

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



**INCLUDING SEPARATE REPORTS**  
of the  
**U.S. COURT OF APPEALS FOR THE ARMED FORCES,**  
**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, 1996 to September 30, 1997

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THE JUDGE ADVOCATE GENERAL'S SCHOOL  
LIBRARY

**ANNUAL REPORT**  
SUBMITTED TO THE  
**COMMITTEE ON ARMED SERVICES**  
of the U.S. Senate  
and the  
**COMMITTEE ON NATIONAL SECURITY**  
of the U.S. 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, 1996 to September 30, 1997

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## **SECTION 1**

# **JOINT ANNUAL REPORT OF THE CODE COMMITTEE**

JOINT ANNUAL REPORT OF THE  
CODE COMMITTEE PURSUANT TO THE  
UNIFORM CODE OF MILITARY JUSTICE

October 1, 1996 to September 30, 1997

The Judges of the United States Court of Appeals for the Armed Forces; 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; Eugene R. Fidell, Esquire, and Professor Fredric I. Lederer, Esquire, Public Members appointed by the Secretary of Defense, submit their annual report on the operation of the Uniform Code of Military Justice pursuant to Article 146, Uniform Code of Military Justice, 10 USC § 946.

The Code Committee met during fiscal year 1997 to consider numerous matters pertaining to the administration of the Uniform Code of Military Justice. This meeting was open to the public and interested attendees participated in the proceedings. Code Committee members presented reports on pending cases and trends in court-martial activity within their respective Armed Forces. Reports and discussions also took place concerning various proposals to amend the Uniform Code of Military Justice and the Manual for Courts-Martial.

The Committee considered a report from an ad hoc study group that considered the purpose, scope, and function of

the Code Committee. As a result of the discussion, two subcommittees were established: one to coordinate plans and programs to mark the 50<sup>th</sup> Anniversary of the Uniform Code of Military Justice, and a second to study the use of technology in the administration of military justice. A report on pending amendments to the Manual for Courts-Martial was presented by a representative of the Joint Service Committee on Military Justice. Other topics discussed by the Code Committee included attorney discipline and digesting military justice cases.

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

WALTER T. COX III  
Chief Judge

EUGENE R. SULLIVAN  
Associate Judge

SUSAN J. CRAWFORD  
Associate Judge

H.F. "SPARKY" GIERKE  
Associate Judge

ANDREW S. EFFRON  
Associate Judge

Major General WALTER B. HUFFMAN, USA  
The Judge Advocate of General of the Army

Rear Admiral JOHN D. HUTSON, USN  
The Judge Advocate of General of the Navy

Major General BRYAN G. HAWLEY, USAF  
The Judge Advocate of General of the Air Force

Rear Admiral PAUL M. BLAYNEY, USCG  
Chief Counsel, U.S. Coast Guard

Brigadier General THEODORE G. HESS, USMC  
Director, Judge Advocate Division  
Headquarters, United States Marine Corps

EUGENE R. FIDELL, Esquire  
Public Member

Professor FREDRIC I. LEDERER  
Public Member

## **SECTION 2**

# **REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

REPORT OF THE  
UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

October 1, 1996 to September 30, 1997

The Judges of the United States Court of Appeals for the Armed Forces submit their fiscal year 1997 report on the administration of the Court and military justice to the Committee on Armed Services of the United States Senate and the Committee on National Security of the United States House of Representatives, and to the Secretaries of Defense, Transportation, Army, Navy, and Air Force in accordance with Article 146, Uniform Code of Military Justice, 10 USC § 946.

BUSINESS OF THE COURT

The total number of cases carried over on the Court's Petition Docket at the end of fiscal year 1997 (235) reflected a substantial reduction of 38% compared with the same category at the end of fiscal year 1996. (See Appendix A.) Part of this reduction resulted from a decline in the number of petitions filed with the Court during the current fiscal year, which consisted of a 14% decrease compared with petition filings during the preceding fiscal year. (See Appendix J.) However, the number of cases carried over on the Master Docket increased from 73 cases at the end of fiscal year 1996 to 291 cases at the end of fiscal year

1997. (See Appendix B.) This increase was primarily attributable to the large number of petitions granted by the Court at the end of fiscal year 1997 which involved the same issue that was granted in United States v. Gorski, 47 MJ 370 (1997). The number of oral arguments and the number of opinions filed by the Court remained fairly constant in comparison with these same two categories at the end of fiscal year 1996. (See Appendices C and D.)<sup>1</sup>

The average processing time from the date of filing a petition to the date of a grant also remained fairly constant in comparison with the prior fiscal year. (See Appendix E.) However, the processing time from the date of a grant to the date of oral argument was dramatically reduced by 24% compared with this average during the prior fiscal year. (See Appendix F.) Furthermore, there was a significant decrease of 16% in the average time between oral argument and the filing of a final opinion, and a major decrease of 22% in the overall average processing time between the filing of a petition on the Petition Docket and the filing of a final opinion on the Master Docket. (See Appendices G and H.) The average processing time for the total of all cases filed on the Petition, Master, and Miscellaneous Dockets which were decided by the

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<sup>1</sup> Although not part of the business of the Court, it is noted that during fiscal year 1997 the Court was notified that petitions for writ of certiorari were filed with the Supreme Court of the United States in 32 Master Docket cases in which the Court issued a final decision.

Court reflected a slight increase in this overall category compared with the prior fiscal year. (See Appendix I.)

The Chief Justice of the United States, acting pursuant to Article 142(f), Uniform Code of Military Justice, 10 USC § 942(f), designated the Honorable Janet Bond Artherton, United States District Court for the District of Connecticut, and the Honorable Malcolm J. Howard, United States District Court for the Eastern District of North Carolina, to sit with the United States Court of Appeals for the Armed Forces during fiscal year 1997. Additionally, Senior Judges William H. Darden and Robinson O. Everett were recalled and participated in the review and decision of several cases during the same reporting period.

During fiscal year 1997 the Court admitted 311 attorneys to practice before its Bar, bringing the cumulative total of admissions before the Bar of the Court to 30,841.

#### **INTERNET ACCESS TO THE WORK OF THE COURT**

In 1997, the Court established an Internet web site to provide the public with prompt access to the Court's opinions, as well as general information about the Court. The internet address of the web site is:

<http://www.armfor.uscourts.gov>

## PUBLIC AWARENESS PROJECT

### (Project Outreach)

In furtherance of a practice established in 1987, the Court scheduled several special sessions and heard oral arguments in selected cases outside its permanent Courthouse in Washington, D.C. This practice, known as "Project Outreach", was developed as part of a public awareness program to demonstrate not only the operation of a Federal Court of Appeals, but also the effectiveness and quality of the criminal justice system of the Armed Forces of the United States. The Court conducted appellate hearings during this fiscal year, without objection of the parties, at the Dickinson School of Law, Carlisle, Pennsylvania; the Duke University School of Law, Durham, North Carolina; the Howard University School of Law, Washington, D.C.; the United States Air Force Academy, Colorado Springs, Colorado; the United States Coast Guard Academy, New London, Connecticut; and the United States Military Academy, West Point, New York.

This program has continued to promote an increased public awareness of the fundamental fairness of the military justice system and the role of the Court in the overall administration of military justice throughout the world. The Court hopes that those who attend these hearings from both military and civilian communities will realize that the United States is a democracy that can maintain an armed

force instilled with the appropriate discipline to make it a world power, while affording all its members the full protection of the Constitution of the United States and Federal law.

### **JUDICIAL VISITATIONS**

During fiscal year 1997 the Judges of the Court, consistent with past practice and their ethical responsibility to oversee and improve the entire military criminal justice system, participated in professional training programs for military and civilian lawyers, spoke to professional groups of judges and lawyers, and visited with judge advocates and other military personnel at various military installations throughout the world.

### **JUDICIAL CONFERENCE**

On May 8 and 9, 1997, the Court held its Annual Judicial Conference in The Marvin Center, George Washington University School of Law, Washington, D.C. The Judicial Conference Program was certified for credit to meet the continuing legal education requirements of numerous State Bars throughout the United States in order to assist both military and civilian practitioners in maintaining those professional skills necessary to practice before trial and appellate courts. The Conference opened with welcoming remarks by the Honorable Walter T. Cox III, Chief Judge,

United States Court of Appeals for the Armed Forces, followed by speakers for this year's Conference who included Brigadier General John S. Cooke, USA, Chief Judge, United States Army Court of Criminal Appeals, who delivered remarks on the subject "Military Justice - A Look Back and Ahead"; Colonel Dennis R. Hunt, USA, Professor of Law, United States Military Academy, who spoke on "Legal Reasoning and Military Law"; Professor David A. Schlueter, Saint Mary's University School of Law, who discussed "Character and Credibility Evidence"; Dr. Jonathan Lurie, Historian to the United States Court of Appeals for the Armed Forces and Professor of History, Rutgers University, whose topic was "The Unlikely Undertaking of Writing the Court's History -- Fact? . . . or Fiction?"; Professor Paul C. Giannelli, Case Western University School of Law, who addressed the subject of "Polygraphs"; Major Amy M. Frisk, USA, Professor, Criminal Law Department, The Judge Advocate General's School, United States Army, and Major Maurice Lescault, Jr., USA, Professor, Administrative and Civil Law Department, The Judge Advocate General's School, United States Army, who together presented a program on "Ethics"; Professor Stephen A. Saltzburg, George Washington University National Law Center, who reviewed recent Supreme Court cases; Vaughn E. Taylor, Esquire, who presented a program on "Trial and Appellate Advocacy"; Professor Fredric I. Lederer, College of William and Mary School of Law, who spoke on "Confrontation, Compulsory Process and Command Influence"; and Lieutenant Commander Tammy P. Tideswell, USN, Head,

Trial Advocacy and Criminal Law Division, Naval Justice School, who presented a discussion on "Computer Crimes."

The Judge Advocates Association Awards for outstanding career attorneys in each of the Armed Services were presented by Colonel Eileen Albertson, USMC (Ret.).

WALTER T. COX III  
Chief Judge

EUGENE R. SULLIVAN  
Associate Judge

SUSAN J. CRAWFORD  
Associate Judge

H.F. "SPARKY" GIERKE  
Associate Judge

ANDREW S. EFFRON  
Associate Judge

USCA STATISTICAL REPORT

Fiscal Year 1997

CUMULATIVE SUMMARY

CUMULATIVE PENDING OCTOBER 1, 1996

Master Docket .....	73
Petition Docket .....	379
Miscellaneous Docket .....	<u>1</u>
TOTAL .....	453

CUMULATIVE FILINGS

Master Docket .....	385
Petition Docket .....	1234
Miscellaneous Docket .....	<u>37</u>
TOTAL .....	1656

CUMULATIVE TERMINATIONS

Master Docket .....	169
Petition Docket .....	1378
Miscellaneous Docket .....	<u>31</u>
TOTAL .....	1578

CUMULATIVE PENDING OCTOBER 1, 1997

Master Docket .....	289
Petition Docket .....	235
Miscellaneous Docket .....	<u>7</u>
TOTAL .....	531

OPINION SUMMARY

<u>CATEGORY</u>	<u>SIGNED</u>	<u>PER</u>	<u>CURIAM</u>	<u>MEM/ORDER</u>	<u>TOTAL</u>
Master Docket .....	107	6		56	169
Petition Docket .....	0	0		1378	1378
Miscellaneous Docket ....	<u>0</u>	<u>0</u>		<u>31</u>	<u>31</u>
TOTAL .....	107	6		1465	1578

FILINGS (MASTER DOCKET)

Remanded from Supreme Court ..... 0  
Returned from Court of Criminal Appeals.... 4  
Mandatory appeals filed ..... 1  
Certificates filed ..... 6  
Reconsideration granted ..... 1  
Petitions granted (from Petition Docket)... 373  
TOTAL ..... 385

TERMINATIONS (MASTER DOCKET)

