

Military Justice Trends in Brief: From CAAF to Canberra



Fulton Conference 2012

Outline

- **International Trends**
 - Independent judiciary?
 - Jurisdiction?
 - Professionally trained corps of lawyers?
- **UCMJ Trends from the Perspective of CAAF**
 - Crawford line of cases
 - Fosler/LIO line of cases
 - Number of cases/Theater cases
- **CAAF**
 - Grant process
 - Number of 3-2 cases
 - Importance of outreach
 - Records

Caveats: The Usuals

International Trends Overview: Categorizing Systems

- There are a number of different ways to categorize systems:
 - Common law v. civil law systems
 - Emerging democracies v. Commonwealth or ANZAC
 - Large systems v. small
 - ECHR countries v. other
 - Deployed v. not-deployed.
- I have chosen to “consider” a number of factors I believe are distinguishing rule of law characteristics.

International Trends: Independent Judiciary?



International Trends: Jurisdiction

Service Connection



Status-based



Location-based

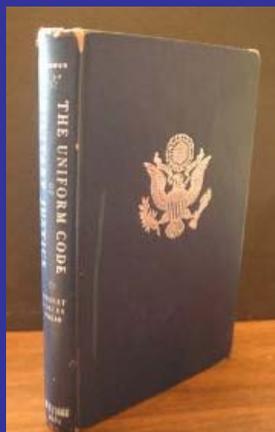
International Trends: Professionally trained lawyers?



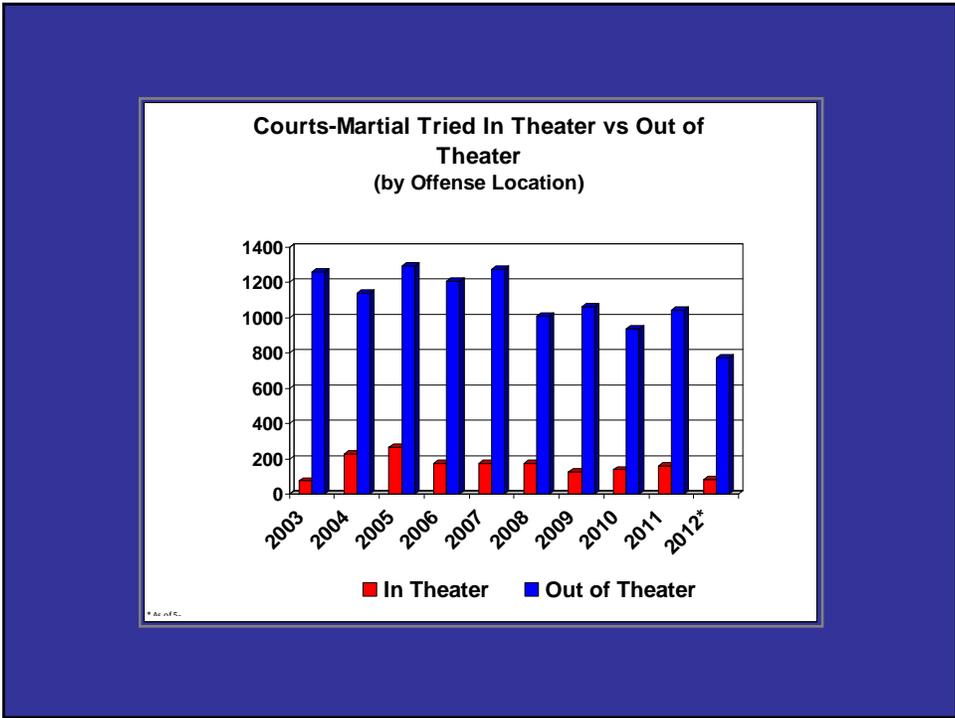
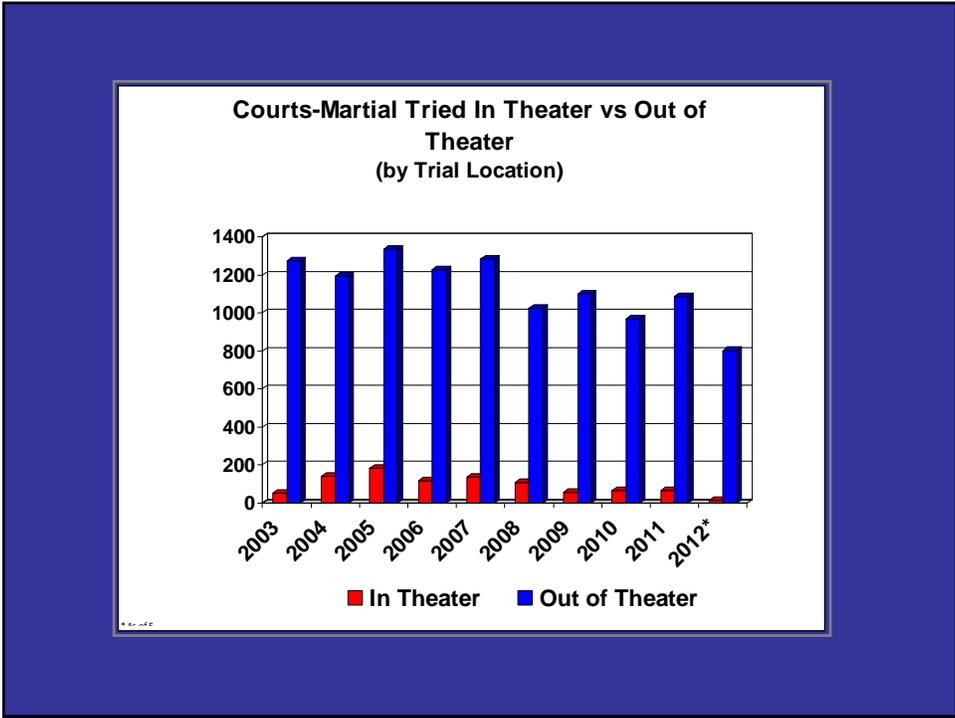
Military Justice in Comparison: Number of JAGs in Different Countries

