

REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY

OCTOBER 1, 1999, TO SEPTEMBER 30, 2000

During fiscal year 2000 (FY 00) and in compliance with Article 6(a), Uniform Code of Military Justice (UCMJ), The Judge Advocate General and senior members of his staff made 25 official visits of field legal offices in the United States and overseas. In addition, 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 UCMJ. Through its Field Operating Agencies, OTJAG provided judicial and appellate services, advice, assistance, and professional education to ensure the efficient administration of military justice. Numbers in this report are based on an Army end strength of 482,170 in FY 00. The Army end strength was 479,426 in FY 99.

MILITARY JUSTICE STATISTICS

STATISTICAL SUMMARY: FY 00
(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 U.S. 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 54 offices worldwide. USATDS counsel defended soldiers facing the entire range of allegations under the Uniform Code of Military Justice.

USATDS counsel workload from FY 97 through FY 00 is displayed below.

	<u>FY 98</u>	<u>FY 99</u>	<u>FY 00</u>
General Courts-Martial	694	722	733
Special Courts-Martial	286	331	392
Administrative Boards	597	698	597
Nonjudicial Punishment	32,181	31,595	30,633
Consultations	28,668	26,794	24,051

USATDS provided defense services to deployed forces around the world, including Southwest Asia, Macedonia, Haiti, Kuwait, Hungary, Bosnia, and Kosovo. Its highest profile case was a potential capital case involving the kidnapping, rape, and murder of a Kosovar girl in Kosovo. Success in negotiating a decision to refer the case as a non-capital one in exchange for a guilty plea was the result of tireless efforts by the TDS team. At some locations, USATDS maintained inter-service agreements to provide defense services to military personnel of sister services. TDS continued to support soldiers in Physical Evaluation Boards (PEB) at selected locations.

TDS continued attempts to leverage distance technology in providing services to clients who were not located with TDS counsel. Although the technology suffers from many flaws, it has proven valuable, particularly to deployed soldiers or those at remote locations and with counseling on Article 15s. TDS offices around the world completed surveys outlining facilities and resources, complete with digital photographs. This survey will be publicly posted to enhance awareness of TDS offices.

TDS has instituted new policies and procedures for enlisted support, rehearings ordered by appellate courts, and the new Reserve Component Trial Defense Service Legal Support Organizations (TDSLSO). Although TDS has no intrinsic enlisted support, instead relying on OSJA personnel assigned to TDS on a rotating basis, TDS expanded its operating procedures to encompass the training and assignment of enlisted personnel. TDS has also begun to work formal cooperative arrangements with the Defense Appellate Division (DAD). There is now a formal mechanism for the early transfer from appellate counsel to trial defense counsel of cases in which a rehearing on findings or sentence has been ordered, and a Memorandum of Understanding between DAD and TDS is currently under development. For RC soldiers, the new 154th TDSLSO will service the eastern half of CONUS and Europe, while the 22d TDSLSO will service the western half CONUS. The TDSLSOs were activated effective 16 September 2000. Active Component TDS roles with the new TDSLSOs are set forth in the FY00 Memorandum of Understanding between OTC, TDS, and the Defense LSOs.

Continuing Legal Education (CLE) training for TDS counsel was conducted in weeklong, consolidated regional conferences twice a year, attended by active duty TDS counsel and open to reserve TDS counsel as well. The FY 00 CLEs were conducted at Hunter Army Airfield, GA; Fort Carson, CO; Randolph Air Force Base, TX; and Garmisch, Germany. The multi-region approach to the CLEs results in more productive and informative CLEs, benefiting all attendees.

TRIAL COUNSEL ASSISTANCE PROGRAM

The U.S. Army's Trial Counsel Assistance Program (TCAP) composed of three Army judge advocates supported by a civilian paralegal, fulfilled its mission of providing information, advice, training, and trial assistance to military prosecutors worldwide. 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 2000: (1) telephone/e-mail inquiry assistance; (2) advocacy training courses; (3) publications; and (4) trial assistance. TCAP personnel accomplished the following: responded to more than 200 telephonic and 175+ e-mail requests for assistance; conducted 11 three-day advocacy training courses in the United States, Korea, and Germany, providing 237 hours of continuing legal education to 155 judge advocates from all services at a cost of \$24,163.00 or \$155.89 per judge advocate trained; and sent out materials 68 times in response to requests. The Website is readily accessible via the Lotus Notes system or the World Wide Web (WWW). There were 536 applications for access from the WWW, which has reduced direct requests for assistance. Reservists, National Guard, and sister services continue to request access at a pace roughly equal to requests from Army personnel.