Findings & sentence affirmed ..... 122  
Reversed in whole or in part ..... 35  
Granted petitions vacated ..... 1  
Other disposition directed ..... 11  
TOTAL ..... 169

Signed .... 107  
Per curiam . . 6  
Mem/order .. 156  
TOTAL ..... 169

PENDING (MASTER DOCKET)

Awaiting briefs ..... 49  
Awaiting oral argument ..... 39  
Awaiting lead case decision (trailer cases) 189  
Awaiting final action ..... 12  
TOTAL ..... 289

FILINGS (PETITION DOCKET)

Petitions for grant of review filed .....1230  
Petitions for new trial filed ..... 2  
Cross-petitions for grant filed ..... 1  
Petitions for reconsideration granted ..... 1  
Returned from Court of Criminal Appeals ...0  
TOTAL .....1234

TERMINATIONS (PETITION DOCKET)

Petitions for grant dismissed ..... 6  
Petitions for grant denied ..... 981  
Petitions for grant granted ..... 373  
Petitions for grant remanded ..... 8  
Petitions for grant withdrawn ..... 8  
Other .....2  
TOTAL .....1378

Signed ..... 0  
Per curiam .. 0  
Mem/order..1378  
TOTAL .... 1378

PENDING (PETITION DOCKET)

Awaiting briefs ..... 85  
 Awaiting Central Legal Staff review ..... 35  
 Awaiting final action ..... 115  
 TOTAL ..... 235

FILINGS (MISCELLANEOUS DOCKET)

Writs of error coram nobis sought ..... 3  
 Writs of habeas corpus sought ..... 1  
 Writs of mandamus/prohibition sought ..... 7  
 Other extraordinary relief sought ..... 4  
 Writ appeals sought ..... 22  
 TOTAL ..... 37

TERMINATIONS (MISCELLANEOUS DOCKET)

Petitions withdrawn .....	0	
Petitions remanded .....	0	
Petitions granted .....	1	
Petitions denied .....	29	Signed .... 0
Petitions dismissed .....	1	Per curiam. 0
Other .....	<u>0</u>	Mem/order.. <u>31</u>
TOTAL .....	31	TOTAL ..... 31

PENDING (MISCELLANEOUS DOCKET)

Awaiting briefs ..... 2  
 Awaiting Writs Counsel review ..... 0  
 Awaiting final action ..... 5  
 TOTAL ..... 7

RECONSIDERATIONS & REHEARINGS

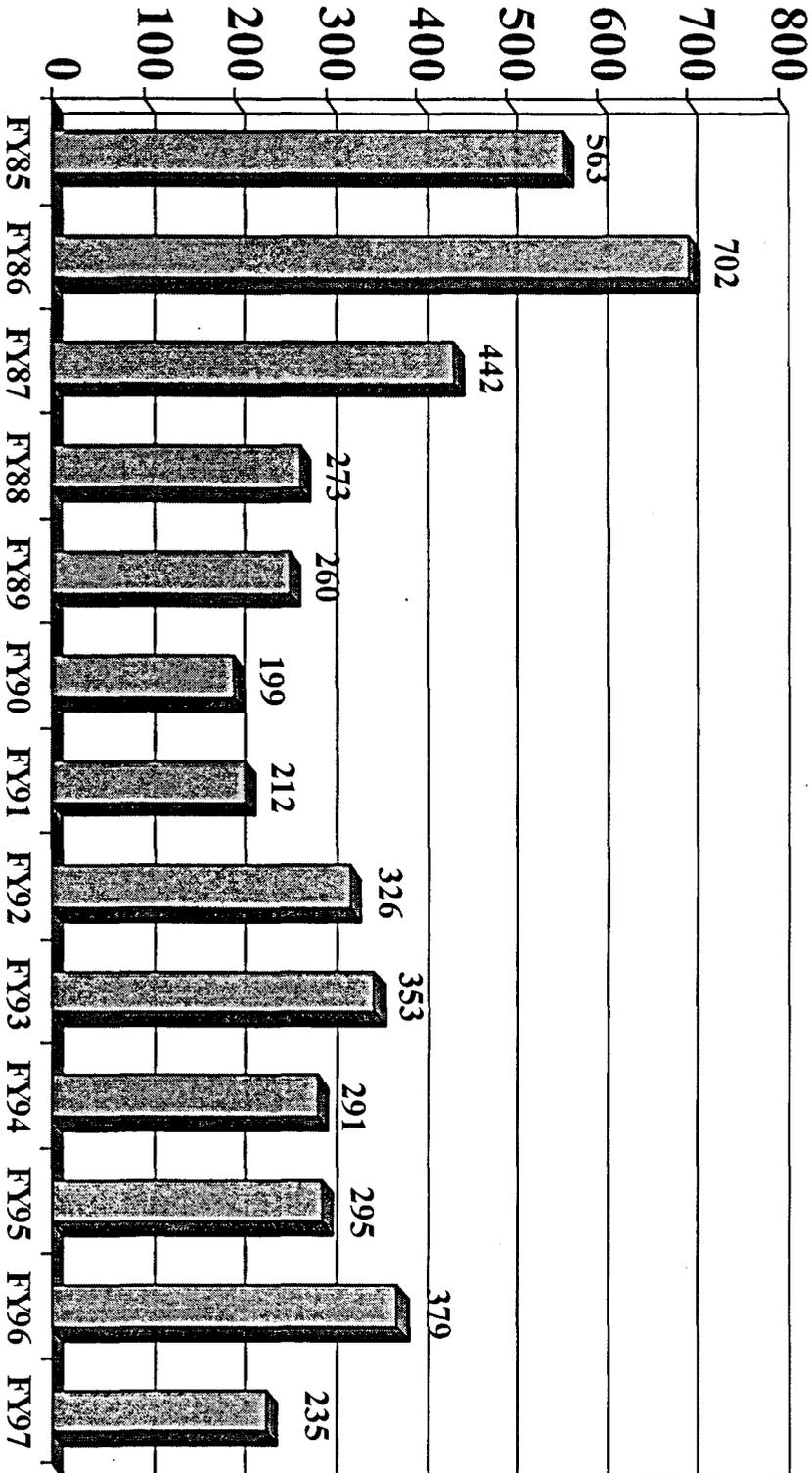
<u>CATEGORY</u>	<u>BEGIN</u>		<u>END</u>		<u>DISPOSITIONS</u>		
	<u>PENDING</u>	<u>FILINGS</u>	<u>PENDING</u>		<u>Granted</u>	<u>Denied</u>	<u>Total</u>
Master Docket ....	3	9	1		1	10	11
Petition Docket ..	0	6	0		1	5	6
Misc. Docket .....	<u>0</u>	<u>2</u>	<u>0</u>		<u>0</u>	<u>2</u>	<u>2</u>
TOTAL .....	3	17	1		2	17	19

MOTIONS ACTIVITY

<u>CATEGORY</u>	<u>BEGIN</u>		<u>END</u>		<u>DISPOSITIONS</u>			
	<u>PENDING</u>	<u>FILINGS</u>	<u>PENDING</u>		<u>Granted</u>	<u>Denied</u>	<u>Other</u>	<u>Total</u>
All motions .....	19	761	23		688	69	0	757

