

**ANNUAL REPORT
of the
CODE COMMITTEE
on
MILITARY JUSTICE**

**INCLUDING SEPARATE REPORTS
of the
U.S. COURT OF MILITARY APPEALS,
THE JUDGE ADVOCATES GENERAL
OF THE U.S. ARMED FORCES,
AND THE CHIEF COUNSEL
OF THE U.S. COAST GUARD**

**For the Period
October 1, 1988 to September 30, 1989**

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ANNUAL REPORT
SUBMITTED TO THE
COMMITTEES ON ARMED
SERVICES

of the
U.S. Senate and House of Representatives
and to the
SECRETARY OF DEFENSE,
SECRETARY OF TRANSPORTATION,
and
SECRETARIES OF THE
ARMY, NAVY, AND AIR FORCE

PURSUANT TO THE
UNIFORM CODE OF MILITARY JUSTICE
For the Period
October 1, 1988—September 30, 1989

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**JOINT ANNUAL REPORT
of the
CODE COMMITTEE
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UNIFORM CODE OF MILITARY JUSTICE
October 1, 1988 to September 30, 1989**

The Judges of the United States Court of Military Appeals; the Judge Advocates General of the Army, Navy, and Air Force; the Chief Counsel of the Coast Guard; the Director, Judge Advocate Division, Headquarters, United States Marine Corps; and Professor David A. Schlueter submit their annual report on the operation of the Uniform Code of Military Justice, pursuant to Article 67(g), Uniform Code of Military Justice, 10 USC §867(g).

The Code Committee met on two separate occasions during fiscal year 1989 and, pursuant to notice published in the Federal Register, both meetings were open to the public. The Code Committee was pleased that a number of visitors attended each of these meetings and demonstrated their interest concerning the matters being considered by the Code Committee.

The initial meeting of the Code Committee was held on December 13, 1988, and pursuant to an invitation by the Code Committee, the Chairman of the Joint-Service Committee on Military Justice was present to discuss several proposed changes to the Uniform Code of Military Justice. Specifically, the agenda included a consideration of proposals concerning modifications to Article 3(a), Uniform Code of Military Justice, relating to the retention of military jurisdiction over servicemembers who were discharged and subsequently reenlisted; modifications to Articles 9, 10, and 33 relating to speedy trials and the rules pertaining thereto; modifications to Article 32 to permit an investigating officer to investigate uncharged offenses; changes to Articles 39 and 41 to specifically permit an additional peremptory challenge for new members added to a court-martial; an amendment to Article 47 removing the specific punishment provisions for refusal to testify before a court-martial and substituting the authority of an appropriate federal court to assess the punishment to be imposed for such refusal; amendments to Article 48 to specifically authorize the Courts of Military Review and the Court of Military Appeals to assess punishment for contempt; an amendment to Article 54 to require ver-

batim transcripts only where mandatory review of a court-martial proceeding is required by Article 61; modifications to Article 57(a) to effect adjudged forfeitures of pay and allowances and reduction in grade by a court-martial upon the announcement of the sentence; an amendment to Article 63 to permit increased punishment where a rehearing was ordered by appellate authorities or requested by an accused; an expansion of Article 111 to proscribe operating a vessel or aircraft while under the influence of alcohol or drugs; and modifications to Article 136 relating to the authorization of civilian legal assistance attorneys to act as notaries public. Additionally, various proposals were discussed concerning specified terms for trial and appellate military judges; the promulgation of procedures for investigating allegations of judicial misconduct; the experience of counsel trying cases; problems encountered with misconduct of civilian dependents in a foreign country; and confinement of military personnel in foreign confinement facilities.

The second meeting of the Code Committee was held on June 27, 1989. During this meeting the proposed change to Military Rule of Evidence 707 to specifically prohibit evidence relating to polygraph examinations and a modification to Rule for Courts-Martial (RCM) 701 to permit the Government to discover the names and addresses of defense witnesses other than the accused were discussed by the members. A change to RCM 702 to require the defense to give notice of an intent to offer the defense of innocent ingestion of drugs was also discussed during this meeting. The members further discussed proposals to allow the Government to initiate pretrial agreement negotiations; to establish continuing court-martial jurisdiction; and whether there was a need to establish procedures for handling requests from the news media for access to court-martial records or proceedings. Furthermore, during both meetings the members received reports on the status of military justice in each of the Armed Services and discussed matters relating to the numbers of court-martial proceedings in each service as well as the quality of the servicemembers being recruited. Concern was noted that if the quality of the military recruit was allowed to deteriorate, more military disciplinary problems would be encountered.

Finally, the Code Committee was briefed by the Clerk of the United States Court of Military Appeals on several proposed changes to the Rules of Practice and Procedure of the United States Court of Military Appeals. This discussion included a proposed change to allow the certification of issues of military criminal law to the Court of Military Appeals by an appropriate state court or federal court and, in addition, certification of an issue of state law by the Court of Military Appeals to an appropriate state court. This discussion also included a proposed change to Rule 21

relating to the pleading requirements of a supplement to the petition for grant of review.

Separate reports of the United States Court of Military Appeals and the individual Armed Services address further items of special interest to the Committees on Armed Services of the United States Senate and House of Representatives, as well as the Secretaries of Defense, Transportation, Army, Navy, and Air Force.

ROBINSON O. EVERETT

Chief Judge

WALTER T. COX, III

Associate Judge

EUGENE R. SULLIVAN

Associate Judge

Major General WILLIAM K. SUTER, USA

The Acting Judge Advocate General of the Army

Rear Admiral EVERETTE D. STUMBAUGH, USN

Judge Advocate General of the Navy

Major General KEITHE E. NELSON, USAF

Judge Advocate General of the Air Force

Rear Admiral JOSEPH E. VORBACH, USCG

Chief Counsel, United States Coast Guard

Brigadier General MICHAEL E. RICH, USMC,

Director, Judge Advocate Division,

Headquarters, United States Marine Corps

Professor DAVID A. SCHLUETER

REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS October 1, 1988 to September 30, 1989

The Judges of the United States Court of Military Appeals submit their fiscal year 1989 report on the administration of the Court and military justice to the Committees on Armed Services of the United States Senate and House of Representatives and to the Secretaries of Defense, Transportation, Army, Navy, and Air Force in accordance with Article 67(g), Uniform Code of Military Justice, 10 USC §867(g).

THE BUSINESS OF THE COURT

The reduction of the backlog of the Court that was reflected in fiscal year 1988 continued into 1989. Although the Court accomplished a significant reduction in the petition docket in 1988, the total number of such cases was further reduced from 273 cases at the end of 1988 to 260 cases at the end of 1989. (See Appendix A.) The master docket was reduced from 65 to 48 cases during the same period. (See Appendix B.) The number of cases carried over on the miscellaneous docket remained constant with only three cases. Thus, the total number of carryover cases was reduced from 341 cases at the end of 1988 to 311 cases at the end of 1989. During the course of 1989 the Court issued a total of 120 opinions as compared with a total of 130 opinions during 1988.¹ (See Appendix C.)

As the number of cases pending before the Court has been reduced to a record low in recent years, the processing times have similarly been significantly reduced. For example, the average processing time from the filing of a petition for grant of review to the action of the Court in granting such petition has been reduced from a 5-year high of 181 days in fiscal year 1987 to only 113 days in fiscal year 1989. This represents a reduction of 38 percent. (See Appendix D.) Similarly, the average number of days between the date a petition for grant of review is granted to the oral argument date has been reduced from 426 days in fiscal year 1985 to only 158

¹ Although not part of the business of the Court, it is noted that during Fiscal year 1989, the Court was notified that petitions for writ of certiorari were filed with the Supreme Court of the United States in 25 master docket cases in which the Court took final action.

days in fiscal 1989, a reduction of 63 percent. (See Appendix E.) The average number of days between oral argument and the release of a final decision was also significantly reduced from 261 days in fiscal year 1988 to only 185 days in fiscal year 1989, a reduction of 29 percent. (See Appendix F.) This work effort resulted in a reduction in the overall processing time of a case which was granted review and given plenary consideration by the Court from a 5-year high of 549 days in fiscal year 1987 to an average of only 387 days in fiscal year 1989, a reduction of 30 percent. (See Appendix G.) Although the number of cases pending before the Court has been significantly reduced there was a slight increase in the number of oral arguments from fiscal year 1988 to fiscal year 1989. (See Appendix H.)

The average processing times reflected in Appendices A through G include the times allotted for counsel to file pleadings. Therefore, since a normal briefing cycle under the Court's Rules of Practice and Procedure requires 70 days for the filing of briefs in cases on the master docket, the average periods for the actual consideration of a case by the Court after the filing of such pleadings is significantly less than the figures indicated in Appendices D, E, and G. These 5-year comparative tables thus reflect a substantial improvement in case processing times which is attributable to the fact that the Court has been functioning since June 1986 with a full complement of 3 judges and has more recently established an annual Term of Court.

PUBLIC AWARENESS PROJECT

(Project Outreach)

Following a practice which was established during fiscal year 1988, the Court again travelled outside its own courthouse to hear oral arguments in several actual appeal cases in order to assist people within the Armed Services, as well as those in the civilian community throughout the United States, to gain a greater appreciation of the procedural safeguards Congress has provided in the military justice system, and particularly in the appellate review of court-martial convictions and sentences. At the invitation of the Superintendent of the United States Military Academy, the Judges of the Court on February 22, 1989, travelled to West Point, New York, and heard oral argument in an Army appeal in Thayer Hall before a group of approximately 1,200 Cadets as well as civilian and military lawyers. The Court subsequently accepted a similar invitation from the Commander of the South Carolina National Guard and from the Dean of the University of South Carolina School of Law and, on March 11, 1989, heard oral argument in an Army appeal in the Strom Thurmond Auditorium of the School of

Law in Columbia, South Carolina, before a large group of local military active duty and reserve judge advocates, civilian judges and lawyers, and law students. Both of these occasions provided an opportunity for members of the academic community, military and civilian judges and lawyers, law students, and future military leaders of the United States Army to meet with the Judges and view how court-martial cases are presented by appellate advocates for decision by the Court.

In addition to continuing its practice of travelling outside its own courthouse to hear oral arguments, the Court participated in an historic television program which consisted of the videotaping of an actual hearing conducted in the courthouse on July 14, 1989, and televised nationwide on the C-SPAN television network later that same evening as part of a three-hour special program on the military justice system and the appellate review of court-martial cases under the Uniform Code of Military Justice. The viewer response from this special program was uniformly favorable from many different sections of the United States and reflected the positive educational purpose which originally motivated the Court to undertake its Public Awareness Project.

JUDICIAL VISITATIONS

During fiscal year 1989, the Judges of the Court, consistent with past practice, visited military installations, delivered speeches to numerous professional organizations, and participated in many seminars to inform both the military and civilian communities of the Court's work concerning the administration of the military justice system.

In fulfillment of this responsibility, Chief Judge Robinson O. Everett delivered speeches at the 1988 Army Judge Advocate General's Conference, Charlottesville, Virginia; the Air Force Tactical Air Command Judge Advocate General's Conference, Langley Air Force Base, Virginia; the Naval Justice School, Newport, Rhode Island; Tyndall Air Force Base, Panama City, Florida; East Coast Navy Military Judges' Conference, Norfolk, Virginia; Army Trial Judiciary Annual Judicial Conference and Criminal Investigation Division, Fort Bragg, North Carolina; American Bar Association Midyear Meeting, Denver, Colorado; Pentagon Chapter of the Federal Bar Association, Fort Myer Officers Club, Arlington, Virginia; Chicago Bar Association, Chicago, Illinois; National Guard Judge Advocate Conference, Washington, D.C.; Military Air Command Conference, Little Rock Air Force Base, Arkansas; United States Coast Guard Academy, New London, Connecticut; Law Day Programs, at Bergstrom Air Force Base, Austin, Texas and Fort Bliss, Texas; U.S. Army Sergeants Major Academy, Fort Bliss, Texas;

Connecticut Bar Association, Stamford, Connecticut; Thirty-Second Military Judge Course, The Judge Advocate General's School, Charlottesville, Virginia; and the Congressional Youth Leadership Council, Washington, D.C.

Chief Judge Everett also participated in the Appellate Military Judges' Conference, Washington, D.C., and in meetings of the U.S. Judicial Conference Advisory Committee on Rules of Criminal Procedure and the Drafting Committee to Revise Uniform Controlled Substances Act of the National Conference of Commissioners on Uniform State Laws. In addition, he delivered a lecture at the Army Judge Advocate General's School, Charlottesville, Virginia, and spoke to different groups including students at the Judge Advocate General's School, Maxwell Air Force Base, Alabama, and members of the Inter-Service Military Judges' Conference. As an advisor he was present for meetings of the American Bar Association Standing Committee on Military Law and he attended the District of Columbia Circuit Judicial Conference; the District of Columbia Bar Annual Convention; the 59th Annual Judicial Conference of the Fourth Circuit; the Annual Meeting of the National Conference of Commissioners on Uniform State Laws; the American Bar Association Annual Meeting; the Annual Convention of the Federal Bar Association, and the AIRLIFT RODEO at Pope Air Force Base, North Carolina.

Judge Cox participated in the Judicial Conference, Frankfurt, Federal Republic of Germany; Area Defense Counsel Circuit Conference, Garmisch, Federal Republic of Germany; Joint Services Appellate Counsel Workshop, Bolling Air Force Base; United States Army Judicial Conference, Western Circuit, Fort Ord, California; Federal Bar Association Conference, San Francisco, California; Air Force Defense Counsel Conference, Denver, Colorado; United States Army Reserves' Workshop, Judge Advocate General's School, Charlottesville, Virginia; Military Judges Seminar, Air Force Judge Advocate General's School, Maxwell Air Force Base, Alabama; the American Bar Association Meeting, Fort Jackson, South Carolina; Fourth Circuit Judicial Conference, Hot Springs, Virginia; Judicial Conference, Fort Jackson, South Carolina; and the Federal Bar Association Convention, Washington, D.C. He also delivered Law Day speeches at Shaw Air Force Base, South Carolina, and the Naval Base, Norfolk, Virginia. In addition, Judge Cox conferred with military lawyers, judges and senior commanders at Hickam Air Force Base, Hawaii; Camp Lejeune, North Carolina; Fleet Combat Training Center, Dam Neck, Virginia; Coast Guard Academy, New London, Connecticut; and the Naval Justice School, Newport, Rhode Island.

Judge Sullivan delivered speeches at the Judge Advocate General's Annual Continuing Legal Education Training Program, Char-

lottesville, Virginia; the United States Army Ranger School Graduation, the United States Military Academy Prep School Graduation, the New York Bar Association Meeting, and at a Law Day Program held at Wright-Patterson Air Force Base, Ohio. He also attended and participated in the meeting of the American Bar Association Standing Committee on Military Law, and received briefings at 12th Air Force; 7th Air Force; the Pacific Command Air Force Headquarters; 8th Army; United States Coast Guard Atlantic Maintenance and Logistics Command, and the United States Army Information Command.

HOMER FERGUSON CONFERENCE

The Fourteenth Annual Homer Ferguson Conference was held at the George Washington University Marvin Center on May 11-12, 1989. As in previous years, this conference was jointly sponsored by the Court and the Military Law Institute and was certified for credit to meet the continuing legal education requirements of various State Bars in order to assist both military and civilian practitioners in maintaining those professional skills necessary to practice before trial and appellate courts.

The speakers for this year's conference included Major General Hugh R. Overholt, The Judge Advocate General, United States Army; the Honorable Edward D. Re, Chief Judge, United States Court of International Trade; the Honorable William C. Bryson, Deputy Solicitor General of the United States; the Honorable Walter T. Cox, III, Associate Judge, United States Court of Military Appeals; Mr. Tim O'Brien, ABC News Law Correspondent; Dr. Jonathan Lurie, Historian to the United States Court of Military Appeals and Professor of History, Rutgers University; Major Dixie Morrow, Air Force Judge Advocate General's School; the Honorable Wayne E. Alley, Judge, United States District Court, Western District of Oklahoma; Mr. Edward L. Burwitz, FBI Academy; Dean James Taylor, Jr., Wake Forest University School of Law and Chairman of the United States Court of Military Appeals Court Committee; Major Carol DiBattiste, Air Force Judge Advocate General's School; and the Honorable Robinson O. Everett, Chief Judge, United States Court of Military Appeals.

In addition, the Honorable Eugene R. Sullivan, Associate Judge, United States Court of Military Appeals, served as moderator of a conference panel entitled "Evidence Update" with panelists Mr. Stephen A. Saltzburg, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice and Professor of Law, University of Virginia School of Law; Lieutenant Colonel Lee D. Schinasi, Judge Advocate General's Corps, United States Army;

and Dean David Schlueter, Associate Dean and Professor of Law, St. Mary's University School of Law, San Antonio, Texas.

A panel concerning issues on AIDS was introduced by Chief Judge Everett with panelists Mrs. Bonnie B. Wilford, Acting Director, Division of Clinical Science, Director of Substance Abuse, American Medical Association; Ms. Leigh Bradley and Mr. Paul Koffsky, both from the Office of the General Counsel, Department of Defense; and Major Paul Capofari, Criminal Law Division, Office of the Judge Advocate General, United States Army.

The conference closed with a series of seminars under the direction of Major Paul Capofari, including seminars entitled "First Amendment and Courts-Martial," "Clemency and Parole for Convicted Servicemen" and "DNA Testing: The Legal Issues." Participants included Ms. Barbara P. Percival, Assistant Counsel, The Washington Post; Mr. Thomas S. Markiewicz, Chief of Clemency, Corrections and Officer Review Division, Office of the Air Force Judge Advocate General; Major Michael Millard, Criminal Law Division, Office of the Army Judge Advocate General; Lieutenant Colonel Steven Bamberger, Executive Secretary of the Naval Clemency and Parole Board; and Captains Denise J. Arn and Michael Doyen, United States Army Trial Counsel Assistance Program.

The invocation was offered by Major General Norris L. Einertson, Chief of Chaplains, United States Army. The conferees were welcomed by the Honorable Robinson O. Everett on behalf of the Court; Colonel Walter L. Lewis, United States Air Force (Ret.), on behalf of the Military Law Institute; and Dean John Jenkins, Associate Dean for Administrative Affairs, on behalf of the George Washington University National Law Center. A special presentation by the Pentagon Chapter, Federal Bar Association, was made by Craig Kabatchnick, Esquire, President of the Chapter.

The conferees included numerous military and civilian lawyers as well as Judges of the Courts of Military Review, legal scholars, and commentators in the field of military justice. As in prior years, the conference was videotaped to provide a medium of education for those interested in the administration of military justice.

SIGNIFICANT DECISIONS AFFECTING THE ADMINISTRATION OF MILITARY JUSTICE WITHIN THE ARMED FORCES ²

MILITARY RULES OF EVIDENCE

The United States Court of Military Appeals issued numerous decisions during the 1989 term of Court interpreting and applying the Military Rules of Evidence (Mil.R.Evid.). The first such decision was *United States v. Gordon*, 27 MJ 331 (CMA 1989), which involved the question of whether the sequestration rule of Mil.R.Evid. 615 allowed a government expert witness to remain in the courtroom during the testimony of other witnesses. Citing *United States v. Croom*, 24 MJ 373 (CMA 1987), and observing that Mil.R.Evid. 703 permits an expert witness to base opinion testimony on facts and data made known to such expert, the Court held that the military judge properly allowed the expert witness to remain in the courtroom for the purpose of ascertaining the evidence presented by other witnesses.

The issue of whether a certificate of completion of training at the United States Army Retraining Brigade was the equivalent of a pardon, annulment, or certificate of rehabilitation requiring rejection of the offer of the accused's prior conviction in another court-martial was addressed by the Court in *United States v. Clarke*, 27 MJ 361 (CMA 1989), wherein the Court held that the completion of such retraining program was not equivalent to a pardon, annulment, or certificate of rehabilitation under Mil.R.Evid. 609(c). The parameters of the admissibility of former testimony under Mil.R.Evid. 804(b)(1) was addressed by the Court in *United States v. Connor*, 27 MJ 378 (CMA 1989). In that case the unavailability of the declarant was established and the Court construed the "similar motive" requirement of the rule as it related to the testimony of a witness at a hearing conducted under Article 32, Uniform Code of Military Justice (UCMJ), as requiring merely an opportunity to cross-examine the witness even if for tactical reasons the right to cross-examine is not extensively utilized. Additionally, the Court held that the former testimony was not rendered inadmissible because information may have been obtained by the defense after the opportunity was given to cross-examine the witness in question. The Court subsequently applied the same principle in *United*

² This section of the Court's Annual Report is prepared solely as an information tool by the Staff of the Court. It is included for the convenience of the reader to assist in easily locating cases of particular interest during the term. The case summaries are not of precedential value and should not be cited in briefs filed with the Court.

States v. Hubbard, 28 MJ 27 (CMA 1989), and *United States v. Spindle*, 28 MJ 35 (CMA 1989).

The issue of when and under what circumstances evidence of uncharged misconduct may be admitted under Mil.R.Evid. 404 was addressed by the Court in several cases during the 1989 term. Specifically, in *United States v. Ferguson*, 28 MJ 104 (CMA 1989), the Court held that such evidence must relate to a specific fact that is in issue at the trial rather than the general issue of criminality. Thus, the Court held in *Ferguson* that the judge erred by admitting evidence of uncharged child sexual offenses to show *modus operandi* where the perpetrator's identity was not a fact in issue during the trial and the uncharged misconduct did not closely parallel the charged misconduct.

In *United States v. Trimper*, 28 MJ 460 (CMA 1989), the Court held in a trial involving the wrongful use of cocaine and marijuana that where an accused testified that he had never used drugs, the Government was properly allowed to submit a positive urinalysis allegedly commissioned by the accused himself because it was properly admitted to rebut defense character evidence that the accused was a non-user of drugs and to impeach his credibility as a witness. The Court also held in *United States v. Brown*, 28 MJ 470 (CMA 1989), that uncharged misconduct evidence that was not admitted prior to findings was not admissible during the sentencing hearing, observing that while such evidence may be considered under the federal sentencing guidelines (28 USC §994(d)(10)), such guidelines were inapplicable to court-martial proceedings.

