requires legal professionals to perform non-legal tasks, which they do not have the necessary education or experience to execute proficiently, and which distract from the core mission. There is also the dynamic that FTJAs and Legalmen are often trying to learn the same legal skill sets and lack the necessary experience to rely on or cross-train each other. Better integrating the efforts of judge advocates and paralegals is a long-standing issue, indicating that the JAG Corps has not found the root cause of this inefficiency. Considering the administrative requirements that are associated with sexual assault cases and the increased complexity of court-martial litigation, improved utilization of Legalmen and civilian paralegals is essential to most effectively and efficiently support NLSC and SJA

requirements and will, in turn, allow more effective and efficient use of judge advocates in support of Fleet requirements.

Recommendations:

a. Once NLSC organizational structure reviews are complete, conduct a comprehensive JAG Corps assessment of judge advocate and Legalman inventory and billet distribution requirements based on current and anticipated Fleet requirements. This assessment will support definition of career tracks, training, and education requirements, and milestones necessary to inform both numbers and skill sets required. [3.4.1, 3.4.5]

b. Review current judge advocate accession sources and identify where direct recruitment and use of new “DOPMA relief” authority to commission experienced attorneys with specific skills needed by the Navy might be more effective and efficient. [3.4.1, 3.4.5, 3.5.1]

c. Evaluate execution of the FTJA program, and the associated PDO and PDS programs, based on formal measures of effectiveness, balancing Fleet requirements for legal services and JAG Corps professional development requirements. [3.5.1, 3.5.3]

d. After determining the appropriate future structure of NLSC, determine the necessary manning construct for NLSC field offices, to include paralegal, information technology, administrative, security, and other support billets required to optimize delivery of Fleet legal services. [3.3.2, 3.3.3, 3.5.3, 3.7.6]

e. Prioritize any future review of NLSC field offices, consistent with Fleet requirements. [3.3.2, 3.3.3, 3.5.3, 3.7.6]

f. Review the development, distribution, and enforcement of institutional standards regarding Legalmen training. Publish clear expectations on division of attorney and paralegal roles and responsibilities. Drive cultural change to require effective judge advocate and Legalman teamwork in accordance with published standards. [3.5.2, 3.5.3]

g. Review retention incentives, to include Judge Advocate Continuation Pay, to ensure that necessary incentives are in place, of sufficient financial value and properly

structured to specifically address student loan debt and senior officer retention challenges, ensuring retention of the officers best qualified. Consider payment of licensing and associated continuing education fees and adoption of a law school education debt subsidy program, similar to Marine Corps efforts. [3.5.1, 3.5.3]

h. Review the issue of direct accessions of civilian paralegals to the Legalman rating, as well as targeted incentives to address current recruiting and retention challenges. Examine options to open the years of service window for rating conversion of prior serving Sailors to the Legalman rating. [3.5.2, 3.5.3]

i. Fund Disability Evaluation System Counsel Program attorney billets to ensure continued support of Sailors and Marines in the disability evaluation process. [3.4.5]

4.4.3 Military Justice Litigation Career Track

The Military Justice Litigation Career Track has not been executed as originally intended, leading to what appears to be misalignment between the numbers of officers in the track, the billets those officers fill, and the number of courts-martial tried. From 2000 to 2009, there was a high but declining volume of courts-martial, particularly special courts-martial. Beginning in 2009, the number of tried courts-martial has stabilized at approximately 250 per year. While fewer cases are now tried, they have become more complex and the administrative requirements, particularly with respect to sexual assault reports, have increased. This has resulted in fewer opportunities for MJLCT officers to develop and hone their litigation skills, while demanding significant work outside of the courtroom. Allocating significant numbers of judge advocates to court-martial litigation for limited numbers of courts-martial further deprives MJLCT officers of the number of cases needed to maintain expert-level proficiency. Assessment of the appropriate number of MJLCT officers, and the organizations through which they deliver these essential services, must be linked to Fleet requirements.

The MJLCT involves assignment of officers within this track to NLSC and Judiciary positions in support of their development as litigators. The MJLCT does support at least one non-litigation assignment to provide a wider breadth of professional Naval and legal experience for MJLCT officers.

Recommendations:

- a. *Optimize the inventory and assignment of MJLCT practitioners to meet Fleet court-martial requirements, carefully considering the imperative of maintaining a fully capable military justice litigation community and efficiencies to be gained through proper military and civilian paralegal utilization. [3.4.1, 3.4.3, 3.7.2, 3.7.6]*
- b. *Identify career paths that return senior officer MJLCT litigators to the courtroom as trial and defense counsel, and detail them accordingly to mentor and lead junior counsel from the front. [3.7.2, 3.7.6]*
- c. *Consider making command eligibility or equivalent assignment a milestone requirement for all qualified MJLCT litigators to ensure an adequate cadre of senior officers are available for leadership roles within NLSC and other equivalent military justice positions. [3.7.2, 3.7.6]*
- d. *Consider detailing only senior MJLCT qualified officers to NLSC command, officer in charge and executive officer billets. [3.7.2, 3.7.6]*
- e. *Forward reports prepared in compliance with 10 U.S.C. § 946a to the Secretary and Service Chiefs to ensure senior leaders are informed of measures implemented to ensure the ability of judge advocates to participate competently as trial and defense counsel, to preside as military judges, and to perform the duties of victims' legal counsel. [3.7.2, 3.7.6]*
- f. *In coordination with Marine Corps, assess the feasibility of longer or more repeat tours for military judges. [3.5.1, 3.7.2]*
- g. *Explore offering qualified retired Commanders (O-5) and Captains (O-6) the opportunity to serve as military judges under an "out and back" or "up and stay" program.²⁹¹ [3.4.5]*

²⁹¹ An "out and back" program would enable expedited reentry to active duty for officers leaving active duty who may later decide to return. See, e.g., *Targeted Reentry Program*, NAVY PERSONNEL COMMAND, <https://www.public.navy.mil/bupers-npc/career/transition/Pages/Targeted-Re-Entry-Program.aspx> (last visited Nov. 26, 2019). An "up and stay" program would allow officers with special skill sets to remain longer in technical or non-command roles without upward mobility. CHIEF OF NAVAL PERSONNEL, GROWING TO WIN: SAILOR 2025 – NAVY'S STRATEGY FOR PEOPLE IN OUR FUTURE FLEET 13 (Mar. 9, 2018).

h. Assess requirements to assign law clerks within Navy-Marine Corps Trial Judiciary Circuits in support of trial-level military judges. Report the results of this assessment to JAG for resourcing consideration, consistent with overall Fleet requirements. [3.7.2]

4.4.4 Material Deficiencies

The DON's lack of a functioning, comprehensive military justice data collection and case management system is a mission-critical deficiency. Although the need for a modern case management system has long been recognized by the JAG Corps, and the JAG Corps has made concerted efforts to acquire one since 2004, this has proven unsuccessful due to various program challenges. The Military Justice Act of 2016 now requires the DoD to develop uniform standards for military justice data collection and case management. In December 2018, DoD issued formal definitions and guidance to meet these requirements. JAG has initiated an acquisition action and, given known deficiencies in the current Case Management System (CMS), the Navy and Marine Corps legal communities are cooperating in development of an interim system to transition between CMS and the new MJA 2016 compliant system.

The Navy JAG Corps must continue to invest in “smart” courtroom technologies, to increase efficiency and effectiveness of military justice and ensure that Navy courtrooms comply with civilian standards in the conduct of criminal proceedings.

The Navy JAG Corps lacks the technological capability to produce timely, accurate transcripts of courts-martial and administrative proceedings. Modern court reporting and transcription technology is necessary to improve the quality of litigation and more efficiently produce records of trial. Pilot programs, to include speech-to-text software, have not succeeded primarily due to NMCI and other government networks' networks' (such as ONE-NET) constraints.

The use of non-deployable Sailors as courtroom security personnel presents an avoidable and unnecessary risk to the safety of military justice practitioners, witnesses, and trial observers. Navy courtroom security needs to be properly resourced and elevated to civilian courtroom standards.

Recommendations:

a. Resource the expedited acquisition of a modern, secure military justice data collection and case management system that is compliant with statutory and DoD requirements. This is essential to improve the efficiency of the DON military justice system, mitigate the risks of legal error caused by poor case management, facilitate more accurate and informative responses to internal and external requests for data, and enable effective trend analysis. [3.6.2, 3.6.3]

b. Expedite appropriate waivers from NMCI and other government networks (such as ONE-NET) policies, or develop alternatives to the same, to implement modern court-reporting technologies and software to include identification and resourcing of the court reporters and IT support personnel necessary to maintain these systems. Establish commercial “white lines” (i.e., non-secure) in courtrooms to facilitate the use of artificial intelligence assisted transcription. Provide an assessment of any resource challenges or delays as part of the annual military justice report submitted to the Secretary and Service Chiefs. [3.6.2, 3.6.3]

c. Evaluate current Navy courtroom facilities and security protocols compared to federal civilian courtroom facilities, security infrastructure, and policies in consultation with the U.S. Marshals Service and Naval Criminal Investigative Service. Ensure sufficient Master-at-Arms or other properly trained Navy security forces are provided for court-martial proceedings. [3.6.1, 3.6.3]

4.5 UNLAWFUL COMMAND INFLUENCE

Unlawful command influence undermines the fairness and credibility of military legal systems, effectively precluding the proper administration of justice. The military justice system expects that commanders will exercise their broad discretion over the disposition of charges independently and without interference from superiors. Given recent courts-martial proceedings that have involved highly publicized rulings of actual or apparent unlawful influence involving senior line and JAG officers, commanders are properly concerned with avoiding actions that may give rise to such claims. Left unaddressed, these concerns interfere with a commanders’ ability and duty to

communicate both internally and externally as required to establish and maintain good order and discipline. Commanders require clear, consistent, and timely guidance in order to do both. Similarly, SJAs desire community discussion and guidance on how recent UCI rulings may shape their communications with convening authorities and with other legal advisors both up and down the chain of command. Uncertainties create unnecessary barriers to necessary and appropriate communication between legal professionals. Commanders and judge advocates at all levels must honor and respect convening authorities' independence and scrupulously refrain from, deter, and report any improper attempt to influence the exercise of their discretion.

Recommendation:

a. Provide all Flag Officers, commanders and judge advocates clear, current, and consistent guidance and training on what constitutes unlawful command influence. The training must proactively incorporate the important lessons to be learned from recent and selected past case law, particularly emphasizing convening authorities' independence. At the same time, commanders must be encouraged by this training to exert lawful influence over their commands in the interest of maintaining good order and discipline. [3.7.1, 3.7.6]

Section 5

Organization, Mission, Roles, And Responsibilities of The Marine Corps Uniformed Legal Community

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5. ORGANIZATION, MISSION, ROLES, AND RESPONSIBILITIES OF THE MARINE CORPS UNIFORMED LEGAL COMMUNITY

5.1 HISTORICAL BACKGROUND AND RESPONSE TO CONGRESSIONAL CONCERN

Within the Department of the Navy, the Secretary of the Navy provides oversight and Department-wide policy of the legal mission through the General Counsel of the Navy and the Judge Advocate General (JAG). Execution of legal functions, however, are primarily done at the Service-level. Execution refers to Service-level functions of command, direction, management, training, equipping, and organizing (including manpower management and assignments) of judge advocates and legal services specialists. The distinction between Departmental oversight and Service-level execution is critical to understanding how uniformed legal support is provided within the Marine Corps.

The Staff Judge Advocate to the Commandant (SJA to CMC) oversees and supervises the provision of legal support within the Marine Corps on behalf of the Commandant, pursuant to the Commandant's Title 10 responsibilities to organize, train, equip, administer, and maintain the force.²⁹² Allocation and execution of legal capabilities within the Marine Corps is commander-oriented, mission-focused, and accountable to the Commandant through the SJA to CMC.

5.1.1 Past Congressional Concerns over Execution of DON Legal Support

Two recent studies evaluated the execution, supervision, and oversight of the legal support mission within the DON: the 2010 Department of Defense Inspector General (DoD IG) report and the 2011 Independent Review Panel to Study Judge Advocate Requirements for the Department of the Navy (the 506 Panel).

The case of *United States v. Foster* received Congressional scrutiny due to a nine-year post-trial processing delay and Sergeant Foster's subsequent exoneration.²⁹³

²⁹² U.S. MARINE CORPS, ORDER 5430.2, ROLES AND RESPONSIBILITIES OF THE STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS 1-3 (Dec. 12, 2013) [hereinafter MCO 5430.2].

²⁹³ *United States v. Foster*, No. 200101955, 2009 CCA LEXIS 62, at *23-29 (N-M. Ct. Crim. App. Feb. 17, 2009). The Navy-Marine Corps Court of Criminal Appeals held that the evidence was factually and

As a result, the Senate Armed Services Committee directed the DoD Inspector General (DoD IG) to review the systems, policies, and procedures for post-trial review of courts-martial in the DON and to assess their adequacy.

In the aftermath of the 2010 DoD IG report's findings, and in accordance with Section 506 of the National Defense Authorization Act (NDAA) for Fiscal Year 2010, the Secretary of Defense appointed an Independent Panel to review judge advocate requirements for the DON.²⁹⁴ Informed by the findings of the 2010 DoD IG report, the 506 Panel conducted a comprehensive review of Navy and Marine Corps judge advocate requirements.

On February 22, 2011, the 506 Panel delivered its report to Congress. The 506 Panel concluded that the "Commandant, with the assistance of the SJA to CMC, is effectively managing judge advocate manpower (i.e., structure, inventory, and assignments) to meet Service, Departmental, and Joint legal requirements [and ensuring] proper career progression (i.e., promotions) for Marine judge advocates."²⁹⁵ To ensure enduring organizational change, the 506 Panel recommended legislation to clarify and strengthen the role of the SJA to CMC with statutory authority to supervise the administration of military justice and legal assistance within the Marine Corps.²⁹⁶

5.1.2 Commandant Endorsement of Statutory Changes for SJA to CMC

In response, the then-Commandant took action. In his July 2011 Memorandum to the Secretary, the Commandant proposed Department-level courses of action to implement the recommendations of the 506 Panel. The Commandant stated that he viewed the Congressional concerns that led to the creation of the 506 Panel as a "call to action."²⁹⁷

legally insufficient to convict Sergeant Foster of rape. Sergeant Foster's case was docketed with the appellate court at the Department-level on November 21, 2001.

²⁹⁴ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506, 123 Stat. 2190, 2278 (2009).

²⁹⁵ 506 PANEL REPORT, *supra* note 11, at 217.

²⁹⁶ *Id.* at 218.

²⁹⁷ Memorandum from the Commandant of the Marine Corps to the Secretary of the Navy, Recommendations of the Independent Panel Review of the Judge Advocate Requirements of the Department of the Navy (July 1, 2011) (on file).

In line with the recommendations of the 506 Panel, the Commandant endorsed follow-on legislation that fundamentally changed the role of the SJA to CMC to include the authority to exercise functional supervision over the execution of the uniformed legal mission within the Marine Corps. With one exception, Congress approved the following legislative proposals:

- Amend Article 6(a), UCMJ, 10 U.S.C. § 806(a), to authorize SJA to CMC to conduct inspections and supervise the administration of military justice administration within the Marine Corps [enacted]
- Amend 10 U.S.C. § 1044 to authorize SJA to CMC responsibility to supervise the provision of legal assistance within the Marine Corps [enacted]
- Amend 10 U.S.C. § 8046 to create a position with authority to perform duties relating to legal matters arising within the Marine Corps as well as UCMJ functions and legal assistance functions [enacted]
- Amend 10 U.S.C. § 8046 to establish SJA to CMC with the permanent grade of major general [enacted]²⁹⁸
- Amend 10 U.S.C. § 8046 for SJA to CMC to have a direct statutory relationship with the Secretary of the Navy [not enacted].²⁹⁹

5.1.3 Commandant-Directed Reorganization of Legal Services Support

Subsequent to the findings of the 506 Panel, the SJA to CMC recommended the reorganization of legal support within the Marine Corps, culminating in the 2012 Commandant-directed reorganization of the Marine Corps legal community.³⁰⁰ Prior to the reorganization, legal services support was provided in garrison by 15 installation law offices and three Legal Services Support Sections (LSSSs) that worked independently

²⁹⁸ For unrelated reasons, that part of the statute establishing the SJA to CMC in the permanent grade of major general was deleted in 2016. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 502, 130 Stat. 2000, 2104 (2016).

²⁹⁹ 506 PANEL REPORT, *supra* note 11, at 218-19. These statutory changes took effect in 2013 with the exception of SJA to CMC's authority to establish a direct statutory relationship with the Secretary of the Navy. It is unclear why that language was deleted from the legislative proposal because it was inconsistent with the Secretary's intent to do so. See Letter from Raymond E. Mabus, Jr., Secretary of the Navy, to Howard P. McKeon, Chairman, House Committee on Armed Services (Feb. 15, 2011) (on file) (expressing the Secretary's intent to propose legislation establishing a direct statutory relationship between the Secretary and the SJA to CMC).

³⁰⁰ U.S. MARINE CORPS, MARINE CORPS BULLETIN 5400, REORGANIZATION OF LEGAL SERVICES SUPPORT AND ESTABLISHMENT OF LEGAL SERVICE SUPPORT SECTIONS AND TEAM (Aug. 30, 2012) (on file).

with varying degree of capabilities. The 15 law offices and three LSSSSs were realigned into four regional LSSSSs and ten subordinate Legal Services Support Teams (LSST) aligned within Marine Corps Installations Command (MCICOM). See Figure 16.

Commander-Focused & Accountable to CMC

Unity of Effort & Functional Supervision

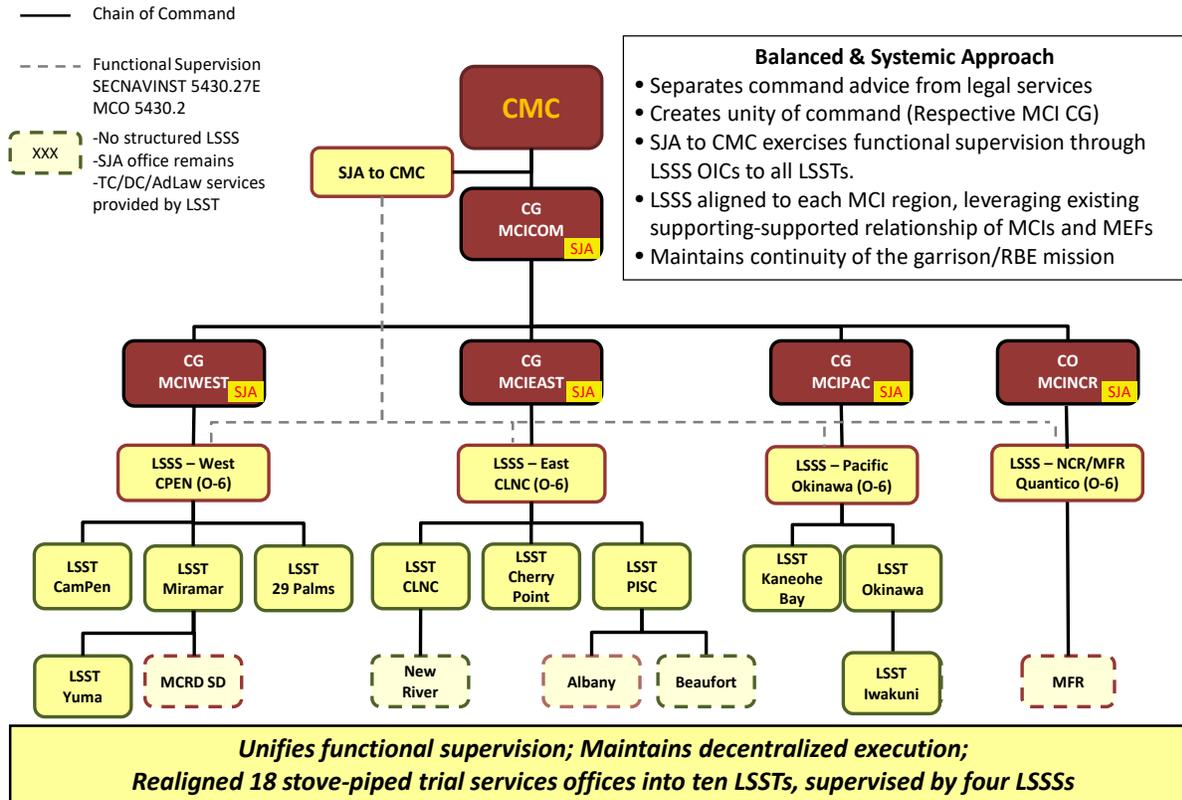


Figure 16: Unity of Effort and Functional Supervision.

Each LSSS Officer-in-Charge (OIC) is responsible and accountable to the Regional Installation Commanding General for the provision of uniformed legal services within the Legal Services Support Area (LSSA). The 2012 reorganization also created the Regional Trial Counsel Office led by a Lieutenant Colonel as the Regional Trial Counsel (RTC), added a civilian expert legal advisor (GS-15) with extensive civilian prosecution experience, a complex trial team, a legal administrative officer, and two criminal investigators.³⁰¹ The organizational design of the Regional Trial Counsel with

³⁰¹ The criminal investigators, Military Occupational Specialty 5821 (Criminal Investigator, Criminal Investigation Division CID Agent), assist with witness interviews, courtroom security, safe-guarding of evidence, acquisition of digital evidence with an in-house capability to pull electronic data from various

supervisory authority and oversight over the prosecution function within the region largely mirrored the previously established supervisory role of the Regional Defense Counsel within the Defense Services Organization (DSO). See Figure 17.

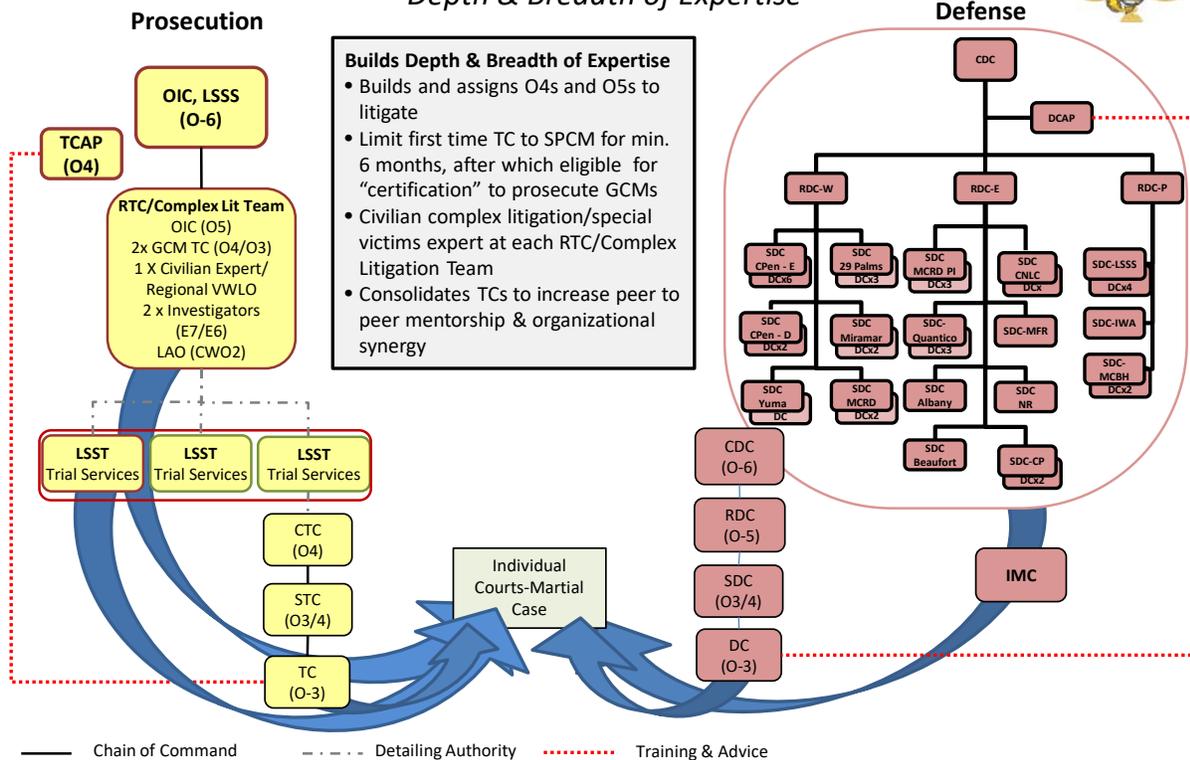
Prior to the reorganization, the legacy delivery-model for military justice support relied on the independent action of 18 trial services offices with no regional oversight and no unity of prosecutorial effort. Each trial services office prosecuted cases with the capability it had, not necessarily the prosecution capability and capacity the institution needed in the event of a complex, high-visibility case.

The CMC-directed legal reorganization positioned the Marine Corps to achieve greater levels of individual proficiency, organizational efficiency, and institutional accountability through regional consolidation of military justice capabilities (Trial, Defense, Victims' Legal Counsel, and Post-Trial Review). Additionally, it enabled the SJA to CMC to exercise functional supervision more effectively over the delivery of Service-level legal support.³⁰²

digital devices. U.S. MARINE CORPS, ORDER P5800.16A, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION, para. 1202.1a(2) (CH-7, Feb. 19, 2014) [hereinafter MCO P5800.16A LEGADMINMAN] *cancelled by* U.S. MARINE CORPS, ORDER 5800.16, LEGAL SUPPORT AND ADMINISTRATION MANUAL (CH-1, Aug. 8, 2018) [hereinafter MCO 5800.16 LSAM].

³⁰² Functional supervision includes the authority to formulate, promulgate, implement, supervise, inspect, and enforce standards of practice and to use uniform standards of procedures for the performance of legal support tasks. The authority does not include direction and control as direction and control of legal support personnel remains an inherent function and responsibility of the respective Commander. MCO 5800.16 LSAM, *supra* note 301, at 1-4.

Organizationally Balanced Military Justice Function *Depth & Breadth of Expertise*



Positions the Right Counsel to the Right Case – Balanced Adversarial System

Figure 17: Military Justice Function in the Marine Corps.

5.2 MARINE CORPS METHOD TO INFORM COMPREHENSIVE REVIEW

5.2.1 Scope of Review

On August 21, 2019, the Secretary directed the Chief of Naval Operations (CNO) and the Commandant to conduct a comprehensive review of the Department's military legal communities.³⁰³ The ERP appointed by the Secretary on August 29, 2019, led the Comprehensive Review.³⁰⁴ The Marine Corps formed a working group to support the Executive Review Panel's review of the Marine Corps uniformed legal community.³⁰⁵

³⁰³ Memorandum from the Sec'y of Navy to Chief of Naval Operations and Commandant of the Marine Corps, Comprehensive Review of the Department of the Navy's Uniformed Legal Communities (Aug. 21, 2019) (on file) [hereinafter SECNAV Memo of Aug. 21, 2019].

³⁰⁴ *Id.*

³⁰⁵ Memorandum from Assistant Commandant of the Marine Corps to Distribution List, Appointment of Tactical to Team to Conduct Comprehensive Review of The Marine Corps Legal Community (Aug. 27 2019) (on file).

On September 6, 2019, the Chief of Staff for the Comprehensive Review, focused the teams on the following areas highlighted by the Secretary:

- Navy Judge Advocate General's Corps (JAG Corps) and Marine Judge Advocate (JA) Organization and Command Relationships
- Legal Community Training and Professional Development
- Evaluation of Career Progression
- Efficiency and Effectiveness of the Delivery of Legal Services
- Sufficiency of Staffing Levels
- Assessment and Improvement Process.³⁰⁶

Additionally, the Secretary directed the Marine Corps Working Group not to duplicate or replace the efforts of CNA, which is concurrently studying the provision of legal support within the Marine Corps. The CNA study is expected to finish in the Spring of 2020 and make recommendations to optimize the provision of legal support within the Marine Corps.³⁰⁷

5.2.3 Research and Methodology by the Marine Corps Working Group

To fulfill and execute the mandate of the Secretary,³⁰⁸ the Marine Corps Working Group gathered information and data from across a broad spectrum of sources, including other Services and Government agencies, industry, and military law experts who are external to the Marine Corps legal community. In assembling the Working Group, the Marine Corps selected a range of Marine officers with diverse career paths, including lawyers and non-lawyers, as well as senior enlisted personnel. To broaden the perspective, the Marine Corps also obtained support from a senior judge advocate within the U.S. Coast Guard.

The Working Group developed a 12-question survey for Marine General Officers to rate their satisfaction on a broad range of legal services. The Working Group viewed their input as essential in gathering information about the overall efficiency and

³⁰⁶ Memorandum from Chief of Staff, Comprehensive Review to Sec'y of Navy, Comprehensive Review of the Department of the Navy's Uniformed Legal Communities (Sept. 6, 2019).

³⁰⁷ SECNAV Memo of Aug. 21, 2019, *supra* note 303.

³⁰⁸ *Id.*

effectiveness of the provision of legal support within the Marine Corps. The Working Group Leader presented the questionnaire during the September 2019 General Officer Symposium. Forty-six General Officers completed the survey.³⁰⁹

Additionally, the Working Group invited the approximately 1,050 members of the Marine Corps uniformed legal community to complete an online survey.³¹⁰ The Marine Corps uniformed legal community survey (internal survey) included 35 substantive questions and three demographic questions. Of the 35 substantive questions, 17 asked respondents to rate a specific issue on a scale from 1 to 5 (“Very Dissatisfied,” “Dissatisfied,” “Neutral,” “Satisfied,” “Very Satisfied”) or “No Opinion.” The 18 remaining questions called for open-ended, narrative responses. The Working Group received 341 “Full Responses” (32% completion rate) and 196 partial responses, for a total of 537 responses (51% response rate). The survey demographics had the following completion rates: 64% Active Duty Officers, 16.4% Active Duty Enlisted personnel, 16% Reserve Officers, and 2.35% Warrant Officers. The survey data, with extensive narrative comments, spanned 332 pages.

The Working Group also sought input from nine military law experts not currently affiliated with the Marine Corps.³¹¹ Eight of the nine provided narrative responses that covered a wide array of subjects related to the efficacy of legal service delivery, litigation practices, career progression, training, structure, and professional responsibility issues within the Marine Corps.

Finally, the Working Group Leader conducted in-person interviews with the SJA to CMC, two previous SJAs to CMC, the Chief Defense Counsel for Military Commissions (a Marine Corps brigadier general), the Assistant Judge Advocate General (AJAG) for Military Law, and the Chief Defense Counsel of the Marine Corps. Additionally, the Working Group leader interviewed the Director of the Marine Corps Staff, the Deputy Commandant for Manpower and Reserve Affairs, and the Counsel for the Commandant.

³⁰⁹ Marine Corps Working Group, General Officer Survey Results – Final Update (Sept. 2019) (on file).

³¹⁰ See Marine Corps Working Group, Internal Survey Results (Sept. 2019) (on file).

³¹¹ The working group was constrained from contacting more than nine external sources. See DOD 8910.01-M, *supra* note 13, vol. 2, 20 (requiring approval from the Office of Management and Budget for information obtained by public collection from more than nine persons).