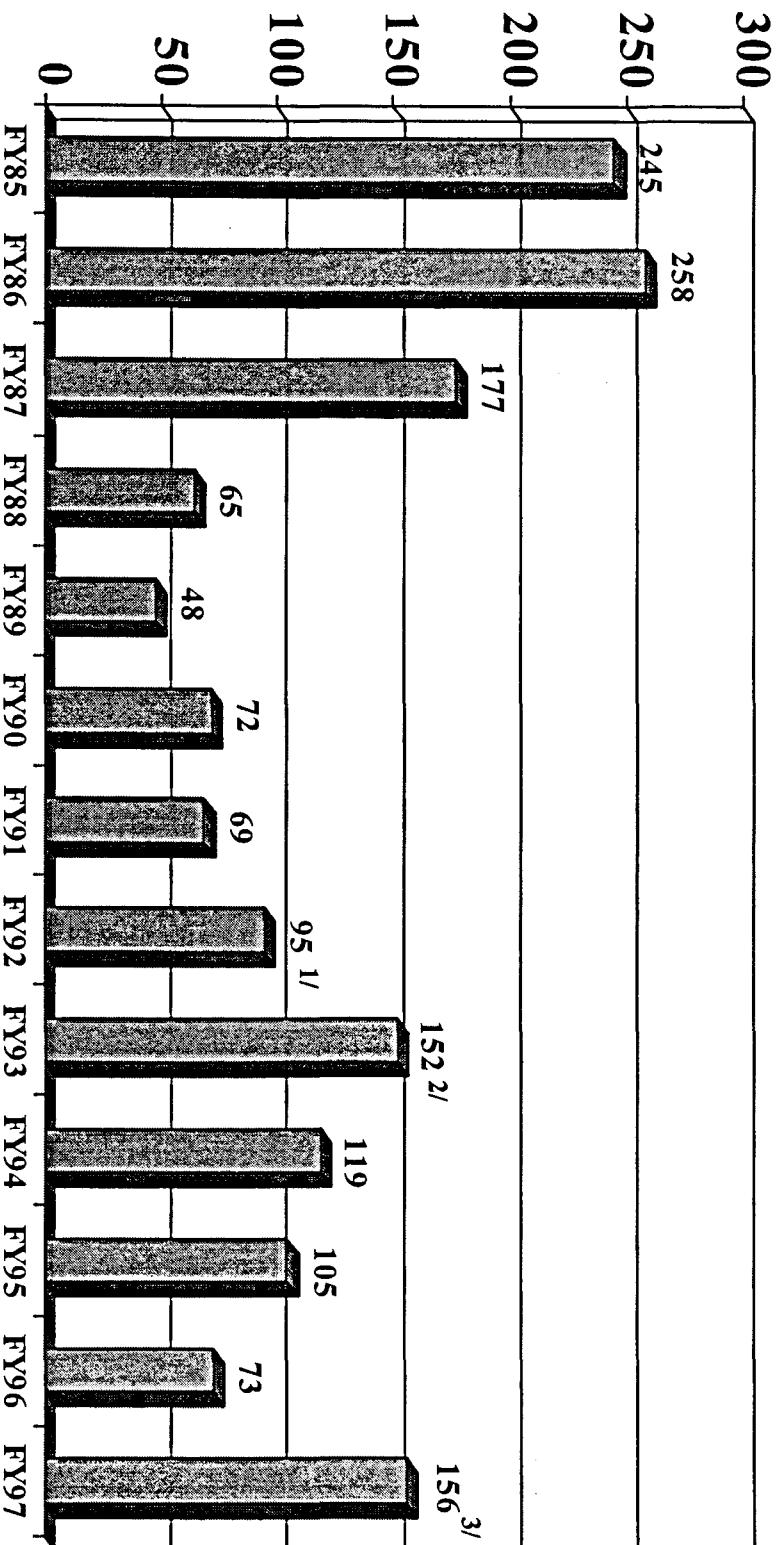
# APPENDIX A

## Petition Docket Year End Pending



# Master Docket Year End Pending

## APPENDIX B



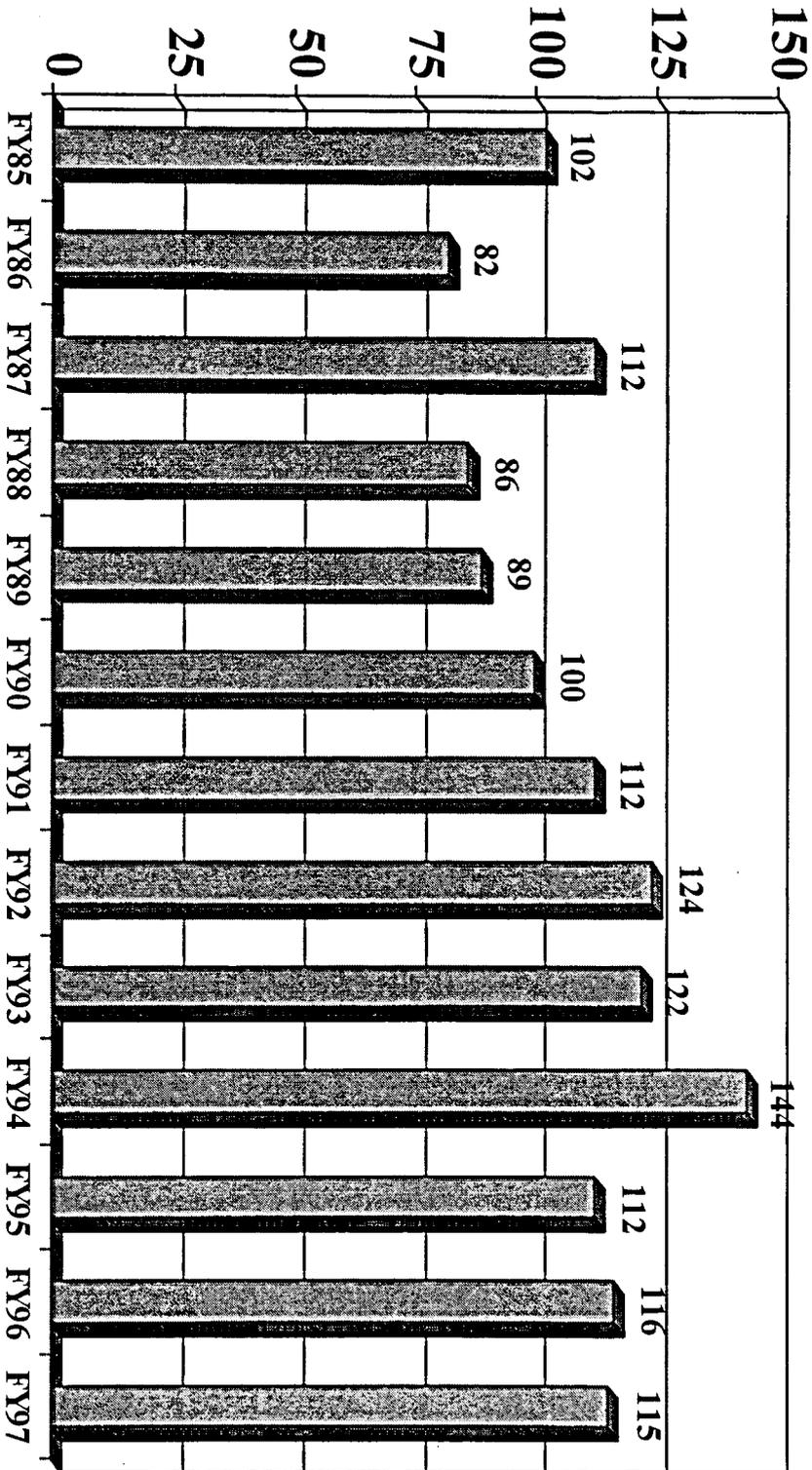
1/ This figure does not include 16 trailer cases to United States v. Watson, No. 68206/MC, and 8 trailer cases to United States v. Weiss, No. 67869/MC.

2/ This figure does not include 87 trailer cases to United States v. Mitchell, No. 93-1044/NA, and 9 trailer cases to United States v. Rexroat, No. 93-5007/AR.

3/ This figure does not include 133 trailer cases to United States v. Gorski, No. 97-0034/AF.

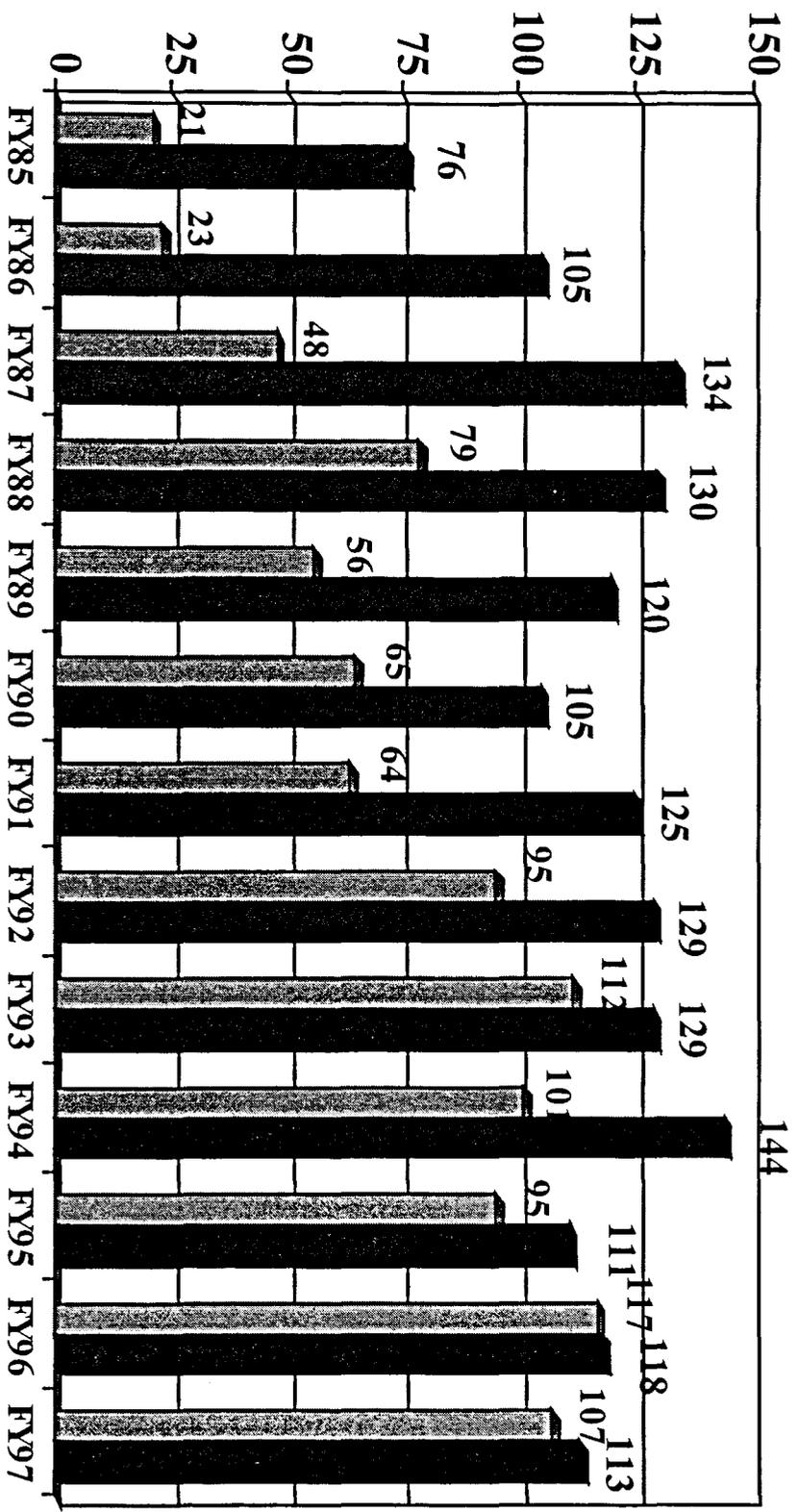
# APPENDIX C

## Oral Arguments Per Year



# Total Opinions Per Year

## APPENDIX D

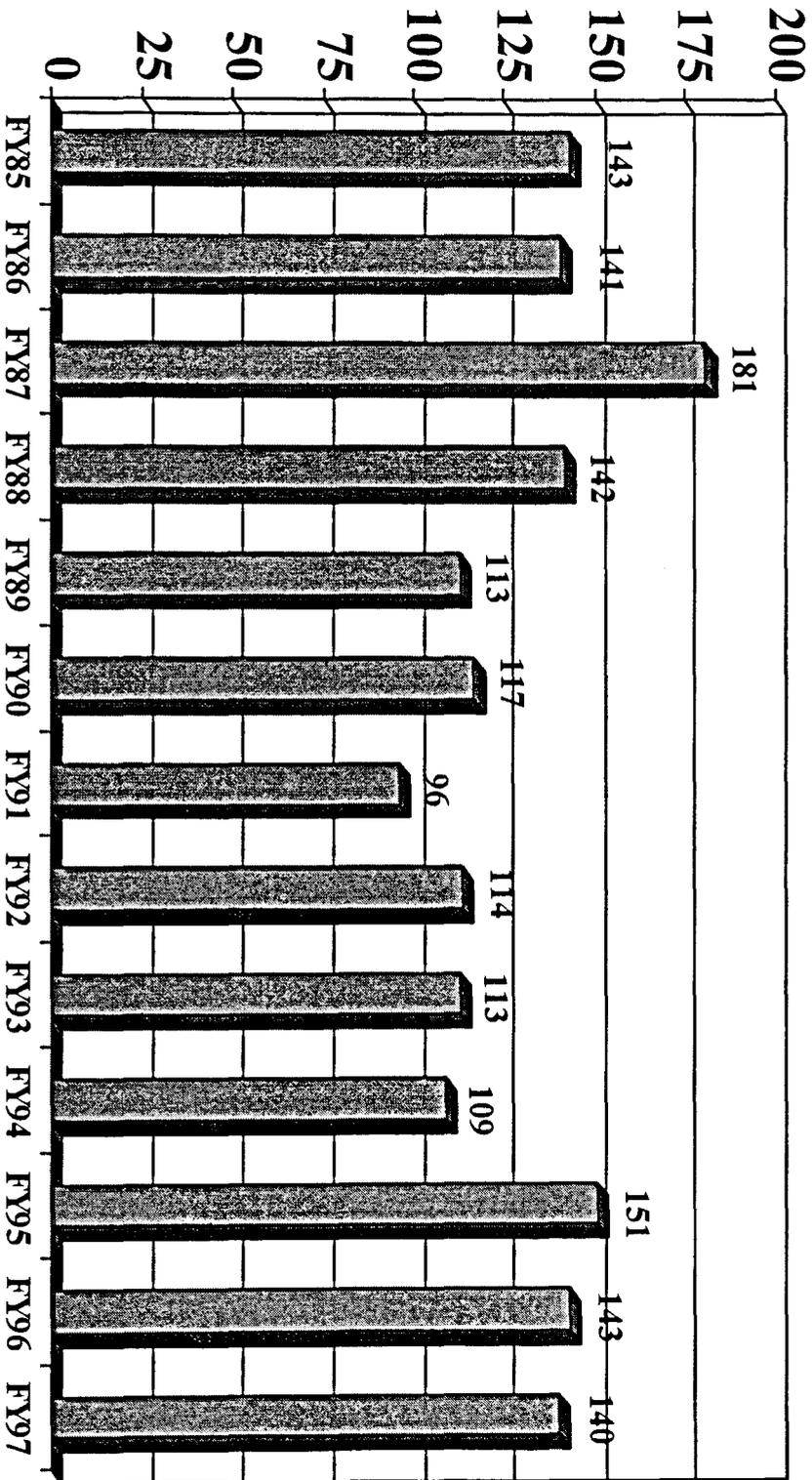


■ TOTAL SEPARATE OPINIONS (CONCUR, CONCUR IN THE RESULT, AND DISSENT)