In *United States v. Reynolds*, 29 MJ 105 (CMA 1989), the Court delineated the three standards which must be met under Mil.R.Evid. 401-404 for the admissibility of uncharged misconduct, namely, (1) whether the evidence reasonably supports a finding by the court members that the appellant committed prior crimes, wrongs or acts; (2) whether a fact of consequence is made more or less probable by the existence of the evidence; and (3) whether the probative value is substantially outweighed by the danger of unfair prejudice. Applying these standards in *Reynolds*, the Court concluded that the military judge properly allowed the testimony of a woman that she had been earlier raped by appellant to be introduced during the appellant's court-martial for the rape of another woman where the "classic consent/mistake of fact defense" was raised by the appellant. Noting previous cases which held that *modus operandi* evidence is generally not admissible to show lack of consent, the Court held that the evidence in *Reynolds* was significantly similar to the charged acts and therefore constituted evidence of a particular "design" or "system" to prove a fact in issue. Specifically, the Court held that the evidence of other acts of misconduct reflected that the appellant "had worked out a system to

put his victim into an unsuspecting and vulnerable position whereby he could engage in sexual intercourse with or without consent."

The question of whether Mil.R.Evid. 404(b) provided a complete listing of the circumstances where uncharged misconduct was admissible or whether the list was merely exemplary was answered by the Court in *United States v. Castillo*, 29 MJ 145 (CMA 1989). Therein, the Court observed that it had previously interpreted a similar provision (para. 138(g), Manual for Courts-Martial, United States, 1951), as permitting uncharged misconduct under circumstances not specifically enumerated within the Manual provision. As the provisions of Mil.R.Evid. 404(b) were substantively rooted within the 1951 Manual provision, the Court held that "the sole test under Mil.R.Evid. 404(b) is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime." Because the misconduct under consideration in *Castillo* explained and corroborated the testimony of a witness who was the victim of the charged misconduct, the Court held that the testimony was admissible under the cited provision. The Court also reconciled a potential conflict between the provisions of Mil.R.Evid. 301(e) and 404(b) by holding in *Castillo* that an accused who testifies under direct examination about an offense for which he is being tried does not waive his privilege against self-incrimination with respect to uncharged misconduct occurring at a different time and place even though evidence of the misconduct may be admissible under Mil.R.Evid. 404(b). However, the Court also held that if the accused's testimony relates to a particular transaction giving rise to the charged offense, his testimony does waive his privilege against self-incrimination as to any facts relating to such transaction, even though those facts may establish his guilt of other crimes. Finally, the Court held in *Castillo* that if the accused exercises his right and refuses to testify as to matters admissible under Mil.R.Evid. 404(b), such refusal does not relate to a purely collateral matter and, therefore, his testimony can be stricken by the military judge pursuant to Mil.R.Evid. 301(f)(2).

The question of when and under what circumstances an accused may prevent the Government's use of a statement made by the accused's wife was addressed by the Court in *United States v. Hughes*, 28 MJ 391 (CMA 1989). Therein, the Court held that an out-of-court statement made by the accused's wife was admissible under Mil.R.Evid. 504(a) since that rule addressed the capacity of the testifying spouse rather than the content of such testimony. In this regard the Court noted the distinction between subsections (a) and (b) of Mil.R.Evid. 504, observing that subsection (b) dealt with confidential communications between spouses. As the issue under consideration involved an out-of-court statement made by the accused's wife to a third party, the Court held that the protection of

the marital status was not involved and that, since the statement bore sufficient indicia of reliability, it was properly received in evidence from the Government.

In *United States v. Ferdinand*, 29 MJ 164 (CMA 1989), the Court held that the military judge improperly admitted a pretrial statement of a child sexual victim on the basis that the mother of the child testified that, in her opinion, the child's best interest would be served by refusing to testify. The Court observed that while there is some authority that unavailability to testify may be established from testimony of a psychiatrist or a psychologist that participation in the trial would be too traumatic for the child in question, the military judge's decision in the case at hand was predicated solely upon the lay testimony of the mother and no expert witness was presented to testify concerning the matter. Thus, the Court held that the unavailability requirement of Mil.R.Evid. 804(b)(5) had not been established but that the erroneous admission of the statement was harmless beyond a reasonable doubt.

JURISDICTION

In *United States v. King*, 27 MJ 327 (CMA 1989), a case appealed to the Court under the provisions of Article 62, UCMJ, 10 USC §862, the Court addressed the question of whether the military lost jurisdiction over the accused where a discharge certificate was transferred to him for the purpose of effecting an early reenlistment. Citing *United States v. Johnson*, 6 USMA 320, 20 CMR 36 (1955), the Court held that a discharge for the purpose of facilitating a reenlistment did not effect a return of a servicemember to civilian life and, therefore, the court-martial could exercise jurisdiction over the accused in question.

In *Unger v. Ziemniak*, 27 MJ 349 (CMA 1989), which involved a writ appeal petition by an accused officer, the Court re-examined its authority to review a trial by special court-martial where a punitive discharge could not be adjudged. Noting that such a case could never qualify for review by a Court of Military Review pursuant to Article 66(b), and ultimate review by the U.S. Court of Military Appeals under Article 67(b), the Court held that its jurisdiction was not limited to cases reviewable under these provisions of the Uniform Code of Military Justice. Rather, citing *McPhail v. United States*, 1 MJ 457 (CMA 1976), the Court concluded it had been granted judicial authority by Congress to issue an appropriate writ in "aid" of its jurisdiction even though such case was not within the limits of the appellate jurisdiction defined in Article 67(b). Furthermore, the Court noted that since *McPhail* was decided, Congress had acted several times to amend the Uniform Code but had never acted in a manner indicating any dissatisfaction with the scope of the Court's review within the context of "All-

Writs Act supervisory jurisdiction" as explained in *McPhail*. Rather, the Court observed that Congress had acted numerous times to strengthen the Court and enhance its image. Thus, the Court concluded that it had jurisdiction to resolve the matter, but nonetheless affirmed the decision of the Court of Military Review, which denied a petition for extraordinary relief in view of the circumstances involved in the case.

Concerning the jurisdiction of the Court of Military Review to consider an appeal by the United States under the provisions of Article 62, UCMJ, 10 USC §862, the Court held in *United States v. True*, 28 MJ 1 (CMA 1989), that an order of a trial judge abating a court-martial was the functional equivalent of a termination of the proceedings and that the trial judge's action authorized the Court of Military Review to consider the case on appeal by the United States pursuant Article 62 of the Code.

Addressing the question of whether a convening authority could set aside the findings of guilty where the case had been remanded to a convening authority by a Court of Military Review with directions to take action relating only to the sentence, the Court held in *United States v. Montesinos*, 28 MJ 38 (CMA 1989), that a convening authority loses original jurisdiction once he publishes his action or officially notifies an accused thereof. Thus, the Court held that the convening authority acted improperly when he took action on the findings as he was subject to the directions of the Court of Military Review on remand and had no independent statutory authority to act on the findings under those circumstances. The Court stressed that the convening authority on such a remand was acting solely by delegation from the Court of Military Review and, therefore, for the purpose of the case under consideration, he was subordinate to an appellate court regardless of his rank.

An issue concerning the jurisdiction of the Court of Military Review was addressed by the Court in the context of a petition for extraordinary relief filed in *Boudreaux v. United States Navy-Marine Corps Court of Military Review*, 28 MJ 181 (CMA 1989). Therein, the Court noted that the Court of Military Review had previously returned a case to a convening authority for a rehearing; that at such rehearing, the petitioner received a punishment well below the statutory threshold for mandatory review under Article 66(b), UCMJ, 10 USC §866(b), although the original sentence had fallen within the mandatory review provisions of that article; and that approximately ten years later, the Judge Advocate General of the Navy returned the case to the Court of Military Review requesting consideration of an issue relating to his authority to review the case under Article 69 of the Code. In a divided opinion the Court of Military Review held that it had jurisdiction under either a theory of ancillary jurisdiction or under its extraordinary

writ jurisdiction but that it was not required to exercise such jurisdiction. However, the Court of Military Appeals disagreed, holding that once jurisdiction had been effected pursuant to Article 66, the Court of Military Review had a statutory duty to review the case to completion. Thus, the Court held that the Court of Military Review erred by declining to exercise its jurisdiction.

Turning to the question of *in personam* jurisdiction over a military accused, the Court held in *Pearson v. Bloss*, 28 MJ 376 (CMA 1989), in the context of a writ appeal petition to review a denial of a petition for extraordinary relief by the Court of Military Review, that Article 2(a)(4), UCMJ, 10 USC §802(a)(4), authorized the exercise of court-martial jurisdiction over a retired enlisted member of the United States Air Force. After discussing the legislative history of Article 2(a)(4), the Court rejected the accused's argument that the provision should apply only to retired officers. Thus, citing *United States v. Overton*, 24 MJ 309 (CMA), *cert. denied*, 484 U.S. 976, 108 S.Ct. 487, 98 L.Ed.2d 485 (1987), the Court held that court-martial jurisdiction could be exercised in this case. Resolving the question of when a reservist called to active duty becomes subject to the Uniform Code of Military Justice under the provisions of Article 2(a)(3) of the Code, the Court held in *United States v. Cline*, 29 MJ 83 (CMA 1989), that such jurisdiction attached one minute after midnight of the date on which he was ordered to report.

PROVIDENCY OF GUILTY PLEAS

Affirming the decision of the Court of Military Review, the Court held in *United States v. Dock*, 28 MJ 117 (CMA 1989), that the Court of Military Review had correctly ruled that where an accused plead guilty to crimes of unpremeditated murder and robbery by means of force and violence, under the circumstances, the pleas related to a capital offense of felony murder which should have been rejected under the provisions of Article 45(b), UCMJ, 10 USC §845(b).

The Court held in *United States v. Romanelli*, 28 MJ 184 (CMA 1989), that testimony at a rehearing on sentence which tended to show that the accused had been entrapped into distributing LSD would not justify withdrawal of his pleas of guilty to such charge. The Court noted that its earlier decision in *United States v. Barfield*, 2 MJ 136 (CMA 1977), required such a result under the provisions of paragraph 81b(2), Manual for Courts-Martial, 1969 (Revised edition), and that the relevant provisions of Rule for Courts-Martial (RCM) 810(a) paralleled the requirements of the 1969 Manual paragraph.

Rejecting an accused's contention that his statements during a providence inquiry on a guilty plea reflected that his conviction of larceny should be reversed because the asportation of the stolen

property had been completed before he obtained the property, the Court held in *United States v. Hubbard*, 28 MJ 203 (CMA 1989), that in view of the accused's admitted custodial role over the property in question, his conviction of larceny could be affirmed on the theory that he was a withholder of such property. Rejecting a claim on appeal that a military judge should have set aside the accused's pleas of guilty to drug offenses because the issue of entrapment was raised, the Court held in *United States v. Clark*, 28 MJ 401 (CMA 1989), that a mere tactical possibility of raising a defense does not of itself require a rejection of an otherwise provident guilty plea and that in borderline cases the military judge can give weight to the defense evaluation of the evidence.

The Court also refused to set aside pleas of guilty to kidnapping in *United States v. Jeffress*, 28 MJ 409 (CMA 1989), when it rejected a defense argument that the record only showed an incidental detention or asportation and, rather, held that the record reflected the accused's movement of the victim some fifteen feet had increased the risk of harm to the victim under the circumstances and, therefore, the elements of the crime of kidnapping had been established on the record. In *United States v. Ballesteros*, 29 MJ 14 (CMA 1989), the Court subsequently refused to set aside appellant's plea of guilty to carrying a concealed weapon, rejecting his contention that the providence inquiry demonstrated an improvident plea of guilty. Rather, the Court held, despite the accused's contention, that the responses during the providence inquiry showed that the loaded gun was sufficiently accessible to satisfy the element of being "on or about his person." An accused's conviction on the basis of his pleas of guilty for obstruction of justice was also affirmed in *United States v. Williams*, 29 MJ 41 (CMA 1989), wherein the Court rejected the accused's claim that such pleas were improvident because a charge of obstruction of justice could not be predicated on communications between accomplices to a crime. Rather, the Court held that federal civilian law was not controlling for offenses charged under clauses 1 or 2 of Article 134, UCMJ, 10 USC §934, and the conviction could be affirmed where the communications between accomplices constituted separate and distinct acts by the accused.

The Court affirmed an accused's conviction of aggravated assault upon his pleas of guilty in *United States v. Stewart*, 29 MJ 92 (CMA 1989), rejecting the accused's argument that the specification in question did not allege an offense. Rather, the Court held that a specification alleging that the accused wrongfully exposed a victim to human immunodeficiency virus (HIV) with a means likely to produce death or grievous bodily harm while knowing he was infected with such virus and wrongfully engaged in sexual intercourse with the named victim without using a form of barrier pro-

tection was sufficient to allege an aggravated assault. The Court specifically rejected the defense argument that evidence reflecting a 30 to 50% probability of developing AIDS from HIV was not sufficient to render the accused's pleas improvident since even a 30 to 50% chance of death from the battery inflicted was sufficient to fall within the "natural and probable consequence" definition concerning death or grievous bodily harm.

MILITARY JUDGES

Concerning the qualification requirements of a military judge pursuant to Article 26(c), UCMJ, 10 USC §826(c), the Court held in *United States v. Beckermann*, 27 MJ 334 (CMA 1989), that a Coast Guard military judge of a general court-martial was not so qualified. The Court noted that the judge in question had been designated to serve as military judge for only forty days; that he did not revert to the rank of commander but continued to serve as captain, a rank he temporarily held because of his service as district legal officer; and that he continued to perform nonjudicial duties. The Court held these circumstances did not reflect that his primary duty was that of a military judge and, therefore, he was not qualified within the requirements of Article 26(c) of the Code.

In *United States v. Scaff*, 29 MJ 60 (CMA 1989), the Court discussed the powers of a military judge to convene a post-trial session. Noting his authority under Article 39(a), UCMJ, 10 USC §839(a), the Court held that a military judge could conduct a post-trial session up until the time he authenticates the record of trial. Thus, the military judge in question properly convened the post-trial session to receive relevant evidence concerning whether cocaine had been added to the accused's drink without his knowledge. The Court further observed that if the military judge had been persuaded that an accused had complied with the requirements for a new trial on the basis of newly discovered evidence, he could have set aside the findings of guilty so that a rehearing could have taken place. Additionally, the Court held that a convening authority's decision to refuse to provide fees for a subpoenaed witness improperly thwarted the military judge's attempt to obtain relevant evidence and that the convening authority's only recourse, if he disagreed with the trial judge's ruling on the matter, was to have sought an appeal under the provisions of Article 62, UCMJ, 10 USC §862. Thus, the Court returned the case for referral to a convening authority to conduct a hearing to determine whether the witness in question would have provided evidence necessitating a new trial.

SEARCH AND SEIZURE

Concerning the question of investigatory intrusion into a service-member's room, the Court held in *United States v. Thatcher*, 28 MJ

20 (CMA 1989), that the term "contraband" as used within Mil.R.Evid. 313(b) included all items not lawfully possessed and was not limited to items whose importation or exportation was illegal. Thus, applying this definition in *Thatcher*, the Court held that the Government had failed to establish by clear and convincing evidence that the intrusion in question was a lawful military inspection rather than an illegal search, where the intrusion occurred several hours in advance of a health and comfort inspection of all rooms in the accused's unit but after the accused had been identified as a suspect. However, the Court held in *United States v. Fagan*, 28 MJ 64 (CMA 1989), that the accused had not been seized where the commanding officer ordered the accused to proceed to the Naval Investigative Service (NIS) office for the purpose of being fingerprinted. The Court noted that a servicemember has no right to withhold fingerprints from military authorities, and that the accused was not seized within the meaning of the Fourth Amendment of the United States Constitution when he and fellow Marines were directed to the NIS office in question.

The Court subsequently sustained the admissibility of evidence of a second urinalysis in *United States v. Layne*, 29 MJ 48 (CMA 1989), ruling that the commanding officer had probable cause to conduct the second urinalysis. The Court stressed that the commanding officer was justified in believing a report that the originally ordered sweep urinalysis test had been compromised by the accused where the report was supplied by an accountable "citizen informant," citing *United States v. Wood*, 25 MJ 46 (CMA 1987).

COURT MEMBERS

Addressing the question of whether the military judge erred by rejecting a defense challenge for cause against a prospective court member in *United States v. Reichardt*, 28 MJ 113 (CMA 1989), the Court held that the trial judge did not abuse his discretion even though the member had been a victim of a crime similar to the crime giving rise to the court-martial. Citing *United States v. Smart*, 21 MJ 15 (CMA 1985), the Court held that a victim of a similar crime was not *per se* disqualified to serve as a court member. Noting the particular circumstances in *Reichardt*, including the fact that the crime involved was not particularly traumatic as far as the challenged member was concerned and did not involve reoccurring experiences; that the witness gave no equivocal answers and did not manifest evasive behavior; and that the military judge noted on the record that he was favorably impressed with the member, the Court held that the judge's ruling reflected he did not rely on a mere naked disclaimer of bias by the court member and affirmed his ruling.

After noting that the rule set forth in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), had been applied to the military in *United States v. Santiago-Davila*, 26 MJ 380 (CMA 1988), the Court in *United States v. Moore*, 28 MJ 366 (CMA 1989), prospectively adopted a *per se* rule against the Government's unexplained use of peremptory challenges to excuse members of an accused's own race. The Court established that, upon timely objection, a trial counsel must explain his use of a peremptory challenge in such a situation. Although such explanation need not rise to a level justifying a challenge for cause, the Court observed that the trial counsel can not assume that race renders the member partial to the accused. The Court explained in this regard that the *per se* rule was adopted to simplify the peremptory challenge process for members of courts-martial as it would be difficult to demonstrate a "pattern" of discrimination in a system permitting only one peremptory challenge.

In *United States v. Nigro*, 28 MJ 415 (CMA 1989), the Court held that it would not disturb a military judge's ruling denying a challenge for cause against a court member absent a clear abuse of discretion. Thus, the Court upheld the military judge's rejection of a challenge for cause after a court member attempted to obtain information from outside the court-martial proceedings. Rather, the Court rejected an argument that such a member was automatically disqualified and held that each case must be analyzed on its own merit to determine whether disqualification is required. Concerning the order of challenges, the Court held in *United States v. Newson*, 29 MJ 17 (CMA 1989), that absent extraordinary or uncommon circumstances, a military judge should not depart from the order specified by RCM 912(g) (1). However, although the trial judge erred by allowing the trial counsel to proceed in a manner where the Government could exercise a challenge after the defense counsel, the Court found no prejudice in the case at hand.

ARTICLE 31-FIFTH AMENDMENT-SIXTH AMENDMENT RIGHTS

As in previous years, the 1989 term of Court resolved several cases addressing questions as to when and in what manner members of the military services may be questioned or interviewed. In *United States v. Sievers*, 29 MJ 72 (CMA 1989), the Court held that the Fifth Amendment privilege did not permit an accused who was a base security officer to fill out an incident-complaint report in a false manner by stating that suspects were unknown where the accused and other servicemen had committed the crimes under investigation. The Court emphasized that while the accused may properly have refused to provide the information under the Fifth Amendment, he could not lie about the matter. Addressing a question left unanswered in *United States v. Lee*, 25 MJ 457 (CMA 1988), the

Court held in *United States v. Williams*, 29 MJ 112 (CMA 1989), that a U.S. Forces Korea regulation requiring service members to demonstrate, upon request, documentation or information showing a continued possession or lawful disposition of controlled items was not unconstitutional *per se*. The Court emphasized that, as construed, the regulation did not require an accused to acknowledge that he had purchased controlled items and, as the record did not show that the accused was a suspect at the time in question, no violation of Article 31, UCMJ, 10 USC §831, or the Fifth Amendment was reflected on such record.

In *United States v. Spaulding*, 29 MJ 156 (CMA 1989), the Court affirmed the military judge's ruling that an accused's subsequent statement was admissible even though he had previously given an unwarned and incriminating statement. The Court emphasized in upholding the military judge's ruling that the accused's own testimony reflected that he had received a full warning of his rights and had cooperated fully with the investigators with nothing to hide concerning the statement that was admitted into evidence. Citing Mil.R.Evid. 304(c) (3), the Court also held in *Spaulding* that the military judge properly rejected a defense motion to suppress the testimony of a witness as evidence derived from an earlier involuntary statement. Again, the Court relied on the evidence utilized by the military judge in reaching this conclusion. The Court subsequently held in *United States v. Jordan*, 29 MJ 177 (CMA 1989), that statements made by an accused to civilian investigators who did not contact previously assigned military counsel were properly used as evidence as such statements were voluntary and were preceded by an appropriate waiver of the accused's right to counsel.

In *United States v. Fassler*, 29 MJ 193 (CMA 1989), the Court held that in view of *Arizona v. Roberson*, 486 U.S. —, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), which was decided after the date of trial, the admissibility of an accused's pretrial statement which occurred after he requested counsel did not hinge on Mil.R.Evid. 305(e) but, rather, on the application of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Thus, the Court held that after he requested counsel, the accused could not be interrogated at the initiative of the investigators about the offense for which he had previously been confined or any other suspected offense, thereby rejecting an argument by the Government that the military judge properly relied on Mil.R.Evid. 305(e) which would allow an investigatory interview on other offenses.

The final case decided by the Court in the 1989 term also involved an issue concerning the admissibility of an accused's pretrial statements. In *United States v. Brabant*, 29 MJ 259 (CMA 1989), the Court held that where an accused, who was a security

policeman, became a suspect and exercised his right to remain silent and requested a lawyer, such action rendered a statement later given by him to his superior officer inadmissible under the circumstances. Therein, the Court observed that the acting commander's action in directing the accused to meet with him after the invocation of his rights was the functional equivalent of a reinitiation of the interrogation, notwithstanding the fact that the purpose of the meeting was to advise the accused of his rights but such purpose was never explained to the accused.

