Marine Corps
Military Justice Report
Fiscal Year 2013
In Fiscal Year 2013 (FY13), the Marine Corps legal community continued to face significant challenges in the military justice arena. Changes to the Uniform Code of Military Justice, combined with an increasing number of complex and contested cases, validated the 2012 restructuring of the Marine Corps legal community, which ensured that we were well-placed to confront the new military justice landscape. As the first full year of the Commandant-directed restructuring, FY13 saw the Marine Corps reap the benefits of the superior model for the provision of legal services to the Marine Corps.

In FY13, the Marine Corps legal community achieved another significant milestone with the passage of the FY13 National Defense Authorization Act (NDAA). For the first time, the statutory role of the Staff Judge Advocate to the Commandant of the Marine Corps was expanded beyond serving as a legal advisor to the Commandant. The Marine Corps now has a single officer responsible to the Commandant for the supervision of the uniformed Marine Corps legal community, further elevating our military justice practice.

In order to reinforce the successes of the last few years in improving our military justice practice, the Marine Corps needs to continually evaluate the training and assignment of judge advocates, as well as the number of billets available to support the military justice mission. Not only has the military justice practice increased in complexity, but the required number of well-trained and experienced judge advocates has increased. To continue the current high quality military justice support provided to commanders, Marines, Sailors, and victims, we must ensure that we are incentivizing our best judge advocates to remain on active duty. Likewise, we must explore realigning personnel and resources from specialized mission sets that do not require uniformed judge advocates to face the growing military justice mission.

Nevertheless, our work is not done. The Marine Corps legal community will continue to take the steps necessary to adapt to evolving requirements and to improve how we support our commanders and Marines in a fair and efficient military justice system.

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I. INTRODUCTION

Fiscal Year 2013 (FY13) marked a significant milestone for the Marine Corps legal community. The Secretary of the Navy initiated a number of reforms and in January 2013, the President signed the FY13 National Defense Authorization Act (NDAA) into law, expanding the statutory role of the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) beyond serving as a legal advisor to the Commandant of the Marine Corps (CMC). The Marine Corps now has a Service-level legal billet with the statutory responsibility to supervise the entire Marine legal community. These new responsibilities will ensure stability, professionalism, and consistency in the provision of legal support, and especially military justice, throughout the Marine Corps.

The FY13 NDAA gave the SJA to CMC the authority to supervise the administration of military justice under Article 6 of the Uniform Code of Military Justice (UCMJ). During the year, the SJA to CMC conducted a robust inspection program, visiting three of the four Legal Services Support Sections (LSSS) with a team of inspectors to assess the efficiency and effectiveness of military justice services.

FY13 was also the first full operating year of the CMC-directed restructuring of the Marine Corps legal community. The restructuring centralized the provision of legal services, particularly military justice services, into four regional Legal Services Support Sections (LSSSs) to enable greater supervision, efficiencies, and individual proficiency. The regional LSSSs have the flexibility and capability to better address complex legal cases and ensure that the right judge advocate is assigned to the right case at the right time. The LSSSs made full use of the FY13 inventory of approximately 565 Marine Corps judge advocates to significantly improve the ability of the Marine Corps to provide consistent, high-quality legal services across the Marine Corps. However, continuing shortages in experienced, field grade judge advocates have placed a premium on our military justice supervisors and threaten the long-term success of the restructuring.

1 The FY13 NDAA amended 10 U.S.C. §§ 806, 1044, 5041, and 5046.
Another key development in the Marine Corps legal community during FY13 was the expansion of the Case Management System (CMS) to incorporate the Navy, creating a Department-wide case tracking system in compliance with a Congressional mandate.\(^2\) CMS enables the Department to track cases in both Naval Services from “cradle to grave,” giving the Judge Advocate General of the Navy and the SJA to CMC visibility on all cases within the Department’s military justice system.

Through better organization, oversight, and case management technology, the Marine Corps legal community continues to elevate the practice of law, ensuring a consistently fair and efficient system of justice. While much has been accomplished, our work is not done. To further strengthen the institutional changes the Marine Corps legal community has made during FY13, the Marine Corps needs to adjust its incentives to retain field grade judge advocates, grow future field grade judge advocates, and better realign its legal resources to meet a changing growing military justice mission.

