

REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY

OCTOBER 1, 1998, TO SEPTEMBER 30, 1999

During fiscal year 1999 (FY 99), 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 an Army end strength of 479,426 in FY 99. The Army end strength was 484,054 in FY 98.

MILITARY JUSTICE STATISTICS

STATISTICAL SUMMARY: FY 99

(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

The United States Army Trial Defense Service (USATDS), a defense service consisting of approximately 130 attorneys, provided high quality, professional defense services to soldiers throughout the Army from 55 offices worldwide. USATDS counsel defended soldiers facing the entire range of allegations under the Uniform Code of Military Justice.

USATDS counsel carried a large workload in FY 99 with workload data for FYs 97, 98, and 99 as displayed below.

	FY97	FY98	FY99
General Courts-Martial	796	694	722
Special Courts-Martial	344	286	331
Administrative Boards	564	597	698
Nonjudicial Punishment	33,185	32,181	31,595
Consultations	30,026	28,668	26,794

USATDS provided defense services to deployed forces around the world, including Southwest Asia, Macedonia, Haiti, Kuwait, Hungary, Bosnia and Kosovo. At certain locations, USATDS maintained inter-service agreements to provide defense services to military personnel from other services. TDS continued to support soldiers in Physical Evaluation Boards (PEB) at selected locations.

The National Capital Region Technology Management Office has provided eight desktop video teleconferencing computer-driven units to eight USATDS offices that support distant clients.

USATDS also assisted in developing a new memorandum of agreement establishing relationships with newly created Reserve trial defense units.

The Office of the Chief, USATDS, relocated to improved facilities at Arlington, Virginia, a move that will enable the Trial Defense Service to more efficiently lead the defense organization.

TRIAL COUNSEL ASSISTANCE PROGRAM

During Fiscal Year (FY) 1999, 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 1999:

(1) telephone/e-mail inquiry assistance; (2) advocacy training courses; (3) publications; and (4) trial assistance. During FY 1999, TCAP personnel (three Army judge advocates supported by a civilian paralegal) accomplished the following: responded to 361 telephonic requests for assistance; answered 138 e-mail requests for assistance; sent out materials 134 times in response to calls; and, conducted 10

three-day advocacy training courses in the continental United States, Korea, Hawaii, and Germany, providing 215 hours of continuing legal education to 190 judge advocates from all services at a cost of \$23,834.00 or \$125.45 per judge advocate trained. In addition, TCAP expanded the new TCAP website consisting of 5 databases and more than 500 full-text searchable documents. The website is readily accessible via the Lotus Notes system or the World Wide Web (WWW). Applications for access from the WWW increased to 847, more than double the 400 applications for FY 1998. The reduction in phone calls is directly attributable to increased website access. Reservists, National Guard, and sister services continue to request access at a pace roughly equal to requests from Army personnel. On one occasion, TCAP provided a briefing on the TCAP mission to the Senior Prosecutor for the Korean Army. For the first time, TCAP gave a presentation at the Military Justice Managers Course at The Judge Advocate General's School.

Beyond this extensive support to trial counsel, TCAP attorneys prepared 9 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. TCAP reviewed, monitored, and responded to 11 Extraordinary Writs filed in either the Army Court of Criminal Appeals or the Court of Appeals for the Armed Forces and handled three Government Appeals. Finally, they prepared briefs and presented oral argument before the Army Court of Criminal Appeals and the Court of Appeals for the Armed Forces in assistance to other branches of the Government Appellate Division.

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 three fiscal years is displayed below:

	<u>FY 97</u>	<u>FY 98</u>	<u>FY 99</u>
White House inquiries	139	88	111
Congressional and other inquiries	310	297	330
Clemency Petitions, Art. 74, UCMJ	11	8	8
Officer Dismissals	15	16	14
Freedom of Information Act/Privacy Act	21	25	63

On March 17, 1999, Major General David R.E. Hale was convicted at Fort Lewis, Washington, in accordance with his pleas of one specification of making a false official statement, and seven specifications of conduct unbecoming an officer, in violation of Articles 107 and 133, UCMJ, 10 U.S.C. Sections 907 and 933 (1988). The offenses related to inappropriate personal or sexual relationships with the spouses of subordinate military officers in his command. He was sentenced to be reprimanded, to be fined \$10,000.00 and to forfeit \$1,500.00 pay per month for 12 months. On July 8, 1999, in accordance with the terms of a pretrial agreement the convening authority approved the reprimand, a fine of \$10,000.00 and a forfeiture of \$1,000.00 pay per month for 12 months. This is the third court-martial of a flag level officer since World War II. The other two cases were the 1952 trial of Army Major General Robert W. Grow and the 1957 trial of Rear Admiral Selden G. Hooper.