The Marine Corps also obtained written input from the four Legal Services Support Sections Officers in Charge (Marine Corps Colonels), the seven Branch Heads (Marine Corps Lieutenant Colonels/GS-15 civilians) at Judge Advocate Division, and the Victims' Legal Counsel Officer in Charge (Marine Corps Lieutenant Colonel).

To inform its analysis, the Working Group gathered documentary data from a broad spectrum of sources to include historical evaluations of the Marine Corps legal community. The Working Group leveraged past evaluations of the Marine Corps legal community in an effort to ascertain what type of follow-on action was taken in response to historical evaluations.³¹² The most notable documents include, but are not limited to, the following:

- The Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy Final Report of 2011 (506 Panel)³¹³
- The 2010 DoD IG Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy (Project No. 2009C007)
- SJA to CMC's Strategic Action Plan 2010-2015³¹⁴
- "Commanders' Philosophy on the Administration of Military Justice in the Marine Corps" survey of 2012³¹⁵

³¹² "Professions that cannot change themselves from within, cannot respond to the needs of their clients, and cannot enforce standards of behavior so as to maintain the confidence of their constituencies while also inspiring admiration and loyalty of their own members are in trouble." Richard H. Kohn, *Tarnished Brass: Is the U.S. Military Profession in Decline*, WORLD AFF., Spring 2009, at 73, 83.

³¹³ The Secretary of Defense appointed an independent panel to conduct a review of "the policies and management and organizational practices of the Navy and Marine Corps with respect to the responsibilities, assignment, and career development of judge advocates for purposes of determining the number of judge advocates required to fulfill the legal mission of the Department of the Navy" as directed by the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506, 123 Stat. 2190, 2278 (2009).

³¹⁴ STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS, MARINE CORPS LEGAL SERVICES STRATEGIC ACTION PLAN 2010-2015 (2010) [hereinafter SAP 2010-15]. The Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) published the SAP 2010-15 to improve the delivery of legal services, to identify strengths and weaknesses, opportunities, and threats. He identified five strategic goals: (1) standardization of practices and procedures; (2) increasing competency; (3) improving transparency; (4) evaluating and correcting staffing to "right-size" the legal community; and (5) revise and develop new doctrine. *Id.* at vi.

³¹⁵ STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS, COMMANDERS' PHILOSOPHY ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE MARINE CORPS (Apr. 2012). The Commanders' Survey had three purposes: (1) to determine whether the decline in special courts-martial was attributable to a change in disciplinary philosophy; (2) to determine what trends to expect in the following decade; and (3) to determine what changes were necessary to meet those changes. *Id.* at iii.

- “Legal Services in the Department of Defense: Advancing Productive Relationships” of September 2005³¹⁶
- Legal Support Inspections (LSIs) and Article 6, UCMJ Inspection reports
- Output and analysis of more than 70 issues evaluated by the Marine Corps Judge Advocate Board (MCJAB) from 2015 to present³¹⁷
- SJA to CMC Climate Survey of 2019
- The “Report of the Marine Corps Legal Services Study” of 1969³¹⁸
- Past and present statutes, orders, regulations, manuals, directives, standing operating procedures (SOPs), and miscellaneous policy and guidance documentation.

5.3 MISSION AND FUNCTIONS

The Marine Corps legal community’s mission is to provide timely, efficient, and appropriate command legal advice and legal services to commanders, Marines, Sailors,

³¹⁶ 574 PANEL REPORT, *supra* note 7. This evaluation was convened to study the relationships between the military department General Counsels and Judge Advocates General as required by the Ronald W. Regan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 574, 118 Stat. 1811, 1923 (2004).

³¹⁷ The Marine Corps Judge Advocate Board (MCJAB) is the principal method by which the SJA to CMC conducts process-improvement within the Marine Corps legal community. Memorandum from Staff Judge Advocate to the Commandant of the Marine Corps to Distribution List, Charter for the Marine Corps Judge Advocate Board and Operational Advisory Groups 3 (Nov. 17, 2015) (on file). Created in 2015, the MCJAB is composed of the senior leadership in the Marine Corps uniformed legal community (the staff judge advocates for U.S. Marine Corps Forces, Pacific; U.S. Marine Corps Forces Command; U.S. Marine Corps Forces, Reserve; Marine Corps Combat Development Command; and Marine Corps Installations Command; and the officers-in-charge of the legal services support sections for the pacific, west, east, and national capital region.). *Id.* The SJA to CMC convenes operational advisory groups (OAG) to study initiatives and process-improvement matters. *Id.* at 2. Following OAG study and recommendation, the MCJAB votes on initiatives and briefs the SJA to CMC for final decision and follow-on implementation. *Id.* at 5–6. The MCJAB meets at least twice annually. *Id.* at 4.

³¹⁸ LIEUTENANT GENERAL LOUIS B. ROBERTSHAW, MARINE CORPS LEGAL SERVICES STUDY (MCLS Study), (June 1969) (on file) [hereinafter 1969 MCLS STUDY]. The MCLS Study comprehensively evaluated five options for delivery of legal support within the Marine Corps:

- Continue present system providing legal services for the Marine Corps (option selected by the Commandant, General Chapman, and still employed today)
- Utilize only Navy lawyers for providing legal services to the Marine Corps
- Establish judge advocate only corps of Marine lawyers
- Maximize use of Navy lawyers, but continue having Marine lawyers provide military justice legal services
- Modify present system by designation of limited group [military judges] of Marine lawyers for law duty only.

Id. at 65, 71, 76, 80, and 85.

and their families to promote readiness and contribute to Marine Corps mission accomplishment.³¹⁹

The Marine Corps provides legal support across six functional areas:

- Military justice
- International and operational law
- Administrative law
- Civil law
- Legal assistance
- Legal administration.³²⁰

Within these functional areas legal support is provided in two forms:

- Command legal advice
- Legal services.

Command legal advice is provided by a command's staff judge advocate (SJA) and that SJA's staff, while legal services support is provided by the regional Legal Services Support Section (LSSS) or Legal Services Support Team (LSST).³²¹

5.4 COMMAND LEGAL ADVICE

Command legal advice is that legal advice provided by judge advocates in their role as command advisors, generally while in an SJA billet. Command legal advice informs the commander's decision-making process, ensures good order and discipline, maintains unit readiness, and fosters mission accomplishment. Command legal advice includes that advice required by law and regulation. Command legal advisors are part of a commander's special staff and advise on all matters within their cognizance, including military justice, operational law, administrative law, claims, and ethics. No officer or employee of DoD may interfere with the ability of judge advocates assigned or attached to, or performing duty with, military units to give independent legal advice to

³¹⁹ U.S. MARINE CORPS, WARFIGHTING PUBLICATION 11-10, MARINE CORPS LEGAL SUPPORT 1-2 (June 19, 2018) [hereinafter MCWP 11-10].

³²⁰ *Id.* at 1-3.

³²¹ *Id.* at 1-3.

their commanders.³²² Similarly, under Article 6, UCMJ, convening authorities “shall at all times communicate directly with their staff judge advocate . . . in matters relating to the administration of military justice.”³²³ The term “command legal advice” is a term of art meant to refer to the independent legal advice prescribed in 10 U.S.C. § 8046(d)(2).³²⁴

5.5 LEGAL SERVICES SUPPORT

Legal services support are recurring legal support tasks that are executed to implement a commander’s decision, sustain the force, and support service members, retirees, and their families. Marine Corps judge advocates and legal support personnel perform legal services support tasks in the following functional areas: military justice, operational law, administrative law, civil law, and legal assistance.

5.5.1 Legal Services Support Sections and Teams

The Marine Corps provides legal services support through four regional LSSSs and subordinate LSSTs.³²⁵ Each LSSS provides support to commands and individual Marines, Sailors, retirees, dependents, and other eligible recipients within its designated Legal Services Support Area (LSSA).³²⁶ The four regional LSSSs are generally aligned to the four regional geographic commands within Marine Corps Installations Command (MCICOM): Pacific, West, East, and National Capital Region.³²⁷

The LSSS is led by a Colonel (O-6) and supported by a legal administrative officer (CWO-4) and a senior enlisted legal services chief (E-9).³²⁸ Also within the LSSS are the Regional Trial Counsel (RTC), Regional Defense Counsel (RDC), Regional Victims’ Legal Counsel (RVLC), Regional Legal Assistance Director (RLAD) and Regional Post-Trial Review Officer, who supervise their respective legal functions in the region.³²⁹ Figure 18 depicts the general organization of an LSSS.

³²² 10 U.S.C. § 8046(d)(2) (2018).

³²³ 10 U.S.C. § 806 (2018).

³²⁴ MCO 5800.16 LSAM, *supra* note 301, at 2-3.

³²⁵ *Id.*

³²⁶ *Id.* at 2-4.

³²⁷ *Id.* at 2-4, 2-5.

³²⁸ *Id.* at 2-7.

³²⁹ *Id.* at 2-7.

Although the RDC and RVLC offices are located within the regional LSSA, neither the RDC nor the RVLC are directly supervised by the LSSS OIC. Instead, the RDC and RVLC report to their own supervisory counsel, both of whom are assigned to Judge Advocate Division (JAD), Headquarters, Marine Corps (HQMC).³³⁰

Each LSSS provides supervision and support to its subordinate LSSTs, which are located on other installations within the LSSA. The LSSTs are usually led by an OIC in the grade of Lieutenant Colonel (O-5), with LSSTs in smaller areas led by a major (O-4). The LSSTs provide legal services support in the following functional areas: military justice, administrative law, operational law, and legal assistance.

³³⁰ *Id.* at 3-7, 4-7.

Legal Services Support Section

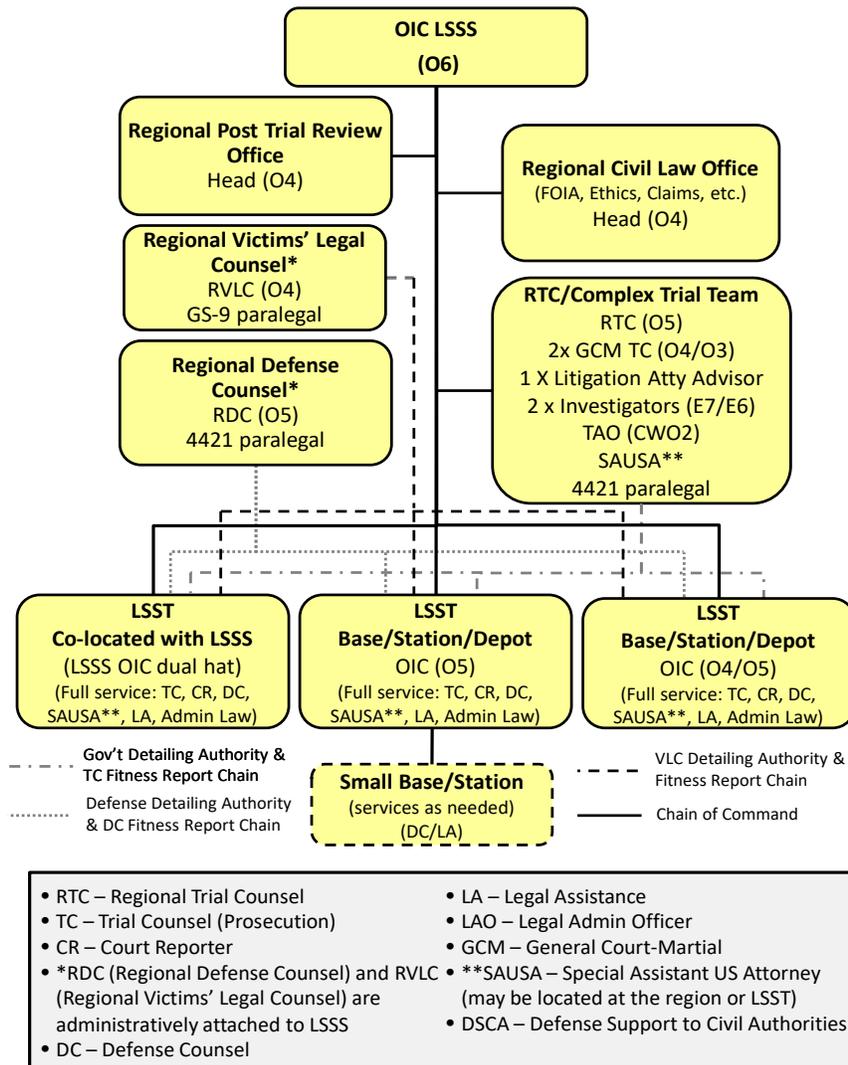


Figure 18: Organization of the LSSS.

5.5.2 Defense Services Organization (DSO), Victims' Legal Counsel Organization (VLCO), and Legal Services Support Relationship

The DSO and VLCO are functionally independent organizations. DSO personnel represent eligible Marines and Sailors accused of committing crimes. VLCO represent clients who are victims of crime.³³¹ Marine defense counsel and victims' legal counsel (VLC) serve at locations throughout the Marine Corps and are administratively attached

³³¹ The Victim's Legal Counsel Organization represents victims of sexual assault and other crimes in accordance with 10 U.S.C. §§ 1044, 1044e, and 1565b (2018).

to the regional LSSS or subordinate LSST.³³² However, Marine defense counsel are under the functional supervision and accountable to the Chief Defense Counsel of the Marine Corps via the cognizant RDC. Similarly, Marine VLC are under the functional supervision and accountable to the OIC, VLCO via the cognizant RVLC.

The LSSS OIC provides administrative support to DSO and VLCO personnel assigned to the region, but does not exercise direct supervisory authority over them. The LSSS OIC, however, assigns Marine judge advocates and legal services specialists to the DSO and VLCO. The LSSS OIC, RDC, and RVLC are required to coordinate on assignments within the region to ensure personnel are assigned for the appropriate length of time. Generally, Marine judge advocates and legal services specialists are assigned to the DSO for 18 months or to the VLCO for 12 months.³³³

5.6 MARINE CORPS LEGAL SUPPORT PERSONNEL ASSIGNMENTS

Marine Corps uniformed legal community personnel are assigned throughout the operational forces and supporting establishment. They are also assigned to support the DON, the Office of General Counsel of the DON, and the Joint force. Members of the Marine Corps uniformed legal community may also be assigned to non-legal billets to meet other Marine Corps requirements.

Most Marine Corps legal support personnel are assigned to either the office of the SJA or assigned to an LSSS. Within the Marine Corps, every General Court-Martial Convening Authority is assigned an SJA. Each SJA is designated as an ethics counselor and supervises the ethics program within the command. The office of the SJA is generally composed of a deputy SJA as well as additional judge advocate and enlisted support personnel.

In garrison, the majority of legal personnel are assigned to an LSSS. In the event of a contingency operation, operational force commanders can task legal personnel working within the LSSS to augment the cognizant SJA office or to establish an LSST to provide forward-deployed legal services support. The LSST is scalable

³³² See MCO 5800.16 LSAM, *supra* note 301, at 3-7 (discussing the supervisory chain of command for the Defense Services Organization), 4-3 (discussing the supervisory chain for the Victims' Legal Counsel Organization).

³³³ *Id.* at 3-11, 4-16.

based on validated requirements of the supported MAGTF.³³⁴ The LSSS's organizational structure maximizes the use of consolidated legal support personnel providing steady-state legal services support in garrison while still maintaining a ready pool of personnel in the event of a deployment or contingency operation. See figure 19.

The ability to respond to commander-driven mission priorities during combat operations was validated when the Marine Corps employed Marine judge advocates as legal advisors with infantry regiments and battalions during Operation Iraqi Freedom and Operation Enduring Freedom. Based on the assessment of commanders, Marine judge advocates became a “force multiplier” that “enhanced the ability of the battalion to accomplish its mission.”³³⁵

The decision to place Marine judge advocates with infantry regiments and battalions was an innovative and flexible approach that enabled commanders to more effectively execute their battlefield missions. The Majors (O-4) and Captains (O-3) — legal professionals—seamlessly integrated into operational units because they were MAGTF officers.

³³⁴ A significant number of judge advocates and legal services specialists within the LSSS are part of the supported marine logistics group within the LSSA, but assigned in garrison supporting the regional installation commander via either the Fleet Assistance Program (FAP) or via a Headquarters, U.S. Marine Corps (HQMC)-approved mapping process (Mapping is a mechanism for individuals to be assigned to units other than the parent organization to meet short term garrison requirements without permanently modifying wartime requirements. U.S. MARINE CORPS, ORDER 5311.1E, TOTAL FORCE STRUCTURE PROCESS MANUAL 9-14 to -15 (Nov. 18, 2015) [hereinafter MCO 5311.1E].

³³⁵ MARINE CORPS CENTER FOR LESSONS LEARNED, LEGAL SERVICES SUPPORT TO OPERATIONAL COMMANDERS (2006). One commander put it this way: “for OIF II, absolutely indispensable...It [a battalion judge advocate] wasn't a luxury, it was a necessity in that environment.” *Id.* at 10.

Organized for Warfighting Mission

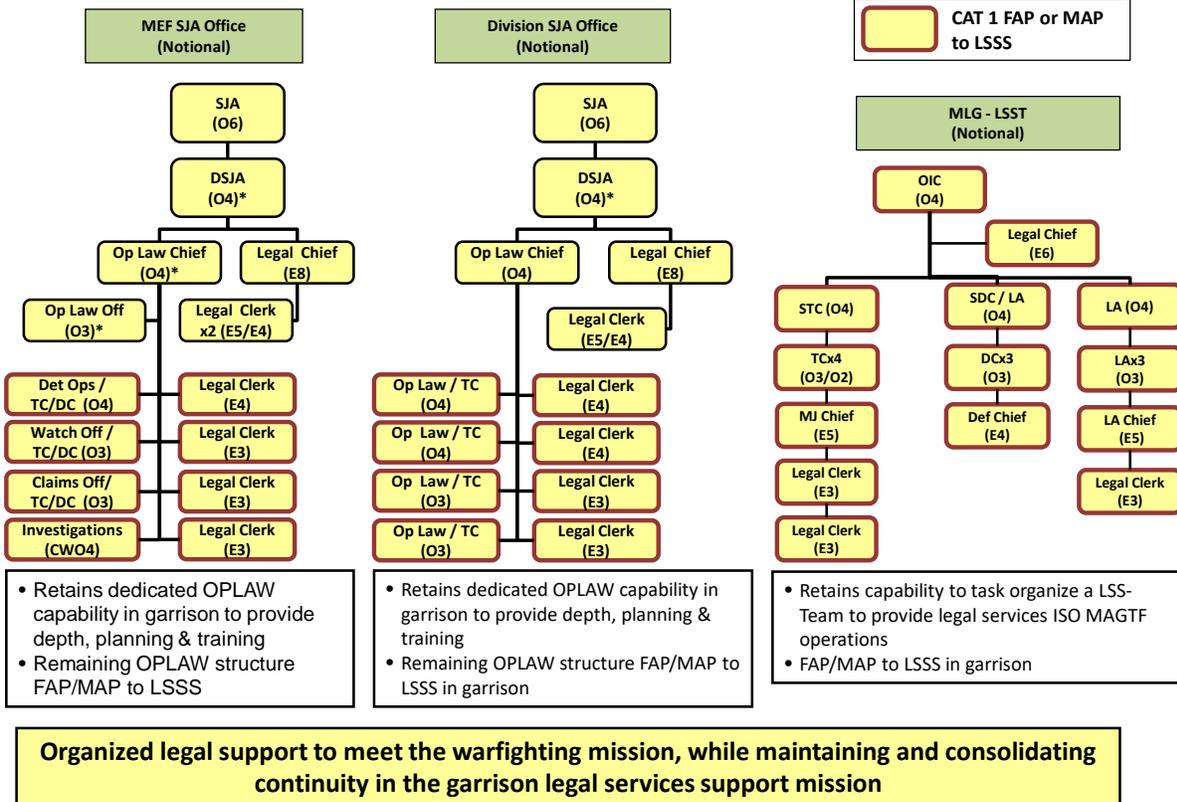


Figure 19: Notional MAGTF Deployed Legal Structure.

5.6.1 Counsel for the Commandant

The Office of Counsel for the Commandant (CL) is a subordinate office of the General Counsel of the DON. Its mission, to include its field offices, is to provide legal advice and support to the CMC, HQMC staff agencies, and Marine Corps operating and supporting establishments in the areas of business and commercial law, environmental law, land use, civilian labor law, procurement and fiscal law, government ethics, and other matters under the cognizance of the General Counsel of the DON.³³⁶ Marine Corps judge advocates assigned to CL generally have advanced law degrees and

³³⁶ The Secretary of the Navy has assigned a specific set of responsibilities of the Navy General Counsel within the Department of the Navy. U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5430.25F, THE GENERAL COUNSEL OF THE NAVY; ASSIGNMENT OF RESPONSIBILITIES enclosure 1, at 1-3 (Mar. 26, 2019) [hereinafter SECNAVINST 5430.25F]. CL is a subordinate office within Department of the Navy's Office of General Counsel (OGC). *Id.* at enclosure 2, at 1.

provide support in the following areas: civilian labor law, environmental law, and procurement law.

5.6.2 Departmental Assignments

By statute, a Marine judge advocate who has the qualifications prescribed by the JAG may be detailed as Assistant JAG (AJAG). That construct reflects congressional intent that there be two AJAGs within the DON—one Navy judge advocate and one Marine judge advocate.

Under Secretarial instruction, there are currently four AJAG positions within the DON: Civil Law, Operations and Management, Military Law, and Chief Judge of the DON.³³⁷ As a matter of current administrative practice, U.S. Navy judge advocates serve as AJAGs for Civil Law, Operations and Management, and the Chief Judge. The Marine judge advocate serves as the AJAG (Military Law).

The Marine judge advocate detailed as the AJAG (Military Law) is selected by a Marine Corps General Officer selection board and serves three years detailed as a statutory AJAG of the DON.

Within the DON, Marine judge advocates are assigned to the Office of the Secretary, the Office of the DON General Counsel, the Office of the Judge Advocate General, as trial and appellate military judges, appellate counsel, as instructors at Naval Justice School (NJS), and at the U.S. Naval Academy. Additionally, enlisted legal services specialists are assigned to the Navy-Marine Corps Appellate Review Activity (NAMARA) and NJS.

5.6.3 Joint Assignments

Marine judge advocates compete for assignment to joint legal billets on the staff of the combatant commands. These joint billets are neither structured nor aligned to be filled by any particular Service judge advocate. Currently, two Marine judge advocates are SJAs for COCOMs (U.S. Indo-Pacific Command and U.S. Africa Command). Marine judge advocates also serve at U.S. Central Command, U.S. Southern Command, U.S. Africa Command, U.S. European Command, U.S. Special Operations

³³⁷ SECNAVINST 1800.3A, *supra* note 18, at 1–2.

Command, U.S. Indo-Pacific Command, U.S. Transportation Command, U.S. Cyber Command, U.S. Strategic Command, Joint Task Force-North, Joint Special Operations Command, the Defense Intelligence Agency, the Office of Military Commissions, the Defense Innovation Unit, and the Joint Staff.

In addition to the aforementioned assignments, Marine judge advocates may be temporarily assigned to Joint Service duties as Individual Augmentees (IA). IA assignments for judge advocates are generally operational law assignments, primarily as staff judge advocates (SJA) or members of the SJA's staff. The SJA provides operational law support as command advisors, including membership on operational planning teams, boards, and cells. Marine judge advocates may also be assigned to augment U.S. Navy or Marine contingency task forces.

5.7 ROLE OF STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS

The SJA to CMC serves within HQMC and is the senior uniformed legal advisor to the Commandant. The SJA to CMC provides independent legal advice, counsel, and guidance to the Commandant³³⁸ and HQMC staff and agency personnel on any matter under the SJA to CMC's cognizance. By statute and regulation, the SJA to CMC is also responsible for overseeing and supervising the provision of legal support within the Marine Corps, as well as exercising professional responsibility oversight of individual Marine judge advocates, legal administrative officers, legal services specialists, and civilian legal support personnel under the SJA to CMC's cognizance.³³⁹ To execute these two roles (legal advice to CMC and functional supervision over the provision of legal support across the force), the SJA to CMC is supported by approximately 40 personnel assigned to Judge Advocate Division (JAD), HQMC.

³³⁸ 10 U.S.C. §§ 8041, 8046 (2018).

³³⁹ 10 U.S.C. §§ 806, 1044, 1044e, and 8046 (2018); SECNAVINST 5430.27E, *supra* note 16; MCO 5430.2 *supra* note 292, and JAGINST 5803.1E, *supra* note 126.

5.7.1 Judge Advocate Division Organization and Subordinate Branches.

As Director, the SJA to CMC directly supervises and manages JAD, its personnel, and its subordinate branches:

Deputy SJA to CMC/Deputy Director, JAD

The Deputy SJA to CMC is responsible for the day-to-day operations of JAD and acts in the place of the SJA to CMC during any absence. The Deputy SJA to CMC supervises the Administrative Support Branch (JAA), Civil and Administrative Law Branch (JCA), Military Personnel Law Branch (JPL), and the International and Operational Law Branch (JAO).

Administrative Support Branch (JAA)

The JAA Branch is primarily responsible for managing internal administrative requirements of JAD, including the JAD Reserve Individual Mobilization Augmentee (IMA) Detachment. Duties include: management of awards; military and civilian performance evaluations; training, files and directives control; law library; budget and fiscal matters; travel; and reserve orders preparation.

Civil and Administrative Law Branch (JCA)

The JCA Branch provides legal review and guidance to the SJA to CMC, HQMC staff agencies, and the Marine Corps legal community on civil and administrative law matters, to include: processing complaints of wrongs under Article 138, UCMJ, or Article 1150, U.S. Navy Regulations, as well as reviewing release of Government records under the Freedom of Information Act (FOIA), or the Privacy Act (PA). The JCA Branch assists the SJA to CMC's role as Deputy Designated Agency Ethics Official responsible for managing the Marine Corps Government ethics program. JCA also supports SJA to CMC's role as Rules Counsel for professional responsibility oversight of Marine judge advocates. Additionally, the JCA Branch supports the Office of the JAG and the Department of Justice on civil litigation and claims affecting the Marine Corps.

Military Personnel Law Branch (JPL)

The JPL Branch advises the SJA to CMC, HQMC staff agencies, and the Marine Corps legal community on military personnel law matters affecting the Active and

Reserve components to ensure the provision of timely, efficient, consistent, and appropriate legal advice and support through the SJA to CMC to the Deputy Commandant for Manpower and Reserve Affairs (DC M&RA), the Commandant, and the Secretary. The JPL Branch duties include: reviewing officer misconduct and substandard performance cases, reviewing selection board precepts and guidance; screening results of selection boards and monthly promotion messages, processing adverse officer promotion packages, and reviewing enlisted administrative separation packages for cases requiring approval by DC M&RA or the Secretary. In addition, on behalf of the SJA to CMC, the JPL Branch provides advisory opinions to the Performance Evaluation Review Board and to the Board for Correction of Naval Records.

International and Operational Law Branch (JAO)

The JAO Branch assists the SJA to CMC as legal advisor to the Commandant on operational law matters. It provides operational law support to the Commandant in his role as both Service Chief and member of the Joint Chiefs of Staff, to HQMC staff agencies, and to Marine judge advocates worldwide. On behalf of the SJA to CMC, the JAO Branch maintains HQMC staff cognizance over the operational law function, including legal issues associated with treaty interpretation and compliance, negotiation and conclusion of international agreements, law of war (LOW), detainee operations, rules of engagement, law of the sea, funding of military operations, training and equipping foreign forces, cyberspace law, non-lethal weapons, intelligence activities, and domestic operations. While the Deputy Commandant for Plans, Policies and Operations is the primary staff sponsor, the JAO Branch is the subject-matter expert and manager of the Marine Corps LOW Program and provides support to Marine judge advocates, to include: instruction and guidance, a web-based resource and information portal, training materials, and reference documents.

Deputy Director, JAD (Military Justice and Community Development)

The Deputy Director, JAD (Military Justice and Community Development) (DepDir (MJCD)) is responsible to the SJA to CMC for military justice matters and for legal community planning and development to ensure the Marine Corps provides high-

quality legal services support across the entire spectrum to commanders, Marines, Sailors, and their families. The DepDir (MJCD) oversees the following: the Military Justice Branch, the Plans and Innovation Branch, and the Legal Assistance Branch.

Military Justice Branch

The Military Justice Branch contains two sections, the Military Justice Policy and Legislation Section, and the Trial Counsel Assistance Program.

Military Justice Policy and Legislation Section: provides military justice advice to the SJA to CMC, CMC, HQMC staff agencies, and the Marine Corps legal community on all military justice policy or legislative matters; informs lawmakers and other federal officials regarding military justice matters; and, drafts, reviews, and oversees implementation of military justice-related legislation, regulations, and policy.

Trial Counsel Assistance Program (TCAP): supports Marine trial counsel by providing training, advice, and assistance; helping standardize trial counsel practice; coordinating training; serving as a help desk and resource; and managing the Marine Corps Victim-Witness Assistance Program.

Plans and Innovation Branch (JPI)

The JPI Branch works in conjunction with the legal community to set standards for legal support providers, to manage and develop training and equipment to help the community meet those standards, and to create metrics by which those standards can be inspected. It is responsible for the following specific functions: performing long-term strategic planning for the Marine Corps legal community, using lessons learned to propose and draft organizational and doctrinal changes, providing overall coordination of IT assets and support to the legal community, managing both internal and external strategic communications, and coordinating all manpower requirements of legal support providers, both active and reserve.

Information and Technology Section (JAI): The JAI Branch is a section within the JPI Branch and manages the technological mission for the Marine Corps legal community including the case management system, knowledge management platforms, fleet-wide courtroom technology, and internal/external technological support. The JAI

Branch works within the internal/external departments and agencies to create and maintain the necessary platforms utilized by the Marine Corps legal community.

Legal Assistance Branch (JLA)

The JLA Branch administers the Marine Corps Legal Assistance Program, provides functional supervision and guidance to Marine legal assistance attorneys and staff, disseminates legal assistance policies and procedures, assists JAD with inspecting the effectiveness of the legal assistance program, and assists and advises the SJA to CMC on all legal assistance policies, procedures, and related matters.

Chief Defense Counsel of the Marine Corps (CDC)

The CDC is the head of the Marine Corps Defense Services Organization (DSO) and is responsible to the SJA to CMC for the supervision of all Marine defense personnel and the provision of defense counsel services throughout the Marine Corps.

Officer-in-Charge, Victims' Legal Counsel Organization (OIC, VLCO)

The Officer-in-Charge, Victims' Legal Counsel Organization (OIC, VLCO) is the head of the VLCO and responsible to the SJA to CMC for the supervision of all VLCO personnel and for the provision of VLC services throughout the Marine Corps.