II. MILITARY JUSTICE BY THE NUMBERS – TRENDS & ANALYSIS

During FY13, the Marine Corps continued to see a steady climb in the number of complex and contested cases.\(^3\) Marine Corps judge advocates litigated 135 general courts-martial and 292 special courts-martial to completion. The total number of our most complex cases, general courts-martial, increased by over 11 percent compared to FY12, a significant growth in workload for military justice practitioners. Compounding the increase in the number of complex cases was the fact that almost 48% of all general and special courts-martial were contested, and over 52% of general courts-martials were contested. This reflects a significant increase over FY12, where

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\(^2\) In Senate Report 112-26, which accompanied the FY12 NDAA, the Senate Armed Services Committee ordered the development of a single case tracking system within the Department of the Navy no later than 1 July 2013.

\(^3\) For the purposes of this report, a FY13 “case” is an adjudicated general or special court-martial where the findings, in cases with an acquittal, or the original sentencing date, in cases with a conviction, occurred within FY 13.
approximately 35% of all general and special courts-martial were contested (see Figure A and Figure B). The strongest representation of these trends has been in the area of sexual assault litigation. Between FY12 and FY13, the number of sexual assault prosecutions doubled, while the number of contested sexual assault prosecutions increased by over 160% (see Figure C).

Over the past few years, the Marine Corps has seen an increase in the demand for experienced military justice practitioners and the supervisors necessary to oversee these complex cases and ensure that individual cases continue to move through the system.

On the other hand, there continues to be a decrease in the number of special courts-martials. However, this decrease is misleading as the corresponding increase in administrative discharge boards more than makes up for the reduced special court-martial caseload. The number of administrative discharge boards supported by LSSSs has increased from 306 in FY08 to 805 in FY13, an increase of 163 percent (see Figure D). While many special courts-martial are uncontested, all administrative discharge boards are contested in some fashion. The result is a cumulative increase in workload for defense counsel and those trial counsel performing duties as a recorder.
The steadily increasing number of cases resolved through administrative discharge boards and other non-judicial methods reflects the trend that commanders are seeking other means of handling misconduct, especially misdemeanor-level misconduct such as drug use and minor military offenses. Nevertheless, disposition of offenses through means other than special or general courts-martial requires case-work by military justice personnel, client representation by defense personnel, and military justice expertise and advice by staff judge advocates.

III. POST-TRIAL REVIEW AND APPELLATE DECISIONS

Through a combination of CMS and the professionalism of our judge advocates and legal services specialists, the Marine Corps has continued its excellent rate of compliance with post-trial processing time goals. During FY13, the Marine Corps also maintained an outstanding record during appellate review, having no convictions reversed as a result of a denial of the right to a speedy trial review or otherwise remitted due to loss of records of trial or other administrative deficiencies. However, one conviction was reversed as a result of unlawful command influence (UCI).

![Figure E. Marine Corps Post-Trial Processing Times FY09 - FY13](image-url)
A. Processing Time Goals

In FY13, over 1000 general, special, and summary courts-martial warranted some form of post-trial review. *United States v. Moreno* sets standards for speedy post-trial processing of special and general courts-martial, requiring justification of post-trial processing that exceeds 120 days from the completion of trial to convening authority’s action (CAA), or exceeds 30 days from CAA to docketing of the case with the Court of Criminal Appeals. In FY13, the Marine Corps averaged 87 days from the date of trial to CAA and 12 days from CAA to docketing of the case with the Navy-Marine Corps Court of Criminal Appeals (NAMARA) (see Figure E).

One area of significant improvement in post-trial processing continues to be court-reporter transcription times. Since many more cases are contested, and also more complex, there has been a significant rise in the average in-court hours spent on each case. Despite this growth, the average transcription time has decreased from 29 days to 27 days. The continuing decrease in transcription times, in the face of the increasing length and complexity of cases, reflects the significant improvements in training and equipment of Marine court reporters.

As indicated in Figure F, every LSSS in the Marine Corps, on average, not only met the Moreno requirements in FY13, but also improved upon their averages from the prior year. Despite increasing numbers of hours spent on the record, the vigilance of military justice supervisors at all levels, combined with additional oversight by Judge Advocate Division, has resulted in our improved post-trial processing times.