■ TOTAL COURT OPINIONS

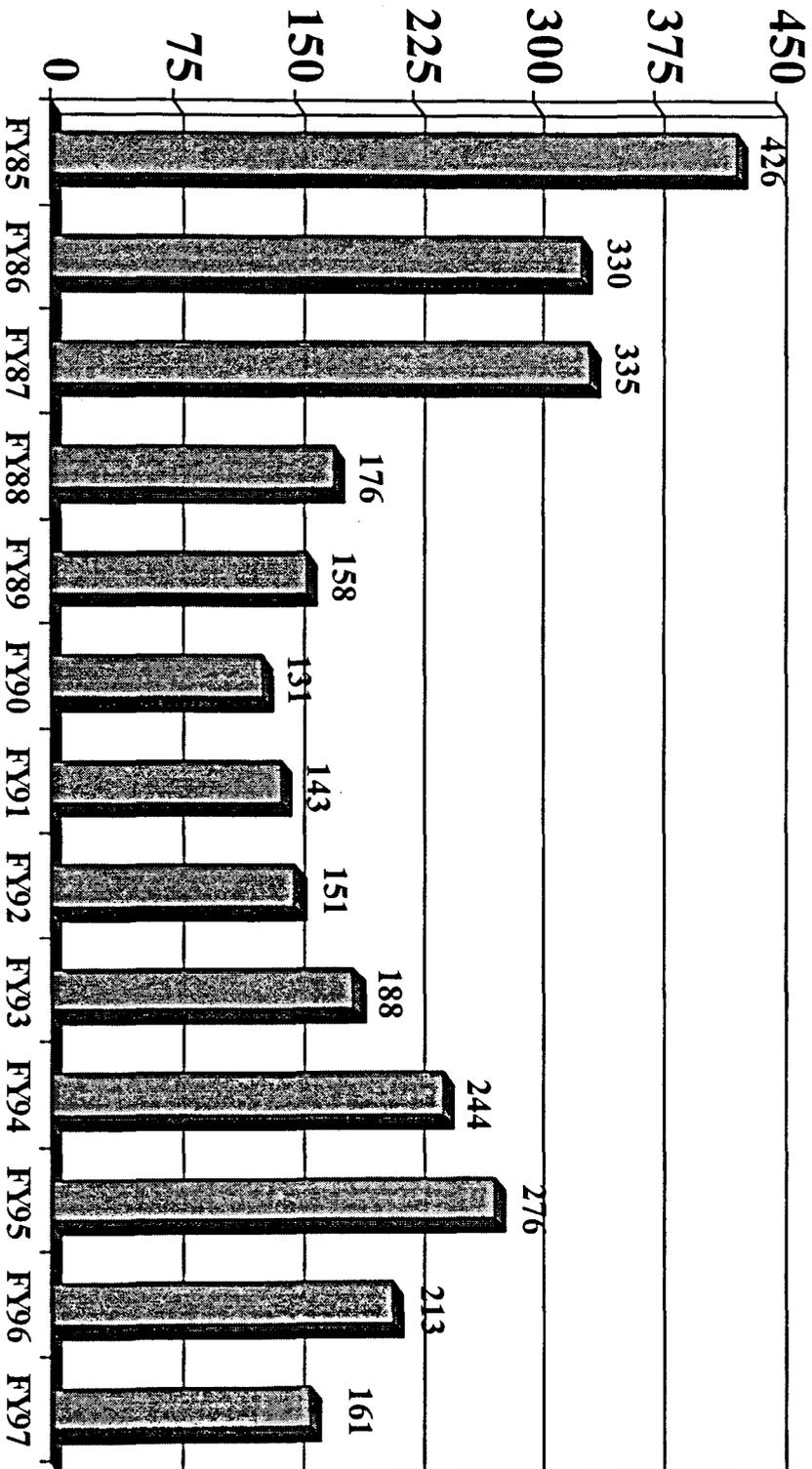
# APPENDIX E

## Days from Petition Filing to Grant



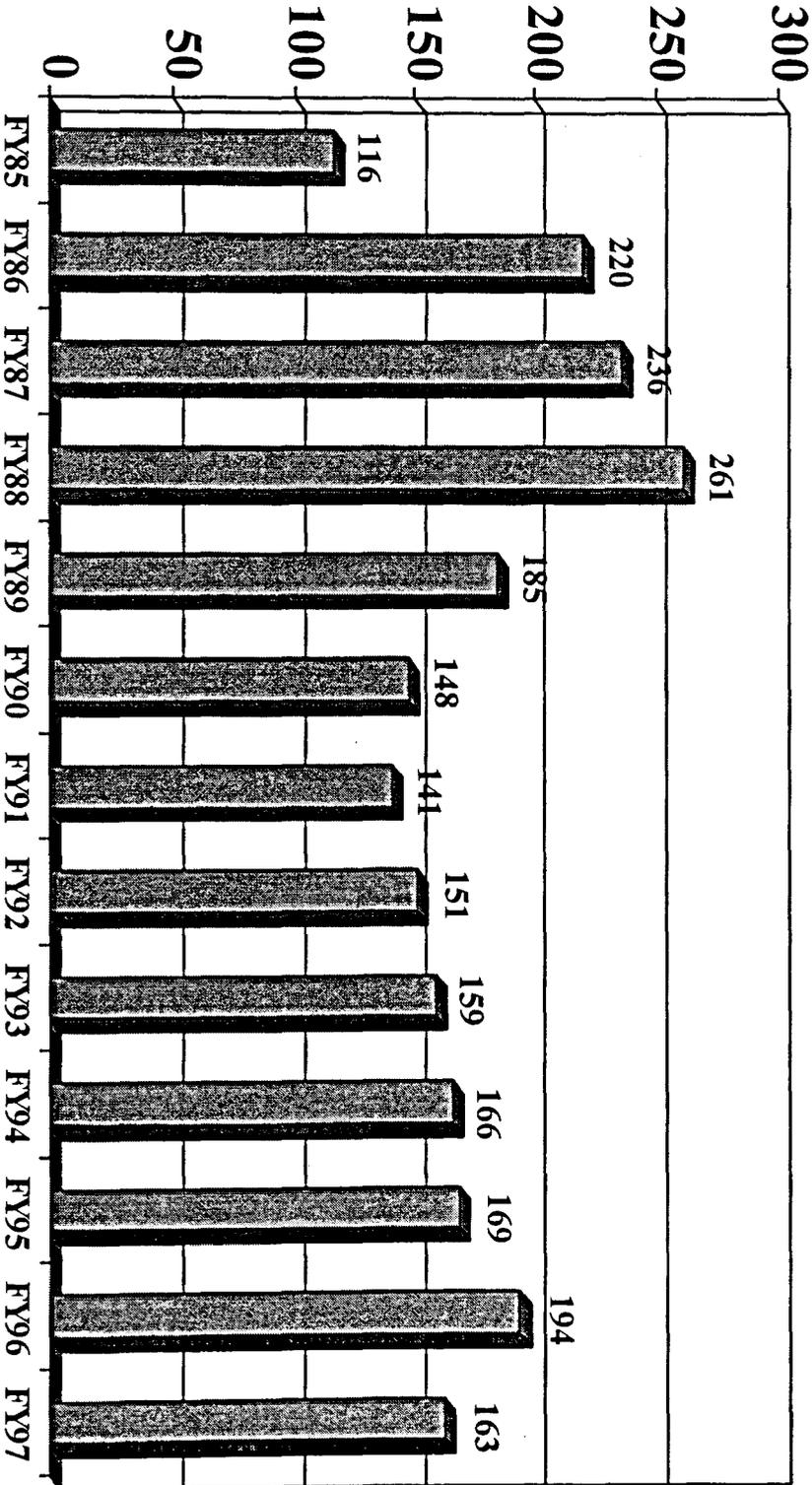
# APPENDIX F

## Days from Petition Grant to Oral Argument



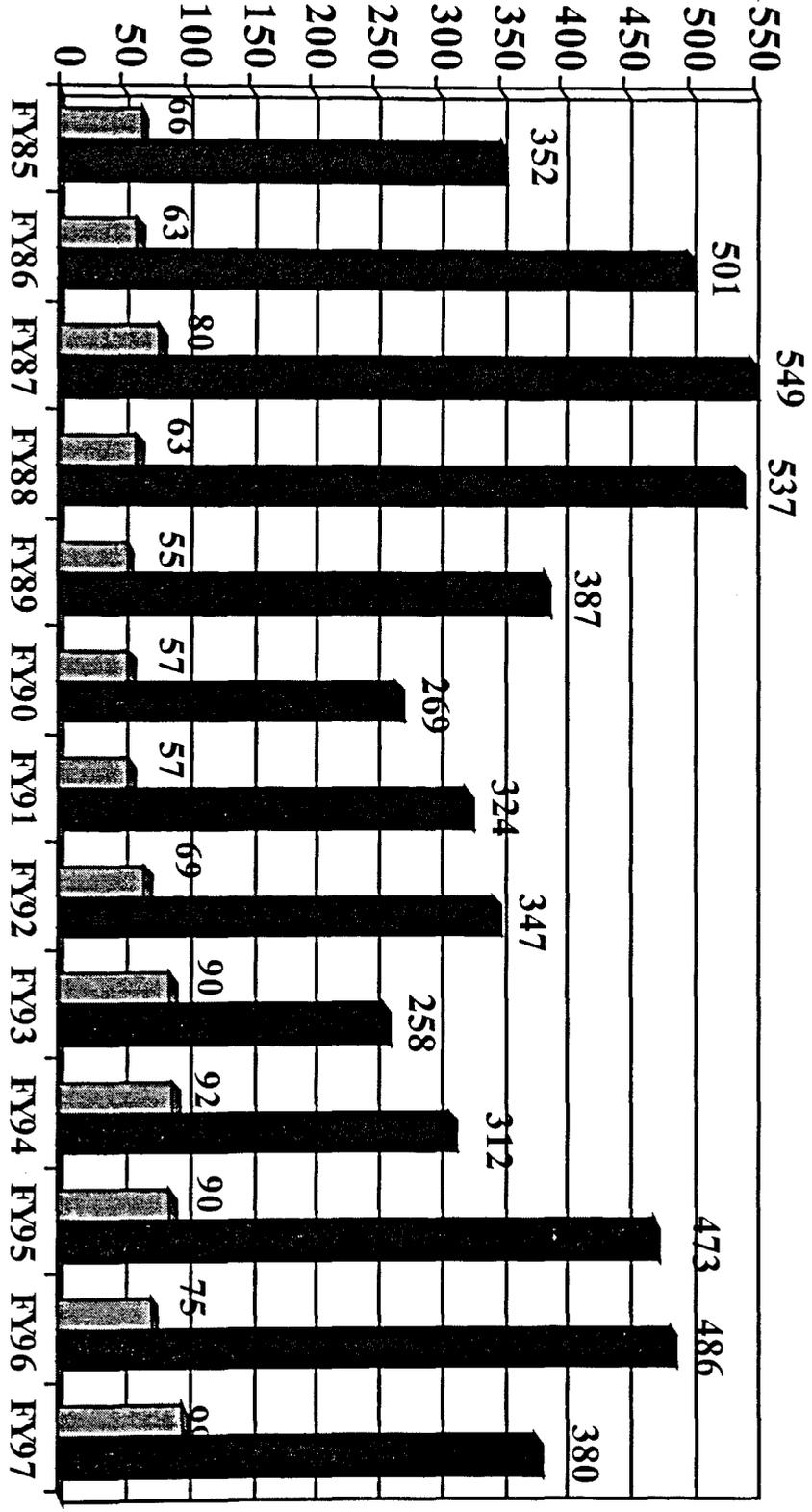
# APPENDIX G

## Days from Oral Argument to Final Decision



# APPENDIX H

## Days from Petition Filing to Final Decision

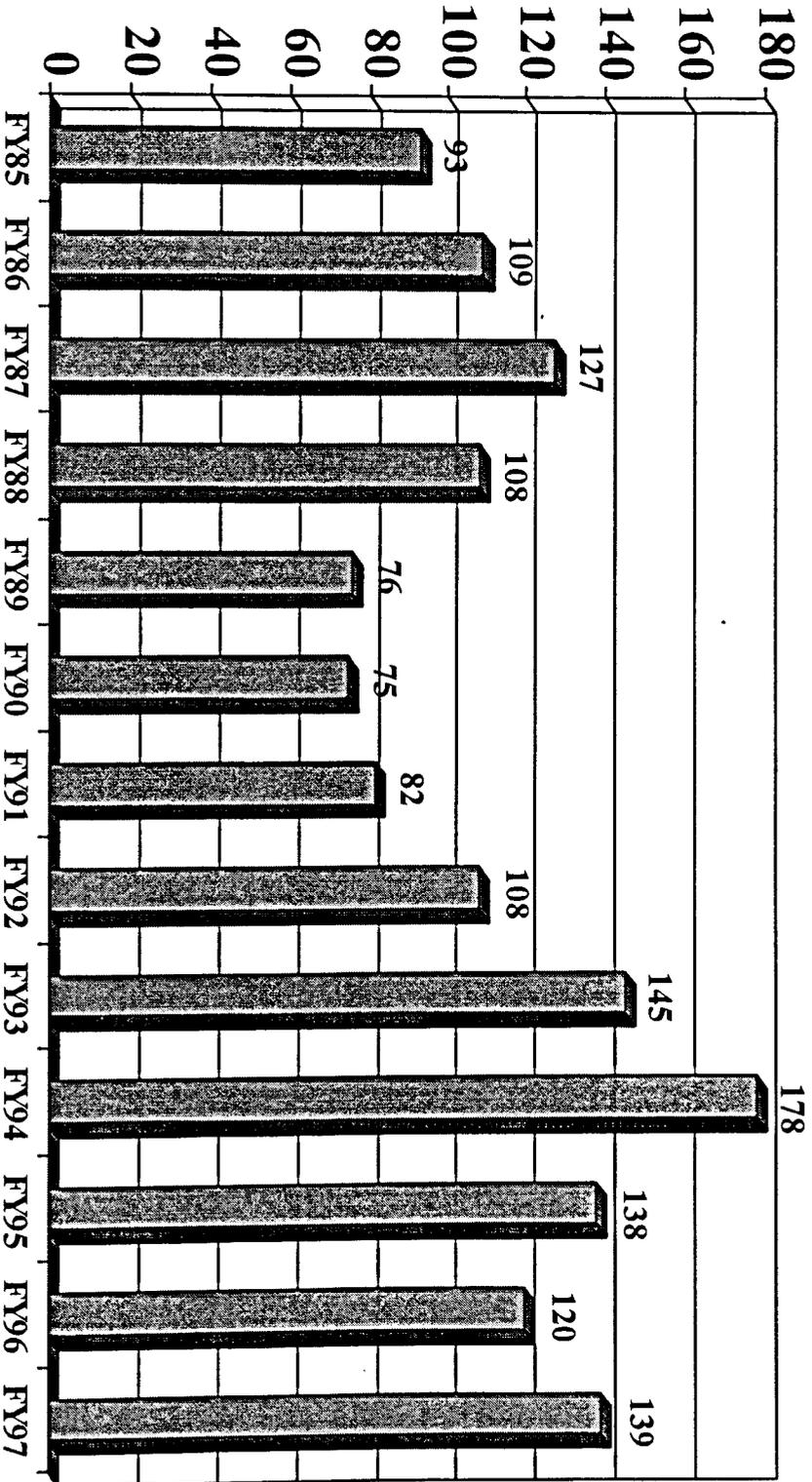


■ PETITION DOCKET (DENIAL/DISMISSAL/WITHDRAWAL)

■ MASTER DOCKET (GRANTED/CERTIFIED/DEATH CASES)

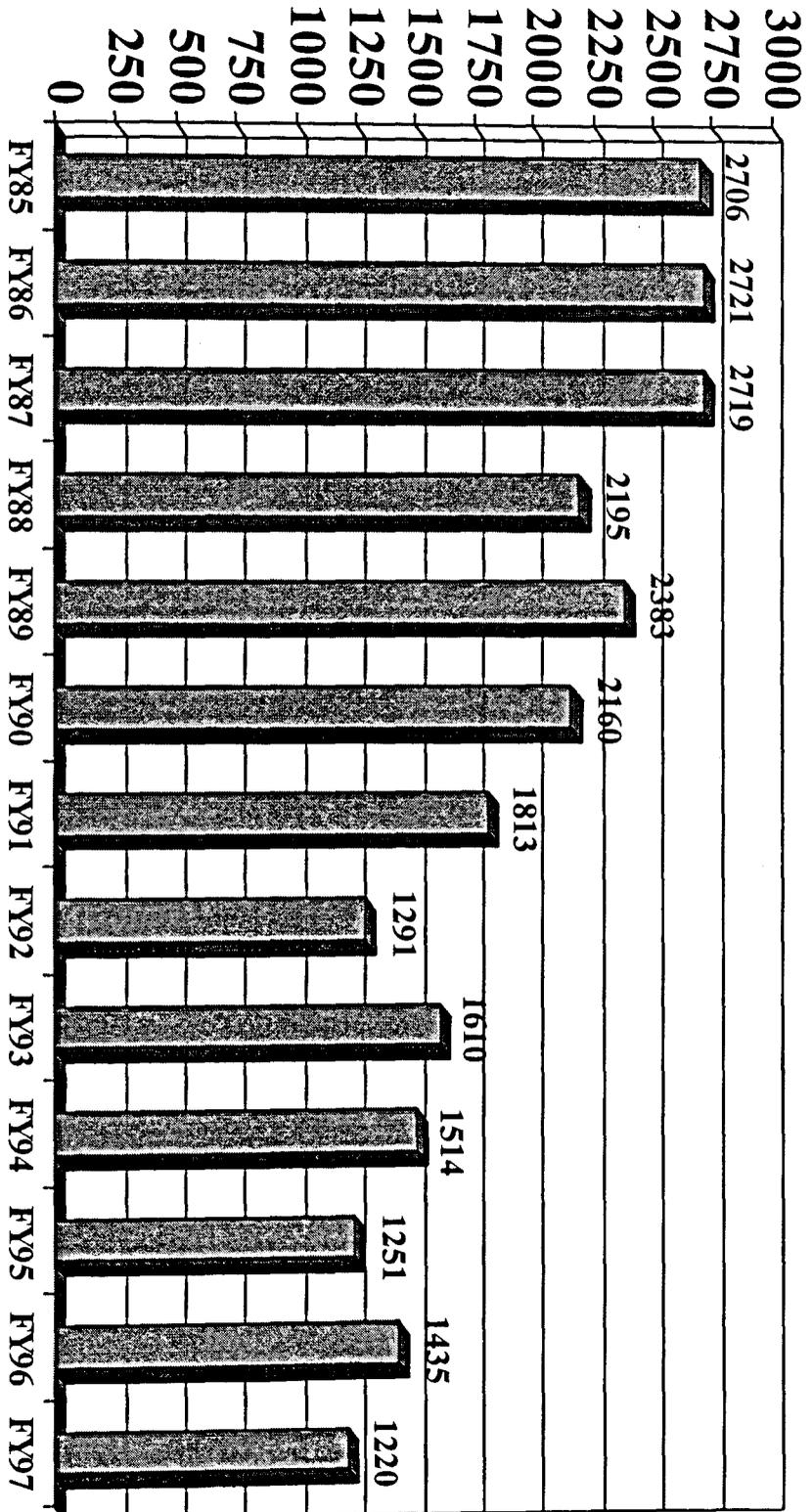
# APPENDIX I

## Days from Filing to Final Decision in All Cases



# APPENDIX J

## Total Petitions Filled Per Year



# APPENDIX K

## SELECTED DECISIONS AFFECTING THE ADMINISTRATION OF MILITARY JUSTICE WITHIN THE ARMED FORCES <sup>1</sup>

### COMMAND INFLUENCE

The Court addressed an issue in United States v. Bartley, 47 MJ 182 (1997), which involved a defense allegation that the trial defense counsel had entered into a sub rosa agreement with the Government that the defense would not make a motion based on unlawful command influence in exchange for a favorable pretrial agreement. After earlier remanding the case for further fact-finding on this issue (43 MJ 426-27), the Court upon further review examined the evidence relating to the issue and concluded that it was not convinced beyond a reasonable doubt, based on the full record, that the command influence issue did not induce the guilty plea. Thus, the Court set aside the findings and sentence and authorized a rehearing.

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<sup>1</sup>This section of the Court's annual report is prepared solely as an informational tool by the staff of the Court. It is included for the convenience of the reader to assist in easily locating cases of interest during the term. The case summaries are not of precedential value and should not be cited in briefs filed with the Court. It is further noted that some of these decisions were not unanimous.

## COURTS OF CRIMINAL APPEALS

Noting the authority of the Courts of Criminal Appeals under Article 66(c), UCMJ, concerning the scope of their fact-finding powers, the Court held in United States v. Ginn, 47 MJ 236 (1997), that Congress intended such courts to act as fact-finder in an appellate-review capacity and not in the first instance as a trial court. Thus, the Court also ruled that it was inappropriate for a Court of Criminal Appeals to exercise its fact-finding authority to resolve a post-trial claim of ineffective assistance of counsel predicated, in part, on the submission of conflicting post-trial affidavits. However, the Court further noted that an evidentiary hearing was not required in all cases to resolve such collateral claims. In resolving a guilty-plea case when an ineffective assistance of counsel claim was made by an accused, the Court held that an evidentiary hearing need not be ordered if an appellate court can conclude that the motion and the files and records of the case conclusively show that an appellant is entitled to no relief, citing United States v. Giardino, 797 F.2d 30, 32 (1<sup>st</sup> Cir. 1986). Although the Court found that, under the circumstances presented in Ginn, the Court of Criminal Appeals had erroneously exercised its fact-finding powers, it nevertheless held that the appellant had not been harmed because he had not shown that he would not have pleaded guilty but for counsel's alleged deficient representation.