Deputy Director, Reserve Legal Support (RLS)

The Deputy Director (Reserve Legal Support) (DepDir, RLS) oversees the provision of legal support from reserve personnel on behalf of the SJA to CMC. In coordination with the JPI Branch, the DepDir, RLS, ensures that all JAD IMA billets are filled by the most qualified reserve judge advocates and legal services specialists. The JAD IMA Detachment consolidates IMA judge advocate billets that provide legal services support. Command legal advice billets are located within the supported commander's reserve structure. The Operational Sponsor for the JAD IMA Detachment is located within the JPI Branch and assists the DepDir, RLS in overseeing the provision of reserve legal support to the total force. All members of the JAD IMA Detachment in defense counsel, VLC, or, judiciary billets receive administrative support from the JAD IMA Detachment, but operate under the supervision of the CDC, OIC, VLCO, Chief

Judge of the Navy-Marine Corps Trial Judiciary, or Chief Judge of the Navy-Marine Court of Criminal Appeals, as appropriate.

Legal Administrative Officer of the Marine Corps (LAO)

The LAO is the senior chief warrant officer within the legal administrative officer community and serves as the SJA to CMC's primary advisor on legal administrative matters. The LAO is the occupational field manager for legal administrative officers and advises the SJA to CMC on the adequacy of active and reserve legal administrative officer billets.

Legal Services Chief of the Marine Corps (LSC)

The Legal Services Chief (LSC) is the senior enlisted advisor to the SJA to CMC. In coordination with the JPI Branch, the LSC oversees enlisted training and education, assignments, and promotions within the Marine Corps. The LSC also advises the SJA to CMC on the adequacy of active and reserve legal services specialist billets within the Marine Corps legal community.

5.8 FUNCTIONAL AREAS

5.8.1 Military Justice

The Marine Corps uniformed legal community provides the following military justice capabilities at the Service-level: prosecution, defense, legal assistance to victims of crime, court reporting, and post-trial review. These capabilities also include advising commanders on the appropriate disposition of alleged misconduct throughout the legal process in coordination with that commander's SJA. At the Department-level, Marine Corps uniformed legal community personnel in the Office of the JAG work alongside Navy JAG Corps personnel as military judges and appellate counsel to represent the interests of the DON.

5.8.2 International and Operational Law

International and operational law addresses all laws, both international and domestic, that affect the ability of the Marine Corps to conduct training, exercises, and operations. This includes areas such as the law of war, status of forces agreements, and rules of engagement. It also includes such divergent areas as operational fiscal

law, foreign criminal jurisdiction, intelligence operations and oversight, operations in cyberspace, and domestic operations.

5.8.3 Administrative Law

Administrative law matters address the various statutes, regulations, and judicial decisions that govern the establishment, functioning, and command of military organizations, as well as administrative actions of military personnel. This includes command and regulatory authority, administrative investigations, officer and enlisted administrative separations, and adverse administrative actions.

The three general sub-functions of administrative law are administrative investigations, military personnel law, and Government ethics. Administrative investigations allow commanders to recognize and record findings for line of duty determinations, corrective action processes, disputes and operational questions, and accountability of Marines. Military personnel law includes policies and decisions relating to uniforms, leave and liberty, accessions, training, promotions, separations, and officer personnel actions related to misconduct and substandard performance. Government ethics involves specific legal and ethical requirements imposed on the Marine Corps, including relations with and support to non-Federal entities, financial disclosure requirements, fundraising, and gifts to and amongst Marines.

5.8.4 Civil Law

Civil law addresses the statutes, regulations, and judicial decisions that govern the rights and duties of military organizations with regard to civil authorities, as well as interactions with civilian personnel requesting information or making claims against the United States. These include service of process, foreign criminal jurisdiction, support to civil authorities, domestic operational law, and the duties of a special assistant U.S. attorney. Support to civil authorities and domestic operational law issues primarily emerge when the military supports civilian authorities during civil disturbances and natural disasters.

5.8.5 Legal Assistance

The legal assistance function focuses on ensuring Marines and their families receive sound legal advice that responds to their unique individual needs. This allows Marines to resolve personal legal issues that would otherwise distract them from accomplishing the mission.³⁴⁰

5.8.6 Legal Administration

Legal administration includes those tasks and associated capabilities—some unique to legal support—necessary for the internal administration of legal organizations. These tasks and associated capabilities include, but are not limited to, correspondence, budget, embarkation for deployment, and information technology.

5.9 SJA TO CMC ASSESSMENTS OF THE UNIFORMED LEGAL COMMUNITY

To cultivate a culture of continuous learning and professional development within the Marine Corps uniformed legal community, the SJA to CMC uses three methods to exercise functional supervision and oversight: the Commanding General Inspection Program, Legal Support Inspections, and the Marine Corps Judge Advocate Board.

5.9.1 Commanding General Inspection Program

In 2010, the SJA to CMC implemented command inspections of SJA offices, law centers, and LSSSs as part of the Inspector General of the Marine Corps (IGMC) Commanding General Inspection Program (CGIP).³⁴¹ Subsequent updates to the functional area IGMC Legal Administration 5800.16 checklist no longer include inspections of SJA offices, law centers, or LSSSs. Those inspections are carried out by JAD directly via Legal Support Inspections. Now, the SJA to CMC acts as the functional area sponsor for inspection checklists for units that lack organic legal support. The

³⁴⁰ The issues with which the legal assistance function assists Service Members include, but are not limited to, powers of attorney, estate planning, income tax assistance, immigration and naturalization services, family law matters (e.g., divorce, separation, and adoption matters), and notary services.

³⁴¹ U.S. MARINE CORPS, MARINE ADMIN. MESSAGE 276/10, IMPLEMENTATION OF COMMAND INSPECTIONS OF SJA OFFICES, LAW CENTERS, AND LEGAL SERVICES SUPPORT SECTIONS (May 14, 2010); *see also* INSPECTOR GENERAL OF THE MARINE CORPS, FUNCTIONAL AREA CHECKLISTS, <https://www.hqmc.marines.mil/igmc/Units/Inspections-Division/Functional-Area-Checklists-FACs/> (last visited Nov. 1, 2019) (The functional area checklist for legal administration clarifies that inspections conducted by the Inspector General do not include the Offices of the Staff Judge Advocate.).

Inspector General of the Marine Corps and Commanding Generals use the CGIP to evaluate the overall effectiveness and efficiency of legal administration within subordinate units. Members of the Marine Corps uniformed legal community with administrative expertise, e.g., Legal Administrative Officers (MOS 4430) and Senior Legal Services Specialist (MOS 4421) assist with CGIP inspections.³⁴²

5.9.2 SJA to CMC Legal Support Inspection (LSI)

The SJA to CMC uses the information gathered from legal support inspections (LSIs) during annual inspections of SJA offices and LSSSs within the Marine Corps pursuant to Article 6, UCMJ. Personnel from JAD conduct LSIs of the LSSSs and LSSTs, as well as SJA offices. Required by regulation, the LSI program allows the Marine Corps uniformed legal community to “continuously evaluate[] itself in order to improve and adapt to the ever-changing and increasingly complex legal practice.”³⁴³ The LSI checklist is 27 pages and contains both compliance requirements and “best practices” process improvement recommendations.³⁴⁴

In the spring of 2019, JAD personnel conducted LSIs of 17 SJA offices, LSSTs, and LSSSs. The biggest area of concern dealt with a shortfall in timely and accurate criminal justice information reporting on the part of an SJA office. Immediately after the LSI, JAD personnel held a “town hall” with all area SJAs to ensure the proper criminal justice information was captured and reported. The SJA to CMC also uses information gathered during LSIs to convene Operational Advisory Groups (OAGs) to research potential topics and initiatives for presentation to the Marine Corps Judge Advocate Advisory Board (MCJAB).

5.9.3 The Marine Corps Judge Advocate Board Process

In 2015, the SJA to CMC created the Marine Corps Judge Advocate Board (MCJAB) to assess, evaluate, and propose improvements in the delivery of legal

³⁴² In FY 19, 34 commands were subject to an Inspector General of the Marine Corps inspection. Six of the commands did not have a unit level legal section. Of the 27 commands that were inspected within the legal functional area (FA), all received an overall grade of “effective” resulting in a 100% effective rating for FA 5800.16 Legal Administration. See Email from Deputy Director of Inspections, Office of the Inspector General, Headquarters, U.S. Marine Corps, to Working Group (Oct. 1, 2019) (on file).

³⁴³ MCO 5800.16 LSAM, *supra* note 301, at 2-3.

³⁴⁴ *Id.* at 2-3.

support. The MCJAB is composed of the senior leaders of the Marine Corps judge advocate community responsible to the SJA to CMC for the delivery of command legal advice and legal services support. Members of the MCJAB include: the Deputy SJA to CMC as the Chair of the MCJAB; the Deputy Director (Military Justice and Community Development) as Recorder; the Deputy Director, Reserve Legal Support; the four LSSS OICs; and the SJAs for U.S. Marine Corps Forces Command; U.S. Marine Corps Forces, Pacific; U.S. Marine Corps Forces, Reserve; Marine Corps Combat Development Command; and U.S. Marine Corps Installations Command.³⁴⁵

Additionally, the SJA to CMC established subsidiary OAGs for every legal support functional area. Assisted and informed by the output of the OAGs, the MCJAB enables the SJA to CMC to identify and inform judge advocate capability and development, establish community priorities, develop strategic objectives, and promote collaborative interaction amongst the LSSS OICs, MARFOR SJAs, and JAD senior leadership.

The SJA to CMC directed that MCJAB members meet in person at least twice a year to discuss, evaluate, and vote on process improvement and resourcing initiatives. Additionally, the MCJAB is required to provide to the SJA to CMC an executable implementation and resourcing plan for each recommended course of action.

To date the MCJAB has studied in-depth approximately 70 initiatives. Some significant highlights include:

- *Increased legal services support capability at MCAS Iwakuni.* Previously, the LSSS in Okinawa provided military justice support to MCAS Iwakuni. Because of time-distance factors and the fact that MCAS Iwakuni has had an almost 100% increase in personnel since 2012, the MCJAB recommended adding a military justice capability at MCAS Iwakuni. This resulted in assigning three company grade overstaff billets to establish trial and defense services, and one Major (O-4) judge advocate billet to ensure proper leadership and supervision over LSST Iwakuni.

³⁴⁵ Memorandum from Staff Judge Advocate to the Commandant of the Marine Corps to Distribution, Charter for the Marine Corps Judge Advocate Board and Operational Advisory Groups 3 (Nov. 17, 2015) (on file).

- *4417 AMOS (Master of Cyber, Intelligence, and Information Law)*. In 2018, the SJA to CMC directed the creation of the Master of Cyber, Intelligence, and Information Law AMOS (4417)³⁴⁶ based on operational demand for judge advocates with specialized knowledge of cyber law and operational law. The AMOS is awarded upon completion of a Master of Law degree (LL.M.) in cyber law or a closely related course of study. This initiative made the Marine Corps the first Service to have a specific program devoted to cyber law and developed judge advocates with the education to effectively address issues that arise from cyber operations.³⁴⁷

- *Automated-Speech-to-Text Recognition software for Court-Reporting*. The Military Justice Act of 2016 (MJA 16) required the Services to produce court-martial records faster than existing practice.³⁴⁸ The MCJAB identified a solution: use of Automated Speech-to-Text software and hardware upgrades to quickly produce both audio and text based records. The Marine Corps is coordinating with the Navy to obtain approval for commercial internet services to implement the software and hardware upgrades.

- *Fitness Report Guidance for Student Judge Advocates*. Most Marine judge advocates commission as officers before graduating from law school. In the past, they served on active duty during the summer and received “observed” fitness reports.³⁴⁹ The practice caused untrained student judge advocates to be compared against fully trained and experienced peers, inevitably resulting in lower evaluations that negatively affected their careers. Once identified, the Marine Corps changed its

³⁴⁶ See U.S. MARINE CORPS, NAVMC 1200.1E, MILITARY OCCUPATIONAL SPECIALTIES MANUAL p. 1-176 (Mar. 29, 2019) (The MOS Manual now includes AMOS 4417) [hereinafter NAVMC 1200.1E].

³⁴⁷ The Deputy Commandant for Information (DC I) submitted a request for and obtained a judge advocate to serve on the staff of Commander, U.S. Marine Corps Forces, Strategic Command. See Memorandum from Deputy Commandant for Information and Commander, Marine Forces Strategic Command to Deputy Commandant for Manpower and Reserve Affairs, U.S. Strategic Command Overstaff Request (Nov. 16, 2018) (on file).

³⁴⁸ Memorandum from Operational Advisory Group Leader to Staff Judge Advocate to the Commandant, Current Court Reporting OAG MCJAB 4-18 (Topic #2) (Aug. 17, 2018) (on file).

³⁴⁹ U.S. MARINE CORPS, ORDER 1610.7, PERFORMANCE EVALUATION SYSTEM 6-3 (Feb. 13, 2015) *cancelled* by U.S. MARINE CORPS, ORDER 1610.7A, PERFORMANCE EVALUATION SYSTEM (May 1, 2018) (“Reporting officials must observe and report all aspects of a Marine’s performance, potential, and professional character” on students “like regular duty.”) [hereinafter MCO 1610.7A].

regulation to direct “unobserved” fitness reports for Lieutenants who have not completed primary MOS training.³⁵⁰

³⁵⁰ MCO 1610.7A, *supra* note 349, at 3-7.

Section 6

Marine Corps Findings and Recommendations

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6. MARINE CORPS FINDINGS AND RECOMMENDATIONS

6.1 CULTURE

Traditionally, “every Marine is a rifleman, every officer is a provisional rifle platoon commander.” Former Commandant, General Conway, perhaps captured the concept best, “[e]very Marine, regardless of military occupational specialty, is first and foremost a disciplined warrior.”³⁵¹

These ideas are at the heart of the Marine Corps culture and guide much of a Marine’s training, education, and career progression.³⁵² All Marine Corps officers, including judge advocates, are line officers and undergo the same indoctrination and training to become leaders of Marines.³⁵³ This socialization process provides all Marine Corps officers a common experience, a set of shared core values, and a binding sense of comradeship.³⁵⁴ In this regard, every Marine Corps judge advocate is expected to have a career development path that includes assignments to operational units, expeditionary tours, non-legal billets, as well as a requirement to complete formal courses of (non-legal) Professional Military Education (PME) for each pay grade. In practical terms, these are more than expectations. Marine judge advocates compete with all other Marine Corps officers for promotion and command selection, based on their competence as leaders of Marines, Marine Air-Ground Task Force (MAGTF) officers, and their proficiency as attorneys. The benefit to the Marine Corps for requiring

³⁵¹ GENERAL JAMES T. CONWAY, MARINE CORPS VISION AND STRATEGY 2025 8 (June 20, 2010).

³⁵² See generally U.S. MARINE CORPS, DOCTRINAL PUBLICATION 1-0, MARINE CORPS OPERATIONS 1-23 (Sept. 27, 2001) [hereinafter MCDP 1-0] (“Marine Corps ethos are based on the core values of *honor*, *courage*, and *commitment*. These values provide a framework for how Marines act and think. Strict adherence to the core values, coupled with rigorous training and education, ensure a Marine Corps that is made up of men and women with intellectual agility, initiative, moral courage, strength of character, and a bias for action.”); see also U.S. MARINE CORPS, WARFIGHTING PUBLICATION 6-11, LEADING MARINES 7 (Jan. 3, 1995) (Ultimately adherence to this creed creates a mindset in which being a Marine becomes more than a profession, it becomes a calling.).

³⁵³ Warrant and limited duty officers are not unrestricted line officers but, having come up from the enlisted ranks, have undergone the same rigorous indoctrination and training.

³⁵⁴ MCDP 1-0, *supra* note 352, at 59.

its judge advocates to be members of both the legal profession and the profession of arms has been validated in past studies.³⁵⁵

In 1969, the Marine Corps studied whether it had a need for uniformed Marine Corps judge advocates who were also unrestricted line officers. The study found in part that “[l]awyers have substantial influence on the state of discipline, esprit, morale and accomplishment of the commander’s mission. There is a distinct difference between the kinds of purely technical services furnished by medical officers, civil engineers and chaplains and those provided by lawyers.”³⁵⁶ The study also found that “[b]etter military lawyers will result when these officers are also intimately familiar with non-lawyer, strictly military functions, procedures and environments.”³⁵⁷ The then-Commandant, General Leonard F. Chapman, fully endorsed the findings of the study.

In 2011, the 506 Panel reinforced General Chapman’s conclusion. The 506 Panel found that “having Marine judge advocates serve as unrestricted line officers, expected to maintain themselves as well-rounded MAGTF officers, makes for not only a better Marine officer, but also a more effective Marine judge advocate.”³⁵⁸ Marine commanders are, “likely to be more receptive to legal advice from a fellow Marine officer who has an understanding, not only of the specific legal issue, but also of the overall context of the challenges facing the commander.”³⁵⁹

Recommendation:

a. Ensure members of the Marine Corps uniformed legal community attain legal expertise and simultaneously develop as well-rounded Marine Air-Ground Task Force officers.

³⁵⁵ 1969 MCLS STUDY, *supra* note 318, at iii (“In the execution of the responsibilities of leadership, Marine Commanders will be better able to accomplish this function so vital to the Marine Corps by advice from Marine lawyers who think, are trained, have experienced field hardships throughout their careers the same as their Commanders.”); 506 PANEL REPORT, *supra* note 11, at 219.

³⁵⁶ 1969 MCLS STUDY, *supra* note 318, at iii.

³⁵⁷ *Id.* at 106.

³⁵⁸ 506 PANEL REPORT, *supra* note 11, at 219.

³⁵⁹ SAP 2010-15, *supra* note 314, at 1.

6.2 ORGANIZATION

6.2.1 Authority of the SJA to CMC

In 1986, Congress created a role for the senior uniformed legal officer of the Marine Corps.³⁶⁰ The billet was entitled “Staff Judge Advocate to the Commandant of the Marine Corps.”³⁶¹ The statute, however, did not create a functional leadership or professional supervisory role with respect to the Marine legal community. As the 1990 Legal Service Support Master Plan stated: “The Staff Judge Advocate to the Commandant has no express statutory duties other than those which any staff judge advocate has under the UCMJ.”³⁶²

In 2008, Congress made statutory changes to ensure that senior uniformed legal officers of the several Services would have an independent, distinct legal voice, as well as an opportunity to be heard within the civilian echelons of the Military and Defense Departments, particularly with regard to the application of the law of war to armed conflicts.³⁶³

The DON-led DoD IG in 2010, and 506 Panel in 2011, both recommended legislation to strengthen and clarify the role of the SJA to CMC within the Marine Corps and the DON. The Secretary agreed, and endorsed legislation in the FY 13 NDAA that provided the SJA to CMC with a statutory billet description and authority to exercise oversight over provision of legal support within the Marine Corps.

According to current regulation, but not statute, the SJA to CMC has authority to provide independent legal advice directly to the Secretary.³⁶⁴ To strengthen the role of the SJA to CMC within the DON, the 506 Panel recommended legislative change to establish a direct relationship between the Secretary and the SJA to CMC. A previous

³⁶⁰ 10 U.S.C. § 8046 (2018).

³⁶¹ *Id.*

³⁶² US. MARINE CORPS, LEGAL SERVICES SUPPORT MASTER PLAN 1990–2000, at C-II (1989).

³⁶³ Congress has previously seen fit to carefully define and defend legal roles through legislative action. Recently, Congress cited the Air Force Secretary’s attempt to subordinate the JAG to the General Counsel and directed the Secretary to rescind the order. The conference report noted that this was the second time in 12 years that attempts by the civilian leaders and legal counsel within the Military and Defense Departments to consolidate legal services had led to Congressional action. See H.R. REP. NO. 108-767, at 682 (2004) (Conf. Rep); see also 574 PANEL REPORT, *supra* note 7, at 33–42.

³⁶⁴ SECNAVINST 5430.27E, *supra* note 16, encl. 1, at 6; see also SECNAVINST 5430.25F, *supra* note 336, at 2.

Secretary expressed his intent to DoD IG, the 506 Panel, and Congress to submit legislation establishing a direct relationship between the Secretary and SJA to CMC.³⁶⁵

The preference for statutory over regulatory change is not without foundation. To preclude civilian service secretaries from subordinating the role of the JAGs to that of the civilian general counsels, Congress amended Title 10 to protect the independent legal advice of the senior uniformed legal officers.³⁶⁶

Recommendation:

a. Submit a legislative proposal to establish a direct statutory relationship between the Staff Judge Advocate to the Commandant of the Marine Corps and the Secretary of the Navy, consistent with current regulation and past recommendations.

6.2.2 Headquarters Marine Corps Legal Structure

Clear roles and responsibilities with regard to the provision of legal advice is paramount. A commander relies on legal advice to ensure good order, enforce discipline, maintain unit readiness, and accomplish the mission. Accordingly, it is critical that the legal advice provided comes from an official who has the appropriate statutory or regulatory authority. Statutory and regulatory roles must also be made clear to the consumer of that legal advice. The 2012 Commandant-directed legal reorganization divided legal support into legal services, provided by the LSSS and LSST, and command legal advice provided by the cognizant SJA. This analytical division between legal services and command legal advice helped clear up perceived confusion on the part of commanders seeking either legal services support or command legal advice. It also enables SJAs to speak with one voice to Commanding Generals and subordinate commanders as the legal and ethics advisor.

³⁶⁵ See Letter from Raymond E. Mabus, Jr., Secretary of the Navy, to Carl M. Levin, Carl M. Levin, Chairman, Senate Committee on Armed Services (Sept. 1, 2011) (on file). See also Letter from Raymond E. Mabus, Jr., Secretary of the Navy, to Mr. Daniel J. Dell’Orto, Chairman, Independent Review Panel to Study the Judge Advocate General Requirements of the Department of the Navy (Nov. 5, 2010) (on file); Letter from Raymond E. Mabus, Jr., Secretary of the Navy, to Howard P. McKeon, Chairman, House Committee on Armed Services (Feb. 15, 2011) (on file) (expressing the Secretary’s intent to propose legislation establishing a direct statutory relationship between the Secretary and the SJA to CMC).

³⁶⁶ See *generally* H.R. REP. NO. 108-767, at 682–83 (2004) (Conf. Rep.). The statutes have subsequently been re-codified as 10 U.S.C. §§ 7037(e) (Army JAG); 8088(e) (Navy JAG); 8046(d) (SJA to CMC); 9037(f) (Air Force JAG).

Within the Marine Corps uniformed legal community there is clarity as to who provides legal advice to the commander—the SJA or member of the SJA’s staff. There is, however, lack of clarity with regard to legal advice provided by the SJA and OGC attorneys assigned to the Office of the Counsel for the Commandant (CL). The General Officer Survey highlighted the issue and proposed a solution: “Clear delineation of responsibilities in area counsel [CL] and command SJA, and training [for] commanders and staff in that regard, may improve efficiency.”

In May 2019, the Secretary issued SECNAVINST 5430.27E, which defines roles and responsibilities of the DON General Counsel, the JAG, and the SJA to CMC as the three principal legal advisors within the DON. These three principal legal advisors are all appointed by the President, confirmed by the Senate, and subject to Congressional oversight. Counsel for the Commandant (CL) is a career civil servant who reports to the DON General Counsel and provides legal support to the Commandant and HQMC in certain areas of the law as specified by the Secretary.³⁶⁷

Secretarial regulation might be clear, but the Executive Review Panel observed that even if the regulation is clear, the regulation must be implemented so that all senior Marine Corps leaders understand which official within the DON is the appropriate legal advisor. Members of the Executive Review Panel noted on multiple occasions that confusion is still present within the DON. Additionally, the Executive Review Panel also noted that the title “Counsel for the Commandant” may serve to contribute to the confusion. To alleviate confusion, the Executive Review Panel recommended the position be renamed to one that more accurately defines the billet roles and responsibilities.

Additionally, the confusion appears to extend beyond the DON and to officials charged with civilian oversight of the military—members of Congress. During the October 29, 2019 confirmation hearing for the General Counsel of the DON, three of

³⁶⁷ SECNAVINST 5430.27E, *supra* note 16 defines the roles and responsibilities of the JAG and the SJA to CMC. SECNAVINST 5430.25F, *supra* note 336 defines the roles and responsibilities of the General Counsel of the DON.

the Senate Armed Services Committee advanced policy questions requested the nominee address the relationship between the SJA to CMC and CL.³⁶⁸

Recommendations:

a. Ensure, enforce, promulgate, and communicate to Marine Corps stakeholders the regulatory roles and responsibilities of the Staff Judge Advocate to the Commandant of the Marine Corps and the Counsel for the Commandant.

b. Consider renaming the billet “Counsel for the Commandant” to one that more accurately defines the billet roles and responsibilities as an Office of General Counsel attorney who reports to the Department of the Navy General Counsel.

6.2.3 Health of Captain (O-3) Judge Advocate Inventory

The Marine Corps must maintain a total inventory of active duty Marine judge advocates to fulfill manpower requirements of both the Marine Corps uniformed legal community and the rest of the Marine Corps. Marine judge advocates serve outside the MOS in joint billets, career broadening B-billets,³⁶⁹ resident school (both legal and professional military education (PME)), and in command.

To meet manpower requirements, Manpower Plans and Policy, Officer Plans (MPP-30), an office within HQMC, uses a manpower model to calculate required legal billets within the Marine Corps that can only be filled by a Marine judge advocate, plus a number of “fair share” billets that an officer in any MOS can fill, plus a number referred to as P2T2 (patient, prisoner, transient, and trainee).³⁷⁰ Adding these numbers

³⁶⁸ Senate Armed Services Committee, Advance Policy Questions for Mr. Robert J. Sander, Nominee to be General Counsel of the Department of the Navy (Oct. 29, 2019). The Commandant of the Marine Corps received similar Advanced Policy Questions during his confirmation hearing before the Senate Armed Services Committee. See Senate Armed Services Committee, Advance Policy Questions for Lieutenant General David H. Berger, Nominee for Appointment to the Grade of General and to be Commandant of the Marine Corps (Apr. 19, 2019).

³⁶⁹ A “B-billet” is an assignment to a job outside of a Marine’s military occupational specialty (MOS). Typical B-billet assignments include assignment to serve as a recruiter, drill instructor, embassy security guard, or school instructor. These assignments give officers and Marines an opportunity to gain experiences outside of their primary MOS field.

³⁷⁰ The Department of Defense requires all Services in their programming and accounting for Active Duty end strength to include an accounting of patient, prisoner, transient, and trainee (P2T2) personnel against end strength even though these personnel are not assignable. See U.S. DEP’T OF DEF. INSTR. 1120.11, PROGRAMMING AND ACCOUNTING FOR ACTIVE COMPONENT MILITARY MANPOWER, enclosure 2, at 7–9 (17 Mar. 2015).

together, MPP-30 arrives at a number referred to as target inventory. Current inventory (actual number of active duty Marine judge advocates) is 515. According to MPP-30, target inventory is 562 for Marine judge advocates in grades Second Lieutenant (O-1) to Colonel (O-6).

The target inventory for Marine judge advocates in the grade of Captain (O-3) is cause for concern. According to MMP-30, the “health” of the Captain (O-3) community has been steadily declining since FY 16 and is projected to continue its decline based on MPP-30’s current manpower model. The Marine Corps is currently at 79% of its target inventory for Captain (O-3) judge advocates. MPP-30 considers any MOS “unhealthy” if it falls below 85% of target inventory. Based on the current trend, MPP-30 projects that the target inventory for O-3 judge advocates will remain “unhealthy” through FY 25. This decline is based in part on the fact that annual accessions³⁷¹ for Marine judge advocates have been decreasing since FY 16 and also that Marine judge advocates in the grade of Captain (O-3) decline career designation³⁷² and leave the Marine Corps at a higher rate than any other MOS.³⁷³ From 2017–2019, of those officers selected for career designation, on average, 84.3% of officers accept compared to 70.9% of Captain (O-3) judge advocates.

Increasing accessions or slowing promotion flow alone are not sufficient solutions. While increasing the number of accessions will improve the target inventory of Captain (O-3) Marine judge advocates, it does not address the problem in its entirety. The Marine judge advocate community needs to incentivize those already trained litigators to remain on active duty to litigate, train, mentor, and supervise less experienced judge advocates.

Slowing down the promotion flow to Major (O-4) would improve the target inventory for Captain (O-3) judge advocates, but it would not affect the number of Captains (O-3) who decline career designation nor would it assist in retention. Additionally, to increase retention, MPP-30 may increase the selection of Captain (O-3)

³⁷¹ Accessions refers to the number of people recruited into the Marine Corps.

³⁷² Career designation is the process used to determine which company grade offices will be offered the opportunity for continued active service beyond their initial active service obligation. U.S. MARINE CORPS, ORDER 1011.65, OFFICER RETENTION AND PRIOR SERVICE ACCESSIONS, 2 (Dec. 11, 2014).

³⁷³ Email from Unrestricted Officer Promotion Planner, Manpower Plans and Policies to Working Group (Nov. 4, 2019) (on file).

judge advocates on the Career Designation Board; however, this course of action would not solve the problem because judge advocates are accepted for career designation at 90%.

The Marine Corps should use financial incentives to create a broader pool of Captain (O-3) judge advocates who want to remain in uniform. Financial incentives not only help with accessions and retention, but also broaden the pool of talented, trained, and experienced judge advocates. A broader pool will allow the Marine Corps to choose those talented and experienced judge advocates whom the Corps needs and wants to stay.³⁷⁴

Recommendations:

a. Increase accession of Marine judge advocates, until such time as the Captain (O-3) community is appropriately staffed.

b. Fund continuation pay for judge advocates within the Department of the Navy, with amounts and structure designed to stem current negative retention trends.

6.2.4 Financial Challenges

Law School Education Debt Subsidy (LSEDS)

Marine judge advocates have significant financial burdens not present in other MOSs. Marine judge advocates are unique in the Marine Corps in that they pay for their professional training in civilian law school to be certified as judge advocates.

The average law school graduate carried approximately \$145,500 of loan debt in 2016.³⁷⁵ Assuming a 5.0% percent interest rate, financing this debt over ten, fifteen, or twenty years will cost a Marine judge advocate \$1,431.00, \$1,067.57, or \$890.94 per month over the course of the loan term. Servicing this type of law school debt is a significant financial burden that is unique to Marine judge advocates. The impact begins before the officer attends basic infantry training at The Basic School (TBS) since loan repayment begins within six months of graduation from law school. Marine judge advocates are not permitted to attend TBS until they provide Marine Corps Recruiting Command proof that they have passed a bar exam and been accepted to a state bar.

³⁷⁴ GENERAL DAVID H. BERGER, COMMANDANT'S PLANNING GUIDANCE 7 (2019).

³⁷⁵ AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 24, 34, 35 (2019).

Currently, the Department of Education has a program called the Public Service Loan Forgiveness (PSLF) Program. In its current version it promises to pay for law school debt over a 10-year period of public service. The PSLF program encourages public service by forgiving the remaining balance on eligible federal student loans after 120 qualifying payments (approximately 10 years of public service). The program only covers a specific type of law school loan so not all Marine judge advocates are eligible for the program. Additionally, the PSLF program is under review and may be either eliminated or extended from a 10-year to a 30-year government repayment program.