![Figure F. Post-Trial Processing Averages, in Days, By LSSS, FY12 – FY13](image)
B. Reversal of Convictions for Denial of Speedy Post-Trial Review, UCI, or other Administrative Deficiencies

In FY13, the Marine Corps had no convictions reversed for a violation of the right to speedy post-trial review or for administrative deficiencies, a result of better oversight and tracking of cases. The Marine Corps did have one conviction reversed as a result of apparent UCI. Article 37 of the UCMJ prohibits those persons subject to the UCMJ from attempting to coerce or influence court-martial actions through unauthorized means. In FY13, the Court of Appeals for the Armed Forces (CAAF) set aside the findings and sentence in one general court-martial due to apparent UCI: *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013).

In *Salyer*, originally tried in 2011, a general court-martial convicted the accused, contrary to his pleas, of wrongful possession of child pornography in violation of Article 134, UCMJ, and sentenced him to confinement for two years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. Early on in the case, one of the trial counsel suspected that the military judge originally detailed to the case had a personal bias that affected one of his rulings. In order to confirm the suspected bias, the trial counsel’s superior, the military justice officer, accessed the military judge’s personnel records. In addition, the officer-in-charge (OIC) of the law center handling the case telephoned the military judge’s supervisor to apprise him of the pending challenge to the military judge. In that call, the OIC conveyed his dissatisfaction with one of the military judge’s rulings. The military judge ultimately recused himself from the case. Upon review, CAAF held that, among other actions, accessing the military judge’s personnel file and calling the military judge’s supervisor amounted to apparent UCI and dismissed the findings and sentence with prejudice.

IV. Complex Trial Practice

During FY13, the Marine Corps has taken great strides to ensure that judge advocates competently participate as trial and defense counsel in complex cases, including capital cases, national security cases, sexual assault cases, and military commissions. In 2012, the CMC directed a comprehensive restructuring of the Marine Corps legal community to provide for better supervision of the legal services mission. The legal restructuring, along with the 2011 establishment of the Defense Services Organization (DSO), the hiring of civilian Highly Qualified Experts (HQEs), the higher standards for detailing counsel to cases, and better training
and advice from the Trial and Defense Counsel Assistance Programs has enabled the Marine Corps to put highly qualified, experienced counsel on complex cases. Nevertheless, the growing need for experienced military justice supervisors, coupled with the loss of field grade judge advocates, continues to present obstacles for the Marine Corps legal community.

A. Legal Restructuring & the DSO

The restructuring of the Marine Corps legal community regionalized the delivery of the provision of legal services to ensure consistent, high quality support throughout the Marine Corps. It created four regional LSSSs and nine subordinate LSSTs. A colonel judge advocate is in charge of each regional LSSS. To lead each region’s military justice effort, the restructuring created a regional trial counsel (RTC) billet, responsible to the LSSS Officer-in-Charge, that is filled with a lieutenant colonel judge advocate who has significant litigation experience, advanced education, and demonstrated ability to lead and mentor.

The RTC Office includes a number of trial support assets that allow the RTC to efficiently and effectively supervise the military justice mission and to form Complex Trial Teams (CTT), as required. Each RTC Office includes experienced complex trial counsel, a civilian HQE, military investigators, a legal administrator, a paralegal, and support staff. HQEs are civilian prosecutors with decades of criminal justice experience who provide consultation, case assessments, and training for Marine Corps trial counsel throughout the region.

As the officer primarily responsible for the military justice mission, the RTC has the authority to task-organize CTTs from any combination of trial services personnel within the

Figure G. Military Justice Organization within LSSS
region, thereby greatly increasing the experience and knowledge available for prosecuting complex cases. With an expert staff and regional detailing authority, the RTC can tailor a CTT to meet the needs of a particular case anywhere in the region, no matter how complex (see Figure G). This ability to rapidly task-organize a CTT also satisfies the FY13 NDAA requirements that each Service establish special victim capabilities (SVC) that include specially trained and selected investigators from NCIS, judge advocates, victim witness assistance personnel, and administrative paralegal support.

