

**STAFF JUDGE ADVOCATE  
TO THE  
COMMANDANT, U.S. MARINE CORPS  
SUBMISSION TO  
THE INDEPENDENT PANEL  
REVIEW OF LEGAL REQUIREMENTS IN  
THE DEPARTMENT OF THE NAVY**

**INTRODUCTION**

In 2009 Congress ordered the establishment of an independent panel to study:

**“...the policies and management and organizational practices of the Navy and Marine Corps with respect to the responsibilities, assignments, 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.”<sup>1</sup>**

As part of this study the panel was specifically tasked to review:

- 1) emergent requirements for operational law in support of on-going combat operations;
- 2) requirements for the Office of Military Commissions (OMC) and Disability Evaluation System (DES);
- 3) military justice requirements for complex courts-martial and post-trial processing;
- 4) the roles and authorities of the Judge Advocate General (JAG) of the Navy with regard to assignments of judge advocates;
- 5) regulations governing the provision of legal services applicable to both services within the department;
- 6) career progression requirements for Marine Corps judge advocates;
- 7) and any other matter deemed relevant by the Panel.

This brief is submitted by the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) for the Panel’s consideration during the course of their study. The brief will first address the general issue presented by Congress, then address each of the seven specific issues in turn. The overall goal of this brief is to provide the Panel an informed assessment of the Marine Legal Services organization from a service perspective.<sup>2</sup>

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<sup>1</sup> National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §506, 123 Stat. 2190 (2009).

<sup>2</sup> The term “Marine Legal Services” as used herein, denotes all Marines serving in the Military Occupational Specialty of 4400 and civilian support personnel attached to Marine legal offices. It does not include civilian attorneys working for the Counsel for the Commandant.



## 506 GENERAL ISSUE

### **POLICIES AND MANAGEMENT AND ORGANIZATIONAL PRACTICES OF THE MARINE CORPS WITH RESPECT TO THE RESPONSIBILITIES, ASSIGNMENTS, 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**

Through the lens of the Marine legal community, this general issue can be restated: *what personnel resources are required to accomplish the legal mission of the Marine Corps and how are those requirements being fulfilled?* This section will address the mission and organization of the Marine Legal Services, the type and quantity of personnel required for that mission, and the methodology for fulfilling those requirements.

#### **A. MARINE CORPS LEGAL SERVICES MISSION AND ORGANIZATION**

As a point of departure, considering the implications of the questions presented to the Panel, it is important to note that despite the significant challenges of continuous operational demands, increased complexity of courts-martial, and recent appellate decisions on post-trial processing, the Marine legal community continues to successfully accomplish its mission in a manner worthy of the public trust. Our judge advocates, legal administrative officers, and enlisted legal service specialists continue to provide commanders, Marines, Sailors, and their families with outstanding support both at home and abroad.

**1. Mission** – The mission of Marine Corps legal services is to provide timely, efficient, and appropriate legal advice and support to commanders, Marines, Sailors, and their families to promote the readiness of the force and contribute to Marine Corps mission accomplishment. The Marine legal community is tasked with specific responsibilities for accomplishing this broad legal mission. Marine judge advocates balance these tasks to ensure the mission is accomplished within the letter and spirit of the law, while protecting the rights of individual Marines and Sailors, and maintaining the trust and confidence the American people have placed in the institution.

It should be emphasized that the legal mission of the Department of the Navy (DON), although supervised at the department level, is primarily executed at the uniformed service-level.<sup>3</sup> Supervision refers to the Department-wide policy-making and oversight functions of the Secretary of

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<sup>3</sup> In so far as that mission entails the provision of command advice and support in military justice, operational law, administrative law and legal assistance. The broader departmental legal mission includes execution of departmental functions such as the Navy and Marine Corps Trial Judiciary, including the Navy and Marine Corps Court of Appeal, as well as Navy and Marine Corps Appellate Review Activity. The department legal mission also includes the legal advice and support provided by the General Counsel, through the Counsel for the Commandant, in the departmental business of intelligence oversight, legislative affairs, budgeting, environmental compliance, civilian employment, land-use, etc.



the Navy, the General Counsel, and the JAG in his departmental role.<sup>4</sup> Execution refers to the service-level functions of command, direction, management, training, equipping, and organization (which includes manpower management and assignment) of judge advocates, in order to make available to the operational forces the legal capabilities necessary to complete assigned missions. This distinction is essential to an analysis of the issues presented.

## 2. Organization.

**a. Capabilities** – The Marine legal community performs a wide range of legal functions. The core functional areas are military justice, operational and international law, administrative law, and legal assistance. These capabilities directly support the operating force commander in maintaining unit readiness in garrison and in accomplishing the mission abroad. In providing command advice, the Marine legal community also practices in other functional areas, including fiscal, labor, environmental law, land use and ethics. Generally, uniformed judge advocates provide advice in these areas in conjunction with and under the supervision of the Counsel for the Commandant (CL), as part of the General Counsel (GC) to the DON legal mission.

**b. Commander-Oriented & Mission-Focused** – Although by statute Staff Judge Advocates (SJA) may, and often do, communicate directly with other SJAs in superior and subordinate units, there is no centralized legal organization with formal functional leadership authority over the judge advocates assigned to the operating forces (OPFOR) or supporting establishments (SE).<sup>5</sup> Instead, legal capabilities are assigned to the commander. Within the Marine Expeditionary Force (MEF), judge advocates are assigned as command advisors within the command element of the MEF and major subordinate commands (MSCs) and assigned as legal service support providers within the Legal Services Support Section (LSSS) of the Marine Logistics Group (MLG). The commander, ultimately responsible for unit readiness and accomplishment of the mission, has exclusive authority to further organize and task these capabilities based on mission requirements.<sup>6</sup> This allocation of legal assets ensures that a unit's legal capability is commander-oriented and mission-focused. Such a model allows the commander to make the most efficient and effective use of legal assets, reinforces the relationship between the commander and assigned judge advocates, and builds mutual trust and responsiveness between the judge advocate and client base.

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<sup>4</sup> See generally U.S. DEP'T OF DEFENSE, DIR 5100.1, FUNCTIONS OF THE DEPARTMENT OF DEFENSE AND ITS MAJOR COMPONENTS, (1 Aug. 2002); 10 U.S.C. § 5016 (Provides the Assistant Secretaries of the Navy with responsibility for "overall supervision" of specified functions, while those same functions are left to the service-level counterparts to execute).

<sup>5</sup> Although there is no formally assigned leadership functions, there is a common understanding that the SJA to CMC exercises service-level functional leadership within the Marine legal services community. See generally S. REP. 99-331 (1986); and U.S. DEP'T OF DEFENSE, CHAIRMAN OF THE JOINT CHIEFS OF STAFF REPORT ON ROLES, MISSIONS, AND FUNCTIONS, (10 Feb. 1993).

<sup>6</sup> See generally U.S. MARINE CORPS, MARINE CORPS WARFIGHTING PUBLICATION 4-11.8, SERVICES IN AN EXPEDITIONARY ENVIRONMENT, 3-8 through 3-9 (24 Sep. 2001)[hereinafter MCWP 4-11.8]; and U.S. MARINE CORPS, MARINE CORPS DOCTRINAL PUBLICATION 1, WARFIGHTING, p. 54. (20 June 1997) [hereinafter MCDP 1] (However, "operating forces should be organized for warfighting then adapted for peace-time, not vice versa.").



## **B. WHAT PERSONNEL RESOURCES ARE REQUIRED TO ACCOMPLISH THE MARINE CORPS LEGAL MISSION?**

Accomplishment of the broad Marine legal mission requires an adequate number of sufficiently trained, educated, and experienced personnel of varying grades, equipped with the right tools, and assigned to the right task. Inseparable from the question of personnel requirements, however, is the fundamental reality that the delivery of legal services, as an integral part of service-level mission execution, must account for the unique history, culture and operational nature of the respective services. Accordingly, our legal mission requires more than just a given number of competent lawyers in uniform. It requires a certain type of officer. Specifically, it requires officers (and enlisted Marines) who effectively and efficiently deliver legal services across the spectrum of legal functions under a variety of demanding circumstances and who are steeped in, and guided by, the Marine Corps' service culture, leadership philosophy, and warfighting doctrine. In short, our judge advocates must be Marine Air-Ground Task Force (MAGTF) officers.

**1. Regular Unrestricted Line Officers as Judge Advocates** – Bearing the title “Marine” requires adherence to the creed: “every Marine a rifleman, every officer a provisional rifle platoon commander.” Perhaps stated best by the Commandant, “[e]very Marine, regardless of military occupational specialty, is first and foremost a disciplined warrior.”<sup>7</sup>

**a. Historical and Cultural Requirement.** “Every Marine a rifleman” is the heart of the Marine ethos and a guide for much of a Marine’s training, education, and career progression.<sup>8</sup> All Marine officers, including judge advocates, are fully integrated line officers<sup>9</sup> and undergo the same rigorous indoctrination and training to become leaders of Marines. This socialization process provides all Marine officers a common experience, a set of shared core values and a binding sense of comradeship.<sup>10</sup> Moreover, all Marine officers are expected to have a career development path that includes assignments to operational units, expeditionary tours, and non-legal billets, as well as completion of formal courses of (non-legal) Professional Military Education (PME) for each rank. Practically, however, these are more than expectations. Marine judge advocates must compete with all other Marine officers for promotion and command, based on their competence as leaders of Marines and MAGTF officers in addition to their proficiency as lawyers.

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<sup>7</sup> CMC, General James T. Conway, Marine Corps Vision and Strategy 2025, 8 (30 June 2010).

<sup>8</sup> See generally U.S. MARINE CORPS, MARINE CORPS DOCTRINAL PUBLICATION 1-0, MARINE CORPS OPERATIONS, 1-23 (27 Sep. 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, MARINE CORPS WARFIGHTING PUBLICATION 6-11, LEADING MARINES, 7 (3 Jan 1995)[hereinafter MCWP 6-11](Ultimately adherence to this creed creates a mindset in which being a Marine becomes more than a profession, it becomes a calling).

<sup>9</sup> 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.

<sup>10</sup> MCDP 1, at 59.



**b. Operational Requirement.** Congress' intent that the Marine Corps serve as the nation's "force in readiness" was founded on a recognized national need for a force capable of rapid response to emerging crises.<sup>11</sup> Marines must be most ready when the nation is least ready<sup>12</sup> and this requires above all else that we share an expeditionary mindset. "Bags packed," we must be constantly prepared for immediate deployment overseas, bringing everything essential to accomplish the mission and no more. It implies a Spartan attitude – an expectation and willingness to endure austere conditions and to do more with less. This expeditionary mindset is developed through our common training and experience as MAGTF officers.

In addition to mindset, the Corps' expeditionary mandate demands all Marine judge advocates be generalists, capable of performing a wide range of tasks under a variety of circumstances. This allows a commander to efficiently task-organize for expeditionary operations across the spectrum of conflict. Further, by maintaining their basic warrior competency, "riflemen" and MAGTF officers are force multipliers. Marine judge advocates, while they generally begin their careers with an emphasis on military justice, are expected to be competent to provide advice and support across the core legal functions, providing a "plug-and-play" asset for the commander and serving as a versatile force-multiplier. Nowhere is this more evident than in the recent practice of assigning judge advocates to infantry battalions and regiments in Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF).<sup>13</sup>

The generalist's flexibility, rifleman's versatility, and shared expeditionary mindset enables the Marine Corps to act with a small tail to tooth ratio – key to conducting effective expeditionary operations. This explains to some degree, the Corps' efficiency – best exemplified by its historic ability to provide 23% of the nation's active ground forces, for 6% of the defense budget.<sup>14</sup>

**c. Mutual Benefits for the Corps & Marine Legal Services.** For Marine judge advocates, therefore, the MAGTF officer principle is not the mantra of a chowder and marching society; it is integral to providing a proven capability to the world's premier fighting force. Indeed, there are unique intangible benefits that accrue to both the Marine legal community and the greater

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<sup>11</sup> CMC, General James T. Conway, MARINE CORPS VISION AND STRATEGY 2025, 8 (30 June 2010).

<sup>12</sup> See Conference Report accompanying P.L. 416, 82<sup>nd</sup> Congress (1952) (stating "...American history, recent as well as remote, has fully demonstrated the vital need for the existence of a strong force-in-readiness. Such a force, versatile, fast moving, and hard-hitting.... can prevent the growth of potentially large conflagrations by prompt and vigorous action during their incipient stages. The nation's shock troops must be the most ready when the nation is least ready... to provide a balanced force-in-readiness for a naval campaign and, at the same time, a ground and air striking force ready to suppress or contain international disturbances short of large scale war....").

<sup>13</sup> See U.S. MARINE CORPS, MARINE CORPS CENTER FOR LESSONS LEARNED, LEGAL SERVICES SUPPORT TO OPERATIONAL COMMANDERS (3 May 2006) [hereinafter MCCL LEGAL SERVICES REPORT].(In a survey of 60 battalion commanders who participated in OEF and OIF, one hundred percent responded that their assigned judge advocate was a force multiplier and seventy four percent responded that given the choice between an additional senior captain or major combat arms officer, a civil affairs officer or a battalion judge advocate they would prefer a judge advocate.)

<sup>14</sup> Navy League of the United States, 2002 Almanac, [http://www.navyleague.org/sea\\_power/almanac\\_jan\\_02\\_13.php](http://www.navyleague.org/sea_power/almanac_jan_02_13.php) (last visited Aug. 26, 2010).



Marine Corps from having unrestricted line officers serve as judge advocates. Officers who have gone through the same socialization process, experienced similar field hardships, and have deployed abroad together gain a mutual understanding of the character, dispositions, and motivations of Marines and those who lead them. This leads to a shared leadership philosophy among officers and a shared sense of the manner in which good order and discipline in the Corps should be maintained. As Senator Ervin observed in 1966 when questioning Colonel Neville, the Staff Legal Officer to the Commandant, about the philosophy of requiring Marines lawyers to serve as line officers:

“I had always understood the theory more particularly was that if an officer had had experience in command of a platoon, a company or any other detachment, he would be a better judge or better prosecuting or defense counsel if he knew something about the behavior of men in the ranks...[a]s well as men above the ranks.”<sup>15</sup>

Moreover, commanders are likely to be more receptive to the advice and counsel of officers who share the same service ethos and doctrinal understanding.<sup>16</sup> For example, a common understanding of warfighting doctrine, obtained through The Basic School and grade-specific PME, allows officers to communicate to each other in a common language, providing the basis for harmonious action and mutual understanding. Similarly, a common culture and philosophy, gained through shared experiences and career broadening tours, enhances the trust between lawyer and client. Communication and trust, as much as substantive competency, are the bedrocks to providing effective legal advice and support. Ultimately, the American public interest is best served by having Marine commanders advised in the lawful conduct of combat operations and the maintenance of good order and discipline by judge advocates who share these intangibles with their commanders.<sup>17</sup>

**2. Capability Requirements** – The Marine Corps must maintain a total inventory of judge advocates on active duty sufficient to fulfill the manpower requirements of both the Marine legal mission and those of the greater Marine Corps. The breadth of roles performed by Marine judge advocates includes service-level legal requirements, departmental and joint legal billets, career broadening “B-billets,”<sup>18</sup> schools (both legal and PME) and command.

The current inventory of active duty judge advocates is **435**. SJA to CMC recommends a target inventory, based on current mission requirements, of **520**. That target is based on a table of organization or structure for 398 judge advocates (current structure of 366 plus a requested increase

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<sup>15</sup> *Bills to Improve the Administration of Justice in the Armed Services: Joint Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary and a Special Subcomm. of the S. Comm. on Armed Services, 89th Cong.*, 44 (1966).

<sup>16</sup> See Marine Corps Legal Services Study, at 100 (May 1969) [hereinafter MCLSS]. (“[S]taff legal officers will be better able to perform their staff functions, and commanders will be more receptive to this legal advice, if the lawyers are of the same service, have gone to the same professional military schools, attended the same duty stations, and shared the same hardships in the field.”).

<sup>17</sup> See generally MCLSS (The study found that lawyers can have “substantial influence on the state of discipline, esprit, morale and accomplishment of the commander’s mission.”).

<sup>18</sup> There are two-types of B-Billets applicable to the 4402 MOS: 1.) PMOS specific, in that it is required to be filled by an officer with a specific MOS, and 2.) PMOS Non-Specific, in that it can be filled by an officer of any MOS.





of 32);<sup>19</sup> an additional 93 judge advocates filling overstuffed legal billets and fair share MAGTF (non-legal) billets; and P2T2, 29.<sup>20</sup> Today's shortfall of 85 is partially offset by 36 activated reservists. The inventory is projected to be at 487 by January 2011. With this projected inventory we can meet all legal requirements, assuming they remain constant; any shortfall from the target will, however reduce the legal community's ability to support the overall Marine Corps mission and provide career-broadening opportunities for our judge advocates.

Maintaining the right number of judge advocates cannot be done by merely fixing a number and building to it. A deliberate process is necessary to continuously assess and fulfill global manning requirements. Similarly, capability to meet legal mission requirements is not solely a function of the number of judge advocates available. Maintenance of a capable and effective expeditionary legal "force in readiness" requires the accession and career development – through education, training, experience – of quality individuals to serve as MAGTF officer judge advocates. Effective management of the practice of law and effective leadership of the community are also essential factors. The next section will provide a general overview of how the Marine Corps addresses these qualitative requirements, as well as the quantitative requirements associated with the manning of service, departmental, and joint billets by Marine judge advocates. This general overview of the manpower process will set the stage for later discussions of the specific legal requirements that are addressed in the Panel's charter.

## **C. HOW ARE THESE REQUIREMENTS BEING FULFILLED?**

### **1. The System – A Deliberate, Balanced System Focused on Mission Requirements**

There is no single, legal-specific entity for managing Marine legal services structure, manpower, education, recruiting, and retention. Rather there is a deliberate system of several interactive agencies within Headquarters Marine Corps to ensure manning requirements for all occupational fields are met. The system, in its simplest terms, begins with identifying the required *structure* – the number of judge advocates required to fulfill the legal requirements within each organization of the Marine Corps. This is identified on unit Tables of Organization (T/O). This structure is balanced against funding priorities and legal and regulatory constraints to determine what portion of each unit's structure will be authorized for funding. The outcome of this formulation is published in the Authorized Strength Report (ASR). Assignments of judge advocates are made according to the structured billets funded in the respective ASR. Concurrently, forecasted ASRs are used to plan total future *inventory* of judge advocates.<sup>21</sup> Judge advocates are also added to the inventory to account for the number that may be assigned outside primary legal duties, including an appropriate

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<sup>19</sup> This number is based on Authorized Strength Report (ASR) or "bought" billets, but includes 32 billets approved by the recent Capability Assessment Review (CAR) but not yet formally added to the structure.

<sup>20</sup> Personnel projected to be in a patient, prisoner, transient or trainee status are considered P2T2.

<sup>21</sup> Inventory refers to the total number of judge advocates actually serving on active duty at a specific point in time.



share of career broadening billets (B-Billets), and the number who are projected to be in a P2T2 status. These additions are calculated through a computer modeling process, called Grade Adjusted Recapitulation (GAR), which also accounts for grade shaping. The GAR provides the targeted ideal inventory required to meet both the legal requirements of the Marine legal community and its broader mission requirements. It drives planning for recruiting, accessions, promotions, training, and education.

Within this system, the SJA to CMC is the legal services Occupational Field Manager<sup>22</sup> for the Marine Corps' 4400 series community. The SJA to CMC appoints MOS Managers, within the Judge Advocate Division (JAD)<sup>23</sup> to evaluate manpower within the 4400 occupational field, which includes three Military Occupational Specialties (MOS): 4402 - judge advocates; 4430 - legal administrative officers; and 4421 - legal service specialists. These MOS managers provide input on manpower requirements based on several considerations:

- The number of legal services billets – or positions within the organizational structure of the Marine Corps – that are currently established.
- The allocation of legal services billets, both under the current mission set and anticipated future requirements.
- The numbers of 4402s, 4430s, and 4421s of the appropriate grade in the current and projected inventory available to fill the legal services billets.
- Whether the Marines within the inventory have the requisite experience and training to successfully fill the billets.
- Whether the community is recruiting and retaining the right kind and sufficient number of Marines to meet the current and anticipated mission.

The above considerations are continuously readdressed in light of changing mission priorities, budgetary constraints, and emergent requirements. JAD manages these considerations by continuous interaction with those headquarters agencies responsible for force structure, manpower, recruiting, retention, and education.

