

**REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY
OCTOBER 1, 1996, TO SEPTEMBER 30, 1997**

During fiscal year 1997 (FY 97), the Office of The Judge Advocate General (OTJAG) continued to monitor courts-martial, review and prepare military publications and regulations, and develop and draft changes to the Manual for Courts-Martial (MCM) and the Uniform Code of Military Justice (UCMJ). Through its Field Operating Agencies, OTJAG provided judicial and appellate services, advice, assistance, and professional education to ensure the orderly and efficient administration of military justice. Numbers in this report are based on military end strength of 487,812 in FY 97 and 493,700 in FY 96.

**MILITARY JUSTICE STATISTICS
STATISTICAL SUMMARY: FY 97**

(See table insert, attached)

U.S. ARMY LEGAL SERVICES AGENCY

The U.S. Army Legal Services Agency, a field operating agency of OTJAG, includes the following organizations involved in the administration of military justice: the U.S. Army Judiciary, the Government Appellate Division, the Defense Appellate Division, the Trial Defense Service, and the Trial Counsel Assistance Program.

U.S. ARMY JUDICIARY

The U.S. Army Judiciary consists of the U.S. Army Court of Criminal Appeals, the Clerk of Court, the Examination and New Trials Division, and the Trial Judiciary.

U.S. ARMY TRIAL DEFENSE SERVICE

During FY 97, the United States Army Trial Defense Service (USATDS) continued to provide high quality, professional defense counsel services to soldiers throughout the Army. USATDS workload data for FYs 96 and 97 is displayed below.

	FY96	FY97
General Courts-Martial	789	796
Special Courts-Martial	357	344
Administrative Boards	778	564
Nonjudicial Punishment	32,053	33,185
Consultations	33,364	30,026

USATDS provided support to the Multi-National Force in the Sinai, and to troops in Southwest Asia, Macedonia, Haiti, Kuwait, Hungary, and Bosnia. USATDS counsel manned 56 offices worldwide. At certain locations, USATDS maintained inter-service agreements to provide mutual

support along with Judge Advocates of other services. At Aberdeen Proving Grounds and other training installations around the world, USATDS defended soldiers accused of fraternization, rape, and other consensual or nonconsensual sexual offenses involving trainees. Pursuant to support agreements, TDS has also undertaken support of soldiers in Physical Evaluation Boards (PEB) at three selected locations.

TRIAL COUNSEL ASSISTANCE PROGRAM

During FY 97, the U.S. Army's Trial Counsel Assistance Program (TCAP) fulfilled its mission of providing information, advice, training, and trial assistance to military prosecutors world-wide. In addition to services provided to Army attorneys, TCAP had an expanded constituency among prosecutors in the Air Force, Navy, Marine Corps, and Coast Guard. TCAP provided four basic categories of services during FY 1997: (1) telephone/e-mail inquiry assistance; (2) advocacy training courses; (3) the TCAP Memo; and (4) trial assistance.

During FY 97, TCAP personnel (three Army judge advocates supported by a civilian paralegal) accomplished the following: responded to 732 telephonic requests for assistance; 159 e-mail requests for assistance; sent out materials 245 times in response to calls; provided three complete sets of TCAP Memos on disk; conducted eleven three-day advocacy training courses in the continental United States, Panama, Korea, Hawaii, and Germany, providing 288 hours of continuing legal education to 206 judge advocates from all services at a cost of \$12,705.06 or \$61.68 per judge advocate trained; held a video teleconference which was transmitted to or later provided to every installation; published and distributed four editions of the TCAP Memo to approximately 360 subscribers; provided technical and trial assistance in two courts-martial; and performed press liaison duties for The Judge Advocate General in one court-martial. On one occasion, TCAP provided instructional assistance at The Judge Advocate General's School. This presentation was to the Criminal Law New Developments Course.

Beyond this extensive support to trial counsel, TCAP attorneys prepared fourteen Answers and Returns to Habeas Corpus petitions filed with the Office of the U.S. Attorney for the District of Kansas or the United States Court of Appeals for the Tenth Circuit. They reviewed, monitored, and responded to twenty Extraordinary Writs filed in either the Army Court of Criminal Appeals or the Court of Appeals for the Armed Forces and handled two Government Appeals. Finally, they prepared briefs and presented oral argument twice before the Army Court of Criminal Appeals and twice before the Court of Appeals for the Armed Forces.