The Marine Corps DSO, established in 2011, foreshadowed the regional restructuring of trial services. The DSO is led by a colonel judge advocate, with an experienced lieutenant colonel regional defense counsel (RDC) for each region. The DSO is capable of task organization and resource sharing, similar to the RTC’s abilities within his region. The organization of the DSO ensures high quality representation by defense counsel throughout the Marine Corps, including on complex cases.

The legal restructuring greatly increases the experience, training, and expertise available for prosecuting all cases. Along with the DSO, this new construct provides for better sharing of resources throughout the legal community and ensures that only the best-suited counsel handle cases, including complex ones, such as sexual assaults.

B. Detailing Counsel

In July 2013, the Marine Corps updated the policy for detailing counsel in order to provide objective criteria to inform detailing decisions. Further, the Marine Corps developed new minimum qualifications for detailing counsel to special victim cases, including capital cases, national security cases, and sexual assault cases. The new standards assist the RTCs and RDCs in detailing the right counsel to the right cases.

Marine Administrative Message 336/13, “Detailing of Trial Counsel, Defense Counsel, and Article 32, UCMJ, Investigating Officers,” updates and refines detailing standards to make sure that judge advocates who are detailed as trial counsel, defense counsel, and investigating officers under Article 32, UCMJ, possess the appropriate expertise to perform their duties. Detailing authorities must consider a number of factors when detailing counsel or investigating officers, including trial experience, education, training, and the individual characteristics of the
case. Additionally, to ensure the highest quality prosecution, trial counsel prosecuting sexual assault cases must now consult the civilian HQEs resident in RTC offices.

For special victim cases, the Marine Corps developed new qualification criteria and detailing guidance. Prior to serving as a trial counsel on any special victim case, judge advocates must be certified in writing as “Special Victim Qualified Trial Counsel.” This requires achieving specific training and performance milestones, including certification as a General Court-Martial Qualified Trial Counsel, experience as an assistant trial counsel in a contested court-martial involving a special victim, completion of an intermediate level trial advocacy training course for the prosecution of special victim cases, and demonstration to both the RTC and LSSS OIC that the counsel is prepared to try special victim cases.

These minimum qualification standards ensure that the trial counsel has the basic competence to try the case. Nevertheless, for this qualification system, as well as the regional supervisory model of the 2012 restructuring to operate as designed, these basically qualified trial counsel must have appropriate field grade supervision.

C. Training and Advice

The Marine Corps continues to provide counsel with training and trial advice beyond the mentorship and on-the-job training offered by the RTC and other experienced judge advocates within the LSSS. Leading this training and advice effort are our HQEs. In FY13, the Marine Corps hired three HQEs, regionally located, to assist in the prosecution and defense of all complex cases, including sexual assaults. The HQEs are seasoned civilian prosecutors with significant experience in complex criminal litigation, to include successful trial-level work in sexual assault cases. Their primary job is to train counsel to prosecute and defend sexual assault cases by providing perspective, sharing best practices, and assisting with case preparation. Trial counsel are required to consult with their regional HQE within ten days of being detailed to any sexual assault case. Due to the success of the program, and the growing military justice requirements, the Marine Corps is working on plans to hire additional HQEs.

Additionally, the Marine Corps Trial Counsel Assistance Program (TCAP) and Defense Counsel Assistance Program (DCAP) provide training and advice by serving as centralized resources and helping to spread best practices from one region to another. TCAP and DCAP maintain restricted membership SharePoint sites, answer calls and e-mails for assistance, and
provide information and advice regarding new legal developments, including updates to statutes and regulations. TCAP and DCAP also host training events that include lectures and practical exercises designed to develop and hone skill sets for counsel who handle complex cases.

In FY13, TCAP offered two week-long courses focused on the prosecution of sexual assault cases, attendance at which meets the training requirement to be awarded the qualification to prosecute special victim cases. The TCAP courses included training in building case theory, charging under Article 120, UCMJ, general trial advocacy skills, use of expert witnesses, victim support, and prosecutorial ethics. A mix of experienced experts provided the instruction, including senior judge advocates, district attorneys, and expert witnesses who frequently testify in sexual assault cases, such as computer forensic experts, forensic DNA analysts, toxicologists, and sexual assault nurse examiners. To ensure that trial counsel better represent the victims’ interests when prosecuting cases, the Marine Corps also continued its partnership with the United States Department of Justice’s Office for Victims of Crime (OVC). The OVC provided valuable financial support and information on current victims’ rights laws and trends. Finally, TCAP offered two-day sexual assault short courses to supplement the week-long courses. These short courses had a heavier focus on issues relating to sexual assault cases, combined with instruction on trial advocacy.