## **2. Structure – Organizing Legal Capability Based on Mission Requirements**

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<sup>22</sup> U.S. MARINE CORPS, ORDER 5311.1D, TOTAL FORCE STRUCTURE PROCESS enclosure 1 (26 Feb 09) [hereinafter MCO 5311.1D] (Defined as “the principal point of contact between the Commandant and the total force with regard to capabilities and force structure, intended structure changes, training, and unique operational considerations pertaining to a specific OccFld. OccFld managers are assigned purview over a grouping of Military Occupational Skills (MOS) and their respective MOS managers.” MOS Managers duties include providing Functional Advocate, Occupational Field Manager and MOS Manager expertise, participate in all force structure Doctrine, Organization, Training, Materiel, Leadership and Education, Personnel, and Facilities (DOTMLPF) Assessments to include the development of detailed implementation plans for DOTMLPF solutions, and provide subject matter expertise to various force structure related working groups, and colonel level (or higher) members to the standing DOTMLPF WG, and the Total Force Management Council of Colonels Executive Steering Group, review and provide comments, concurrence, non-concurrence to all pertinent Table of Organization & Equipment Change Requests (TOECRs) and MCBul 5400s.)

<sup>23</sup> See MCO 5311.1D (the MOS Manager for 4402s is the JAS Branch Head, for 4421s, the Legal Chief of the Marine Corps and for 4430s, the Legal Administrative Officer of the Marine Corps).





The Marine legal community's 4402 structure is managed by the Deputy Commandant for Combat Development and Integration (DC, CD&I) via the Total Force Structure Division (TFSD). TFSD uses top-down guidance, policy constraints, and bottom-up recommendations from commanders to determine the T/O required for each unit within the Marine Corps to accomplish mission essential tasks. This T/O constitutes the optimal force structure for a fully manned Marine Corps. Force structure represents the total personnel requirement for each command, itemized by billets, MOS, and grade, necessary to accomplish the unit's particular mission. Ideally, the total number of 4402s in this structure represents the total number of judge advocate positions that must be filled to meet the Marine Corps service-level legal mission, as well as departmental and joint legal requirements.

Fiscal realities create the need to prioritize the force structure of the Marine Corps to properly allocate limited resources. The Commandant issues a Manning and Staffing Precedent Order, which delineates "excepted commands" – those units whose structure will be funded 100%, and "priority commands" – those units whose structure will receive at least 90% funding.<sup>24</sup> All remaining commands, (in which most legal billets reside), are allocated structure based on the remaining funding available. Through this process TFSD creates the ASR, reflecting which structured billets will be "bought." The ASR is published semiannually in February and August. The report includes forecasted future year ASRs, subject to change pursuant to variations in manning precedents. Structure is the baseline number and the largest input to ASR, and ASR drives assignments and inventory (discussed in more detail below). Therefore it is critical to ensure unit T/Os are actively managed to reflect current requirements.

All judge advocates, including the SJA to CMC, review their respective unit's T/O to identify necessary force structure changes. This billet structure may be modified through a T/O and Equipment Change Request<sup>25</sup> (TOECR). TOECRs may call for the addition or deletion of structure, the realignment of structure, or modifications to existing structure such as the MOS or grade required. A request for additional structure for a particular command, without any off-set from another command, is called an "uncompensated" request; a request that seeks to realign structure from one command to another command is a "compensated" request.

Currently, the Marine Corps has 366 structured billets requiring a primary MOS (PMOS) of 4402. This structure reflects the active management by both the separate commands and JAD to effect a series of incremental changes in an effort to align structure to actual requirements. Ongoing evaluation of necessary changes in structure is a fluid and iterative process.

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<sup>24</sup> U.S. MARINE CORPS, ORDER 5320.12G, PRECEDENT LEVELS FOR MANNING AND STAFFING, (8 Jan. 2010) [hereinafter MCO 5320.12G].

<sup>25</sup> MCO 5311.1D



**a. SJA to CMC, 2005 Strategic Planning Panel.** In December 2005 the SJA to CMC convened a panel of senior officers from the Marine legal community, SJAs, OICs, Military Judges, and others with extensive experience across the spectrum of legal functions. Their charter was to make recommendations for changes to Marine legal services organization, training, and equipment to increase support to operational commanders and meet evolving legal requirements. The panel reviewed the entire 4400 series structure, studied historical organizational work-loads and the ratio of judge advocates to respective geographic active duty populations. Based on this review, the panel recommended several compensated TOECRs to realign structure from the supporting establishment to the operating forces, uncompensated additions to structure to address existing and emergent requirements, and several TOECRs to adjust billet grades and re-code billets to 4402 to reflect actual billet requirements (as discussed further below).

**b. Re-Coding Historically Unstructured Legal Billets.** The need to “re-code” billets, results from commands historically requesting and receiving judge advocates to fill a billet listed on the T/O as something other than a 4402 “Judge Advocate” and then using them to fill unstructured legal requirements within the command. A typical example involves the Marine Expeditionary Unit (MEU) SJA. For over two decades the Marine legal community has been providing seven 4402s to serve as command legal advisors to MEU commanders. On the MEU T/O, however, these 4402s are assigned to a 0530 “Civil Affairs” billet. The result is an overall 4402 structure that reflects something less than what is actually required, and a 4402 inventory that appears larger than what is required to meet the structure. JAD has worked with TFSD and the MEUs to make changes to re-code these historic “legal” billets.

**c. Re-coding Previously Structured 4402 Billets.** The Marine legal community, while maintaining the preference for generalists, recognized that certain supervisory legal billets required additional concentration in specific functional areas. In 2005 the Marine Corps effected a change to the MOS Manual<sup>26</sup> to add six additional MOSs (AMOS) for judge advocates.<sup>27</sup> The re-coding created the requirement that these billets be filled with judge advocates possessing the advanced education, experience and training required to be assigned these secondary MOSs. In addition, the re-coding created the requirement to staff or “buy” these billets at 100% manning during the development of the ASR. By June 2010, 32 structured 4402 and 4410 billets had been re-coded to various AMOSs.<sup>28</sup> In June 2010 another 22 structured 4402 billets were re-coded, all of them to the 4409 AMOS.<sup>29</sup>

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<sup>26</sup> U.S. MARINE CORPS, ORDER 1200.17A, MILITARY OCCUPATIONAL SPECIALTIES MANUAL, (4 June 2009) [hereinafter MCO 1200.17A].

<sup>27</sup> The six new additional MOSs (AMOS) include: 4405 - International/Operational Law; 4406 – Environmental Law; 4407 – Labor Law; 4408 – Procurement and Fiscal Law; 4409 - Military Justice Manager; and 4410 – General L.L.M. Designation of the AMOSs requires advanced degrees and experience.

<sup>28</sup> In 2013, the Marine Corps will have 12 billets in 4405, 9 in 4406, 7 in 4407, 4 in 4408, and 2 in 4410.

<sup>29</sup> See TFSD Report of 8 June 2010.



**d. JAD 2007 Structure Review.** In February 2007, JAD undertook another review of the Marine legal structure. This study considered the input of SJAs and OICs, vetted by their commanders, and conducted a line-by-line review and validation of every billet in the JA structure. The review confirmed much of the 2005 review, and ultimately recommended 22 compensated (realigning 4402 structure), and 36 uncompensated (creating new 4402 structure) changes to the T/O. Many of the “uncompensated” changes were requests to re-code non-legal billet structure to reflect those historically filled by 4402s (e.g., seven MEU SJAs and three Deputy MEF SJAs). This request was submitted on 30 July 2007 but ultimately not approved.<sup>30</sup> A TOECR converting the MEU billets from 0530 to 4405 was resubmitted and approved in 2009; the changes are slated to take effect in 2012.

**e. JAD 2008 Uncompensated Structure Request.** In April 2008, JAD submitted another request for uncompensated structure, this time reflecting not only legacy deficiencies, but also new requirements based on the growth of the Corps to 202K. That year, the Marine Corps conducted an Uncompensated Review Board (URB) wherein JAD requested to convert existing non-legal structure billets to the judge advocate and legal service specialist structure. Many of the judge advocate billets were coded as 8006 (Unrestricted Officer). 34 judge advocate billets and 29 enlisted billets were requested.<sup>31</sup> Although the billet requests were validated by TFSD and approved by the URB, no structure was added due to the Marine Corps’ prioritization of resources.

**f. JAD 2009 Uncompensated Structure Request.** In 2009, another URB was conducted.<sup>32</sup> JAD requested an uncompensated structure addition of 32 officers, two warrant officers, and 29 enlisted personnel. Justification for the addition was the need for the provision of legal services to a Marine Corps growing to 202,000.<sup>33</sup> The 2009 URB was again validated but the JAD requests were not added as other Marine Corps priorities were met.<sup>34</sup>

**g. Capabilities Assessment Review.** In spring 2010, a Capabilities Assessment Review (CAR) assessed personnel requirements and made recommendations for changes in structure. The CAR recommended the addition of 32 4402s to judge advocate structure. This recommendation is pending approval. Defense Officer Personnel Management Act (DOPMA) grade relief would be required for the CAR recommended changes to be implemented.<sup>35</sup> In addition, implementation of the results of the CAR has been held in abeyance pending the results of a Force

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<sup>30</sup> SJA to CMC Ltr to CMC Judge Advocate Division Review of the Structure for Delivery of Legal Services in the Marine Corps, 30 July 2007.

<sup>31</sup> See Judge Advocate Division Uncompensated Structure Request dtd 22 April, 08

<sup>32</sup> MARADMIN 0031/09.

<sup>33</sup> See Judge Advocate Division Uncompensated Structure Request dtd 30 March, 09

<sup>34</sup> Id.

<sup>35</sup> EMail of 9 June 10 from Director, TFSD



Structure Review Group (FSRG) scheduled for September 2010. The FSRG is anticipated to conduct a total review of all Marine Corps requirements and structure.

### **3. Inventory – Fulfilling Requirements for MAGTF Officers**

Marine Corps personnel inventory is managed by the Deputy Commandant for Manpower & Reserve Affairs (DC, M&RA). Recruiting and accessions are managed by Marine Corps Recruiting Command (MCRC), and, to the extent not provided by the Naval Justice School (NJS), training and education is managed by Training & Education Command (TECOM). Inventory for all MOS's is managed to meet MOS mission requirements and overall Marine Corps (not mission specific) mission requirements. Inventory is heavily impacted by recruiting and accessions, which for the Marine Corps judge advocate community includes lateral accessions through law education programs.

DC M&RA, Manpower Management (MM) uses the most recently published ASR to compare current, assignable inventory with the authorized requirement to prepare unit-staffing goals. Manpower Plans (MP) simultaneously converts the report into the GAR report for use in developing military inventory. The GAR is the primary tool used by MCRC and MM to shape structure for the total force. This model first pulls the funded structure from the ASR by MOS, and then “maps” a share of B-Billets<sup>36</sup> and P2T2 to that particular MOS.<sup>37</sup> These totals, organized by grade, are then adjusted for grade shaping. The GAR provides the planning basis for building the requisite inventory to meet projected requirements. These plans are then provided to MCRC and TECOM to develop accession and training plans to build projected inventory requirements. The actual inventory may differ from previous projected inventories for a given year, based on anomalies in rates of accessions and attrition.

JAD has a close working relationship with each of the agencies responsible for structure and inventory as well as assignments. JAD makes recommendations to each agency based on the needs of the legal community as a whole, and plays a major role in the training, education, assignment and management of the 4400 series personnel inventory. Based on SJA to CMC input and other indicators, DC, M&RA has taken steps to improve the health of the judge advocate community.

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<sup>36</sup> There are two-types of B-Billets applicable to the 4402 MOS: 1.) PMOS specific, in that it is required to be filled by an officer with a specific MOS, and 2.) PMOS Non-Specific, in that it can be filled by an officer of any MOS.

<sup>37</sup> It is important to note that billets are categorized as “A-Billets” and “B-Billets.” A-Billets are those billets fulfilling the primary mission of an MOS, while B-Billets are those billets necessary for accomplishing the broader mission of the Marine Corps. Most B-Billets require the general qualities of a MAGTF officer, rather than any specific MOS. Within the category of B-Billets, however, there are “Necessary B-Billets,” and “Fair Share B-Billets.” Necessary B-Billets are those which require a primary MOS of 4402 due to the legal duties associated with the billet. These billets are normally, though not always, “specialty” billets staffed by senior Judge advocates with an AMOS and concentration in a specific area of law. Fair Share B-Billets, on the other hand, do not require a primary MOS of 4402, as they are not associated with legal-specific duties. The number of “fair-share” billets required to be filled by judge advocates is not fixed, but instead fluctuates depending on the relative “health” of the MOS as compared to others and the priorities set by HQMC.



Accordingly, five inventory shaping measures have been implemented: (1) increased accessions; (2) 100% career designation for judge advocates; (3) inclusion of judge advocate shortages in promotion precepts; (4) return to active duty boards; and (5) Law School Education Debt Subsidy.

**4. Integration of the Reserve Component.** An analysis of what is required to perform the Marine Corps' legal mission cannot be made without considering reserve capabilities. The Marine reserve legal component, consisting of 385 reserve judge advocates, is an integral part of the total force. Prior to 2003, these personnel were assigned to local non-legal Selected Marine Corp Reserve (SMCR) units, typically filling non-legal billets, or served as Individual Mobilization Augmentees (IMAs), unassociated with any particular unit. This presented difficulties in identifying subject matter expertise, task-organizing, integration, and exercising professional supervision.

In 2003, Marine Forces Reserve (MFR) established a Reserve LSSS (RLSSS) and began moving these disparate 4402s under one organization. This reorganization created an organization capable of providing centralized management, administration, and command and control of the delivery of reserve component legal services to the Total Force and to ensure that trained and qualified judge advocates were available to support active duty requirements as directed. In 2010, operational sponsorship of the RLSSS was assigned to the SJA to CMC and RLSSS coordinators were relocated to JAD. This re-assignment and re-location allows the Marine Corps to more effectively and efficiently integrate reserve capabilities to meet legal mission requirements.<sup>38</sup>

As indicated previously, meeting legal requirements must be analyzed within the framework of the overall Marine Corps Manpower system. From the above description, it is apparent that the Marine Corps has a responsive process to adjust both structure and inventory to meet mission requirements for all MOSs, including judge advocates. Although there is a projected shortfall in the target legal inventory recommended by the SJA to CMC, the process is continuous and must account for reassessment of mission requirements. In addition to adjusting based on mission requirements, organizational and management practices must ensure effectiveness and efficiency given the resources available. In this regard, the SJA to CMC has recently published a Strategic Action Plan 2010-15 (SAP) to maximize efficiency and effectiveness through standardized processes and procedures and oversight.

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<sup>38</sup> The RLSSS has contributed significantly to meeting the increased demand for legal capability, resulting from operations in OEF/OIF. Its IMA structure allows the necessary flexibility to task-organize and surge reserve legal services assets to meet emerging needs. The RLSSS can draw on a pool of experts from its six specialized branches providing the Total Force with timely advice on myriad legal issues, including law of war and rules of engagement, pre-mobilization legal assistance, trial and defense counsel mentoring and training, trial and appellate judicial support, and installation law. The RLSSS acts in general support to operational SMCR units just as active duty LSSSs provide general support to active Marine Forces.



## 506 ISSUE I

### **EMERGENT OPERATIONAL LAW REQUIREMENTS OF THE MARINE CORPS, INCLUDING REQUIREMENTS FOR JUDGE ADVOCATES ON JOINT TASK FORCES, IN SUPPORT OF RULE OF LAW OBJECTIVES IN IRAQ AND AFGHANISTAN, AND IN OPERATIONAL UNITS.**

The issue presented is concerned with emergent operational law requirements that have arisen since September 11<sup>th</sup>, 2001 primarily as a result of contingency operations in Iraq and Afghanistan. In addressing this issue, Congress has specifically directed the panel to consider requirements for Marine judge advocates: 1) on Joint Task Forces, 2) in support of Rule of Law Objectives in Iraq and Afghanistan, and 3) in operational units.

In light of the issues presented, two initial observations are appropriate. First, prior to 2001 there were significant existing operational law requirements for Marine judge advocates, including service on joint task forces and in operational units. Second, although the Marine Corps has deployed over 600 active duty and reserve Marine judge advocates since 2001 in support of operations in OEF and OIF, many of those judge advocates performed traditional core legal functions in support of unit readiness, albeit performed in an operational environment.

With these observations in mind, this section will address what is encompassed by the term “operational law;” the historically evolving operational law requirements for the Marine legal services community; the specific operational law requirements that emerged as a result of OEF/OIF; how these requirements were met through the Marine Corps’ structure, manning and staffing process; the associated training and education requirements; whether Marine legal services effectively met these requirements; and the impact these requirements had on other mission requirements for the Marine legal services community.

#### **A. THE PARAMETERS OF “OPERATIONAL LAW”**

Operational law, as a core legal function, refers to the entire range of legal issues affecting the planning and executing of military operations. As currently defined, “operational law” is “that body of international, foreign (host nation), and U.S. domestic laws, regulations, and policies that directly affect U.S. military operations across the operational spectrum – from peacetime activities to combat operations.”<sup>39</sup> While traditionally focused on areas such as the Law of War, status of forces agreements, and rules of engagement (ROE), it also encompasses such divergent areas as foreign claims, foreign criminal jurisdiction, contracting, and the practice of traditional core areas in an operational environment. More recently, judge advocates serving in operational law assignments

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<sup>39</sup> U.S. MARINE CORPS, ORDER 3300.4. MARINE CORPS LAW OF WAR PROGRAM , Encl.1, para. 2 (20 Oct 2003)[hereinafter MCO 3300.4].





have been called upon to not only provide subject matter expertise during planning processes, but also to participate in the execution of operational missions such as rule of law<sup>40</sup> and civil affairs.

The art of the operational legal practice is identifying the legal issues in these divergent areas and rapidly synthesizing them into timely, coherent legal advice for a military commander engaged in operational planning<sup>41</sup> and execution. The key is “ensur[ing] Marines and all personnel accompanying Marine Corps forces will conduct all military operations in accordance with applicable laws, regulations, and policies.”<sup>42</sup>

## **B. HISTORICALLY EVOLVING OPERATIONAL LAW REQUIREMENTS**

The requirements for operational law result from the historic and continuous evolution of the modern operating environment and the way in which it is regulated. Operational law requirements are driven by three factors: 1) requirements imposed by law and regulation; 2) lessons learned from previous contingencies, and 3) the commander’s mission analysis. These requirements, in turn, drive the responsibilities, assignments, and training of Marine judge advocates, to ensure the commander is equipped with completely capable MAGTF officers.

Operational law services have been, and continue to be, provided within the Marine Corps operating forces primarily by the SJA to the Marine Forces (MARFOR) components, Marine Expeditionary Forces (MEF), and major subordinate commands. These SJAs, and their organic legal staff, provide operational law support in their role as command advisors, primarily through their participation on operational planning teams for exercises and contingencies as well as standing OPLANS. These SJAs also accompany the force to the field as part of the command element.

During the 1990’s, the Marine Corps responded to contingencies involving drawn-out, low-intensity, asymmetric warfare; in failed or weak states; and under tenuous international legal authority and mandates creating legally intensive operating environments for the commander. Additionally commanders began to confront the impact of the “strategic corporal” and the ubiquitous media whose presence meant that conflicts were acted out before an international audience.<sup>43</sup> The lessons learned from these conflicts served to reinforce the trend of increased operational law requirements

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<sup>40</sup> CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES (2009).

<sup>41</sup> U.S. MARINE CORPS, MARINE CORPS WARFIGHTING PUBLICATION 5-1, MARINE CORPS PLANNING PROCESS (24 Aug. 2010)[hereinafter MCWP 5-1].

<sup>42</sup> MCO 3300.4, para. 3.a(1)

<sup>43</sup> “Today’s Marines often operate far ‘from the flagpole’ without the direct supervision of senior leadership and they will be asked to deal with a bewildering array of challenges and threats. They will be required to confidently make well-reasoned and *independent* decisions under extreme stress. In many cases, the individual Marine will be the most conspicuous symbol of American foreign policy and will potentially influence not only the immediate tactical situation, but the operational and strategic levels as well.” Gen. Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, Marines Magazine, January 1999.



identified in the Gulf War.<sup>44</sup> The importance of operational law was not lost upon the leadership of the Marine Corps. While serving as Commanding General, I MEF, then-Lieutenant General Anthony Zinni commented:

Operational Law is going to become as significant to the commander as maneuver, as fire support, and as logistics. It will be a principal battlefield activity. The senior staff judge advocates may be as close to the commander as his operations officer or his chief of staff. They will be the right hand of the commander, and he will come to them for advice.<sup>45</sup>

To support this growing operational law requirement, the service schools began offering courses of instruction in this functional area.<sup>46</sup> This included the NJS two-week course on the Law of Military Operations and the (Army) Judge Advocate General's Legal Center and School (TJAGLCS) two-week course on Operational Law and one-week course on the Law of War. The Marine Corps established a Law of War Detachment within the Marine Corps Reserve which traveled to Marine Corps installations providing a one-week course of instruction to Commanders and judge advocates on the law of war. Further, the Marine Corps began sending a small number of judge advocates each year to civilian institutions and TJAGLCS to obtain LL.Ms in International Law.