PROCEDURE

In a case that reached the Court through an accused's petition for a writ of mandamus directing his immediate release from confinement which had been previously ordered by the U.S. Navy-Marine Corps Court of Military Review, the Court addressed a question in *Frage v. Moriarty*, 27 MJ 341 (CMA 1988), that involved an issue concerning the tolling of the statute of limitations. Therein, the Court ruled that since the charges were preferred against the accused before an officer who was not authorized to administer oaths, the procedure did not comply with Article 30(a), UCMJ, 10 USC §830(a), regardless of the perception of the officer who believed he was properly being sworn. As Article 43 of the Code required the receipt of *sworn* charges by an officer exercising summary court-martial jurisdiction as a prerequisite for tolling the statute of limitations, the Court held that the statute of limitations had not been properly tolled and that the military judge properly granted the defense motion for dismissal of the charges and specifications. In another case involving an application for extraordinary relief, *Vanover v. Clark*, 27 MJ 345 (CMA 1988), the Court considered the propriety of re-referral of charges to a second court-martial after they had been withdrawn by the convening authority from the accused's first court-martial. Factually, the Government attempted to introduce uncharged misconduct at the first court-martial and the military judge rejected the Government's proffer. Thereafter, the original charge was withdrawn from the first court-martial and re-referred to a second court-martial with additional charges relating to the same misconduct which was sought to be introduced at the original court-martial. Citing RCM 604, the Court held that the second military judge failed to adequately dispel the appearance of evil and that extraordinary action by the Court was warranted. Thus, the Court granted the accused's writ appeal petition and directed that the additional charges be dismissed without prejudice at the accused's second court-martial.

In *United States v. Pierce*, 27 MJ 367 (CMA 1989), the Court held that the accused's nonjudicial punishment imposed under Article 15, UCMJ, 10 USC §815, for larceny did not preclude his subse-

quent court-martial for the same offense, noting that Article 15(f) does not bar a court-martial for a serious crime or offense involving the same act or omission. Thus, the Court ruled that the former jeopardy provisions of Article 44, UCMJ, 10 USC §844, did not apply to nonjudicial punishment. However, the Court held that the accused could not be punished twice for the same misconduct and that, under the circumstances of this case, the Article 15 proceeding could not be used for any purpose against the accused at trial.

The question of whether a Court of Military Review could direct a convening authority to inquire into an accused's mental responsibility at the time of the charged offenses was addressed by the Court in *United States v. Massey*, 27 MJ 371 (CMA 1989). Therein, the Court rejected the Government's contention that the Court of Military Review was limited to the question of an accused's mental capacity during the appellate review process, noting that RCM 1203(c)(5) used the permissive word "may" rather than the mandatory word "shall" in referring to the Court of Military Review's authority to inquire into an accused's mental capacity during appellate review of the court-martial record. Thus, the Court held when RCM 1203 was read in conjunction with RCM 706, the Court of Military Review had the authority to inquire into issues concerning both mental responsibility and mental capacity. Recognizing that Article 50(a), UCMJ, 10 USC §850(a), mandates that an accused can prevail on an issue of mental responsibility only if he convinces the factfinder that he was not mentally responsible, the Court noted that the change in evidentiary standard did not limit the Court of Military Review's power to order an inquiry into the matter.

The Court rejected a government argument in *United States v. Martinez*, 28 MJ 56 (CMA 1989), that an accused had judicially confessed as a result of his testimony offered during a pretrial suppression motion hearing. Rather, the Court held that, absent a clear agreement of counsel on the record that such testimony can be used against the accused on the merits, the testimony must be limited to use in resolving the suppression issue.

A problem concerning the constructive service of opinions of Courts of Military Review on appellants prior to the effective date of the amendments to Article 67(c), UCMJ, 10 USC §867(c), resulting from the Military Justice Act of 1981, Pub.L. No. 97-81, §5, 95 Stat. 1085, 1088, was addressed by the Court in *United States v. Myers*, 28 MJ 191 (CMA 1989). The Court concluded in this case that its earlier decision in *United States v. Larnear*, 3 MJ 76 (CMA 1977), did not foreclose constructive service on appellants. Therefore, the Court promulgated rules of constructive service which included requirements that the authorities publish a notice in a newspaper of general circulation in the area of the appellant's home of record; place copies of the decision of the Court of Military

Review in the official military service record of the appellant with appropriate forms for petitioning the U.S. Court of Military Appeals; and publish the same notice in the Federal Register. After following the foregoing procedures in cases where actual service cannot be effected on the accused, the Court held that, after the lapse of 60 days from the publication notice action, such cases may be considered final for purposes of executing an adjudged discharge. However, the Court indicated that it would not refuse an appellant's request to file a petition for grant of review where he can show that he acted within 60 days—the time period now provided in Article 67(c)—of the date he received actual notice. In a related matter involving a motion filed by an appellate defense counsel to withdraw a petition for grant of review because it was untimely filed by the accused himself, the Court held in *United States v. Engle*, 28 MJ 299 (CMA 1989), that a defense counsel should not move to withdraw a petition for grant of review on the basis of untimeliness without obtaining permission from the accused. The Court reasoned that such action placed an appellate attorney in a position in conflict with the interests of his client and that no fraud on the Court was involved on the part of an appellate attorney as the timeliness of the petition was a matter of record which was easily ascertainable by appellate government counsel or by personnel of the Court. Thus, the Court determined that the problem could easily be resolved by the Government moving to dismiss such a petition for untimeliness and that this requirement would preclude the loss of confidence in an appellate defense counsel who has taken a position hostile to the interests of his client.

The question of the legal effect of an equally divided Court of Military Review was addressed by the Court in *United States v. Ohrt*, 28 MJ 301 (CMA 1989). Noting the general rule in appellate practice, the Court held that an evenly divided vote on a question of law constitutes an affirmation of the decision of the lower court and that an evenly divided vote on a question of admissibility of evidence affirms the ruling below. However, the Court further held in *Ohrt* that the military judge erred by allowing the accused's commander to testify that the accused did not have potential for continued service in the absence of a proper foundation showing that the commander's opinion was personalized and based on the accused's character and potential.

After analyzing the enactment of Article 60(d) UCMJ, 10 USC §860(d), and the legislative history of the Military Justice Act of 1983, Pub. L. No. 98-209, §5, 97 Stat. 1393, 1396-97, the Court held in *United States v. Curry*, 28 MJ 419 (CMA 1989), that the convening authority was given the discretion to decide whether to seek a post-trial recommendation from a "non-lawyer legal officer" of his command or whether, instead, to seek the recommendation of a

staff judge advocate. In reaching this decision the Court rejected the defense argument that a post-trial recommendation had to be prepared by a lawyer and held that a non-lawyer officer who was trained to serve as a "legal officer" of the command was adequate if the convening authority so chose.

The issue of whether the adoption of RCM 1001(b)(3) changed the rule as to the use of prior convictions was addressed by the Court in *United States v. Caniete*, 28 MJ 426 (CMA 1989). Therein the Court held that RCM 1001(b)(3) had effectively changed the rule previously set forth in paragraph 75b(2), Manual for Courts-Martial, 1969 (Revised edition), as interpreted by *United States v. Krewson*, 12 MJ 157 (CMA 1981). Therefore, the Court held that the accused's convictions obtained between the date of the offense for which he was on trial and the date of trial were "prior convictions" within the meaning of the new rule and were thus proper evidence in aggravation during the sentencing phase of his trial.

The question of whether the employment of an expert for the defense made such expert a "lawyer's representative" within the meaning of Mil.R.Evid. 502 was addressed by the Court in *United States v. Turner*, 28 MJ 487 (CMA 1989). After analyzing the rule, the Court held that if an expert is employed solely for the purpose of assisting the defense, such an expert is a lawyer's representative and should not be interviewed by the prosecution. However, the Court further held that if the expert is also to testify for the defense at trial, the prosecution is authorized to interview such expert regarding the testimony in question. The issue of the statutory disqualification of defense counsel under the provisions of Article 27(a)(2), UCMJ, 10 USC §827(a)(2), was addressed by the Court in *United States v. Sparks*, 29 MJ 52 (CMA 1989). As an accused could constitutionally dispense entirely with counsel in a criminal proceeding, the Court held that a defense counsel who was disqualified as having previously acted for the prosecution in the same case did not deprive the court-martial of jurisdiction. Rather, the Court held that if an accused makes an informed choice to proceed with such counsel, that accused cannot later complain about such counsel unless the latter fails to meet the customary standards of professional competence. The Court also held that such disqualification could be asserted by either the defense or government and that the military judge was not required to allow defense counsel's representation under these circumstances.

Noting the provisions of RCM 1001(b) (4) and (5), the Court held in *United States v. Antonitis*, 29 MJ 217 (CMA 1989), that evidence during the sentencing portion of a court-martial concerning the accused's loss of a security clearance as a result of her conviction was improperly received, since such evidence did not demonstrate a relationship between the offense and the military mission involved

and the loss of her security clearance was not relevant to her rehabilitative potential. However, the Court held in *United States v. Fontenot*, 29 MJ 244 (CMA 1989), that the testimony of a rape victim's parents was properly accepted into evidence during the presentencing proceedings.

Interpreting the scope of admissibility of matters submitted by the accused under *United States v. Grostefon*, 12 MJ 431 (CMA 1982), the Court held in *United States v. Peel*, 29 MJ 235 (CMA 1989), that the accused was entitled to have a 55-page document prepared by his mother who was not a lawyer considered by the Court of Military Review, because the accused had adopted the document as his own.

ATTORNEY FEES

In *United States Navy-Marine Corps Court of Military Review v. Cheney*, 29 MJ 98 (CMA 1989), the Court held that the United States Court of Military Appeals is a "court" within the meaning of the Equal Access to Justice Act, 28 USC §2412(d), for the purpose of awarding attorney fees. However, the Court rejected the attorney's application for fees for legal representation expenses incurred in representing the petitioner in *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 MJ 328 (CMA 1988), on the basis that such litigation was not a "civil action" for the purpose of the award of such fees under the statute in question.

PERVERSION OF JUSTICE

In *United States v. Stroup*, 29 MJ 224 (CMA 1989), the Court concluded that a statement made by an alleged co-conspirator was inadmissible as evidence against his accomplice because it was not made during the course of or in furtherance of the conspiracy. The Court also ruled that trial counsel's misuse of certain evidence and his use of derogatory evidence relating to the accused's father as "a crook"—which was unrelated to the accused—constituted a "perversion of justice".

OTHER CASES OF INTEREST

In *United States v. Bolden*, 28 MJ 127 (CMA 1989), the Court held that the accused could be convicted of larceny by helping another servicemember arrange for a sham marriage to the accused's girl friend for the purpose of fraudulently obtaining off-base housing allowances. Additionally, the Court noted that the accused could also be convicted of larceny on the theory that the amount of rent for which the servicemember was reimbursed had been overstated. In *United States v. Orben*, 28 MJ 172 (CMA 1989), the Court affirmed a conviction of taking indecent liberties with a minor where the evidence proved that the accused had displayed pictures

of nude persons to the named victim and the evidence also established that the act was done with the intent to arouse his own sexual passions, those of the child victim, or both. Additionally, the Court ruled that the accused's acts were not protected by the First Amendment because communications to young children may be restricted without violating the First Amendment.

A conviction for conduct unbecoming an officer under Article 133, UCMJ, 10 USC §933, was affirmed by the Court in *United States v. Lewis*, 20 MJ 179 (CMA 1989), where the evidence showed that the accused had charged a fellow officer \$2,000 for tutoring the officer in leadership skills. A conviction for the rape of a recruit trainee's wife by a drill sergeant was affirmed by the Court in *United States v. Bradley*, 28 MJ 197 (CMA 1989), wherein the Court stressed that explicit threats and displays of force were not required by the drill sergeant given the coercive nature of the encounter between the parties, which occurred late at night in a secluded trailer for the alleged purpose of discussing infractions by the recruit trainee which could lead to his imprisonment for up to three years. The Court noted the atmosphere of dominance and control of the drill sergeant as a result of his military relationship with the trainee and the fact that the encounter took place at night when both the drill sergeant and the trainee's wife were aware that her husband would not be home.

Addressing the question of whether a specification was sufficient to allege an offense under Article 134, UCMJ, 10 USC §934, in *United States v. Woods*, 28 MJ 318 (CMA 1989), the Court upheld the validity of the specification in question and affirmed the decision of the Court of Military Review which granted an appeal by the United States from a contrary ruling of the military judge. The Court noted in *Woods* that a specification which alleged that the accused engaged in unprotected sexual intercourse with another servicemember after knowing that his seminal fluid contained a deadly virus capable of being transmitted sexually and after having been counseled regarding infecting others constituted an inherently dangerous act likely to produce death or great bodily harm. Therefore, the Court held his conduct was prejudicial to the good order and discipline in the armed forces and was properly chargeable under Article 134.

Another issue involving the protection of servicemembers from sexually transmitted diseases was addressed by the Court in *United States v. Womack*, 29 MJ 88 (CMA 1989). Therein the Court affirmed a conviction for violation of a "safe sex" order issued by the base commander which prohibited the accused servicemember from engaging in any acts of sodomy or homosexuality since he was infected with the Human Immunodeficiency Virus. The Court ruled that such an order had a valid military purpose because it insured

that servicemembers would remain healthy and capable of performing their duties. Additionally, the Court rejected an argument in *Womack* that such an order violated the accused's First Amendment right as the right of privacy applied differently to the military community and the armed forces may constitutionally prohibit or regulate conduct which might be permissible elsewhere.

Stressing that aggravated arson alleged as a violation of Article 126(a), UCMJ, 10 USC §926(a), is a general intent crime, the Court held in *United States v. Marks*, 29 MJ 1 (CMA 1989), that the accused's act of putting a flame to a canvas litter was "willful and malicious" even though the accused stated he merely put the flame to the canvas to see if it was flame retardant. The Court later held in *United States v. Dayton*, 29 MJ 6 (CMA 1989), that the defense of objective entrapment had earlier been rejected and, therefore, the military judge did not err by refusing to instruct on such a defense.

In *United States v. Reichenbach*, 29 MJ 128 (CMA 1989), the Court concluded that a conviction under Article 112a, UCMJ, 10 USC §912a, involving the wrongful use of a drug known as ECSTASY could not be sustained as the substance had not been properly listed either temporarily or permanently as a controlled substance under Section 813 of Title 21, United States Code, during the use period in question. However, the Court did observe that, after the date of the offenses involved, such a substance had been properly listed as a controlled substance and could, therefore, be prosecuted under Article 112a(b)(3) of the Uniform Code. The Court further held in *Reichenbach* that the adoption of Article 112a did not preempt prosecution under the third clause of Article 134 of the Code. Thus, the Court held that the conviction under a specification alleging wrongful *distribution* of ECSTASY could be sustained as a violation of 21 USC §841, which prohibited the distribution of a controlled substance analogue, but the conviction for wrongful *use* could not be sustained since use was not included as a prohibited act by the federal law at the time of the commission of the alleged wrongful use offense. Thus, the Court set aside the conviction for the use offense but affirmed the conviction for distribution of ECSTASY.

After analyzing the legislative history behind the military offense of resisting apprehension under Article 95, UCMJ, 10 USC §895, the Court held in *United States v. Harris*, 29 MJ 169 (CMA 1989), that the flight of an accused from attempted apprehension

does not constitute the offense of resisting apprehension within the terms of Article 95.

ROBINSON O. EVERETT

Chief Judge

WALTER T. COX, III

Associate Judge

EUGENE R. SULLIVAN

Associate Judge

USCMA STATISTICAL REPORT

Fiscal Year 1989

CUMULATIVE SUMMARY

CUMULATIVE PENDING OCTOBER 1, 1988

Master Docket.....	65
Petition Docket	273
Miscellaneous Docket	3
TOTAL.....	341

CUMULATIVE FILINGS

Master Docket.....	176
Petition Docket	2383
Miscellaneous Docket	33
TOTAL.....	2592

CUMULATIVE TERMINATIONS

Master Docket.....	193
Petition Docket	2396
Miscellaneous Docket	33
TOTAL.....	2622

CUMULATIVE PENDING OCTOBER 1, 1989

Master Docket.....	48
Petition Docket	260
Miscellaneous Docket	3
TOTAL.....	311

OPINION SUMMARY

CATEGORY	SIGNED	PER CURIAM	MEM/ ORDER	TOTAL
Master Docket	100	8	85	193
Petition Docket	3	0	2393	2396
Miscellaneous Docket.....	9	0	24	33
TOTAL.....	112	8	2502	2622

FILINGS (MASTER DOCKET)

Returned after remand	22
Mandatory appeals filed	1
Certificates filed	12
Reconsideration granted	1
Petitions granted (from Petition Docket)	140
TOTAL	176

TERMINATIONS (MASTER DOCKET)

Findings & sentence affirmed	133	
Reversed in whole or in part	28	Signed 100
Granted petitions vacated	0	Per curiam 8
Other disposition directed	32	Mem/order 85
TOTAL	193	TOTAL..... 193

PENDING (MASTER DOCKET)

Awaiting briefs	19
Awaiting oral argument	7
Awaiting final action	22
TOTAL	48

FILINGS (PETITION DOCKET)

Petitions for grant of review filed	2375
Petitions for new trial filed	4
Cross-petitions for grant filed	4
TOTAL	2383

TERMINATIONS (PETITION DOCKET)

Petitions for grant dismissed	7	
Petitions for grant denied	2210	
Petitions for grant granted	137	
Petitions for grant remanded	34	Signed 3
Petitions for grant withdrawn	8	Per curiam 0
Other	0	Mem/order 2393
TOTAL	2396	TOTAL..... 2396

PENDING (PETITION DOCKET)

Awaiting briefs	172
Awaiting Central Legal Staff review	23
Awaiting final action	65
TOTAL	260

FILINGS (MISCELLANEOUS DOCKET)

Writs of error coram nobis sought.....	0
Writs of habeas corpus sought	4
Writs of mandamus/prohibition sought	10
Other extraordinary relief sought	7
Article 62 review	3
Writ appeals sought	9
TOTAL	33

TERMINATIONS (MISCELLANEOUS DOCKET)

Petitions withdrawn	0	
Petitions remanded.....	0	
Petitions granted.....	3	
Petitions denied.....	24	Signed 9
Petitions dismissed	2	Per curiam 0
Other	4	Mem/order 24
TOTAL	33	TOTAL..... 33

PENDING (MISCELLANEOUS DOCKET)

Awaiting briefs.....	0
Awaiting Writs Counsel review	0
Awaiting final action	3
TOTAL	3

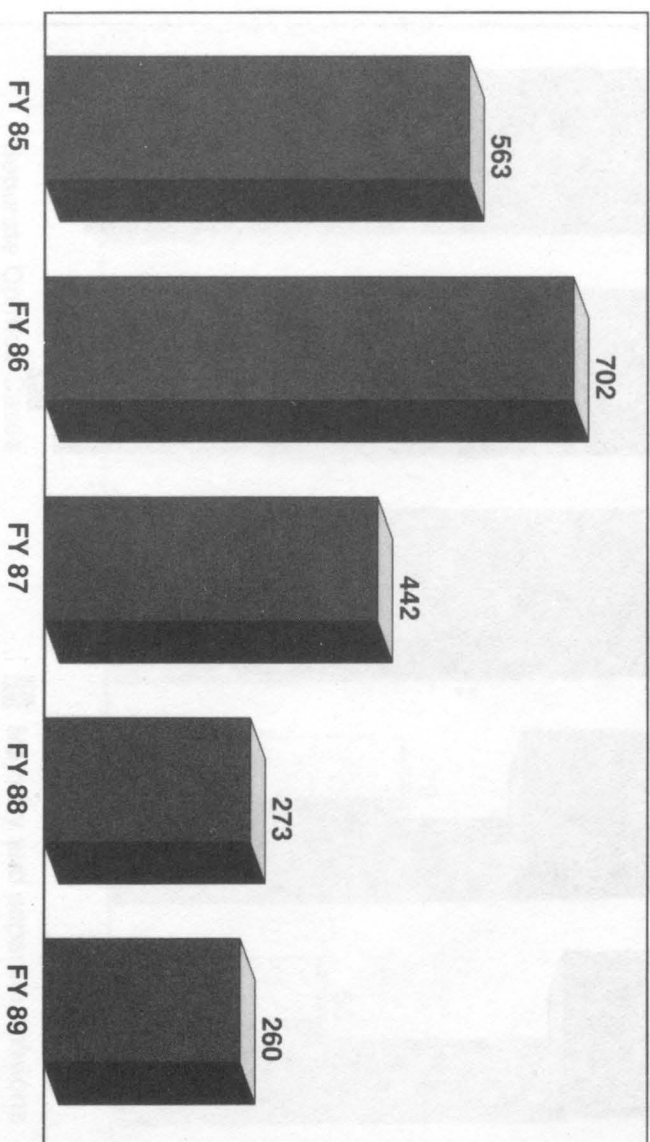
RECONSIDERATIONS & REHEARINGS

CATEGORY	BEGIN PEND- ING	FILINGS	END PEND- ING	DISPOSITIONS		
				Granted	Rejected	TOTAL
Master Docket	0	10	0	1	9	10
Petition Docket	0	2	0	0	2	2
Misc. Docket	0	1	0	0	1	1
TOTAL.....	0	13	0	1	12	13