TCAP created and began using a new practical exercise scenario. Beginning with the trip to Fort Stewart, GA in September 2000, TCAP used a sexual misconduct scenario specifically created to address identified weaknesses in prosecuting this complex and difficult area. To date, the scenario has been highly rated by all attendees.

Beyond this extensive support to trial counsel, TCAP attorneys prepared 13 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 21 extraordinary writs filed in either the Army Court of Criminal Appeals or the Court of Appeals for the Armed Forces (CAAF) and handled five 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 98</u>	<u>FY 99</u>	<u>FY 00</u>
White House inquiries	88	111	163
Congressional and other inquiries	297	330	312
Clemency Petitions, Art. 74, UCMJ	8	8	13
Officer Dismissals	16	14	23
Freedom of Information Act/Privacy Act	25	63	54

At the request of Senator Paul Sarbanes (D-Maryland) and at the direction of Secretary of the Army Louis Caldera, the Army established a multidisciplinary Process Action Team (PAT) Joint Council for Sexual Misconduct Initiatives to recommend improvements for investigating and prosecuting sexual offenses and for providing services to sexual offense victims. The PAT, comprised of military and civilian experts from a variety of fields including investigative, medical/psychiatric, legal, social services, and automation, critically examined how the Army processes sexual misconduct cases, from sexual harassment to rape. The Army Chief of Staff, General Eric K. Shinseki approved recommendations from the PAT to: increase interdisciplinary training and communication among medical, law enforcement, and legal disciplines; assign and train more forensic experts; expand physician training on physical examination, documentation, handling of victims, and Post-Traumatic Stress Disorder; expand and establish Internet distance learning training programs for prosecutors and for victim assistance liaisons; appoint full-time headquarters and regional victim coordinators; implement regional training conferences; and expand the Victim Information and Notification Everyday (VINE) Program. The Criminal Law Division has the responsibility to supervise the implementation of these recommendations.

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

The Army is the Executive Agent for the Joint Service Committee on Military Justice (JSC). The JSC was originally established by the

Judge Advocates General and the Secretary of Transportation (Coast Guard) on August 17, 1972. It conducts an annual review of the Manual for Courts-Martial (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 is also the Executive Agent for publication of the MCM. The 2000 edition of the MCM commemorating the 50th Anniversary of the Uniform Code of Military Justice was published in FY 00. It is available in hardcopy from the Government Printing Office at <http://www.gpo.gov/> or by telephone at (202) 512-1800; fax (202) 512-2250. The 2000 edition of the MCM is also available electronically to the public at the following web sites:

<ftp://pubs.army.mil/pub/epubs/pdf/mcm2000.pdf>

<http://www.usapa.army.mil>.

During FY 00, the JSC completed its sixteenth annual review of the MCM. This review was published in the Federal Register for public comment 15 May 2000 and a public meeting was held on 28 June 2000 to receive comments from interested parties. Highlights of the annual review's proposed changes include: references to MRE 513 (psychotherapist-patient privilege) in discovery rules; explanation in the analysis to RCM 707 that "reasonable diligence" is the standard applied by CAAF to determine whether the prosecution's progress toward trial for a confined accused is sufficient to satisfy the speedy trial requirement of Article 10, UCMJ; clarification of summary and special courts-martial authority to adjudge, and the convening authority to approve, a combination of both a fine and forfeitures at summary and special courts-martial; and clarification of the limitations on the imposition and approval of summary and special courts-martial sentences consisting of both a fine and forfeitures.