### **C. EMERGENT OPERATIONAL LAW REQUIREMENTS OF OEF/OIF**

In March 2004, the guidance from senior civilian and military leadership was that U.S. forces would begin to withdraw from Iraq as soon as responsibility for security, and a sufficient rule of law system, could be turned over to the interim, and eventually the newly elected Iraqi government. It was unclear how long, or to what extent, the Marine Corps would be committed to Al Anbar Province. As it turned out the Marine Corps would maintain nearly a MEF size MAGTF, referred to as Multi-National Forces-West (MNF-W), in Iraq through January 2010.

Throughout these five years, Marine judge advocates continued to serve at the MEF, Division, Regiment and Battalion level for most maneuver units, as well as the headquarters of the Marine Aircraft Wing (MAW) and MLG. Most of these judge advocates served in the command advisor role, advising their commanders not only on operational law, but also across the spectrum of legal functions, including rule of law operations.<sup>47</sup> The MLG continued to operate the LSSS, which provided traditional military justice, administrative law, and investigation support. Marine judge

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<sup>44</sup> Center for Law and Military Operations, *Forged in the Fire: Legal Lessons Learned During Military Operations 1994-2008*, 140 (2008). CLAMO, *Forged in the Fire*, pg 140 citing the LL library of books.

<sup>45</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS (1 Mar. 2007).

<sup>46</sup> LtCol Walter G. Sharp, *The Warfighting Role of the Marine Judge Advocate*, Marine Corps Gazette, Feb. 1996, at 18.

<sup>47</sup> Few Marine judge advocates were assigned solely to rule of law operations, primarily filling the requirement for one field grade judge advocate per 12-14 month tours in the MNF-W G-9 section - responsible for overseeing MNF-W rule of law operations.



advocates also were tasked to serve on Joint Task Forces, specifically Multi-National Corps Iraq (MNC-I), Multi-National Force Iraq (MNF-I) and Joint Task Force (JTF) -134.

As the Marine Corps drew down its forces from Iraq, it began building up forces in southern Afghanistan, beginning in 2008 with the establishment of a MAGTF, built around several infantry battalions, and later in 2009 with a brigade-sized MAGTF (MEB-A). Capitalizing on lessons learned from OIF, the MEB-A employed judge advocates at all levels of command – the MEB, the RCT, and each maneuver battalion. A significant portion of their duties are of an operational law nature.<sup>48</sup> MEB-A has been replaced by a larger MEF (Forward) organization, which continues to assign judge advocates at all levels of command. There has also been a requirement for one Marine judge advocate each six months, to serve on JTF-76 (now USF-A) in Afghanistan. As part of the wider OEF mission, there has been a requirement for one Marine judge advocate each six months, to serve on JTF-HOA.

#### **D. MEETING REQUIREMENTS THROUGH MARINE CORPS' TASK-ORGANIZATION**

Initially, judge advocates were deployed and assigned to duties in support of OEF and OIF and were sourced from the deploying command's organic structure. However, the SJA offices within the MEF and Ground Combat Element (GCE) soon required augmentation. Further, the requirements for battalion, RCT, JTF-134, and other joint assignments were not on any structured table of organizations for these units, creating the requirement for additional augmentation. These judge advocates were sourced from throughout the total force. With the exception of judge advocates assigned to infantry battalions, most of these billets had a tour length of 12 to 14 months. Navy judge advocates provided additional sources of augmentation to the MNF-W SJA office, filling approximately six billets in FY 06, five billets in FY 07 and FY 08, and two billets in FY 09.<sup>49</sup>

#### **E. ASSOCIATED TRAINING & EDUCATION REQUIREMENTS**

Requirements to prepare judge advocates for emergent operational law demands evolved alongside the demand as lessons learned in theater were quickly compiled, disseminated and absorbed by the service components. To address these demands the Marine Corps implemented measures to improve the training and equipping of Marine judge advocates to provide effective and efficient operational law capability to the supported commanders.

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<sup>48</sup> Letter from SJA, MEB-A, to SJA, II MEF, "Ongoing Assessment of Best Practices To Provide Legal Support to the 2d Marine Expeditionary Brigade – Afghanistan" (25 Oct 2009).

<sup>49</sup> All of the Navy augmentees were assigned at the Regimental Combat Team (RCT) level and above, which would have normally required a 12-14 month deployment. However, as the individual Navy augmentees were only available for six month tours, this doubled the amount of Navy judge advocates used to fill these billets. As a result, 36 Navy judge advocates deployed in support of Marine OIF requirements between 2003 and 2010.



**1. Basic Operational Legal Training** – Initiated after September 11, 2001, this five-day training program gives new judge advocates a working foundation in international and operational law. The program was created by SJA to CMC in response to a validated need for international and operational law training at the NJS Basic Lawyer’s Course (BLC). Originally, it was a “Marine-only” program given at the beginning or end of the 10-week BLC. The Navy began participating in the program in August 2006. It has become a formal part of the NJS BLC curriculum.

**2. Pre-Deployment Legal Training (PDLT)** – PDLT began in December of 2003 and is still in effect for all deployments. PDLT, managed by the MEF SJAs, provides deploying judge advocates with refresher training and updates on legal issues in their planned area of operations.

**3. International-Operational Law MOS – 4405.** The Special Education Program (SEP), Advanced Degree Program (ADP) and TJAGLCS graduate course offer Marine judge advocates the opportunity to obtain a masters of law degree (LL.M) in International-Operational Law and an additional MOS (AMOS) of 4405. HQMC anticipates funding this year for five SEP LAW students and 15 students to attend TJAGLCS, among whom several are expected to obtain the 4405 AMOS.

**4. Operational Law Training at Mojave Viper (MV)** – MV is the training program conducted at the Marine Corps Air-Ground Combat Center (MCAGCC) in 29 Palms, California to train Marine combat units rotating into Iraq in support of OIF. Beginning May of 2006, a judge advocate was assigned to Tactical Training Exercise Control Group (TTECG) to provide legal expertise for the training packages.<sup>50</sup>

**5. The Center for Law and Military Operations (CLAMO)** - CLAMO is a U.S. Army run, joint, interagency, and multinational legal center responsible for collecting and synthesizing data relating to legal issues arising in military operations, managing a central repository, and disseminating resources, to facilitate the development of doctrine, organization, training, materiel, leadership, personnel, and facilities as these areas affect the military legal community. A Marine judge advocate is assigned to CLAMO to assist in collecting valuable input from those returning from the fight, as well as its dissemination to the Marine legal community.<sup>51</sup>

## **F. ASSESSMENT**

Often the judge advocates at the battalion level were junior company grade officers with little operational experience. However, due largely to their training as MAGTF officers, functional

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<sup>50</sup> The judge advocate provides training in detainee operations, law of armed conflict, ROE, and Escalation of Force measures; which is incorporated into the entire curriculum to include classroom training, practical application, and final exercises. Enhanced MV now trains units deploying to Afghanistan.

<sup>51</sup> MAGTF HB; Center for Law and Military Operations, *Rule of Law Handbook: A Practitioner’s Guide for Judge Advocates* (2009); Center for Law and Military Operations, *Forged in the Fire: Legal Lessons Learned During Military Operations 1994-2006* (2006), Tip of the Spear.



supervision at the regimental and division level, and pre-deployment training, these assignments have proved successful.

One measure of this success is the assessment of those officers, including commanders, engaged in the mission. Their judgment was encapsulated in a 2006 Marine Corps Center for Lessons Learned report.<sup>52</sup> When specifically asked if they were able to obtain the legal support they needed, an overwhelming majority of the officers who expressed an opinion answered in the affirmative.<sup>53</sup> In addition, they almost uniformly responded that having judge advocates assigned to the battalion level was a “force multiplier” that “enhanced the ability of the battalion to accomplish its mission.”<sup>54</sup> A few selected comments from the report further illustrate these points:

“For OIF II, absolutely indispensable...It [a Bn JA] wasn't a luxury, it was a necessity in that environment...the SJA and Civil Affairs were key supporting arms...having all the lawyers up at regiment and division is purely reactionary....”<sup>55</sup>

“I did not know what a combat multiplier he would be in this environment when we began, but would be disingenuous if I were to in any way recommend anything other ... for future commanders.”<sup>56</sup>

Despite the resource demands placed upon judge advocates as a whole, the Marine legal community has successfully met operational law support requirements for OEF/OIF. This is due in large part to two factors. First, the decision to place judge advocates with infantry regiments and battalions. This decision reflected the innovative, flexible, and unorthodox approach to the mission that has helped to make the delivery of Marine legal services, and the Marine Corps, successful.<sup>57</sup> Second, the Marine Corps' continued insistence that all Marine officers, judge advocates included, be well-rounded MAGTF officers allowed our judge advocates to seamlessly integrate into their operational units.

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<sup>52</sup> MCCLL LEGAL SERVICES STUDY. *Legal Services Support to Operational Commanders, A Summary of Observations and Lessons from OEF/OIF Judge Advocates and Infantry Commanders* (2006).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Wagoner, *Marine Operational Law*, Marine Corps Gazette On-Line (Oct. 2006).

<sup>57</sup> *Id.*, citing a 1<sup>st</sup> Marine Division Battalion Commander: “Attaching SJAs at the battalion level and their application out here is one of the best innovations I've seen in my time in the Corps.” (Citing a Regimental Commander: “We can't go back to the old ways of using SJAs, they need to be fully integrated into the combat team and know the ground, the enemy, and the commander's intent.”).



## **G. IMPACT ON MARINE LEGAL SERVICES MISSION AND THE MARINE CORPS**

The impact of continuous deployment of legal personnel in support of OEF and OIF has understandably placed heavy demands on the organization, its personnel, and their families. This has required flexibility, ingenuity, and endurance by all. These demands are mitigated by several factors. First, legal requirements for the uniform legal services community are largely generated by the command. Therefore, the legal mission follows the command. Accordingly, most organic legal personnel within the SJA offices deploy with the command and continue to provide routine legal services while in theater. Second, the reserve component, as an effectively integrated component of the total force, has fulfilled one-fourth of the total requirement for deployed judge advocates to support OEF/OIF, which includes a significant number assigned to Joint Task Forces and the MAGTF Command Elements, Regiments, and Battalions. Lastly, the percentage of the active duty 4402 officer inventory deployed each year on average since 2001, has been one of the lowest compared to all other active duty officer MOS communities across the Corps.<sup>58</sup>

### **506 ISSUE II**

#### **NEW REQUIREMENTS TO SUPPORT THE OFFICE OF MILITARY COMMISSIONS AND TO SUPPORT THE DISABILITY EVALUATION SYSTEM FOR MEMBERS OF THE ARMED FORCES.**

##### **A. SUPPORT TO THE OFFICE OF MILITARY COMMISSIONS**

From the beginning of the military tribunals in the war on terror,<sup>59</sup> through the statutory establishment of the Office of Military Commissions (OMC),<sup>60</sup> the Marine Corps has continually provided judge advocates to support the evolving requirements. Initially, the Marine Corps provided five judge advocates: one lieutenant colonel, three majors, and one captain.<sup>61</sup> In the first conviction of Australian David Hicks, Marines served as prosecutor, defense counsel, and judge.<sup>62</sup>

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<sup>58</sup> M&RA MOS Deployment Report, dated 24 August 2010.

<sup>59</sup> President of the United States, Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (13 Nov 01).

<sup>60</sup> Pub. L. No. 109-366, Military Commissions Act of 2006 (establishing the Military Commissions and later amended by Public Law 111-84, Military Commissions Act of 2009).

<sup>61</sup> JAS Document "Office of the Military Commissions (OMC) (7 Oct 07)," p. 2.

<sup>62</sup> Associated Press, *Australian Pleads Guilty to Terrorism Charge*, [www.msnbc.msn.com/id/17801019](http://www.msnbc.msn.com/id/17801019) (Mar. 27, 2007)(last visited 19 Aug 10).





In 2004, the Marine Corps added two more judge advocates: one lieutenant colonel and a captain.<sup>63</sup> The requirement continued to evolve in 2006<sup>64</sup> and 2008<sup>65</sup> as the Deputy Secretary of Defense tasked the Marine Corps, among the other services, with providing additional judge advocates. During the most recent trials of Omar Kadr<sup>66</sup> and Ibrahim al-Qosi,<sup>67</sup> Marines served as the prosecutor in each case. DC M&RA has approved the total provision of 13 judge advocate billets to the OMC.<sup>68</sup> Based on the current OMC requirement, which is smaller than anticipated, nine (soon to be 11) active duty judge advocates, including a Marine colonel serving as the Chief Defense Counsel, are currently serving there.<sup>69</sup> The unfilled structure will allow the Marine Corps to surge judge advocates to the OMC should the requirement increase.

## **B. SUPPORT TO THE DISABILITY EVALUATION SYSTEM**

Section 1612 of the 2008 National Defense Authorization Act (NDAA) directed the military departments to provide "legal counsel to recovering service members *while undergoing evaluation by a physical disability evaluation board.*" (emphasis added). In October 2008, the Under Secretary of Defense (Personnel and Readiness) issued Policy Memorandum on Implementing Disability-Related Provisions of the NDAA of 2008, directing the Department Secretaries to "provide government legal counsel to advise and represent service members during the Physical Disability Evaluation (PDE) process (informal and formal Physical Evaluation Boards) and any subsequent appeals to the Secretary of the Military Department concerned ..., relating to the final disposition of the Service member disability cases."<sup>70</sup>

In the Disability Evaluation System (DES), a wounded warrior's case can proceed through three boards: the initial Medical Evaluation Board (MEB), then the Informal Physical Evaluation Board (IPEB), and finally the Formal Physical Evaluation Board (FPEB). Before enactment of the NDAA, wounded warriors were provided legal assistance only at the final stage of the DES, the FPEB. All FPEBS are held at the Washington Navy Yard, where Marines are represented by Navy judge advocates. Upon approval and scheduling of an FPEB, an attorney is assigned to assist and represent the Marine at the FPEB. The Under Secretary's memorandum provides that government counsel

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<sup>63</sup> *Id.*

<sup>64</sup> Memorandum, Dep. Sec. of Def. to Secretaries of the Military Departments, Subject: Office of Military Commissions Military Personnel Staffing (20 Nov. 2006).

<sup>65</sup> Memorandum, Dep. Sec. of Def. to Secretaries of the Military Departments, General Counsel of the Department of Defense, Director Administration and Management, Subject: Personnel Resources and Administrative Support for the Office of the Commissions (OMC)—and Related Matters (14 May 2008).

<sup>66</sup> Carol Rosenberg, *Judge Finalizes Jury for War Crimes Case*, Miami Herald, Aug 12, 2010, at 4.

<sup>67</sup> Sean Alfano, *Osama Bin Laden's Former Cook Ibrahim al-Qosi Sentenced to 14 Years by Guantanamo Jury*, New York Daily News, Aug. 12, 2010.

<sup>68</sup> Decision Paper Subj: Overstaff Request ICO Office of the Military Commissions

<sup>69</sup> Occupational Staffing Report of 5 Oct 09 (documenting nine officers, one of whom rotated away in 2010).

<sup>70</sup> § 1612, National Defense Authorization Act for Fiscal Year 2008.



shall be available to consult with the wounded warrior upon the warrior's receipt of the decision of an Informal PEB.<sup>71</sup> Military Departments may, however, make legal counsel available to wounded warriors prior to receipt of the IPEB decision.<sup>72</sup>

In his 2006 Planning Guidance, the Commandant pledged that the Corps would continue support for wounded warriors and their families. In April 2007 the Wounded Warrior Regiment (WWR), was established in Quantico, Virginia, and with Wounded Warrior Battalions (WWB) on the East and West Coast.

In line with CMC's guidance, Marine judge advocates assisting in the DES process have determined that the earlier they can assist Marines in the process, the better. Their experience has shown that making contact with the Marines at the time of the Medical Evaluation Board results in the rest of the DES process operating much more efficiently and helps to present a better package to the IPEB and ultimately to the FPEB, if needed.

Currently, the Marine Corps meets the needs of wounded warriors using mobilized reserve judge advocates. The activation of four reserve Marine judge advocates was authorized in 2009. Two judge advocates each were sent to Camp Pendleton and to Camp Lejeune. Currently three field grade reserve judge advocates are filling these billets, and a fourth judge advocate recently finished his period of activation. On 13 July 2010, the MFR LSSS announced this vacancy and is currently interviewing three applicants.

The use of mobilized Reserve judge advocates to provide legal counsel for Marines in the DES process is temporary until a permanent solution is achieved. The planned long term solution is to use a mix of judge advocates and civilian attorneys to provide legal counsel for Marines in the DES. In October 2009, it was determined that 14 attorneys would be needed, of which three would be supervisory, to assist Marines being processed through the DES.<sup>73</sup> These 14 attorneys would be divided between five active duty attorneys and nine civilian attorneys. The five active duty permanent structure billets for the DES were requested as part of JAD's 2009 overall request for additional structure, through the Capability Assessment Review (CAR).<sup>74</sup> JAD also requested the provision of nine civilian attorneys, which was to be considered at the FY 2010 Uncompensated Review Board (URB). This board was ultimately cancelled and the request awaits the results of the 2010 Force Structure Review Group which will review all Marine Corps structure.

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<sup>71</sup> Memorandum, Under Sec. of Def. for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, General Counsel of the Department of Defense, and Inspector General of the Department of Defense, Subject: Policy Memorandum on Implementing Disability-Related Provisions of the National Defense Authorization Act of 2008 (Pub L. 110-181, (14 Oct. 2008).

<sup>72</sup> *Id.*

<sup>73</sup> The need for 11 attorneys to assist Marines was based on an attorney to client ratio of approximately 1:200 projecting an annual average of 2440 Marines entering the DES over the next four years.

<sup>74</sup> See discussion of DES history and process in section II B, *infra*.



In August 2010, the SJA to CMC directed that a formal DES program be developed based on the experience gained over the past several years by our DES attorneys. A reserve Marine lieutenant colonel judge advocate who had been serving as a DES attorney was assigned to compile lessons learned and best practices and produce a draft directive. A comprehensive program is contemplated that will establish responsibility and authority for the DES mission and more clearly identify Marine Corps DES requirements and the optimal means of meeting those requirements. This effort will include revalidating the DES attorney to client ratio to determine judge advocate manning requirements for DES and the appropriate amount of civilian structure that will be requested.<sup>75</sup>

### 506 ISSUE III

#### **JUDGE ADVOCATE REQUIREMENTS FOR THE MILITARY JUSTICE MISSION, INCLUDING ASSIGNMENT POLICIES, TRAINING AND EDUCATION, INCREASING COMPLEXITY OF COURTS-MARTIAL LITIGATION, AND THE PERFORMANCE OF THE MARINE CORPS IN PROVIDING LEGALLY SUFFICIENT POST-TRIAL PROCESSING OF CASES IN GENERAL AND SPECIAL COURTS-MARTIAL.**

This section addresses: (1) what are the general requirements for the military justice mission; (2) what are the assignment policies, and training and education requirements to maintain sufficient capability to perform the military justice function; (3) what additional requirements are necessary to effectively administer complex cases; and (4) what additional requirements are necessary to sufficiently process cases post-trial.

#### **A. GENERAL REQUIREMENTS**

**1. Introduction** – Military justice is a central component to the commander’s ability to maintain good order and discipline, a core function of command. As such it is critical the commander receive legal advice and support that reflects the respective service’s unique discipline philosophy and culture. Accordingly, military justice is the primary statutory function of Marine judge advocates.<sup>76</sup> Marine judge advocates perform this function in various roles including, trial and defense counsel, review officers, staff judge advocates,<sup>77</sup> appellate counsel and trial and appellate judges. At the service level, Marine judge advocates advise commanders on disposing of allegations of criminal misconduct under the UCMJ, litigate cases at court-martial, and process cases for post-trial review by convening and appellate authorities.

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<sup>75</sup> Aside from mobilized reservists, JAD is looking at ways to utilize reserve judge advocates in Individual Mobilization Augmentee (IMA) detachments and completing Reserve Counterpart Training to assist in the mission.

<sup>76</sup> 10 USC §§ 801-946 (2008) [hereinafter art. 1-146, U.C.M.J.].

<sup>77</sup> Staff judge advocates act as supervisory attorneys and are the commander’s primary source of advice and guidance for handling misconduct within the command. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103 (17)(2008)[hereinafter MCM].