	Brazil	Canada	India (Army only)	Liberia	United States
Number of JAGs	80	153 regular force; 55 reserve force legal officers	JB SWAG: 200	0	4700
Approximate number of People Serving in the Military	371,199 active duty; 1,340,000 reservists	68,000	1.1 Million	2400	1.5 Million

UCMJ Trends



- Crawford line of cases
- Fosler/LIO line of cases
- Number of cases/Theater cases



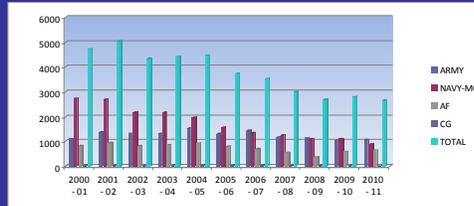
Top 5 Offenses in Theater

U.S. Army Judiciary:
Office of the Clerk of Court

Offense Location - 2003 thru 2012*	
Cases	Offense
305	A107 FALSE OFFICIAL STATEMENTS
199	A92 RELATING TO ALCOHOL
140	A121 LARCENY OF NONMIL PROP (NOT AIRCRAFT, ETC)
136	A92 VIOL GENL ORDERS OR REGULATIONS NOT LISTED
125	A128 ASSAULT CONSUMMATED BY A BATTERY

Courts Martial (GCMs & BCD SPCMs)

Year	ARMY	NAVY-M C	AF	CG	TOTAL
2000 - 01	1124	2745	830	32	4731
2001 - 02	1380	2687	948	27	5042
2002 - 03	1333	2169	822	26	4350
2003 - 04	1324	2185	870	39	4418
2004 - 05	1525	1969	939	52	4485
2005 - 06	1322	1577	796	48	3743
2006 - 07	1434	1346	711	40	3531
2007 - 08	1158	1253	563	32	3008
2008 - 09	1156	1112	391	31	2690
2009 - 10	1056	1125	595	32	2808
2010 - 11	1081	898	664	18	2661



Courts-Martial Tried (GCMs & BCD SPCMs)

	<u>Army</u>	<u>Navy-MC</u>	<u>Air Force</u>	<u>Coast Guard</u>	<u>Total</u>
1952	7,261	4,647	2,822	124	14,854
1962	28,483*	16,277*	3,740*	152*	48,652*
1972	3,049	2,866	2,434*	173*	8,522
1982	4,056	4,279	865	88	9,288
1992	1,708	2,981	779	42	5,510