The JSC also drafted a stand alone executive order (EO) to amend the MCM to implement a 1999 amendment to Article 19, UCMJ, that authorized an increase in sentencing authority of special courts-martial by allowing such courts to impose confinement or forfeiture of two thirds pay per month up to one year. The increase in sentencing jurisdiction authorized by Congress will not take effect until the President signs this EO. The EO proposes to rescind the six month limitation on confinement/forfeitures for special courts-martial, require a verbatim record of trial and military judge authentication for SPCM with sentences of confinement or forfeitures greater than six months, and require the same vacation, staff judge advocate recommendation, and appeal procedures for special courts-martial with approved confinement for one year as for special courts-martial with

an approved bad-conduct discharge. The EO was published in the Federal Register for public comment on 4 April 2000. A public meeting

was held on 18 April 2000. It was incorporated into EO 1999b (1999 annual review) on 30 June 2000. EOs 1999b and 1999a (1998 annual review) were pending at the Office of Management and Budget at the end of FY 00.

A JSC ad hoc working group completed an Independent Judiciary study. Ongoing studies by the JSC include joint military justice, Article 15, and use of technology in courts-martial.

FOREIGN CRIMINAL JURISDICTION

As Executive Agent for foreign criminal jurisdiction, 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, provides an accurate picture of the exercise of foreign criminal jurisdiction during this reporting period:

	1 Dec 1997 to <u>30 Nov 1998</u>	1 Dec 1998 to <u>30 Nov 1999</u>
Foreign Offense Citations	5,092	5,233
Total Civilian	1,498	1,346
Total Military	3,594	3,887
Exclusive Foreign Jurisdiction	192	183
Concurrent Jurisdiction	3,402	3,704
Traffic/Other Minor Offenses	335	430
Foreign Jurisdiction Recalls	546	708

With the exception of Total Civilian and Exclusive Foreign Jurisdiction, there was an 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 to U.S. authorities 35 of the 183 exclusive foreign jurisdiction cases involving military personnel. 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 3,144 cases. Overall, waivers were obtained by the U.S. in 84.8 % of all exclusive and concurrent jurisdiction cases. This figure reflects a 2.5% decrease in such waivers from 1997-1998, when the relevant figure was 87.3 %.

During the last reporting period, civilian employees and dependents were involved in 1,498 offenses. Foreign authorities released 246 of these cases (16.4 % 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 1,346 offenses. The foreign authorities released 254 of these cases (18.9 % of the current total).

Foreign authorities tried a total of 1,256 cases. Twenty-one trials, or 1.7 %, resulted in acquittals. Those convicted were sentenced as follows: 10 cases resulted in executed confinement; 37 cases resulted in suspended confinement; and 1,188 cases (94.6 % 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 00, 20 professional conduct inquiries were conducted and closed, the same as FY 99. Of the 20 cases closed in FY 00, 7 cases resulted in a finding of attorney misconduct. Of the seven founded cases, two had only minor violations of ethics rules.

The remaining five cases were serious, resulting in a military reprimand, state suspensions and reprimands, and criminal diversion and conviction.

Active Duty Case

1. Reprimand of military organization's chief attorney for conflicts of interest by communicating with and advising an alleged rapist and victim, both of whom the attorney personally knew.

Reserve and Guard State Reciprocity Cases

2. 91-day suspension for not refunding fees and abandoning civilian clients.
3. Public reprimand for mismanaging civilian client's trust.
4. Diversion of criminal charges for state prosecutor who played sting operation tapes for a companion.
5. Felony conviction for forcible sodomy with biological children.

LITIGATION

The number of civil lawsuits against the Department of the Army and its officials increased slightly from the previous year, with approximately 585 actions filed in FY 00. Cases that require civilian courts to interpret the UCMJ remain a small, but significant portion of this total. Most of these cases are by (former) soldiers seeking collateral review of courts-martial proceedings, usually via petitions for writs of habeas corpus filed in federal district courts, or in back-pay actions filed in the Court of Federal Claims. 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, Hall v. Department of Defense, involves a class action filed in 1997 by all inmates confined at the United States Disciplinary Barracks (USDB). The inmates claim 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. 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. Plaintiffs' attorney moved to dismiss the case in June 2000, claiming that because the new DB will be completed in the next year, the issues presented by the lawsuit will be moot. A hearing on the dismissal is pending.

Litigation Division is also defending three cases challenging the Feres doctrine as it applies to military prisoners after their punitive discharges have been executed, but while they continue to serve sentences of confinement at the USDB and the Regional Confinement Facilities (RCFs). All three cases, one of which involves a service-member who was discharged before his court-martial and who was on terminal leave when apprehended, are currently before the 10th Circuit Court of Appeals. The appellate court should definitively decide the applicability of Feres to post-discharge military prisoners soon. These decisions will have broad ramifications for the USDB and all RCFs.