The resources required to provide sufficient military justice capability at the service level are dictated by the number and complexity of cases. Generally, the *number* of judge advocates assigned to military justice billets over the last 5 to 10 years has been sufficient to accomplish the mission, considering the overall caseload. However, during this same period the evidentiary and procedural burdens of increasingly complex cases; the requirements for timely post-trial case processing; and the high turnover of personnel due to operational demands have created significant challenges. The Marine legal community has undertaken several initiatives over the past several years to confront these challenges, many of which have already had positive results.

**2. Caseload** – Last fiscal year, the Marine Corps litigated (to completion) 140 general courts-martial and 675 special courts-martial.<sup>78</sup> There are currently 46 trial counsel and 48 defense counsel throughout the Marine Corps.<sup>79</sup> Applying the case totals to the current number of counsel, provides an average of approximately 18 cases (3 general and 15 special courts-martial) per trial counsel and 17 cases (3 general and 14 special courts-martial) per defense counsel.<sup>80</sup> However, this statistic does not capture a significant percentage of the workload handled by each counsel. A number of cases begin as military justice requests for legal services, but end up at alternative forums, such as administrative discharge boards, summary courts-martial or at nonjudicial punishment, which must still be handled by our counsel. For example, last year the Marine Corps conducted 581 administrative discharge boards, and each board requires the assignment of a defense counsel to represent the respondent. Boards of Inquiry (officer administrative separations) also contribute to the workload of trial and defense counsel.<sup>81</sup> Defense counsel also handle NJP counseling, Article 138, UCMJ complaints and Request Mast petitions by service members while trial counsel handle numerous administrative requirements for each court-martial.<sup>82</sup>

Case loads for special and general courts-martial dropped across the services between 2000 and 2009. In particular, within the Marine Corps the number of special courts-martial decreased by more than 50% since last decade. At the same time, summary courts-martial have increased by nearly the same amount. This likely indicates that commanders are handling minor misconduct cases traditionally referred to special courts-martial at lower and other forums.<sup>83</sup> Additionally, cases

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<sup>78</sup> Code Committee Reports, Court of Appeals for the Armed Forces [hereinafter CAAF Reports] website at <http://www.armfor.uscourts.gov/Annual.htm> (last visited August 19, 2010).

<sup>79</sup> This includes 17 supervisory government counsel and 11 supervisory defense counsel.

<sup>80</sup> Of course, these statistics vary by location. For instance, the case load per counsel at the busy LSSSs will be higher than those at smaller law centers. However, counsel at the smaller offices are usually tasked with other duties, such as legal assistance, civil law, and Special Assistant U.S. Attorneys.

<sup>81</sup> Thus, each Marine defense counsel handled approximately 12 boards in FY09. Statistics obtained from HQMC, Manpower and Reserve Affairs (M&RA) at end of FY 09.

<sup>82</sup> Thus, the administrative case load is not captured by merely reviewing the annual statistics captured by the Code Committee Reports. See Code Committee Reports, *supra*, note 3.

<sup>83</sup> It should also be noted that the jurisdictional maximum punishment for special courts-martial increased to allow one year confinement, among other punishments, in 2000. 10 USC § 819; National Defense Authorization Act for Fiscal Year 2000, P.L. No. 106-65, 113 Stat 512 (1999).



deemed to be on the border of a general court-martial or special court-martial may be shifted into the special courts-martial forum in order to increase the speed of disposition.<sup>84</sup>

Two factors likely contribute to these trends. First, for some time the Marine legal services community has been educating commanders about the lengthy post-trial review process involved in handling special courts-martial cases where a bad conduct discharge is awarded.<sup>85</sup> Presumably these considerations have over time, caused a shift in disposition philosophy, towards efficiency and certainty.<sup>86</sup> Second, as this shift began to take hold, the high operational tempo of many units since 2002, has placed heavy demands on time and resources, causing a complementary shift in disposition philosophy, in favor of efficiency and speed.<sup>87</sup>

## **B. ASSIGNMENT POLICIES**

Currently, 30% of the Marine Corps judge advocate inventory is assigned to military justice billets. This includes trial counsel (10%), defense counsel (11%), review officers (2%), appellate counsel (2%), and military judges (4%).

**1. Trial and Defense Counsel.** Judge advocates detailed to billets of trial counsel, defense counsel or review officer are typically in their first or second-tour and are company-grade officers with little litigation experience. The preponderance of Marine judge advocates will be detailed as either trial counsel or defense counsel, and often both, during their first tour in the Corps. Once assigned to a billet at the LSSS or law center, trial and defense counsel are detailed to cases by their local supervisors; frequently, detailing authority is delegated to the officer-in-charge, regional defense counsel, military justice officer, or senior trial or defense counsel. Within the various legal teams, supervisory attorneys for trial and defense counsel, such as the legal team officers-in-charge, military justice officers, senior trial and defense counsel and regional defense counsel, use a variety of techniques to ensure the competence and preparation of their trial lawyers. These supervisory attorneys provide informal local training, assist in drafting charges, develop prosecution or defense case strategies, conduct “murder boards” (trial rehearsals), litigate the more complex cases while

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<sup>84</sup> Handling a case at a special court-martial requires fewer resources than a general court-martial. E.g., See Art. 32, U.C.M.J.; R.C.M. 405, MCM (providing requirements for an article 32 hearing prior to referral of a case to a general court-martial).

<sup>85</sup> Cases in which a bad-conduct discharge is adjudged are sent for review to NMCAA per Art. 66, UCMJ, where the appellate review process takes months. Only after final appellate review may a punitive discharge be approved. Meanwhile these Marines remain in an appellate leave status, creating a “lost-battalion” of Marines, performing little service to the Corps, but costing a lean expeditionary Corps needed manpower and litigation resources. Col Ralph F. Miller, *The Lost Battalion, Courts-martial for minor offenses is a strain on precious resources*, Marine Corps Gazette, Jan. 2007 at 53. The article urged commanders to consider disposing of minor misconduct cases at these lesser forums and trumpeted the cost and time savings to be gained from so doing.

<sup>86</sup> *Id.* at 53.

<sup>87</sup> It should also be noted that commanders were more likely to explore alternative disposition that did not include a discharge for Marines who violated the UCMJ but had demonstrated (or would demonstrate) exemplary behavior in combat. It is foreseeable that upon conclusion of the current conflicts, there may be a spike in the numbers of courts-martial. Once the force returns to a primarily garrison environment, there will be more opportunities for Marines to commit misconduct, and commanders will have less incentive to dispose of cases quickly due to the operational tempo.



allowing junior trial and defense counsel to participate as second chair for experience, and manage the docket and administrative tasks associated with the military justice process.

**2. Military Judges.** By statute and regulation the trial and appellate judiciary is a completely departmental level function. The UCMJ gives the JAG authority and responsibility to establish a trial and appellate judiciary, which includes the certification of all judge advocates serving as military judges.<sup>88</sup> However the Marine Corps is required to fill 14 judicial positions at the trial level, and is currently filling all of these requirements. Marine Corps representation in this departmental function is key to ensuring an accused Marine, the commanders, and the Corps as a whole, believe Marines are being judged by one who understands their respective service culture and traditions.<sup>89</sup> Once a candidate is successfully screened and slated by OJAG for a military judge billet, prospective military judges attend the TJAGLCS Military Judges Course.<sup>90</sup> Marine military judges are then assigned to a particular circuit by HQMC based on input from the JAD.<sup>91</sup>

**3. Review Officers.** At LSSSs and law centers, review officers provide the initial review of the court-martial proceedings and prepare the post-trial documents in support of the SJA, who conducts a second legal review of the proceedings prior to making the SJA's Recommendation (SJAR) and preparing the Convening Authority's Action.<sup>92</sup> Review officers are usually 27(b) certified judge advocates; although, in some locations the review officer function is fulfilled by a civilian paralegal. The review officer is often a first tour judge advocate, and is usually assigned after a trial or defense counsel billet to ensure a basic understanding of courts-martial procedure.

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<sup>88</sup> Art. 26, U.C.M.J. (2008).

<sup>89</sup> 1969 CMC Study, at 51 and 68.

<sup>90</sup> A Judicial Screening Board composed of AJAG (Military Justice); Chief Judge, Navy-Marine Corps Court of Criminal Appeals; Chief Judge, Navy-Marine Corps Trial Judiciary; Deputy AJAG (Criminal Law); and Headquarters, U.S. Marine Corps Deputy SJA to CMC) annually screens prospective Navy and Marine Corps trial and appellate military judges. The Board submits a report to the JAG that summarizes the Board's proceedings and recommendations. The report is advisory in nature and does not restrict in any manner the JAGs statutory authority to make judicial appointments, nor does it confer any rights or entitlements to an officer recommended for judicial assignment. See, U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTRUCTION, 5817.1C, JUDICIAL SCREENING BOARD (7 Jan. 2008).

<sup>91</sup> There are currently Marine military judges assigned to all but one circuit in the Navy Marine Corps Trial Judiciary, including the Northern, Eastern, Southern, Western and West Pacific circuits. There is no Marine in the Central Circuit.

<sup>92</sup> The SJA is required to provide written advice to the convening authority before a case may be referred to a general court-martial and is also responsible for a post-trial SJA recommendation (SJAR) for any special or general court-martial that results in a conviction. art. 34, U.C.M.J. (2008). R.C.M. 1106 MCM.





### C. REQUIREMENTS FOR COMPLEX CASES

While the trend for courts-martial overall has reflected a shift from higher forums to lower forums, the complexity of courts-martial has increased.<sup>93</sup> This is illustrated by the proliferation of child pornography cases requiring detailed understanding of computer forensics,<sup>94</sup> the increased reliance upon DNA evidence and other complex forensic scientific evidence and the increasingly complex statutory construction of our criminal code.<sup>95</sup> Moreover, the ongoing operations in OIF/OEF have led to allegations of law of war violations against Marines, resulting in significant prosecution efforts to handle these high profile cases.<sup>96</sup> Our counsel must have a detailed understanding of how to handle the various issues that accompany these complex cases, including computer forensics;<sup>97</sup> the challenging statutory framework of the new Article 120, UCMJ; DNA and other scientific evidence; outside interest from the public and the press; and the handling of classified evidence.<sup>98</sup> While additional counsel would certainly be useful, addressing the challenges presented by complex litigation requires more than numbers. It requires sufficiently trained, educated, and experienced counsel; experienced supervisory attorneys; expert mentorship and assistance; and institutional resources (such as a central repository for motions, pleadings, correspondence, and subject matter research, among other resources).

In that regard, the SJA to CMC initiatives to re-code 22 billets within military justice leadership positions around the Marine Corps as “Military Justice Manager” billets requiring an LL.M in criminal law or proven military justice expertise and to increase the number LL.M’s offered at TJAGLCS to Marine judge advocates are critical.<sup>99</sup> In June 2010, JAD also established a Marine

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<sup>93</sup> Case complexity is not a defined legal term of art. A case may be considered complex for many reasons such as: whether expert witnesses are required, the number of charges and specifications, the amount of documentary, computer or forensic evidence, whether a case is contested with members and whether there is media interest.

<sup>94</sup> Naval Clemency and Parole Board case statistics for FY 2006 to FY 2009 indicate a rise of sex offense cases from 28% in 2006 to 48% in 2009. In FY 09, 38% of the sex offenses involved child sex offenses, including child pornography. Child pornography and other child sex offenses are invariably difficult to prosecute and defend.

<sup>95</sup> See, e.g. Hoegge, Major Howard H., *Overshift: The Unconstitutional Double Burden-Shift on Affirmative Defenses in the New Article 120*, 2007 ARMY L. REV. 2, 4 (2007).

<sup>96</sup> These cases tend to be more difficult to litigate than locally investigated complex general courts-martial because of the geographically dispersed nature of the evidence, the combat conditions under which the evidence is collected, language barriers with foreign witnesses, classification of evidence, and vocal opposition to (or support for) prosecuting Marines for acts committed during combat operations by certain segments of society and the military. See, e.g. *U.S. v. Wuterich* 68 M.J. 623 (N.M.Ct.Crim.App. 2010); *U.S. v. Chessani*, 2009 WL 690110 (N.M.Ct.Crim.App. 2009); *U.S. v. Hutchins*, 68 M.J. 623 (N.M.Ct.Crim.App. 2010); *U.S. v. Shumate*, 30 C.M.R. (AMCR, 1961); *U.S. v. Pennington*, 2008 WL 5233379 (N.M.Ct.Crim.App.2008).

<sup>97</sup> For example, crimes increasingly involve the use of advanced information and communication technology (such as computers and cell phones). Accordingly, investigators, prosecutors and defense counsel must be familiar with the technology and be proficient in getting evidence derived from the technology admitted into evidence. For example, in a child pornography case, the prosecutor must understand how users transmit, receive, store (and hide) information.

<sup>98</sup> Increased use and reliability of forensic evidence has also added to the complexity of courts martial. Judge advocates must understand how forensic evidence is collected and tested. In some instances, judge advocates must know when/where the evidence is likely to be found so they can effectively advise NCIS or in the case of defense counsel, an investigator. Importantly, judge advocates must know what the forensic evidence means and how to interpret forensic reports.

<sup>99</sup> See *supra* Introduction.C.2.b-c.



Corps Trial Counsel Assistance Program (TCAP) within the Military Justice Branch, modeled after the Army JAG Corps' TCAP. The TCAP office develops and provides training, mentoring, and advice for complex or high-profile cases upon demand, and includes a practitioners' website with military law updates, forms, pleadings, motions, advice, links to various military law websites and a legal news and blog forum.

#### **D. POST-TRIAL PROCESSING REQUIREMENTS.**

The post-trial review process, at the service-level, includes those procedures required between findings and announcement of sentence, to receipt of the record of trial at the Navy and Marine Corps Appellate Review Activity (NAMARA). The process requires a substantial amount of action in a relatively short period of time (120 days from date of trial to the convening authority's initial action and 30 days from convening authority's action to docketing at NMCCA).<sup>100</sup> This includes preparation of a verbatim transcript by the court reporter, review by trial and defense counsel, authentication by the military judge, preparation of an SJA recommendation (SJAR), clemency submissions by the accused or counsel, and the convening authority's initial action. In both LSSS and Law Centers, review offices are established to shepherd cases through the post-trial review process. Currently, there are 11 court reporter offices and 12 review offices. The manning of a review shop for an LSSS includes the review officer, a review chief (a staff noncommissioned officer), and three review clerks (Sergeant to Lance Corporal). For the smaller law centers, a judge advocate may perform both as the review and civil law officer, along with one clerk.

Once a record is received by NAMARA, the departmental-level post-trial process begins. The Marine legal services community has no responsibility for or authority over that process other than to provide a specified number, as determined by the JAG, of judge advocates and enlisted Marines to support NAMARA. The OJAG requirement for Marine judge advocates at NAMARA is currently 11 second tour judge advocates (six government counsel and five defense counsel), and the Marine Corps is meeting that requirement, along with the OJAG requirements for 3 appellate judges at the NMCCA<sup>101</sup>

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<sup>100</sup> In 2006, CAAF decided the case of *United States v. Moreno*, which mandated a new methodology for review of post-trial delay cases. Using a balancing test it adopted from the Sixth Amendment speedy trial case of *Barker v. Wingo*, CAAF held that a finding of prejudice is not an absolute requirement, but merely one of four factors to be considered in determining whether to grant relief for a violation of due process. Additionally, the court set forth benchmarks for various steps of the post-trial process, violations of which would trigger a presumption of unreasonableness. *U.S. v. Moreno*, 62 M.J 129 (C.A.A.F. 2006).

<sup>101</sup> Since 2005, the Marine Corps has exceeded the staffing goals for judge advocates to be provided to NAMARA, but understaffed the NMCCA by two military judges in 2005 and one in 2007. *Judge Advocate Support Branch historical data*.



The cases of *U.S. v. Moreno*<sup>102</sup> and *U.S. v. Foster*<sup>103</sup> are indicative of the lapses in both the service and departmental-level post-trial processing. Each case involved unreasonable delay at the respective review office, SJA's office, and at the NMCCA. Appellate relief has also been granted in other Marine cases for failure to provide timely post-trial processing.<sup>104</sup> In the vast majority of these cases, the delay was at both the service level and at the NMCCA (departmental level). Although this is a relatively insignificant number by comparison to the overall number of cases reviewed by the appellate courts,<sup>105</sup> such delay is unacceptable in any case.

The unreasonable delay, at the service-level, was produced in part by the same factors impacting our ability to handle the increasing complexity of courts-martial; namely, lack of performance standards and associated inspections, lack of uniform procedures, and high turnover resulting in inexperienced personnel handling the post-trial processing mission. Additionally, the post-trial process lacked mechanisms for visibility. Recent service-wide initiatives by JAD to address these issues are already showing significant positive improvements, however much work is left to be done.<sup>106</sup> The ability to move records more quickly through the post-trial process is being addressed by the Marine Corps Case Management System (CMS),<sup>107</sup> initiatives underway to pilot the use of electronic records of trial,<sup>108</sup> and an assessment of the merits of reorganizing Marine review and court-reporter offices.<sup>109</sup> Additionally, JAD initiatives include efforts to standardized procedures and forms for all SJA offices LSSSs and law centers to reduce error and contribute to timely and accurate post-trial processing.<sup>110</sup>

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<sup>102</sup> See, *Moreno*, *supra* note 24.

<sup>103</sup> In *United States v. Foster*, a Marine Sergeant was convicted of spousal rape and assault, and he began serving a lengthy sentence to confinement on December 3, 1999. The post-trial process ultimately resulted in the rape conviction being overturned for lack of evidence, but it took nearly ten years while the appellant remained confined.

<sup>104</sup> A recent review of all Marine cases that were subject to review since 2005 indicated there were approximately 38 published and unpublished cases where the delay was deemed to warrant sentence relief.

<sup>105</sup> NMCCA reviewed 7,190 cases during this period. CAAF Reports, FY 2005-2009.

<sup>106</sup> On 9 January 2010, the SJA to CMC sent a letter to all Marine Judge Advocates explaining the need for improvement of our post-trial processing and outlining the initiatives underway to ensure this, including the implementation of CMS, standardization and inspections.

<sup>107</sup> The SJA to CMC, through the authority of the CMC, mandated the service-wide use of the CMS on 1 February 2010 per MARADMIN 062/10 of 17 Feb 2010. The CMS tracks court-martial cases from receipt of a request for legal services through to the promulgating order and submission of the ROT to NAMARA. At the implementation of CMS, there were 41 cases over 120 days on the "Moreno 1" clock. As of the August 23, 2010 weekly post-trial case review there were only four cases over 120 days without convening authority's action.

<sup>108</sup> The overall savings per record of trial, if used throughout the post-trial life of a case, could be considerable. The JAD is currently conducting a pilot test using e-ROTs for simple special court-martial guilty plea cases aboard 29 Palms and envisions implementing e-ROTs on a broader scale once proven successful.

<sup>109</sup> Currently, there are 11 court reporter offices and 12 review offices in the Marine Corps. The JAD is conducting research into the most efficient court reporter and review offices in order to develop a plan to reduce the number of court reporter offices and review offices to several smaller regional hubs (potentially 6 offices). The plan is expected to improve the efficiency of post-trial processing at the service-level by consolidating personnel, equipment, and experience into larger regional court reporter and review offices.

<sup>110</sup> The Marine Corps published the AIRS 091 inspection checklist in May 2010. The checklist allows commanders to inspect SJA offices, LSSSs and law centers, including review and court reporter section and promotes standardized procedures. See MARADMIN 276/10 of 15 May 2010. A pilot test of both standardized SJA review letters and Convening Authority's Action letters is being conducted aboard the LSSS at Camp Lejeune, North Carolina, and JAD is currently conducting a review of Review Office SOPs and checklists to compile best practices and provide standardized versions for the entire community.