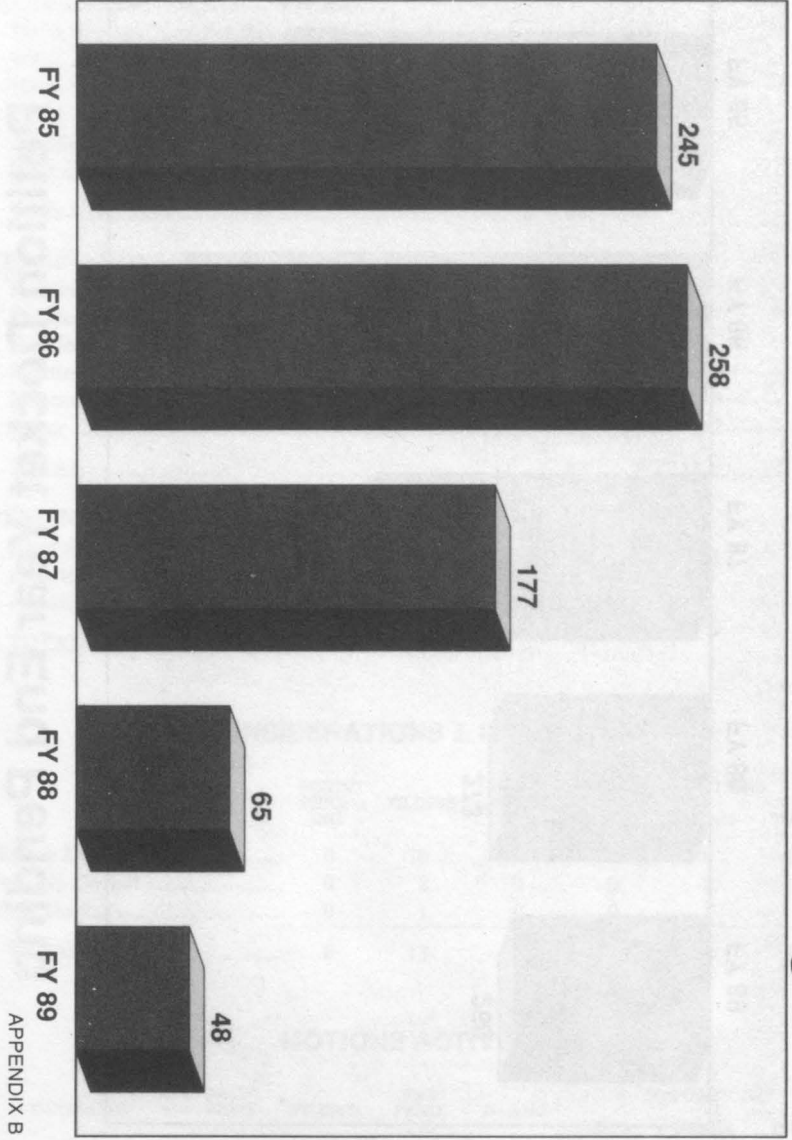
MOTIONS ACTIVITY

CATEGORY	BEGIN PEND- ING	FILINGS	END PEND- ING	Granted	DISPOSITIONS		
					Rejected	OTHER	TOTAL
All motions	26	494	2	412	55	51	518

Petition Docket Year End Pending

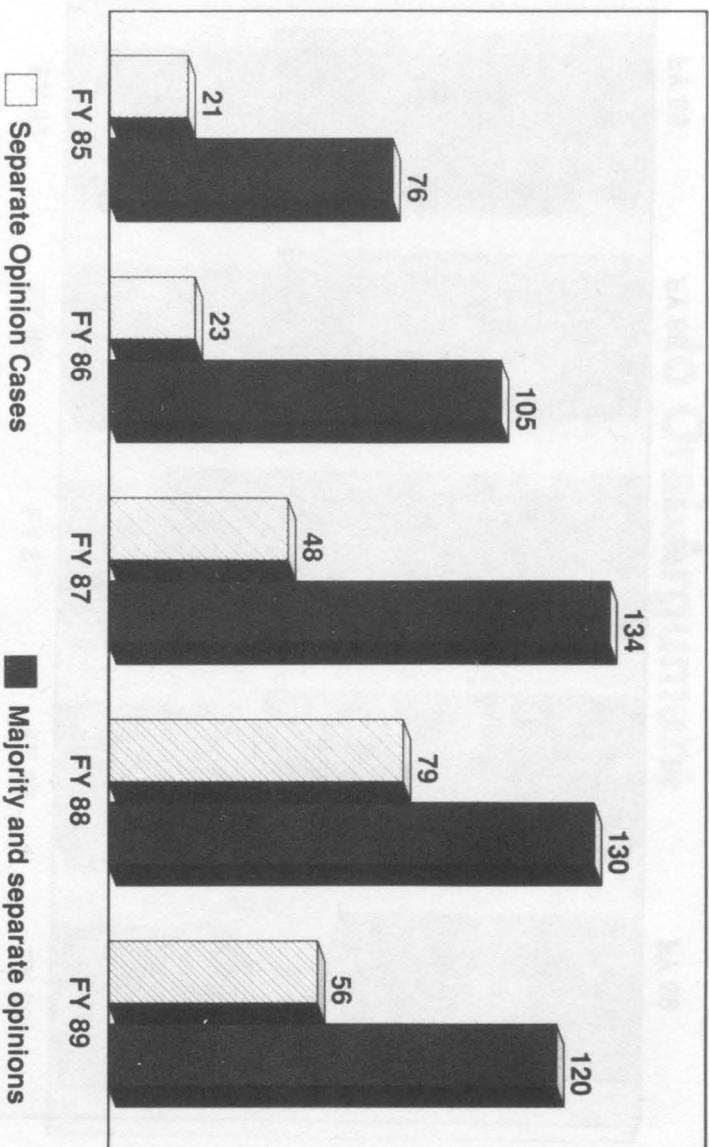


Master Docket Year End Pending

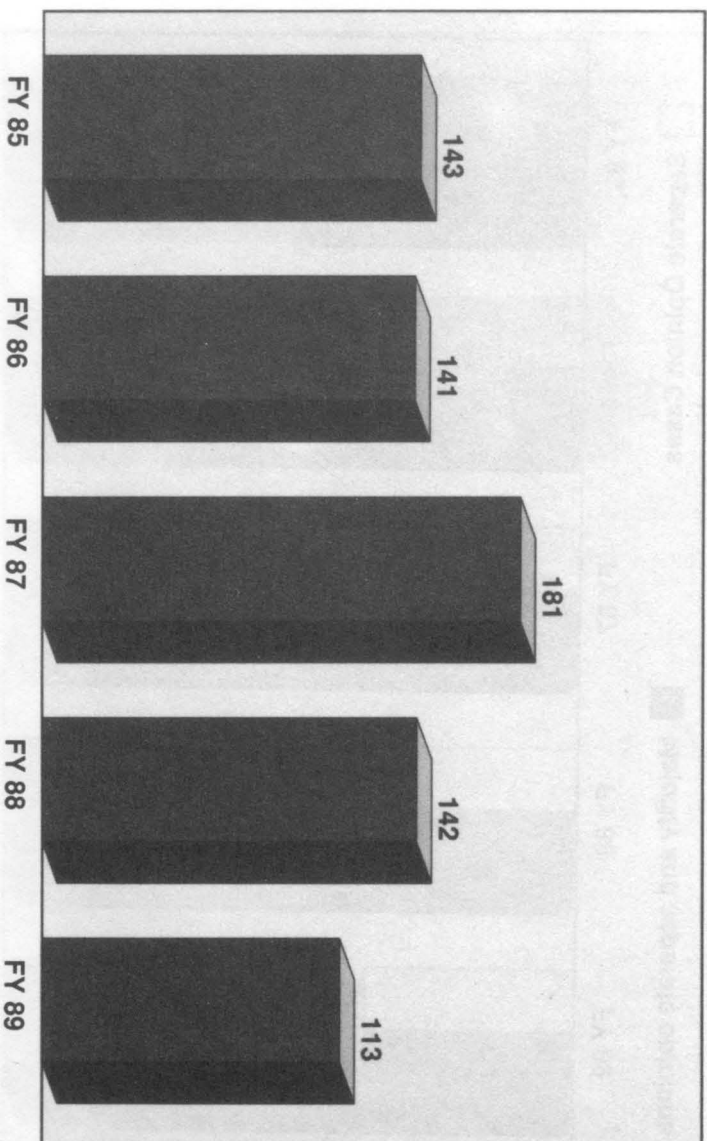


APPENDIX B

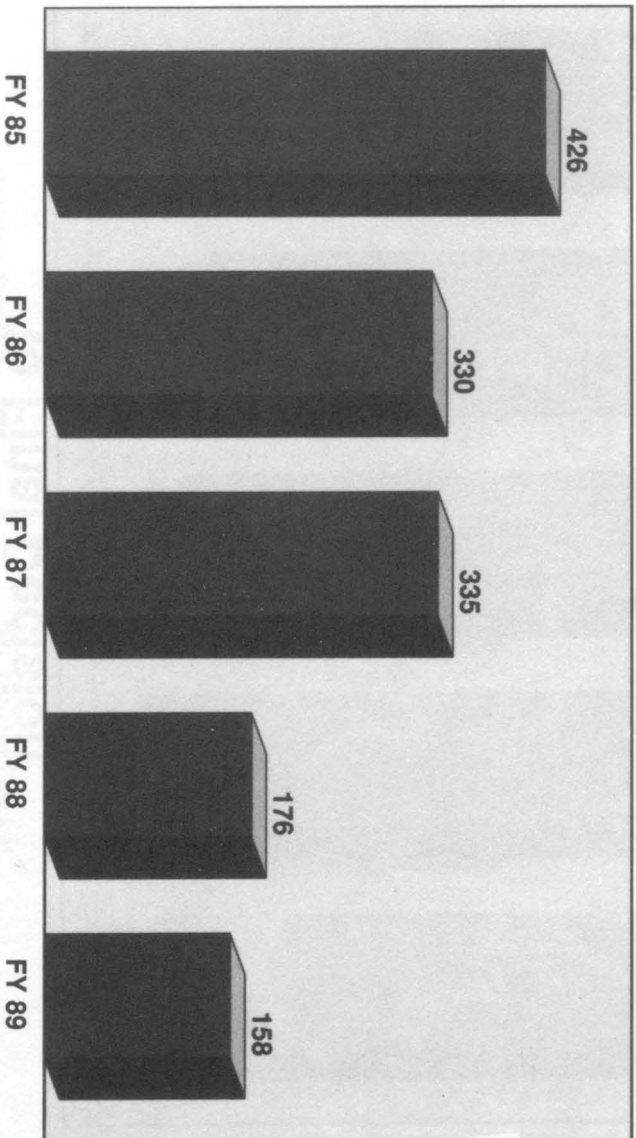
Total Opinions Per Year



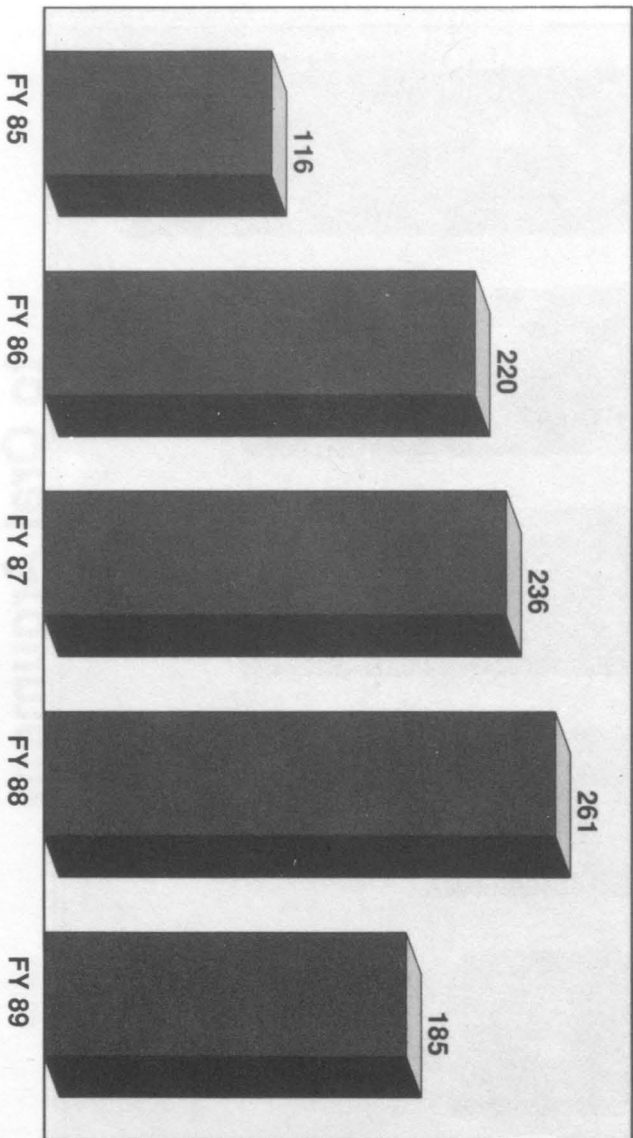
Days from Petition Filing to Grant



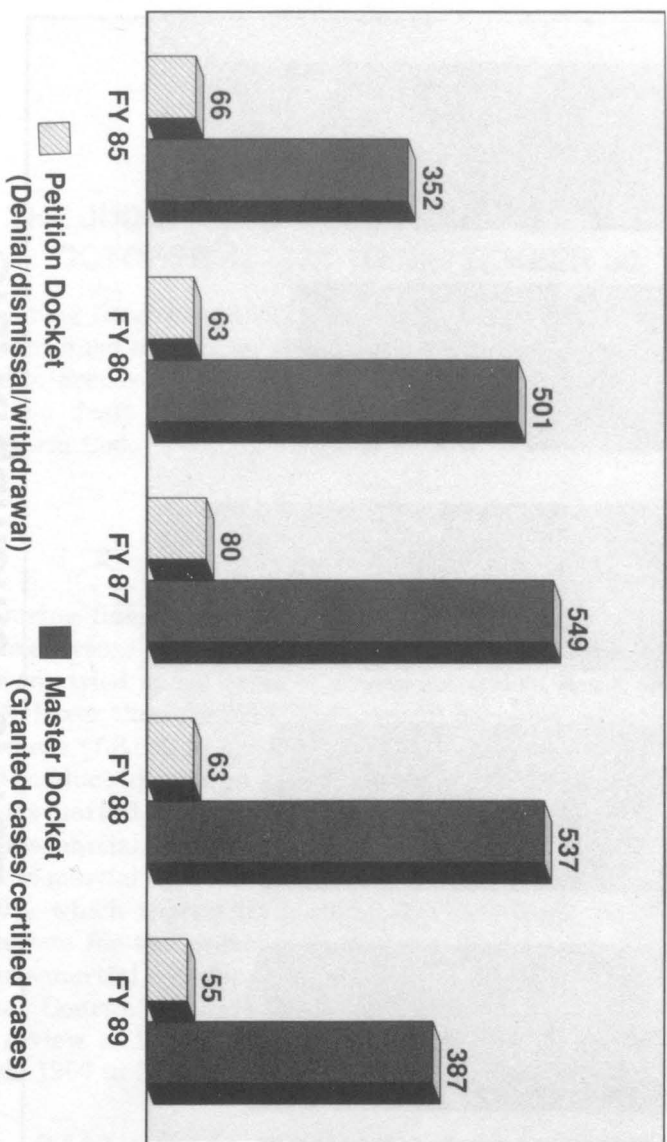
Days from Petition Granted to Oral Argument



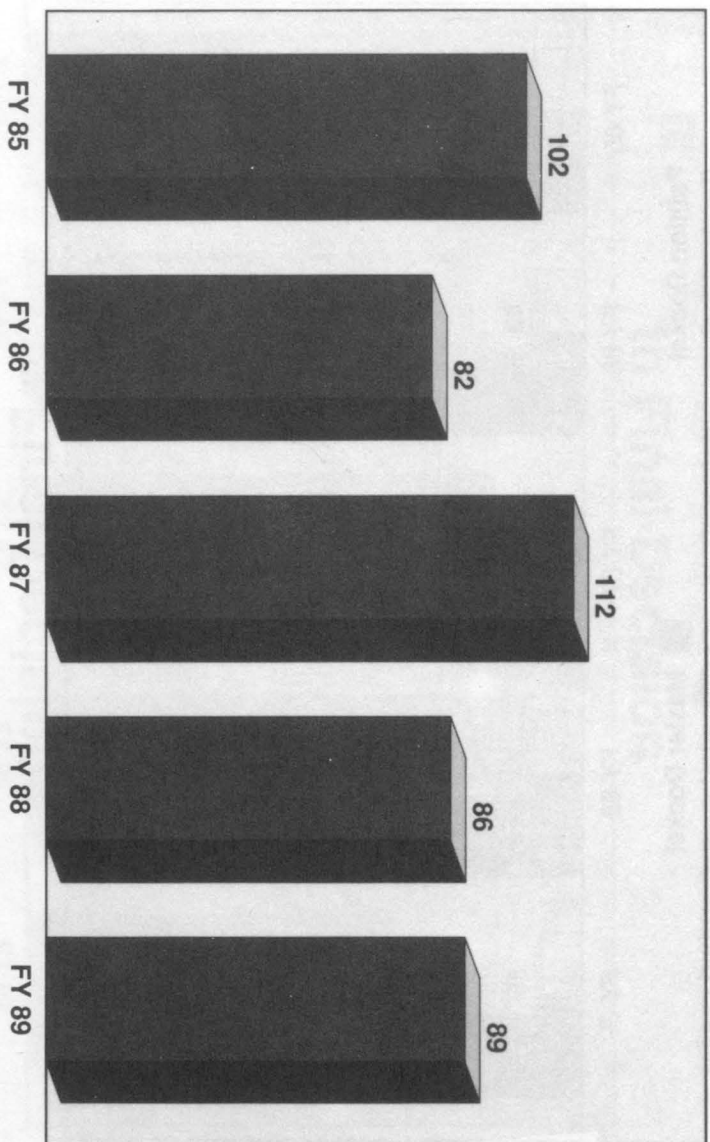
Days from Oral Argument to Final Decision



Days from Petition Filing to Final Decision



Oral Arguments Per Year



APPENDIX H

REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY OCTOBER 1, 1988 TO SEPTEMBER 30, 1989

During fiscal year 1989, the Office of The Judge Advocate General continued to monitor the proceedings of courts-martial, to review and to prepare military publications and regulations, and to develop and draft changes to the Manual for Courts-Martial and the Uniform Code of Military Justice.

MILITARY JUSTICE STATISTICS AND U.S. ARMY JUDICIAL ACTIVITIES

During fiscal year 1989, the court-martial rates show an Army-wide decrease in the number of courts-martial. The total number of persons tried by all types of courts-martial in fiscal year 1989 was 3.9% lower than for 1988. This overall decrease reflects primarily a decrease of 8.0% in special courts-martial empowered to adjudge a bad-conduct discharge (BCD), and a 3.2% decline in summary courts-martial. There was a 1.7% increase in non-BCD special courts-martial, and a 2.8% increase in the number of general courts-martial. The overall conviction rate for fiscal year 1989 was 93.0% which represents a slight decrease from the 95.6% conviction rate for the previous fiscal year. The decrease in the overall courts-martial rate for the last few years is consistent with the U.S. Army Court of Military Review having 282 fewer cases referred for its review and a 10.9% decrease in the number of cases reviewed (from 1966 to 1752) during fiscal year 1989.

STATISTICAL SUMMARY: FISCAL YEAR 1989 (See table insert, attached)

U.S. ARMY LEGAL SERVICES AGENCY

The U.S. Army Legal Services Agency includes the U.S. Army Judiciary, the Government Appellate Division, the Defense Appellate Division, the Trial Defense Service, the Trial Counsel Assistance Program, the Contract Appeals Division, the Regulatory Law Office, Patents, Copyrights and Trademarks Division, the Litigation Division, the Procurement Fraud Division, the Environmental Law

Division and the Professional Recruiting Office. The latter seven sections have no function related to the U.S. Army Judiciary and its courts-martial mission. The Contract Appeals Division and the Regulatory Law Office represent the Army and the Department of Defense in certain contractual and regulatory disputes before commissions and boards. The Patents, Copyrights and Trademarks Division controls and coordinates the named subject area and related activities of the Department of the Army. The Litigation Division is responsible for representing Army interests in defensive and affirmative Federal civil litigation. The Procurement Fraud Division is responsible for asserting and monitoring the prosecution of government remedies against fraud and irregularities in the Army acquisition process. The Environmental Law Division, is responsible for providing advice and guidance to the ARSTAF on environmental legal issues, as well as serving as the agency counsel in environmental litigation in coordination with the Office of the General Counsel and Department of Justice. The Professional Recruiting Office coordinates the recruitment of lawyers in the Army. An Information Management Office facilitates automation of the Agency.

U.S. ARMY JUDICIARY

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

U.S. ARMY TRIAL DEFENSE SERVICE

During fiscal year 1989, the United States Army Trial Defense Service (USATDS) continued to provide high-quality, professional defense counsel services to soldier clients world-wide. USATDS counsel represented 2259 clients at proceedings conducted under Article 32, UCMJ; 1606 clients at general courts-martial; 1054 clients at special courts-martial; and 1460 clients at administrative boards. USATDS counsel advised 73,068 clients regarding nonjudicial punishment under Article 15, UCMJ, and 29,260 clients regarding a variety of administrative separation actions.

USATDS continued to send a counsel to the Sinai in support of the Multi-National Force while other counsel participated in command training exercises and numerous deployments. Additionally, USATDS continued to operate cross-service agreements with judge advocates of other U.S. Armed Forces to provide mutual support at specified locations overseas.

TRIAL COUNSEL ASSISTANCE PROGRAM

During fiscal year 1989, the U.S. Army Trial Counsel Assistance Program (TCAP) continued to serve as a source of information, advice and training for trial counsel world-wide. While this support is directed towards Army trial counsel, support has also been provided to trial counsel from the Air Force, Coast Guard, Marines, and Navy. During the past year, TCAP attorneys responded to nearly 1000 requests for assistance, participated in three major special prosecutions, and provided written guidance on practically every area of criminal law and trial advocacy. Additionally, TCAP attorneys conducted a total of sixteen two-day training seminars, eleven in the United States, four in the Federal Republic of Germany, and one in Korea. TCAP also provided instructional support for trial counsel attending the U.S. Army Europe's Criminal Law Conferences and the Trial Advocacy Courses at the Army's Judge Advocate General's School. Throughout the year, TCAP provided training for approximately 450 counsel. Over 350 copies of the TCAP Training Memorandum are distributed each month. This publication combines information on recent criminal law developments with practical advice on how trial counsel can utilize these developments. A new section of the Memo provides actual advocacy examples which serve as a teaching device and can be modified and utilized by trial counsel in actual cases. A more detailed examination of criminal law developments is provided through TCAP's Trial Counsel Forum portion of *The Army Lawyer*.

