

**REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY**

**OCTOBER 1, 1997 TO SEPTEMBER 30, 1998**

During fiscal year 1998 (FY 98), 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 484,054 in FY 98 and 487,812 in FY 97.

**MILITARY JUSTICE STATISTICS  
STATISTICAL SUMMARY: FY 98**

(See Attached Table)

**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 98, the United States Army Trial Defense Service (USATDS) continued to provide high quality, professional defense counsel services to soldiers throughout the Army from 56 offices worldwide. USATDS workload data for FYS 97 and 98 is displayed below.

	FY 97	FY 98
General Courts-Martial (includes cases which did not go to trial)	796	694
Special Courts-Martial (includes cases which did not go to trial)	344	286
Administrative Boards	564	597
Nonjudicial Punishment	33,185	32,181
Consultations	30,026	28,668

USATDS conducted its bi-annual Capital Litigation Seminar at Andrews Air Force Base. Military and civilian capital litigation specialists provided instruction to over ninety military attorneys from all four services. At Fort Polk, Louisiana, two USATDS counsel successfully defended a client in a contested capital court-martial, avoiding the death penalty.

Media attention continued to focus on soldiers accused of fraternization, rape, and other consensual or nonconsensual sexual offenses. In the most widely reported case, *United States v. McKinney*, the trial court found the former Sergeant Major of the Army guilty of one offense (obstruction of justice), out of nineteen charged offenses, and reduced him to Master Sergeant.

USATDS provided support to the Multi-National Force in the Sinai, and to troops in Southwest Asia, Macedonia, Haiti, Kuwait, Hungary, and Bosnia. At certain locations, USATDS maintained inter-service agreements to provide defense services to military personnel from other services. TDS has continued to support soldiers in Physical Evaluation Boards (PEB) at three selected locations, and is reviewing a request to undertake PEB representation at a fourth location in Europe.

#### **TRIAL COUNSEL ASSISTANCE PROGRAM**

During FY 98, 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 98: (1) telephone/e-mail inquiry assistance; (2) advocacy training courses; (3) publications; and (4) trial assistance.

During FY 98, TCAP personnel (three Army judge advocates supported by a civilian paralegal) accomplished the following: responded to 553 telephonic requests for assistance; answered 155 e-mail requests for assistance; sent out materials 137 times in response to calls; conducted eleven three-day advocacy training courses in the continental United States, Panama, Korea, Hawaii, and Germany, providing 242 hours of continuing legal education to 208 judge advocates from all services at a cost of \$16,905 or \$81.27 per judge advocate trained; held a video teleconference which was transmitted to or later provided to every installation; and performed press liaison duties for The Judge Advocate General (TJAG) in one court-martial. In addition, TCAP started up the new TCAP Website consisting of 5 databases and nearly 500 full-text searchable documents. The Website is readily accessible via the Lotus Notes system or the World Wide Web

(WWW). Nearly 400 applications for access from the WWW alone have been processed. The largest percentage of these applications were from Reservists, National Guard, and sister services. On one occasion, TCAP provided a briefing on the TCAP Website at The Judge Advocate General's School (TJAGSA). This presentation was to the Criminal Law New Developments Course.

Beyond this extensive support to trial counsel, TCAP attorneys prepared 8 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 and one for the Eastern District of North Carolina. TCAP reviewed, monitored, and responded to 8 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 four times before the Army Court of Criminal Appeals.

#### **CRIMINAL LAW DIVISION**

The 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.

#### **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 the Army representative served as the Chairman of the Joint Service Committee until June 1, 1998.

During FY 98, the JSC completed its fourteenth 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: setting forth the rules for issuing protective orders preventing the parties and witnesses from making out of court

statements when there is a substantial likelihood of material prejudice to a fair trial; clarifying which convictions are admissible on sentencing; updating all of the model specifications by removing the reference to the 20th Century from the date of the offense; and incorporating numerous references into the existing rules, discussion, and punitive articles regarding confinement for life with or without eligibility for parole. Additionally, the JSC proposed legislation amending Article 111 of the UCMJ to provide an alcohol blood/breath concentration of 0.08 grams or more per 100 milliliters of blood or 210 liters of breath as a per se standard of illegal intoxication for drunken operation of a vehicle, vessel or aircraft. Following revision of the proposed changes in response to the public comments, the proposed MCM changes should be forwarded to the DoD General Counsel in early 1999.