SIGNIFICANT MILITARY JUSTICE ACTIONS

Criminal Law Division, OTJAG, advises The Judge Advocate General on military justice policy, legislation, opinions, and related criminal law actions. Specific responsibilities include: promulgating military

justice regulations and reviewing Army regulations for legal sufficiency, military corrections, the Army's drug testing program, federal felony and magistrate court prosecutions, legal opinions for the Army Staff, statistical analysis and evaluation, and Congressional inquiries.

Criminal Law Division workload data for the last two fiscal years is displayed below:

	<u>FY96</u>	<u>FY97</u>
White house inquiries	573	139
Congressional inquiries	151	132
Secretary of Defense, Secretary of the Army Chief of Staff of the Army, and The Judge Advocate General inquiries	349	173
Miscellaneous inquiries	14	5
Clemency Petitions, Article 74, UCMJ	19	11
Officer Dismissals	18	15
Freedom of Information Act/Privacy Act	24	21

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

The Chief, Criminal Law Division, OTJAG, serves as the Army representative to the Joint Service Committee on Military Justice (JSC). The JSC was established by the Judge Advocates General and the Secretary of Transportation (Coast Guard) on August 17, 1972. It conducts an annual review of the MCM as required by Executive Order 12473 and DOD Directive 5500.17. The JSC proposes and evaluates amendments to the UCMJ, MCM, and serves as a forum for exchanging military justice information among the services.

The Army acts as Executive Agent for the JSC on a permanent basis. In addition, through FY 98, the Army representative is the Chairman of the Joint Service Committee.

During FY 97, the JSC completed its thirteenth annual review of the MCM. This review was published in the Federal Register for public comment and a public meeting was held to receive comments from interested parties. Highlights of the annual review's proposed changes include: creating a psychotherapist-patient rule of privilege applicable to proceedings under the UCMJ; allowing reserve component judges to conduct trials during periods of inactive duty for training and inactive duty training travel; procedures to allow a child witness to testify out of the presence of the accused after appropriate findings by the military judge; allowing evidence during sentencing that an offense was a "hate crime"; deleting "loss of numbers" as a punishment; adding the youth of the victim as an aggravating factor in capital cases; and recognizing the offense of reckless endangerment. As the result of the

public comments, some of the proposed changes have been revised. The revised changes should be forwarded to the DoD General Counsel in early FY 98.

At the request of the Secretary of Defense, the Committee conducted a substantial study and analysis of the offense of adultery. As the result of that review, the Committee recommended adding language providing further guidance on the offense. Those recommendations were forwarded to a Senior Review Panel, which was established to review the Committee's recommendations. The Senior Review Panel has reviewed the JSC's work and is considering additional changes.

The JSC also initiated a review of the new DoD policy on hazing and how to best make punitive any violations of that policy. Upon completion of its review, the JSC will report back to the DoD General Counsel.

FOREIGN CRIMINAL JURISDICTION

As Executive Agent for the Department of Defense, the Department of the Army, through the International and Operational Law Division, OTJAG, compiles information concerning the exercise of foreign criminal jurisdiction over U.S. personnel.

The data below, while not drawn from precisely the same reporting period used in other parts of this Report, does provide an accurate picture of the exercise of foreign criminal jurisdiction during this reporting period:

	1 Dec 1994 to 30 Nov 1995	1 Dec 1995 to 30 Nov 1996
Foreign Offense Citations	5,796	4,611
Total Civilian	1,428	1,336
Total Military	4,368	3,275
Exclusive Foreign Jurisdiction	984	152
Concurrent Jurisdiction	3,384	3,123
Traffic/Other Minor Offenses	341	331
	1,125	901

There was a significant decrease in the Exclusive Foreign Jurisdiction category. Last year's reported figure (984) for 1 Dec 1994 to 30 Nov 1995 was an anomaly when compared to the prior year (from 1 Dec 93 - 30 Nov 94) and this year's figures (182 and 152 respectively). The anomaly is the result of large changes in the Navy's numbers for those years. Apart from this noticeable change, all reported categories have decreased proportionally. This correlates directly with the decreased number of serious offenses, such as manslaughter, robbery, larceny, simple assault, and drug offenses, committed overseas by servicemembers against foreign nationals.