## PROCEDURE

Examining the requirements of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986), as earlier applied in United States v. Moore, 28 MJ 366 (CMA 1989), concerning government peremptory challenges of court members of a military accused's own race, the Court noted in United States v. Tulloch, 47 MJ 283 (1997), that it had relied on differences between the military justice system and the civilian system in reaching its decision in Moore. In reliance on those differences in Moore, the Court further noted that it had rejected a requirement that the defense establish a prima facie case of discrimination. Addressing the issue of the Government's burden to justify a peremptory challenge in Tulloch, the Court held that once the convening authority has designated a servicemember as "best qualified" to serve on a court-martial panel, trial counsel may not strike that person on the basis of a proffered reason, under Batson and Moore, that is unreasonable, implausible, or that otherwise makes no sense. Thus, under the circumstances in Tulloch, the Court upheld the ruling of the Court of Criminal Appeals that the trial judge had erred in allowing the trial counsel to peremptorily challenge a court member.

Addressing the standard of review on appeal of an issue relating to the providency of pleas of guilty, the Court held in United States v. Peterson, 47 MJ 231 (1997), that

once a military judge has accepted a plea and entered findings of guilty thereon, an appellate court will not disturb the findings and plea unless it finds a substantial conflict between the plea and the accused's statements or other evidence of record, quoting United States v. Garcia, 44 MJ 496, 498 (1996).

#### **SUBSTANTIVE LAW**

In United States v. Solis, 46 MJ 31 (1997), the Court rejected a defense argument that there should be an "exculpatory no" exception in the military justice system to the offense of making a false official statement in violation of Article 107, UCMJ. After observing that there was a conflict among the federal circuit courts of appeals as to the application of an "exculpatory no" exception to 18 USC § 1001, the Court held that Article 107 differed from 18 USC § 1001 and that there were important reasons for such differences relative to the military mission of the armed forces. The Court held in this regard that the purpose of military criminal law was to maintain morale, good order, and discipline within the armed forces, an objective which had no parallel in civilian criminal law.<sup>2</sup>

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<sup>2</sup> Subsequent to the Court's decision in United States v. Solis, 46 MJ 31 (1997), the Supreme Court of the United States rejected the defense's interpretation of 18 USC § 1001 in Brogan v. United States, 66 LW 4111 (S. Ct. June 26, 1998).