Judge Advocate Division personnel studied the impact the proposed changes to the PSLF Program will have on judge advocates. Out of 62 judge advocates interviewed, 65% of them stated they could not manage their law school debt without the benefit of the PSLF Program and would need to change careers to pay law school debt.³⁷⁶

Since 2015, the Marine Corps has not offered any financial assistance, whether that be to the community at large or to high-performing individual judge advocates. In contrast, the other Services provide, on average, \$60,000 through various milestones throughout that JAG Corps officer's career. The timing of the discontinuation of the LSEDS program within the Marine Corps coincides with the downward trajectory relative to MPP's current and projected decline in "health" of the 4402 O-3 inventory.

The LSEDS program is a method to retain the best and brightest Marine judge advocates. The Commandant's 2019 Planning Guidance serves to animate the argument that LSEDS is a talent management tool because the "essence of manpower systems is to encourage those you need and want to stay."³⁷⁷ In consonance with encouraging highly trained Marine judge advocates to stay Marine, re-implementation of LSEDS would serve as an important tool for retention and talent management.

³⁷⁶ Judge Advocate Div., Headquarters, Marine Corps, Report of Internal Questionnaire on Public Service Loan Forgiveness Program (2017) (on file). Of the 62 judge advocate surveyed, 20 would not have joined the Marine Corps if the Public Service Loan Forgiveness Program was not an option. *Id.*

³⁷⁷ GENERAL DAVID H. BERGER, COMMANDANT'S PLANNING GUIDANCE 7 (2019).

The LSEDS program model in the Marine Corps offered \$50,000 in exchange for five years of continued service.³⁷⁸ The five-year LSEDS model came as a result of careful study and metric-driven recognition that following the 10-year mark in service, resignation rates drop significantly. The LSEDS program has been used since at least FY 07. In FY 14, the LSEDS program utilized a competitive board process to incentivize ten high performing judge advocates. In FY 15, the LSEDS program was discontinued.

The SJA to CMC has submitted repeated requests to re-implement the LSEDS program. Each was denied. On May 7, 2018, DC M&RA denied the request to re-implement the LSEDS program for FY 19 concluding that the judge advocate community was at 105% of its requirement according to the 186K Authorized Strength Report (ASR) and the judge advocate population of Captains (O-3) was at 108% of the requirement.

Recent data from MPP-30 suggests that the trajectory of O-3 inventory is declining to “unhealthy” levels based on projected target inventory. Additionally, internal survey replies indicate financial burden is a significant factor that causes judge advocates to leave the Marine Corps. The LSEDS program should not be viewed through the prism of requirements based on quantity (i.e., accession and retention). Rather, it should be viewed as a quality-driver—and incentive program to motivate and retain the best and brightest judge advocates who want to stay—consistent with the Commandant’s exhortation to break free from “industrial age” manpower models and focus on talent management as a means to keep the best and brightest as detailed in his 2019 Planning Guidance.

Recommendation:

a. Fund an enduring Law School Education Debt Subsidy program as a recruiting, retention, and talent management tool.

³⁷⁸ In FY 14, the Marine Corps offered LSEDS as part of a competitive board selection process to ten Marine judge advocates at the rate of \$50,000.00 for five years. U.S. MARINE CORPS, MARINE ADMIN. MESSAGE 474/14, FY14 LAW SCHOOL EDUCATION DEBT SUBSIDY (LSEDS) PROGRAM SELECTIONS (Sept. 23, 2014).

State Bar Licensing Fees

In 2001, Congress enacted 5 U.S.C. § 5757.1 allowing agencies to pay for civilian licensing fees. In 2006, Congress enacted 10 U.S.C. § 2015, authorizing and requiring the Secretary of Defense to pay for expenses incurred by members of the armed forces to obtain professional licenses. In 2009, the Under Secretary of Defense issued a memorandum authorizing all military departments to pay for the professional credentialing of their Service members with detailed limitations and bi-annual reporting requirements. On February 18, 2010, the Assistant Secretary of the Navy, Manpower and Reserve Affairs, issued a memorandum authorizing DC M&RA to pay credentialing expenses for military members and for the Marine Corps to “consider utilizing the existing infrastructure and processes already established within the Navy rather than expending funds on creating a Marine Corps specific enterprise.”³⁷⁹

Marine Corps judge advocates are required to remain in good standing with a state or other qualifying jurisdictional bar. Because the recurring payment of state-imposed bar dues is a condition to remain in good standing, it is a reimbursable cost under 10 U.S.C. § 2015. Commands are authorized, subject to the availability of funding, to pay for professional credentials that are necessary in the performance of official duties, but that authority only applies to civilian employees.³⁸⁰

Similar to the civilian workforce, Marine judge advocates should have their licensing fees reimbursed based on 10 U.S.C. § 2015. Reimbursing Marine judge advocates will bring them into parity with their Army and Air Force counterparts, ensure they are treated fairly, and promote retention.

The Army and Air Force have implemented programs to reimburse their attorneys’ licensing fees. The Air Force implemented a program to reimburse licensing fees in 2009 and the Army began reimbursing licensing fees in 2018. Both the Air Force and Army have implemented programs to reimburse their attorneys up to \$350 per year for one licensing fee every calendar year.

³⁷⁹ Memorandum from Assistant Secretary of the Navy for Manpower and Reserve Affairs to Chief of Naval Personnel and Deputy Commandant for Manpower and Reserve Affairs, Delegation of Authority to Administer Payment of Credential Expenses for Military Members (Feb. 18, 2010) (on file).

³⁸⁰ U.S. MARINE CORPS, MARINE ADMIN. MESSAGE 433/10, PAYMENT FOR CIVILIAN ACADEMIC DEGREES AND PROFESSIONAL CREDENTIALS (Aug. 3, 2010).

To date, the DON does not reimburse Navy JAG Corps officers, though some Navy commands reimburse attorneys working for OGC. In addition, pursuant to the Memorandum for OGC Personnel of May 4, 2009, CL reimburses some Marine judge advocates assigned to CL.

Annual attorney licensing fees range from \$35 to \$600. The Air Force budgets \$400,000 for their 1,400 judge advocates and civilian attorneys. The Army budgets \$424,000 for their 1,853 judge advocates and civilian attorneys. In the Marine Corps, JAD estimates the cost for Marine judge advocates will range annually between approximately \$135,000 to \$206,850, with the variance due to different fee structures and waiver eligibility amongst various state bar agencies.

Recommendation:

a. Reimburse judge advocates for their continuing annual licensing fee requirements.

6.2.5 Assignment Process

A large percentage of Marine judge advocates are not satisfied with the assignments process.³⁸¹ Most of the comments expressed dissatisfaction with the lack of transparency and a feeling that the assignments process was unfair.

The Marine Corps judge advocate assignment process is a collaborative effort between JAD's Plans & Innovation Branch (JPI) and Manpower Management Officer Assignments (MMOA) at HQMC. As the occupational field sponsor for the uniformed legal community, the SJA to CMC has authority and responsibility to supervise Marine Corps judge advocates and make recommendations regarding assignments.³⁸² Marine

³⁸¹ According to the internal uniformed legal community survey, 19% were "very dissatisfied", 19% were "dissatisfied", 20% were neutral, 21% were "satisfied", and 1% were "very satisfied." Marine Corps Working Group, Internal Survey Results (Sept. 2019) (on file).

³⁸² The SJA to CMC is the occupational field sponsor for, and oversees the professional development, training, and education of, all Marine judge advocates legal administrative officers, and legal services specialists. The SJA to CMC is responsible for making recommendations on legal structure and alignment within the Marine Corps. In addition, due to the unique requirements of the legal mission and the professional development of the legal community, the SJA to CMC advises the Deputy Commandant, Manpower and Reserve Affairs, regarding which Marine judge advocates, legal administrative officers, and legal services specialists are best suited to fill particular billets within the Marine Corps. SECNAVINST 5430.27E, *supra* note 16, enclosure 1 at 9.

judge advocates and legal support personnel within JPI assist the SJA to CMC in his occupational field sponsor duties.

As subject matter experts, the Marines in JPI work closely and collaboratively with the monitors within MMOA. The monitors handle institutional manpower issues across all MOSs and use specialized knowledge from JPI to ensure judge advocate manpower decisions are well-informed. Ultimately, MMOA has sole responsibility for Marine Corps assignments and issuance of orders for officers across the force. Placing the right Marine judge advocate in the right job is the primary guiding principle.³⁸³

To fulfill the responsibilities as occupational field sponsor, the SJA to CMC makes written recommendations to MMOA on officer assignments. The recommendations generally occur in January in support of the Summer PCS move and are tied to the official release of Marine Corps promotion, resident school, and command selection boards. Once official board results are released, the SJA to CMC submits to DC (M&RA) a comprehensive list of recommended assignments for the judge advocates who are moving.

Career progression goals balance the need for Marine judge advocates to be broadly skilled generalists and MAGTF officers, while also affording the opportunity to concentrate in an area of the law via AMOS designation (e.g., 4405 or 4409).³⁸⁴ To ensure well-rounded legal practitioners, JPI works to rotate judge advocates amongst command legal advice billets (e.g., SJA or Deputy SJA), legal services billets (e.g., LSSS/LSST), joint assignments, and billets within JAD or OJAG.

To develop as MAGTF officers, Marine Corps judge advocates also serve tours in non-legal billets, to include command, staff, and leadership positions, and as students at resident PME schools. Service in these billets and attendance at resident PME schools, produce Marine judge advocates who provide better advice and support to

³⁸³ The officer assignments process is governed by U.S. MARINE CORPS, ORDER 1300.8, MARINE CORPS ASSIGNMENT POLICY (Sept.18, 2014). The priorities for assignment considerations are: 1) needs of the Marine Corps, 2) career progression, 3) overseas control date, and 4) individual preferences. *Id.* at 2-1.

³⁸⁴ Following board selection to resident school through either the Commandant's Career-Level Education Board (CCLEB) for company grade officers or the Commandant's Professional Intermediate-Level Education Board (CPIB) for field grade officers, Marine judge advocates may receive advanced law degrees from the Army Judge Advocate General's Legal Center and School in AMOS, 4405 Master of International Law (Lieutenant Colonel to Major) and AMOS, 4409, Master of Criminal Law (Colonel to Major).

commanders and their staffs because they are more likely to understand not only the specific legal issue, but also the overall context of the challenges facing the commander. Approximately 10% of the Marine judge advocate population is currently assigned on orders from MMOA outside the 4402 MOS or as students at resident PME schools.³⁸⁵

The SJA to CMC (JPI) must prioritize transparency and communication efforts with the entire uniformed legal community on the assignments process. Communication with officers and enlisted Marines about assignments should not occur only as a Marine is scheduled to change assignments (generally every three years). Dialogue regarding assignments, career progression, professional goals, and personal concerns should be ongoing and continuous to ensure transparency and fairness of the process.

Opportunities for face-to-face dialogue between JPI personnel and Marines in the field occur during Legal Services Inspections and SJA to CMC Article 6, UCMJ, inspections. Education in the assignments process should begin at The Basic School and reinforced at NJS prior to a Marine's first duty station. Additionally, because future assignments and the issuance of orders is an MMOA responsibility, LSSS OICs and SJAs should ensure all officers attend and meet with the MMOA monitors during their annual visits ("road-show") to designated locations where MMOA personnel conduct a series of briefs, in-calls, staffing meetings, and interviews to update commands on manpower issues and assist Marines in making well-informed career decisions.

Recommendation:

a. Ensure continuous communication with the Marine uniformed legal community to facilitate transparency and better understanding of the Marine Corps assignments process.

³⁸⁵ This includes five judge advocate students at the Expeditionary Warfare School; seven judge advocate students assigned to either the U.S. Army Command and General Staff College or U.S. Marine Corps Command and Staff College; six Lieutenant Colonels in command; two Colonels in command; and, one judge advocate Colonel student at top level school. These numbers do not include the non-written orders (local manpower tax) imposed on local commanders and LSSS OICs to provide officers (usually in the grades of O-1 to O-3) to serve in additional "outside" the MOS short term assignments (usually one year) such as company commander, series commanders, aide-de-camp duties, etc. The local manpower tax is generally levied on the LSSS as the largest source of Marine judge advocates. Based on the short duration, many of these billets and assignments are advantageous to young Marine judge advocates in their development as MAGTF officers, and are often career enhancing.

6.2.6 Promotion Competitiveness (MAGTF Officer/Generalist vs. Specialist)

Marine judge advocates, as unrestricted line officers, are distinct from their military Service counterparts, who are a part of a staff corps. Marine judge advocates must be competitive with their peers of every MOS for promotion. Recruiting material for prospective officer candidates for the law program highlights the “two careers” of a judge advocate: as an attorney and as an unrestricted line officer of Marines. Upon accession, new judge advocates are aware of opportunities for assignments and training outside the legal profession, and the Marine Corps culture encourages concurrent development of MOS-proficiency and well-rounded MAGTF officership. Both formal and informal polling of Marine judge advocates indicate that the opportunities to be a well-rounded MAGTF officer is a significant reason why a prospective officer candidate pursues a commission as a Marine, rather than a JAG Corps Officer in another Service. However, this duality in career development raises concern over whether or not the requirement to be a well-rounded MAGTF officer comes at the expense of immersion and specialization in the Marine Corps legal profession. For example, one comment from an internal survey stated that “too much focus is placed on ‘MAGTFery’ and not law.”

In striking an appropriate balance between MAGTF officership and specialized legal training, Marine judge advocates face an additional and unique issue in comparison to officers in other MOSs. The vast majority of Marine judge advocates are accessed from ABA accredited law schools via the Platoon Leaders Class and Officer Candidate Course. Based on statutory authority, Marine judge advocates receive constructive service credit for each year of law school once they graduate from NJS. However, constructive service credit only applies to advanced education received prior to commissioning.³⁸⁶ As a result, Marine judge advocates are promoted to Captain (O-3) much faster than their cohorts in other MOSs.

According to the internal survey of the Marine Corps uniformed legal community, there remains a generally positive acceptance of the line-officer-first mentality, and general enthusiasm to pursue assignments and education outside the legal field as both

³⁸⁶ 10 U.S.C. § 12207(b) et seq. (2018)

enjoyable and career-enhancing. Junior judge advocates perceive that development as a MAGTF officer is at least as important as MOS proficiency in order to be competitive for deployment opportunities, selection for resident PME, and promotion. Mid-career judge advocates, however, perceive that non-selection for O-5-level command may significantly limit further advancement, and they plan their careers accordingly.

HQMC (MMOA) manages judge advocate assignments, with JAD input and recommendation, to maximize judge advocates competitiveness for promotion to at least the grade of O-5. Over a ten-year period, Marine judge advocates averaged a 6% greater selection rate to O-4 and an 8% greater rate to O-5 than did their peers.³⁸⁷

The preference for well-rounded MAGTF officers, beginning at the company grade, may be causing a lack of supervisory experience and expertise at the LSSSs, particularly within the military justice functional area. Numerous comments from the internal survey, the external survey of military law experts, and senior judge advocate leadership reference a lack of “second-tour Captains (O-3)” serving at the LSSS, able to utilize their military justice litigation skills and provide peer mentorship to support and develop newly assigned first-tour judge advocates.

Marine judge advocates have date-of-rank seniority due to constructive service credit. Judge advocate Captains (O-3) are eligible for resident Expeditionary Warfare School (EWS) through the Commandant’s Career-Level Education Board (CCLEB) selection process before they have sufficient time and experience in their specialty.. Practically, this means that judge advocate Captains (O-3) are screened for career-level school after only one tour in the 4402 MOS. Currently, 14 second-tour Captains (O-3) are serving in B-billets outside the 4402 MOS or attending resident EWS.³⁸⁸

One solution is for HQMC (M&RA) to restrict eligibility for 4402 judge advocates to screen for CCLEB following their first tour. Additionally, HQMC (M&RA) should

³⁸⁷ Email from Officer Inventory Planner, Manpower Plans and Policy, Manpower and Reserve Affairs, Headquarters, Marine Corps to Working Group (Sept. 13, 2019) (on file).

³⁸⁸ This number does not include officers on temporary assignment due to local manpower taxes imposed at the garrison command level.

“fence-off” the 4402 second-tour Captain (O-3) population from consideration for B-billet tours outside the uniformed legal community.³⁸⁹

Importantly, this does not foreclose CCLEB or B-billet eligibility—only delays—Marine judge advocates the opportunity to attend EWS or serve outside the 4402 MOS, except for filling “local manpower tax” requirements.³⁹⁰ Delaying consideration for resident PME selection and B-billets until Marine judge advocates complete their second tour would allow the Marine Corps uniformed legal community to more adequately populate the LSSSs with second-tour Captains (O-3) and optimally utilize their experience and expertise litigating cases, providing peer mentorship, training, and supervising first-tour judge advocates.

Recommendations:

a. Do not consider Marine judge advocate Captains (O-3) executing their first set of permanent change of station orders for the Commandant’s Career-Level Education Board or B-billet assignment.

b. Develop a reporting mechanism to track when a judge advocate serves outside the military occupational specialty in support of local mission requirements.

6.2.7 Promotion and Assignment of Judge Advocate Colonels

The data suggests that selection to Colonel (O-6) is highly dependent on previous experiences outside the judge advocate (4402) MOS, especially successful command tours and resident top-level school (TLS) attendance. Over a ten-year period, judge advocates select to Colonel (O-6) at an average rate of 5% less than their peers. This results in a frequent inventory shortage of 4402 O-6s, requiring O-5s to serve in O-6 billets. In response to the shortfall, the Secretary included precept

³⁸⁹ All Marine Corps officers are eligible for screening by the CCLEB if they are executing permanent change of station (PCS) orders. Those officers who are screened, but not selected for resident school are then considered by Marine Corps Recruiting Command as either a recruiter, officer selection officer, or a member of the staff. Currently, four Marine judge advocate second-tour Captains (O-3) are assigned to MCRC and serve in non-legal billets as staff members of a recruiting station or officer selection office.

³⁹⁰ Local manpower tax refers to non-written orders imposed on local commanders and LSSS OICs to provide officers (usually in the grades of O-1 to O-3) to serve outside the MOS in short term assignments (usually one year) such as company commander, series commanders, aide-de-camp duties, etc.

language expressing a need for 4402 Colonels in the FY 17 through FY 20 O-6 promotion selection boards.

Current projections anticipate that O-6 selections from the FY 21 selection board will restore the 4402 O-6 inventory to “healthy” levels. However, observations from the internal and external surveys raise concern that O-5 judge advocates who have remained in 4402 assignments are far less likely to be selected than their O-5 peers who have been out of the MOS for 2-3 years in command and attending resident top-level school (TLS). Selection statistics for lawyers appear to bear this out.

Comments from internal surveys and interviews suggest that preference for MAGTF experience over MOS specialization is recognized in the field-grade uniformed legal community. As a result, some judge advocates with the desire to specialize in military justice litigation depart the Marine Corps because of the perception that they are less competitive for promotion to O-6. To ensure the best and fully qualified are selected, requiring a General Officer judge advocate (active or retired) to be a member of O-6 promotion selection boards may help inform Board Members regarding career paths of O-5s who may have elected to specialize in, for example, military justice litigation.

The General Officer survey indicated high satisfaction with the quality of legal support from their respective SJA, who are Colonels serving in judge advocate billets. Interview data indicated General Officers prefer that 4402 Colonels serve in legal positions, rather than O-6 command or other non-legal billets.

Recommendations:

- a. Evaluate making judge advocate (4402) Colonels ineligible for selection to O-6 command.*
- b. Ensure a judge advocate (4402) General Officer participates in every Colonel (O-6) selection board to explain unique legal career paths to help select the best and fully qualified judge advocate Colonels (O-6).*
- c. Provide precept language for every Colonel (O-6) selection board to explain the unique legal career paths to help select the best and fully qualified judge advocate (4402) Colonels (O-6) when a judge advocate General Officer is not available.*

6.3 EDUCATION AND TRAINING

6.3.1 Professional Responsibility (PR)

Internal and external surveys show respondents are concerned with the uniformed legal community's overall knowledge of PR rules and requirements,³⁹¹ lack of follow-on PR training, and a lack of mentorship and accountability.³⁹² These concerns may be addressed by mandating periodic PR training after initial training at NJS.

In addition to the PR education Marine judge advocates receive in civilian law school,³⁹³ they get additional PR education during initial legal instruction at NJS.³⁹⁴ However, there is no additional mandated PR training for Marine judge advocates at the unit or Service-level.

The data suggested that PR concerns stem from training and mentorship gaps that develop and widen once Marine judge advocates begin to practice law. Over time, and in the absence of follow-on training, judge advocates may fail to recall specific PR rules, particularly Marine judge advocates who serve outside the uniformed legal community for an extended period of time. Refresher training or formal Service-level instruction may serve to close any real or perceived gaps in PR matters. The training should cover recent and selected historical PR performance issues, so that the community at large can learn how to avoid similar missteps.

Recommendations:

a. Establish annual formalized professional responsibility training for judge advocates, and during Article 6, Uniform Code of Military Justice visits, reinforce the importance of mentorship and supervision.

³⁹¹ However, several Internal Survey questions addressed the issue of the quality and quantity of legal training at various levels of seniority more generally. See Marine Corps Working Group, Internal Survey Results, questions 4-15 (Sept. 2019) (on file).

³⁹² Marine Corps Working Group, Internal Survey Results, question 32 narrative responses, pp. 269-79 (Sept. 2019) (on file) (e.g., comments 226, 320, 368, 493, & 495).

³⁹³ All law schools accredited by the American Bar Association (ABA) require students to complete at least "one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members." AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2019-2020 ch. 3, 16 (2019).

³⁹⁴ See Naval Justice School BLC 19030 Syllabus (Aug. 2019) (on file).

b. Collaborate with the American Bar Association, State Bars, and the Armed Services to identify best practices for professional responsibility rules and processes.

6.3.2 Sustainment and Refresher Training

The Marine Corps encourages its judge advocates and legal services specialists to take advantage of career broadening opportunities both inside and outside of the legal field. Whether these legal professionals are entering new practice areas or returning to legal practice, they will require a period of time to hone their proficiency. The Marine Corps must provide these practitioners timely and appropriate training to ensure they are ready to assume the responsibilities of their new positions.

The practice of assigning judge advocates and legal services specialists to non-legal assignments is consistent with the Marine Corps ethos: every Marine a rifleman. Assignment outside of the uniformed legal community gives these Marines a better understanding of how the Marine Corps operates.

However, time outside legal practice is not without cost. Respondents to the internal, external, and General Officer surveys expressed concern that members of the uniformed legal community who serve in non-legal assignments lose legal proficiency, particularly in military justice practice.³⁹⁵ Others expressed concern that field grade officers and staff noncommissioned officers returning to the uniformed legal community will be expected to serve as supervisors without having the necessary experiences and training to teach and mentor junior legal personnel.³⁹⁶

The Marine Corps should mitigate some of the loss in proficiency by requiring uniformed legal personnel to attend a refresher course prior to or soon after entering a new assignment. This training would be particularly helpful to legal personnel who have been assigned to non-legal billets for an extended period of time.

Recommendations:

a. Develop resident or online courses, by billet and grade, to refresh the skills of practitioners returning from assignments outside the Marine Corps uniformed legal community.

³⁹⁵ Marine Corps Working Group, Internal Survey Results, question #9 (Sept. 2019) (on file).

³⁹⁶ *Id.*

b. Leverage modern training techniques to include practical application through simulations and exercises for the purpose of developing skills, maintaining proficiency, as well as team building for both generalist and litigation personnel.

6.3.3 Advanced Law Degree (LL.M.) Requirements

Every year, the Marine Corps convenes school selection boards to screen and select approximately 20 Marine judge advocates to obtain advanced law degrees (LL.M.)³⁹⁷ from the Army Judge Advocate General's Legal Center and School (TJAGLCS).³⁹⁸ These areas of study include cyber law, international and operational law, criminal law, civilian labor law, and procurement law.

The Marine Corps has a requirement for expertise in national security and operational law, intelligence, and cyber law to support its ever present and growing international and operational law mission requirements as identified by community feedback during the comprehensive review.³⁹⁹

In 2019, the Secretary assigned SJA to CMC the added responsibility to provide legal advice and training on international and operational law issues of interest to the Marine Corps.⁴⁰⁰ The new requirement significantly expands the SJA to CMC's enumerated statutory and regulatory responsibilities.⁴⁰¹

To effectively meet new operational law requirements, the Marine Corps needs to build the capability for cyber law expertise and increase capacity within the international and operational law functional area. The 2014 Quadrennial Defense Review identified a need for the DoD to develop cyberspace capabilities to meet emerging mission requirements.⁴⁰² When conducting cyberspace operations, U.S. forces are required to

³⁹⁷ LL.M. (*Legum Magister*) is a professional advanced law degree.

³⁹⁸ In past years, the Marine Corps has sent some judge advocates to civilian law schools to obtain advanced law degrees. However, beginning in Fiscal Year 2020, the Marine Corps will only send its judge advocates to TJAGLCS.

³⁹⁹ Marine Corps Working Group, Internal Survey Results, questions 5, 17, 19, 25, 36, 37 (Sept. 2019) (on file) (comments associated with the listed questions express a requirement, need, and desire for judge advocate expertise in national security and operational law, intelligence, and cyber law in the Marine Corps.).

⁴⁰⁰ SECNAVINST 5430.27E, *supra* note 16, encl. 1, at 7.

⁴⁰¹ Compare SECNAVINST 5430.27E, *supra* note 16 with SECNAVINST 5430.27D.

⁴⁰² U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW 2014, at x-xi (2014). "The Department of Defense will deter, and when approved by the President and directed by the Secretary of Defense, will disrupt and deny adversary cyberspace operations that threaten U.S. interests." *Id.* at 14.

“abide by applicable laws, policies, and regulations . . . [and to] operate consistent with the policy principles and legal frameworks associated with the law of war.”⁴⁰³ This is an area where increased legal expertise is critical, especially at the senior level, to properly advise COCOMs of their legal authorities and options in the cyberspace environment.

In 2017, the SJA to CMC convened an Operational Advisory Group (OAG) as part of the Marine Corps Judge Advocate Board (MCJAB) process.⁴⁰⁴ The OAG studied whether the uniformed legal community was positioned to support Marine Corps cyber law needs. After reviewing the OAG’s findings and recommendations, the SJA to CMC concluded the uniformed legal community needed to develop judge advocates with advanced law degrees in cyber law, stating “Legal advisors to Marine Corps operational commands must possess a basic ability to recognize issues that may arise from cyber operations.”⁴⁰⁵

In his 2019 Planning Guidance, the Commandant identified a need to retain the most talented personnel with respect to cyber, artificial intelligence, and data science capabilities.⁴⁰⁶ Accordingly, the Marine Corps uniformed legal community must prioritize the types of advanced law degrees its judge advocates obtain to ensure they optimally address the uniformed mission sets that best support operational commanders.

In addition to operational and cyber law capabilities, the Marine Corps also has a requirement for experienced military justice practitioners with advanced law degrees in criminal law. The rapid pace of change in military justice and the increased complexity of court-martial processing requires Marine Corps judge advocates who have advanced training and legal education in this area to ensure courts-martial and other legal and administrative proceedings are conducted fairly with adequate protections for the due

⁴⁰³ *Id.* at 15.

⁴⁰⁴ The Marine Corps Judge Advocate Board (MCJAB) is the principal process by which the Marine Corps legal community conducts assessments and explores initiatives for process-improvements for more effective and efficient delivery of legal support within the Marine Corps and the DON. For a more thorough explanation of the MCJAB process, see Section 5.9.3.

⁴⁰⁵ Memorandum from Staff Judge Advocate to the Commandant of the Marine Corps to Branch Head, Plans and Innovation Branch, Judge Advocate Division, Cyber Law Specialty Tasking Memorandum (undated) (on file).

⁴⁰⁶ GENERAL DAVID H. BERGER, COMMANDANT’S PLANNING GUIDANCE 13 (2019).

process rights of not only those accused of committing crimes, but also the rights of crime victims.⁴⁰⁷

In today's resource-constrained environment, every legal billet needs to be examined and validated. Uniformed Marine judge advocates directly support the DON's Office of General Counsel (OGC) mission in the areas of environmental law, civilian labor law, and procurement law⁴⁰⁸ at a rate that exceeds all other Services combined.

Every year, the Marine Corps sends between three and seven judge advocates to obtain advanced law degrees in environmental, civilian labor, and procurement law.⁴⁰⁹ These Marine judge advocates are then assigned to support the DON's OGC through the Office of Counsel for the Commandant (CL). Legal support provided under the auspices of the DON's OGC are not part of Marine Corps legal support under Departmental instruction or Marine Corps Doctrine.⁴¹⁰ Therefore, the SJA to CMC has no statutory or doctrinal role within the environmental law, civilian labor law, and procurement law functional areas.⁴¹¹

Currently, there are 19 uniformed judge advocates assigned throughout the Marine Corps in direct support of CL's OGC offices. For comparison, the Army JAG Corps provides five, the Air Force JAG Corps six, and the Navy JAG Corps one judge advocate to support their respective Offices of General Counsel.⁴¹²

Typically, a Marine judge advocate will serve only one three-year assignment with OGC before returning to execute and support uniformed legal mission sets within the Marine Corps uniformed legal community. That means Marine judge advocates at the O-4 or O-5 level spend four years outside uniformed practice areas and instead support OGC mission sets. With rare exception, a Marine judge advocate never returns to support OGC mission sets because repeated assignments to CL have proven to be a

⁴⁰⁷ The National Defense Authorization Acts for Fiscal Years 2012 to 2016 made hundreds of changes to the UCMJ. See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

⁴⁰⁸ SECNAVINST 5430.25F, *supra* note 336, enclosure 1 at 2.

⁴⁰⁹ Email from Plans and Innovation Branch, Judge Advocate Division, Headquarters, Marine Corps, to Working Group (Nov. 25, 2019) (on file).

⁴¹⁰ See MCWP 11-10, *supra* note 319; see also SECNAVINST 5430.27E, *supra* note 16, enclosure 1 at 6-10.

⁴¹¹ See MCWP 11-10, *supra* note 319; see also SECNAVINST 5430.27E, *supra* note 16, enclosure 1.

⁴¹² Email from Branch Head, Plans and Innovation Branch, Judge Advocate Division to Working Group, Judge Advocates assigned to the Counsel for the Commandant (Oct. 1, 2019) (on file).

significant limiting factor for career progression. In 2014, the Commandant directed the SJA to CMC to conduct an internal review of the Marine Corps legal community that included, among other things, an evaluation of the “civilianization of billets and practice areas.”⁴¹³ In response, the SJA to CMC specifically recommended to civilianize OGC practice areas and realign the existing uniformed structure.⁴¹⁴ It appears that no evaluation or follow-on action occurred.

In 2015, the next Commandant also identified this area of concern and specifically directed DC M&RA to ensure that the SJA to CMC and CL “examine personnel requirements across each of their communities” and make recommendations as to any changes in structure.”⁴¹⁵ Additionally, the Commandant expressed a preference that Marine judge advocates be utilized to support uniformed mission sets rather than OGC mission sets.⁴¹⁶ Other than anecdotal information that a few meetings took place, an evaluation never occurred. In 2018, the former SJA to CMC delivered a letter to the Secretary and the Commandant that again recommended examination and clarification of the legal responsibilities amongst the SJA to CMC, OGC (CL), and JAG.⁴¹⁷ The issue remains unresolved.