This year, foreign authorities released 11 of the 152 exclusive foreign jurisdiction cases involving military personnel to U.S. authorities, for disposition. In concurrent jurisdiction cases in which the foreign countries had the authority to assert primary jurisdiction, U.S. military authorities were able to obtain waivers of the exercise of this jurisdiction in 2,363 cases. Overall, the U.S. obtained waivers in 75.6 percent of all exclusive and concurrent jurisdiction cases. This figure reflects a decrease in such waivers from 1994-1995, when the figure was 90.3 percent.

The 75.6 percent waiver rate includes a very low 9.2 percent waiver rate for Panama. Panama's waiver rate is reported artificially low because of the DoD mandated reporting format. That format is geared exclusively towards those countries with an arrangement for the automatic waiver of jurisdiction. Waivers of Panamanian jurisdiction are not automatic and must be requested by U.S. authorities. The DoD report format does not permit the reporting of the number of cases in which waiver had been requested. Upon further inquiry, United States Army South (USARS0) reported that 100 percent of the waivers requested were granted for 1996. If this figure were factored into the 76 percent waiver rate noted above, the resulting overall waiver percentage would be close to that of the last reporting period. Future reports will take these factors into consideration.

During the previous reporting period, civilian employees and dependents were involved in 1,428 offenses. Foreign authorities released 326 of these cases (22.8 percent of this total) to U.S. military authorities for administrative action or some other form of disposition. This year, civilian employees and dependents were involved in 1,336 offenses. The foreign authorities only released 192 of these cases (14.4 percent of the current total).

Foreign authorities tried a total of 1,083 cases. Eighteen trials (1.7 percent) resulted in acquittals. This is an increase from last year when only 6 trials (.4 percent of that year's trials) ended in acquittals. Those convicted were sentenced as follows: 25 cases with executed confinement; 55 cases with suspended confinement; and 985 cases (91 percent of the total trials) with only fines or reprimands.

PROFESSIONAL RESPONSIBILITY

The Professional Responsibility Branch, Standards of Conduct Office, was created in August 1991. It is charged with managing TJAG's professional responsibility program, previously a responsibility of the OTJAG Criminal Law Division.

In 1987 the Army promulgated AR 27-26, Rules of Professional Conduct for Army Lawyers (Army Rules). These rules, which closely parallel the ABA's Rules of Professional Conduct for Lawyers, apply to all active and reserve component judge advocates, all Department of the Army civilian attorneys, and non-government attorneys who practice before courts-martial. The Army Rules were revised in 1992.

The Professional Conduct Branch maintains its records on a calendar year basis. During 1996, 33 professional conduct inquiries were closed, a 14% increase over 1995's 29 cases. Based on the 1997 closed cases through October, there will be a decrease in closed professional conduct inquiries. Of the cases closed in 1996, 70% of the allegations of attorney ethical violations were, after a full inquiry, determined to be unfounded. Of founded cases, 30% were minor or inadvertent violations of attorney ethics rules. On average, 30% of all attorney ethics inquiries concern the conduct of trial or defense counsel. Each year since 1987, we have conducted an average of one ethics inquiry per year into allegations concerning a military judge.

LITIGATION

The number of civil actions against the Department of the Army and its officials remains relatively high with 659 lawsuits filed in FY 97. Civil actions requiring civilian courts to interpret the UCMJ constitute a small but significant portion of this litigation. The majority of these cases seek collateral review of courts-martial proceedings. One noteworthy case decided in the last year upheld the propriety of exercising court-martial jurisdiction over an enlisted soldier who refused to wear the United Nations blue beret and other accouterments in preparation for his unit's deployment to support peace keeping operations in Macedonia. Another case is a class action filed on behalf of inmates at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, which alleges that living conditions there generally violate the eighth amendment proscription against cruel and unusual punishment. Most of the remaining suits involve challenges to specific confinement conditions, parole and clemency proceedings, or administrative actions taken by confinement facility officials.

EDUCATION AND TRAINING

In Charlottesville, Virginia, the Criminal Law Department of The Judge Advocate General's School introduced several initiatives this year, many of them geared to lead and support the Corps-wide effort to improve and sustain advocacy skills.

After several years' absence, contested courts-martial were reintroduced to the curriculum beginning with the 143d Judge Advocate Officer Basic Course in July. Each Basic Course student now will act as sole counsel in a contested court-martial before graduation. This is in addition to their performing as counsel in a court-martial guilty plea and an administrative separation board. The Military Justice Managers Course, offered for the third time in August, now includes a component on advocacy training. The Graduate Course was offered for the first time an elective in creation of advocacy training scenarios, enabling the School to draw on the experience of Graduate Course students and to spur the development of training scenarios for practitioners.