Citing its prior case law, the Court in United States v. Bygrave, 46 MJ 491 (1997), affirmed an accused's conviction of assault with a means likely to cause death or grievous bodily harm in violation of Article 128, UCMJ, where the charged misconduct consisted of the accused engaging in unprotected sex with a victim whom he previously informed as to his own HIV-positive condition. The Court ruled that since a form of aggravated assault was involved, the victim could not consent to an act that was likely to result in grievous injury or death.

#### **EVIDENCE**

In United States v. Miller, 46 MJ 63 (1997), the Court held that the military judge did not abuse his discretion by admitting evidence of the accused's prior molestation of another child to show intent, plan or scheme, or motive to molest the present victim under the provisions of Military Rule of Evidence 404(b), citing United States v. Hicks, 24 MJ 3 (CMA 1987). The Court also ruled that the accused's acquittal of the prior offense was not dispositive since the proper focus of the admissibility of such evidence was whether it was relevant and whether its probative value outweighed its prejudicial impact under the provisions of Military Rules of Evidence 401 and 403.

## EVIDENCE OF RETIREMENT BENEFITS

In United States v. Greaves, 46 MJ 133 (1997), the Court held that a military judge erred in his response to questions from court members concerning the impact of a punitive discharge on the accused's eligibility for retirement by instructing the members that such matters constituted collateral consequences which they should not consider. Noting that the accused was very close to becoming retirement eligible, the Court held that its prior decision concerning a similar issue in United States v. Henderson, 29 MJ 221 (CMA 1989), was easily distinguishable from the present case, that each case must be examined on its facts and circumstances, and that the military judge in this case erred by rejecting evidence pertaining to the accused's potential monetary loss of retirement benefits.

## CHALLENGES FOR CAUSE

In United States v. Minyard, 46 MJ 229 (1997), the Court held that a military judge erred by rejecting a defense challenge for cause against a court member who was married to an agent involved in the investigation of this case. The Court distinguished between actual bias and implied bias by noting that a challenge for cause based on actual bias is essentially one of credibility where the military judge's ruling is accorded great deference, whereas a challenge based on implied bias is reviewed under an objective standard (reasonable member of the public)

which, in turn, requires an examination under Rule for Courts-Martial 912(f)(1)(N) to determine if there is substantial doubt as to legality, fairness, and impartiality of the court-martial.

#### **ARTICLE 31 RIGHTS**

In United States v. Payne, 47 MJ 37 (1997), the Court addressed a question concerning whether a civilian polygraph examiner was required to inform a military person of his Article 31, UCMJ, rights as part of a security clearance investigation in order for his confession to a rape offense to be admissible in his subsequent court-martial. The Court held that where the military accused requested revalidation of his security clearance and a polygraph examination was conducted as part of such security clearance investigation, the person performing the examination was not required to give Article 31 warnings as a prerequisite to the admissibility of the accused's rape confession to the examiner at the subsequent court-martial on this charged offense. In reaching its decision the Court observed that the examiner was a civilian employed by the Defense Investigation Service, the examiner was outside the accused's branch of service, there was no ongoing criminal investigation of the accused, and the accused initiated the security investigation.

## **PRETRIAL CONFINEMENT**

Addressing a defense claim of unlawful pretrial punishment in United States v. McCarthy, 47 MJ 162 (1997), the Court held that the mere fact that an accused complained to authorities about the conditions of his pretrial confinement did not support the conclusion that he was improperly subjected to punishment prior to trial in violation of Article 13, UCMJ. The Court further held that the question of unlawful pretrial punishment under Article 13 was a mixed question of law and fact that required a de novo review, but that the question of whether there was a purpose or intent to punish an accused before trial involved basic, primary, or historical facts. Thus, the Court ruled that a military judge's finding of fact on the purpose or intent alleged in the case would be reversed only for a clear abuse of discretion. After examining the evidence of record in this case, the Court held that the military judge did not err by rejecting the accused's claim of unlawful pretrial punishment.

## **ELECTRONIC CRIME**

The Court examined the constitutional protection of an individual's receipt and transmission of electronic data in the context of the transmission of child pornography in United States v. Maxwell, 45 MJ 406 (1996). Therein the Court observed that a person has a limited expectation of privacy in e-mail messages received on a computer

subscription service and that law enforcement officials must establish probable cause to enter into a personal and private computer. However, the Court noted that, after an electronic message is transmitted, the Fourth Amendment expectation of privacy diminished and that, after a message is transmitted and received by another person, the transmitter no longer controls its destiny. The Court further distinguished between an electronic message which had been transmitted via a network service such as America Online (AOL) and direct "real time" transmissions, noting that in the former the transmission is stored in a centralized computer. The Court also distinguished between information provided by an individual after he received it through normal channels, noting the loss of the expectation of privacy after its transmission, and the search of the computer files of AOL where there was a greater expectation of privacy which required a warrant. After examining the information provided for the search warrant of the computer files of AOL in this case, the Court held that the search was valid in part and invalid in part. Specifically, noting that AOL allowed users to select various screen names, as the warrant was issued in terms of a specific screen name, the Court held that the conversion of the screen name to a user name by AOL resulting in the search of all screen names of the user was overly broad. Rather, the Court held that the search pertaining to the screen name provided in the warrant, after viewing a mistake in

spelling to be inconsequential, was valid but that the search under another screen name utilized by the same accused was invalid.

#### **PRIOR PUNISHMENT**

Analyzing the concept of prior punishment in United States v. Zamberlan, 45 MJ 491 (1997), the Court held that the military judge did not err by rejecting a defense requested instruction on prior punishment where the accused had a nonjudicial punishment previously imposed under Article 15, UCMJ, which was suspended but subsequently imposed due to a vacation of the suspension for later misconduct. Distinguishing its earlier decision in United States v. Pierce, 27 MJ 367 (CMA 1989), which involved a prior nonjudicial punishment for the same misconduct involved in the later court-martial, the Court held that, in this case, the misconduct giving rise to the court-martial was not the same misconduct as resulted in the Article 15 punishment, but was only utilized to vacate the suspended punishment of that prior proceeding.

#### **CAPITAL PUNISHMENT**

The Court previously affirmed a sentence of death in United States v. Curtis, 44 MJ 106 (1996). Thereafter, the Court granted a defense petition for reconsideration in this case, 46 MJ 129 (1997), and held that the accused had been denied effective assistance of counsel during the

sentencing hearing. Accordingly, the Court reversed the decision of the United States Navy-Marine Corps Court of Military Review (now the Court of Criminal Appeals) as to the sentence and remanded the case with directions to either affirm a sentence of life imprisonment with accessory penalties or conduct a rehearing on the sentence.

Another death sentence was reviewed by the Court in United States v. Thomas, 46 MJ 311 (1997). Therein the Court held that the military judge had erred by instructing the members to vote on a sentence to death before voting on a less severe sentence. The Court ruled that the military judge's erroneous instructions undermined confidence in the reliability of this sentence because they created an intolerable risk that this ultimate sanction was erroneously imposed. Thus, the Court reversed the decision of the United States Navy-Marine Corps Court of Criminal Appeals as to sentence and remanded the record with direction that a rehearing on sentence may be ordered.

#### **JURISDICTION**

Noting the literal language of Article 3(b), UCMJ, the Court affirmed the decision of the United States Army Court of Criminal Appeals in United States v. Reid, 46 MJ 236 (1997), which held that an accused must be tried and convicted on a charge of fraudulent discharge before he can be tried for misconduct which occurred prior to such

discharge. The Court held that a fraudulent discharge is merely voidable, not void, and that a court-martial provided an appropriate forum for adjudicating such matter. Rejecting the Government's argument of efficiency and effectiveness as to allowing all charges to be tried by one court-martial, the Court ruled that this was a matter of policy to be addressed to Congress, not the Court.

The Court held in United States v. Edwards, 46 MJ 41 (1997), that it had no jurisdiction to directly review nonjudicial proceedings under the provisions of Article 15, UCMJ, but held it may review the question of the admissibility of a record of an Article 15 proceeding at a court-martial. Thus, the Court addressed the issue of whether the operational status of a Navy vessel was relevant to the "vessel exception" of Article 15(a) concerning a servicemember's right to demand trial by court-martial. Citing United States v. Yatchak, 35 MJ 379 (CMA 1992), which construed the term "attached to or embarked in a vessel" as used in Article 15(b)(2)(A) concerning the punishment of confinement on bread and water, the Court held that the limitation should be defined in the same manner as the term was used in Article 15(a). As Yatchak held that the operational status of a vessel was relevant, the Court remanded Edwards for further proceedings.

## **SECTION 3**

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

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

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

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

(See table insert, attached)

**U.S. ARMY LEGAL SERVICES AGENCY**

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

**U.S. ARMY JUDICIARY**

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

**U.S. ARMY TRIAL DEFENSE SERVICE**

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

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

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

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

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

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

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

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

#### **SIGNIFICANT MILITARY JUSTICE ACTIONS**

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

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

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

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

#### JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

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

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

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

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

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

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

#### FOREIGN CRIMINAL JURISDICTION

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

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

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

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

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

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

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

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

#### PROFESSIONAL RESPONSIBILITY

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

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

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

#### LITIGATION

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

#### EDUCATION AND TRAINING

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

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

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

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

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

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

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

## PERSONNEL, PLANS, AND POLICIES

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

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

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

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

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

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

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

# U.S. ARMY MILITARY JUSTICE STATISTICS

Period: FISCAL YEAR 1997

## PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)

TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
GENERAL	741	701	40	-6.1%
BCD SPECIAL [A]	312	271	41	-5.2%
NON-BCD SPECIAL	13	8	5	-53.6%
SUMMARY	396	381	15	+66.4%
OVERALL RATE OF INCREASE (+)/DECREASE (-) OVER LAST REPORT				+5.6%

## PART 2 - DISCHARGES APPROVED [B]

GENERAL COURTS-MARTIAL (CA LEVEL)			
NUMBER OF DISHONORABLE DISCHARGES(+ dismissals)		152 (+26)	
NUMBER OF BAD CONDUCT DISCHARGES		391	
SPECIAL COURTS-MARTIAL (SA LEVEL) [A]			
NUMBER OF BAD CONDUCT DISCHARGES		155	

## PART 3 - RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG

FOR REVIEW UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL	766
FOR REVIEW UNDER ARTICLE 66 - BCD SPECIAL COURTS-MARTIAL	156
FOR EXAMINATION UNDER ARTICLE 69 - GENERAL COURTS-MARTIAL	94

## PART 4 - WORKLOAD OF THE U.S. ARMY COURT OF CRIMINAL APPEALS

TOTAL ON HAND BEGINNING OF PERIOD (AT ISSUE)	97 [C]
GENERAL COURTS-MARTIAL [D]	
BCD SPECIAL COURTS-MARTIAL [D]	
REFERRED FOR REVIEW (AT ISSUE)	734 [C]
GENERAL COURTS-MARTIAL	
BCD SPECIAL COURTS-MARTIAL	
TOTAL CASES REVIEWED	733 [E]
GENERAL COURTS-MARTIAL	
BCD SPECIAL COURTS-MARTIAL	
TOTAL PENDING AT CLOSE OF PERIOD (AT ISSUE)	98 [C]
GENERAL COURTS-MARTIAL	
BCD SPECIAL COURTS-MARTIAL	
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD	-12.0%

## PART 5 - APPELLATE COUNSEL REQUESTS BEFORE U.S. ARMY COURT OF CRIMINAL APPEALS

NUMBER	731 [F]
PERCENTAGE	99.86%

## PART 6 - ACTIONS OF THE U.S. COURT OF APPEALS FOR THE ARMED FORCES

PERCENTAGE OF CCA. REVIEWED CASES FORWARDED TO USCAAF361 of 733 [G]	49.2%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD	+ 1.4%
PERCENTAGE OF TOTAL PETITIONS GRANTED 64 of 392 [G]	16.3%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD	+ 9.3%
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY USACCA [G]	8.7%
RATE OF INCREASE (+)/DECREASE (-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD 39 in FY 96; 50 in FY 97 [H]	+ 28.2%