Civilian labor law and environmental law issues are complex and complicated and often take years to resolve. Although Marine judge advocates have been successful supporting these OGC missions, that does not change the fact that this is an inefficient utilization of Marine Corps uniformed assets to support an OGC mission rather than having continuity of civilian attorney expertise.

To require the SJA to CMC to continually build an OGC capability by sending uniformed judge advocates to receive advanced law degrees in legal functional areas that fall under the cognizance of OGC is an inefficient utilization of uniformed judge

⁴¹³ Memorandum from Commandant of the Marine Corps to Distribution List, Evaluation of the Marine Corps Legal Community (Mar. 5, 2014) (on file).

⁴¹⁴ Memorandum from Staff Judge Advocate to the Commandant of the Marine Corps to Commandant of the Marine Corps, Evaluation of the Marine Corps Legal Community 3 (Apr. 15, 2014) (on file).

⁴¹⁵ Email from Commandant of the Marine Corps to Director, Marine Corps Staff, Alignment (Apr. 20, 2015) (on file).

⁴¹⁶ *Id.*

⁴¹⁷ Memorandum from Staff Judge Advocate to the Commandant of the Marine Corps to Commandant of the Marine Corps, Recommendations for Improvements to the Provision of Legal Support and Advice within the Department of the Navy and within the U.S. Marine Corps and U.S. Navy (Sept. 5, 2018) (on file).

advocates. For the SJA to CMC, it is also an ineffective utilization of uniformed personnel because these Marine judge advocates—currently 19 at the critical mid-level leadership grades of Major (O-4) and Lieutenant Colonel (O-5)—serve outside the community for four years supporting OGC, instead of leading and supervising judge advocates, legal administrative officers, and legal services specialists within the LSSS, or providing uniformed legal advice as SJAs to supported commanders—core uniformed mission sets.

Despite the expressed intent of two Commandants in 2014 and 2015 to evaluate and validate personnel requirements within CL and SJA to CMC, no requirements-based validation occurred. The DON and the Marine Corps would be better served by hiring civilian attorneys to meet validated requirements to support the OGC mission within the Marine Corps.

Recommendations:

a. Do not assign uniformed judge advocates to Office of General Counsel (Counsel for the Commandant (CL)) offices; transition CL billets formerly held by uniformed judge advocates to civilian positions.

b. Realign judge advocate structure from Office of General Counsel (Counsel for the Commandant) to support Marine Corps uniformed legal requirements.

c. Shift educational resources for advanced law degrees that currently support Office of General Counsel requirements to meet uniformed legal requirements in military justice, cyber, and international law.

6.3.4 Victims' Legal Counsel Certification Course at Naval Justice School

The nature of the attorney-client relationship between victims and VLCs is unique and complex. Experience has shown that these billets require specialized training due to the nature of the services offered.⁴¹⁸ This training is a necessary supplement to the initial training received at NJS by all judge advocates.⁴¹⁹ In the Marine Corps, a judge advocate must be certified by the SJA to CMC as a VLC before providing VLC services

⁴¹⁸ See 10 U.S.C. § 1044e(b) *et seq.* (2018).

⁴¹⁹ Marine Corps Working Group, Internal Survey Results, question 5, comment 313, 369 (Sept. 2019) (on file).

to a client.⁴²⁰ As a matter of statute and policy, the SJA to CMC will not certify a judge advocate as a VLC until that judge advocate has completed a VLC certification course in addition to meeting other prerequisites.⁴²¹

The Marine Corps relies on the Army and Air Force Service schools for VLC certification. The Army recently reduced its course offering to one course per year, resulting in each school offering only one course a year. The Army Special Victims' Counsel (SVC) course is held in August and the Air Force SVC course is in May.⁴²² NJS does not offer a course. The small number of courses limits availability for judge advocates to obtain VLC certified training, and limits an LSSS OIC's ability to assign personnel to VLC positions.

The limited opportunities to train incoming VLCs puts a strain on personnel movement within the LSSSs. This is especially problematic when a VLC has to unexpectedly leave the assignment, which has resulted in less than ideal personnel assignments. For example, in the past, LSSS OICs have had to reassign judge advocates as VLC when they had only served as trial counsel for six months. The creation of a VLC certification course at NJS would give the Marine Corps additional opportunities to train and certify its VLCs, thereby giving LSSS OICs greater flexibility to assign the right judge advocate to the right job. Additionally, designing a VLC certification course at NJS would allow instructors to create a curriculum responsive to the unique aspects of VLC representation within the Navy and Marine Corps.

Recommendation:

a. Determine the feasibility of developing a victims' legal counsel certification course at Naval Justice School offered at different times than the Army and Air Force

⁴²⁰ 10 U.S.C. § 1044e(d)(2) (2018).

⁴²¹ *Id.*; STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS, U.S. MARINE CORPS VICTIMS' LEGAL COUNSEL MANUAL 61 (2018) [hereinafter USMC VLC MANUAL]. To serve as a regional victims' legal counsel, a judge advocate should be serving in or selected to the grade of O-4; have at least two years combined experience as a trial counsel, defense counsel, or military judge, and experience in at least one contested general court-martial case; and will normally possess an advanced degree in criminal law. MCO 5800.16 LSAM, *supra* note 301, at 7. To serve as a victims' legal counsel a judge advocates should be serving in or selected to the grade of O-3, have six months or more military justice experience with at least one contested case. *Id.* volume 4, at 8.

⁴²² Memorandum from Deputy Office in Charge, Victims' Legal Counsel Organization to Working Group, Victims' Legal Counsel Organization Narrative for Tactical Team Consideration 9 (Sept. 16, 2019) (on file).

courses to ensure greater flexibility in victims' legal counsel certification and assignment.

6.3.5 Enlisted Utilization and Training

Based on interviews and survey results, there is wide-spread concern regarding the quality of training received and the utilization of enlisted personnel within the Marine Corps uniformed legal community. Additionally, the SJA to CMC identified this issue and convened an OAG to research and make recommendations regarding education and effective utilization of legal services specialist (MOS 4421).⁴²³

Based on Working Group research, there is a significant level of dissatisfaction with regard to utilization and education of legal services specialists.⁴²⁴ First, a majority of enlisted personnel seek more complex tasks within their MOS, especially as they progress through the ranks and billets. Second, Marine judge advocates want enlisted personnel to perform more complex tasks; however, judge advocates are not adequately taught the capabilities and tasks enlisted personnel were trained to execute. Third, unit-level training is inadequate and inconsistently applied across the community. Fourth, there are inconsistent institutional standards for advanced skills training and no official endorsement of follow-on education, causing enlisted personnel to receive inconsistent training opportunities. These four factors contribute to the concern that enlisted personnel are not reaching their full potential, and that their skills are degrading after formal training due to inadequate and inconsistent unit-level and follow-on educational sustainment.

Formal school training for legal service specialists is conducted at NJS. A cadre of Marine enlisted instructors, Corporals (E-4) and above, coordinate and conduct the 10-week Legal Services Specialist Course. This 10-week course comprises administrative and legal training structured around 7 of the 31 required 4421 tasks from

⁴²³ Memorandum from Staff Judge Advocate to the Commandant of the Marine Corps to Operational Advisory Group Leader, Appointment to Chair the Operational Advisory Group on Education and Utilization of Enlisted Marines ISO the Marine Corps Judge Advocate Board #1-2019 (June 6, 2019) (on file).

⁴²⁴ According to the internal survey of the Marine Corps uniformed legal community, 39% were either "dissatisfied" or "very dissatisfied" with the quantity and quality of available legal training for 4421s. Marine Corps Working Group, Internal Survey Results (Sept. 2019) (on file).

the Commandant's Training and Readiness (T&R) Manual, the doctrinal publication for legal services training in the Marine Corps.⁴²⁵

After completion of entry-level training, legal services specialists are required to learn the remaining 24 of 31 T&R tasks through on-the-job training or by attending follow-on courses at NJS. The requirement for on-the-job training or additional coursework places emphasis and responsibility at the unit level to ensure legal services specialists are learning these T&R tasks; however, there is currently no tracking resource or commonly used method to capture and account for these additional training requirements. The current lack of accurate tracking of training standards has led to gaps in the training and proficiency of legal services specialists across the force.

Naval Justice School offers follow-on training for legal services specialists that expands their knowledge in critical functional areas and fulfills the training requirements for certain T&R tasks. They include the following courses: Legal Services Administrative Board Recorder, Legal Services Military Justice, Legal Services Administrative Law, Legal Ethics for Paralegals, Paralegal Research and Writing, and Legal Services Court Reporter Course.⁴²⁶

The Legal Services Administrative Board Recorder course prepares Chief Warrant Officers and Staff Sergeants (E-6) and above to serve as recorders during enlisted administrative separation boards. The course covers the procedures for administrative separation boards and the skills needed to represent the Government during those boards. The Legal Services Military Justice course provides military justice instruction in the following areas: charging theories and preparing charge sheets, drafting convening orders, and providing general litigation support to judge advocates. The Legal Services Administrative Law course reviews references that govern administrative separations and investigations, and instructs students how to prepare and process administrative separation packages and administrative investigations. The Legal Ethics for Paralegals course educates students on PR and the references that govern ethical behavior and responsibility. The Paralegal Research and Writing course

⁴²⁵ U.S. MARINE CORPS, NAVMC 3500.82A, LEGAL SERVICES TRAINING AND READINESS MANUAL (C1, 8 Sept. 2015).

⁴²⁶ See Naval Justice School, Annual Course Catalog Fiscal Year 2020 (2019) (on file).

prepares students to conduct legal research using online databases and law library resources as well as draft case briefs and legal memoranda.

The Marine Corps also utilizes its legal services specialists as court reporters. Each LSSS and LSST has an in-house court reporter capability. The Legal Services Court Reporter Course at NJS covers the references and processes of legal proceedings and teaches students to use speech recognition technology to capture the spoken word in order to transcribe and produce verbatim and summarized records of legal proceedings. Once this training is complete, students obtain a necessary military occupational specialty (NMOS) 4422⁴²⁷ (court reporter) and may be assigned to serve as a court reporter with the LSSS. As a separate MOS, 4422 has its own task list in the T&R Manual. The Legal Services Court Reporter Course is specifically developed to meet those T&R requirements.

Legal Services Specialists rely on the 4421 MOS Roadmap as a means to gauge career progression. The MOS Roadmap is a resource published through the Marine Corps Training and Education Command and provides enlisted Marines with a projection of recommended professional milestones throughout their career. Current as of 2018, the 4421 MOS Roadmap lists the following courses as recommended additional MOS training beginning at the staff noncommissioned officer (SNCO) level: Legal Officer Course, Senior Legalman Course, Advanced Law for Paralegals, and the Law Office Managers Course. These courses are not developed for the 4421 MOS, but are instead Service equivalent legal courses at various Navy, Army, and Air Force installations. These courses, however, are only recommended for Marines the grades of Gunnery Sergeant (E-7) through Master Gunnery Sergeant (E-9). There are no recommended skills training courses listed in the 4421 MOS Roadmap for Marines in pay grades of Private (E-1) through Staff Sergeant (E-6). Additionally, the follow-on courses developed from the T&R Manual, and offered at NJS, are not listed in the 4421 MOS Roadmap.

⁴²⁷ A necessary military occupational specialty (NMOS) is a military occupational specialty (MOS) that identifies a particular skill or training that is in addition to a Marine's primary MOS (PMOS) but can only be filled by a Marine with a specific PMOS (e.g., the PMOS for NMOS 4422 (court reporter) is 4421 (legal services specialist). NAVMC 1200.1E, *supra* note 346. An Additional MOS (AMOS) is any existing MOS awarded to a Marine who already holds a PMOS. *Id.* at xii.

While the MOS Roadmap is available for download on the SJA to CMC secured portal, it is not widely circulated among the enlisted uniformed legal community. This leads to inconsistencies in the use of the MOS Roadmap and inefficiencies in the management of follow-on training requirements for purposes of career progression. The MOS Roadmap also does not mention follow-on courses at NJS, which are the only follow-on courses that fulfill certain T&R standards. The mismatch between T&R Manual requirements and lack of MOS Roadmap clarity creates confusion and inefficiency. The 4421 MOS Roadmap should be updated to better align training opportunities with MOS requirements outlined in the T&R Manual. Likewise, once updated, the MOS Roadmap should be widely published to legal services specialists and their supervisors to increase the consistent application of enlisted training throughout the uniformed legal community.

The SNCO Degree Completion Program (SNCODCP) is an educational initiative directed by the Commandant.⁴²⁸ Qualified SNCOs may complete a four-year college bachelor's degree and fill designated billets for certain MOSs. The program is predicated on the need for SNCOs with skills in specific educational disciplines greater than those associated with normal MOS requirements. A SNCO with a paralegal degree would increase the capability set of the uniformed legal community. The uniformed legal community has eight designated billets for AMOS 8015 (Paralegal) for Marine SNCOs who participate in the SNCODCP. Currently, there are two 8015 billets slated to each LSSS, with six of those eight available billets unfilled due to program nonparticipation.⁴²⁹

Initial analysis of the SNCODCP indicates a disinterest to participate in the program. There are no measurable metrics to indicate why participation is low; however, certain inferences can be made. First, the Military Tuition Assistance Program covers 100% of college costs to active duty enlisted personnel who pursue off-duty education to obtain an associate degree, baccalaureate degree, or master's degree. In

⁴²⁸ See U.S. MARINE CORPS, ORDER 1560.21E, STAFF NONCOMMISSIONED OFFICERS DEGREE COMPLETION PROGRAM (SNCODCP) (May 13, 2013).

⁴²⁹ U.S. MARINE CORPS, MARINE ADMIN. MESSAGE 662/18, FISCAL YEAR 2019 STAFF NONCOMMISSIONED OFFICER DEGREE COMPLETION PROGRAM (SNCODCP) SELECTION BOARD (Nov. 21, 2018)

contrast, Marines who participate in the SNCODCP must use their G.I. Bill benefits or personal funding sources to cover their tuition and other associated costs.

Second, along with the financial burden is the two years spent outside of the uniformed legal community to pursue one's degree. Anecdotal information suggests that SNCOs fear this loss of MOS experience will be held against them on promotion boards. This is especially true for Sergeants (E-5) and Staff Sergeants (E-6) who are often placed in the promotion zone shortly after two years' time-in-grade. Without effective incentives to participate in the SNCODCP, Marines who are uninterested will seek other means to obtain off-duty education, and a majority of the 8015 paralegal billets will remain unfilled.

Recommendations:

a. Develop mechanisms to capture and track legal services specialist proficiency at every pay grade that are specifically linked to Training and Readiness Manual requirements.

b. Reconcile the Legal Services Specialist Roadmap with formal training opportunities and Training and Readiness Manual requirements.

c. Identify root causes for lack of participation in further education, such as the Staff Noncommissioned Officer Degree Completion Program, and update the program to address those issues.

6.4 RESOURCING

6.4.1 Background on Billet Structure

In the Marine Corps, judge advocate requirements are driven by Marine Corps organizational force structure and the requirement to fill a proportionate share of non-legal assignments (B-Billets). Total Force Structure Division (TFSD), HQMC, in concert with subject-matter experts and functional advocates, determines the Marine Corps structure for the force through coordination of multiple processes.⁴³⁰

The TFSD evaluates each unit's mission statement and essential tasks and determines the right skills by grade and quantity of military personnel needed to

⁴³⁰ MCO 5311.1E, *supra* note 334.

accomplish that particular unit's mission. The process results in the creation of tables of organization (T/O) that represent the total military personnel required, tabulated by MOS and grade for each unit within the Marine Corps.⁴³¹

6.4.2 Table of Organization (T/O) Requirement Mismatch

The Marine Corps must re-evaluate where its judge advocates and legal services specialists may be best assigned to support uniformed Marine Corps and DON legal mission sets. The Marine Corps has changing requirements for its uniformed legal community that do not match current manpower structure. For example, the Marine Corps has an emerging need for judge advocates to support its cyber law, intelligence law, and special operations capabilities, but HQMC has not created the required manpower structure.⁴³² The CNA is currently studying what legal support the Marine Corps uniformed legal community is expected to provide to the Marine Corps and the DON, and whether the Marine Corps uniformed legal community is best positioned to meet those requirements. The CNA is expected to offer detailed analysis and recommendations regarding appropriate staffing for the effective delivery of uniformed legal support across the force.⁴³³

Since 2012, the Marine Corps has had on average 515 active duty judge advocates.⁴³⁴ These officers are usually assigned to Marine Corps units that have an identified need for a judge advocate as reflected on that unit's Table of Organization (T/O).⁴³⁵ Commanders who require additional assigned legal personnel must either submit a table of organization and equipment change request (TOECR) or an overstaff request.⁴³⁶ A TOECR is a request by a unit commander to permanently change the unit's T/O so that it reflects the need for a specific type of officer or enlisted Marine. This process is time consuming and challenging because it requires reassigning an asset from another unit's T/O to the requesting unit's T/O. In other words, in most

⁴³¹ 506 PANEL REPORT, *supra* note 11, at vii–viii.

⁴³² See section 6.3.3 (discussing the need for the Marine Corps to determine which advanced law degrees its judge advocates should seek to support the Marine Corps and DON missions).

⁴³³ CENTER FOR NAVAL ANALYSES, OPTIMIZATION OF COMMAND LEGAL ADVICE AND LEGAL SERVICES SUPPORT: INTERIM REPORT 1, at 3 (2019).

⁴³⁴ Working Group brief to Executive Review Panel (Sept. 18, 2019) (on file) (containing data from the Marine Officer Inventory Planner (MPP-30)).

⁴³⁵ See MCO 5311.1E, *supra* note 334, at 10-1 to -2.

⁴³⁶ *Id.* at 9-1.

cases if a commander wants to add a Marine judge advocate to the T/O, that Marine judge advocate billet must be compensated by removing another billet of the same grade from within the Marine Corps. It is extraordinarily difficult to add structure, a process commonly referred to as “uncompensated growth.” Because of the difficulty associated with executing a personnel TOECR, commanders submit overstaff requests to DC (M&RA) to meet emerging requirements.

An overstaff request is a temporary solution to add personnel to a unit’s T/O. A commander may favor an overstaff request vice a TOECR because an overstaff request is generally answered more quickly and likely more successful. However, an overstaff assignment may not be filled for longer than three years.⁴³⁷

The Marine Corps currently has 16 Marine judge advocates assigned to units through overstaff requests. These judge advocates are assigned to provide legal support to cyber and intelligence activities, special operations units, and military justice requirements.⁴³⁸ If the supported commands do not submit a TOECR, the Marine Corps will no longer fill these assignments following expiration of the overstaff approval. This will leave the unit without the legal support the commander has identified as necessary to meet the mission.

Recommendation:

*a. Adjust current Marine Corps legal billets to support cyber, intelligence, and information operations, per the Commandant’s Planning Guidance.*⁴³⁹

6.4.3 Top Secret/Sensitive Compartmented Information (TS/SCI) Clearances

The inventory of judge advocates with Top Secret security clearances is inadequate to meet growing demands. In addition, the protracted length of time required to adjudicate a Top Secret clearance requires officers to initiate the process

⁴³⁷ *Id.* at 38.

⁴³⁸ Marine Corps uniformed legal community has overstaff assignments to support U.S. Cyber Command; U.S. Strategic Command; Marine Corps Intelligence Activity; Deputy Commandant for Information; Deputy General Counsel (Intelligence), Department of Defense Office of General Counsel; Joint Special Operations Command; U.S. Marine Corps Forces, Special Operations Command; Victims’ Legal Counsel Organization; and various assignments in support of its military justice function.

⁴³⁹ See MCO 5311.1E, *supra* note 334, at 23–24. The SJA to CMC is the military occupational specialty (MOS) sponsor and is responsible for assisting in the development, implementation, and revision of force structure initiatives by providing advice, information, proposals, and evaluations for assigned occupational fields and MOSs. *Id.* at 11-1.

many months before having the clearance becomes necessary. Therefore, waiting to initiate the process once a clearance is needed is too late for effective and timely delivery of legal support.

Judge advocates who advise commanders on matters involving national security or who prosecute and defend national security cases require appropriate security clearances. As missions and staffing in the cyber and intelligence communities continue to grow and develop, so too will disciplinary matters within these communities. In addition to the legal advisors in the fields of cyber and intelligence, as a matter of readiness, the Marine Corps uniformed legal community must be poised to prosecute and defend cases involving classified material and information. This demand necessarily requires adequate clearances for SJAs to review classified materials to advise commanders on case disposition, for trial counsel to prosecute associated misconduct, and for defense counsel to adequately defend accused Marines.

Judge Advocate Division has attempted to address this issue. First, in September of 2017, after being informed that some current billet holders did not possess the required clearance, the former SJA to CMC encouraged the Marine Corps uniformed legal community to be proactive in its pursuit of Top Secret clearances. In a letter to the LSSS OICs, the SJA to CMC listed all 70 Billet Identification Codes (BICs) designated for Top Secret and observed that it “is imperative that these billet holders immediately contact their local security manager and initiate the security clearance request process.”⁴⁴⁰ A previous SJA to CMC also approved the modification of the MOS Manual to state that Marines rate a TS/SCI clearance by virtue of the Master of International Law (AMOS 4405) or Master of Cyber, Intelligence, and Information Law (AMOS 4417). Specifically, the FY 20 Manual directs that officers with orders to study 4405 or 4417 will submit applications for the SCI security clearance eligibility and that they “must be submitted prior to attendance of an LL.M. program.” The MOS Manual also directs the officer to maintain TS/SCI eligibility after acquiring the AMOS. This modification allows officers to begin the process for the TS before they get to school

⁴⁴⁰ Memorandum from Staff Judge Advocate to the Commandant of the Marine Corps to Legal Services Support Section Officers in Charge et. al., Judge Advocate Security Clearances (Sept. 14, 2017) (on file).

and results in approximately 18 months of lead time before the officers will report to the duty station where they will need their LL.M.s and clearances.

There is a limited number of judge advocates with appropriate clearances to support current and emerging legal requirements involving sensitive and classified information. This shortfall is significant among judge advocates with Masters of Criminal Law (AMOS 4409) who prosecute and defend cases involving sensitive and classified information. Upon receipt of orders to obtain a 4409 AMOS, judge advocates should immediately initiate the security clearance process. Proactive clearance acquisition will ensure a sufficient population of judge advocates ready to provide timely legal support.

Recommendation:

a. Review the security clearance requirements for all judge advocate billets, and mandate Master of Criminal Law (4409) candidates apply for Sensitive Compartmented Information security clearance eligibility prior to attending an advanced law degree program, similar to the requirement for Master of International Law (4405) or Master of Cyber, Intelligence, and Information Law (4417) candidates.

6.4.4 Judge Advocate Division Staffing

The capacity within JAD to effectively execute the SJA to CMC's dual-role has not kept up with the increase in statutory and regulatory responsibilities. To execute the SJA to CMC's functional supervision, JAD needs to be organizationally optimized because its size is based on meeting past requirements, not present ones.

The JAD serves two functions. First, JAD assists the SJA to CMC to provide independent legal advice, counsel, and guidance to the Commandant, HQMC staff, and other Marine Corps personnel on any matter under the SJA to CMC's cognizance. Second, JAD assists the SJA to CMC in the oversight and functional supervision of legal support within the Marine Corps, as well as professional responsibility oversight of individual Marine judge advocates, legal administrative officers, legal services specialists, and all civilian legal support personnel under the SJA to CMC's cognizance.

While the ongoing CNA study is analyzing the organization and inventory of judge advocate billets across the force, consistent observation from interviews, survey

comments, external military law experts, and JAD Branch Head assessment conclude that JAD is undermanned, impeding the effective oversight and supervision of the provision of legal support across the force.

On May 13, 2019, the Secretary significantly expanded the role of the SJA to CMC with the following duties and responsibilities:

SJA to CMC supervises and manages legal matters arising in the Marine Corps in the areas of: Military Justice; Operational and International Law, to include information operations and cyberspace operations; Civil and Administrative Law; Intelligence Law and oversight of intelligence related activities, Special Access Programs and Sensitive Activities; and Legal Assistance. SJA to CMC formulates, supervises, and inspects the use of standard policies and procedures for the delivery of legal services throughout the Marine Corps, with the exception of those matters assigned to DON General Counsel. SJA to CMC is also specifically assigned as the occupational field sponsor and oversees the professional development, training and education of all Marine judge advocates, legal administrative officers and enlisted legal services specialists.⁴⁴¹

While the roles and responsibilities of the SJA to CMC have significantly increased within the last decade, JAD personnel structure has not kept pace. The SJA to CMC supervises the uniformed legal support functional areas through seven JAD Branches, not including the DSO and VLCO, with a structure of 26 officers, 12 enlisted Marines and eight civilians (including four civilian attorneys). Thus, the SJA to CMC executes the role as legal advisor to the Commandant and HQMC agency personnel and exercises functional supervision over the provision of legal support throughout the Marine Corps with a staff of 46.⁴⁴² The data the Working Group collected through

⁴⁴¹ SECNAVINST 5430.27E, *supra* note 16, enclosure 1 at 6–10.

⁴⁴² By general comparison, roughly the same functions are supported by Navy OJAG with 106 uniformed judge advocates, three Legalmen, and 144 civilians. Air Force Judge Advocate HQ and the Air Force Legal Operations Agency, performs a similar (if more expansive role), with 454 uniformed judge advocates, 218 enlisted paralegals and 216 civilians. Members of the Executive Panel have commented on the efficient and effective delivery of legal services by the Air Force, which is enabled at the top by a robust investment of legal personnel at Air Force JAHQ.

surveys and personal interviews suggests that JAD is not optimally structured to fully support and execute both roles.

To support the Commandant and provide functional supervision over the Marine Corps uniformed legal community, JAD personnel have implemented and executed numerous legal requirements based on current and emerging statutory requirements. A small sample from the last three years include: Military Justice Act of 2016 implementation and training for the Marine Corps uniformed legal community and commanders, military justice conviction tracking and reporting under the Gun Control Act, VLC program implementation and staffing, as well as initiating concurrent jurisdiction with civilian authorities to adjudicated juvenile misconduct on military installations.

Consistent with the observations by the Executive Panel, many findings and recommendations in this report are linked to training of commanders with the support of their SJAs. JAD will have primary responsibility to implement these recommendations.

Comments from the internal surveys and assessments from JAD suggests JAD personnel are able to support “Current Operations” with regard to functional supervision and provision of legal support across the force, but cannot effectively support “Future Operations” or “Future Plans.” The following narrative comments illuminate the problem: “(JAD) can (only) engage 5-meter targets” and fend off “alligators closest to the boat.” Assessments from within JAD Branches consistently suggest that the addition of only a few additional personnel would permit improvements in the efficiency and effectiveness of legal support throughout the force. Additionally, required tasks for JAD are only expected to increase. A breakdown of the 2019 Commandant’s Planning Guidance includes 43 express or implied tasks with JAD as Office of Primary Responsibility or Office of Coordinating Responsibility.⁴⁴³

The JAD has had some success in overcoming its structural shortfall and conducting longer-range planning through the MCJAB process whereby subject matter experts and senior judge advocates study issues and provide recommendations to the SJA to CMC. The MCJAB has been generally successful. It has considered 70

⁴⁴³ Implementation Plan for the 38th Commandant’s Planning Guidance & SJA to CMC Task Analysis (on file).

initiatives on a variety of topics, augmenting the efforts of JAD, but implementing many of the approved MCJAB topics requires extensive effort by JAD personnel.⁴⁴⁴

Recommendation:

a. Subject to Center for Naval Analyses (CNA) refinement, determine the appropriate structure for Headquarters, Marine Corps Judge Advocate Division.

6.4.5 Military Judge Assignments

Marine judge advocates seeking assignment as military judges apply to an annual Judicial Screening Board (JSB), with minimum requirements of four years in an active duty criminal or civil litigation position and a leadership tour in criminal or civil litigation as prerequisites.⁴⁴⁵ Successful screening does not automatically result in assignment as a military judge, but the JSB selection remains valid for three years before an applicant must reapply. Consistent with normal rotational requirements, a judge advocate trained as a military judge may or may not serve as a military judge in successive assignments. Additionally, requirements for judge advocates with significant military justice experience may require a military judge to serve as supervisory trial or defense counsel, or as VLC. Working Group interviews of senior judge advocate leadership, internal survey results, and opinions from external military law experts, caution against real or perceived conflicts-of-interest when a military judge leaves the bench to take a military justice litigation billet within the same region.

As occupational field sponsor, the SJA to CMC has recommended to MMOA that military judges be prohibited from executing a Permanent Change of Assignment (PCA) into an LSSS litigation billet within the same installation. This practice does not completely alleviate the concern, and judge advocates remain obligated to identify a potential conflict-of-interest and recuse themselves as appropriate. While recusal from cases or investigations in which a judge advocate may have had prior knowledge may protect the substantive rights of an accused, there remains an appearance problem of a former military judge serving in a litigation billet at or near the same installation.

⁴⁴⁴ See Staff Judge Advocate to the Commandant of the Marine Corps, Report of the SJA to CMC's Judge Advocate Board 2015-2018 (2018) (on file).

⁴⁴⁵ The Judicial Screening Board is composed of senior officers in the Navy JAG Corps and senior Marine judge advocates. See JAGINST 5817.1J, *supra* note 114, at 1–2.

Observations from Executive Review Panel members suggest that military judges with fewer than three years of experience are, in their opinion, insufficiently experienced to address complex litigation at the trial level. Options discussed include assigning military judges for more extended periods of time or even as a permanent assignment.

From a manpower perspective, setting extensive conditions and limitations on the assignments and career progression of military judges could discourage Marine judge advocates with military justice expertise from applying to be military judges. Under current manpower models, Marine judge advocates assigned as military judges remain unrestricted line officers and compete with their peers across the force for promotion and command selection. Also, evidence from interviews and internal surveys suggests that Marine Corps military judges, like most Marine judge advocates, are equally dedicated to the profession of arms as MAGTF officers as they are to the profession of law as judge advocates. Further refinement by CNA or force design development through the Commandant's Planning Guidance may suggest a manpower model for Marine Corps military judges that incentivizes extended tours or permanent assignment as judges. For example, Marine judge advocates at the O-6 level with significant military justice expertise and experience might serve as military judges at the trial or appellate level through a retire-retain selection process.

As a more immediate measure to address the concern of the appearance of a conflict-of-interest for military judges practicing in the same region, JAD should consider the impact of an MMOA prohibition on military judges receiving a follow-on assignment in a litigation billet within the same region or judicial circuit after leaving the bench.

While there is no evidence to establish a correlation between cases reversed on appeal due to trial court error and judicial inexperience, recognition of the concern that military judges with fewer than three years of experience may not be as equipped to address complex litigation is prudent.