The most significant contribution to the advancement of advocacy was the publication of The Advocacy Trainer, A Manual for Supervisors. The Trainer contains numerous skill development drills in all aspects of court-martial practice. The package of scripted and videotaped training scenarios is designed to give supervisors - primarily chiefs of justice and senior defense counsel - the ability to conduct "off the shelf" training in all trial-related skills. World-wide distribution was made and orders were received from the Air Force, Navy and Marine Corps as well.

In response to a Department of Defense tasking, the department offered the First National Security Crime Symposium in February 1997. This four-day course was designed to bring together practitioners and investigators in the national security field. Thirty-nine military and three civilian students from all services attended the successful first course, which was capped by an address from M.E. (Spike) Bowman, Associate General Counsel (National Security Affairs), Federal Bureau of Investigation. The next iteration of this course will occur in June 1998 as the National Security Crimes/ Intelligence Law Course.

The department continued to strengthen its links to the sister services during this year, not only by sharing the Advocacy Trainer but also by instructing at each other's courses. Major Moran taught a class at the Air Force Trial and Defense Counsel Advocacy Course on the use of demonstrative evidence. Major Pede gave tips on testifying to agents at the Advanced Foreign Counter-Intelligence Training Course, Fort Meade, Maryland, and Major Coe enlightened Navy and Marine Corps defense counsel with a criminal law update at the Defense Counsel Workshop in New Orleans.

Again the department was host to several distinguished guest speakers, including Professor William R. Eleazer of Stetson (Fla.) University Law School, who spoke to the 7th Criminal Law Advocacy Course (CLAC) in April, and Colonel (Ret.) John Smith, who spoke to the 8th CLAC in September. Walter Cox, III, Chief Judge of the Court of Appeals for the Armed Forces, again opened the 40th Military Judge Course in May, with his popular and motivational presentation on the challenges and rewards of serving as a trial judge. Students in that course also had the opportunity to hear Brigadier General John S. Cooke, Chief Judge of the Army Court of Criminal Appeals, deliver his experienced perspectives on judging. The 20th New Criminal Law Developments Course in November 1996 featured Prof. John E.B. Myers, McGeorge School of Law, University of the Pacific, noted authority in the field of child sexual abuse, and Skip Webb, Chief, Polygraph Division, U.S. Army Criminal Investigation Command, who demonstrated the new computerized polygraph machine.

Two criminal law faculty members served on Expanded International Military Education Training missions: Major Henley accompanied a delegation to Bangladesh in September, and Major Coe was part of a contingent that traveled to Uganda in April.

PERSONNEL, PLANS, AND POLICIES

The strength of the Judge Advocate General's Corps at the end of FY 97 was 1,523. This total includes 50 officers participating in the Funded Legal Education Program. The diverse composition of the Judge Advocate General's Corps included 101 African-Americans, 40 Hispanics, 38 Asians and Native Americans, and 321 women. The FY 97 end strength of 1,523 compares with an end strength of 1,541 in FY 96, 1,561 in FY 95; 1,575 in FY 94; 1,646 in FY 93; and, 1,710 in FY 92. The grade distribution of the Corps was 4 general officers; 129 colonels; 222 lieutenant colonels; 297 majors; 757 captains; and 68 first lieutenants. Sixty-four warrant officers, 354 civilian attorneys, and 1,571 enlisted soldiers supported legal operations worldwide.

To ensure selection of the best-qualified candidates for appointment, career status, and schooling, The Judge Advocate General convened advisory boards several times during the year. Competition for appointment in the Corps remains keen with more than ten applicants applying for each opening.

One hundred and ninety-eight Judge Advocate officers completed the following resident service schools:

U.S. Army War College	2
National War College	1
Industrial College of the Armed Forces	2
Department of Justice Fellowship	1
U.S. Army Command and General Staff College	16
The Judge Advocate Officer Graduate Course	56
The Judge Advocate Officer Basic Course	120

During FY 97, eight officers completed funded study for LL.M. degrees in the following disciplines: environmental law, international law, criminal law, constitutional law, and government procurement law.

As a separate competitive category under the Department of Defense Officer Personnel Management Act, officers of the Judge Advocate General's Corps compete among themselves for promotion. During FY 97, the Secretary of the Army convened six selection boards to recommend Judge Advocate officers for promotion to higher grades.

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Major General, US Army
The Judge Advocate General