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.

During FY 99, the JSC completed its fifteenth 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: extending to victims the same rights granted to them in Federal court by The Victims' Rights and Restitution Act of 1990, 42 U.S.C. § 10607(e)(2) by preventing victims who may testify at sentencing from being excluded from the courtroom; raising the monetary amount affecting the maximum punishments for various offenses from \$100 to \$500; providing for enhanced maximum punishment when a firearm or explosive is used for violations of Article 103 (Captured or abandoned property); deleting para. 31(c)(6) (Article 107 - False official statements) to conform with recent court decisions that statements made by a suspect or an accused during an interrogation can be false official statements; providing guidance for charging credit, debit, and electronic transactions as violations of Article 121(Larceny and wrongful appropriation).

JSC legislative proposals to amend Article 111 of the UCMJ to provide an alcohol blood/breath concentration of 0.08 or more as a per se standard of illegal intoxication and to amend Article 19 to increase the sentencing jurisdiction of special courts-martial to adjudge confinement and/or forfeiture of pay for up to one year were incorporated into DoD's Omnibus Legislation to Accompany the DoD Authorization Act Request for FY 2000. Section 577 of the National Defense Authorization Act for FY 2000 amended Article 19 to increase the sentencing authority of special courts-martial but did not include the 0.08 blood/breath concentration for Article 111. The legislation further amended Article 19 to provide that no confinement for more than six months or forfeiture of pay for more than six months may be adjudged without a verbatim record and counsel and a military judge detailed to the case absent military exigency.

Article 19 establishes maximum sentencing jurisdiction for special courts-martial, subject to such limitations as the President may prescribe. Currently, RCM 201(f)(2)(B)(i) limits the confinement and forfeiture sentencing authority of special courts-martial to six months. The JSC is drafting a special executive order, in addition to the 2000 annual review, to make appropriate Manual changes to implement amended Article 19.

Executive Order 13140 was signed into law on 6 October 1999. This executive order resulted from the 1997 annual review. It amends the qualifications of military judges to allow Reserve Component judges to conduct trials in certain cases; provides for the use of remote live testimony for child victims; establishes a psychotherapist-patient privilege; adds hate crime motivation as aggravating evidence for sentencing; adds "victim under 15" as an aggravating factor authorizing a death sentence; and adds reckless endangerment as an offense under Article 134.

The proposed executive order for the 1998 annual review is being staffed. It proposes to codify the military judge's authority to issue protective or "gag orders"; clarifies which civilian convictions are admissible on sentencing; rejects automatic change to MRE 407 based on a change to FRE 407; updates all of the model specifications by removing the reference to the 20th Century from the date of the offense; conforms the Manual to Article 56a which authorizes a sentence of life without eligibility of parole; and provides additional guidance on the offense of adultery and the circumstances under which its prosecution at a court-martial is appropriate.

Pursuant to Section 552 of the National Defense Authorization Act for FY 1999, the JSC studied and reported on the method of selection of members of the armed forces to serve on courts-martial. The study concluded that the current member selection practice best applies the criteria of Article 25(d), consistent with the demands for fairness

and justice in the military justice system. The DoD General Counsel forwarded the study to Congress on 11 October 1999. Currently, pursuant to a Code Committee request, a JSC ad-hoc working group is studying the feasibility and desirability of creating an independent judiciary. The JSC is also studying Article 15 at the request of the Code Committee and joint military justice at the request of the Joint Staff.