Recommendations:

a. Develop manpower and assignment policies to reconcile the need for experienced military judges with the institutional goal of promoting well-rounded Marine Air-Ground Task Force officers.

b. Explore offering Marine Corps Lieutenant Colonels (O-5) and Colonels (O-6) the opportunity to serve as military judges under a retire-retain program.

c. Continue the current policy of not assigning military judges leaving the judiciary to litigation billets in the same geographic location.

6.4.6 Defense Services Organization Resources

The Working Group requested input from the Marine Corps Defense Services Organization (DSO) for concerns it may have regarding the areas the Secretary identified for review. Additionally, the Working Group leader personally interviewed the Chief Defense Counsel (CDC). The CDC identified the following items:

- Lack of defense investigators
- Lack of personnel with sufficient qualifications
- Lack of sufficient detailing authority
- Lack of its own independent budget
- Lack of membership on the Marine Corps Judge Advocate Board (MCJAB).

The CDC identified the lack of investigators assigned to her various DSO offices.⁴⁴⁶ Normally, the Marine Corps does not provide permanent investigators to the DSO. However, a defense counsel may ask the commander or the military judge for an investigator to be assigned on a case-by-case basis.⁴⁴⁷ If the defense counsel is able to show a need, the commander or military judge may order an investigator be assigned to support the defense counsel.

The CDC requested that one investigator be assigned to each of the DSO's four regional offices to assist its judge advocates in preparing court-martial cases.⁴⁴⁸ Neither defense counsel nor the legal services specialists assigned to support the DSO receive specialized training in investigative techniques. The Office of the Regional Trial Counsel, responsible for prosecuting cases, have two investigators assigned to each of the four RTC offices, for a total of eight investigators.⁴⁴⁹

⁴⁴⁶ Memorandum from Chief Defense Counsel of the Marine Corps to Comprehensive Review Board, Narrative Concerning Defense Services Organization Requirements and Shortfalls 1 (Sept. 26, 2019) [hereinafter CDC memo].

⁴⁴⁷ See MCM, *supra* note 148, R.C.M. 703(d).

⁴⁴⁸ CDC Memo, *supra* note 446, at 1.

⁴⁴⁹ MCO 5800.16 LSAM, *supra* note 301, volume 2, at 7.

In April 2019, the DoD indicated it would “direct the Services to develop an appropriate defense [services] investigator capability on a trial basis for a three-year term.”⁴⁵⁰ Additionally, there is a provision in the Senate version of the FY 20 NDAA that requires the Service Secretaries to establish a three-year pilot program on defense investigators in the military justice system.⁴⁵¹ The Navy currently employs civilian “litigation support specialists” as defense investigators. For the Navy, the total cost of eight litigation support specialists is \$1.3M per year, which reflects salary, benefits, permanent change of station travel, housing, and cost of living adjustments.⁴⁵²

Next, the CDC argues for full control over the personnel assignments process to include the duration of assigned DSO personnel because she asserts that the DSO does not receive judge advocates with the appropriate qualifications to serve as supervisory attorneys.⁴⁵³ Under regulation, the regional defense counsel (RDC) is supposed to be serving in or selected to the grade of O-5 and will normally possess an advanced law degree in criminal law (AMOS 4409).⁴⁵⁴ A senior defense counsel (SDC) is a judge advocate preferably serving in or selected to the grade of O-4, normally with AMOS 4409.⁴⁵⁵ These requirements are similar to the requirements to serve as regional trial counsel (RTC) and senior trial counsel (STC).⁴⁵⁶

The DSO has four regional offices: Pacific, West, East, and National Capital Region. Many of the DSO’s supervisory attorneys do not have advanced law degrees in criminal law. One of four RDCs and six of ten SDCs lack advanced degrees in criminal law, but that RDC has previously served as a defense counsel.

There are four Regional Trial Counsel Offices in the same locations as the DSO regional offices. Many of these offices have similar staffing issues in that not all RTCs or STCs have advanced degrees in criminal law. Two of four RTCs and six of eleven STCs lack advanced degrees in criminal law.

⁴⁵⁰ SEXUAL ASSAULT ACCOUNTABILITY AND INVESTIGATION TASK FORCE, REPORT 10 (2019) [hereinafter SAAITF REPORT].

⁴⁵¹ National Defense Authorization Act for Fiscal Year 2020, S.1790, 116th Cong. § 560 (2019).

⁴⁵² SAAITF REPORT, *supra* note 450, at 39.

⁴⁵³ CDC Memo, *supra* note 446, at 1–2.

⁴⁵⁴ MCO 5800.16 LSAM, *supra* note 301, volume 3, at 8.

⁴⁵⁵ MCO 5800.16 LSAM, *supra* note 301, volume 3, at 9.

⁴⁵⁶ MCO 5800.16A LEGADMINMAN, *supra* note 301, at 1-11; 1-17 *cancelled by* MCO 5800.16 LSAM, *supra* note 301.

The Marine Corps assignment process for judge advocates is discussed in section 6.2.5. JAD (JPI) personnel coordinate with MMOA to determine what assignment to give a judge advocate, e.g., assignment as the RDC at LSSS-West located at Marine Corps Base Camp Pendleton. However, when the judge advocate reports for duty, the LSSS OIC may re-assign the judge advocate a different duty depending on the OIC's assessment of where that judge advocate may best help accomplish the LSSS mission and what assignments will benefit that judge advocate's career progression.⁴⁵⁷

The DSO has input and some control regarding personnel assignments to the DSO offices. The CDC consults with JAD to identify key DSO leadership positions, to include the RDCs, DCAP, and the CDC's eventual successor.⁴⁵⁸ When the OIC of the LSSS or LSST determines who to assign to the DSO, the LSSS OIC is required to consult with responsible RDC to set an established tour length for the assigned judge advocate or legal services specialists.⁴⁵⁹ Normally, SDCs, defense counsel, and defense enlisted support personnel are assigned for 18 months with the anticipated rotation date memorialized in writing.⁴⁶⁰ Further, if the LSSS OIC decides to rotate assigned defense counsel early without the concurrence of the cognizant RDC, then the OIC must notify the SJA to CMC, through the CDC, as to why the rotation is necessary.⁴⁶¹ Ultimately, if the issue is not resolved locally, the SJA to CMC will adjudicate a dispute.⁴⁶²

Next, the CDC states that an independent budget and sufficient personnel to manage the budget would allow the DSO to: 1) assign defense counsel to cases as necessary without the need to coordinate with convening authorities;⁴⁶³ 2) contract for expert assistance without the need to justify the expense to the commander who

⁴⁵⁷ The officer is actually ordered to report for duty to the Commanding General of that unit. The Commanding General has discretion to re-assign that judge advocate to other duties based on that general's needs. For example, a company grade judge advocate assigned to LSSS-West may be reassigned by the Commanding General, Marine Corps Installations-West, to serve as a company commander. See Section 6.4.2 Table of Organization (T/O) Mismatch.

⁴⁵⁸ MCO 5800.16 LSAM, *supra* note 301, volume 3, at 11.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at 12.

⁴⁶² *Id.*

⁴⁶³ CDC Memo, *supra* note 446, at 2.

convened the court-martial;⁴⁶⁴ and, 3) control its own training and travel budget for matters not related to courts-martial.⁴⁶⁵ The first two items will be addressed together as they deal with the funding of courts-martial.

In courts-martial, the government and defense are entitled to an equal opportunity to obtain witnesses and evidence. This principle is codified in Article 46, UCMJ and animated in the Rules for Courts-Martial. For example, Rule for Court-Martial 703(b) states that each party is entitled to the production of any witness whose testimony would be relevant and necessary.⁴⁶⁶

The convening authority is responsible for paying all expenses related to the court-martial.⁴⁶⁷ If DSO personnel determine they need to obligate Government funds, they submit a request to the convening authority, usually via trial counsel.⁴⁶⁸

The RDCs have authority to assign defense counsel to any case within the supported region. Normally, defense counsel are only assigned to cases within the LSST to which they are assigned.⁴⁶⁹ If the RDC determines it is necessary to assign a defense counsel to a case that will require that defense counsel to incur travel expenses, then the RDC must first obtain approval from the convening authority who will pay for the travel expenses.⁴⁷⁰ If the DSO had its own budget, the CDC and the RDC could assign counsel to cases as they deemed appropriate without the need to request the responsible commander's approval.

⁴⁶⁴ *Id.* at 3.

⁴⁶⁵ *Id.* at 2.

⁴⁶⁶ MCM, *supra* note 148, R.C.M. 703(b).

⁴⁶⁷ JAGMAN, *supra* note 100, 1-95 to -96. The military does not have standing courts with their own budgets.

⁴⁶⁸ *Id.* at 1-95.

⁴⁶⁹ MCO 5800.16 LSAM, *supra* note 301, volume 3, at 15.

⁴⁷⁰ *Id.* "Defense counsel are normally only detailed to represent an accused assigned to an organization that is supported by that defense counsel's LSST either as a consequence of geography or through a specific request for legal services. However, a defense counsel may be detailed to represent an accused assigned to an organization that is not normally supported by the defense counsel's LSST on a case-by-case basis. Factors that may necessitate such a detailing include, but are not limited to, the following: unique requirements of the case; supporting units and organizations without defense counsel; conflict-of-interest cases; gaps in defense counsel coverage; and savings by using a counsel from another location. If such detailing decisions will result in non-local travel costs as defined by the Joint Federal Travel Regulations beyond those implicit in the request for legal services, then prior to detailing a defense counsel to the case, the authorized detailing authority shall get approval from the Convening Authority (CA) or his or her SJA for travel costs associated with that detailing decision. If the CA will not agree to fund the non-local travel costs associated with the detailing decision the issue will be forwarded to the CDC for resolution. If the CDC cannot resolve the funding issue, it will be forwarded to the SJA to CMC for final decision." *Id.*

Similarly, a defense counsel who requests expert assistance on a case submits a request to the convening authority via the trial counsel.⁴⁷¹ Defense counsel are required to justify requests to the convening authority by explaining why such assistance is necessary.⁴⁷² If the convening authority denies the request, the defense counsel may file a motion with the military judge.⁴⁷³ The CDC argues that giving the DSO its own budget would allow the CDC to determine which cases require expert assistance without the need to justify its request to the convening authority. Additionally, such a request would relieve military judges from having to rule on motions from defense counsel if a convening authority denies the initial request.

If defense requests are approved, then the local LSSS or LSST is responsible for the administrative steps necessary to pay the expenses as well as coordinating travel arrangements for expert assistants and witnesses, to include airfare and lodging.

The CDC's final budgetary request argues that the DSO should be able to fund its own training opportunities and operational travel.⁴⁷⁴ Currently, JAD provides funds to the Office of the CDC. JAD receives its funding from HQMC.⁴⁷⁵ The LSSS provides training and operational travel funds to the RDC office for which it is responsible. Each LSSS receives funds from the supported Marine Corps Installation Commander.⁴⁷⁶ Additionally, the funds JAD provides to the Office of the CDC may be used to support training and operational travel for the RDC offices.⁴⁷⁷

The Marine Corps uniformed legal community works to ensure funding is shared fairly among its litigation organizations (TSO, DSO, VLCO). By regulation, the DSO receives "equitable distribution, commensurate with mission requirements, between the

⁴⁷¹ JAGMAN, *supra* note 100, at 1-98.

⁴⁷² MCM, *supra* note 148, R.C.M. 703(d)(1).

⁴⁷³ MCM, *supra* note 148, R.C.M. 703(d)(2).

⁴⁷⁴ "The DSO currently has to request funding from Judge Advocate Division (JAD) in order to fund travel for training, RDCs are reliant on the LSSS to fund necessary site and training travel, and the Litigation Attorney Advisor (LAA) similarly requires LSSS monies to execute their duties. Our west coast LAA has not even traveled annually to Japan; the west coast LSSS has announced that only two RDC trainings will be funded this year, and the Pacific region essentially does not execute RDC training because of funding shortfalls at the LSSS." CDC Memo, *supra* note 446, at 2.

⁴⁷⁵ MCO 5800.16 LSAM, *supra* note 301, volume 3, at 4; *see also id.* at 6-7 (The CDC conducts inspections and reports back to the Staff Judge Advocate to the Commandant of the Marine Corps the availability of funds and resources. Also, the CDC coordinates with Judge Advocate Division to ensure the availability of headquarters level funding for training).

⁴⁷⁶ *Id.* at 8.

⁴⁷⁷ *Id.* at 6.

defense function and the prosecution function with respect to the following: assignment of attorneys and enlisted support staff, access to resources, capabilities, and facilities, seats at continuing legal education courses, and training funds.”⁴⁷⁸ In its budget submission for FY 20, JAD proposed allocating approximately \$410,000 to support training for the Office of the CDC and \$400,000 to support training for the prosecution function within Marine Corps.⁴⁷⁹

The CDC recommended that she be assigned as permanent member of the Marine Corps Judge Advocate Board (MCJAB) because the CDC’s exclusion provides a negative perception to the public and to defense clients.⁴⁸⁰

Under the MCJAB Charter, the CDC is not a permanent member of the MCJAB.⁴⁸¹ Many headquarters-level leaders are not a part of the MCJAB. Notably, the OIC VLCO is not a member and neither are the JAD Branch Heads.

Although the CDC and the OIC, VLCO are not members of the MCJAB, they are not without a means to communicate with the SJA to CMC. The SJA to CMC is the direct supervisor for both the CDC and OIC, VLCO. Both the CDC and OIC VLCO have a duty to report at least annually to the SJA to CMC regarding the provision of legal services in their respective practice areas.⁴⁸²

Recommendations:

- a. Resource a pilot program for Defense Services Organization investigators.*
- b. Assess the Marine Corps inventory of judge advocates with advanced degrees in criminal law (AMOS 4409), subject to validation and refinement by the Center for Naval Analyses (CNA) study.*
- c. Continue current processes to resource defense expert assistance in courts-martial; ensure convening authority training emphasizes the convening authority’s*

⁴⁷⁸ *Id.*

⁴⁷⁹ Judge Advocate Div., FY 20 Budget Submission (2019) (on file).

⁴⁸⁰ CDC Memo, *supra* note 446, at 2.

⁴⁸¹ See Memorandum from Staff Judge Advocate to the Commandant of the Marine Corps to Distribution List, Charter for the Marine Corps Judge Advocate Board and Operational Advisory Groups (Nov. 17, 2015) (on file).

⁴⁸² MCO 5800.16 LSAM, *supra* note 301, volume 3, at 5–6 (The CDC is to report to SJA to CMC on provision of defense services), volume 4, at 6 (The OIC VLCO is to report to SJA to CMC on provision of victims’ legal services.).

responsibilities to ensure equal access to evidence and witnesses per Article 46, Uniform Code of Military Justice.

d. Continue the current processes for travel and training funding to the Defense Services Organization and its regional defense services offices.

e. Add the Chief Defense Counsel to the Marine Corps Judge Advocate Board, when appropriate.

6.4.7 Victims' Legal Counsel Organization Resources

The Working Group requested input from the Marine Corps VLCO for concerns it may have regarding the areas the Secretary identified for review. The OIC VLCO identified shortfalls in VLCO capability:

- Lack of sufficient VLC capacity at the two installations with the largest military justice dockets: Camp Lejeune and Camp Pendleton
- Lack of civilian paralegal support at Marine Corps Air Station (MCAS) Iwakuni
- Lack of civilian capability at VLCO headquarters
- Lack of VLC capability in anticipation of Congress mandating the Services provide VLC services to domestic violence victims.

The VLCO provides legal advice, legal counseling, and representation to victims of sexual assault, domestic violence, and other qualifying offenses,⁴⁸³ while ensuring that victims' rights are protected at all stages of the investigation and throughout the military justice process.⁴⁸⁴

Camp Lejeune is the headquarters for the eastern region of the VLCO. The Regional victims' legal counsel (RVLC), two VLC, and a civilian paralegal make up the Camp Lejeune Office.⁴⁸⁵ The eastern region also has offices at MCAS Cherry Point and Marine Corps Recruit Depot (MCRD) Parris Island, each consisting of one VLC and one paralegal. The Camp Lejeune office is the busiest in the region and the two VLC

⁴⁸³ Qualifying offenses include but are not limited to robbery, assault or cruelty and maltreatment. USMC VLC MANUAL, *supra* note 421, at 4.

⁴⁸⁴ *Id.* at 3. See also 10 U.S.C. §§ 1044, 1044e, 1565b (2018) (directing the military services to provide legal representation to victims of sexual assault and other offenses).

⁴⁸⁵ Memorandum from Deputy Officer in Charge, Victims' Legal Counsel Organization, to Working Group, Victims' Legal Counsel Organization Narrative for Tactical Team Consideration 4 (Sept. 16, 2019) (on file [hereinafter VLCO DOIC Memo]).

routinely carry just under 40 cases.⁴⁸⁶ The proximity of MCAS Cherry Point to Camp Lejeune allows the RVLC to assign cases to the MCAS Cherry Point VLC as necessary to control the VLC caseload at Camp Lejeune.⁴⁸⁷

Camp Pendleton is the headquarters for the western region of the VLCO. The RVLC, one VLC, and a civilian paralegal make up the MCB Camp Pendleton office.⁴⁸⁸ There is also an Auxiliary VLC at Camp Pendleton.⁴⁸⁹ The western region has offices at MCAS Miramar, California; Marine Corps Air Ground Combat Center Twentynine Palms, California; and MCAS Yuma, Arizona.⁴⁹⁰ The Camp Pendleton office is the busiest, yet has only two counsel including the RVLC.⁴⁹¹ Miramar-based VLC are therefore often cross-detailed to Camp Pendleton cases.⁴⁹²

The VLCO has hired a number of civilian paralegals to assist VLC. They are proficient and have acted as the continuity of experience and corporate knowledge for the organization. VLC are able to focus on their clients, research, outreach, training, and important advocacy matters because these paralegals are able to manage the day-to-day administrative burdens of the office.⁴⁹³

The VLC office at MCAS Iwakuni does not have a civilian paralegal. The VLC office has access to a legal services specialist, but his primary duty is to support the local legal assistance office. A dedicated VLCO civilian paralegal would prevent conflicts-of-interest issues from occurring between the legal assistance and VLC offices, which are not uncommon given that sexual assault allegations and marital separations sometimes occur near one another in time. The OIC VLCO believes a dedicated civilian paralegal would better support the sensitive nature of client intake and improve the professional nature of the office.⁴⁹⁴

The OIC VLCO identified a need for a civilian Legal Assistance Advisor (LAA) at the headquarters-level to assist in addressing issues with DoD and Congress, to assist

⁴⁸⁶ *Id.* at 8.

⁴⁸⁷ *Id.* at 4.

⁴⁸⁸ *Id.* at 5.

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ *Id.* at 8-9.

⁴⁹⁴ *Id.* at 9.

with appellate issues and litigation, and to ensure continuity and develop an enduring expertise.⁴⁹⁵ A civilian employee would allow for VLCO continuity in the same manner as civilian attorneys at JAD's International and Operational Law Branch (JAO), Legal Assistance Branch (JLA), and Civil and Administrative Law Branch (JCA).⁴⁹⁶ Additionally, a civilian attorney would also support RVLC and VLC in the field similar to how the RTC's four and the DSO's two LAAs assist the trial and defense counsel.⁴⁹⁷ The VLCO is the only military justice litigation practice area and organization in the Marine Corps without this resource.⁴⁹⁸

The John S. McCain NDAA for FY 19 required the Secretary of Defense to submit a report on the feasibility and advisability of expanding eligibility for the VLC Programs to include victims of domestic violence.⁴⁹⁹ In response, the Marine Corps VLCO estimates a need for nine additional VLC to adequately handle the increased case load that would be produced if VLC are required to represent domestic violence victims.⁵⁰⁰ The House version of the FY 20 NDAA proposes mandating legal services to domestic violence victims who request VLC services in the same way that VLC are currently assigned to represent sexual assault victims.⁵⁰¹

Recommendations:

- a. Further assess the staffing of the Victims' Legal Counsel Offices at Marine Corps Base Camp Lejeune and Marine Corps Base Camp Pendleton.*
- b. Authorize a civilian paralegal at Marine Corps Air Station Iwakuni.*
- c. Hire a civilian litigation attorney advisor at Victims' Legal Counsel Organization headquarters.*

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 534, 132 Stat. 1636, 1759 (2018).

⁵⁰⁰ VLCO DOIC Memo, *supra* note 485, at 10.

⁵⁰¹ National Defense Authorization Act for Fiscal Year 2020, H.R. 2500, 116th Cong. § 542 (2019).

d. Determine if additional victims' legal counsel are required in anticipation of Congress mandating the provision of victims' legal counsel services to domestic violence victims.

6.4.8 Case Management System (CMS)

In anticipation of the 2010 DoD IG's findings as to systemic failures in the tracking of courts-martial, the SJA to CMC implemented and mandated a single web-based tracking system for courts-martial.⁵⁰² CMS was designed and implemented to respond to an immediate need for the Marine Corps legal community to have a real-time, common operating picture of the status of courts-martial within the Marine Corps. CMS was designed as a case tracking-system, not as a data management system. Favoring the practical and affordable over the exquisite and expensive, CMS was fielded in record time and built in-house at a cost of approximately \$60,000. Built to address the core problem, CMS was successful in bringing visibility and accountability relative to the tracking of courts-martial. When CMS was implemented in February 2010, there were 41 courts-martial in the post-trial process that had exceeded the 120-day time-limit requirement from adjournment to convening authority's action.⁵⁰³ By June 2010, there were less than two.⁵⁰⁴

Over time, the requirement to add documents and data into CMS degraded its capability, utility, and functionality. Additionally, as currently designed, CMS is inadequate to address recent congressional requirements for case processing and data management to include the requirement that information be publically accessible.

Specifically, Congress directed the Secretary of Defense to:

[P]rescribe uniform standards and criteria for conduct of each of the following functions at all stages of the military justice system, including pretrial, trial, post-trial, and appellate processes, using, insofar as practicable, the best practices of Federal and State courts:

(1) Collection and analysis of data concerning substantive offenses and procedural matters in a manner that facilitates case management and decision-

⁵⁰² See U.S. MARINE CORPS, MARINE ADMIN. MESSAGE 62/10, IMPLEMENTATION OF CASE MANAGEMENT SYSTEM FOR COURTS-MARTIAL (Feb. 1, 2010) (The Case Management System went on-line on December 23, 2009 and the SJA to CMC directed transition to CMS for all courts-martial by February 17, 2010.).

⁵⁰³ See *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F 2006).

⁵⁰⁴ SAP 2010-15, *supra* note 314, at 22 n.61.

making within the military justice system, and that enhances the quality of periodic reviews under section 946 of this title (article 146).

(2) Case processing and management.

(3) Timely, efficient, and accurate production and distribution of records of trial within the military justice system.

(4) Facilitation of access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records.⁵⁰⁵

It is clear, through community perception via internal and external surveys that CMS is inadequate to meet the needs of the DON. The current version of CMS is an IBM Lotus Notes, web-based application designed to perform many of the requirements in Articles 140a and 146a of the UCMJ; however, the CMS platform is outdated compared to current database capabilities. Additionally, it has lost functionality for long periods of time due to system failures, and it lacks the public accessibility required under Article 140a, which takes effect in December 2020.

From a user perspective, CMS does not adequately aid trial services offices in the preparation and processing of their cases. Dates of major milestones, basic case information, and basic document uploads can be captured in the system; however, detailed case processing information, checklists, access to references, and many other features do not exist in CMS. As a result, trial counsel and legal services specialists maintain external files, both electronic and documentary, to assist in the processing of their caseloads, which leads to redundancies in records management requirements and increases the workload in trial services offices.

The JAD JPI Branch is working with Navy OJAG's Technology, Operations & Plans Division (Code 67) to develop an integrated Navy-Marine Corps case management system as an interim solution to meet the December 2020 data requirements outlined in Articles 140a and 146a, UCMJ. This system is a web-based system on a SharePoint platform. Additionally, the Navy and Marine Corps legal

⁵⁰⁵ Article 140a, UCMJ; 10 U.S.C. § 940a (2018). Article 146a requires the Service JAGs and the SJA to CMC to track specific date such as: compliance with processing goals; convictions reversed because of unlawful command influence (UCI) or denial of speedy trial rights; provisions within the UCMJ declared unconstitutional; and other administrative deficiencies (e.g., loss of a court-martial record) that led to appellate court reversals. *Id.*

communities are working collaboratively on a permanent solution to design a case-tracking and data management system that meets the needs of both Services.

Recommendation:

a. Resource the expedited acquisition of a modern, secure military justice data collection and case management system that is compliant with statute and Department of Defense requirements. This is essential to improve the efficiency of the Department of the Navy military justice system, mitigate the risks of legal error caused by poor case management, facilitate more accurate and informative responses to internal and external requests for data, and enable effective trend analysis.

6.4.9 Court Reporting Technology

The Marine Corps court reporting program has undergone numerous transitions and innovations over the last twelve years. In 2007, JAD officially ended the long-running stenography program and terminated MOS 4429 (Stenographer) in order to transition to voice recognition technology and address career progression and manpower issues associated with the 4429 MOS.⁵⁰⁶ As a result, all Marines who previously held the 4429 MOS were subsumed into the 4421 MOS. The NMOS 4422 (Court Reporter) was created to identify and train legal services specialists to be court reporters. Simultaneous to these administrative changes, Marines assigned to NJS developed the Legal Services Court Reporter Course to train legal services specialists how to use voice recognition technology and closed-mask dictation to capture the spoken word and produce verbatim and summarized records of trial. The court reporter course has since seen gradual upgrades in software and hardware capabilities, including the use of real-time dictation during court proceedings.

The Department of Defense implementation of the Military Justice Act of 2016 (MJA 16) created a requirement to provide audio recordings to interested parties with appropriate redactions. Marine Corps court reporting practice at the time did not provide this capability. As a result, the SJA to CMC, with recommendations from an

⁵⁰⁶ Marines with the 4429 MOS attended civilian stenography school for two years and were then “fenced off” from B-Billet assignments, which made most of the stenographers non-competitive for promotion.

OAG, implemented the use of artificial intelligence assisted transcription in all Marine Corps courtrooms to meet the MJA 16 requirement.

In coordination with the Navy, commercial internet services are set to be installed in all Navy and Marine Corps courtrooms during FY 20. Commercial internet service will provide the capability needed to optimally operate artificial intelligence assisted transcription. While initial reports show accurate and quality results from using artificial intelligence assisted transcription, a more detailed and informative assessment awaits additional data collection from this ongoing initiative.

Recommendations:

a. Expedite appropriate waivers from information technology policies, or develop alternatives to the same, to implement modern court-reporting technologies and software to include establishing commercial “white lines” (i.e., non-secure) in courtrooms to facilitate the use of artificial intelligence assisted transcription.

b. Maintain a court reporting system capable of operating forward or in austere environments; consider stenographers.

6.4.10 Courtroom Security

The Executive Review Panel noted that physical security in Marine Corps courtrooms is not up to a standard comparable to civilian courtrooms, whether federal or state.⁵⁰⁷ The Panel’s observation is accurate and JAD has studied and implemented options to enhance the physical security of courtrooms with infrastructure improvements, assignment of security personnel and changes to policy. Continued development and implementation of courtroom security initiatives are ongoing, and require coordination with other sections of HQMC and adjustment of Marine Corps funding priorities.

In April 2016, the SJA to CMC convened an Operational Advisory Group (OAG) to study courtroom security issues and courses of action. The OAG considered three issues on the topic: 1) Improving Courtroom Facilities; 2) Sourcing Courtroom Security Personnel; and 3) Standardizing Procedures for Posting Security. The OAG noted that

⁵⁰⁷ Marine Corps courtroom security procedures are informed by guidance from the Office of the Judge Advocate General, but that guidance is not controlling. See JAG/CNLSCINST 5530.2D, *supra* note 143.

unlike civilian facilities, Marine Corps facilities do not employ permanent physical security personnel and screening procedures, or standard physical security infrastructure, such as access control points, cameras, or separate government and defense witness waiting areas. In a survey of Marine Corps courtroom facilities, 48% were assessed to lack effective exterior access control and 52% lacked effective interior control, in addition to other shortfalls. The OAG identified that courtroom security personnel falls within an installation commander's "security force," as that term is defined in the Marine Corps Physical Security Manual, with installation commanders having broad discretion to implement physical security.⁵⁰⁸ Standards for physical security personnel are also addressed by the Marine Corps Law Enforcement Manual, defining the role of the Provost Marshal's Office to support trial security upon request.⁵⁰⁹ Additionally, upgrades of courtrooms with enhanced physical security measures such as secure access points, screening areas, security cameras, and cypher locks for controlled spaces, are generally funded at the installation level based on approval of prioritized facilities and infrastructure projects.

In August 2016, as a short-term solution to fund physical security infrastructure, the SJA to CMC approved the use of end-of-year FY 16 Sexual Assault Prevention and Response (SAPR) funds for courtroom security improvements. Funds were dispersed based on priorities identified by the LSSS OICs. The funding permitted some improvements to courtrooms with highest priority need, using a source of funding available specifically for military justice matters, but did not affect the installation's priorities for facilities and infrastructure development. At the Service level, priorities for installation funding are addressed by the Marine Installations Board (MIB) and Installation Advisory Groups (IAGs), but without an identified requirement, requests for physical security improvements generally have been a lower priority for funding. In the wake of Hurricane Florence in 2018, funding priority for many infrastructure development projects was reduced in favor of hurricane damage repair and recovery.

To address the issue of personnel assigned for courtroom security, in October 2016, the SJA to CMC requested Deputy Commandant for Plans, Policies and

⁵⁰⁸ U.S. MARINE CORPS, ORDER 5530.14A, MARINE CORPS PHYSICAL SECURITY PROGRAM MANUAL (June 5, 2009).

⁵⁰⁹ U.S. MARINE CORPS, ORDER 5580.2B, LAW ENFORCEMENT MANUAL (CH-2, Dec. 30, 2015)

Operations (DC PP&O) to assist with development of Marine Corps standards and policy to provide security for military justice proceedings through updating the Physical Security Manual and Law Enforcement Manual. JAD continues to engage with PP&O personnel as they conduct their periodic review of these Marine Corps Orders.

Recommendation:

a. Resource improved courtroom security and associated infrastructure to ensure trial courtrooms meet required physical security standards; regarding state-of-the-art courtroom security requirements, consider coordinating with the U.S. Marshals Service.

6.5 UNLAWFUL COMMAND INFLUENCE

6.5.1 Command Team Training

In accordance with the UCMJ, the Marine Corps puts commanders at the center of legal processes, especially the administration of military justice. Failure to ensure justice is administered fairly harms the Department's mission of providing trained and ready forces, and erodes the trust of the American people. While judge advocates play a vital role in informing commanders' decisions, it is commanders who make decisions commensurate with their authority, and it is commanders who are both responsible and accountable for those decisions.