## 506 ISSUE IV

### **ROLE OF THE JUDGE ADVOCATE GENERAL OF THE NAVY AS THE SENIOR UNIFORMED LEGAL OFFICER OF THE DEPARTMENT OF THE NAVY, AND WHETHER ADDITIONAL AUTHORITY FOR THE JUDGE ADVOCATE GENERAL OVER MANPOWER POLICIES AND ASSIGNMENTS OF JUDGE ADVOCATES IN THE MARINE CORPS IS WARRANTED.**

The issue presented is composed of two parts. First, what is the role of the Judge Advocate General of the Navy as the *senior uniformed legal officer of the Department of the Navy*.<sup>111</sup> Second, whether authority for the Judge Advocate General of the Navy over the manpower management and assignments of Marine officers, in particular judge advocates – a service-level function performed by the Commandant of the Marine Corps (CMC) – is warranted.<sup>112</sup>

#### **A. THE ROLE OF THE JUDGE ADVOCATE GENERAL OF THE NAVY AS THE SENIOR UNIFORMED LEGAL OFFICER OF THE DEPARTMENT OF THE NAVY.**

##### **1. Statutory Construct of the Leadership Positions within the Office of the Judge Advocate General**

The position of the JAG was expressly created by Congress as a departmental role, subordinate to the Secretary of the Navy. The JAG's role is to perform departmental functions specified by Chapter 513 of Title 10, military justice functions specified by Chapter 47 of Title 10, and functions specified by departmental regulations.<sup>113</sup> The statutory scheme provides that the JAG will be assisted in this role by an Office of the JAG (OJAG) including of a Deputy JAG (DJAG), and two Assistant Judge Advocates General (AJAG).<sup>114</sup>

Congress directed that the JAG and DJAG positions be selected by a board, constituted and convened by the Secretary of the Navy, that will consider both Marine and Navy judge advocates.<sup>115</sup> Congress further created two AJAGs that were to be filled by one Marine and one Navy judge

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<sup>111</sup> Roles are the broad and enduring purposes for which the Services and U. S. Special Operations Command were established by law.

<sup>112</sup> Functions are the appropriate or assigned duties, responsibilities, missions, or tasks of an individual, office, or organization as defined in the National Security Act of 1947, including responsibilities of the Armed Forces as amended. The term "function" includes purpose, powers, and duties.

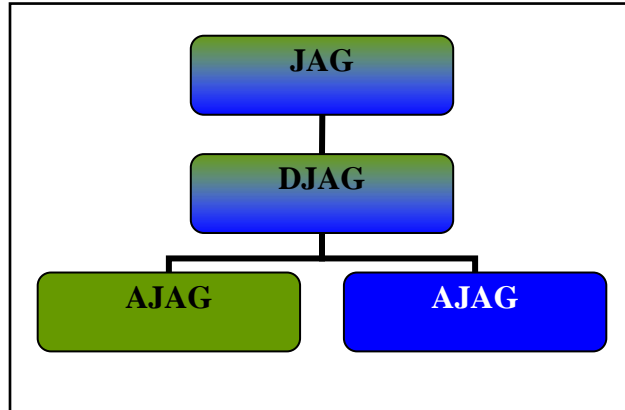
<sup>113</sup> 10 U.S.C. § 5014; and 10 U.S.C. § 5148.

<sup>114</sup> 10 U.S.C. § 5148 establishes the Office of the Judge Advocate General within the executive part of the Department of the Navy. 10 U.S.C. § 5149 establishes a line of succession for the JAG, making the DJAG the successor to the JAG in his absence, and the AJAG the successor to the DJAG as well as the JAG in their absence.

<sup>115</sup> Although the Secretary of the Navy had created a position of solicitor general by regulation during the Civil War, Congress did not establish the position of Judge Advocate General of the Navy until 1880. From this initial statutory creation of the billet to present, Congress has always authorized the appointment of either an officer of the Navy or Marine Corps to serve as the JAG. See 10 U.S.C. § 5148, 5149.



advocate, also selected by a board constituted and convened by the Secretary of the Navy.<sup>116</sup> The structure of the senior departmental legal billets balanced Navy and Marine Corps representation in the department.



Similarly, the express intent of Congress in overhauling the military departments in the 1986 Goldwater-Nichols Act was to ensure that the Navy and Marine Corps were equal partners in the DON departmental mission.<sup>117</sup>

“Particular care must be taken by the Secretary of the Navy to ensure that the Marine Corps, which has fewer personnel to devote to staff duty than the Navy, receives evenhanded treatment in organizing, manning, establishing work priorities, and otherwise structuring and operating the consolidated offices. ...Consolidating offices should include appropriate numbers of Marine generals and other Marine officers to ensure that the interest of the Marine Corps will be represented and that the Commandant will receive appropriate support from these offices.”<sup>118</sup>

In light of these repeated expressions of congressional intent, one would expect the statutory billet structure to result, over time, in each service holding a fair share of departmental billets, including the primary position of the JAG. This would ensure the two services are equal partners, fully integrated into and oriented to the departmental mission. Departmental integration would necessarily include an equal service voice for both the Navy and the Marine Corps into the formulation of departmental policy, oversight and budgetary decisions on legal matters; as well as an equal voice in the formulation of legal advice provided to the Secretary of the Navy.<sup>119</sup>

<sup>116</sup> 10 U.S.C. § 5149.

<sup>117</sup> See Conference Report 99-824 to accompany H.R. 3622 Goldwater-Nichols Department of Defense Reorganization Act of 1986, at 150-151.

<sup>118</sup> *Id.*

<sup>119</sup> See 10 U.S.C. §§ 5148, 5046, and Senate and Conference Reports. The congressional intent to provide the uniformed services effective legal voice within the civilian echelons of the Military and Defense Departments has taken on new significance over the past



## 2. Statutory Construct of the Functions of the Judge Advocate General

Congress has assigned several specific functions, with respect to the administration of military justice, to every service JAG in Chapter 47 of Title 10 – the UCMJ.<sup>120</sup> Congress assigns these functions, responsibilities and authorities to the three JAGs by referring to, and defining the “Judge Advocates General” as:

“...severally, the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security...”<sup>121</sup>

The following significant functions, authorities and responsibilities under Chapter 47 are assigned to the JAGs of the several services:

- Conduct “inspections in the field of supervision of the administration of military justice;”<sup>122</sup>
- Make recommendations on the “assignments for duty of judge advocates;”<sup>123</sup>
- Certify military judges as “qualified for duty;”<sup>124</sup>
- Certify trial and defense counsel as “competent to perform such duty;”<sup>125</sup>
- Establish a court of criminal appeals (CCA);<sup>126</sup>
- Order individual cases to be reviewed by both the CCA and the CAAF;<sup>127</sup> and
- Modify or set aside findings and sentence in individual cases.<sup>128</sup>

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several years in the wake of the process by which the Office of Legal Counsel and the General Counsel’s office formulated legal policy on the detention of detainees in combat operations.

<sup>120</sup> The statutory and regulatory history does not preclude the assignment of military justice functions to other officers within the department or service. *See* SASC Committee Report, April 14, 1986, to Accompany S. 2296 “Department of Defense Reorganization Act of 1986.” In designating functions for which each Office of the Secretary of a Military Department should have sole responsibility, Congress selected functions that are either civilian in nature or key to effective civilian control. In doing so, Congress left all other functions to the discretion of the Military Departments to either retain at the departmental-level or to delegate to the service-level. Further, Congress placed the position and authority of the Navy JAG within the Office of the Secretary of the Navy, whereas the Army and Air Force JAGs were not similarly placed. *See e.g.* 10 USC 3014, 3031.

<sup>121</sup> 10 USC § 801.

<sup>122</sup> 10 USC § 806.

<sup>123</sup> 10 USC § 806.

<sup>124</sup> 10 USC § 826.

<sup>125</sup> 10 USC § 827.

<sup>126</sup> 10 USC § 866.

<sup>127</sup> 10 USC §§ 869, 867.

<sup>128</sup> 10 USC § 869.





In Chapter 513 of Title 10, Congress prescribed further functions beyond the administration of military justice, specifically for the Navy Department JAG, to be executed “under the direction of the Secretary of the Navy:”<sup>129</sup>

- Perform duties related to legal matters arising in the Department of the Navy as may be assigned to him;
- Perform the functions and duties and exercise the powers prescribed for the JAG in the UCMJ;
- Receive, revise, and have recorded the proceedings of boards for the examination of officers of the naval service for promotion and retirement; and
- Perform such other duties that may be assigned to him.

These Navy JAG functions differ from those specified by Congress in the same legislation for the other two department JAGs. In 1956, the Army and Air Force JAGs were given additional authority to direct the performance of duties of all judge advocates within their respective services.<sup>130</sup> This is a significant difference, in that the additional authority granted to the Army and Air Force JAGs reflects inherent functions of command, typically reserved to commanders tasked with executing assigned missions – a service-level function. The Army and Air Force JAGs, operating in single-service departments, are dual-hatted as both the departmental JAG and the senior uniformed legal officer for their service.<sup>131</sup> They can exercise all of their statutory functions with little tension between their departmental and service level roles.<sup>132</sup> As the departmental JAG they carry out those departmental functions of overall supervision, such as policy formulation and oversight, and advising the Secretary. As the senior uniformed legal officer of their service they carry out those service-level execution functions, such as manning, organizing, directing, managing, and inspecting the administration of legal services, and advising the service chief.

Congress apparently deemed that investing such functions in a dual-service departmental JAG, where the billet would be filled by either service, would create conflicts and prove impractical.<sup>133</sup>

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<sup>129</sup> 10 USC § 5148(d).

<sup>130</sup> 10 U.S.C. §§ 3037, 8037.

<sup>131</sup> *See generally* 10 USC 3014, 3031. Both the Army and Air Force JAGs are assigned, by statute, to the military service staffs, whereas the Navy JAG is assigned to the Office of the Secretary of the Military Department.

<sup>132</sup> *See generally* 10 USC § 3037; Army Regulations 27-1; and Air Force Instruction 51-102. The statutory and regulatory language assign extensive service as well as departmental level functions.

<sup>133</sup> *See generally* SASC Committee Report, April 14, 1986, to Accompany S. 2296 “Department of Defense Reorganization Act of 1986.” Senator Denton remarked in the report that “...the attempt to provide uniformity fails to accommodate diversity among the Department and military services. For example, the Department of the Navy includes two services... Yet there is confusion in the bill as to where authorities can or should be located. Functions that in some departments, fall properly under the Chiefs of Staff must in the Navy, fall under the Service Secretary. That is for example the case with the Judge Advocate General...” Prior to the 1950 enactment of the UCMJ having a JAG from either service may have not created much conflict, as at that time there were no judge advocates in the Navy and Marine Corps, rather only line officers with collateral specialty designations in the law. The few officers with such specialties that existed filled limited legal duties, mainly as trial, defense and judges at general courts-martial. However the 1968 Military Justice Act marked the beginning of a steady and continuing increase in service-level legal requirements.



For example, if the Army or Air Force scheme were applied to the DON, a Marine judge advocate appointed as the Navy JAG would assume functions which are properly the domain of the senior uniformed legal officer of his sister service – i.e. directing Navy JAGC officers in the performance of their service-level legal mission. Without the benefit of a career of service in the U.S. Navy, the Marine JAG would lack the service-unique cultural, philosophical, and doctrinal background to effectively perform this command-like, service-level function,<sup>134</sup> to say nothing of the marginalizing effect this would have on the voice of the senior uniformed JAGC officer within the U.S. Navy. Congress expressed this recognition in reorganizing the military departments in 1986:

“The conferees recognize that the consolidation of functions within the Office of each Secretary of a Military Department will pose unique problems for the Department of the Navy because of the existence of two separate Armed Forces within the Department – the Navy and the Marine Corps.”<sup>135</sup>

The legislative landscape also appears to reflect the distinct histories of the Army and Navy legal communities. The construct for the Army reflects a long tradition stemming from the Continental Congress’ appointment of a Judge Advocate General for the Continental Army.<sup>136</sup> The Navy JAG position was not created for another century, and historically was limited to a departmental role, representing and advising the Secretary. The provision of legal advice and support throughout the sea services was largely decentralized, and performed by line officers, with collateral designations as “law specialists.”<sup>137</sup> In declining to create a separate JAGC for the Navy or Marine Corps, Congress evinced the intent to maintain the de-centralized provision of service-level legal support and advice throughout the sea services. Although Congress eventually created a Navy JAGC in 1967, it was arguably intended to elevate the standing of U.S. Navy law specialists, rather than to create a service-level role for the Navy JAG.<sup>138</sup>

Most recently, during the Senate consideration of the 2005 NDAA, Senator Graham offered an amendment which would have assigned the JAG the service-level role of supervising the performance of duties by members of the Navy’s JAGC.<sup>139</sup> This amendment was not adopted by the full Senate. Rather, the Senate version of the NDAA that was sent to the conference committee

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<sup>134</sup> See generally Grant, RADM H.E., Memorandum for the General Counsel of the Navy, Marine Nominees for Appointment to be the Judge Advocate General and Deputy Judge Advocate General of the Navy, May 22, 1995.

<sup>135</sup> Conference Report 99-824 to accompany H.R. 3622 Goldwater-Nichols Department of Defense Reorganization Act of 1986, at 150. See generally 10 USC 3014, 3031.

<sup>136</sup> The Judge Advocate General of the Army was one of the first officers appointed by the continental Congress to the staff of General George Washington, commander of the continental army.

<sup>137</sup> See generally Senate Armed Services Committee Report No. 9, to accompany the nomination of CAPT Ia H. Nunn, May 22, 1952 at 1-2; and Pub. L. 90-179, 81. Stat. 545, Dec.8, 1967. It was not until 1947 that the Navy provided for limited duty officers, who performed strictly legal duties, and not until 1967 that Congress created a Staff Corps for Navy judge advocates.

<sup>138</sup> See House Committee on the Armed Services Report No. 491 to Accompany H.R. 4080 “Uniform Code of Military Justice,” pg. 8-9; and Senate Report No. 90-748.

<sup>139</sup> Congressional Record, S6015, SA 3238, May 20, 2004.



included a provision similar to the Army and Air Force, whereby the Navy JAG would supervise the performance of *all* judge advocates within the department, including Marine officers.<sup>140</sup> The Senate bill's provision was rejected by the conference committee.

Through statutory language, legislative history and other expressions of intent, Congress has demonstrated an intent that the role of the Judge Advocate General of the Department of the Navy be different than that of the Army and Air Force JAGs. Congress has left the role of the Navy JAG departmentally oriented, and has determined that the JAG's authority should be less than "direct[ing] ... judge advocates in the performance of their duties," a service-level function that a dual-service departmental JAG is ill-positioned to perform.

Although Congress's intent that the role of the JAG of the Navy be departmentally oriented is clear, the statutory architecture did leave gaps. Notably, it initially failed to provide a statutory senior uniformed legal officer for either the U.S. Navy or the Marine Corps.<sup>141</sup> These gaps have become more evident as the requirements for service-level legal advice and support have increased. Arguably, both the Navy and the Marine Corps, as mature separate services, require a senior uniformed legal officer whose role, in addition to advising their respective service chiefs on legal matters, includes the functional leadership of the service-level legal mission --a function involving hundreds of lawyers world-wide practicing across numerous legal functional areas. Departmental regulations and practices have attempted to reduce these gaps but the effort has proven insufficient and has had unintended second order effects.

### **3. Regulatory Construct for the Role of the Judge Advocate General**

The Secretary of the Navy is, of course, responsible for further implementing the statutory construct for the role and functions of the JAG through departmental regulations, and has done so since the statutory creation of the billet in 1880 and after every significant statutory amendment affecting the billet since. The Secretary's implementing regulations assign various departmental functions to the JAG.<sup>142</sup> Chief among these are to:

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<sup>140</sup> Congressional Record, S6786, SA 3326, June 15, 2004.

<sup>141</sup> Congress has still made no provision for a separate statutory position for the senior legal officer of the Navy with assigned service level functions. Congressional establishment of a statutory service position for the Marine Corps was late in coming, and consistent with the fact that the Marine Corps was considered by many in Congress, up through World War II, as a part of the U. S. Navy, rather than a mature separate service. Further, prior to WWII and for some decades following, powerful interests in Congress resisted measures that would recognize the Marine Corps as a separate, mature, and equal service. Only beginning in the 1960s, did legislation appear that provided the Marine Corps equal footing within the joint community and at the departmental level. It was not until 1986 that Congress created the SJA to CMC as the statutory senior uniformed legal officer for the Marine Corps. It did not, however, provide a billet description or parcel out service level functions similar to the JAGs Chapter 47 duties.

<sup>142</sup> There is no compelling reason of efficiency, consolidation, or policy for many of these functions to be exclusively departmental functions. Many are primarily and necessarily functions of execution at the service-level, or are more appropriately commanded, directed, controlled, or managed at the service-level.



- Serve as a Staff Assistant to the Secretary of the Navy;<sup>143</sup>
- Provide legal and policy advice to the Secretary of the Navy on military justice, administrative law, claims, and operational and international law;<sup>144</sup>
- Provide or supervise the provision of legal advice and related services throughout the DON;<sup>145</sup>
- Provide “professional supervision” over judge advocates (i.e. to establish rules of professional and ethical conduct; and establish procedures for receiving, processing and taking action on complaints of professional misconduct);<sup>146</sup>
- Serve as Commander, OJAG; and<sup>147</sup>
- Organize, administer, and assign functions to the Navy and Marine Corps Trial Judiciary (NMCTJ).<sup>148</sup>

The Secretary has assigned relatively few departmental functions to the DJAG and AJAGs. The DJAG has been assigned to perform the duties of the JAG during his vacancy and the AJAGs have been delegated, respectively, supervisory responsibility for: administrative law matters within DON, military justice matters, and the trial and appellate judiciary.<sup>149</sup>

Additional regulations attempt to fill the vacuum created by the absence of a statutory U.S. Navy senior legal officer. The Secretary has issued extensive regulations assigning the JAG, DJAG and AJAG, Navy-specific, service-level functions. By regulation the JAG serves as the Chief of the Navy Judge Advocate Generals Corps; provides advice and assistance to the Chief of Naval Operations (CNO) in formulating and implementing policies and initiatives pertaining to the provision of legal services in the U.S. Navy; and serving as Special Assistant to CNO for Legal Services within OPNAV, and is responsible for monitoring U.S. Navy judge advocate staffing and workloads to advise the CNO on distribution of assets.<sup>150</sup> Over the last five decades this extensive

<sup>143</sup> U.S. Navy Regulations, 1990, at par. 310.

<sup>144</sup> *Id.*

<sup>145</sup> U.S. Navy Regulations, 1990, at par. 0331; SECNAVINST 5430.27Q at 18. *See also* SECNAVINST 5430.27C, in which “supervision” of legal advice and services contemplates only the functions of “professional supervision” and certification of trial and defense counsel, and military judges.

<sup>146</sup> JAGINST 5803.1C, 9 November 2004; *and* SECNAVINST 5430.27C.

<sup>147</sup> JAGINST 5400.1A, OJAG *Organization Manual*, (6 July, 1992).

<sup>148</sup> SECNAVINST 5400.40A NMCTJ, (16 December, 2005).

<sup>149</sup> U.S. DEP’T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5400.1A, OFFICE OF THE JUDGE ADVOCATE GENERAL (OJAG) ORGANIZATION MANUAL, (5 July 1992) [hereinafter JAGINST 5400.1A]; U.S. DEP’T OF NAVY, JUDGE ADVOCATE GEN. NOTICE 5450, MISSION AND FUNCTION OF ASSISTANT JUDGE ADVOCATE GENERAL, CHIEF JUDGE OF DEPARTMENT OF THE NAVY (24 May 2010). The AJAG (Operations and Management), who also serves as Vice Commander, Navy Legal Services Command, does not appear to have any assigned departmental functions. JAGINST 5400.1A.

<sup>150</sup> *See* USNR par. 0331 (Chief of OJAG); USNR par. 1009 (Principle advisor and sponsor on matters concerned with JAGC officers); SECNAVINST 5430.7Q (Chief of JAGC); SECNAVINST 5430.27C (Chief of JAGC, SA to CNO); U.S. DEP’T OF NAVY, NAVAL OPERATIONS INSTR. 5430.48D, OFFICE OF THE CHIEF OF NAVAL OPERATIONS (OPNAV) ORGANIZATION MANUAL (29 Mar. 1993) [hereinafter OPNAVINST 5430.48D]; JAGINST 5400.1A (JAG assigned to OPNAV staff as SA for legal services (0P-09J), DJAG is Cmdr, NLSC); U.S. DEP’T OF NAVY, NAVAL OPERATIONS INSTR. 5450.189B, MISSION AND FUNCTIONS OF THE NAVAL LEGAL SERVICE



regulation has created a “dual-hatted” role for the JAG, DJAG and AJAGs – much like their Army and Air Force counterparts. For the JAG, this has resulted in statutory departmental role in which the JAG advises the Secretary of the Navy, and a regulatory service role in which the JAG is subordinated to the CNO in the performance of service duties.