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 1996 to 30 Nov 1997	1 Dec 1997 to 30 Nov 1998
Foreign Offense Citations	4,870	5,092
Total Civilian	1,487	1,498
Total Military	3,383	3,594
Exclusive Foreign Jurisdiction	187	192
Concurrent Jurisdiction	3,196	3,402
Traffic/Other Minor Offenses	346	335
Foreign Jurisdiction Recalls	609	546

With the exception of Foreign Jurisdiction Recalls and Traffic/Other Minor Offenses, there was a slight increase in all categories. This increase was proportional across all categories in certain major offenses, such as robbery, larceny, aggravated assault, simple assault, and drug offenses.

This year, foreign authorities released 76 of the 192 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 2,972 cases. Overall, waivers were obtained by the U.S. in 87.3 percent of all exclusive and concurrent jurisdiction cases. This figure reflects slightly more than a one percent increase in such waivers from 1996-1997, when the relevant figure was 86.1 percent.

During the last reporting period, civilian employees and dependents were involved in 1,487 offenses. Foreign authorities released 250 of these cases (16.8 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 1,498 offenses. The foreign authorities released 246 of these cases (16.4 percent of the current total).

Foreign authorities tried a total of 1,240 cases. Eight trials, or .6 percent, resulted in acquittals. Those convicted were sentenced as follows: 27 cases resulted in executed confinement; 53 cases resulted in suspended confinement; and 1,152 cases (92.9 percent of the total trials) resulted in only fines or reprimands.

PROFESSIONAL RESPONSIBILITY

The Standards of Conduct Office (SOCO) manages TJAG's professional responsibility program. This program includes tasking judge advocates for field inquiries into allegations of professional misconduct, reviewing reports of inquiry, and advising TJAG on appropriate resolution of ethics cases. SOCO oversees the operation of TJAG's Professional Responsibility Committee and its issuance of advisory ethics opinions. SOCO also oversees professional responsibility training within the Army. Working closely with The Judge Advocate General's School, SOCO assists judge advocates in implementing training programs in their commands and offices.

During FY 1999, 20 professional conduct inquiries were conducted and closed. This is an 11% increase from FY 1998's 18 cases. Of the 20 cases closed in 1999, nine cases resulted in a finding of attorney misconduct. Of the nine founded cases, two were minor violations of ethics rules. The remaining seven cases were serious, resulting in punishment including reprimands, suspensions, or resignations. The cases include the following:

- Failing to file post-conviction matters on a client's behalf.
- Misinforming a client about military retirement pay (resulting in a successful malpractice claim against the Army).
- Making untruthful statements about a legal official; falsely claiming that an Army officer was his client; and secretly paying a civilian criminal defense attorney for legal fees without disclosure, consultation, or the client's consent.
- Neglecting a military client's case (after reserve attorney accepted retainer in his civilian capacity).
- State bar suspension for fee and escrow violations and for threatening a former client.
- Shoplifting.
- Conviction for possession of cocaine.

LITIGATION

The number of civil lawsuits against the Department of the Army and its officials dropped slightly from previous years, with about 560 actions filed in FY 99. Cases that require civilian courts to interpret the UCMJ remain a small but significant portion of this total. Most of these cases are filed by (former) soldiers seeking collateral review of courts-martial proceedings in district courts, usually via petitions for writs of habeas corpus, or in the Court of Federal Claims in back-pay actions. Other suits involve challenges to confinement conditions, to decisions to deny clemency or parole, to revoke parole, or to other administrative actions taken by confinement facility officials.

One case of particular note involves a class action filed in 1997 by all inmates confined at the United States Disciplinary Barracks (USDB). The inmates claim that they are subject to unsafe living conditions that violate the Eighth Amendment proscription against cruel and unusual punishment. They allege that the USDB main building is structurally unsound, that they are exposed to unsafe environmental conditions, and that they are improperly subjected to certain administrative practices. In FY 98, the district court denied the inmates' request for a preliminary injunction ordering the Army to transfer them to other correctional institutions. In January 1999, the Army filed a motion for summary judgment maintaining that there is no issue of fact that the inmates are not exposed to unsafe living conditions and that the administrative practices of which they complain are proper, accepted correctional methods. The parties are currently engaged in limited discovery.

EDUCATION AND TRAINING

In Charlottesville, Virginia, the Criminal Law Department of The Judge Advocate General's School continues to lead the way in the Corps-wide effort to improve and sustain our military justice practice. This year, the Criminal Law Department provided instruction on issues ranging from technical litigation skills to managing high profile cases.