SIGNIFICANT MILITARY JUSTICE ACTIONS

Actions involving military justice handled by the Criminal Law Division, Office of The Judge Advocate General, included: evaluating and drafting legislation, executive orders, pamphlets and regulations affecting the operation of the Army and the Department of Defense; monitoring the administration of military justice to include military corrections, the Army's drug testing program, professional responsibility of attorneys and expanded UCMJ jurisdiction over reservists; rendering opinions for the Army Staff; reviewing various aspects of criminal cases for action by the Army Secretariat and Staff; and evaluation of ongoing major projects. During fiscal year 1989, the Criminal Law Division responded to 142 White House inquiries, 252 Congressional inquiries, 6 requests for legal opinions from the Army Board for the Correction of Military Records, 451 letters relating to military justice matters written to the Secretary of Defense, Secretary of the Army, Chief of Staff of the Army, and The Judge Advocate General, and 24 other miscellaneous inquiries. The office also processed 36 clemency petitions

under Article 74, Uniform Code of Military Justice (UCMJ), 21 officer dismissal cases for Secretary of the Army approval, 9 requests for Presidential pardon and 22 Freedom of Information Act/Privacy Act requests.

CHANGE OF MILITARY JUSTICE REGULATION

Army Regulation (AR) 27-10, Military Justice, was revised effective February 16, 1989. This regulation now contains a new Chapter 22, The Trial Counsel Assistance Program (TCAP), providing a regulatory basis for the program. The change also clarified the procedures for submitting post-trial clemency requests under Article 74, UCMJ.

JOINT-SERVICE COMMITTEE ON MILITARY JUSTICE

The Judge Advocates General and General Counsel of the Department of Transportation established the Joint-Service Committee on Military Justice on August 17, 1972. The Army, Navy, Air Force, Marine Corps, and Department of Transportation (Coast Guard) provide representatives and a nonvoting representative is provided by the U.S. Court of Military Appeals. The Joint-Service Committee on Military Justice primarily prepares and evaluates proposed amendments and changes to the Uniform Code of Military Justice and Manual for Courts-Martial. The Committee also serves as a forum for the exchange of ideas relating to military justice matters among the services.

The public comment period for the third annual review of the Manual for Courts-Martial concluded on October 5, 1987. The Joint-Service Committee considered the comments received, made minor modifications to proposals contained in the review, and submitted a revised proposed executive order to the Office of the General Counsel, Department of Defense on February 19, 1988. In May 1988, the proposed executive order was submitted to the Office of Management and Budget for evaluation and interdepartmental coordination. In November 1989, the proposed executive order was returned to the Office of the General Counsel, Department of Defense to make modifications to the proposed executive order. The modifications were made and the proposed executive order was returned for approval.

The public comment period for the fourth annual review of the Manual for Courts-Martial concluded on September 26, 1988. The Joint-Service Committee considered the comments received and, on October 21, 1988, submitted a revised proposed executive order to the Office of the General Counsel, Department of Defense. In November 1988, the proposal was coordinated with the services, and

on November 25, 1988, the proposal was submitted to the Office of Management and Budget for evaluation and interdepartmental coordination. In October 1989 the Joint-Service Committee decided to combine the fourth and fifth annual reviews of the Manual for Courts-Martial into a single executive order when coordination on the fifth annual review has been completed.

The fifth annual review for the Manual for Courts-Martial was completed on April 20, 1989. The proposed amendments include: authorization for either the defense or government to initiate pretrial agreements; a requirement for defense notice of intent to raise the defense of innocent ingestion; an amendment granting the government independent discovery rights; clarification of criteria to review pretrial confinement pending government appeal; an increase of the maximum punishment for attempted murder to life imprisonment; changes to the speedy trial rule requiring the government to process a case in 120 days, from referral to arraignment, unless a pretrial delay is granted; and an amendment to the Military Rules of Evidence to prohibit admission into evidence of the results of polygraph examinations. On April 22, 1989, a proposed executive order was forwarded to Office of General Counsel, Department of Defense. During the period of August 1989 to October 1989, the Joint-Service Committee made additional amendments to the speedy trial rules contained in R.C.M. 707. In November 1989 an amended proposed executive order was submitted to Office of the General Counsel, Department of Defense. The public comment period for this proposal began on December 7, 1989.

The Defense Authorization Act for Fiscal Years 1990 and 1991 contained several important changes to the Uniform Code of Military Justice. Significant changes include: an increase in the size of the Court of Military Appeals from three to five judges effective October 1, 1990; provisions to permit senior CMA judges and Article III federal judges to serve in place of a disabled CMA judge; a requirement for the President to prescribe standards and procedures to investigate military trial and appellate judges; and the revision and restatement of the charter of the United States Court of Military Appeals in a new subchapter of the Uniform Code of Military Justice.

FOREIGN CRIMINAL JURISDICTION

As executive agent for the Department of Defense, the Department of the Army, through International Affairs Division, Office of The Judge Advocate General, maintains information concerning the exercise of foreign criminal jurisdiction over U.S. personnel.

During the reporting period December 1, 1987, through November 30, 1988, a total of 149,150 United States personnel, military

and civilian, were charged with offenses subject to the primary or exclusive jurisdiction of foreign tribunals. A total of 133,267 of these offenses were charged against military personnel. Of this number 117,696 of the charges against military personnel were subject to exclusive foreign jurisdiction. Nonetheless, foreign authorities released 842 of the exclusive foreign jurisdiction offenses to United States military authorities for appropriate disposition.

The rest of the military offenses subject to foreign jurisdiction, totaling 15,571 offenses, were concurrent jurisdiction offenses involving alleged violations of both United States military law and foreign law over which the foreign country had the primary right to exercise jurisdiction. United States military authorities obtained a waiver of primary foreign jurisdiction in 14,028 of these incidents, for a world-wide waiver rate of 90.1 percent.

Foreign authorities reserved for their disposition a total of 118,397 offenses allegedly committed by military personnel. A total of 116,784 of these offenses were relatively minor (simple assault, disorderly conduct, and traffic offenses). Traffic violations comprised 99.4 percent, or 116,143 of these offenses.

A total of 15,883 civilian employees and dependents were charged with offenses subject to foreign jurisdiction. As civilians are not subject to trial by courts-martial in peacetime, the United States had no effective jurisdiction over these offenses. Nonetheless, foreign authorities released 328 of these offenses, or 2.1 percent of the total, to United States military authorities for administrative or other appropriate disposition.

There were 127,633 final results of trial, i.e., final acquittals or final convictions for military, civilian and dependents. Of this number 139 (.1 percent of the final results) were acquittals and 127,494 (99 percent) were sentences to a fine or reprimand. The remainder of the final results of trial consisted of 55 sentences to confinement and 125 suspended sentences to confinement.

LITIGATION

Civil litigation against the Department of the Army and its employees continued to increase during fiscal year 1989. Suits requiring the civilian courts to interpret the Uniform Code of Military Justice, and the validity of actions taken pursuant to it, constitute a small but significant portion of the litigation. A majority of these cases seek collateral review of courts-martial proceedings. Most of the other cases present challenges to the general conditions of confinement, specific actions taken by confinement facility personnel, and parole and clemency proceedings.

EDUCATION AND TRAINING

During fiscal year 1989, The Judge Advocate General's School, located in Charlottesville, Virginia, provided legal education to lawyers of the military services and other federal agencies. Forty-one resident courses were conducted with 3,486 students in attendance. Courses were attended by 1,506 Army, 93 Navy, 104 Marine, 243 Air Force, 30 Coast Guard, 374 Army Reserve, 81 Army National Guard Officers, 108 enlisted soldiers, 929 civilian, and 18 international military students. Three Basic Course Classes, the 117th, 118th, and 119th, graduated a total of 207 Judge Advocate General's Corps officers.

The Judge Advocate General's School continues to be the only government entity statutorily authorized (10 U.S.C. §4315) to confer the degree of Master of Laws (LL.M.) in Military Law. Recognizing the demanding scholastic standards of the Graduate Program, in August 1988 the American Bar Association accepted its Accreditation Committee's site evaluation recommendation and concurred in the School's awarding of the LL.M. in Military Law.

On May 18, 1989, the 57 students of the 37th Graduate Class received The Judge Advocate General's School Master of Laws in Military Law. In addition to 47 Army judge advocates, the class consisted of five Marines, one Navy, and four international military students. The 38th Graduate Class began on July 31, 1989. The class contains 44 Army, eight Marines, two Navy, one Army National Guard, two Army Reserve, and four international military students.

During fiscal year 1989, the School continued to provide senior officers with legal orientations prior to their assumption of command. Twenty-eight general officers attended General Officer Legal Orientation Courses, and 210 battalion and brigade command designees attended one of four resident Senior Officers Legal Orientation Courses. Additionally, instructors from the School participated in twelve Pre-Command Courses conducted at Fort Leavenworth, Kansas, for approximately 840 battalion and brigade command designees. The School also provided orientations on Army legal issues to a member of the House of Representatives and two Senate staff members.

The Criminal Law Division sponsored five resident continuing legal education (CLE) courses in fiscal year 1989. The Criminal Trial Advocacy Course was presented twice, in November and February, the Procurement Fraud Course in November, the Military Judges Course in May-June, and the Criminal Law New Developments Course in August. Outstanding guest speakers for these courses included the Honorable Kathleen A. Buck, General Counsel, Department of Defense; Mr. Joe B. Brown, United States Attor-

ney for the Middle District of Tennessee; Mr. Edward F. Sulzbach, Special Agent, Behavioral Science Unit, Federal Bureau of Investigation Academy; Colonel Francis A. Gilligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army; and noted trial attorneys Gary A. Meyers and Vaughan E. Taylor. In addition to sponsoring these CLE courses, three nonresident courses were presented in Germany in October, and nonresident instruction was provided in five different countries during the Pacific Command (PACOM) trip in September.

The International Law Division sponsored six resident CLE courses, each lasting one week, in fiscal year 1989. The Law of War Workshop, held three times, continued to provide practical law of war training to legal officers from all four armed forces and to several international military students. The 10th Legal Aspects of Terrorism Course offered by the Division continued the tradition, established in prior courses, of augmenting the School's instruction with presentations by experts from the Department of Defense, the Department of State, the Department of Justice, and the Federal Bureau of Investigation. A representative of the Ministry of Defense of the Federal Republic of Germany attended the course and also gave a presentation on terrorism counteraction in the Federal Republic. All involved actively discussed the various legal issues confronted during terrorism counteraction operations, whether conducted domestically or overseas. The 4th and 5th Judge Advocate and Military Operations Seminars and the second quarter International Law instruction to the 37th Graduate Course presented the concept of Operational Law (OPLAW) as a fully evolved legal discipline focusing on those legal issues, both domestic and international, associated with the preparation for and deployment of U.S. forces overseas, in both peacetime and combat environments. In responding to other instructional requirements, the Division sent two instructors to Germany to assist in the presentation of the U.S. Army Europe Operational Law course and one instructor to the U.S. Army Europe International Law Conference. All courses sponsored by the Division continued to stress the practical application of International Law, an approach designed to prepare judge advocates to serve as valuable members of a commander's operations team.

The Contract Law Division conducted 13 continuing legal education (CLE) courses in fiscal year 1989. The courses sponsored by the Division provided basic and advanced instruction in Government contract law and in fiscal law and policy. The courses were designed primarily to meet the needs of Government lawyers, but they also benefited contracting officers, comptrollers, program managers, and others involved in the federal acquisition process, from novices to experienced professionals. A wide variety of classes

was offered at these courses to ensure that instruction was available in Government contract and fiscal law as practiced at military installations, at commands devoted to production of supplies and weapon systems, at commands dedicated to research and development, and at activities involved in contract disputes and litigation. The two-week Contract Attorneys Course was given three times to a total of 382 students. The annual Government Contract Law Symposium was attended by 181 senior military and civilian lawyers from throughout the Government. The Fiscal Law Course was offered twice to a total of 272 students. One Installation Contracting Course was conducted for 88 attorneys practicing at military posts worldwide. The Program Managers' Attorneys Course attracted 36 attorneys who advise managers of major weapon systems programs. The Advanced Acquisition Course offered in-depth instruction in specialized subject areas to 105 experienced Government contract lawyers. The Contract Claims, Litigation, and Remedies Course featured matters involving contractual disputes and remedies for the 95 litigators who attended. In addition to the contract and fiscal law CLE courses, the Contract Law Division provided instruction to 207 members of three Judge Advocate Officer Basic Courses and to 57 members of the resident Judge Advocate Officer Graduate Course. The Division's instructors presented classes on contract and fiscal law and policy at ten Reserve Component Technical Training sites within the U.S. They also presented three overseas continuing legal education courses: fiscal law courses were given at Fort Shafter, Hawaii, and to the Corps of Engineers in Europe, and the annual CLE course on new developments in contract law was again taught to military and civilian personnel stationed in Europe.

The Administrative and Civil Law Division conducted six continuing legal education courses, including two presentations of the Legal Assistance Course, two presentations of the Federal Labor Relations Course, the Administrative Law for Military Installations Course, and the Federal Litigation Course. In addition, instructors presented classes at the Tax Conference in Korea and the Administrative Law, Tax, and Legal Assistance Conferences in Europe. One instructor taught installation commanders during five separate Army Installation Management Courses at Fort Lee, Virginia. The Division also provided an instructor for the PACOM CLE trip, presenting instruction at five locations. One instructor from the Administrative and Civil Law Division taught classes at the Army Management Staff College. One instructor also taught environmental law courses at Maxwell Air Force Base as part of an Air Force course and participated in an environmental law course sponsored by the Army's Office of The Judge Advocate General.

The Legal Assistance Branch of the Administrative and Civil Law Division revised and updated its publications, including the *Legal Assistance Wills Guide*, the *Legal Assistance Consumer Law Guide*, the *Legal Assistance Notarial Guide*, the *Legal Assistance Office Administration Guide*, the *Legal Assistance Deployment Guide*, the *Legal Assistance Real Property Guide*, the *Model Tax Assistance Program*, the *Tax Information Series*, and the *Legal Assistance Attorneys Federal Income Tax Supplement*. The *Legal Assistance Family Law Guide* was revised as well, and the new edition was expanded significantly to include child support guidelines, instructions, and worksheets from all States. Members of the Branch published two major articles and extensive monthly practice notes in *The Army Lawyer*, and one scholarly paper in the *Military Law Review*. Two articles were also prepared for publication in an American Bar Association magazine. A member of the Branch also addressed five civilian continuing legal education courses throughout the Nation to train State agents and attorneys on methods for enforcing family support obligations against military personnel.

The Judge Advocate Guard and Reserve Affairs Department (GRA) sponsored several resident courses for Reserve Component judge advocates in fiscal year 1989. Approximately 207 Army Reserve and National Guard judge advocates attended Triennial Training between 19 and 30 June 1989. This year, the Trial, Defense, and Military Judge Teams were trained. Phase II of the Judge Advocate Officer Advanced Course was attended by 127 students during this same period. The 2072nd U.S. Army Reserve Forces School in Philadelphia, Pennsylvania, provided administrative support for both courses. The Department also sponsored the CLE (On-Site) Training Program. Between October 1988 and May 1989, the School provided CLE to 2487 officers in 22 regional population centers throughout the United States. Attendees represented all services and components. Interaction of Active and Reserve Component judge advocate officers in the on-site program continues to be invaluable. The last major training program hosted by GRA was the 1989 Judge Advocate General's Reserve Component Workshop during 11-14 April 1989. One hundred and fifty-seven senior Active and Reserve Component judge advocates met to discuss the significant legal and military issues facing the Reserve Components. Guest speakers at the workshop included Colonel (Ret) Frederick Wiener, who discussed the Tricentennial of the first Mutiny Act, and MG John S. Peppers, J-5, FORSCOM. GRA also hosted a new training program, the ARNG State Area Command Judge Advocate Course. This course was held at TJAGSA from 17-21 July 1989 and was attended by judge advocates from ten STARC headquarters. The week long course was designed to update

STARC JA's on legal issues that will occur during mobilization as well as other issues of mutual concern.

MAJOR PROJECTS

The School hosted the 1988 Judge Advocate General's Annual Continuing Legal Education Training Program during October 4-7, 1988. Over 174 senior judge advocates from posts throughout the world conferred on areas of interest and discussed recent developments in 17 areas of military law. Guest speakers included the Honorable John W. Shannon, Assistant Secretary of the Army; Professor Mark H. Moore, Guggenheim Professor, Kennedy School of Government, Harvard University; and the Honorable Chase Untermeyer, Assistant to the President and Director of Presidential Personnel.

A major development in operational law was a decision by the Secretary of the Army to create the Center for Law and Military Operations at the School. The International Law Division will administer the Center, conduct symposia, publish articles, and provide resource material on operational law. The first symposium is scheduled for April, 1990.

The Sixth Gilbert A. Cuneo Lecture in Government Contract Law was presented on January 9, 1989, by the Honorable Griffin B. Bell, former United States Attorney General. The Cuneo Lecture was entitled "Ethics and Professionalism in Federal Service."

On January 11, 1989, the School instituted the First Annual Major Frank B. Creekmore Lecture. The inaugural lecture was delivered by Mr. Rhett Dawson, Assistant to the President for Operations and former Staff Director to the President's Blue Ribbon Commission on Defense Management (better known as the Packard Commission).

On March 23, 1989, the 18th Annual Kenneth J. Hodson Lecture in Criminal Law was presented by Mr. Arthur "Cappy" Eads, District Attorney of the 27th District of Texas and Chairman of the Board of the National District Attorneys Association. Mr. Eads gave an outstanding lecture on Military and Civilian Prosecution Coordination.

The Thirteenth Charles L. Decker Lecture was given on April 10, 1989, by Judge William W. Wilkins, Jr. His lecture was entitled "*Mistretta v. United States*—Its Impact."

On May 4, 1989, the Sixth Waldemar A. Solf Lecture in International Law was presented by Judge Abraham D. Sofaer, the Legal Advisor for the Department of State. His presentation, "The Legal Basis for Use of Force in Response to Terrorism," was well received.

The Developments, Doctrine and Literature Department's Combat Developments section initiated the fielding process for two JAGC Tables of Organization and Equipment (TOE). The Judge Advocate General Service Organization (JAGSO), redesigned under TOE 27512L000, replaces the current JAGSO structure. The redesigned JAGSO TOE enhances the Corps' ability to provide required legal assets to deploying TOE units without embedded legal assets and to corps and echelons above division to complement the JAGC's mission of providing full legal services on the AirLand Battlefield. The Legal Services Command, TOE 27602L000, is a new organization. It will convert Table of Distribution and Allowance (TDA) requirements to TOE requirements. It will provide defense counsel, military judges and other legal assets on the AirLand Battlefield. Manpower Requirements Criteria (MARC) studies for MOS 71D, Legal Specialist; MOS 71E, Court Reporter; and MOS 550A, Legal Administrator, were completed and approved by HQDA. The MARC study for AOC 55A, Judge Advocate, has been reviewed, coordinated, and forwarded to TRADOC. The Judge Advocate General has directed the development of a JAGC Modernization Master Plan. It will be a comprehensive study of all JAGC doctrine, training, organization and equipment. The plan will be milestone driven and guide the JAGC through AirLand Battle-Future and into Army 21. Development of FM 27-100, *Judge Advocate Operations on the AirLand Battlefield*, was continued from the prior fiscal year. The FM will provide general guidance to the supported commander and staff on the organization, personnel and services of the JAGC. It also will provide a doctrinal basis for staff judge advocates and judge advocates on how, when, and where legal services are provided.

A new edition of DA Pamphlet (Pam) 27-153, *Contract Law*, was issued on August 15, 1989. New editions of DA Pam 27-10, *Handbook for Trial Counsel and Defense Counsel*, and DA Pam 27-173, *Trial Procedure*, will soon be issued. Revisions of several other publications are ongoing. A total of 37 instructional deskbooks are now available to attorneys in the field through the Defense Technical Information Center. Articles of interest to military attorneys continue to be distributed to the field through the DA Pam 27-100-series, *Military Law Review*, and the DA Pam 27-50 series, *The Army Lawyer*.

PERSONNEL, PLANS AND POLICIES

Including law students participating in the Funded Legal Education Program, the strength of the Judge Advocate General's Corps at the end of the fiscal year 1989 was 1756. Representing minority groups were 105 blacks, 31 Hispanics, 21 Asian and Native Ameri-

cans, and 224 women. The fiscal year 1989 end strength compares with an end strength of 1759 in fiscal year 1988, 1820 in fiscal year 1987, and 1825 in fiscal year 1986. The grade distribution of the Corps at the end of the fiscal year was four general officers, 131 colonels, 218 lieutenant colonels, 353 majors, 985 captains, and 77 first lieutenants. Forty-two officers (29 captains and 13 first lieutenants) participated in the Funded Legal Education Program. There were also 65 warrant officers.

To ensure selection of the best qualified candidates for initial commission, career status, and The Judge Advocate General's Officer Graduate Course, advisory boards convened under The Judge Advocate General's written instructions several times during the year.

In November 1988, a selection board selected 18 active duty commissioned officers to commence law school under the Funded Legal Education Program.

Sixty-seven judge advocate officers completed the following service schools:

U.S. Army War College.....	2
National War College.....	2
Industrial College of the Armed Forces.....	1
U.S. Army Command—General Staff College.....	10
Armed Forces Staff College.....	2
The Judge Advocate Officer Graduate Course.....	47
Defense Project Manager's Course.....	3

During fiscal year 1989, five officers completed fully funded study for LL.M. degrees in specialized fields of law. As a result of the Defense Officer Personnel Management Act (DOPMA) newly appointed judge advocates accessed for the fiscal year received commissions as first lieutenants. The Judge Advocate General's Corps is a separate competitive category, and selects and promotes its officers based on Judge Advocate General's Corps grade vacancies as they occur.