Commanders would benefit from additional training and education. Research further indicates the Marine Corps can, and should, provide better oversight of the administration of military justice—especially in cases where commanders fall short of performing to standard. Some commanders' actions resulted in cases being dismissed with prejudice, overturned on appeal, or resolved in a manner that eroded public trust.⁵¹⁰

⁵¹⁰ In addition to preventing UCI, the commander's central role in the military justice process requires education on a range of actions that can negatively influence the fair administration of justice, and thereby damage trust in the system. Missteps can occur when commanders decide pre-trial confinement, or when they authorize searches and seizures. MCM, *supra* note 148, R.C.M. 305 and 315. Convening authorities can unintentionally disqualify themselves by becoming accusers, improperly handle requests to fund expert assistance, improperly decide post-trial matters, or engage in other activities that harm the process. *Id.* at 601(c), 703(d), and 1110.

Due to a commander's critical responsibility, unlawful command influence is an over-arching concern for commanders at all levels. It undermines the fairness and credibility of the system and interferes with the proper administration of justice. There is lawful and unlawful command influence, and clear understanding of the difference is imperative for commanders, judge advocates, and staffs. Commanders, especially when acting as Convening and Disposition Authorities, have lawful limits on their actions. Ensuring good order and discipline is within the authority of a commander. In some cases, courts found commanders' efforts to communicate their expectations of good order and discipline may have improperly influenced later military justice actions. As such, training must include case study analysis that focuses upon the specific commander, judge advocate, and/or staff actions that negatively impacted military justice administration, and thus, detracted from both good order and discipline, and mission readiness.

Commanders may not fully understand their responsibilities in the impartial administration of military justice.⁵¹¹ Some data indicates commanders may not understand the nuance between mentoring junior commanders and creating actual or apparent unlawful command influence. Additionally, the data suggests commanders may not understand the depth and breadth of their SJA's responsibilities. Like Navy commanders, Marine Corps commanders need to be "better educated clients," such that they can fully explore all the "right questions" and better exercise their

⁵¹¹ Commanders have two responsibilities within the military justice system: Commanders serve a quasi-judicial role, and commanders are charged with maintaining good order and discipline.

As quasi-judicial officers, commanders have a responsibility to ensure the rights of both crime victims and those accused of crime are protected. See Art. 6b, and 46, UCMJ, 10 U.S.C. §§ 806b, 846. From the first allegation of misconduct to the conclusion of the post-trial process, commanders must remain impartial in the administration of military justice. For example, the Code prohibits commanders who have more than an official interest in a case from taking an active role in that court-martial. See Art. 22(b) and 23(b), UCMJ, 10 U.S.C. §§ 822(b), 823(b); see also *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003) ("In the performance of post-trial duties, a convening authority [the commander] acts in a 'role . . . similar to that of a judicial officer'" (citations omitted)).

However, this does not mean that commanders have no interest in the outcomes of cases. Commanders are charged with maintaining good order and discipline. The military justice process ensures those accused receive due process and that those found guilty are held appropriately accountable. MCM, *supra* note 148, App'x 2.1, ¶ 2.1. It is precisely because of these dual responsibilities that commanders must receive appropriate training on the nature and scope of a commander's role in the military justice process to ensure it is applied fairly and achieves just results.

responsibilities to supervise and oversee the actions of their SJAs. Marines trained to standard can be rewarded when they perform to standard—and held accountable when they fail to meet the standard.

Convening authorities already meet annual requirements for ethics, computer security awareness, classified materials handling and other training; however, no annual legal training is required. Training modules, derived from actual court opinions, should be provided to all convening authorities as a portion of annual training.

The Marine Corps Aviation Community’s handling of accidents could provide an example of how to address missteps in military justice.⁵¹² If the military justice community were to adopt similar procedures to address missteps, it could provide additional opportunity to educate the force—particularly commanders—and “cultivate a culture of continuous learning.”⁵¹³

Effecting change requires totality of effort. Educating the force on authority and responsibility, without enforcing accountability, is insufficient. Examining cases in which courts found unlawful command influence could help ensure those who are entrusted with the authority and responsibility of leading Marines both know the standard, and get refreshed at a periodicity that reinforces the importance of the topic. Once trained, commanders can be held accountable. The Marine Corps owes America’s sons and daughters a system of military justice, executed by educated and well-informed commanders, that is not only just, but also perceived as just.

Recommendations:

a. Deliver training on military legal matters (military justice, ethics, etc.) during every formal professional military education course using case studies.

b. Conduct annual military justice refresher training for every court-martial convening authority.

⁵¹² In the aftermath of an aviation mishap, a safety investigation takes place. Safety investigations can, within bounds, be used to examine causal and contributory factors to mishaps, and then further used to educate the force on mishap prevention. In addition, the Naval Aviation Safety Center produces *Approach* magazine, which is filled with stories of near misses and tragic errors; a reader can vicariously experience mishaps, and envision how to prevent something similar from taking place. Those who were part of a near miss often write the article that describes it.

⁵¹³ RICHARD V. SPENCER, SECRETARY OF THE NAVY YEAR 3 STRATEGIC VISION, GOALS, AND IMPLEMENTATION GUIDANCE, FISCAL YEARS 2020-2023, at 2 (2019).

c. Enforce existing mechanisms to ensure commanders are held accountable where appropriate.

6.5.2 Unlawful Command Influence Accountability

Unlawful command influence violates the integrity of the military justice system. Commanders and judge advocates at all levels must honor and respect convening authorities' independence and scrupulously refrain from, deter, and report any improper attempt to influence the exercise of their discretion.

Service level accountability mechanisms exist, and can be applied to protect the integrity of the military justice system. Congress already requires reporting of unlawful command influence, and the Marine Corps investigates and documents potential officer misconduct.⁵¹⁴ Service-level investigation of any substantiated claim of unlawful command influence can occur as a matter of routine and the conclusions of an investigation can be used to initiate accountability actions. Addressing the totality of the authority, responsibility, and accountability could incentivize commanders to better execute their central role in the military justice system.

Recommendation:

a. Provide all General Officers, commanders, and judge advocates clear, current, and consistent guidance and training on what constitutes unlawful command influence. The training must incorporate the important lessons to be learned from recent and selected past case law, particularly emphasizing convening authorities' independence. At the same time, commanders must be encouraged by this training to exert lawful influence over their commands in the interest of maintaining good order and discipline.

⁵¹⁴ Article 146a, UCMJ, 10 U.S.C. § 946a (2018), requires the SJA to CMC to report annually to the Senate and House Committees on Armed Services, the Secretary of Defense, and the Secretary of the Navy the facts and circumstances in which a special or general court-martial was reversed because of command influence.

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Section 7

Appendices

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7. APPENDICES

7.1 SUMMARY OF NAVY RECOMMENDATIONS

7.1.1 Culture

1. Issue governing principles for the JAG Corps that establish and emphasize the judge advocate's status as both Naval Officer and attorney. Reinforce these principles through accessions training, each career education and training opportunity, prior to milestone assignments and promotions and generally throughout a judge advocate's career.

2. Expand the portion of JAG officer accessions from the Law Education Program (LEP) and In-Service Procurement Program (IPP) to both expand the size of the JAG Corps as required and develop an expanded cadre of judge advocates with Fleet perspective.

3. Determine resources necessary to provide in-residence professional military education, in addition to advanced legal education, and deliver a plan to execute accordingly.

4. Leverage modern training techniques to include practical application through simulations and exercises for the purpose of developing skills, maintaining proficiency, as well as team building for both generalist and litigation personnel.

5. Sustain efforts in national security law, command advice, administrative law, legal assistance and claims that support naval operations and Sailors. Effectively communicate the need for, and value of, these missions to the entire JAG Corps organization.

6. Develop a formal, repeatable and continuous process to assess the effectiveness of all aspects of the Navy JAG Corps' legal practice, to include OJAG headquarters, staff judge advocates, Naval Justice School and the judiciary, and codify that process in a formal instruction. This self-assessment program must be founded on clear identification of Navy requirements, determination of whether the JAG Corps is meeting those requirements, identification of standards used to measure success, and employment of effective processes to share lessons across the legal community.

Coordinate with the Navy Inspector General to review the Commanding General Inspection Program (CGIP) administered by the Inspector General of the Marine Corps (IGMC) for the functional area of Legal Administration and apply it to the Navy JAG Corps.

7. Improve the JAG Corps Professional Responsibility program to provide regular and proactive dissemination of lessons learned, including the use of case studies of recent and selected past disciplinary actions and “near misses.” Consistent with the Privacy Act, provide information on matters leading to corrective actions and the publication of JAG and Rules Counsel ethics opinions. Coordinate with Naval Education and Training Command to incorporate lessons into judge advocate pipeline training as well as annual Professional Responsibility training for the JAG Corps.

8. Collaborate with the American Bar Association, State Bars, and the Armed Services to identify best practices for professional responsibility rules and processes.

9. Establish a formal process to consult recipients of OJAG support, to include external agencies such as those sections of the Department of Justice that represent the DON in litigation for matters under the cognizance of JAG, to ensure continuous evaluation of OJAG performance.

7.1.2 Organization

10. Provide the Secretary and Service Chiefs clear guidance regarding appropriate roles and responsibilities of JAG and DJAG in providing information and advice to DON principal officials.

11. Provide the results of the Center for Naval Analyses (CNA) study to the Secretary and Service Chiefs along with a detailed recommendation on organizational changes to improve lines of authority, responsibility and accountability.

12. Pending completion of the CNA report, consider creating and resourcing an active duty Navy Flag billet to independently serve as CNLSC.

13. Review Navy AJAG billets to determine whether the breadth and scope of these senior JAG Corps leadership positions warrant assignment of active duty RDMLs (O-7). If warranted, develop a legislative proposal to amend 10 U.S.C. § 8089 and

create permanent active Flag AJAG billets. In the alternative, support reinstatement of retired pay authority for AJAGs who retire at the rank of Rear Admiral (Lower Half) or Brigadier General.

14. Review the existing relationships between Chief of Staff-RLSO and TCAP, as well as Chief of Staff-DSO and DCAP, to ensure that they are properly aligned and focused on delivering efficient and effective legal services to the Fleet through their RLSO and DSO organizations.

15. Request CNA evaluate how judge advocates assigned to the SECNAV and CNO personal staffs, and the legal opinions and advice they provide, are overseen to ensure that the JAG, the SJA to CMC, and General Counsel remain the final approval authorities on advice provided to the DON's most senior leaders.

16. Evaluate the Marine Corps Judge Advocate Board process (MCJAB) and propose a similar Navy organization.

17. Assess overall NLSC alignment with Navy and Fleet priorities and issue a NLSC strategy document that redirects and reorients NLSC commands in line with governing principles established by recommendation 4.2.1.a.

18. Consider an organizational change to reestablish Trial Service Offices (TSOs) in order to achieve the single mission focus of providing court-martial prosecution services. In the planning process, address the resulting organizational and resourcing effects on ashore SJA offices, legal services to Sailors and their families, Victims' Legal Counsel, the First Tour Judge Advocate program, and impact to command opportunities.

19. Coordinate the reestablishment of TSOs with alignment of Region SJA billets to the applicable Region Commanders, and alignment of other SJA billets to their respective commanders.

20. Develop specific professional qualifications, to include minimum experience, and training requirements for Region SJAs, given their role in the Navy's general courts-martial practice.

21. Review procedures for evaluating defense counsel support requests to emphasize the need for affording both defense and government counsel adequate access to resources as well as to ensure compliance with the Military Justice Act of 2016.

7.1.3 Education and Training

22. Formalize a relationship between Commander, Naval Education and Training Command and JAG to assess, develop, and deliver an improved career continuum legal training for line officers. Review requirements for career milestone-based legal training for officers and senior enlisted leaders, focused on the legal requirements and challenges associated with incremental leadership responsibilities.

23. Develop and deliver through operational chains of command standardized legal training for commanders at all echelons that provides guidance on use of the military justice system, administrative accountability measures, and compliance with standards of conduct. Commanders serving as Convening Authorities require scenario-based training on military justice, ethics, and UCI, which incorporates lessons learned, and ongoing assessments of implementation of the Military Justice Act of 2016.

24. Develop standardized decision aids for legal matters that provide commanders flow charts of their basic legal options and decision points regarding personnel accountability, disciplinary actions, and investigative procedures. Decision aids should include administrative options, to include Show Cause Proceedings (Boards of Inquiry) and their potential impact on follow-on administrative or military justice proceedings. For example, “if a conviction is obtained at a court-martial and does not include a dismissal, subsequent convening of a board of inquiry has the following advantages and disadvantages...” These aids should be tailored to support commanders at each echelon.

25. Revise the Manual of the Judge Advocate General to clarify, consistent with case disposition guidance, that general court-martial convening authorities are not required to forward cases requiring trial by general court-martial to Navy Region Commanders, but, in their discretion, may convene general courts-martial locally, as required, to maintain good order and discipline within their commands.

7.1.4 Resourcing

26. *Align JAG Corps community management practices to meet Navy officer community management practices. This includes developing a strategic plan accounting for current and future Fleet demands and formal definition of career paths, milestones, education, training, and professional development. Navy experience has proven this requires a dedicated, integrated community management team, not a collateral duty responsibility. Establishing formal community management practices is not to interfere with the JAG's authority under 10 U.S.C. § 806 to direct the assignment (detail) of judge advocates. Rather, it is to establish a Fleet-focused, strategic JAG Corps human resources program.*

27. *Formally define career and competency expectations by paygrade and communicate those expectations to the JAG Corps in a formal policy document.*

28. *Review officer subspecialty code structures and review all billets that require or should require a subspecialty code to ensure proper identification of officers' experience and use of that experience.*

29. *Ensure to the maximum extent practicable that all judge advocates receive required milestone training prior to or en route to billet assignment, rather than on an ad hoc basis.*

30. *Explore, in coordination with the Army and Air Force, the feasibility of developing a VLC certification course at NJS to ensure greater flexibility in VLC certification and assignment.*

31. *Once NLSC organizational structure reviews are complete, conduct a comprehensive JAG Corps assessment of judge advocate and Legalman inventory and billet distribution requirements based on current and anticipated Fleet requirements. This assessment will support definition of career tracks, training, and education requirements, and milestones necessary to inform both numbers and skill sets required.*

32. *Review current judge advocate accession sources and identify where direct recruitment and use of new "DOPMA relief" authority to commission experienced attorneys with specific skills needed by the Navy might be more effective and efficient.*

33. Evaluate execution of the first tour judge advocate program, and the associated professional development officer and professional development standards programs, based on formal measures of effectiveness, balancing Fleet requirements for legal services and JAG Corps professional development requirements.

34. After determining the appropriate future structure of NLSC, determine the necessary manning construct for NLSC field offices, to include paralegal, information technology, administrative, security, and other support billets required to optimize delivery of Fleet legal services.

35. Prioritize any future review of NLSC field offices, consistent with Fleet requirements.

36. Review the development, distribution, and enforcement of institutional standards regarding Legalmen training. Publish clear expectations on division of attorney and paralegal roles and responsibilities. Drive cultural change to require effective judge advocate and Legalman teamwork in accordance with published standards.

37. Review retention incentives, to include Judge Advocate Continuation Pay, to ensure that necessary incentives are in place, of sufficient financial value and properly structured to specifically address student loan debt and senior officer retention challenges, ensuring retention of the officers best qualified. Consider payment of licensing and associated continuing education fees and adoption of a law school education debt subsidy program, similar to Marine Corps efforts.

38. Review the issue of direct accessions of civilian paralegals to the Legalman rating, as well as targeted incentives to address current recruiting and retention challenges. Examine options to open the years of service window for rating conversion of prior serving Sailors to the Legalman rating.

39. Fund Disability Evaluation System Counsel Program attorney billets to ensure continued support of Sailors and Marines in the disability evaluation process.

40. Optimize the inventory and assignment of Military Justice Litigation Career Track practitioners to meet Fleet court-martial requirements, carefully considering the

imperative of maintaining a fully capable military justice litigation community and efficiencies to be gained through proper military and civilian paralegal utilization.

41. Identify career paths that return senior officer MJLCT litigators to the courtroom as trial and defense counsel, and detail them accordingly to mentor and lead junior counsel from the front.

42. Consider making command eligibility or equivalent assignment a milestone requirement for all qualified MJLCT litigators to ensure an adequate cadre of senior officers are available for leadership roles within NLSC and other equivalent military justice positions.

43. Consider detailing only senior MJLCT qualified officers to NLSC command, OIC and executive officer billets.

44. Forward reports prepared in compliance with 10 U.S.C. § 946a to the Secretary and Service Chiefs to ensure senior leaders are informed of measures implemented to ensure the ability of judge advocates to participate competently as trial and defense counsel, to preside as military judges, and to perform the duties of victims' legal counsel.

45. In coordination with Marine Corps, assess the feasibility of longer or more repeat tours for military judges.

46. Explore offering qualified retired Commanders (O-5) and Captains (O-6) the opportunity to serve as military judges under an "out and back" or "up and stay" program.

47. Assess requirements to assign law clerks within Navy-Marine Corps Trial Judiciary Circuits in support of trial-level military judges. Report the results of this assessment to JAG for resourcing consideration, consistent with overall Fleet requirements.

48. Resource the expedited acquisition of a modern, secure military justice data collection and case management system that is compliant with statutory and DoD requirements. This is essential to improve the efficiency of the DON military justice system, mitigate the risks of legal error caused by poor case management, facilitate

more accurate and informative responses to internal and external requests for data, and enable effective trend analysis.

49. Expedite appropriate waivers from NMCI and other government networks (such as ONE-NET) policies, or develop alternatives to the same, to implement modern court-reporting technologies and software to include identification and resourcing of the court reporters and IT support personnel necessary to maintain these systems. Establish commercial “white lines” (i.e., non-secure) in courtrooms to facilitate the use of artificial intelligence assisted transcription. Provide an assessment of any resource challenges or delays as part of the annual military justice report submitted to the Secretary and Service Chiefs.

50. Evaluate current Navy courtroom facilities and security protocols compared to federal civilian courtroom facilities, security infrastructure, and policies in consultation with the U.S. Marshals Service and Naval Criminal Investigative Service. Ensure sufficient Master-at-Arms or other properly trained Navy security forces are provided for court-martial proceedings.

7.1.5 Unlawful Command Influence

51. Provide all Flag Officers, commanders, and judge advocates clear, current, and consistent guidance and training on what constitutes unlawful command influence. The training must proactively incorporate the important lessons to be learned from recent and selected past case law, particularly emphasizing convening authorities’ independence. At the same time, commanders must be encouraged by this training to exert lawful influence over their commands in the interest of maintaining good order and discipline.

7.2 SUMMARY OF MARINE CORPS RECOMMENDATIONS

7.2.1 Culture

1. *Ensure members of the Marine Corps uniformed legal community attain legal expertise and simultaneously develop as well-rounded Marine Air-Ground Task Force officers.*

7.2.2 Organization

2. *Submit a legislative proposal to establish a direct statutory relationship between the Staff Judge Advocate to the Commandant of the Marine Corps and the Secretary of the Navy, consistent with current regulation and past recommendations.*

3. *Ensure, enforce, promulgate, and communicate to Marine Corps stakeholders the regulatory roles and responsibilities of the Staff Judge Advocate to the Commandant of the Marine Corps and the Counsel for the Commandant.*

4. *Consider renaming the billet “Counsel for the Commandant” to one that more accurately defines the billet roles and responsibilities as an Office of General Counsel attorney who reports to the Department of the Navy General Counsel.*

5. *Increase accession of Marine judge advocates, until such time as the Captain (O-3) community is appropriately staffed.*

6. *Fund continuation pay for judge advocates within the Department of the Navy, with amounts and structure designed to stem current negative retention trends.*

7. *Fund an enduring Law School Education Debt Subsidy program as a recruiting, retention, and talent management tool.*

8. *Reimburse judge advocates for their continuing annual licensing fee requirements.*

9. *Ensure continuous communication with the Marine uniformed legal community to facilitate transparency and better understanding of the Marine Corps assignments process.*

10. Do not consider Marine judge advocate Captains (O-3) executing their first set of permanent change of station orders for the Commandant's Career-Level Education Board or B-billet assignment.

11. Develop a reporting mechanism to track when a judge advocate serves outside the military occupational specialty in support of local mission requirements.

12. Evaluate making judge advocate (4402) Colonels ineligible for selection to O-6 command.

13. Ensure a judge advocate (4402) General Officer participates in every Colonel (O-6) selection board to explain unique legal career paths to help select the best and fully qualified judge advocate Colonels (O-6).

14. Provide precept language for every Colonel (O-6) selection board to explain the unique legal career paths to help select the best and fully qualified judge advocate (4402) Colonels (O-6) when a judge advocate General Officer is not available.

7.2.3 Education and Training

15. Establish annual formalized professional responsibility training for judge advocates, and during Article 6, Uniform Code of Military Justice visits, reinforce the importance of mentorship and supervision.

16. Collaborate with the American Bar Association, State Bars, and the Armed Services to identify best practices for professional responsibility rules and processes.

17. Develop resident or online courses, by billet and grade, to refresh the skills of practitioners returning from assignments outside the Marine Corps uniformed legal community.

18. Leverage modern training techniques to include practical application through simulations and exercises for the purpose of developing skills, maintaining proficiency, as well as team building for both generalist and litigation personnel.

19. Do not assign uniformed judge advocates to Office of General Counsel (Counsel for the Commandant (CL)) offices; transition CL billets formerly held by uniformed judge advocates to civilian positions.

20. *Realign judge advocate structure from Office of General Counsel (Counsel for the Commandant) to support Marine Corps uniformed legal requirements.*

21. *Shift educational resources for advanced law degrees that currently support Office of General Counsel requirements to meet uniformed legal requirements in military justice, cyber, and international law.*

22. *Determine the feasibility of developing a victims' legal counsel certification course at Naval Justice School offered at different times than the Army and Air Force courses to ensure greater flexibility in victims' legal counsel certification and assignment.*

23. *Develop mechanisms to capture and track legal services specialist proficiency at every pay grade that are specifically linked to Training and Readiness Manual requirements.*

24. *Reconcile the Legal Services Specialist Roadmap with formal training opportunities and Training and Readiness Manual requirements.*

25. *Identify root causes for lack of participation in further education, such as the Staff Noncommissioned Officer Degree Completion Program, and update the program to address those issues.*

7.2.4 Resourcing

26. *Adjust current Marine Corps legal billets to support cyber, intelligence, and information operations, per the Commandant's Planning Guidance.*

27. *Review the security clearance requirements for all judge advocate billets, and mandate Master of Criminal Law (4409) candidates apply for Sensitive Compartmented Information security clearance eligibility prior to attending an advanced law degree program, similar to the requirement for Master of International Law (4405) or Master of Cyber, Intelligence, and Information Law (4417) candidates.*

28. *Subject to Center for Naval Analyses (CNA) refinement, determine the appropriate structure for Headquarters, Marine Corps Judge Advocate Division.*

29. *Develop manpower and assignment policies to reconcile the need for experienced military judges with the institutional goal of promoting well-rounded Marine Air-Ground Task Force officers.*

30. *Explore offering Marine Corps Lieutenant Colonels (O-5) and Colonels (O-6) the opportunity to serve as military judges under a retire-retain program.*

31. *Continue the current policy of not assigning military judges leaving the judiciary to litigation billets in the same geographic location.*

32. *Resource a pilot program for Defense Services Organization investigators.*

33. *Assess the Marine Corps inventory of judge advocates with advanced degrees in criminal law (AMOS 4409), subject to validation and refinement by the Center for Naval Analyses (CNA) study.*

34. *Continue current processes to resource defense expert assistance in courts-martial; ensure convening authority training emphasizes the convening authority's responsibilities to ensure equal access to evidence and witnesses per Article 46, Uniform Code of Military Justice.*

35. *Continue the current processes for travel and training funding to the Defense Services Organization and its regional defense services offices.*

36. *Add the Chief Defense Counsel to the Marine Corps Judge Advocate Board, when appropriate.*

37. *Further assess the staffing of the Victims' Legal Counsel Offices at Marine Corps Base Camp Lejeune and Marine Corps Base Camp Pendleton.*

38. *Authorize a civilian paralegal at Marine Corps Air Station Iwakuni.*

39. *Hire a civilian litigation attorney advisor at Victims' Legal Counsel Organization headquarters.*

40. *Determine if additional victims' legal counsel are required in anticipation of Congress mandating the provision of victims' legal counsel services to domestic violence victims.*

41. Resource the expedited acquisition of a modern, secure military justice data collection and case management system that is compliant with statute and Department of Defense requirements. This is essential to improve the efficiency of the Department of the Navy military justice system, mitigate the risks of legal error caused by poor case management, facilitate more accurate and informative responses to internal and external requests for data, and enable effective trend analysis.

42. Expedite appropriate waivers from information technology policies, or develop alternatives to the same, to implement modern court-reporting technologies and software to include establishing commercial “white lines” (i.e., non-secure) in courtrooms to facilitate the use of artificial intelligence assisted transcription.

43. Maintain a court reporting system capable of operating forward or in austere environments; consider stenographers.

44. Resource improved courtroom security and associated infrastructure to ensure trial courtrooms meet required physical security standards; regarding state-of-the-art courtroom security requirements, consider coordinating with the U.S. Marshals Service.

7.2.5 Unlawful Command Influence

45. Deliver training on military legal matters (military justice, ethics, etc.) during every formal professional military education course using case studies.

46. Conduct annual military justice refresher training for every court-martial convening authority.

47. Enforce existing mechanisms to ensure commanders are held accountable where appropriate.

48. Provide all General Officers, commanders, and judge advocates clear, current, and consistent guidance and training on what constitutes unlawful command influence. The training must incorporate the important lessons to be learned from recent and selected past case law, particularly emphasizing convening authorities’ independence. At the same time, commanders must be encouraged by this training to

exert lawful influence over their commands in the interest of maintaining good order and discipline.

7.3 MATRIX OF PREVIOUS RECOMMENDATIONS

Accomplished	Partially accomplished	Not accomplished
<p><u>2019 Sexual Assault Accountability and Investigation Task Force</u> <i>(Summary of portions of the recommendations that require JAG Corps involvement)</i></p>		
<p>1. Increase responsibilities of Trial Counsel in obtaining, recording, and communicating victim preferences for jurisdiction.</p>		
<p>JAGMAN 0128(a), promulgated in JAGINST 5800.7F CH-2, 26 Aug 2019, requires documentation of the victim's preference for jurisdiction with a letter signed by the victim and trial counsel or trial paralegal.</p>		
<p>2. Enhance training requirements of personnel participating in Special Victim Investigation and Prosecution (SVIP).</p>		
<p>Within the Navy, JAG/CNLSCINST 5817.2 establishes certification based on training and experience for prosecutors, paralegals, and administrative support personnel working on allegations of child abuse, domestic violence, and adult sexual assault. Each Trial Department is required to have one certified attorney for every four attorneys in the department and one certified paralegal or administrative support member.⁵¹⁵ The Marine Corps implemented training requirements for SVIP counsel in MARADMIN 527/19.⁵¹⁶</p>		
<p>3. Require SVIP-qualified prosecutors to work closely with NCIS in developing investigative plans.</p>		
<p>JAG/CNLSCINST 5817.2 requires Judge Advocates to attend one NCIS advanced Special Victim Investigation course. These courses allow trial counsel to build a relationship with NCIS and gain familiarity with the investigative stages of Special Victim cases. MARADMIN 527/19 lists NCIS courses among the courses required to fulfill the Marines' training requirement.</p>		
<p>4. Implement training in Commander's role in processing sexual assault cases in professional military education; create formalized training requirements for commanders exercising sexual assault initial disposition authority.</p>		
<p>Naval Justice School offers training on sexual assault to senior leaders, to include the Senior Leaders Legal Course, in three Fleet locations and via mobile training teams.⁵¹⁷</p>		
<p><u>2011 Independent Review Panel to study JAG requirements of the DON</u></p>		
<p>5. Increase manpower to 950 Navy and 550 Marine judge advocates.</p>		
<p>The Navy has 938 judge advocate billets authorized in FY 19, up from 800 in 2010. There is a programmed increase to 940 billets in FY 24.⁵¹⁸ The current inventory of Marine judge advocates is 515.⁵¹⁹</p>		

⁵¹⁵ JAG/CNLSCINST 5817.2, *supra* note 175.

⁵¹⁶ U.S. DEP'T OF NAVY, COMMANDANT OF MARINE CORPS, MARINE ADMIN. MESSAGE 527/19, FY20 MILITARY JUSTICE AND SPECIAL VICTIM LITIGATION TRAINING CALENDAR (Sept. 26, 2019).

⁵¹⁷ Naval Justice School, Annual Course Catalog Fiscal Year 2020 (2019) (on file).

⁵¹⁸ Working Group brief to Executive Review Panel (Sept. 5, 2019) (on file) (containing data from Navy Personnel Command).

⁵¹⁹ Working Group brief to Executive Review Panel (Sept. 18, 2019) (on file) (containing data from the Marine Officer Inventory Planner (MPP-30)).

6. Judge Advocates filling operational law positions should receive specialized training.	
<p>Since 2011, the JAG Corps has expanded the number and quality of training opportunities for officers filling operational billets.⁵²⁰ The JAG Corps has invested in better Naval Justice School training, Information Warfare Community and Special Warfare-focused training, Naval War College courses and conferences, as well as international law training hosted by Oxford University (UK).⁵²¹ The JAG Corps continues to support attendance at U.S. Army and U.S. Air Force National Security Law courses.</p>	
7. Ensure involvement of Navy and Marine judge advocates in joint billets.	
<p>As of September 2019, there were 87 Navy judge advocates serving in joint and interagency billets.⁵²² Twenty-five of 158 (16%) of attorneys on COCOM staffs are Navy judge advocates (25/122 uniformed attorneys). A Navy judge advocate is Chairman's Legal Counsel; however, none of the 10 COCOM SJAs are currently Navy judge advocates. There are two Marine COCOM SJAs.⁵²³</p>	
8. Develop and fund a requirement for Navy judge advocates to receive JPME.	
<p>DoD policy does not require judge advocates to complete Joint Officer qualifications. The Navy typically funds three to five judge advocates to attend the Naval War College or National Defense University each year.⁵²⁴ The JAG Corps encourages Navy judge advocates to complete JPME Phase I by the time they are in zone for O-5, typically through distance education programs. As of September 2019, 197 out of 449 (44%) of O-4 to O-6 JAG Corps officers have completed JPME Phase I.⁵²⁵</p>	
9. The DoD should formalize judge advocate participation in the joint officer management program and joint qualification system.	
<p>DoD continues to waive Joint Officer qualification requirements for all judge advocates.⁵²⁶ Accordingly, Joint Officer promotion requirements and objectives do not apply to judge advocates.</p>	
10. Extend manning requirement of the OMC past December 2012.	
<p>This was implemented.⁵²⁷</p>	

⁵²⁰ Naval Justice School BLC 19030 Calendar (Aug. 2019) (on file); Naval Justice School, Annual Course Catalog Fiscal Year 2020 (2019) (on file); Working Group site visit to Naval Justice School (Sept. 2019).

⁵²¹ Judge Advocate Gen., Legal Community Assessment (July 11, 2019) (on file).

⁵²² Joint-Interagency-IA-GSA listing, *supra* note 197.