The JSC continued its work on adultery which it started in FY 97 at the request of the Secretary of Defense. The proposed adultery changes from the Senior Review Panel were published in the Federal Register and comments on the changes were received at a public meeting. During FY 99 the JSC will review those public comments to see if the proposed changes should be revised in light of the comments.

During FY 98, the JSC completed its review of the new DoD policy prohibiting hazing and how to best make punitive any violations of that policy. The JSC recommended to the DoD General Counsel that the DoD policy be implemented by service directive rather than by changes to the MCM or UCMJ. That recommendation was endorsed by the DoD General Counsel and forwarded to the individual services. An Army regulatory policy prohibiting hazing was subsequently drafted and is currently being staffed.

#### **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 1995 to 30 Nov 1996	1 Dec 1996 to 30 Nov 1997
Foreign Offense Citations	4,611	4,870
Total Civilian	1,336	1,487
Total Military	3,275	3,383
Exclusive Foreign Jurisdiction	152	187
Concurrent Jurisdiction	3,123	3,196
Traffic/Other Minor Offenses	331	346
Foreign Jurisdiction Recalls	901	609

With the exception of Foreign Jurisdiction Recalls, 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, drug offenses, as well as in certain minor offenses, such as traffic offenses, disorderly conduct, drunkenness and others.

This year, foreign authorities released 22 of the 187 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 2,752 cases. Overall, waivers were obtained by the U.S. in 86.1 percent of all exclusive and concurrent jurisdiction cases. This figure reflects a 10 percent increase in such waivers from 1995-1996, when the relevant figure was 75.6 percent.

During the last reporting period, civilian employees and dependents were involved in 1,336 offenses. Foreign authorities released 192 of these cases (14.4 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 1,487 offenses. The foreign authorities released 250 of these cases (16.8 percent of the current total).

Foreign authorities tried a total of 1,231 cases. Eighteen trials, or 1.5 percent, resulted in acquittals. Those convicted were sentenced as follows: 18 cases resulted in executed confinement; 64 cases resulted in suspended confinement; and 1,131 cases (91.9 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 The Assistant Judge Advocate General on appropriate resolution of ethics cases. SOCO oversees the operation of TJAG's Professional Responsibility Committee and its issuance of advisory ethics opinions. It is also responsible for overseeing professional responsibility training within the Army. Working closely with TJAGSA, SOCO assists judge advocates in implementing training programs in their commands and offices.

During 1997, seventeen professional conduct inquiries were closed. This is a 49% decrease from 1996's thirty-three cases. Of the cases closed in 1997, six of the allegations of attorney ethical violations were founded. Two of the founded cases were minor or inadvertent violations of ethical rules. Of the remaining four cases, two involved reserve component judge advocates suspended by their state bars for matters unrelated to military service. One was a National Guardsman who, in his state capacity, failed to diligently appeal a client's state court-martial conviction. The third case involved a judge advocate who was relieved for lying and disclosing confidential client information.

Through the end of November 1998, SOCO closed fourteen new professional responsibility inquiries. Based on projected rates, closed professional conduct inquiries will decrease by ten percent in 1998. Of the cases closed in 1998, four of the allegations of attorney ethical violations were founded. Three of the four founded cases were for minor or inadvertent violations of ethical standards. The fourth case was for legal malpractice when a judge advocate improperly advised a legal assistance client on a separation agreement in 1988.

#### **LITIGATION**

The number of civil lawsuits against the Department of the Army and its officials dropped slightly from previous years, with about 600 actions filed in FY 98. Cases that require civilian courts to interpret the UCMJ constitute 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 involved a habeas petition brought by a soldier seeking to stay his pending court-martial for refusing to obey orders to wear United Nations accouterments (blue beret and brassard) incident to his unit's deployment to Macedonia. During FY 98, an appellate court affirmed the district court's decision

dismissing the petition, holding that federal civilian courts should ordinarily not entertain such actions until the military justice system (including all appeals) has run its course.

Another suit involves a class action filed by all inmates currently 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. During FY 98, the district court denied the inmates' request for a preliminary injunction ordering the Army to transfer them to other correctional institutions. The Army recently 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.

#### **EDUCATION AND TRAINING**

In Charlottesville, Virginia, the Criminal Law Department of The Judge Advocate General's School continued to lead the way in the Corps-wide effort to improve and sustain trial advocacy skills.