WILLIAM K. SUTER

Major General, USA

Acting The Judge Advocate General

Period: FISCAL YEAR 1989

PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)

[A]

TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
GENERAL	1,585	1,500	85	-2.8%
BCD SPECIAL [B]	850	788	62	-8.0%
NON-BCD SPECIAL	184	148	36	+1.7%
SUMMARY	1,365	1,290	75	-3.2%
OVERALL RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT				-3.9%

PART 2 - DISCHARGES APPROVED

[C]

GENERAL COURTS-MARTIAL (CA LEVEL)			
NUMBER OF DISHONORABLE DISCHARGES [D]		486	
NUMBER OF BAD CONDUCT DISCHARGES		790	
SPECIAL COURTS-MARTIAL (SA LEVEL)			
NUMBER OF BAD CONDUCT DISCHARGES		489	

PART 3 - RECORDS OF TRAIL RECEIVED FOR REVIEW BY JAG

FOR REVIEW UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL	1333
FOR REVIEW UNDER ARTICLE 66 - BCD SPECIAL COURTS-MARTIAL [E]	494
FOR EXAMINATION UNDER ARTICLE 69 - GENERAL COURTS-MARTIAL	161

PART 4 - WORKLOAD OF THE U.S. ARMY COURT OF MILITARY REVIEW

TOTAL ON HAND BEGINNING OF PERIOD	221 [F]
GENERAL COURTS-MARTIAL [G]	
BCD SPECIAL COURTS-MARTIAL	
REFERRED FOR REVIEW	1786 [H]
GENERAL COURTS-MARTIAL	
BCD-SPECIAL COURTS-MARTIAL	
TOTAL CASES REVIEWED	1752 [H]
GENERAL COURTS-MARTIAL	
BCD-SPECIAL COURTS-MARTIAL	
TOTAL PENDING AT CLOSE OF PERIOD	255 [F]
GENERAL COURTS-MARTIAL [G]	
BCD-SPECIAL COURTS-MARTIAL	
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD	-10.9%

PART 5 - APPELLATE COUNSEL REQUEST BEFORE REVIEW

U.S. ARMY

COURT OF MILITARY

NUMBER	1822
PERCENTAGE	99.5%

PART 6 - U.S. COURT OF MILITARY APPEALS ACTIONS

PERCENTAGE OF COMR REVIEWED CASES FORWARDED TO USCOMA	50.5%
PERCENTAGE OF INCREASE(+)/DECREASE(-) OVER PREVIOUS REPORTING PERIOD	- 4.6%
PERCENTAGE OF TOTAL PETITIONS GRANTED	6.5%
PERCENTAGE OF INCREASE(+)/DECREASE(-) OVER PREVIOUS REPORTING PERIOD	- .4%
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY COMR	3.3%
RATE OF INCREASE(+)/DECREASE(-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD	+ .1%

PART 7 - APPLICATIONS FOR RELIEF, ARTICLE 69

PENDING AT BEGINNING OF PERIOD		9	
RECEIVED		59	
DISPOSED OF		47	
GRANTED	6		
DENIED	37		
NO JURISDICTION [I]	3		
WITHDRAWN	1		
TOTAL PENDING AT END OF PERIOD		21	

PART 8 - ORGANIZATION OF COURT

TRIALS BY MILITARY JUDGE ALONE			
GENERAL COURTS-MARTIAL		1,013	
SPECIAL COURTS-MARTIAL		686	
TRIALS BY MILITARY JUDGE WITH MEMBERS			
GENERAL COURTS-MARTIAL		572	
SPECIAL COURTS-MARTIAL		348	

PART 9 - COMPLAINTS UNDER ARTICLE 138

NUMBER OF COMPLAINTS	53	
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PART 10 - STRENGTH

AVERAGE ACTIVE DUTY STRENGTH	762,233	
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PART 11 - NONJUDICIAL PUNISHMENT (ARTICLE 15)

NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED	83,415	
RATE PER 1,000	109.44	
RATE OF INCREASE(+)/DECREASE(-) OVER PREVIOUS PERIOD	-9.1	

PAGE 2 OF 2

- [A] Part 1 includes only original trials, not rehearings, etc.
 [B] Specifically empowered by GCM convening authorities to impose BCD.
 [C] Part 2 necessarily is based on records received for review rather than all and only cases in Part 1.
 [D] In addition, 30 dismissals of commissioned or warrant officers were approved.
 [E] Does not include 4 cases in which appellate review was waived.
 [F] Includes only briefed cases at issue in panels.
 [G] Cases are not separately counted by type of court.
 [H] Does not include 7 cases withdrawn by accused from appellate review.
 [I] Included applications filed out of time with good cause not shown.

ANNUAL REPORT
of
THE JUDGE ADVOCATE GENERAL OF THE NAVY
pursuant to the
Uniform Code of Military Justice
FISCAL YEAR 1989
SUPERVISION OF THE ADMINISTRATION OF
MILITARY JUSTICE

In compliance with the requirement of Article 6(a), Uniform Code of Military Justice, the Judge Advocate General and the Deputy Judge Advocate General made frequent inspections of legal offices in the United States, Europe, and the Far East in supervision of the administration of military justice.

ARTICLE 69(a), UCMJ, EXAMINATIONS

One hundred and one general court-martial records of trial, not statutorily eligible for automatic review by the Navy-Marine Corps Court of Military Review, were examined in the Office of the Judge Advocate General in fiscal year 1989. This represents a 60% increase over fiscal year 1988. Eleven cases required corrective action by the Judge Advocate General.

ARTICLE 69(b), UCMJ, APPLICATIONS

In fiscal year 1989, fifty-five applications under Article 69(b), Uniform Code of Military Justice, were received for review, equaling the number of applications received in fiscal year 1988. Of these, forty-seven applications were denied on the merits, while relief was granted in whole or in part in eight cases. No cases are pending review.

ARTICLE 73, UCMJ, PETITIONS

In fiscal year 1989 one petition for new trial was reviewed by the Office of the Judge Advocate General. That petition was denied.

ARTICLE 74(b), UCMJ, PETITIONS

Four petitions to substitute an administrative form of discharge for a punitive discharge or dismissal executed in accordance with the sentence of a court-martial were received for consideration by the Secretary of the Navy in fiscal year 1989. One petition was granted, two petitions were denied, and one petition is pending review.

APPELLATE GOVERNMENT DIVISION

The 13 officers assigned to the Appellate Government Division filed a total of 1,092 pleadings with the Navy-Marine Corps Court of Military Review and the U.S. Court of Military Appeals. This number excludes cases which were submitted to the courts without specific assignment of error. Additionally, the Division filed 3 briefs in opposition to petitions for writs of certiorari with the U.S. Supreme Court.

The Trial Counsel Assistance Program (TCAP) established within the Appellate Government Division, provides a central coordinating point to assist trial counsel in the effective prosecution of courts-martial. Three appellate counsel are detailed to implement this program. Prompt assistance (usually same day) is provided in response to telephone calls from trial counsel in the field requesting advice or information about cases currently, or soon to be, in trial. Additional assistance is provided through presentations, newsletters, a computer bulletin board, and a digest of major unpublished decisions. Field calls—in which a team concept is used to provide professional advice and assistance—totalled 922 for the year, an average of 77 per month, up from an average of 47 per month in fiscal year 1988 and 42 per month in fiscal year 1987.

Presentations:

a. October 1988—Director, Appellate Government Division gave a presentation to a combined Army-Navy Reserve Judge Advocate Conference at Minneapolis, MN.

b. January 1989—All members of Appellate Government Division participated in the first annual 2-day appellate law workshop at Andrews AFB.

c. April 1989—Deputy Director, Appellate Government Division presented an update to the Lawyer class, Naval Justice School, concerning current appellate issues and common trial errors.

d. The Deputy Directors, of both Appellate Defense Division and Appellate Government Division, lead a 4 member team to 5 military installations on the West Coast in the presentation of one-day trial advocacy seminars.

The Appellate Government Division also provided training during the fiscal year to reservists tasked to support the Division.

APPELLATE DEFENSE DIVISION

Appellate Defense Practices: The 18 officers assigned to the Appellate Defense Division reviewed a total of 4,362 cases in fiscal year 1989. Of that number, 492 cases were submitted to the U.S. Navy-Marine Corps Court of Military Review with specific assignments of error. The Division also raised specific assignments of error in 135 cases submitted to the U.S. Court of Military Appeals. Additionally, the Division submitted 6 writs of certiorari to the United States Supreme Court and argued 15 writs before the U.S. Court of Military Appeals and the Navy-Marine Corps Court of Military Review.

Trial Defense Training: The Appellate Defense Division continued to present its one-day trial advocacy seminar entitled Trial Advocacy and New Developments in Military Law. During the past year, the course has been presented to 7 Naval Legal Service Offices (NLSOs) and 3 Marine Corps Legal Services Support Sections (LSSS's) in the United States. Follow-on trips are now being planned to present an updated version of the course, taught by 4 of the Division's most experienced officers, to Navy and Marine Corps trial practitioners throughout CONUS.

Although the course is presented principally by the Appellate Defense Division, the materials and presentations are "content neutral" and are intended for all judge advocates who are in any way involved in litigating or reviewing courts-martial. The topics and problems selected for discussion are taken directly from cases reviewed by the Division, and cover such areas as speedy trial, search and seizure, extraordinary relief, post-trial review, child-abuse litigation, use of expert witnesses, residual hearsay, and extrinsic misconduct evidence.

Additional Presentations:

a. April, 1989—Director, Appellate Defense Division presented an update to the Lawyer class, Naval Justice School, concerning current appellate issues and common trial errors.

b. May, 1989—Director, Deputy Director, and Senior Department Head gave a one-half day presentation to the Joint Army-Navy Reserve Weekend Training in Columbus, Ohio.

c. June, 1989—Director, Appellate Defense Division gave presentations to a Military Justice Seminar in Philadelphia, PA, co-sponsored by the Naval Legal Service Office and the Federal Bar Association.

The Appellate Defense Division continued to provide extensive structured training during the year to the 25 Navy and 5 Marine Reservists who support the Division.

NAVY-MARINE CORPS TRIAL JUDICIARY

The Navy-Marine Corps Trial Judiciary provided military judges for 956 general courts-martial during fiscal year 1989, an increase of 76 general courts-martial from the fiscal year 1988 level of 880. In fiscal year 1989, 70% of these GCMs were tried by military judge alone.

There were 5,607 special courts-martial conducted during fiscal year 1989, a decrease of 301 special courts-martial from the fiscal year 1988 level. In fiscal year 1989, 93% of these special courts-martial were tried by military judge alone, the same percentage as in fiscal year 1988.

During fiscal year 1989, total in-court hours for all judges was 23,359 hours, which is 1,600 hours more than fiscal year 1988. This computes to about 2.7 hours more in-court time per month per active duty judge. Travel increased 342 hours in fiscal year 1989, from 5,952 hours for fiscal year 1988 to 6,294 hours for fiscal year 1989.

1. Military Judges Attending Continuing Legal Education/ Seminars/Lectures/Meetings/Conferences.

- a. East Coast Military Judges' Meeting
Fleet Training Center, Atlantic, Dam Neck, VA
—26 active-duty Navy and Marine Corps judges; 4 reserve Navy and Marine Corps judges; Chief Judges from the Air Force and Army; 1 active-duty Air Force judge
- b. West Coast Military Judges' Meeting
Naval Amphibious Base, Coronado, CA
—21 active-duty Navy and Marine Corps judges; 16 reserve Navy and Marine Corps judges; 1 active-duty Air Force judge
- c. Fifteenth Interservice Military Judges' Seminar
Maxwell Air Force Base, Montgomery, AL
—9 active-duty Navy and Marine Corps judges; 2 reserve Navy judges
- d. National Judicial College, Reno, NV
—Constitutional Criminal Procedures
—2 active-duty Marine Corps judges
—Medical & Scientific Evidence
—2 active-duty Marine Corps judges
- e. Military Judges' Course
U.S. Army JAG School, Charlottesville, VA

- 9 active-duty Navy and Marine Corps judges; 2 reserve judges
- f. Military Judges' Course
 - Naval Justice School, Newport, RI
 - 10 active-duty Navy and Marine Corps judges; 4 reserve judges
- g. U.S. Army JAG School, Charlottesville, VA
 - Criminal Law New Development Course
 - 2 active-duty judges
- h. Senior Marine Judge Advocate Conference
 - Arlington, VA
 - 1 active-duty Marine Corps judge
- i. Senior Officer Short Courses in Military Justice
 - Various times and places
 - Presented by 1 active-duty Navy or Marine Corps judge
- j. American Judge's Association Meeting, Colorado Springs, CO
 - Chief Judge participated with civilian judges
- k. Military Law Institute
 - 14th Annual Homer Ferguson Conference
 - 1 active-duty Navy judge
- l. National Institute of Trial Advocacy (NITA)
 - various locations and times
 - 8 active-duty Navy and Marine Corps judges have participated in training trial advocates
- m. Trial Advocate and Judicial Training Evolutions
 - San Francisco, CA
 - 4 active-duty Navy judges and Chief Judges from the Air Force and Army; 14 reserve Navy judges; 1 reserve Army judge
 - Philadelphia, PA
 - 3 active-duty Navy and Marine Corps judges; 1 reserve Navy judge; 1 civilian judge
- n. Reserve judge training for contested cases
 - Minneapolis, MN
 - 1 active-duty judge; 15 reserve Navy and Marine Corps judges
- o. Military Judges' Seminar
 - Quantico, VA
 - 3 active-duty Navy and Marine Corps judges; 2 former Marine Corps judges
- p. Island Judicial Circuit Trial Advocacy Training
 - Pearl Harbor, HI
 - 1 active-duty Marine Corps judge; 1 active-duty Army judge; 1 USCMA judge
- q. Evidence
 - University of San Diego, sponsored by the San Diego Bar Assn.

- “A look at the Expert Witness and the Testimony of Children”
- 1 active-duty Navy and 1 active-duty Marine Corps judge
- r. 9th Texas Biennial Institute on Law
Fort Sam Houston, sponsored by the U.S. District Court
—1 active-duty Navy judge
- s. Virginia Bar Association’s Annual Meeting
Williamsburg, VA
—Chief Judge participated
- t. American Academy of Judicial Education Conference
Cambridge, MA
—1 active-duty judge
- u. Tri-Service Judges Conference
Garmish, Germany
—1 active-duty judge
- v. National Council of Juvenile and Family Court Judges
Charleston, SC
—2 active-duty judges
- w. University of Minnesota/Military Judges’ Training
Minneapolis, MN
—1 active-duty judge
- x. Environmental Law and Regulation Training
Washington, DC
—1 active-duty judge
- y. Senior Legalman Course
Newport, RI
—1 active-duty legalman

Visits by the Judiciary

The Chief Judge presented his annual administrative briefings to students at the military judge’s courses at both Charlottesville and Newport.

The Circuit Military Judge, Atlantic Judicial Circuit, Washington, DC, also visited and participated in the instruction of students at the military judge’s course at Newport.

The Chief Judge, along with the Chief Judges of the Army and the Air Force worked toward uniformity in judicial practice and frequently discussed matters of mutual concern.

The Chief Judge visited and inspected the following judicial circuits and branch offices: Northeast (Philadelphia); Northeast branch (Newport); Tidewater (Norfolk); Piedmont (Camp Lejeune); Sierra (Camp Pendleton); and Southwest (San Diego).

General

Chief Judge courtesy calls on NLSOs, convening authorities and SJAs indicate that the overall quality of judicial services is excel-

lent. There is a continuing emphasis on judicial and advocacy training. Trial judges critique and motivate young advocates in trial work. All judges provide post-trial critiques for counsel.

The Trial Judiciary continues to seek economical ways to deliver quality judicial services. Navy and Marine Corps reserve judges have provided exceptional, professional, and timely support this year.

Economy is still the watchword as the activity continues to lose judge billets as the services draw down on end strength.

Streamlined documentation, specialized computer programs for judicial reports and other software have increased productivity and field communications. The year was marked with improved delivery of judicial services and improved field data.

NAVAL LEGAL SERVICE COMMAND

Naval Legal Service Command (NAVLEGSVCCOM) consists of 21 naval legal service offices and 22 detachments located in areas of naval concentration throughout the world. A new detachment, at NAS Moffett Field, California, opened in March 1989. The command also includes the Naval Justice School at Newport, Rhode Island, and the Office of Legal Counsel at the Naval Academy, Annapolis, Maryland. NAVLEGSVCCOM is commanded by the Deputy Judge Advocate General of the Navy and includes 376 officers (down from 398 in fiscal year 88), 245 enlisted, and 242 civilian employees. The command constitutes about 40% of the Navy's total judge advocate strength.

NAVLEGSVCCOM provides a wide range of legal services to afloat and shore commands, active-duty personnel, dependents, and retirees. Specific functions include the provision of counsel for courts-martial and administrative discharge boards, counsel to commands, claims processing and adjudication, counsel at physical evaluation boards, and legal assistance.

To facilitate high quality and responsive legal services, NAVLEGSVCCOM activities rely upon the Judge Advocate General Management Information System (JAGMIS), a micro-computer system which tracks each activity's case load from receipt to disposition. The Navy Legal Affairs World-wide Support System (NAV-LAWSS), now in development, will refine court-martial case tracking as well as expand the automation of the claims, legal assistance, budgeting, and office-administration functions. In addition, the expansion of electronic-mail capability to more than 300 activities has facilitated rapid communication among NAVLEGSVCCOM activities, staff judge advocates, Marine Corps legal centers, and client activities around the world.

As part of the fiscal year 1989 Department of Defense Military Construction program, four projects were approved for NAV-LEGSVCCOM: two new legal service office buildings at Pearl Harbor, Hawaii, and Mayport, Florida, and additions to present structures at the legal service office in Norfolk, Virginia, and the Naval Justice School. These facilities are now under construction. Also, major renovations were accomplished this year at the legal service offices in Oceana, Virginia; Long Beach, California; and Bremerton, Washington.

NAVAL JUSTICE SCHOOL

During fiscal year 1989, the Naval Justice School (NJS) provided instruction to 6,931 students worldwide (1,253 in resident courses ranging in length from four days to nine weeks). Additionally, the school prepared and published volume 38 of the *Naval Law Review*. Other noteworthy developments include the ground breaking for the new classroom addition to NJS which took place on 12 October 1989, and awarding of the Meritorious Unit Commendation to the Justice School for service performed from April 1987 until June 1988. An update of the School's courses follows:

Law of Naval Operations Workshop. Offered once a year, the purpose of this two-week course is to train judge advocates who are responsible for advising commanders on international law matters and their impact on plans and operations. The course consisted of 30 hours of classroom instruction and 32 hours of practical exercises and seminars. Attendees completing the two-week course in fiscal year 1989 included judge advocates from the Navy (45), Marine Corps (6), Air Force (4), Army (5), and Coast Guard (2).

Staff Judge Advocate Course. Also offered once a year, the purpose of this three-week course is to provide training in specific aspects of military and administrative law likely to be encountered by a command legal advisor. Included in fiscal year 1989 were 56 hours of classroom instruction and 7 hours of practical exercises and seminars. This past year, attendees included judge advocates from the Navy (42), Marine Corps (5), and Army (1).

Senior Legalman Course. Offered annually, the purpose of this three-week course is to provide senior legalmen with specialized training in budget matters, civilian and military personnel management, and other management skills required of mid-level supervisors at naval legal service offices. Included are 61 hours of classroom instruction and 13 hours of workshops and seminars. Nineteen senior enlisted personnel (18 Navy and 1 Army) attended this course in 1989.

Lawyer Course. The Naval Justice School conducted five sessions of the nine-week lawyer course during fiscal year 1989. This course,

which provides basic training in military justice and military administrative and civil law to incoming Navy and Marine Corps judge advocates and Coast Guard law specialists, consists of 166 hours of classroom instruction and 55 hours of practical exercises, including two moot courts and 14 seminars designed to enhance trial advocacy skills. In fiscal year 1989, the course was completed by 125 Navy, 79 Marine Corps, and 14 Coast Guard lawyers.

Legal Officer Course. During fiscal year 1989, the school held seven sessions of the four-week legal officer course. The legal officer syllabus is designed for the nonlawyer junior officer or senior Navy and Coast Guard enlisted paralegals about to assume legal duties with a ship, aircraft squadron, small station, or other military unit with no judge advocate/law specialist. Included in the course are 126 hours of classroom instruction and 79 hours of practical exercises and seminars. Attendees in fiscal year 1989 consisted of 230 Navy officers, 19 Navy legalmen, 44 Marine Corps officers, 3 Coast Guard officers, 1 Coast Guard yeoman, and 1 civilian.

Senior Officer Course. This one-week course, sponsored by the Chief of Naval Operations, prepares commanding officers, executive officers, and officers in charge to handle appropriate command legal responsibilities. Six sessions of the course were held at Newport, Rhode Island, with 193 students attending. An additional 26 offerings of the course were held at the following worldwide locations: Jacksonville, Mayport, and Pensacola, Florida; Charleston (twice) and Parris Island, South Carolina; Norfolk, Virginia (twice); Bangor, Washington; San Francisco (twice), San Diego (twice), Long Beach, and Camp Pendleton, California; Rota, Spain; Pearl Harbor, Hawaii; Subic Bay, Philippines; Yokosuka, Japan; Camp Lejeune, North Carolina; New London, Connecticut; Quantico, Virginia; Philadelphia, Pennsylvania; Great Lakes, Illinois; Corpus Christi, Texas; and Guam. The 1,384 students attending these classes included:

USN:	905	(65.4%)
USMC:	433	(31.3%)
USCG:	27	(2.0%)
USA:	11	(0.7%)
USAF:	4	(0.3%)
CIV:	4	(0.3%)

Military Judge Course. This three-week course, offered once a year, trains active-duty and reserve judge advocates to serve as special and general court-martial military judges. The syllabus includes 74 hours of lecture and 30 hours of practical exercises and seminars during which students preside as military judges during various stages of moot courts-martial. In fiscal year 1989, 1 Army, 4 Marine Corps, 7 Air Force, 1 Coast Guard, and 11 Navy lawyers completed this course.

Legalman Course. This nine-week course, offered three times in fiscal year 1989, provides instruction in military law and electronic court reporting to Navy enlisted personnel selected for conversion to the legalman rating as well as certain Coast Guard yeoman (as the Coast Guard does not have a legalman rating). Included are 162 hours of lecture, 118 hours of practice transcription, and 52 hours of seminars and other practical exercises. As in past years, the Army continues to use the Naval Justice Schools legalman course to train its court reporters. In fiscal year 89, 83 Navy, 8 Coast Guard, and 25 Army students completed this course.

Legal Clerk Course. This two-week course, offered five times in fiscal year 1989, is designed to train members in the Navy, Coast Guard, Marine Corps (equivalent) yeoman rating to process routine legal matters at small or isolated commands. Included in the legal clerk curriculum are 51 hours of lecture and 25 hours of practical exercises. In fiscal year 1989, 208 students completed this course: 202 Navy, 3 Marine Corps, 1 Coast Guard and 2 civilians.