⁵²³ JAG email (Sept. 3, 2019), *supra* note 123. Working Group interviews with Combatant Commanders and COCOM SJAs (Sept. 2019).

⁵²⁴ Navy Personnel Command, Judge Advocate Gen. Corps Officer Branch (PERS 4416), Info Memo: Post-Graduate Education for Judge Advocates (Aug. 28, 2019) (on file).

⁵²⁵ Commanding Officer, Naval Justice School brief to Executive Review Panel (Sept. 5, 2019) (on file).

⁵²⁶ DoDI 1300.19, *supra* note 122.

⁵²⁷ See 2018 ABA REPORT, *supra* note 83, at 33 (detailing support to OMC as of 2018).

11. Navy and Marine Corps should provide OMC with “experienced and accomplished litigators.”	
The Navy is currently required to provide 30 judge advocates. As of September 3, 2019, eight prosecution billets, 14 defense billets, and one convening authority billet were filled with Navy Judge Advocates. ⁵²⁸ The Marine Corps had nine judge advocates assigned to OMC during FY 18. ⁵²⁹ The experience level of the counsel provided varies. ⁵³⁰	
12. Develop and retain experienced and accomplished litigators to participate in OMC or future commissions.	
OMC training for litigators in conjunction with development of litigation talent through the MJLCT increases the caliber of litigators available to OMC. ⁵³¹ The standard tour length of between two and three years challenges development of proficiency because there is a steep learning curve and extension requests are frequently submitted. ⁵³² The Military Commissions Defense Organization appoints “learned counsel” for the accused in death penalty cases, who are experienced in capital litigation. ⁵³³	
13. Provide one more attorney to represent members before the Formal Physical Evaluation Board.	
Implemented through restructuring of Disability Evaluation System legal resources. See item 14 below.	
14. Examine whether service member should receive representation prior to the decision of the informal PEB.	
JAG and SJA to CMC consolidated IDES legal resources and created the DESCOP. Every member referred into the IDES is required to consult with counsel within five business days of referral. ⁵³⁴ Projected levels in FY 21 are 33 counsel supporting IPEB requirements at 15 Fleet and Marine Corps MTF locations, and 12 counsel supporting FPEB operations at the Washington Navy Yard. ⁵³⁵	

⁵²⁸ JAG email (Sept. 3, 2019), *supra* note 123.

⁵²⁹ STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS, MARINE CORPS REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2018, at 5 (Dec. 31, 2018).

⁵³⁰ A review of detailing documents and the “JAG-Link” directory shows officers detailed to support the commissions at the O-3 through O-6 level. 2020 Slate, *supra* note 197; 2020 Downwind Billet List, *supra* note 197.

⁵³¹ 2017 ANNUAL REPORT, *supra* note 180, at 87-88.

⁵³² JAG email (Sept. 3, 2019), *supra* note 123.

⁵³³ *Organization Overview*, OFFICE OF MILITARY COMMISSIONS, <https://www.mc.mil/ABOUTUS/OrganizationOverview.aspx> (last visited Nov. 9, 2019).

⁵³⁴ SECNAV M-1850.1, *supra* note 272; AJAG 01 Response to Data Request, *supra* note 205.

⁵³⁵ AJAG 01 Response to Data Request, *supra* note 205; Code 16 Info Memo, *supra* note 273.

15. Implement single court-martial case tracking system.	
A single court-martial case tracking system, CMS, was developed following the 506 Panel Report. However, this system is not compliant with the new requirements under Article 140a, UMCJ and has degraded technical functions. ⁵³⁶ The Naval Justice Information System, a planned comprehensive case tracking system, was expected in 2015 but never implemented. ⁵³⁷ The Navy and Marine Corps are cooperating in development of an interim measure, pending acquisition of an Article 140a-compliant system. ⁵³⁸	
16. Provide annual report to SECNAV, CNO, and CMC on the state of military justice.	
In compliance with Article 146a, UCMJ, and SECNAVINST 5430.27E, the JAG provides an annual report on the state of military justice. ⁵³⁹	
17. Continue the Military Justice Oversight Council.	
This has been implemented. ⁵⁴⁰	
18. The SECNAV and CNO should identify and assign authorities necessary to the JAG to build a coherent legal community.	
SECNAVINST 5430.27E designates the JAG as the capability sponsor for the Navy JAG Corps, responsible for maintaining the JAG Corps legal community and determining the best possible allocation of JAG Corps community assets. ⁵⁴¹ Since the 2011 506 Panel Report, no additional authorities have been granted to the JAG to facilitate building a coherent legal community. ⁵⁴²	
19. Consider appointing two Marine and two Navy judge advocates to AJAG positions instead of three Navy and one Marine.	
There are still three Navy AJAGs and one Marine AJAG. ⁵⁴³	

⁵³⁶ Working Group visits to RLSO Southwest, RLSO Naval District Washington, and RLSO Mid-Atlantic (Sept. 2019).

⁵³⁷ Off. of Judge Advocate Gen., Tech., Operations & Plans (Code 67), Info Memo: Commercial Off-The-Shelf (COTS) Case Management System Research (Sept. 6, 2019) (on file).

⁵³⁸ *Id.*

⁵³⁹ See 2018 NAVY ANNUAL REPORT, *supra* note 180.

⁵⁴⁰ SECNAVINST 5430.27E, *supra* note 16, encl(1), para. 1.e.(1)(b) requires the JAG to convene a Military Justice Oversight Council (MJOC) no less than quarterly, to evaluate the practice of military justice within the Department of the Navy. The most recent meeting was in September 2019. JAG email (Sept. 3, 2019), *supra* note 123.

⁵⁴¹ SECNAVINST 5430.27E, *supra* note 16, para. 1.f.(3).

⁵⁴² JAG email (Sept. 3, 2019), *supra* note 123.

⁵⁴³ *Id.*

<p>20. Establish direct relationship between SECNAV and SJA to CMC, provide SJA to CMC with authority to supervise administration of military justice and legal assistance in the Marine Corps. SJA to CMC should be responsible for professional and technical supervision of Marine judge advocates.</p>	
<p>A reorganization of legal support services in 2012 realigned all law offices under the LSSS, allowing SJA to CMC to exercise functional supervision more effectively over the delivery of Service-level legal support. In 2013, 10 U.S.C. § 1044 was amended to state that the SJA to CMC is “responsible for the establishment and supervision” of legal assistance in the Marine Corps. Article 6, UCMJ, was amended to provide the SJA to CMC with the responsibility of making inspections to supervise the administration of military justice.⁵⁴⁴ SJA to CMC acts as Rules Counsel for Professional Responsibility matters involving Marines.⁵⁴⁵ By SECNAVINST 5430.27E, SJA to CMC provides independent legal advice to SECNAV and is responsible for oversight of the Marine Corps military justice system at the trial level.⁵⁴⁶</p>	
<p><u>2010 DoD IG Evaluation of Post-Trial Reviews of Courts-Martial within DON</u></p>	
<p>21. Develop single Navy and Marine military justice case tracking system that enables the accused to monitor appellate case status directly through web access.</p>	
<p>See item 15 above regarding status of the case tracking system. The current CMS does not allow the accused to log in and monitor case status.</p>	
<p>22. Establish uniform post-trial processing standards, procedures, time guidelines and process responsibilities.</p>	
<p>JAG/CNLSCINST 5814.1D is the most recent post-trial processing instruction.⁵⁴⁷ It tasks Chief Judge, Department of the Navy with responsibility and accountability for Navy and Marine Corps cases once docketed at NMCCA, and AJAG (02) with responsibility for Navy and Marine Corps cases from the time received by NAMARA until docketed by NMCCA. The instruction also assigns responsibilities to RLSO COs and COS RLSO for NLSC cases and includes post-trial processing procedures.</p>	
<p>23. Give RLSOs authority to direct timely post-trial processing by afloat SJAs.</p>	
<p>JAG/CNLSCINST 5814.1D states that the RLSO providing the prosecutors for a case retains primary responsibility to proactively monitor the completion of required post-trial actions.</p>	

⁵⁴⁴ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 531(d)(1)-(2), 126 Stat. 1632, 1726 (2013).

⁵⁴⁵ JAGINST 5803.1E, *supra* note 126, para. 11.a.

⁵⁴⁶ SECNAVINST 5430.27E, *supra* note 16, para. 2.a.(1)(b).

⁵⁴⁷ JAG/CNLSCINT 5814.1D, *supra* note 100. See also U.S. DEP’T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5813.1D, STANDARDIZATION OF GENERAL COURTS-MARTIAL AND SPECIAL COURTS-MARTIAL VERBATIM TRANSCRIPTS AND SUMMARIZED REPORTS OF ACCOMPANY THE RECORD OF TRIAL (Aug. 12, 2019).

24. Conduct a comprehensive review to identify staffing needed to meet military justice requirements in Navy and Marine Corps.		
<p>Since 2010, there have been several reviews of staffing requirements in the Navy and Marine Corps. For example, the 506 Panel report reviewed staffing requirements in detail, including anticipated future requirements.⁵⁴⁸ However, current Working Group observations noted staffing deficiencies as discussed in this report, such as a lack of support staff in certain areas. This report recommended further study of appropriate staffing levels and improvement of deficiencies.</p>		
25. Increase authority of SJA to CMC to exercise professional supervision over Marine judge advocates and conduct Article 6 inspections of Marine Corps.		
<p>This was implemented, see item 20 above.</p>		
26. Establish a joint Navy and Marine Corps task force to review Federal Case Management/Electronic Case Filing (CM/ECF) System for use in Navy and Marine Corps.		
<p>The CM/ECF used in Federal courts was never adopted.⁵⁴⁹ See item 15 above.</p>		
27. Implement a comprehensive and detailed inspection program for military justice administration in field units, including independent/afloat legal units.	USN	USMC
<p>The JAG inspects activities within the Navy through the Article 6, UCMJ, inspection process.⁵⁵⁰ As of 2019, Article 6, UCMJ, inspections within the Navy only extended to NLSC activities and not independent or afloat legal units. However, in FY 20, the NLSC IG is planning pilot inspections of two non-NLSC SJA offices.⁵⁵¹ A review of reports from the Article 6 inspection process show that the level of detail has increased compared to that described in the 2010 DoD IG evaluation.⁵⁵² The SJA to CMC inspects legal activities within the Marine Corps. Personnel from JAD conduct legal support inspections of the LSSSs and LSSTs, as well as SJA offices.⁵⁵³</p>		
28. Establish Chief Defense Counsel Position for the Navy.		
<p>Within the Navy, COS DSO and Director, DCAP Director serve functions analogous to a Chief Defense Counsel position. However, there is no Chief Defense Counsel of the Navy position.</p>		

⁵⁴⁸ 506 PANEL REPORT, *supra* note 11, Part III.

⁵⁴⁹ Chief Judge Info Memo, *supra* note 178. The 2010 DoD IG report noted that the Center of Naval Analyses was, at the time of the report, in the process of completing a review that compared Navy court-martial tracking to the Federal CM/ECF. DoD IG REPORT, *supra* note 9 at 31-32.

⁵⁵⁰ JAG/CNLSCINST 5040.1B, *supra* note 27.

⁵⁵¹ JAG/CNLSCNOTE 5040, *supra* note 29.

⁵⁵² Review of Article 6 Reports, *supra* note 28; DoD IG REPORT, *supra* note 9 at 14-15.

⁵⁵³ See U.S. MARINE CORPS, ORDER 5800.16, LEGAL SUPPORT AND ADMINISTRATION MANUAL, vol. 2 (20 Feb. 2018).

29. Initiate a legislative proposal to amend statute to authorize the SJA to CMC to certify competence of Marine judge advocates to perform as trial or defense counsel.	
The statute (10 U.S.C. § 827) has not been amended and authority to certify judge advocates as competent to serve as trial or defense counsel remains with the JAG.	
30. JAG provide annual military justice updates to SECNAV, CNO, and CMC.	
This was implemented, see item 16 above.	
31. Update instruction to standardize shipping of post-trial records.	
This was implemented. ⁵⁵⁴	
32. Maintain reserve unit support for appellate divisions and NMCCA.	
This was implemented. ⁵⁵⁵	
33. Maintain Director, Appellate Defense Division at the O-6 level.	
The Director, Appellate Defense Division is an O-6 billet. ⁵⁵⁶	
34. JAG examine effectiveness and utility in the 1-year NMCCA clerkship program established to enhance appellate counsel training and either modify or rescind the program.	
There is no longer a standard one-year clerkship program before proceeding to work as appellate counsel. Instead, judge advocates are usually placed in a full 2-3 year tour as an NMCCA clerk or as appellate counsel. ⁵⁵⁷	
<u>2005 Review Panel to Study Relationships between Military OGC and JAGs</u>	
35. Elevate JAG to three-star rank and elevate SJA to CMC to two-star rank.	
This was initially implemented through a statutory requirement in 2008. ⁵⁵⁸ In 2016, the statutory requirement was removed, but, to date, the JAG and SJA to CMC continue to serve in these ranks. ⁵⁵⁹	
36. Review organizational, staffing and coordination requirements for providing legal advice in the Department of the Navy.	
This was conducted in several reviews subsequent to 2005. See item 24 above.	
37. Ensure a robust program for civilian attorney professional development.	
Opportunities for training for civilian attorney and non-attorney employees are available. This includes leadership development programs, which three civilian attorneys have attended recently, and cross-training among different legal areas. ⁵⁶⁰	

⁵⁵⁴ See JAG/CNLSCINT 5814.1D, *supra* note 100 (describing shipping requirements for records of trial).

⁵⁵⁵ See 2017 ANNUAL REPORT, *supra* note 180, at 63-66.

⁵⁵⁶ Working Group site visit to OJAG and supported elements (Sept.-Oct. 2019).

⁵⁵⁷ *Id.*

⁵⁵⁸ 10 U.S.C. §§ 8046, 8088 (2018); National Defense Authorization Act for Fiscal Year 2008, Pub .L. No. 110-181, § 543(b), 122 Stat. 3, 114-15 (2008); Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub .L. No. 110-417, § 504(a), 122 Stat. 4356, 4434 (2008).

⁵⁵⁹ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 502(ff), 130 Stat. 2000, 2105 (2016).

⁵⁶⁰ Working Group interviews (Sept. 2019); 2018 ABA REPORT, *supra* note 83, at 35 (noting that a civilian mentoring program began in 2017); see U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN./COMMANDER, NAVAL LEGAL SERV. COMMAND INSTR. 12410.1, CIVILIAN EDUCATION, TRAINING, AND CAREER DEVELOPMENT (Aug. 10, 2019).

7.4 COMMANDS AND ORGANIZATIONS CONTACTED BY THE COMPREHENSIVE REVIEW

7.4.1 Navy Working Group

Office of the Secretary of the Navy
The Secretary's Council of Review Boards
Office of the Chief of Naval Operations
Office of the Commandant of the Marine Corps
Office of the Vice Chief of Naval Operations
Various U.S. District Courts
U.S. Fleet Forces Command
U.S. Pacific Fleet
Naval Reactors
Naval Criminal Investigative Service
Navy Installations Command
U.S. Naval Academy
Chief of Naval Personnel
Navy Personnel Command
Office of the Judge Advocate General of the Navy
Office of the Chief of Chaplains
Naval Legal Service Command
Navy Region Mid-Atlantic
Navy Region Japan
Navy Region Europe, Africa, and Southwest Asia
Navy Region Southwest
Navy Region Northwest
Navy Region Southeast
Naval District Washington
Navy Region Hawaii
Naval Warfare Development Command
U.S. Navy Office of Information
Naval Support Activity Washington
Naval Support Facility Annapolis
Naval Station Norfolk
Region Legal Service Office Mid-Atlantic
Region Legal Service Office Naval District Washington
Region Legal Service Office Southwest
Defense Service Office North
Defense Service Office West
Defense Service Office Southeast
Naval Civil Law Support Activity
Navy and Marine Corps Appellate Review Activity
Naval Justice School
Carrier Strike Group NINE
Department of Justice

Standing Committee on Legal Assistance for Military Personnel, American Bar Association
Air Force Legal Operations Agency
Victims' Legal Counsel Program
Survey of Various Flag and General Officers of the Navy and Marine Corps

7.4.2 Marine Corps Working Group

Survey of Practitioners and Consumers of Legal Services

46 General Officers at the 2019 Executive/General Officer off-site
1,050 active duty and reserve component legal community members

Personal Interviews

Director, Marine Corps Staff
Deputy Commandant, Manpower and Reserve Affairs
Staff Judge Advocate to the Commandant of the Marine Corps
Two former Staff Judge Advocates to the Commandant of the Marine Corps
Chief Defense Counsel for Military Commissions
Counsel for the Commandant of the Marine Corps
Assistant Judge Advocate General of the Navy (Military Law)
Chief Defense Counsel of the Marine Corps

Written Input

Officer in Charge, Legal Services Support Section-West
Officer in Charge, Legal Services Support Section-East
Officer in Charge, Legal Services Support Section-Pacific
Officer in Charge, Legal Services Support Section-National Capital Region
Judge Advocate Division Branch Heads

Written Interviews with Experienced Military Justice Practitioners

Assistant Legal Advisor, North Atlantic Treaty Organization Headquarters,
Supreme Allied Commander, Transformation, Norfolk, VA
Supervisory Trial Defense Attorney, Military Commissions Defense
Organization-Office of Secretary of Defense
Founder and Executive Director of Veterans Legal Support Network, Omaha,
NE
Civilian Defense Counsel, Fort Worth, TX
Senior Associate Deputy General Counsel for Military Justice and Personnel
Policy, DoD Office of General Counsel
Clerk of Court, U.S. District Court for the District of Rhode Island
Managing Partner, Hafemann, Magee & Thomas LLC
Supervisor and Federal Public Defender for the Northern District of Ohio

7.5 COMPREHENSIVE REVIEW MEMBERS

7.5.1 Executive Review Panel

GEN Carter F. Ham, USA, Ret., President and Chief Executive Officer of the Association of the United States Army
Honorable G. Patrick Murphy, District Judge for the U.S. District Court for the Southern District of Illinois (Retired)
VADM Bruce E. MacDonald, JAGC, USN, Ret., 40th Judge Advocate General of the Navy
CAPT David Iglesias, JAGC, USN, Ret., Director of the Wheaton Center for Faith, Politics, and Economics and Associate Professor of Politics and Law, Wheaton College
Samantha L. Clark, Esq., Special Counsel, Covington and Burling; former Deputy Staff Director and General Counsel, U.S. Senate Armed Services Committee
BGen Kevin H. Winters, USMC, Ret., Inspector General, National Railroad Passenger Corporation (AMTRAK)
COL Lisa M. Schenck, JA, USA, Ret., Associate Dean for Academic Affairs, Director of the National Security Law Program and Professional Lecturer in Law, George Washington University Law School
John M. Dowd, Esq.
Eugene R. Fidell, Esq., Florence Rogatz Visiting Lecturer and Senior Research Scholar, Yale Law School
Frank A. Putzu, Esq., Counsel, Comprehensive Review

7.5.2 Executive Support Team

RADM James Bynum, USN, Chief of Staff for the Panel; Director, Assessment Division, Office of the Chief of Naval Operations
CDR Chris Peppel, USN, Assessment Division, Office of the Chief of Naval Operations
LCDR Erin Connor, USN, Assessment Division, Office of the Chief of Naval Operations
LCDR Justin Spotser, USN, Surface Warfare Division, Office of the Chief of Naval Operations

7.5.3 Navy Working Group

ADM Robert P. Burke, USN, Vice Chief of Naval Operations
RDML Richard Cheeseman, USN, Assistant Commander, Navy Personnel Command
RDML Michael Quinn, JAGC, USN, Ret., Counsel, Chief of Naval Air Training
CAPT Dom Flatt, JAGC, USN, Principal Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff
CAPT Anastasia Quanbeck, USN, Deputy Chief of Information
CAPT John W. Stafford, USN, Naval Reactors
CAPT H. Tom Workman, USN, Naval Surface Forces Pacific
CDR Dana Chapin, USN, Navy Personnel Command
CDR Shelby Nikitin, USN, Navy Personnel Command

CDR David A. Melson, JAGC, USN, Office of the Assistant Secretary of the Navy (Manpower and Reserve Affairs)

LT Jacob M. Fisch, JAGC, USN, Region Legal Service Office Midwest

LNC(SW/AW) Jeffrey Greener, USN, Office of the Judge Advocate General

7.5.4 Marine Corps Working Group

Gen Gary L. Thomas, USMC, Assistant Commandant of the Marine Corps

MajGen Gregg P. Olson, USMC, Assistant Deputy Commandant, Plans, Policy & Operations

BGen Brian W. Cavanaugh, USMC, Assistant Deputy Commandant, Programs and Resources Department

Col John R. Woodworth, USMC, Officer in Charge, Legal Services Support Section, National Capital Region

Col Mark K. Jamison, USMC, Director, Appellate Government Division, Office of the Judge Advocate General

Col Paul F. Meagher, USMC, Staff Judge Advocate, Marine Corps Installations Command

LtCol William J. Schrantz, USMC, Officer in Charge, Victims' Legal Counsel Organization

LtCol Melissa D. Chestnut, USMC, Section Head, Supply Policy and Capabilities, Installations and Logistics, Headquarters, U.S. Marine Corps

CDR Robert E. Stiles, USCG, Division Chief, U.S. Coast Guard Academy

Maj Wayne Shew, USMC, Judge Advocate Division, Headquarters, U.S. Marine Corps

1stLt Molly M. Doyle, USMC, Adjutant, Department of Aviation, Headquarters, U.S. Marine Corps

MSgt Andrew D. Gallaher, USMC, Trial Services Chief, Legal Services Support Section, National Capital Region

7.6 ACRONYMS

ACMC	Assistant Commandant of the Marine Corps
AJAG	Assistant Judge Advocate General
ALNAV	All Navy and Marine Corps Message
AMOS	Additional Military Occupational Specialty
AOR	Area of Responsibility
AQD	Additional Qualifying Designator
B-Billet	A non-legal assignment for a Marine judge advocate
BCNR	Board for Correction of Naval Records
BIC	Billet Identification Code
BLC	Basic Lawyer Course
BOI	Board of Inquiry
BRS	Blended Retirement System
BSO	Budget Submitting Office
CAAF	Court of Appeals for the Armed Forces
CCLEB	Commandant's Career-Level Education Board
CDA	Consolidated Disposition Authority
CDC	Chief Defense Counsel of the Marine Corps
CGIP	Commanding General Inspection Program
CJA	Command Judge Advocate
CL	Counsel for the Commandant
CM	Case Management
CM/ECF	Case Management/Electronic Case Files (U.S. federal court system)
CMC	Commandant of the Marine Corps
CMS	Case Management System
CNA	Center for Naval Analyses
CNIC	Commander, Navy Installations Command
CNLSC	Commander, Naval Legal Service Command
CNLSCINST	Commander, Naval Legal Service Command Instruction
CNO	Chief of Naval Operations
CNP	Chief of Naval Personnel
CO	Commanding Officer
COCOM	Combatant Command

CONUS	Contiguous United States
CoS	Chief of Staff
CSB	Career Status Board
DC M&RA	Deputy Commandant for Manpower and Reserve Affairs
DC PP&O	Deputy Commandant for Plans, Policies and Operations
DCAP	Defense Counsel Assistance Program
DEOMI	Defense Equal Opportunity Management Institute
DES/IDES	Disability Evaluation System/Integrated Disability Evaluation System
DESCP	Disability Evaluation System Counsel Program
DJAG	Deputy Judge Advocate General
DoD	Department of Defense
DoDI	Department of Defense Instruction
DoD IG	Department of Defense Inspector General
DOIC	Deputy Officer in Charge
DOJ	Department of Justice
DON	Department of the Navy
DOPMA	Defense Officer Personnel Management Act
DSO	Defense Service Office (Navy) or Defense Services Organization (Marines)
ECF	Electronic Case Filings
ECWG	Ethics Counselor Working Group
EPA	Enlisted Programmed Authorizations
ERP	Executive Review Panel
EWS	Expeditionary Warfare School
FCCA	Federal Claims Collection Act
FOIA	Freedom of Information Act
FPEB	Formal Physical Evaluation Board
FTCA	Federal Tort Claims Act
FTJA	First Tour Judge Advocate
FY	Fiscal Year
GCM	General Court-Martial
GCMCA	General Court-Martial Convening Authority
GDMA	Glenn Defense Marine Asia
HHG	Household Goods

HQMC	Headquarters, U.S. Marine Corps
IA	Individual Augmentee
IAG	Installation Advisory Group
IGMC	Inspector General of the Marine Corps
IMA	Individual Mobilization Augmentee
IPEB	Informal Physical Evaluation Board
IPP	In-Service Procurement Program
IT	Information Technology (general meaning), Information Systems Technician (Navy rating)
JA	Judge Advocate
JAA	JAD, Administrative Support Branch
JACP	Judge Advocate Continuation Pay
JAD	Judge Advocate Division
JAG	Judge Advocate General
JAGC	Judge Advocate General's Corps
JAGINST	Judge Advocate General Instruction
JAGMAN	Manual of the Judge Advocate General
JAI	JAD, Plans and Innovation Branch, Information and Technology Section
JAO	JAD, International and Operational Law Branch
JCA	JAD, Civil and Administrative Law Branch
JLA	JAD, Legal Assistance Branch
JPI	JAD, Plans and Innovation Branch
JPL	JAD, Military Personnel Law Branch
JPME	Joint Professional Military Education
JSB	Judicial Screening Board
LAA	Legal Assistance Advisor
LAO	Legal Administrative Officer of the Marine Corps
LEP	Law Education Program
LL.M.	Professional advanced law degree
LN	Legalman
LOS	Length of Service (A LOS diagram depicts the number of personnel in a community according to each member's length of service.)
LOW	Law of War

LPEP	Legalman Paralegal Education Program
LSAM	Legal Support and Administration Manual
LSC	Legal Services Chief of the Marine Corps
LSEDS	Law School Education Debt Subsidy
LSI	Legal Support Inspection
LSSA	Legal Services Support Area
LSSS	Legal Services Support Section
LSST	Legal Services Support Team
MAGTF	Marine Air-Ground Task Force
MARADMIN	Marine Administrative Message
MCA	Manning Control Authority
MCAS	Marine Corps Air Station
MCB	Marine Corps Base
MCEITS	Marine Corps Enterprise Information Technology Systems Cloud
MCICOM	Marine Corps Installations Command
MCJAB	Marine Corps Judge Advocate Board
MCM	Manual for Courts-Martial
MCO	Marine Corps Order
MCRD	Marine Corps Recruit Depot
MCRU	Medical Care Recovery Unit
MEB	Medical Evaluation Board
MHA	Management Headquarters Activity
MIB	Marine Installations Board
MIC	Manager's Internal Control
MILPERSMAN	Military Personnel Manual
MJA	Military Justice Act
MJLCT	Military Justice Litigation Career Track
MJLQ	Military Justice Litigation Qualification
MMOA	HQMC, Manpower Management Officer Assignments
MOS	Military Occupational Specialty
MTF	Military Medical Treatment Facility
NAVADMIN	Navy Administrative Message
NAMARA	Navy-Marine Corps Appellate Review Activity
NCIS	Naval Criminal Investigative Service

NCR	National Capitol Region
NDAA	National Defense Authorization Act
NETC	Naval Education and Training Command
NJIS	Naval Justice Information System
NJS	Naval Justice School
NLSC	Naval Legal Service Command
NLSO	Naval Legal Service Office
NMCCA	U.S. Navy–Marine Corps Court of Criminal Appeals
NMCI	Navy and Marine Corps Intranet
NMOS	Necessary Military Occupational Specialty
NPC	Navy Personnel Command
NPS	Naval Postgraduate School
NROTC	Naval Reserve Officer Training Corps
OAG	Operational Advisory Group
OCONUS	Outside the Contiguous United States
ODS	Officer Development School
OGC	Office of General Counsel
OGE	Office of Government Ethics
OIC	Officer in Charge
OJAG	Office of the Judge Advocate General
OMC	Office of Military Commissions
ONE-NET	OCONUS Navy Enterprise Network
OPA	Officer Programmed Authorizations
OPNAV	Office of the Chief of Naval Operations
OPNAVINST	Chief of Naval Operations Instruction
PA	Privacy Act
PACER	Public Access to Court Electronic Records (U.S. federal court system)
PCA	Military Personnel and Civilian Employees' Claims Act
PCS	Permanent Change of Station
PCU	Personnel Claims Unit
PDO	Professional Development Officer
PDS	Professional Development Standards
PEB	Physical Evaluation Board
PME	Professional Military Education

PMM	Prosecution Merits Memorandum
POAM	Plan of Actions and Milestones
PR	Professional Responsibility
PSLF	Public Service Loan Forgiveness
QUICKMAN	USN/USMC Commander's Quick Reference Legal Handbook
R.C.M.	Rules for Courts-Martial
RDC	Regional Defense Counsel
RLAD	Regional Legal Assistance Director
RLSO	Region Legal Service Office
RRL	Ready Relevant Learning
RTC	Regional Trial Counsel
RVLC	Regional Victims' Legal Counsel
RWU	Roger Williams University
SAAITF	Sexual Assault Accountability and Investigation Task Force
SAP 2010-2015	Marine Corps Legal Services Strategic Action Plan 2010-2015
SAPR	Sexual Assault Prevention and Response
SAUSA	Special Assistant U.S. Attorney
SDC	Senior Defense Counsel
SEA	Senior Enlisted Academy
SECNAV	Secretary of the Navy
SECNAVINST	Secretary of the Navy Instruction
SJA	Staff Judge Advocate
SJA to CMC	Staff Judge Advocate to the Commandant of the Marine Corps
SME	Subject Matter Expert
SMRD	Shore Manpower Requirements Determination
SNCO	Staff Noncommissioned Officer
SNCODP	Staff Noncommissioned Officer Degree Completion Program
SOP	Standard Operating Procedures
SRB	Secretariat Review Board
STC	Senior Trial Counsel
SVC	Special Victims' Counsel
SVIP	Special Victim Investigation and Prosecution
T/O	Table of Organization
T&R	Training and Readiness

TBS	The Basic School
TC	Trial Counsel
TCAP	Trial Counsel Assistance Program
TCU	Tort Claims Unit
TFSD	HQMC, Total Force Structure Division
TJAGLCS	The Judge Advocate General's Legal Center and School (Army)
TLS	Top Level School
TOECR	Table of Organization and Equipment Change Request
TS/SCI	Top Secret/Sensitive Compartmented Information
TSO	Trial Service Office (Navy), Trial Services Office (Marines)
TYCOM	Type Commander
UCI	Unlawful Command Influence
UCMJ	Uniform Code of Military Justice
USCG	United States Coast Guard
USFF	U.S. Fleet Forces Command
USMC	United States Marine Corps
USN	United States Navy
VCNO	Vice Chief of Naval Operations
VLC	Victims' Legal Counsel
VLCO	Victims' Legal Counsel Organization
VWAP	Victim and Witness Assistance Program
XO	Executive Officer
YCS	Years of Commissioned Service