EDUCATION AND TRAINING

The Criminal Law Department of The Judge Advocate General's School (TJAGSA) in Charlottesville, Virginia, continues to focus on sustaining and improving our military justice practice. This year, the

Criminal Law Department provided instruction on a variety of topics ranging from substantive and technical litigation skills to the history of the Uniform Code of Military Justice.

Advocacy training continues to be a top priority for the Criminal Law Department. The Department devotes significant effort to training Basic Course and Advanced Trial Advocacy Course students on trial advocacy skills. Each Basic Course student is required to serve as trial counsel or defense counsel in three advocacy exercises - an administrative separation board, a guilty plea court-martial, and a contested court-martial. Basic Course students leave TJAGSA with a substantive understanding of the military justice system as well as familiarization with the court-martial and administrative separation board processes.

In addition to the Basic Course instruction, the Criminal Law Department continues to offer advanced advocacy training in the 13th and 14th Criminal Law Advocacy Courses, as well as offering advanced advocacy training electives for the Graduate Course. The two-week Criminal Law Advocacy Courses provided advanced individualized training to over 100 judge advocates from all branches of service. Augmented with four Reserve Component officers for each course, the Department puts the students through the rigors of 11 small-group practical exercises on essential litigation skills from opening statement through closing argument. In addition, each Criminal Law Advocacy Course student must serve as trial counsel or defense counsel for a guilty plea and contested court-martial. The Graduate Course electives focus more on training supervisors and managers of the military justice system, with special emphasis on designing and executing in-house training programs.

The Advocacy Trainer, a manual containing several advocacy skills development drills designed to allow supervisors in the field to conduct short and long-term training, continues to enjoy great success. The Criminal Law Department is committed to keeping The Advocacy Trainer current and relevant. During FY 00, the department completed three new training modules. The Advocacy Trainer is now available electronically to all services, and can be accessed under the Publications listing on TJAGSA's home page (<http://www.jagcnet.army.mil/tjagsa>).

The Criminal Law Department also hosted a variety of continuing legal education courses. The Department managed the 43d Military Judge Course, providing preparatory and refresher trainer for the newest members of the trial judiciary. The Department also managed the Sixth Military Justice Manager's Course, which included a popular and informative presentation on forensic science, crime scene analysis, and DNA testing, as well as a block of instruction on how to use The Advocacy Trainer.

The Criminal Law and International & Operational Law Departments co-hosted the 4th National Security Crimes and Intelligence Law Workshop in June 2000. All of the services were represented in this class of military and civilian practitioners and investigators in the national security field.

The Criminal Law Department hosted several distinguished guest speakers during FY 00. Chief Judge Susan Crawford of the Court of Appeals for the Armed Forces delivered the 28th Kenneth J. Hodson Lecture on Criminal Law in May 2000. Colonel (Retired) John Smith and Lieutenant Colonel (Retired) Robert Nunnally discussed trial advocacy in general and use of technology in the courtroom at the 13th Criminal Law Advocacy Course in March 2000. In September 2000, Mr. Terry MacCarthy, a Federal Public Defender and nationally known authority on trial advocacy, and Professor David Schlueter, author of several books on court-martial practice, addressed the 14th Criminal Law Advocacy Course.

PERSONNEL, PLANS, AND POLICIES

The strength of the Judge Advocate General's Corps at the end of FY 00 was 1,427 (including general officers). This total does not include 67 officers participating in the Funded Legal Education Program. The diverse composition of the Judge Advocate General's Corps included 126 African-Americans, 40 Hispanics, 61 Asians and Native Americans, and 371 women. The FY 00 end strength of 1,427 compares with an end strength of 1,426 in FY 99, 1,499 in FY 98, 1523 in FY 97, 1541 in FY 96, 1561 in FY 95, 1575 in FY 94, and 1646 in FY 93. The grade distribution of the Corps was 5 general officers; 130 colonels; 211 lieutenant colonels; 306 majors; 775 captains. Seventy-one warrant officers, 360 civilian attorneys, and 1,467 enlisted soldiers supported legal operations worldwide.

WALTER B. HUFFMAN
Major General, US Army
The Judge Advocate General