Reserve Courses. In addition to training active-duty personnel, the Naval Justice School also presents a number of courses each year to train inactive-duty reservists. The two-week Reserve Lawyer Course prepares inactive-duty lawyers of the Naval and Marine Corps Reserve to perform the duties of an active-duty judge advocate. Similarly, the two-week Reserve Legalman Course, offered in three phases, prepares enlisted personnel in the inactive-duty Reserve to serve as legalmen. During fiscal year 1989, 67 students completed an in-house course of Reserve instruction at the school.

Specialized Briefings and Presentations. In addition to the formal courses listed above, the Naval Justice School presented more than 395 hours of instruction on court-martial procedures, search and seizure, confessions and admissions, nonjudicial punishment, investigations, administrative separations, law of the sea, the law of armed conflict, and rules of engagement to 4,294 students at the Naval War College, Surface Warfare Officers School, Naval Chaplains School, Officer Indoctrination School, Officer Candidate School, and the Senior Enlisted Academy, all located in Newport, Rhode Island. Naval Justice School instructors also provided instruction, principally in operational law, at the United States Military Academy, the United States Coast Guard Academy, and at key locations on both coasts.

MARINE CORPS ACTIVITIES

During fiscal year 1989, the Chief Defense Counsel of the Marine Corps (CDCMARCOR) continued to expand and enhance the trial advocacy training programs given at Quantico, Camp Lejuene,

Paris Island, Camp Pendleton, Kaneohe Bay, and Okinawa. Instructors are experienced active duty and Reserve Marine Corps judge advocates.

Thirty-three Selected Marine Corps Reserve Site Judge Advocate drilling billets were created with the inception of the 4th Marine Division Site Judge Advocate Program. These billets are located with various 4th Division and 4th Force Service Support Group units throughout the United States. This program parallels a similar one existing in the 4th Marine Aircraft Wing.

For the first time ever, two Marines Corps Reserve judge advocate colonels were assigned as appellate judges on the United States Navy-Marine Corps Court of Military Review.

The CDCMARCOR and Regional Defense Counsel conducted frequent command visitations and inspections at all locations where defense counsel were assigned.

Fourteen Marine judge advocates attended year-long service schools, including the Naval War College, the National Defense University, the Marine Corps Command and Staff College, the Amphibious Warfare School, and the U.S. Army Judge Advocate General's School. Seven judge advocates received Master of Law degrees from the Judge Advocate General's School and civilian law schools through the Special Education Program. Two hundred forty-seven judge advocates received continuing legal education at civilian and military schools through courses funded by Headquarters, U.S. Marine Corps, and their parent commands. Ten Marine officers earned law degrees through the Funded Legal Education Program.

EVERETTE D. STUMBAUGH

Rear Admiral, USN

Judge Advocate General of the Navy

Period: FISCAL YEAR 1989

PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)

TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
GENERAL	956	892	64	+ 8.6%
BCD SPECIAL	3276	3276		-7.5%
NON-BCD SPECIAL	2331	1981	350	-1.5%
SUMMARY	2766	2632	134	+ 6.1%
OVERALL RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT				-0.7%

PART 2 - DISCHARGES APPROVED

GENERAL COURTS-MARTIAL (CA LEVEL)		
NUMBER OF DISHONORABLE DISCHARGES		382
NUMBER OF BAD CONDUCT DISCHARGES		411
SPECIAL COURTS-MARTIAL (SA LEVEL)		
NUMBER OF BAD CONDUCT DISCHARGES		3411

PART 3 - RECORDS OF TRAIL RECEIVED FOR REVIEW BY JAG

FOR REVIEW UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL	814
FOR REVIEW UNDER ARTICLE 66 - BCD SPECIAL COURTS-MARTIAL	3077
FOR EXAMINATION UNDER ARTICLE 69 - GENERAL COURTS-MARTIAL	90

PART 4 - WORKLOAD OF THE Navy/Marine Corps COURT OF MILITARY REVIEW

TOTAL ON HAND BEGINNING OF PERIOD		1056
GENERAL COURTS-MARTIAL	321	
BCD SPECIAL COURTS-MARTIAL	735	
REFERRED FOR REVIEW		4100
GENERAL COURTS-MARTIAL	853	
BCD-SPECIAL COURTS-MARTIAL	3247	
TOTAL CASES REVIEWED		4247
GENERAL COURTS-MARTIAL	876	
BCD-SPECIAL COURTS-MARTIAL	3371	
TOTAL PENDING AT CLOSE OF PERIOD		909
GENERAL COURTS-MARTIAL	298	
BCD-SPECIAL COURTS-MARTIAL	611	
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		+ 22%

PART 5 - APPELLATE COUNSEL REQUEST BEFORE Navy/Marine Corps COURT OF MILITARY REVIEW

NUMBER	3433
PERCENTAGE	83.7%

PART 6 - U.S. COURT OF MILITARY APPEALS ACTIONS

PERCENTAGE OF COMR REVIEWED CASES FORWARDED TO USCA	22%
PERCENTAGE OF INCREASE(+)/DECREASE(-) OVER PREVIOUS REPORTING PERIOD	+ 3%
PERCENTAGE OF TOTAL PETITIONS GRANTED	1%
PERCENTAGE OF INCREASE(+)/DECREASE(-) OVER PREVIOUS REPORTING PERIOD	-1%
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY COMR	.3%
RATE OF INCREASE(+)/DECREASE(-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD	-13%

PART 7 - APPLICATIONS FOR RELIEF, ARTICLE 69		
PENDING AT BEGINNING OF PERIOD		7
RECEIVED		153
DISPOSED OF		156
GRANTED	19	
DENIED	137	
NO JURISDICTION	—	
WITHDRAWN	—	
TOTAL PENDING AT END OF PERIOD		4
PART 8 - ORGANIZATION OF COURT		
TRIALS BY MILITARY JUDGE ALONE		
GENERAL COURTS-MARTIAL		669
SPECIAL COURTS-MARTIAL		5238
TRIALS BY MILITARY JUDGE WITH MEMBERS		
GENERAL COURTS-MARTIAL		287
SPECIAL COURTS-MARTIAL		369
PART 9 - COMPLAINTS UNDER ARTICLE 138		
NUMBER OF COMPLAINTS	155	
PART 10 - STRENGTH		
AVERAGE ACTIVE DUTY STRENGTH	806,870	
PART 11 - NONJUDICIAL PUNISHMENT (ARTICLE 15)		
NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED	53,642	
RATE PER 1,000	66.86	
RATE OF INCREASE(+) /DECREASE(-) OVER PREVIOUS PERIOD	-7.16	

**REPORT OF
THE JUDGE ADVOCATE GENERAL OF THE AIR
FORCE
OCTOBER 1, 1988 TO SEPTEMBER 30, 1989**

In compliance with the requirement of Article 6(a), Uniform Code of Military Justice (UCMJ), The Judge Advocate General, Major General Keith E. Nelson, and Deputy Judge Advocate General, Major General David C. Morehouse, made official staff inspections of field legal offices in the United States and overseas. They also attended and participated in various bar association meetings and addressed many civil, professional and military organizations.

AIR FORCE COURT OF MILITARY REVIEW

On 1 March 1989, the Air Force Court of Military Review (AF/JAR), located at Bolling AFB, Washington, D.C., was designated a Directorate, attached directly to the Office of The Judge Advocate General. The Court was formerly a division under the Judiciary Directorate, which continues to supervise the Appellate Government and Defense Divisions, the Military Justice Division and the Trial Judiciary Division. The Court made arrangements to have its significant unpublished opinions entered into the USAF Federal Legal Information Through Electronics (FLITE) network. These opinions had previously been available only through Westlaw and Lexis. The Court was comprised of nine appellate judges during most of Fiscal Year 1989. The number of cases reviewed declined by 13.8% from the prior year. The Chief Judges of the Courts of Military Review appointed a committee in November 1988 to study judicial ethics and discipline. This committee, with one judge from each court, met frequently during 1989. They prepared a proposed Uniform Code of Conduct and proposed Regulations and Procedures Relating to Judicial Discipline. These documents propose rules and procedures which would affect both appellate and trial judges. The committee was expanded in July 1989 to include the Chief Trial Judge of each service.

MILITARY JUSTICE STATISTICS AND US AIR FORCE JUDICIARY ACTIVITIES

The Judiciary Directorate of the Office of The Judge Advocate General has the overall responsibility for supervising the administration of military justice throughout the United States Air Force, from nonjudicial proceedings to appellate review of courts-martial. Additionally, the Directorate has the staff responsibility of the Office of The Judge Advocate General in all military justice matters which arise in connection with programs, special projects, studies and inquiries generated by the Air Staff; Headquarters USAF; the Secretaries of the Departments of Defense, Army, Navy, and Air Force; members of Congress; and other Federal, state and civil agencies. Several of the Directorate's activities are discussed below:

a. The Judiciary Directorate serves as the action agency for the review of military justice issues in applications submitted to the Air Force Board for Correction of Military Records. Formal opinions were provided to the Secretary of the Air Force concerning 105 applications.

b. The Directorate received 557 inquiries in specific cases requiring either formal written replies or telephonic replies to senior executive officials, including the President and members of Congress.

c. The Directorate provided a representative to all interservice activities involving military justice. This included the Joint Service Committee and support for the Code Committee.

LEGAL DATA AUTOMATION AND INFORMATION PROGRAM

The Directorate of Legal Information Services (AF/JAS) plans, develops and manages automated management information systems in support of claims, military justice, office automation, computer assisted legal research and other Air Force and Department of Defense legal services programs. During this fiscal year, the Department was able to largely complete its intended acquisition of personal computers for personnel at all of its 350 sites. Electronic mail was implemented worldwide among all judicial circuits, the major commands, Headquarters USAF and many of the base offices. The JAGMAIL electronic mail system was developed and hosted on the Army Financial Management Systems Integration Agency in accordance with an interagency agreement. One hundred and ten offices were connected to the system. Subsequently, an AT&T 3B2 minicomputer was purchased with a view toward moving the mail system in-house and supporting claims data collection and report dissemination. Also during FY 1989 the initial in-

crement of 110 new Local Area Network systems were fielded to the various headquarters' offices and to the larger legal offices worldwide. Kyocera laser printers for the local area networks and Zenith portable computers for deployability were also purchased. Five new office management software application programs, all capable of multiuser operations over these local area networks, were fielded to all main Air Force legal offices. Included were applications to assist in local management of military justice, legal assistance, and administrative office management. The Federal Legal Information Through Electronics (FLITE) on-line system became operational in Air Force legal offices in the summer, with nearly 150 DoD registered users averaging over 400 legal research searches per month. Expansion of the on-line FLITE system to approximately 3000 other DoD offices and agencies is planned beginning in FY 90. The FLITE Service Center continued to perform a monthly average of over 450 searches for various DoD, Coast Guard and the Executive Office of the President requestors from legal, procurement and finance offices worldwide not using on-line FLITE. In addition, the procurement action was begun for the Defense Emergency Authorities Retrieval and Analysis System (DEARAS) as a part of the Directorate's mission as the DoD executive agent for computer assisted legal research. Two five-year contracts were awarded, one to West Publishing Company for updates to the West reporter data bases included in FLITE and one to Infodata Systems Inc. for technical services in support of mainframe systems using the INQUIRE software. Finally, alpha testing of the new Air Force Claims Information Management System (AFCIMS) was concluded, a major step to replacement of the existing Claims Management Program (CAMP), an Air Force wide standard system. Anticipated completion of this major data automation project with full beddown worldwide is in FY 90. This new automated claims program will benefit both supervisory headquarters, as well as local level claims processing.

TRIAL JUDICIARY

The Air Force Trial Judiciary had an average of 31 military active duty and 5 reserve military judges, including one Chief Trial Judge and his Assistant, assigned to 10 locations worldwide. In addition to presiding over courts-martial and administrative discharge boards, military judges are actively involved as hearing officers in public hearings held to consider draft environmental impact statements.

The Trial Judiciary has been working on a project to utilize laptop computers to provide written instructions to the court members. Ten laptop computers have been given to selected trial judges

together with the software which will permit the judge to rapidly construct a complete package of instructions for both findings and sentencing. These instructions are then printed, reviewed by counsel for both sides and corrections made. The approved instructions are printed, then read to the members and the clean final copy is given to the members for their use in closed session deliberations. While the concept has been applauded by the members, we are having problems with the software. Further research is continuing.

CIRCUIT TRIAL COUNSEL PROGRAM

The number of assigned circuit trial counsel (CTC) remained at 22 during FY 1989. The average number of days TDY per case increased from seven in FY 1988 to eight in FY 1989. The percentage of all courts prosecuted by CTC increased from 35% in FY 1988 to 37% in FY 1989. The total number of general courts-martial tried by CTC increased from 483 in FY 1988 to 548 in FY 1989, while the total number of special courts-martial tried by CTC decreased from 104 in FY 1988 to 66 in FY 1989. The percentage of general courts-martial tried by circuit trial counsel increased from 56% in FY 1988 to 58% in FY 1989, while the percentage of special courts-martial tried by circuit trial counsel fell from 13% in FY 1988 to 10% in FY 1989.

In support of the urinalysis program and to further the trial and administrative skills of the circuit trial counsel, a workshop was conducted at Brooks AFB. The urinalysis program continues to support the important fight against drug abuse in the Air Force. Providing a working knowledge of the Brooks urinalysis program is essential to just results in all urinalysis courts-martial and administrative proceedings. To enhance the capability of Air Force prosecutors to meet the continuing challenges of the defense bar, the attendees focused on methods of maximizing the training of young prosecutors, trial tactics, and the intricacies of recent appellate decisions bearing on military practice.

APPELLATE GOVERNMENT COUNSEL

For the second consecutive year, direct U.S. Supreme Court review of the decisions of the U.S. Court of Military Appeals (COMA) significantly increased appellate government counsel (JAJG) workload in this fiscal year. Air Force petitioners filed more petitions of writs of certiorari in FY 1989 than the sister services combined. The number filed in FY 1989 equalled the number filed in FY 1988, which was a 180% increase over FY 1987. Similarly, briefs in opposition were filed in 80% of all cases, which alone increased some 400% over the number filed in opposition in FY

1987. Under Article 62, UCMJ, seven cases were filed appealing adverse decisions to the Air Force by military trial judges. This increased 350% from FY 1988. In the same vein, ten cases were certified to COMA by The Judge Advocate General in accordance with Article 67(b)(2). This represented a 333% increase over FY 1988. The number of oral arguments before COMA and the Air Force Court of Military Review (AFCMR) dramatically increased in FY 1989 compared to FY 1988. The number before COMA increased 139% with a 333% increase before the AFCMR. JAJG personnel presented 10 appellate update briefings and lectures on recurring appellate errors at various workshops and conferences worldwide.

In January, 1989, JAJG and JAJD hosted the first annual Joint Service Appellate Counsel Workshop at Andrews AFB, MD. The inspiration for the workshop, which was attended by virtually all appellate counsel from all services, came from Colonel Bob Giovagnoni, the Deputy Chief of JAJG. The Judge Advocate General of the U.S. Army made several members of the faculty of his JAG school available to participate along with appellate counsel from all the services as presenters for the sessions. Colonel Giovagnoni's diligent efforts produced an event hailed by all attendees and presenters alike, as the most worthwhile event of its kind in recent memory.

AREA DEFENSE COUNSEL PROGRAM

To better insure that Area Defense Counsel (ADC) are readily available to provide timely defense services to the base population at their assigned bases, the Defense Services Division (JAJD) placed an increased emphasis on reducing ADC travel during FY 1989. One significant step has been the redesignation of several two-manned ADC offices to one assigned ADC and one assigned Circuit Defense Counsel (CDC). The CDC is available to travel to surrounding bases in the circuit when necessary, while the ADC remains at home to provide defense services at the assigned base.

JAJD renewed its emphasis on training the fundamentals of trial practice through the ADC Orientation Course. Newly assigned ADC's within the CONUS are scheduled to attend the course at Bolling AFB prior to or within the first few weeks of being assigned as an ADC. Counsel acquire the basics of defense practice, as well as acquire knowledge in the more complex areas of practice including, but not limited to, handling of experts and the presentation of expert testimony in a variety of scientific areas. To keep the ADCs up-to-date on new problem areas, JAJD began publishing a quarterly Defense Bulletin, informing defense counsel in the field of recent developments in the law.

APPELLATE DEFENSE COUNSEL

Appellate practice before the United States Supreme Court continued to increase in volume from previous years, with much of it occurring in October following the completion of the term of court for the U.S. Court of Military Appeals (COMA). The appellate workload with the Air Force Court of Military Review and COMA continued at about the same level as last year with the exception that the number of oral arguments before both forums has nearly doubled. The breakdown is as follows:

	FY 87	FY 88	FY 89
AFCMR			
ERRORS FILED.....	1012	1059	955
ORAL ARGUMENTS.....	15	12	35
OTHER MOTIONS.....	321	331	450
COMA			
SUPPLEMENTS TO PETITIONS.....	556	600	641
BRIEFS IN SUPPORT.....	164	219	199
GRANT BRIEFS.....	13	27	39
ORAL ARGUMENTS.....	29	22	37
OTHER MOTIONS/PETITIONS.....	215	225	131
SUPREME COURT PETITIONS.....	9	16	20

CONFINEMENT FACILITIES

At the end of the fiscal year a total of 766 Air Force personnel were in confinement. That figure represents about a 31% decrease from the number in confinement at the end of FY 1988. Despite the decrease, there were more officers and women in confinement than at the end of the previous fiscal year. The number of Air Force prisoners on parole, increased from 225 at the end of FY 1988 to 265 at the end of FY 1989, 18% more than last year.

During the fiscal year, some of the pressure on our central confinement facilities was relieved by the new Enhanced Minimum Custody Program at Lowry. Under the program, a total of 20 additional bed spaces were initially made available at Lowry for selected prisoners who had achieved minimum custody. By the end of the fiscal year that number had increased to 42. The program facilitated prisoner transfers from the United States Disciplinary Barracks (USDB), freeing up USDB spaces for other long-term prisoners. At the end of the fiscal year there was no backlog of prisoners awaiting transfer to the USDB or other central confinement facilities.

The return to duty rehabilitation (RTDR) program at the 3320th CRS, Lowry AFB, had another successful year. Seven rehabilitees were restored to productive Air Force duty following completion of

the RTDR program in FY 1989, the same number as during the preceding year.

PROCUREMENT FRAUD

The Contract Law Division monitored over 200 major fraud cases during the past year in a continuing effort to coordinate all criminal, civil, contractual and administrative remedies in significant cases involving procurement fraud and corruption. Contract Law attorneys also assisted investigative authorities during the conduct of several major cases, and coordinated follow-on prosecutions with relevant Department of Justice officials, including a successfully prosecuted precedent-setting 18 U.S.C. 208 conflict-of-interest case. The Division continues to play a supporting role in the aftermath of the ongoing "Ill-Wind" investigations.

CIVIL LITIGATION

The volume of civil litigation challenging actions taken under the Uniform Code of Military Justice increased in FY 1989. Nearly all of these cases involved petitions for *habeas corpus* filed by Air Force inmates in the United States Disciplinary Barracks, seeking collateral review of their cases. Issues included appropriateness of sentence, insufficiency of the evidence, and various evidentiary rulings made at the trial. In addition, one inmate challenged the standards used for the revocation of his parole. There were no decisions issued by any Federal district court granting relief to any of these individuals.

ENVIRONMENTAL ACTIONS

In 1989, three Article 15, UCMJ, actions were based on offenses directly related to environmental matters.

PREVENTIVE LAW AND LEGAL ASSISTANCE PROGRAM

The Preventive Law and Legal Aid Group (JACA) oversaw the provision of legal services to over 439,000 clients worldwide. Top categories continued to be wills and domestic relations. The Chief of JACA served as liaison to the American Bar Association's Standing Committee on Legal Assistance for Military Personnel and the Standing Committee on Lawyers in the Armed Forces.

The Air Force Judge Advocate General School continues to be responsible for the expansion of the Preventive Law Uniform Notebook System. JACA continues to be responsible for policy and pro-

cedures concerning the Preventive Law and Legal Assistance Programs worldwide.

During January through April 1989, tax assistance programs were run by legal offices throughout the world. Over 143,000 members of the Air Force community were helped. Air Force attorneys and the tax advisors they trained and supervised, civilian overhires, and volunteers helped Air Force community members complete 17,830 Form 1040EZs, 28,518 Form 1040As, 36,276 Form 1040s, and 36,314 state tax returns.

THE REPORTER, AFRP 110-2

The Reporter continued to provide timely information on a wide variety of legal issues. Lead articles addressed such vastly different topics as: succession to command, the *Posse Comitatus Act*, the patent system, and bid protests in government contracting.

EDUCATION AND TRAINING

The Judge Advocate General's Department provided several continuing legal education (CLE) opportunities to its personnel, and those of its sister services, during FY 1989.

During FY 1989, approximately 1300 Air Force attorneys (including 560 air reserve force judge advocates) attended courses held at the Air Force Judge Advocate General School, Maxwell AFB, Alabama. Of these, about 420 active duty judge advocates, as well as all of the air reserve force judge advocates, received military justice training.

The Department arranged legal training for 271 attorneys at the Army Judge Advocate General's School, Charlottesville, Virginia; 9 at the Naval Military Justice School, Newport, Rhode Island; and 42 at the Lowry Technical Training Center, Lowry AFB, Colorado. Working with AFIT, the Department sent 61 attorneys to procurement courses at the AFIT School of Systems and Logistics, Wright-Patterson AFB, Ohio. Sixteen military judges attended courses sponsored by the National Judicial College at the University of Nevada in Reno. Six medical law attorneys attended seminars offered nation-wide by various civilian organizations. Finally, 17 judge advocates participated in the Department's Master of Laws (LL.M.) Program in the fields of procurement law, environmental law, labor law, and international law.

THE AIR FORCE JUDGE ADVOCATE GENERAL SCHOOL

The Air Force Judge Advocate General (AFJAG) School is located within Air University's Ira C. Eaker Center for Professional Development at Maxwell AFB, Alabama.

Resident Courses

The AFJAG School conducted 16 different courses (25 offerings) attended by over 1600 students in FY 1989.

The Judge Advocate Staff Officer Course, the AFJAG School's primary course, gives new judge advocates a foundation in both military law and basic advocacy skills. The course was lengthened from seven to eight weeks in FY 1989. The course was conducted three times during the year and involved the instruction of 138 students.