A priority mission for the Criminal Law Department continues to be advocacy training. From the Basic Course to the Advanced Trial Advocacy Course, the department employed innovative techniques to train and teach advocacy. For example, each Basic Course student is required to serve as counsel in three advocacy exercises - an administrative separation board, a guilty plea, and a contested court-martial. The Basic Course student leaves TJAGSA with a realistic familiarization of the court-martial and administrative separation practice.

The Criminal Law Department's advocacy emphasis does not stop at the classroom door. The success of and commitment to *The Advocacy Trainer (The AT)* continued throughout 1998 and carried over to 1999. This manual contains numerous skill development drills in all aspects of court-martial practice. Its tabular design allows supervisors to conduct long-term building block training, or short-term targeted "deficiency" training. The department not only published eight new advocacy-training modules, but also made this unique publication more accessible to the field. *The AT* is now available electronically to all services. You can access *The AT* under the Publications listing on TJAGSA's home page (<http://www.jagcnet.army.mil/tjagsa>).

In addition to teaching the Officer Basic Course and Graduate Course, the Criminal Law Department hosted a variety of short courses. In May 1999, the department managed the first multi-service high profile case management course. The target audience was staff judge advocates and attendance was by invitation only. The course was designed to train judge advocates in the unique legal, managerial, and media relations aspects of high profile courts-martial. The course offered several practical exercises and seminar sessions that proved extremely beneficial for the students. This course was a great success and clearly met its objectives.

The Fifth Military Justice Managers Course included new blocks of instruction taught by members of the American Academy of Forensic Science. The instruction included an overview of forensic evidence, crime scene analysis, and DNA testing. The course also included a block of instruction on how to use *The Advocacy Trainer*.

The Criminal Law and International and Operational Law Departments co-hosted the 3d National Security Crimes and Intelligence Law Workshop in June 1999. This course brought together practitioners and investigators in the national security field. Military and civilian students from all services attended the course. The next iteration of this course will likely occur in June 2000.

The Criminal Law Department hosted several distinguished guest speakers. Mr. Gerald Boyle, a prominent criminal attorney from Milwaukee, Wisconsin, addressed the 11th Criminal Law Advocacy Course (CLAC) in April. Mr. James McElhaney, nationally prominent for his several books and ABA column on trial advocacy, addressed the 12th CLAC. Chief Judge Walter Cox of the Court of Appeals for the Armed Forces delivered the twenty-seventh Kenneth J. Hodson Lecture on Criminal Law in November 1998. Additionally, Judge Cox presented his final motivational talk as a CAAF judge to the 42nd Military Judge Course. He will be greatly missed. The 22nd Criminal Law New Developments Course in November 1998 featured Mr. Dwight Sullivan, Managing Attorney for the Maryland American Civil Liberties Union, who presented a lecture on the application of the Bill of Rights to the

military justice system. Students in the New Developments Course also had the opportunity to hear Brigadier General Hess, Staff Judge Advocate to the Commandant, U.S. Marine Corps, discuss his views about the future of the military justice system.

PERSONNEL, PLANS, AND POLICIES

The strength of the Judge Advocate General's Corps at the end of FY 99 was 1,421. This total does not include 59 officers participating in the Funded Legal Education Program. The diverse composition of the Judge Advocate General's Corps included 113 African-Americans, 42 Hispanics, 58 Asians and Native Americans, and 341 women. The FY 99 end strength of 1,421 compares with an end strength of 1,499 in FY 98, 1523 in FY 97, 1541 in FY 96, 1561 in FY 95, 1575 in FY 94, 1646 in FY 93, and 1710 in FY 92. The grade distribution of the Corps was five general officers; 128 colonels; 207 lieutenant colonels; 328 majors; 752 captains. Sixty-four warrant officers, 360 civilian attorneys, and 1,469 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. Selection for appointment in the Corps averages one in three applications.

Two hundred thirty-one 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	44
The Judge Advocate Officer Basic Course	163

During FY 99, seven officers completed funded study for LL.M. degrees in the following disciplines: environmental law, contract law, international law, criminal law, and health care 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 99, the Secretary of the Army convened six selection boards to recommend Judge Advocate officers for promotion to higher grades.

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The Judge Advocate General of the Army