A second order effect of the service-focus of the JAG’s regulatory functions has been to impose a service-orientation on OJAG, its billet structure and the selection process for those billets. This is illustrated by the objections of then Navy JAG, RADM Grant, JAGC, USN to the CMC’s 1994 request for Secretarial consideration of Marine offices for the positions of JAG and DJAG:

“Currently the JAG and DJAG fulfill several vital Navy-specific functions. These include: (1) commanding the Office of the Judge Advocate General; (2) commanding the Naval Legal Services Command; and (3) advising and assisting the CNO in formulating and implementing legal policies and initiatives. *As the organizations are currently structured*, extensive knowledge and experience of Navy organization, mission and legal structure is a prerequisite for fulfilling the position of JAG and DJAG.”<sup>151</sup> [emphasis added]

This statement indicates the extent to which the JAG and DJAG billets have become viewed as primarily service-level Navy billets -- billets a Marine judge advocate is ill-equipped to perform.<sup>152</sup> Further evidence of the impact of the absence of a U.S. Navy service flag billets is the argument, made in conjunction with this view, that to allow a Marine judge advocate to fill either position would deny the Navy JAGC a flag-level billet.<sup>153</sup> The obvious logical concern is that such arguments disregard the JAG’s primary statutory role as the senior uniformed legal officer of the Department – a department composed of two separate and equal uniformed services.

Nonetheless this service-orientation has been fulfilled through implementing regulations and orders governing the constitution, convening, and issuance of precepts for the boards to select the

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COMMAND (19 JAN. 2007) (Missions and functions of Naval Legal Service Command/DJAG authority to assign/re-assign); U.S. DEP’T OF NAVY, COMMANDER, NAVAL LEGAL SERVICE COMMAND INSTR. 5800.1E, NAVAL LEGAL SERVICE COMMAND (NLSC) MANUAL (19 FEB. 2002).

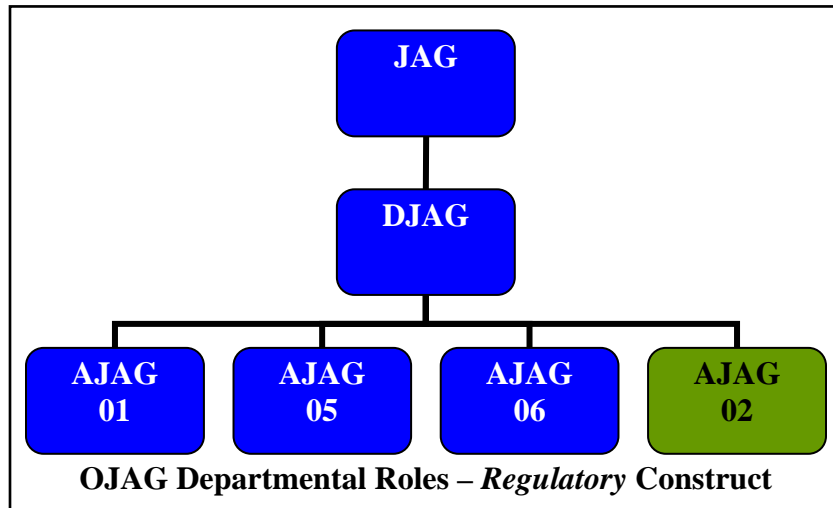
<sup>151</sup> CMC Memo to SECNAV, *Marine Nominees for Appointments to be the Judge Advocate General and the Deputy Judge Advocate General of the Navy*, April 25, 1994 and the Judge Advocate General’s response to the CMC’s memo, JAG Memo to SECNAV, *Marine Nominees for Appointment to be the Judge Advocate General and Deputy Judge Advocate General of the Navy*, May 22, 1995.

<sup>152</sup> See generally *Id.*; See also Memorandum from General Counsel (GC) to SECNAV, subject: Marine Corps Nominees for Appointment as the Judge Advocate General and Deputy Judge Advocate General of the Navy, (9 May 1996); HQMC MAGTF Master Plan (MMP)-34, *Chronology of the Assistant Judge Advocate General (Military Law) Billet*, (28 June 1995) [hereinafter MMP-34].

<sup>153</sup> See e.g. May 22, 1995 Memo, *supra* note 163 (Rear Admiral (RADM) Grant argued that “one considerable negative effect of the selection of a Marine Corps JAG or DJAG would be the dramatic reduction of flag promotion opportunity in the Navy’s JAG Corps.”).



departmental positions of JAG, DJAG and AJAG.<sup>154</sup> The Secretary’s implementing regulation, orders and precepts have largely precluded any opportunity for Marine judge advocates to be considered for, or selected as the JAG or DJAG.<sup>155</sup> As a result, aside from Colonel William Butler Remy, USMC, who was selected in 1878 to serve as the first formal senior uniformed legal officer for the Navy, no other Marine judge advocate has similarly served.<sup>156</sup>



This self-perpetuating service-orientation impairs the ability of the services to integrate as partners, and dilutes the Marine Corps’ service voice in the formulation of departmental policy, oversight and budgetary decisions in legal matters, as well as in formulating legal advice for the Secretary of the Navy. While this seems directly contrary to the recently expressed intent of Congress to raise the senior uniformed legal voice of the individual services, Congress has, effectively acquiesced to this regulatory scheme. Whether or not this indicates an intent on the part of Congress that the departmental structure of DON be Navy-centric, the question whether additional authority for the Judge Advocate General of the Navy over the manpower policies and assignments of Marine judge

<sup>154</sup> SECNAVINST 1401.3A encl (3); SECNAV, Precept, Convening a Selection Board to Recommend a Judge Advocate of the Marine Corps for Appointment as the Staff Judge Advocate to the Commandant of the Marine Corps, (4 June 2009); SECNAV, Precept, Convening An FY-08 Selection and Continuation Board to Recommend a Navy Judge Advocate on the Active-Duty List in the Regular Grade of Captain for Detail as Assistant Judge Advocate General (Operations and Management) and Assistant Judge Advocate of the Navy (Mar. 11, 2008); SECNAV, Precept, Convening The FY09 USMC Assistant Judge Advocate General of the Navy Detailing Selection Board (Oct. 18, 2007).

<sup>155</sup> See SECNAVINST 1401.3A, encl (3) provides that boards for JAG will consist of five members, to be composed of at least four Naval officers, and *may* include one Marine officer; *see generally* Memorandum from JAG to Deputy General Counsel (DPG), subject: Proposed Legislation to Modify Statutes to Select the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant, (6 Mar. 1996); Navy JAG Corps Flag-General Officer Billets, Judge Advocate Research and Civil Law (JAR) (28 July 2010) [hereinafter JAR Information Paper] (Of further note, the JAG is the departmental officer responsible for providing legal advice to the Secretary on the composition of such selection boards. On at least one occasion, however, the Secretary has recognized this inherent conflict, and directed that the General Counsel would provide the necessary advice); Memorandum from SECNAV to Chief of Naval Operations, subject: Selection of Deputy Judge Advocate General of the Navy (10 Apr. 1997).

<sup>156</sup> Ironically, it was Col Remy who successfully petitioned Congress to establish by law the position of Judge Advocate General and to have the position filled by a Flag or General Officer.





advocates is warranted cannot be considered without considering how the “*organizations are currently structured.*”<sup>157</sup>

## **B. WHETHER ADDITIONAL AUTHORITY FOR THE JUDGE ADVOCATE GENERAL OF THE NAVY OVER THE MANPOWER POLICIES AND ASSIGNMENTS OF MARINE JUDGE ADVOCATES IS WARRANTED?**

### **1. Manpower policies and assignments (including the assignment of Marine judge advocates) are presumptively service level functions appropriately performed by the Commandant of the Marine Corps.**

Within the Department of Defense, roles and functions are deliberately set apart and assigned to specific responsible offices within the executive part of the Military Department by law, regulation, and customary practice.<sup>158</sup> From this a statutory and regulatory construct has emerged in which these roles and functions can presumptively be delineated as departmental or service-level.<sup>159</sup> Any examination of whether the responsibility and authority to assign Marine judge advocates should be transferred from the Commandant to the JAG must necessarily take into account the nature of such function - that is whether it is a departmental or service function.

There is a long established statutory and regulatory scheme for assigning functions associated with manpower policies and assignments to the services.<sup>160</sup> As part of the 1986 Goldwater-Nichols Act, Congress granted overall authority to the Secretary of the Navy for, among other functions, organizing, training, administering and maintaining Navy and Marine forces.<sup>161</sup> However, in the same legislation Congress further delegated this authority to the CMC, to be executed under Secretarial direction and control.<sup>162</sup>

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<sup>157</sup> CMC Memo to SECNAV, *Marine Nominees for Appointments to be the Judge Advocate General and the Deputy Judge Advocate General of the Navy*, April 25, 1994 and the Judge Advocate General’s response to the CMC’s memo, JAG Memo to SECNAV, *Marine Nominees for Appointment to be the Judge Advocate General and Deputy Judge Advocate General of the Navy*, May 22, 1995. (emphasis added).

<sup>158</sup> *See generally* Senate Report 84-2484, July 9, 1956. The report offers an excellent discussion of the functions and relationships of the CMC, CNO and other secretarial offices vis-à-vis the Secretary of the Navy and the serious Congressional concerns over increasing authority for one office within the secretariat at the expense of another.

<sup>159</sup> *See generally* Conference Report 99-824 to accompany H.R. 3622 Goldwater-Nichols Department of Defense Reorganization Act of 1986, at 150-151. Recognizing that consolidating functions within the Military Departments would pose unique problems for the Navy and Marine Corps the Congress noted that “[n]othing in the legislation is intended to impair the ability of the [CMC] to carry out his responsibilities ...to train, organize, and equip;” *See also generally* Senate Report 84-2484, to accompany H.R. 7049, July 9, 1956. The committee recognized that the CMC directs and administers the Marine Corps under the direct delegated command of the Secretary of the Navy and to attempt to subordinate the CMC to the authority of the CNO would completely contravene existing law.

<sup>160</sup> *See generally* Conference Report 99-824 to accompany H.R. 3622 Goldwaters-Nichols Department of Defense Reorganization Act of 1986, at 151. Congress recognized “each service should have a separate military headquarters staff within the executive part of its Military Department” which should “continue to conduct the functions for which the effective representation of the military point of view is invaluable...[k]ey among these are : (1) manpower and personnel...”

<sup>161</sup> 10 U.S.C. § 5013.

<sup>162</sup> 10 U.S.C. § 5042. There are, of course, a number of authorities that reside simultaneously at the departmental and service level. The Goldwater-Nichols Act also provided the Secretary specific authority to assign, detail and prescribe duties of members of the Marine Corps. 10 U.S.C. § 5013. The Secretary further delegated these functions, specifically the authority and responsibility: “[t]o



Moreover, the functions of assigning, detailing and prescribing duties, are part of a broader field of end-strength management, which is by a host of statute and regulation delegated to the service chiefs as part of their responsibility to maintain a force ready for service with combatant commands.<sup>163</sup> To remove this authority piecemeal would infringe on an area that has historically and appropriately been the domain of the service chiefs.<sup>164</sup>

This is especially so, considering all of the service unique aspects for education, training and career progression of Marine officers. The Defense Department recognized as much when it considered consolidation of legal services in 1993:

“Moreover, while judge advocates have common legal skills, they serve first as officers of their particular Services, subject to the same performance standards, regulations, policies, and procedures as all other officers of their Service. Their practice of law is predicated upon, and intertwined with, the unique force structure, operational context, and policy decisions of their service.”<sup>165</sup>

As such, any such transfer of authority would, at best, ultimately lead to the creation of a limited-duty officer qualification for Marine judge advocates, and at worse, mark the first step towards absorbing Marine judge advocates into the Navy JAGC.<sup>166</sup> In either eventuality, all of the benefits that inure from having shared experience, culture and philosophy as unrestricted line officers would be lost, significantly impacting the relationship between judge advocates and their clients: commanders and their Marines.

Lastly, assuming *arguendo* that senior uniformed legal leadership requires greater authority over the manpower policy and assignments of Marine judge advocates, the SJA to CMC is the appropriate official in which to place such authority. Given the current departmental U.S. Navy orientation, the JAG is particularly ill-positioned to prescribe manpower policies and direct assignments within Marine organizations. Moreover, to disregard the senior uniformed legal voice within the Marine

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plan for and determine the present and future needs, both quantitative and qualitative, for manpower, including reserve and civilian personnel, of the United States Marine Corps” by regulation. Par. 0505.2.e., U.S. Navy Regulations, (1990).

<sup>163</sup> 10 U.S.C. §§ 5042, 806; U.S. DEPARTMENT OF DEFENSE, INSTR. 1104.4 GUIDANCE FOR MANPOWER MANAGEMENT, (12 Feb. 2005); U.S. DEPARTMENT OF DEFENSE, INST. 1120.6, MONTHLY REPORT OF ACTIVE DUTY MILITARY PERSONNEL END-STRENGTH, (7 Dec. 1981); JP-1, Doctrine of the U.S. Armed Forces, 2009; U.S. Navy Regulations, 1990.

<sup>164</sup> See generally Senate Report 84-2484, July 9, 1956. The report offers an excellent discussion of the functions and relationships of the CMC, CNO and other secretarial offices vis-à-vis the Secretary of the Navy and the serious Congressional concerns over increasing authority for one office within the secretariat at the expense of another.

<sup>165</sup> CJCS Report on the Roles, Missions and Functions of the Armed Forces, 1993.

<sup>166</sup> See generally MCLSS, May 1969, pg 77-102 for an excellent study that remains as relevant today as it was in 1969 of why provision of legal services by Navy JAGC would be undesirable. One such impact is the concern raised in the 1969 study that “Navy JAG officers, as a corps protected by legislation, would be placed in a unique position of strength vis-à-vis the Marine Corps commanders. As “powers behind the throne,” these officers could very well become a group with great influence over policy, discipline, morale and the many other areas of responsibility for performance that must rest, undiluted, with CMC and individual commanders.”



Corps, would serve to marginalize the SJA to CMC as a legal voice within the service, inconsistent with Congress's elevation of the grade of the SJA to CMC.

**2. Additional authority for the JAG over the manpower policies and assignments of Marine judge advocates is inconsistent with prior specific Congressional action and intent in this area.**

As originally enacted in 1950, Article 6(a), UCMJ, provided that:

“The assignment for duty of all judge advocates of the Army and Air Force and law specialists of the Navy and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the *armed force* of which they are members.”

The original intent of the drafters of the Uniform Code of Military Justice was to make “assignment to duty of judge advocates ... subject to the approval of the respective Judge Advocate General.”<sup>167</sup> The House report noted that the intent was to give the JAG “control over” judge advocate assignments, while recognizing that, as a practical matter, orders for assignments would be issued by the personnel departments of the services.<sup>168</sup> The legislative history indicates that the UCMJ amendment requiring assignment recommendations from the JAG was largely based on Congress's perception that the Air Force and Navy at the time were “not giving adequate recognition to their judge advocates and law specialists,” relegating their “legal personnel to positions of lesser importance and dignity than their counterparts in the line.”<sup>169</sup> Apparently, the amendment was not based at all on the notion that lawyers needed to maintain a degree of independence from their service leadership.

Article 6(a) also only addressed assignment of judge advocates in the Army and Air Force, and “law specialists” in the “Navy.”<sup>170</sup> This is because the UCMJ, as originally enacted, reflected a three-department, three-service view of the military, which although largely discarded by the 1947 National Security Act, still lingered in legislation in the decades following World War II. In 1950, the only references to the “Marine Corps” in the UCMJ, including the reference in Article 1, were

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<sup>167</sup> See Prof. E.M. Morgan, Dean, Harvard Law School and Chairman of the Secretary of Defense's Committee on the Uniform Code of Military Justice, Testimony before Subcommittee 1 to the House Armed Services Committee, March 1, 1949.

<sup>168</sup> House Committee on the Armed Services Report No. 491 to Accompany H.R. 4080 “Uniform Code of Military Justice,” pg. 12.

<sup>169</sup> See House Committee on the Armed Services Report No. 491 to Accompany H.R. 4080 “Uniform Code of Military Justice,” pg. 8-9. This led Congress to consider mandating the Navy and Air Force adopt a Judge Advocate General Corps model like the Army to provide a special status and career protection for these officers. Although Congress declined to do so in 1950, by 1967 they apparently decided the time had come, for similar reasons and created a Judge Advocate General Corps for the Navy. The Marine Corps has not had this problem. In fact quite the opposite. The Corps attracts and retains the type of young men and women that it needs to serve as judge advocates in the Corps for this very reason - that the Marines do not have a special corps within a Corps.

<sup>170</sup> See Public Law 90-179-Dec.8, 1967, 545-549. Prior to 1967, Navy and Marine lawyers were line officers, assigned to special duty as “law specialists.” It was not until 1967 that a separate JAGC was formed in the Navy, allowing officers to be commissioned and serve as restricted officers within a separate, special staff Corps; and that Marine line officers were given the statutory option to apply for designation as “judge advocates.”



intended only to make clear that when referring to the services, the term “Navy” encompassed the Marine Corps.

In 1967, the Article 1 definition of “armed force” was amended to identify the Marine Corps as a separate service. Congress likewise amended Article 6, UCMJ to address the assignment of judge advocates of the Marine Corps:

“The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made *upon the recommendation* of the Judge Advocate General of the *armed force* of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made *by direction of the Commandant of the Marine Corps.*”<sup>171</sup> [*emphasis added*]

Congress specifically considered assignments of Marine judge advocates and determined they should be made by the service chief - the Commandant. And this legislative change was made the same year Congress determined it was necessary to provide for a JAG Corps in the Navy.<sup>172</sup> The reasoning behind the establishment of the Navy JAG Corps was to increase the professional stature of lawyers within the U. S. Navy; the concerns implicit in the 1950 enactment of Article 6 had not subsided.<sup>173</sup>

From these contemporaneous legislative actions, one can draw the inference that Congress did not believe that Marine judge advocates required a separate staff corps. Thus, not only are manpower policies and assignments generally considered presumptive service functions, Congress has deliberately and specifically deemed the assignment of Marine judge advocates the domain of the Commandant.

### **3. Additional authority for the JAG over the manpower policies and assignments of Marine judge advocates is not necessary.**

There is no reason to depart from the presumption that manpower policies and assignments are service functions and no reason for Congress to reconsider its previous determination that the

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<sup>171</sup> 10 U.S.C § 806(a).

<sup>172</sup> See Public Law 90-179-Dec.8, 1967, 545-549.

<sup>173</sup> Senate Report No. 90-748 explains the purpose behind the creation of the Navy JAGC in 1967 was to make a career as a uniformed attorney more attractive. Prior to this lawyers were leaving the Navy, citing a lack of professional identity as a prominent reason. They believed that establishment of a JAGC would afford them greater professional stature and recognition. From these contemporaneous actions, one may draw the inference that Congress found the Marine Corps was not similarly relegating their “legal personnel to positions of lesser importance and dignity than their counterparts in the line.” This is consistent with the findings of the CMC’s study only two years later that took note of the continued successful integration of judge advocates as regular Marine line officers. CMC Study 1969, pg 65-70, 100, and 103-108. “...Marine lawyers do not particularly desire to be identified with the Navy JAG Corps. Any action [by Marine Cops leadership] which would do so, “directly or by implication could be considered, at least, a breach of good faith.”



assignment of Marine judge advocates should be made by the Commandant. As discussed earlier the Marine Corps' current policies and practices for organizing and managing manpower, to include assignments of Marine judge advocates is an effective system of checks and balances. This continuous process of assessment and adjustment best ensures the right number of Marine judge advocates is maintained, balancing current and projected mission requirements and fiscal constraints, best ensures the right Marine is assigned to the right billet, and best ensures, along with all Marine officers, appropriate career progression for judge advocates. Importantly, the SJA to CMC has effective input into this process at every step to ensure the legal mission of the Marine Corps, and broader departmental policies are being met.

This system like any other is not perfect. However it has proven effective over time and has succeeded more recently in identifying, responding to, and adjusting for the unparalleled challenges that the Marine Corps and its legal community, along with the rest of the Department of Defense, have faced over the last decade.

Of course, adjustments and improvements can continue to be made and the Marine Corps continues to adapt. The best way to ensure future mission success is by building on recent Marine Corps initiatives, led by the SJA to CMC, to right-size the legal community, and increase effectiveness and efficiency by setting, training to, and enforcing performance standards. Clarifying and enhancing service authority exercised by the SJA to CMC on behalf of the Commandant will facilitate those efforts. Leaving or moving authority best exercised by the service outside the Marine Corps, particularly to a departmental officer oriented on the U.S. Navy will enhance neither effectiveness nor efficiency. Departmental supervision is already available and sufficient. The CMC is currently responsible to the Secretary of the Navy for the manpower policies and assignments of judge advocates within the Marine Corps and the departmental JAG is currently responsible for advising the Secretary on the health of the entire DON legal community. That should be sufficient to respond to any systemic issues rising to the departmental level from the Marine legal community. Inserting the departmental JAG, even if that officer were a U.S. Marine, into the Marine Corps manpower policies and assignments process can only complicate matters. In short, additional authority for the Navy JAG over the manpower policies and assignments of Marine judge advocates is unnecessary and unwarranted.