Each Basic Course student is required to serve as trial and defense counsel in three different advocacy exercises, an administrative separation board, a guilty plea, and a contested court-martial.

The unrivaled success of *The Advocacy Trainer, A Manual for Supervisors* was clearly the highlight of 1998. Over 300 copies were distributed worldwide and to sister services. 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. Following closely on its heels was the *ATII 1998 Supplement*.

The 4th Military Justice Managers Course included a new block of instruction to "train the trainer" how to utilize *The AT*. The Graduate Course was offered two electives regarding advocacy training, enabling the School to draw on the advocacy skills and experience of Graduate Course students and to spur the development of training scenarios for practitioners.

The department co-hosted the 2d National Security Crimes and Intelligence Law Workshop in June 1998. This course was designed to bring together practitioners and investigators in the national security field. Military and civilian students from all services attended the course, which was capped by an address from Mr. Thomas Taylor, Office of the General Counsel, Department of Defense. The next iteration of this course will occur in June 1999.

The department continued to strengthen its links to the sister services and the civilian bar this year, not only by sharing the *Advocacy Trainer* but also by instructing at each other's courses. Majors Edye Moran and Norm Allen served as instructors at the Air Force Trial and Defense Counsel Advocacy Course. Major Hudson offered instruction on testifying to agents at the Advanced Foreign Counter-Intelligence Training Course, Fort Meade, Maryland, and Major Sitler enlightened civilian attorneys in the art of trial advocacy at a prosecutor's workshop in Vale, Colorado.

Again the department was host to several distinguished guest speakers, including Mr. Gerald P. Boyle, Esquire, Milwaukee, Wisconsin, who spoke to the 9th Criminal Law Advocacy Course (CLAC) in April; Mr. David Baugh, Esquire, Richmond, Virginia, who spoke to the 10th CLAC in September; and Colonel (Ret.) John Smith, who spoke to the 10th CLAC in September. Brigadier General John S. Cooke, Retired, delivered the Twenty-Sixth Kenneth J. Hodson Lecture on Criminal Law in March 1998. Walter T. Cox III, Chief Judge of the Court of Appeals for the Armed Forces, again opened the 41st 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 Wayne E. Alley, Retired, now a federal district judge in Oklahoma, deliver his experienced perspectives on judging. The 21st Criminal Law New Developments Course in November 1997 featured Associate Judge Andrew S. Effron, United States Court of Appeals for the Armed Forces, who enlightened students about the significance of history in the military justice system. Dr. Bruce Leeson, Department of Psychiatry, U.S. Disciplinary Barracks (USDB), presented a lecture on new developments in the psychiatric treatment of USDB inmates. Students in the New Developments Course also had the opportunity to hear Colonel Lee D. Schinasi, Retired, now at the University of Miami School of Law, present his sage ideas on "Daubert, Science, and Syndrome: A Landscape Under Construction."

#### **PERSONNEL, PLANS, AND POLICIES**

The Total Army strength of the Judge Advocate General's Corps at the end of FY 98 was 4,438. The Reserve Component strength of the Judge Advocate General's Corps was 2939 with 665 officers serving in the Army Reserve National Guard (ARNG) and 2274 officers serving in

the United States Army Reserve (USAR). The Active Army strength of the Judge Advocate General's Corps was 1,499. The Active Army strength includes 54 officers participating in the Funded Legal Education Program.

The diverse composition of the Active Army Judge Advocate General's Corps included 111 African-Americans, 44 Hispanics, 42 Asians and Native Americans, and 349 women. The Active Army FY 98 end strength of 1,499 compares with an end strength of 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 Active Army grade distribution was 4 general officers; 129 colonels; 212 lieutenant colonels; 315 majors; 749 captains; and 36 first lieutenants. Sixty warrant officers, 357 civilian attorneys, and 1,487 enlisted soldiers supported Active Army 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 Active Army Corps remains strong, with almost seven applicants applying for each opening.

Two hundred and five 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	127

During FY 98, ten officers completed funded study for LL.M. degrees in the following disciplines: environmental law, contract law, international law, tax law, and labor law.

As a separate competitive category under the Department of Defense Officer Personnel Management Act, Active Army officers of the Judge Advocate General's Corps compete among themselves for promotion. During FY 98, the Secretary of the Army convened six selection boards to recommend Active Army Judge Advocate officers for promotion to higher grades.

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