In addition to supervision and mentorship by more experienced judge advocates, consultation with HQEs, formalized on-the-job training, classroom training, and centralized counsel assistance programs, trial or defense counsel assigned to complex cases can receive other specialized training. For example, for national security cases, the Department of the Navy has a National Security Litigation Division, Code 30, which provides individualized training and advice to all trial counsel prosecuting national security cases.

V. Views on the Sufficiency of Resources

During FY13, the Marine Corps continued to experience an increase in the resource demands on its personnel and military justice system. New and expanding requirements, such as the Victims’ Legal Counsel Organization (VLCO) and the Office of Military Commissions (OMC), combined with inventory control measures and the shrinking end-strength of the Marine Corps, placed a drain on field grade military justice supervisors. The impact of this drain has been magnified by the increase in the complexity and number of contested courts-martial, which
require more experienced judge advocates. A deficit in field grade officers has the potential to offset the gains made in the quality of litigation we have seen won with the implementation of the regional supervisory model created by the 2012 restructuring.

The quantity and quality of military justice supervisors are threatened by two force shaping initiatives and a diversion of those supervisors to billets not requiring uniformed judge advocates. In order to meet the growing demands for experienced military justice practitioners, from both new legal requirements and the increasing complexity of courts-martial, I have identified four measures that are necessary to provide the Marine Corps with sufficient personnel and experience to capably perform military justice functions.

A. *Eliminate Voluntary Separation Pay for Judge Advocates*

The increasing demand for military justice supervisors is being undermined by the Marine Corps voluntary separation pay program (VSP). VSP pays eligible majors and major selects a significant sum of money to leave the Marine Corps. The payout to our experienced field grade leadership has ranged from over $115,000 to over $181,000. With this sum, and highly marketable skills, judge advocates are taking VSP in significant numbers.

VSP eligibility for judge advocates begins at the time when the Marine Corps needs them most: as they become qualified to fill trial leadership billets. Field grade officers are precisely the population required to prosecute, defend, and supervise complex cases, and to meet emerging requirements, such as the VLCO and the OMC, both of which also require experienced military justice practitioners. If judge advocates are removed from eligibility, it will help the Marine Corps retain the most qualified personnel to capably perform military justice functions.

B. *Fully Fund Judge Advocate Continuation Pay (Law School Education Debt Subsidy)*

In the FY00 NDAA, Congress authorized the payment of continuation pay to judge advocates because of the very issue the Marine Corps faces today, the growing problem in recruiting and retaining judge advocates in the armed services. Currently, the Army, Navy, and Air Force all provide the maximum amount of $60,000 under the statute, and eligibility extends to all officers who have completed their initial active duty service obligation. However, the Marine Corps, which titles its program the Law School Education Debt Subsidy (LSEDS), only
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provides $50,000, and has indicated a desire to place a cap on the number of judge advocates eligible.

Increasing the total LSEDS payment, and linking it to a six year service obligation, would enhance the ability of the Marine Corps to grow new field grade judge advocates. This would allow eligible judge advocates to handle their law school debts, which range from $88,000 to $215,000. A $60,000 payment for a six-year commitment would also allow eligible judge advocates to remain on active-duty long enough to reach the field grade ranks. Unlike the Army and Air Force, the Marine Corps does not offer a student loan repayment program in addition to LSEDS. By offering LSEDS to all eligible judge advocates at the full amount of $60,000, the Marine Corps can help reduce institutional risk for a relatively minor cost, ensuring that we are well-placed to meet the military justice challenges of the future.

C. Realign Officer Structure to Uniformed Military Justice Requirements

In order to address the long term need for experienced military justice practitioners, certain missions currently filled by uniformed judge advocates need to be realigned to support the military justice mission. The most efficient way is to civilianize those supervisory legal billets that do not require a uniformed judge advocate by statute or regulation, require institutional memory, and require specialized knowledge and skills that are not organically developed. The uniformed structure supporting those civilianized billets can then be realigned to reinforce existing military justice capabilities.