## **506 ISSUE V**

### **DIRECTIVES ISSUED BY THE NAVY AND THE MARINE CORPS PERTAINING TO JOINTLY-SHARED MISSION REQUIRING LEGAL SUPPORT.**

All directives issued by the Navy and Marine Corps pertaining to jointly-shared missions requiring legal support have been provided separately.



## 506 ISSUE VI

### **CAREER PATTERNS FOR MARINE JUDGE ADVOCATES IN ORDER TO IDENTIFY AND VALIDATE ASSIGNMENTS TO NONLEGAL BILLETS REQUIRED FOR PROFESSIONAL DEVELOPMENT AND PROMOTION.**

The axiom “every Marine officer a MAGTF officer” drives expectations for judge advocates to have a career development path that includes assignments to operational units, overseas tours, and non-legal billets, as well as completion of formal courses of Professional Military Education (PME) for each grade. Most Marine judge advocates will spend the vast majority of their careers in legal billets, but as part of the unrestricted line, they must compete with all other Marine officers for promotion, command, and other career advancing opportunities based on their competence as leaders of Marines, MAGTF officers, and their proficiency as judge advocates. There is no “standard” career pattern and many Marine judge advocates have had successful careers with almost exclusively legal assignments while others have served in a number of billets outside of the legal community during the course of a successful career. This section will provide an overview of the opportunities and assignments available for Marine judge advocates.

Prospective judge advocates must first earn a commission as a second lieutenant of Marines by successfully completing Officer Candidates School (OCS) (either two six-week or one ten-week course) at Quantico, Virginia.<sup>174</sup> After completion of OCS, all officers must attend The Basic Course (TBS), a six-month infantry-focused leadership course at Quantico, Virginia. This entry-level training lays the foundation for a career as a Marine officer, fully integrated into service culture. Immediately following TBS, prospective judge advocates attend the Basic Lawyers’ Course (BLC) at the Naval Justice School (NJS), a ten-week course of instruction that trains sea service judge advocates in the fundamentals of military justice, administrative law, investigations, legal assistance and basic operational law, with an emphasis on trial advocacy skills. Upon completion of NJS, students are certified by the JAG as trial/defense counsel, legal assistance attorneys and ethics advisors, and are admitted to practice in military courts.

Judge advocates who come in through the Officer Candidates Course (OCC) or Platoon Leaders Class (PLC) Law programs receive constructive service credit at the rate of one year of service credit for each year of law school completed while not in a commissioned status. As a result, nearly all judge advocates will attain the rank of captain by the middle of their first tour.

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<sup>174</sup> Commissioning programs also include the platoon leaders course (PLC), in which college students do two six-week sessions at OCS and are commissioned upon graduation from college. Marine officers are also commissioned out of the Naval Academy and NROTC programs, which include a modified OCS session. Marine judge advocates typically complete the ten-week OCS course, are commissioned, and return to finish law school and pass the bar before reporting to the Basic School. Accessions to the Marine judge advocate community also come from law programs through which Marine officers attend law school and move laterally to the judge advocate MOS.





For their first tour, almost all judge advocates are ordered to a Marine Corps SJA office, joint law center, or LSSS after leaving NJS and begin their careers in trial, defense, or legal assistance billets. Ideally, they spend 18 months in that billet before rotating across the aisle or into a review officer or Deputy SJA billet. Once they have accumulated 540 days<sup>175</sup> of observed performance on active duty, judge advocates wishing to remain on active duty will compete for career designation as a regular active duty Marine officer. Recently, to help build inventory based on increased demand for judge advocates, DC, M&RA instituted a 100% career designation precept for 4402s.

After their first tour, judge advocates, like their counterparts in other MOSs, may be assigned to career broadening B-billets, such as recruiting duty, instructor duty at TBS, or as series commanders at one of the Recruit Depots.<sup>176</sup> The demands created by the operational tempo over the last several years have created unprecedented opportunities for judge advocates to gain MAGTF officer experience both in and outside of the 4402 MOS and in traditional and non-traditional billets.

At some point during these first two tours, or possibly during their third tour, judge advocates will be expected, as with all officers, to serve a tour of duty overseas, or at least deploy as part of an expeditionary unit. There are a number of opportunities for legal assignments overseas, such as service in OPFOR or base Staff Judge Advocate offices, or within the LSSS, 3d MLG.

Following tours in other occupational specialties, another group of Marine officers join the legal community as senior captains or junior majors through the competitive programs of Funded Law Education Program (FLEP)<sup>177</sup> and Excess Leave Program (Law) (ELP(L)).<sup>178</sup> In these programs, Marine Corps officers are selected to attend American Bar Association accredited law schools full time and after obtaining their degree, transition into the legal field.<sup>179</sup> In 2010, 18 Marine officers are enrolled in these two programs from which over 90 judge advocates have been accessed since 2002.

A judge advocate's third tour will be as a junior field grade officer. Most officers will serve in one of several types of legal assignments: supervising trial, defense or legal assistance counsel; military judge; appellate counsel; SJA or Deputy SJA; or a Departmental, Joint, or Headquarters Marine Corps billet. Officers will typically remain as Majors for five years, and therefore typically complete or partially complete two tour tours in these assignments. One of these assignments will

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<sup>175</sup> MCO 1001.45J.

<sup>176</sup> Includes serving as a Congressional Fellow.

<sup>177</sup> Pursuant to 10 U.S.C § 2004, as implemented by DoD Directive 1322.12 and SECNAVINST 1520.7,

<sup>178</sup> Pursuant to 37 U.S.C. § 502(b),, and 10 U.S.C. § 701 (b)

<sup>179</sup> *Id.*



generally be with an operational force command, as this serves to further an officer's MAGTF competency, whether in a legal billet or not.

During their careers, judge advocates have professional military education (PME) and advanced legal education opportunities to pursue. All Marine Corps officers are required to complete the same PME for each grade. Every Marine judge advocate has the opportunity to complete non-resident PME. Attendance at resident PME is competitive with judge advocates selected at roughly the same percentage as their peers in other specialties. These courses include Expeditionary Warfare School for captains, Marine Corps Command and Staff College for majors, and Top Level School for lieutenant colonels and junior colonels. Marine judge advocates have typically fared well on our selection boards for resident PME.

In addition to PME, there are three legal education programs available for senior captains and majors that allow judge advocates to attain an LL.M., or Masters of Laws: the Special Education Program (SEP), Advanced Degree Program (ADP), and the Graduate Course at the Army Judge Advocate General's legal Center and School (TJAGLCS). Through SEP and ADP, the Marine Corps offers its judge advocates the opportunity to earn an LL.M in criminal, environmental, labor, procurement or international law.<sup>180</sup> In contrast to civilian schools, the Graduate Course curriculum at TJAGLCS is focused on military law with specialty concentrations in many areas. This program is especially well-suited to our practice and produces a well-rounded graduate capable of successfully serving in a variety of challenging billets and in most practice areas.<sup>181</sup>

Although judge advocates, as regular Marine line officers, compete with the entire pool of eligible officers for promotion, they have historically been very competitive on promotion boards. Over the past six years, the in-zone selection rates of judge advocates to the grades of major and lieutenant colonel compared very well with the overall averages for all occupational fields and significantly exceeded the overall selection average in all but one of the twelve boards listed below (FY 09 Majors board). For colonel, the selection rate has been more difficult with three years significantly below the overall average (FY 09: 4 of 12 with 2 above zone selections; FY 08: 1 of 8 with one above zone selection; and FY 07: 4 of 17). Although the above zone selections and the FY 10 colonels board made up for some of the shortfall with its selection of 9 of 14 in zone and one above zone selection, we remain short 4402 colonels and like the FY 10 board, this year's selection board for colonel will likely have a precept identifying a "critically shortage" of judge advocates. Overall, judge advocates have exceeded the promotion rates for in 13 of 18 field grade selection boards in the last six years:<sup>182</sup>

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<sup>180</sup> Tuition for SEP students is paid by the Marine Corps, while ADP students pay their own tuition

<sup>181</sup> The Graduate Course allows attorneys to specialize in Administrative and Civil Law, Criminal Law, Contract and Fiscal Law, or International and Operational Law.

<sup>182</sup> Statistics for table available at: <https://www.manpower.usmc.mil/portal/page> (last visited August 29, 2010).



	Major 4402	Major All OCC Fields	Lieutenant Colonel 4402	Lieutenant Colonel All OCC Fields	Colonel 4402	Colonel All OCC Fields
FY11	87.1%	82.8%	81.8%	65.6%	50.0%	53.6%
FY10	90.6%	87.6%	88.9%	71.8%	64.3%	53.4%
FY09	78.4%	87.0%	90.9%	70.6%	33.3%	50.5%
FY08	90.0%	87.4%	82.4%	65.0%	12.5%	51.0%
FY07	90.0%	86.5%	75.0%	62.4%	23.5%	48.4%
FY06	92.9%	86.7%	78.9%	67.2%	80.0%	50.8%

As unrestricted officers, judge advocates are eligible for command of non-legal units and remain competitive for command selection with their peers in other occupational fields.<sup>183</sup> For colonel commands, judge advocates are currently serving as the Commanding Officer, Marine Corps Base Camp Lejeune and as Commanding Officer of the Headquarters and Support Battalions at both Marine Corps Recruit Depots. Typically lieutenant colonel judge advocates are selected to command recruit training battalions, Marine Security Force Companies, or Headquarters Battalions and there are two lieutenant colonels serving in command billets today.<sup>184</sup> The high rate of selection for both promotion to senior field grade rank and command is a testament not only to the quality of Marine officers serving as judge advocates, but also to the level of integration of judge advocates into the professional cadre of Marine officers.

As lieutenant colonels, judge advocates can expect challenging assignments such as the SJA for a Major Subordinate Command, an Officer-in-Charge of a Law Center or LSSS, a Military Judge for general courts-martial, an appellate judge at NMCCA, Branch Head within the HQMC JAD, or assignment to legal duties on the staff of unified and other joint commands. These assignments to senior staff positions in these commands, although legal in nature, serve to broaden the senior judge advocates experience, further their credentials as MAGTF officers, prepare them for assignments of greater responsibility, and make them competitive for future selection boards.

Finally, as colonels, judge advocates assume positions as the senior most field grade leaders within our Corps and legal community. Most Colonels will be assigned to positions of significant responsibilities such as the SJA for a Major Subordinate Command, Expeditionary Force, or Marine Corps base; Chief Military Judge for a trial circuit; appellate judge at NMCCA; Deputy SJA; or assignment as the SJA for unified and other joint commands.

<sup>183</sup> In fact, no active duty legal organizations have commanders or command screened OICs. RLSSS OIC is a command screened billet.

<sup>184</sup> Marine Administrative Message (MARADMIN) 445/10 (FY11 Lieutenant Colonel Command Screening Board Results): 3 Judge Advocates were selected for command and 4 were selected as alternates. MARADMIN 446/10, FY11 Colonel Command Screening Board Results.



The Marine Corps continues to offer challenging and rewarding career patterns for our judge advocates. It is the diversity of assignments and the unique challenges that come with a career as a Marine judge advocate has always been the allure of service in the Corps and continues to be the best recruiting and retention tool for our community. There is no one set career pattern, but the multitude of opportunities for shaping your own challenging career in the Corps, makes it a special career choice for our junior Marine officers.

## 506 ISSUE VII

### **OTHER RELEVANT MATTERS - ROLE OF THE SJA TO CMC, AND WHETHER ADDITIONAL AUTHORITY FOR THE SJA TO CMC TO EXERCISE SERVICE LEVEL FUNCTIONAL LEADERSHIP OF MARINE LEGAL SERVICES IS WARRANTED.**

This section will first describe the current role of the SJA to CMC of the Marine Corps. Second, it will discuss whether additional authority for the SJA to CMC to exercise service-level functional leadership of Marine Legal Services is warranted.

#### **A. THE ROLE OF THE STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS**

Any review of the current statutory, regulatory and *de facto* role of the SJA to CMC must be made in the context of the historical evolution of the role of the senior uniformed legal officer of the several services and statutory evolution of the Marine Corps as a mature, separate and equal service.<sup>185</sup>

**1. Evolution of the Senior Uniformed Legal Officer Billets.** Prior to World War II the role of the senior uniformed legal officers within the military services had been defined by decades of tradition, regulation and a patchwork of statutory language. As discussed earlier, the statutory role of the JAGs underwent a comprehensive revision in 1950 alongside the enactment of the Uniform Code of Military Justice, with significant modifications in 1956 and 1967. However, these statutory revisions did not address a role for a senior uniformed legal officer of the Marine Corps. The explanation lies, in part in the belated emergence of the Marine Corps as a mature separate service.

Despite the Corps' accomplishments in World War II, there still existed within Congress and the Navy Department a lingering reluctance to recognize the Corps as a mature separate service.<sup>186</sup> It

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<sup>185</sup> See generally Senate Report No. 81, to accompany H.R. 197, Establishing the Grade of General in the Marine Corps, pgs 1-11. In discussing the purpose of the bill Senator Gerry noted it was "...to remedy the omission of General Vandergrift [then CMC and a LtGen] when creating the rank of Admiral of the Fleet was passed by the House and Senate." (emphasis added).

<sup>186</sup> See generally HASC, Full Committee Hearing on S. 677 To Establish the Relationship of the Commandant of the Marine Corps to the Joint Chiefs of Staff, May 23, 1951, pgs 761-764, 809-834.



would be another three decades before Congress recognized the CMC as a full member of the JCS. As Senator Bartlett noted in introducing the legislation on the floor of the Senate in 1978:

“Most Americans recognize that we have four military services, which of course, includes the Marine Corps...My amendment, ...would simply correct an outmoded law to match current practice... My amendment would simply remove an archaic legal distinction between the Commandant of the Marine Corps and the other chiefs of service...”<sup>187</sup>

As a result the statutory development of the role of the senior uniformed legal officers of the several services reflected an outdated view of the armed forces as a three department - three service military establishment.

Even in the context of the Army, Air Force and Navy, the 1950, 1956 and 1967 revisions did not expressly address the increasing dual-nature of the senior legal officer’s role – to perform departmental functions as the JAG, as well as service-level functions as the senior uniformed legal officer of the service. These distinctions were largely left to departmental regulation. These statutory omissions, although understandable in their historic context, have resulted in gaps for the dual-service Department of the Navy.

The 1968 Military Justice Act which amended the UCMJ, together with the Vietnam War, created an exponential increase in legal service requirements.<sup>188</sup> In the decades since, there has been increased codification and litigation of civil law issues (land use, environmental, labor law, etc.); expansion of service members rights, e.g., administrative law, SCRA; and a heightened need for operational law advice and services in contingency operations.<sup>189</sup> The Navy and Marine Corps each now have a total force, active and reserve, approaching one-thousand judge advocates, practicing world-wide, along the spectrum of legal functions to meet these requirements.

Within the DON, these increasing requirements and the lack of a separate well-defined senior uniformed legal officer for the U.S. Navy spawned extensive regulations assigning Navy-specific service-level functions to the departmental JAG.<sup>190</sup> The result, as discussed previously, was a

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<sup>187</sup> Congressional Record, 124 Cong. Rec. S20199-00, July 11, 1978.

<sup>188</sup> The 1968 Military Justice Act required judge advocates to serve as military judges and defense counsel in special and general courts-martial, as well as trial counsel in general courts-martial. This occurred alongside the increase in force size and disciplinary problems associated with the demographics of a conscripted military, resulting from the Vietnam War.

<sup>189</sup> *See generally* 1969 CMC Study and 1990 Master Plan, each discuss the growing trend in legal services requirements of their respective era.

<sup>190</sup> Early versions of both the Navy Regulations and the Manual of the Judge Advocate General of the Navy, and the original version of SECNAVINST 5430.27A (1977) did not establish, recognize or assign functions for the role of the senior legal officer of the Marine Corps.



departmental JAG, service-oriented and U.S. Navy-focused.<sup>191</sup> As a practical matter, this construct assured that the Navy's senior uniformed legal officer would have sufficient statutory authority and departmental resources to execute service-level functions.<sup>192</sup> Further it relieved the U. S. Navy of having to provide for another flag officer billet.

The fact remains, however, that the U.S. Navy has no statutory flag-level service legal officer billet, and that, although the Marine Corps has such a billet, the responsibilities and authorities of that billet are not statutorily defined. This raises the issue whether there should be resident in the Naval Services those authorities necessary to accomplish service-level legal functions.

The examination of this issue may properly begin with 10 USC §5014 (c) which identifies those areas over which the Office of the Secretary of the Navy has sole responsibility to the exclusion of the Office of the CNO and HQMC.<sup>193</sup> Legal matters are not among those areas reserved exclusively for the Office of the Secretary of the Navy. Moreover, there are clearly functions that HQMC properly performs in furnishing professional assistance to the Secretary and in preparing for the employment of the Marine Corps and in administering and maintaining the Marine Corps.<sup>194</sup> As part of HQMC, the SJA to CMC serves both CMC and the Secretary; therefore, in determining whether there should be resident in the Naval Services authorities necessary to accomplish service-level legal functions, considering the evolution of the SJA to CMC billet may be useful.

**2. The Senior Legal Officer of the Marine Corps.** In 1966, in response to the “build up of the Marine Corps, generally” Congress authorized 19 additional general officer billets for the Marine Corps, recognizing that the ratio of general officers in the Marine Corps remained well short of the other services.<sup>195</sup> The legislative history reflects that this was in part to allow the Marine Corps to account for the billet of “Commandant of the Marine Corps Legal Advisor” in the grade of brigadier general.<sup>196</sup> The exact legislative intent behind the bill is unclear, but Congress expressly took into account the fact there were “certain flag officer billets in the Navy which provide support to the Marine Corps; e.g. . . .the Judge Advocate General of the Navy.” Nevertheless, Congress determined that even making “allowance for this Navy support,” the “the increasing complexities involved in the duties and responsibilities of officers in the field, in joint staffs, and Headquarters, U.S. Marine Corps” required a service general officer legal billet. At the time, within Headquarters

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<sup>191</sup> During this period a complex mutually dependant relationship between the department JAG and the Navy JAGC with regards to flag office management was also created, resulting in significant reticence within the Navy JAGC to consideration of Marine judge advocates for these departmental leadership billets.

<sup>192</sup> The same personnel who control Navy-service resources and funding are in many instances the same personnel that control departmental resources and funding.

<sup>193</sup> 10 U.S.C. §5014.

<sup>194</sup> 10 U.S.C. §5042.

<sup>195</sup> Pub. L. 89-731; 80 Stat. 1160; November 2, 1966.

<sup>196</sup> See Senate Report No. 1838 to accompany H.R. 14741.





Marine Corps the billet was described, and assigned duties as both the “Staff Legal Officer” and “Director, Judge Advocate Division.”<sup>197</sup> This role was limited to the service-level function of advising the service chief on specified legal matters and presiding over JAD. The billet description did not include any professional supervision or functional leadership role in relation to the Marine legal community, such as an equivalent to “Chief of the Navy JAGC.”

In 1986 Congress for the first time, expressly created a role for the senior uniformed legal officer of the Marine Corps.<sup>198</sup> The statutory billet was entitled “Staff Judge Advocate to the Commandant of the Marine Corps.”<sup>199</sup> The Senate report accompanying the 1986 legislation stated:

“This position serves as the legal advisor to the Commandant, as well as oversees those Marine Corps officers designated as judge advocates by the Judge Advocate General of the Navy.”<sup>200</sup>

Although Congress seems to have envisioned a functional leadership role, the position was expressly limited to that of a SJA to a general courts-martial convening authority, albeit the Commandant, and the attendant authority to communicate with subordinate SJAs.<sup>201</sup> The statutory language provided simply that:

“(a) An officer of the Marine Corps who is a judge advocate ... may be detailed as [SJA to CMC]. While so serving, a judge advocate who holds a grade lower than brigadier general shall hold the grade of brigadier general if appointed to that grade by the President, by and with the advice and consent of the Senate.

(b) officers retiring from the position of [SJA to CMC], after serving at least three years in that position, shall be retired in the highest grade in which that officer served on active duty satisfactorily, as determined by the Secretary of the Navy.”<sup>202</sup>

The statute does not create a functional leadership or professional supervision role with respect to the Marine legal community. As the 1990 Legal Services Study expressed it:

“The Staff Judge Advocate to the Commandant has no express statutory duties other than that which any Staff Judge Advocate has under the UCMJ...”<sup>203</sup>

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<sup>197</sup> This position was created on HQMC Table of Organization (T/O).

<sup>198</sup> 10 USC 5046.

<sup>199</sup> 10 USC 5046.