Specialty courses taught at the AFJAG School offered instruction in trial advocacy, claims and tort litigation, labor law, environmental law, international operations law, government contracting, and taxation. The AFJAG School also conducted courses for staff judge advocates, military judges of all armed services, law office managers, and both Air National Guard and Air Force Reserve judge advocates.

The Air Force Judge Advocate General School, Ira C. Eaker Center for Professional Development, Maxwell AFB, Alabama, conducted the following courses affecting military justice in FY 1989.

a. Advanced Trial Advocacy Course—This one-week course provides training in advanced advocacy skills to judge advocates currently serving as, or selected for, circuit trial or defense counsel. 34 judge advocates attended this course.

b. Judge Advocate Staff Officer Course—A course providing eight weeks of instruction on the basics of military law. This course was offered three times during FY 1989 and attended by 160-200 judge advocates.

c. Reserve Forces Judge Advocate Course—A one-week course which provides Air Force Reserve personnel and National Guardsmen with up-to-date information on recent developments in military law. This course was offered four times in FY 1988 and was attended by 184 students.

d. Staff Judge Advocate Course—This two-week course provides recently assigned staff judge advocates with both a refresher course in military law and an update on recent developments. This course is offered each year to 70 students.

e. Trial and Defense Advocacy Course—This one-week course, offered once each during FY 1989, provides basic advocacy training

to judge advocates actively engaged in trial practice and was attended by 128 judge advocates.

f. Military Judges' Seminar—This one-week advanced seminar provides military judges with a forum in which to present and discuss new developments in military justice. This course was offered once in FY 1989 and was attended by 61 military judges from all services.

Nonresident Courses

The AFJAG School offered several nonresident courses approved for Continuing Legal Education (CLE) credit. The amount of CLE credit earned by completion of nonresident courses was determined by individual state bar or licensing authorities. The course titles available in FY 1989 were Environmental Law, Estate Planning, Federal Income Tax Law, Government Contract Law, The Government Lawyer and Professional Responsibility, International Law, and Supreme Court Trends in Criminal Justice.

While not approved for CLE credit, the AFJAG School maintained several instructional videotapes for personal, professional enrichment. These videotapes addressed 64 topics in the areas of trial advocacy, criminal law, environmental law, labor law, claims and tort law, acquisition law, income tax, and civil law.

Publications

The AFJAG School was responsible for *The Air Force Law Review*. This legal periodical is published semiannually and, in FY 1989, featured both a traditional edition concerning various, unrelated, legal issues confronting the armed forces and an issue devoted exclusively to environmental law.

The AFJAG School also edited and distributed *Shortbursts*, an informal collection of informative material primarily relevant to judge advocates providing legal assistance to eligible clients. The School also maintained the Preventive Law Clearinghouse, a catalogued repository of materials designed to help military members avoid personal legal problems. Clearinghouse material is prepared by judge advocates around the globe and collected by the School.

PERSONNEL

As of 1 October 1989, there were 1,373 judge advocates on active duty. This total included 2 major generals, 3 brigadier generals, 114 colonels, 232 lieutenant colonels, 335 majors, 633 captains and 54 first lieutenants.

KEITHE E. NELSON

Major General, USAF

The Judge Advocate General

Period: 1 Oct 1987 - 30 Sept 1988

PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)

TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
GENERAL	891	847	44	+29.7%
BCD SPECIAL	343	343		- 9.5%
NON-BCD SPECIAL	460	413	47	- 2.7%
SUMMARY	27	25	2	N/C
OVERALL RATE OF INCREASE (+)/DECREASE (-) OVER LAST REPORT				

PART 2 - DISCHARGES APPROVED

GENERAL COURTS-MARTIAL (CA LEVEL)		
NUMBER OF DISHONORABLE DISCHARGES	127	
NUMBER OF BAD CONDUCT DISCHARGES	597	
SPECIAL COURTS-MARTIAL (SA LEVEL)		
NUMBER OF BAD CONDUCT DISCHARGES	335	

PART 3 - RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG

FOR REVIEW UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL	751	
FOR REVIEW UNDER ARTICLE 66 - BCD SPECIAL COURTS-MARTIAL	316	
FOR EXAMINATION UNDER ARTICLE 69 - GENERAL COURTS-MARTIAL	76	

PART 4 - WORKLOAD OF THE Air Force COURT OF MILITARY REVIEW

TOTAL ON HAND BEGINNING OF PERIOD	213	
GENERAL COURTS-MARTIAL	143	
BCD SPECIAL COURTS-MARTIAL	70	
REFERRED FOR REVIEW	1141	
GENERAL COURTS-MARTIAL	798	
BCD SPECIAL COURTS-MARTIAL	343	
TOTAL CASES REVIEWED	1118	
GENERAL COURTS-MARTIAL	761	
BCD SPECIAL COURTS-MARTIAL	357	
TOTAL PENDING AT CLOSE OF PERIOD	236	
GENERAL COURTS-MARTIAL	180	
BCD SPECIAL COURTS-MARTIAL	56	
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		

PART 5 - APPELLATE COUNSEL REQUESTS BEFORE Air Force COURT OF MILITARY REVIEW

NUMBER	1067	
PERCENTAGE	95.4%	

PART 6 - U. S. COURT OF MILITARY APPEALS ACTIONS

PERCENTAGE OF COMR REVIEWED CASES FORWARDED TO USCMA	621/1118	55.5%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		+ 9.3%
PERCENTAGE OF TOTAL PETITIONS GRANTED	41/621	6.6%
PERCENTAGE OF INCREASE (+) DECREASE (-) OVER PREVIOUS REPORTING PERIOD		- 4.6%
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY COMR	41/1118	3.7%
RATE OF INCREASE (+)/DECREASE (-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		-0.7%

PART 7 - APPLICATIONS FOR RELIEF, ARTICLE 69

PENDING AT BEGINNING OF PERIOD		1	
RECEIVED		41	
DISPOSED OF		39	
GRANTED	1		
DENIED	26		
NO JURISDICTION	10		
WITHDRAWN	2		
TOTAL PENDING AT END OF PERIOD		3	

PART 8 - ORGANIZATION OF COURT

TRIALS BY MILITARY JUDGE ALONE			
GENERAL COURTS-MARTIAL		607	
SPECIAL COURTS-MARTIAL		488	
TRIALS BY MILITARY JUDGE WITH MEMBERS		284	
GENERAL COURTS-MARTIAL			
SPECIAL COURTS-MARTIAL		315	

PART 9 - COMPLAINTS UNDER ARTICLE 138

NUMBER OF COMPLAINTS	26	
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PART 10 - STRENGTH

AVERAGE ACTIVE DUTY STRENGTH	579,536	
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PART 11 - NONJUDICIAL PUNISHMENT (ARTICLE 15)

NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED	17,658	
RATE PER 1,000	30.47	
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD	-8.18	

PAGE 2 OF 2

REPORT OF THE CHIEF COUNSEL OF THE U.S. COAST GUARD

October 1, 1988 to September 30, 1989

The table below shows the number of court-martial records received and filed at Coast Guard Headquarters during FY-89 and the 5 preceding years.

Fiscal Year	89	88	87	86	85	84
General Courts-Martial	5	13	11	5	5	6
Special Courts-Martial	40	25	24	19	43	33
Summary Courts-Martial	48	35	63	50	77	105
Total	93	73	98	74	125	144

COURTS-MARTIAL

Attorney counsel were detailed to all special courts-martial. Military judges were detailed to all special courts-martial. For most cases, the presiding judge was the full time general courts-martial judge. When he was unavailable, military judges with other primary duties were used for special courts-martial. Control of the detail of judges was centrally exercised by the Chief Trial Judge, and all requirements were met in a timely fashion.

GENERAL COURTS-MARTIAL

Of the five accused tried by general courts-martial this fiscal year, three were tried by military judge alone. Of these three, one received a bad conduct discharge and one officer received a dismissal. One of the two accused tried by courts with members received a sentence which included a dishonorable discharge, and the other received a bad conduct discharge. One of the accused whose charges here referred to general courts-martial was nonrated (pay grades E-1 through E-3), three were petty officers (pay grades E-4 through E-6), and one was a Lieutenant Commander (O-4).

The following is a breakdown of sentences awarded by the military judge alone in general courts-martial (3 convictions). In all of these convictions, the accused pled guilty to all charges and specifications.

Sentence	Cases Imposed
dismissal	1
bad conduct discharge.....	1
confinement	3
reduction in rate.....	2
partial forfeiture of pay (\$19,800 total)	2

The following is a breakdown of sentences awarded in general courts-martial with members (2 convictions).

Sentence	Cases Imposed
dishonorable discharge	1
bad conduct discharge.....	1
confinement	2
reduction in rate.....	2
forfeiture of all pay and allowances.....	1

The following indicates the four sentences imposed most by general courts-martial in the past four fiscal years.

FY	Number of Convictions	Forfeitures	Confinement	Punitive Reduction in grade	Discharge/ Dismissal
89	5	3 (60%)	5 (100%)	3 (60%)	4 (80%)
88	12	8 (75%)	12 (100%)	9 (75%)	8 (75%)
87	11	5 (45%)	8 (73%)	8 (73%)	6 (55%)
86	5	5 (100%)	5 (100%)	4 (80%)	5 (100%)

The following table shows the distribution of the 296 specifications referred to general courts-martial.

Violation of the UCMJ, Article	No. of Specs.
80 (attempts)	2
81 (conspiracy)	1
86 (unauthorized absence)	1
92 (violation of order or regulation)	1
107 (false official statement).....	16
108 (sale, loss, damage, destruction, wrongful disposition of military property of the U.S.)	127
109 (willful destruction of property other than U.S.).....	1
112(a) (controlled drug offenses)	2

120	(rape).....	1
121	(larceny and wrongful appropriation).....	132
124	(maiming).....	1
128	(aggravated assault).....	1
130	(housebreaking).....	1
132	(frauds against the United States).....	7
134	(general).....	2

SPECIAL COURTS-MARTIAL

Sixteen of the 40 accused tried by special courts-martial this fiscal year were tried by the military judge alone. Twelve bad conduct discharges were awarded; seven to accused tried by military judge alone, and five to accused tried by a court with members. Fourteen of the accused whose charges were referred to special courts-martial were nonrated (pay grades E-1 through E-3), twenty were Petty officers (pay grades E-4 through E-6), four were chief petty officers (pay grade E-7), one was a senior chief petty officer (E-8), and one was a chief warrant officer (W-3). Four special courts-martial resulted in acquittals.

The following table shows the distribution of the 136 specifications referred to special courts-martial.

Violation of the UCMJ, Article		No. of Specs.
81	(conspiracy).....	4
83	(fraudulent enlistment, appointment or separation).....	1
85 and 86	(desertion and UA).....	21
87	(missing movement).....	2
90	(willfully disobeying superior commissioned officer).....	2
91	(insubordinate conduct toward a petty officer).....	1
92	(violation of order or regulation).....	18
93	(cruelty and maltreatment).....	1
107	(false official statement).....	4
108	(sale, loss, damage, destruction, wrongful disposition of military property of the U.S.).....	2
112	(drunk on duty).....	2
112(a)	(controlled drug offenses).....	20
115	(malingering).....	1
117	(provoking speeches or gestures).....	1
121	(larceny and wrongful appropriation).....	12
123	(forgery).....	21
128	(assault).....	4
132	(frauds against the United States).....	4
133	(conduct unbecoming an officer).....	3
134	(general).....	12

The following is a breakdown of sentences awarded by the military judge alone in special courts-martial (16 convictions). In 14 of these 16 convictions, the accused pled guilty to all charges and specifications.

Sentence	Cases Imposed
bad conduct discharge.....	6
confinement	8
hard labor without confinement.....	3
reduction in rate.....	11
forfeiture of pay (\$20,552 total).....	10
fine (\$9,162.00 total).....	2
restriction.....	1
other (extra duty, reprimand, etc.).....	2

The following is a breakdown of sentences awarded in special courts-martial with members (20 convictions). In seven of these 20 convictions, the accused pled guilty to all charges and specifications.

Sentence	Cases Imposed
bad conduct discharge.....	5
confinement	6
hard labor without confinement.....	5
reduction in rate.....	15
restriction.....	3
forfeiture of pay (\$6,858 total).....	8
fine (\$4,000 total).....	3
other (extra duty, reprimand, etc.).....	8

The following indicates the four sentences imposed most by special courts-martial in the past four fiscal years.

FY	Number of Convictions	Forfeitures	Confinement	Reduction in grade	BCD
89	36	18 (50%)	14 (39%)	26 (73%)	11 (31%)
88	25	9 (36%)	13 (52%)	18 (72%)	8 (32%)
87	23	10 (43%)	13 (57%)	21 (91%)	3 (13%)
86	16	10 (63%)	7 (44%)	9 (56%)	3 (19%)

SPECIAL COURTS-MARTIAL SUMMARY

Forty percent of the accused tried by special court-martial were tried by military judge alone. Fifty-five percent of these accused pled guilty to all charges and specifications. Thirty-five percent of the accused tried by special courts-martial with members pled guilty to all charges and specifications. There was a 60 percent increase in special courts-martial from last fiscal year.

CHIEF COUNSEL ACTION UNDER ARTICLE 69, UCMJ

In addition to the required reviews of courts-martial conducted as a result of petitions filed under Article 69, UCMJ, a discretionary review was conducted under Article 69 of *all* courts-martial not requiring appellate review.

PERSONNEL, ORGANIZATION, AND TRAINING

The Coast Guard has 155 officers designated as law specialists (judge advocates) serving on active duty—118 are serving in legal billets and 37 are serving in general duty billets. Twenty-three Coast Guard officers are currently undergoing postgraduate studies in law and will be certified as law specialists at the completion of their studies.

The Coast Guard has one full-time general court-martial trial judge. Senior law specialists, most serving as district legal officers, are used as military judges in special courts-martial, when required.

Two attorneys from the Military Justice Division, Coast Guard Headquarters, attended an ABA sponsored Seminar on "Effective Argument to the Court" conducted on 4-6 May 1989. The seminar tracked arguments and issues in a case from the trial up through appellate argument and culminated with argument before the Supreme Court. Previously designated attorneys prepared briefs and argued the case during the seminar before panels made up of Federal and local judges, including some Federal Circuit Court judges.

U.S. COAST GUARD COURT OF MILITARY REVIEW

During fiscal year 1989, the Court was composed of five appellate military judges assigned by the General Counsel, Department of Transportation, in his capacity as Judge Advocate General. The Chief Judge and one other Judge are civilians. The remaining

three Judges are Coast Guard commissioned officers. The Court is presently constituted as follows:

Chief Judge Joseph H. Baum
Judge Alfred F. Bridgman, Jr.
Judge Carl Josephson
Judge Kevin J. Barry
Judge Michael C. Grace

In addition to the decisional work reflected in Appendix A, the Judges on the Court have participated in a number of professional conferences, committees and seminars during the past fiscal year. In November 1988, all five Judges attended the Fourth Annual All Services Appellate Military Judges Conference where Chief Judge Baum chaired one of the discussion sections. March 12-16, 1989, Chief Judge Baum, Judge Bridgman, Judge Josephson, and Judge Barry attended the Coast Guard Legal Officers Conference in Leesburg, Virginia, where, as part of that conference, Chief Judge Baum, Judge Bridgman and Judge Barry met with Coast Guard trial judges to discuss areas of mutual concern. During the conference, Chief Judge Baum also participated in a panel presentation on the topic of administrative discharge boards. May 11-12, 1989, Chief Judge Baum, Judge Bridgman and Judge Barry attended the 14th Annual Homer Ferguson Conference sponsored by the U.S. Court of Military Appeals and the Military Law Institute. During the two week period from June 26 to July 7, 1989, Chief Judge Baum attended an Intermediate Appellate Judges Seminar sponsored by the Institute of Judicial Administration at New York University School of Law. During the seminar, faculty, consisting primarily of appellate judges, provided two weeks of lectures and discussions on a variety of topics relating to appellate decision making and opinion writing for the 26 appellate judges attending.

This past year, Judge Barry chaired the Federal Bar Association Military Judges Committee, which, among its other projects, sponsored the All Services Appellate Military Judges Conference in November. Judge Barry was also elected President of the Judge Advocates Association in August 1989, after serving as 2nd Vice-President for the past year. In September 1989, Chief Judge Baum was designated for the upcoming year as Deputy Chair of the Federal Bar Association's Judiciary Section, which includes the Military Judges Committee among its various judicial committees. Over the past year, Chief Judge Baum and Judge Barry have attended the Federal Bar Association Pentagon Chapter Luncheon meetings on a regular basis to listen to leading speakers from the military and civilian legal community. In August 1989, Federal Bar Association activities culminated with the Association's Annual National Meeting in Washington, D.C., which was attended by Chief Judge Baum

and Judge Barry. At this meeting, they participated in seminars relating to ethics in government and drug policy.

In July 1989, Chief Judge Baum visited the Coast Guard's legal office at Governors Island, New York, where he was able to meet and talk with most of the assigned attorneys, including all defense counsel in the Advocacy Branch. Earlier in the year, Chief Judge Baum also visited USCGC Seneca (WMEC 906) in its home port of Boston. USCGC Seneca is one of the U.S. Coast Guard cutters which routinely make drug interdiction patrols in the Caribbean and is commanded by a Coast Guard Law Specialist.

This past year saw the publication in the June 1989 issue of the Federal Bar Association News and Journal of an article co-authored by Chief Judge Baum and Judge Barry: *United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence*. That article analyzed the Court of Military Appeals' landmark *Carlucci* decision and set out implications for the future from that decision. Certain of those implications have been addressed over the past year by a study group composed of judges from each of the Courts of Military Review. Included in the work of that group has been the drafting of a Code of Judicial Conduct for military judges and an appropriate procedure for dealing with allegations of violations of that code. Chief Judge Baum participated throughout the year in the work of that group as the Coast Guard Court's representative.

ADDITIONAL MILITARY JUSTICE STATISTICS

Appendix A contains additional basic military justice statistics for the reporting period and reflects the increase/decrease of the workload in various categories.

J. E. VORBACH

*Rear Admiral, U.S. Coast Guard
Chief Counsel*

Period: 1 October 1988 - 30 September 1989

PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)

TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
GENERAL	5	5	0	-62%
BCD SPECIAL	40	36		+60%
NON-BCD SPECIAL	0	0	0	Unchanged
SUMMARY	48	48	0	+37%
OVERALL RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT				+27%

PART 2 - DISCHARGES APPROVED

GENERAL COURTS-MARTIAL (CA LEVEL)			
NUMBER OF DISHONORABLE DISCHARGES		2 ¹	
NUMBER OF BAD CONDUCT DISCHARGES		2	
SPECIAL COURTS-MARTIAL (SA LEVEL)			
NUMBER OF BAD CONDUCT DISCHARGES		11	

PART 3 - RECORDS OF TRAIL RECEIVED FOR REVIEW BY JAG

FOR REVIEW UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL	6
FOR REVIEW UNDER ARTICLE 66 - BCD SPECIAL COURTS-MARTIAL	10
FOR EXAMINATION UNDER ARTICLE 69 - GENERAL COURTS-MARTIAL	1

PART 4 - WORKLOAD OF THE COAST GUARD COURT OF MILITARY REVIEW

TOTAL ON HAND BEGINNING OF PERIOD		14
GENERAL COURTS-MARTIAL	11	
BCD SPECIAL COURTS-MARTIAL	3	
REFERRED FOR REVIEW		19 ²
GENERAL COURTS-MARTIAL	8	
BCD-SPECIAL COURTS-MARTIAL	11	
TOTAL CASES REVIEWED		23 ²
GENERAL COURTS-MARTIAL	13	
BCD-SPECIAL COURTS-MARTIAL	10	
TOTAL PENDING AT CLOSE OF PERIOD		10
GENERAL COURTS-MARTIAL	6	
BCD-SPECIAL COURTS-MARTIAL	4	
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		0% - Same number of cases reviewed each period.

PART 5 - APPELLATE COUNSEL REQUEST BEFORE COAST GUARD COURT OF MILITARY REVIEW

NUMBER	23
PERCENTAGE	100%

PART 6 - U.S. COURT OF MILITARY APPEALS ACTIONS

PERCENTAGE OF COMR REVIEWED CASES FORWARDED TO USCMA	1/23	+ 4%
PERCENTAGE OF INCREASE(+)/DECREASE(-) OVER PREVIOUS REPORTING PERIOD		- 41%
PERCENTAGE OF TOTAL PETITIONS GRANTED		0
PERCENTAGE OF INCREASE(+)/DECREASE(-) OVER PREVIOUS REPORTING PERIOD		Unchanged
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY COMR		0
RATE OF INCREASE(+)/DECREASE(-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		Unchanged

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¹ One of the two dishonorable discharges is in fact a dismissal.

² Included within this total are sixteen Article 66, UCMJ, case referrals, one Article 69, UCMJ, case referral and two extraordinary writs.

³ Included within this total are 21 decisions pursuant to Article 66, UCMJ, and two actions in response to extraordinary writs.

PART 7 - APPLICATIONS FOR RELIEF, ARTICLE 69

PENDING AT BEGINNING OF PERIOD		0	
RECEIVED		2	
DISPOSED OF		2	
GRANTED	0		
DENIED	2		
NO JURISDICTION	0		
WITHDRAWN	0		
TOTAL PENDING AT END OF PERIOD		0	

PART 8 - ORGANIZATION OF COURT

TRIALS BY MILITARY JUDGE ALONE			
GENERAL COURTS-MARTIAL		1	
SPECIAL COURTS-MARTIAL		16	
TRIALS BY MILITARY JUDGE WITH MEMBERS			
GENERAL COURTS-MARTIAL		4	
SPECIAL COURTS-MARTIAL		24	

PART 9 - COMPLAINTS UNDER ARTICLE 138

NUMBER OF COMPLAINTS	4	
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PART 10 - STRENGTH

AVERAGE ACTIVE DUTY STRENGTH	37,701	
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PART 11 - NONJUDICIAL PUNISHMENT (ARTICLE 15)

NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED	1,446	
RATE PER 1,000	38.35	
RATE OF INCREASE(+)/DECREASE(-) OVER PREVIOUS PERIOD	-18%	

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