Civilian Law in the Military Context

- United States v. Easton, 71 M.J. 168 (2012) (Double Jeopardy)
- United States v. Sweeney, 70 M.J. 296 (2011) (Confrontation Clause)
- United States v. Wilcox, 66 M.J. 442 (2008) (First Amendment)
- United States v. Brooks, 66 M.J. 221 (2008) (Sixth Amendment right to counsel)
- United States v. Long, 64 M.J. 57 (2006) (Fourth Amendment)
- United States v. Marcum, 60 M.J. 198 (2004) (Substantive Due Process)
- United States v. Loving, 41 M.J. 213 (1994) (Equal Protection); aff'd on other grounds, 517 U.S. 748 (1996)
- United States v. Kemp, 46 C.M.R. 152 (1973) (Sixth Amendment right to jury trial)

Theater Cases

- United States v. Ali, 71 M.J. 256 (2012) (Hit, Iraq: UCMJ Application to Non-Citizen Contractor)
- United States v. Vela, 71 M.J. 283 (2012) (Jurf As-Sakhr, Iraq) (Aiding & abetting)
- United States v. Behenna, 71 M.J. 228 (2012) (Bayji, Iraq) (Self-defense instruction)
- United States v. Girouard, 70 M.J. 5 (2011) (Salahuddin Province, Iraq) (Negligent homicide as lesser included offense of premeditated murder)
- United States v. Diaz, 69 M.J. 127 (2010) (Guantanamo Bay, Cuba) (Espionage Act and motive instruction under Article 133)
- United States v. Smith, 68 M.J. 316 (2010) (Abu Ghraib, Iraq) (Obedience to lawful order defense in Abu Ghraib)
- United States v. McCracken, 67 M.J. 467 (2009) (Al Asad, Iraq) (Indecent acts as lesser included offense of rape)
- United States v. Inabinette, 66 M.J. 320 (2008) (Mahmudiyah, Iraq) (Standard of review for acceptance of guilty pleas)
- United States v. Wilson, 65 M.J. 140 (2007) (Guantanamo Bay, Cuba) (Convening authority approval of sentence)
- United States v. Wise, 64 M.J. 468 (2007) (Tikrit, Iraq) (Confinement conditions)
- United States v. Ronghi, 60 M.J. 83 (2004) (Kosovo) (Life without Parole Authorization)
- United States v. Rockwood, 52 M.J. 98 (1999) (Haiti) (UCI & Production of Witnesses)

Observations

- **Grant process**
- **Number of 3-2 cases**
- **Outreach . . . and budget constraints**
- **Records**

Rule 21

RULE 21. SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

- (a) Review on petition for grant of review requires a showing of good cause. Good cause must be shown by the appellant in the supplement to the petition, which shall state with particularity the error(s) claimed to be materially prejudicial to the substantial rights of the appellant. *See* Article 59(a), UCMJ, 10 U.S.C § 859(a).

Examples of “Good Cause”

When the court below

- Decided an important issue of first impression
- Decided a question of law in a way that conflicts with CAAF decisions, Supreme Court decisions, decisions of other Court of Criminal Appeals, or other panel of same Court of Criminal Appeals
- Adopted rule of law materially different from that recognized in civilian criminal cases
- Decided validity of a provision of the UCMJ or other act of Congress, the Manual for Courts-Martial, a service regulation, a rule of court or custom of the service
- Decided the case en banc or by divided vote
- Departed from accepted and usual course of judicial proceedings
- Did not take adequate action when the CAAF remanded the case

Observations

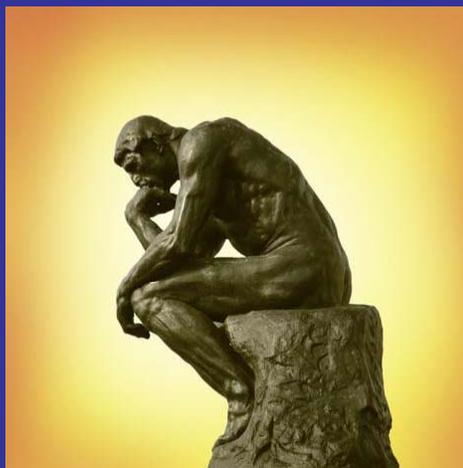
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“We are not final
because we are
infallible, but we are
infallible only
because we are
final.”

-- Justice Robert Jackson, *Brown v. Allen*, 344 U.S. 443, 540 (1953)
(concur.)



So What? Big Questions



Q&A



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