Three particular mission sets with supervisory legal billets meet these criteria. First, the legal assistance practice concerns specialized, often State law specific, areas of law that the Marine Corps does not organically cultivate expertise in, such as family law, consumer law, and estate planning. As such, over the past decade, my predecessors and I have civilianized the supervision of the legal assistance practice in CONUS, while retaining captain judge advocates in the legal assistance attorney billets. This construct places junior judge advocates in a role that implements our statutory authority to provide legal assistance services, but under the guidance and supervision of a civilian expert well-versed in local State law and legal procedure. These junior judge advocates thus provide a superior level of practice, even as they garner experience that will serve them in future uniformed assignments.
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Second, Disability Evaluation System (DES) counsel meet the criteria to be civilianized. The DES Counsel program requires specially trained and certified legal counsel to provide advice to wounded, ill, and injured service members during the Physical Disability Evaluation process. This is another area that is highly specialized, does not require a uniformed judge advocate, and civilianization would provide continuity and a skill set outside those maintained or trained to by our judge advocates. The Marine Corps is in the process of civilianizing these billets.

Finally, the Marine Corps currently employs over twenty judge advocates in billets relating to environmental, land use, and civilian personnel law, most of which are in the rank of major, the key supervisory military justice rank. Environmental, land use, and civilian personnel law are specialized areas of practice for which the Marine Corps does not organically cultivate expertise and which do not require a uniformed judge advocate by statute or regulation. These fields entail long-term issues that need sustained effort and institutional memory that must span decades. In addition, the majority of these billets require advanced degrees in areas of law outside the normal practice of uniformed judge advocates. Environmental, land use, and civilian personnel law billets are primarily, and appropriately, staffed by civilians. Making this change would not only improve the quality of environmental, land use, and civilian personnel law practice within the Marine Corps, but would also free more field grade officers for the military justice mission.

D. Hire an Additional Highly Qualified Expert (HQE)

As the Marine Corps legal community seeks to further improve the quality of services provided in support of the growing military justice mission, we must also improve the training provided to our military justice supervisors. While the Marine Corps legal community’s HQE program has proven to be a tremendous success at the regional level, our community needs uniform training standards, requirements, and programs. An HQE at the headquarters level, located within our TCAP office, would maintain contacts with professional legal training organizations and instructors throughout the country and develop a high-quality training program designed to ensure that our judge advocates receive the best training available. The continuity offered by a civilian HQE would allow the course program to develop between each course, adding and removing materials as the legal landscape continues to evolve.
Additionally, a TCAP HQE would teach regional military justice supervisors how to run a regional training program. An HQE would have the knowledge and continuity to develop and manage a specialized Service-level training program for RTCs and other regional military justice supervisors, teaching them how to deliver superior training on the prosecution of complex cases. A centralized program, with decentralized execution, reflects a fundamental Marine Corps precept and allows regional supervisors, who best know their subordinates, to tailor the training to their region, but under the supervision of a uniform Service-level program.

VI. CONCLUSION

During FY13, the Marine Corps legal community embraced a steadfast commitment to continue elevating the practice of law. We are now better positioned than ever to provide superior, high-quality legal services. The FY13 NDAA’s expansion of the statutory role of the SJA to CMC helped solidify the Marine Corps legal community’s future by making a single officer responsible for managing and supervising the community. The ability to exercise functional supervision over legal personnel within our Corps, combined with the continuing successes of the restructuring, ensures that the right counsel is detailed to the right case every time and fosters the innovation necessary to maintain the improvements to our community. Going forward, eliminating Marine Corps judge advocates from VSP eligibility, fully funding LSEDS, and realigning structure to the military justice mission will better place the Marine Corps to prosecute, defend, and advise on complex cases. Nevertheless, despite the resourcing challenges that confront the Marine legal community, our continuing efforts to set standards, train to standards, and inspect to standards will promote accountability and guarantee continued outstanding legal support to commanders, Marines, Sailors, and their families for the foreseeable future.
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