**PART 7 - APPLICATIONS FOR RELIEF, ARTICLE 69**

PENDING AT BEGINNING OF PERIOD		9	
RECEIVED		18	
DISPOSED OF		22	
GRANTED	1		
DENIED	15		
NO JURISDICTION	6		
WITHDRAWN	0		
TOTAL PENDING AT END OF PERIOD			

**PART 8 - ORGANIZATION OF COURT**

TRIALS BY MILITARY JUDGE ALONE			
GENERAL COURTS-MARTIAL		499	
SPECIAL COURTS-MARTIAL		217	
TRIALS BY MILITARY JUDGE WITH MEMBERS			
GENERAL COURTS-MARTIAL		242	
SPECIAL COURTS-MARTIAL		108	

**PART 9 - COMPLAINTS UNDER ARTICLE 138**

NUMBER OF COMPLAINTS			
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**PART 10 - STRENGTH**

AVERAGE ACTIVE DUTY STRENGTH	486668		
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**PART 11 - NONJUDICIAL PUNISHMENT (ARTICLE 15)**

NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED		39907	
RATE PER 1,000		82.0	
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD		7.8 increase	

PAGE 2 OF 2

## EXPLANATORY NOTES

- [A] Cases convened by GCM convening authority.
- [B] Based on records of trial received during FY for appellate review.
- [C] Includes only cases briefed and at issue.
- [D] No reason being seen for distinguishing, GCM and BCDSPCM appeals are not tracked separately.
- [E] Includes Article 62 appeals, All Writs Act cases, and appeals withdrawn.
- [F] Includes 8 represented by civilian, as well as military, counsel.
- [G] Refers only to cases actually forward and petitions acted upon in FY
- [H] Includes all Army cases decided (including remands) in FY, whether petitioned, certified, or mandatory review.

## **SECTION 4**

### **REPORT OF THE JUDGE ADVOCATE GENERAL OF THE NAVY**

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

**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 order to supervise the administration of military justice.

**ARTICLE 69(a), UCMJ, EXAMINATIONS**

Fifty-five general court-martial records of trial, not statutorily eligible for automatic review by the Navy-Marine Corps Court of Criminal Appeals, were forwarded for examination to the Office of the Judge Advocate General in fiscal year 1997. Three cases required corrective action by the Judge Advocate General. One case was pending review at the close of fiscal year 1997.

**ARTICLE 69(b), UCMJ, APPLICATIONS**

In fiscal year 1997, 25 applications under Article 69(b), Uniform Code of Military Justice, were received for review. Additionally, eight such applications remained pending from fiscal year 1996. Of these 33 applications, 20 were denied on the merits, while relief was granted in whole or in part in six cases. Seven cases are currently pending review.

**ARTICLE 73, UCMJ, PETITIONS**

In fiscal year 1997, one petition for new trial was received by the Office of the Judge Advocate General and that petitioned was denied.

## APPELLATE DEFENSE DIVISION

Appellate Defense Practices. A total of 2240 cases of the 2406 cases received were reviewed during fiscal year 1997 by an average of 16 active duty Navy and Marine Corps judge advocates and 25 Naval and Marine Corps Reserve judge advocates assigned to the Appellate Defense Division. The number of cases reviewed represents an increase of 6.8% over the cases reviewed the previous fiscal year. Of that total, 487 (22%) were fully briefed to the Navy-Marine Corps Court of Criminal Appeals, while 1268 (57%) were summarily assigned. Three hundred and forty-five cases were petitioned to the Court of Appeals for the Armed Forces.

Capital Litigation. This was another active year for the Division in this area of the law. Two decisions were issued by the Court of Appeals for the Armed Forces in which new sentence hearings were ordered: United States v. Curtis and United States v. Thomas.

The Division assisted in the third annual Death Penalty Defense Course at the Naval Justice School. This course presented a "how to" look at trial level litigation. Civilian and military experts taught the basics on how to prepare and defend capital cases.

The year also saw the implementation of the Defense Capital Litigation Resource Center. The Center is headed by Captain Henry Lazzaro, JAGC, USNR, a Naval Reserve judge advocate with an extensive background as a criminal litigator. He is actively assisting Navy, Marine, and Army trial defense counsel who are currently assigned to defend service members in three pending death penalty cases. Captain Lazzaro and the Center's resources are available for judge advocates from any branch of the armed forces.

Supreme Court Practice. During fiscal year 1997, seven petitions for writ of certiorari were submitted.

Trial Defense Assistance. Assistance to trial defense counsel continued to be a primary service offered by the Appellate Defense Division. This year the Division implemented its own electronic advisory in which summaries of appellate cases were provided to the field counsel. Litigation tips and advice regarding trial procedures or tactics are also included in these advisories. In addition to the electronic advisories, counsel at the Appellate Defense Division continue to be available to assist trial defense counsel with telephonic advice.

Reserves. The reserve team continues to be an integral part of our appellate practice. When the Appellate Defense Division turned over almost 75% of its personnel this summer, the reserves stepped in and provided the support needed to keep the cases moving. Approximately 25 Naval and Marine Corps Reserve judge advocates reviewed 1423 cases; almost 60% of the Division docket.

#### APPELLATE GOVERNMENT DIVISION

Appellate Representation. The eight Navy and five Marine Corps judge advocates assigned to the Appellate Government Division filed a total of 1601 pleadings last year; 1282 with the Navy-Marine Corps Court of Criminal Appeals and 319 with the Court of Appeals for the Armed Forces.

Field Assistance. The Trial Counsel Assistance Program (TCAP) is a function within the Appellate Government Division which provides a central coordinating point to assist field trial counsel and staff judge advocates in the effective prosecution of courts-martial. Eleven appellate counsel are detailed to implement this program. In

fiscal year 1997, prompt assistance was provided in response to almost 800 telephone calls or electronic messages from trial counsel and staff judge advocates requesting advice or information about cases pending or being tried. Additional assistance was provided through training presentations. The Appellate Government Division also published six Electronic Viewpoints to the field dealing with a variety of current legal issues.

Presentations. Government counsel participated in the 1997 Judicial Conference of the United States Court of Appeals for the Armed Forces and made presentations at the Army Judge Advocate General's School; the Navy-Marine Corps Trial Judiciary Conference in San Diego, California; the Army-Navy Reserve Conference in Minneapolis, Minnesota; the Courts of Criminal Appeals Judge's Conference in Washington, D.C.; and multiple presentations at the Naval Justice School in Newport, Rhode Island. These presentations included extensive support of the Government's Capital Litigation Course.

Reserves. The Appellate Government Division provided training to, while receiving outstanding support from, 13 Naval reservists assigned to NAMARA (Govt 116) and NAVJAG 113 and six Marine Corps reservists. The reservists continued to make a significant contribution to the successful completion of the Division's mission. Additionally, the Division was honored by receiving the Rear Admiral Hugh H. Howell Award for Excellence for its integration of reserve personnel with the active duty judge advocates.

#### **NAVY-MARINE CORPS TRIAL JUDICIARY**

The Navy-Marine Corps Trial Judiciary (NMCTJ) consists of 33 active duty judges and 26 reservists serving in 13 circuit offices.

In addition, the judiciary staffs four branch offices. The Northeast Judicial Circuit billet is currently gapped, with the cases from that area of responsibility being handled by judges from the Tidewater and Atlantic Circuits.

During fiscal year 1997, NMCTJ provided judicial services in 548 general courts-martial and 2698 special courts-martial. These numbers represent a slight increase in general courts-martial (17) and a decrease in special-martial (96), as compared to fiscal year 1996.

NMCTJ provided judicial services to fleet, Fleet Marine Force, and shore activities in the Continental United States and around the world, including Iceland, the Pacific islands, and at sea.

Members of the Trial Judiciary participated in continuing judicial education at the Trial Judiciary's annual training conference, the Naval Justice School, the Army Judge Advocate General's School, and the Air Force-sponsored Interservice Military Judges' Seminar. NMCTJ also provided training at various levels, including the Navy-Marine Corps Senior Officer Courses and other in-service courses. NMCTJ also performed an active role in mentoring judge advocates through both formal and informal training sessions.

#### **NAVAL LEGAL SERVICE COMMAND**

Naval Legal Service Command (NAVLEGSVCCOM) provides a wide range of legal services to afloat and ashore commands, active duty naval personnel, dependents, and retirees from 68 offices world-wide: eight Naval Legal Service Offices (NLSOs), five Trial Service Offices (TSOs), the Naval Justice School, and 54 detachments and branch offices. NAVLEGSVCCOM provides counsel for courts-martial, administrative boards, physical evaluation boards, legal assistance, and local commanders. NAVLEGSVCCOM also provides assistance for

claims processing and adjudication, and training judge advocates, legalmen, and other DoD personnel.

Over the last year NAVLEGSVCCOM added two new TSOs--TSO Pacific (Pearl Harbor) and TSO Europe and Southwest Asia (Naples). The NLSOs at San Francisco, Pearl Harbor, Great Lakes, and Groton stood down, but NLSO detachments remain at the latter three locations. The new TSOs are assuming all trial counsel (prosecution), court reporting, and command service functions formerly provided by the corresponding NLSO in their area. The NLSOs retained defense counsel, personal representation, legal assistance, and claims functions.

The field version of the Military Justice Management Information System (MJMIS) has been developed and was implemented in our CONUS NLSOs and TSOs. Additional installation at CONUS sites is scheduled for the second quarter of fiscal year 1998. MJMIS provides a consolidated tracking system for courts-martial from the initial receipt of charges through the appellate process.

NAVLEGSVCCOM continues to upgrade the hardware and software assets of its personnel, purchasing Pentium computers and creating a Navy JAG CD-ROM. The JAG Corps offices now have access to the Internet and a Navy JAG Home Page on the World Wide Web.

NAVLEGSVCCOM is commanded by the Deputy Judge Advocate General of the Navy and includes 325 officers, 218 enlisted, and 218 civilian personnel. The command constitutes about 40% of the Navy's total judge advocate strength.

#### NAVAL JUSTICE SCHOOL

Organization. The Naval Justice School (NJS) reports to the Commander, Naval Legal Service Command, for administrative and operational control. The main NJS facility is located in Newport,

Rhode Island. Teaching detachments are also based in San Diego, California, and Norfolk, Virginia (areas of fleet concentration). Also reporting to the Commanding Officer, NJS, is the Defense Institute of International Studies, operating under the Expanded International Military Education and Training (EIMET) Program.

Mission Statement. The mission of NJS is:

1. To oversee training of Navy judge advocates, limited duty officers (law), and legalmen to enhance their career-long professional development and readiness;

2. To provide comprehensive formal training to all sea service (Navy, Marine Corps, and Coast Guard) judge advocates and other legal personnel to promote justice and ensure the delivery of quality legal advice and other legal services; and

3. To train sea service commanders and senior officers in the practical aspects of military law to enable them to perform their command and staff duties, and train other sea service personnel to assist in the sound administration of military justice.

Coordination. Through the Inter-Service Legal Education Review Committee (ISLERC), the Commanding Officer of NJS meets with the Commandants of the Army and Air Force JAG Schools semiannually to discuss new initiatives and opportunities for cross-training, and to increase cooperation and efficiency in the training of legal personnel within DoD.

Academic Programs. NJS has five "core" courses, all of which contain substantial blocks of instruction relating to military justice and operation of the UCMJ. These courses are:

1. *Accession Judge Advocate Course.* This nine-week course is offered four times per year and is the accession level course in military justice for all judge advocates of the Navy, Marine Corps,

and Coast Guard. The majority of the course is dedicated to military justice and court-martial advocacy training (other topical areas include legal assistance and administrative law). Upon graduation from NJS, judge advocates are certified in accordance with Article 27(b), UCMJ. In fiscal year 1997, the following numbers of judge advocates graduated from NJS:

Navy:	88
Marine Corps:	48
Coast Guard:	12
International:	1

2. *Accession Legalman Course.* This nine-week course is offered four times per year. In fiscal year 1997, the course consisted of two phases: a paralegal phase, dedicated to training Navy legalmen in military justice practice (six weeks), and a court reporting phase (three weeks). In fiscal year 1997, 89 legalmen graduated from NJS.