<sup>200</sup> Senate Armed Services Committee, Report to Accompany S. 2638, Report 99-331, June 27, 1986.

<sup>201</sup> 10 USC 806.

<sup>202</sup> 10 USC 5046 as enacted in 1986. See 10 U.S.C.A. 5046 for current language and a complete history of 1994, 2004, and 2008 legislative amendments.

<sup>203</sup> 1990 LSS Master Plan, at C-II-III.



### 3. Role of the Senior Legal Officer Acting Through and In Support of CMC's Role

Arguably the SJA to CMC, acting through and in support of the broad statutory authority of the CMC, can exercise professional supervision of individual judge advocates and formal leadership of the Marine legal community.<sup>204</sup> Various Marine Corps regulations and orders since 1986 provided for further functions for the SJA to CMC, in his role as SJA and Director, JAD. These functions include:

- advising the CMC in military justice, civil and administrative law, operational law, legal assistance matters and any other matters as directed by the Secretary and CMC;
- for matters under the cognizance of the SJA to CMC, serving the legal advisor to Headquarters, Marine Corps, and all other offices of the Marine Corps;
- serving as Director, Judge Advocate Division (JAD), including direct supervisory authority over all active and reserve judge advocates, civilian attorneys, and legal support personnel assigned to the JAD;
- serving as the occupational field sponsor for all active duty Marine Corps judge advocates and advising the Deputy Commandant, Manpower and Reserve Affairs, regarding which Marine judge advocates are best suited to fill particular billets;
- overseeing the Chief Defense Counsel of the Marine Corps;
- conducting annual inspections to ensure that Marine Corps law centers are functioning properly and efficiently;
- serving as Rules Counsel for matters of professional responsibility involving Marine Corps judge advocates or civilian attorneys under his cognizance and reporting to the JAG regarding oversight of professional responsibility matters in the Marine Corps; and
- together with the Counsel for the Commandant, providing legal advice on standards of conduct and government ethics.

Still these service regulations did not expressly provide the SJA to CMC professional supervision or leadership functions over the Marine legal community, aside from the authority to “conduct annual inspections” on behalf of the JAG and to “oversee the Chief Defense Counsel of the Marine Corps.”<sup>205</sup> Several factors arguably have had a chilling effect on the delegation of such authority to the SJA from the CMC.

First, within the Marine Corps at the time of the creation of the SJA to CMC billet, a theory of complete de-centralization of legal services was prevalent under which the commander's SJA office

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<sup>204</sup> See 10 USC 5043. This section establishes the statutory duties of the CMC.

<sup>205</sup> The original MCO P5800.16 Marine Corps Legal Administration Manual regulated a role for the senior legal officer of the Marine Corps, which is also incorporated in the 1989 HQMC Table of Organization for the JAD. The 1999 version of the Legal Administration Manual noted an agreement that had been made between the JAG and CMC to have the SJA conduct Article 6 inspections of Marine Corps legal organization on behalf of the JAG.



comprises a distinct “independent” legal entity. As succinctly stated in the 1990 Legal Services Master Plan:

“Although [the SJA to CMC] serves as the occupational field sponsor for judge advocates, legal service officers, and enlisted, he does not exercise any supervisory authority over such personnel. Such authority remains with the chain of command, except in matter of judge advocate certification in which the ultimate authority lies with the Judge Advocate General.”<sup>206</sup>

“Staff Judge Advocates (SJAs), LSSS OICs, and senior judge advocates have exclusive cognizance throughout the Marine Corps over military law.”<sup>207</sup>

This view results from the statutory authority of commanders to communicate directly with the SJA;<sup>208</sup> the lack of any statutory leadership role for the SJA to CMC; and the Corps’ operational and cultural preference for de-centralization of legal services. To a large degree this is consistent with the service culture and operational doctrine of the Marine Corps which emphasizes the primacy of the commander in maintaining discipline and readiness, the commander’s prerogative to task-organize resources based on mission requirements, independence of the staff judge advocate’s office, mission-oriented orders, and de-centralized execution. This model has served the Corps well for decades but emergent operational demands, increased force size, and the complexity of military justice requirements (and near-instantaneous potential strategic implications of “tactical” legal decisions) has challenged the concept of complete de-centralization.

Similarly, the JAG retains statutory authority for all Chapter 47 functions, irrespective of the service-level nature of some of the functions. Therefore the Navy JAG, by statute, occupies much of the field of supervision of military justice --the core legal function of Marine judge advocates. Arguably in this field the CMC has no statutory jurisdiction to regulate.

Third, in establishing the office of the Secretary of the Navy, Congress provided:

“The Secretary of the Navy shall ensure that the Office of the [SecNav, CNO, HQMC], do not duplicate specific functions for which the Secretary has assigned responsibility to another of such offices.”<sup>209</sup>

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<sup>206</sup> 1990 LSS Master Plan, at c-III.

<sup>207</sup> 1990 LSS Master Plan, 3-5.

<sup>208</sup> 10 USC 806.

<sup>209</sup> 10 USC 5014; and see also H.R. Conf. Rep. No. 99-824, at 146-152 (1986). The Goldwater-Nichols Act of 1986 sought to eliminate duplicative functions between Military Department Secretaries and Service Chiefs.



These factors have fostered a mindset among the Marine Corps leadership that the SJA to CMC role was strictly limited to advisor to CMC and staff cognizance over specified legal matters within HQMC. Any exercise of formal functional leadership, lacking a statutory basis, would be tenuous. And although a regulatory basis could expand this authority, exercise by the SJA to CMC would remain subject to OJAG exercise, effectively undermining the SJA to CMC's ability to provide consistent guidance.<sup>210</sup>

## 5. Recent Statutory Changes to Departmental and Service Billets.

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.<sup>211</sup> This included 10 U.S.C. § 5046, which provides:

- (c) No officer or employee of the Department of Defense may interfere with—
  - (1) the ability of the [SJA] to the [CMC] to give independent legal advice to the [CMC]; or
  - (2) the ability of judge advocates of the Marine Corps assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.

This statutory change increased the independence of the SJA to CMC, in his service role as advisor to the CMC, vis-à-vis the JAG, Counsel for the Commandant and other offices within the Secretariats of the Military and Defense Departments.

In 2008, after Congressional hearings and debate on the provision of legal advice to civilian leadership within the military departments, with regard to the application of the law of war to current conflicts, Congress mandated that the JAGs be elevated in grade to Lieutenant General or Vice Admiral.<sup>212</sup> The Senate Armed Services Committee report accompanying the Senate version of the bill explained:

“[t]he greatly increased operations tempo of the Armed Forces has resulted in an increase in the need for legal advice from uniformed judge advocates in such areas as

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<sup>210</sup> For example, implementing a post-trial checklist as part of an inspection regime, or a service-wide uniform case management system for use by Marine military justice offices, could be summarily voided by subsequent departmental policies.

<sup>211</sup> NDAA FY 2005, Pub. L. 108-375, 108<sup>th</sup> Congress, 118 Stat. 1811, (October 28, 2004)(codified as 10 USC 3037(e), 5148(e), 5046(c), 8037(f)); *see generally* Conference Report 108-767, to accompany H.R. 4200, Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, pg 682-683.

<sup>212</sup> Pub.L.110-181, 122 Stat.3, Jan. 28, 2008, sec. 543; *see generally* Senate Committee on Armed Services Report 110-77 to accompany S. 1547, National Defense Authorization Act, pg 342, June 5, 2007; *and* Congressional Record-Senate, S8790-S8797, July 25, 2005.



operational law, international law, the law governing occupied territory, the Geneva Conventions, and related matters.”<sup>213</sup>

Later that year, Congress also passed legislation elevating the grade of the SJA to CMC to Major General.<sup>214</sup> However, unlike the Deputy JAG billet, which is a permanent grade rear admiral or major general billet, in elevating the grade of the SJA to CMC, Congress changed the grade of the billet from a permanent brigadier general to that of a temporary major general. As a result, the SJA to CMC holds the permanent grade of colonel and the temporary grade of major general “while so serving.”

These recent statutory changes by Congress helped ensure that the 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. However, as neither of these changes included additional roles or functions for the SJA to CMC, much less any mechanisms for the SJA to ensure the service’s legal voice is heard, the position remains strictly that of legal advisor to the CMC, as limited by the role of the JAG and Counsel for the Commandant.<sup>215</sup>

The fact remains that the U.S. Navy has no statutory flag-level service legal officer billet, and, although the Marine Corps has such a billet, the responsibilities and authorities of that billet are not statutorily defined. This raises the issue whether there should be resident in the Naval Services those authorities necessary to accomplish service-level legal functions.

## **B. IS CLARIFYING THE LINES OF AUTHORITY FOR THE SJA TO CMC TO EXERCISE SERVICE-LEVEL LEGAL DUTIES AS THE SENIOR UNIFORMED MARINE JUDGE ADVOCATE WARRANTED?**

As discussed in the previous sections on requirements for operational law and military justice,, meeting Marine Corps legal mission requirements is less about numbers, than about enhancing the professional practice of law with the Corps. An assessment by the SJA to CMC in 2010 suggested that largely as a result of steadily increasing quantity and complexity of legal requirements; historical complete de-centralization of legal services, and the lack of well-defined leadership roles and authorities for the SJA to CMC, the Marine legal community had to overcome certain challenges: lack of uniformity in policies and procedures; lack of adequate means for professional supervision;<sup>216</sup> lack of performance standards; lack of mechanisms to afford transparency, oversight

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<sup>213</sup> S. Rep. No. 109-69, at 310 (2005).

<sup>214</sup> Pub.L. 110-417, 122 Stat.4356, 110<sup>th</sup> Congress, Oct. 14, 2008.

<sup>215</sup> 10 USC §§5046, 5149.

<sup>216</sup> “Professional supervision” refers to establishing rules of professional and ethical conduct; and establishing procedures for receiving, processing and taking action on complaints of professional misconduct.



and accountability; lack of formal mechanisms to maintain military justice expertise; and lack of current doctrine.<sup>217</sup>

These deficiencies have been exposed by the increased complexity of the military justice mission, compounded by the various legal requirements resulting from operations in OEF/OIF. The Marine legal community needs to enhance the professional practice of law within the service by becoming more effective, efficient, and accountable. To do so the community must:

- Establish uniform processes for functional areas;
- Establish standards of performance;
- Establish requirements and opportunities for education and training;
- Conduct inspections;
- Right-size the legal community; and
- Assign judge advocates where the mission requires.

All of these tasks require uniformity of policies and procedures to promote a unified voice and focused effort across the service, while maintaining de-centralized execution to allow rapid, flexible, local initiative, action and response. That is, we must maintain those strengths that have allowed the Marine legal community to provide effective and efficient advice and support to commanders, Marines, Sailors and their families, under challenging circumstances, in a manner worthy of the public trust. These strengths include:

- Judge advocates that are integrated MAGTF officers;
- Primacy of the commander;
- Decentralized execution;
- Commander's ability to task organize;
- Independence of the SJA;
- Independent defense bar;
- "Division of labor" with the Counsel to the Commandant; and
- The Departmental JAG as the senior uniformed legal advisor to the Secretary of the Navy on departmental matters.

The solution requires balance. This balance is best achieved through a centralized, integrated, and responsive authority, best positioned to execute solutions for the Marine legal community. The solutions involve service-level execution – leading, managing, organizing, training, and equipping – rather than the departmental solutions of policy making and oversight available to the Secretary.

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<sup>217</sup> Judge Advocate Division, Headquarters, U.S. Marine Corps, *Strategic Action Plan*, July 2010.





Therefore establishing and implementing any such solutions should be the function of the senior uniformed legal officer of the service – the SJA to CMC.

Both the Navy and Marine Corps senior uniform legal leadership agree that the SJA to CMC is best positioned to address these challenges for the Marine Corps. Recently the OJAG and JAD worked together to formulate proposed changes to SECNAVINST 5430.27C, to delegate to the SJA to CMC additional authority over Marine Corps legal services (roughly commensurate with the authority the SJA to CMC has customarily exercised for the JAG, e.g. Article 6, UCMJ, visits). Given the organizational practices that have evolved over time, however, this regulatory change is insufficient and is unlikely to have a lasting impact necessary to restore the intended statutory balance to the department and meet the legal demands of both services.

As previously discussed, the historic Navy-specific service orientation of OJAG has impaired the ability of the services to integrate as partners in the department to provide legal support and advice to the Secretary and the service chiefs. It has also diluted the Marine Corps' service voice in the formulation of service-specific legal solutions as well as in matters of departmental legal policy, oversight and budgetary decisions.<sup>218</sup> This imbalance and U.S. Navy focus has evolved from a statutory framework clearly intended to create balance. Therefore, one must ask whether any regulatory remedy can be sufficient without a clear expression from Congress that the current organizational practices and departmental legal construct do not meet the statutory intent.<sup>219</sup>

Accordingly, the Panel should consider other measures that will restore balance in the department and ensure clear lines of authority and accountability for the performance of the service-level legal mission. One possible course of action is statutory change. This action would necessarily entail amending the billet description of the SJA to CMC in Chapter 513, as well as the functions assigned to the JAG in Chapter 47 (UCMJ) and 53 (legal assistance). The extent of any amendments should be a factor of:

- Whether the function is properly a matter of departmental or service concern;
- Whether the function should be exclusively reserved to the JAG;
- Who is best positioned to carry out such function;

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<sup>218</sup> As noted earlier, the Navy-focus is also relevant to the essence of the Panel's charter in that it has arguably hampered the JAG's ability to provide departmental oversight.

<sup>219</sup> 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. Conf. Rep. 108-767, 108<sup>th</sup> Cong., to accompany H.R. 4200 Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, at 682; *see also* Report of the Independent Review Panel To Study the Relationships Between the Military Department General Counsel and Judge Advocates General, September 15, 2005, at 33-42.



- Whether re-assigning the functions would improve accountability, effectiveness, and efficiencies; and
- Whether it would enhance the voice of the Marine Legal Services community within the Marine Corps, and thereby bolster the rule of law.

It should be noted that a Congressional grant of authority to the SJA to CMC over those military justice functions assigned to the JAG would not be inconsistent with the statutory or larger regulatory scheme. The statutory and regulatory history does not suggest that these functions are inherently or exclusively departmental. In designating functions for which each Office of the Secretary of a Military Department should have sole responsibility, Congress selected functions that are either civilian in nature or key to effective civilian control.<sup>220</sup> In doing so, Congress left all other functions, including those Chapter 47 functions, to the discretion of the Military Departments to either retain at the departmental-level or to delegate to the service-level. Further, Congressional placement of the position and authority of the Navy JAG within the Office of the Secretary of the Navy, resulted, not from any unique concern for the nature of the functions in Chapter 47, but rather from a recognition of the unique dual-service nature of the department:

“[T]he attempt to provide uniformity fails to accommodate the diversity among the Departments and the military services. For example the Department of the Navy includes two services...Yet there is confusion in the bill about where authorities can or should be located. Functions that may, in other Departments, fall properly under the Chiefs of Staff must, in the Navy, fall under the Service Secretary. That is, for example, the case with the Judge Advocate General...”<sup>221</sup>

The Army and Air Force JAGs were not similarly placed in their respective Secretarial offices. Instead they are, by statute, part of their respective service staffs yet they still report directly to and advise the Secretary of their respective departments with respect to Chapter 47 functions.<sup>222</sup>

Finally, congressional and regulatory history does not preclude the Secretary of the Navy from relying on legal advice from persons other than the JAG.<sup>223</sup> This legal advice may come from

<sup>220</sup> See Conference Report 99-824 to accompany H.R. 3622 Goldwater-Nichols Department of Defense Reorganization Act of 1986, at 149. These functions include acquisition, auditing, comptroller, information management, inspector general, legislative affairs, and public affairs.

<sup>221</sup> SASC Rpt. 99-280, April 14, 1986, to Accompany S. 2295 “Department of Defense Reorganization Act of 1986,” at 149.

<sup>222</sup> See 10 USC §3014, 10 USC §3031, 10 USC §3037, and 10 USC §§8031, 8037.

<sup>223</sup> As the Senate noted in declining to adopt a provision to assign the JAG of the Navy the duty to “perform all duties relating to legal matters arising in the Department:” “That the Secretary of the Navy has authority to assign appropriate legal functions to persons other than the Judge Advocate General is confirmed by almost 50 years of practice.” See also generally SECNAVINST 5430.25E, 27 Dec 2005. Recent Secretarial regulation has recognized a role for the SJA to CMC in providing legal advice directly to the Secretary of the Navy: “Nothing in this instruction is intended to limit in any way the ability of the ...Staff Judge Advocate to the Commandant to provide and volunteer ... advice to the SECNAV on any matter that [the SJA to CMC] determines should be brought to the SECNAV’s attention.”



officers assigned to the military service staffs, such as HQMC, which is responsible, by statute, “to assist the Secretary of the Navy in carrying out his responsibilities.”<sup>224</sup>

## CONCLUSION

In attempting to address the issues presented by the Panel, this brief has identified several past and on-going challenges for the Marine Corps legal community. Our community is addressing these challenges with Marine solutions: ingenuity, flexibility, endurance and questioning the status quo.<sup>225</sup> It is in this spirit that the Judge Advocate Division, along with other agencies at Headquarters Marine Corps and the 4400 uniformed legal community, have developed several initiatives over the past few years. This brief as well as the Judge Advocate Division’s recently published Strategic Action Plan identifies several of the key initiatives undertaken to address current and emerging legal requirements such as those identified by Congress for the independent panel for review.<sup>226</sup> This Strategic Action Plan also captures our most recent assessment of the performance of our Marine legal community in accomplishing the service-level legal mission.

It is our informed assessment and core belief that the provision of legal advice and services to commanders must continue to reflect the Corps’ service-unique history, culture, philosophy and operational mandate. This requires above all else, that Marine line officers, who are also lawyers, continue to be trusted with the provision of uniformed legal services, particularly with regard to military justice and operational law.<sup>227</sup> Further, it requires that the Corps retain: (1) CMC control over all officer assignments and careers; (2) commander’s control, direction, and tasking of judge advocates assigned to his/her command; (3) the independence of the SJA’s substantive legal advice to commanders; (4) the division of duties/responsibilities with CL; and (5) the existing statutory role of the JAG as the senior uniformed legal officer of the Department - departmentally-oriented and departmentally-focused.

It is our assessment that in terms of personnel, although the Marine Corps has experienced judge advocate shortage in recent years, the current and planned number of Marine judge advocates in our inventory fulfills the legal services requirements of the current and projected force size and mission. Requirements for operational law, military justice, OMC and DES can, and are, being met through existing service-level personnel management and organizational practices, in combination with performance and procedural initiatives. Through personnel practices, we are assuring judge

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<sup>224</sup> 10 U.S.C. §5042.

<sup>225</sup> Whether it was pushing for amphibious doctrine in the 1930s, using Combined Action Platoons in Vietnam in 1965, co-opting local tribes in Al Anbar to turn Sunni insurgents against Al Qaeda in 2005-2006 *before* the surge, or most recently deciding to secure and hold Marjah in southern Helmand Province, the Marines have always approached problems in an unorthodox manner, and have generally had great success. See MCDP 1-0 Marine Corps Operations, pg. 1-5 (discussing CAP innovation).

<sup>226</sup> Judge Advocate Division, Headquarters, U.S. Marine Corps, *Strategic Action Plan*, July 2010.

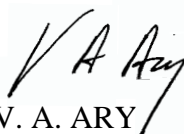
<sup>227</sup> *See generally* 1969 Study. The findings and conclusions in this study remain as relevant and persuasive today, and maybe more so in light of current operations, as they were 40 years ago.



advocates have the requisite experience and training, and are assigned where the mission requires. This is an enduring challenge, which requires continual re-assessment and changes to structure to reflect changing missions and force requirements.

But personnel management and organizational practices are not enough. We must also ensure that our judge advocates are performing to a uniform standard. Establishment and enforcement of service-wide performance standards and procedures, as much as personnel numbers, is critical to fulfillment of mission requirements. The Strategic Action Plan captures many of the recent initiatives that are underway to do just that. However, to ensure these and other initiatives continue in the future, the uniformed service-level leadership must be entrusted with appropriate responsibilities and authorities, which reflect a separate, mature service. Entrusting the Staff Judge Advocate to the Commandant with such responsibilities and authorities also ensures the Marine Corps, like every other service, has a senior uniformed legal voice within the civilian-political leadership of its respective military department and the Department of Defense. Addressing the challenges for the Corps' legal community with Marine solutions will ensure continued successful accomplishment of the Corps' legal service mission, and in so doing support the broader DON legal mission.

This brief has been provided to the Independent Panel to Review Legal Requirements within the Department of the Navy on 31 August 2010.



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