3. *Senior Officer Course in Military Justice and Civil Law (SOC).* This four-day course is taught both in Newport and in other areas of fleet and Fleet Marine Force concentration. In fiscal year 1997, it was offered 21 times, at 13 different locations. The course is designed to prepare senior officers in the execution of the legal responsibilities of command. As such, the majority of the course focuses on such areas as nonjudicial punishment and court-martial procedures. In fiscal year 1997, the following numbers of senior officers participated in SOCs:

Navy:	695
Marine Corps:	185
Coast Guard	21
Civilian	3
Air Force	1

4. *Legal Officer Course.* In the sea services, non-lawyer "legal officers" perform a host of military justice functions in many commands that are not large enough to warrant assignment of a judge

advocate. This four-week course is geared toward these collateral duty legal officers (typical paygrade is 0-1 to 0-3) and prepares them to assume legal duties in their respective commands. This course is offered 16 times per year, at Newport, San Diego, and Norfolk. In fiscal year 1997, the following numbers of legal officers were trained at NJS:

Navy:	427
Marine Corps:	73
Coast Guard:	2
Civilian:	1
International:	3

5. *Legal Clerk Course.* Typically assigned to assist a non-lawyer legal officer within a command is a "legal clerk," usually a collateral duty for a command yeoman, personnelman, or (in the Marine Corps a legal services specialist). This two-week course is designed to provide training in the area of legal forms and reports, service record entries, post-mast and post-court-martial procedures. In fiscal year 1997, the course was offered 23 times, at Newport, San Diego, and Norfolk, and trained the following numbers of personnel:

Navy:	359
Marine Corps:	12
Coast Guard:	0
Civilian:	3
Army:	1

In addition to the "core" courses described above, NJS offered numerous continuing legal education programs throughout fiscal year 1997 which included detailed instructions relating to the operation of the UCMJ. These include:

Officer Courses:

Reserve Judge Advocate Course	(two weeks)
Staff Judge Advocate Course	(two weeks)
Capital Litigation Course	(three days)
(Separate offerings for both Prosecution and Defense)	
Intermediate Trial Advocacy Course	(one week)
Advanced Trial Advocacy Course	(two days)
Coast Guard Law Specialist Course	(one week)

Reserve JAGC Military Law Workshop	(two days)
Computer Crimes	(two days)
National College of District Attorneys Course	(one week)
Senior Leadership Military Justice Refresher	(two days)

Enlisted Courses:

Reserve Legalman Course	(two weeks)
Army Reserve Court Reporting Course	(two weeks)
Mid-Career Legalman Course	(two weeks)
Senior Legalman Course	(one week)

International Programs. Within the EIMET program, the NJS Defense Institute of International Legal Studies plays an important role in developing educational programs for foreign military and civilian officials in the areas of military justice, human rights, disciplined military operations, and civilian control of the military.

In many of these programs, the structure and operation of the UCMJ is used both to initiate discussion and as a comparative model. In fiscal year 1997, the NJS International Training Detachment was involved in training delegations from over 50 countries and assisted several developing democracies in drafting their own military justice codes.

Publications. NJS is responsible for the publication of the Naval Law Review, all materials in support of academic programs, and any additional materials directed by higher authorities. In fiscal year 1997, Volume 44 of the Naval Law Review was published, and contained several articles related to the operation of the UCMJ. NJS also updated several of its study guides.

#### MARINE CORPS ACTIVITIES

The Marine Corps judge advocate community consisted of approximately 392 certified judge advocates during fiscal year 1997. Nearly half of all judge advocates were company grade officers, in pay

grade 0-3 or below. Thirty-five officers were new accessions, ordered to begin their period of active duty at The Basic School in Quantico, Virginia. In addition, to the new accessions, 10 officers graduated from ABA accredited law schools by way of government sponsored law education programs. Four of these officers graduated from the Funded Law Education Program (FLEP) and six graduated from the Excess Leave Program (LAW) (ELP). Thirteen officers are currently assigned to FLEP and fifteen are now attending law school under the ELP.

Ten judge advocates attended resident professional military education courses in fiscal year 1997. Six majors and one captain received LL.M. degrees from the graduate course at the Army Judge Advocate General's School. Two captains completed the Amphibious Warfare School in Quantico, Virginia, and one major completed the Command and Staff Course. Two majors received LL.M. degrees through the Special Education Program (SEP). Twelve officers are currently attending resident professional military education courses and two are assigned to the SEP.

As unrestricted officers, Marine Corps judge advocates continue to fill numerous non-legal billets. Two judge advocates serve in command billets at Marine Corps Recruit Depot, Parris Island, South Carolina, and Marine Corps Air-Ground Combat Center, 29 Palms, California. Three colonel judge advocates are chiefs of staff at major commands. During fiscal year 1997, three judge advocates (one colonel and two lieutenant colonels) were approved for command. Ten judge advocates continue to serve in joint billets.

The Marine Corps reserve judge advocate community averaged 393 officers during fiscal year 1997. Approximately 300 of these officers were actively participating in the Reserve. Two colonel reserve judge advocates currently serve as appellate judges on the Navy-Marine Corps

Court of Criminal Appeals. Fifteen reserve judge advocates, major through colonel, serve as military judges in the Navy-Marine Corps Trial Judiciary. Sixteen reserve judge advocates serve as appellate counsel with the Navy-Marine Corps Appellate Review Activity. Reserve judge advocates serve at bases and stations throughout the country and overseas. They provide legal support alongside, and are indistinguishable from, their active duty counterparts in billets ranging from instructors at Naval Justice School to legal assistance attorneys at Marine Corps Base, Camp Pendleton. Reserve judge advocates are also found serving in non-legal billets at various combat arms and supporting commands.

JOHN D. HUTSON  
Rear Admiral, USN  
Judge Advocate General of the Navy

Period: FY 1997

**PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)**

TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
GENERAL	548	511	37	+ 4%
BCD SPECIAL	2698	2586	112	- 3%
NON-BCD SPECIAL	0	0	0	0%
SUMMARY	1631	1589	42	+ 4%
OVERALL RATE OF INCREASE (+)/DECREASE (-) OVER LAST REPORT				- .2%

**PART 2 - DISCHARGES APPROVED**

GENERAL COURTS-MARTIAL (CA LEVEL)				
NUMBER OF DISHONORABLE DISCHARGES			205	
NUMBER OF BAD CONDUCT DISCHARGES			220	
SPECIAL COURTS-MARTIAL (SA LEVEL)				
NUMBER OF BAD CONDUCT DISCHARGES			1756	

**PART 3 - RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG**

FOR REVIEW UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL	387	
FOR REVIEW UNDER ARTICLE 66 - BCD SPECIAL COURTS-MARTIAL	1926	
FOR EXAMINATION UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL	47	

**PART 4 - WORKLOAD OF THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS**

TOTAL ON HAND BEGINNING OF PERIOD		1646	
GENERAL COURTS-MARTIAL	430		
BCD SPECIAL COURTS-MARTIAL	1216		
REFERRED FOR REVIEW		2370	
GENERAL COURTS-MARTIAL	419		
BCD SPECIAL COURTS-MARTIAL	1951		
TOTAL CASES REVIEWED		2008	
GENERAL COURTS-MARTIAL	363		
BCD SPECIAL COURTS-MARTIAL	1645		
TOTAL PENDING AT CLOSE OF PERIOD		2008	
GENERAL COURTS-MARTIAL	490		
BCD SPECIAL COURTS-MARTIAL	1518		
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD 2090/2008			- 4%

**PART 5 - APPELLATE COUNSEL REQUESTS BEFORE U. S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS**

NUMBER	2370	
PERCENTAGE	100%	

**PART 6 - U. S. COURT OF APPEALS FOR THE ARMED FORCES**

PERCENTAGE OF COMR REVIEWED CASES FORWARDED TO USCA	346	17%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		0%
PERCENTAGE OF TOTAL PETITIONS GRANTED	47	14%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		+ 7% more=50% increase
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY COMR		2.3%
RATE OF INCREASE (+)/DECREASE (-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		+ 88%

**PART 7 - APPLICATIONS FOR RELIEF, ARTICLE 69**

PENDING AT BEGINNING OF PERIOD		8	
RECEIVED		25	
DISPOSED OF		26	
GRANTED	6		
DENIED	20		
NO JURISDICTION	-----		
WITHDRAWN	-----		
TOTAL PENDING AT END OF PERIOD		7	

**PART 8 - ORGANIZATION OF COURT**

TRIALS BY MILITARY JUDGE ALONE			
GENERAL COURTS-MARTIAL		427	
SPECIAL COURTS-MARTIAL		2437	
TRIALS BY MILITARY JUDGE WITH MEMBERS			
GENERAL COURTS-MARTIAL		121	
SPECIAL COURTS-MARTIAL		261	

**PART 9 - COMPLAINTS UNDER ARTICLE 138**

NUMBER OF COMPLAINTS	200	
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**PART 10 - STRENGTH**

AVERAGE ACTIVE DUTY STRENGTH	556,559	
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**PART 11 - NONJUDICIAL PUNISHMENT (ARTICLE 15)**

NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED	34,033	
RATE PER 1,000	60.1	
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD	+ 10%	

## **SECTION 5**

### **REPORT OF THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE**

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

In compliance with the requirements of Article 6(a), Uniform Code of Military Justice (UCMJ), The Judge Advocate General and Deputy Judge Advocate General 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 civic, professional, and military organizations.

**THE AIR FORCE COURT OF CRIMINAL APPEALS**

The Court underwent a number of changes during this year. Chief Judge Richard D.S. Dixon, II, retired from military service after 30 years in the Air Force and over 5 years as Chief Judge. Colonel Richard F. Rothenburg assumed the mantle of Chief Judge on April 1, 1997.

The process begun under Chief Judge Dixon, of reducing the Court's backlog was completed, with cases completing review in record time. With the elimination of the backlog, the Court's output has decreased by 25%. Of primary focus were over 150 cases reviewed by the Air Force Court involving application of Articles 57a and 58b, UCMJ. The *ex post facto* application of the law was ultimately resolved by the ruling of the United States Court of Appeals for the Armed Forces in *United States v. Gorski*. Post-trial errors continue to be a factor and, in addition to the guidance in the Court's written opinions, the Court has embarked on a broader outreach program.

**USAF JUDICIARY ORGANIZATION**

The USAF Judiciary Directorate has responsibility for overseeing the administration of military justice throughout the United States Air Force, from nonjudicial proceedings to the appellate review of courts-martial. Additionally, the Directorate has the staff responsibility of the Air Force Legal Services Agency in all military justice matters which arise in connection with programs, special projects, studies, and inquiries generated by the Department of Defense (DoD), Headquarters USAF, members of Congress, and various agencies. The Judiciary Directorate consists of the Trial Judiciary Division, Government Trial and Appellate Counsel Division, Appellate Defense Division, Trial Defense Division, Military Justice Division, and the Clemency, Corrections and Officer Review Division.

**TRIAL JUDICIARY DIVISION**

The military judges' duties include: presiding over all general and special courts-martial tried in the United States Air Force; serving as investigating officers under Article 32, UCMJ; legal advisors for officer discharge boards and other administrative boards; and hearing officers at public hearings held to consider draft environmental impact statements. The Air Force Trial Judiciary had an average of 21 active duty trial judges, 5 Reserve trial judges, and 11 noncommissioned officers assigned throughout 5 judiciary circuits worldwide. During the year, military judges averaged approximately 120 days on temporary duty to perform these functions at locations other than their bases of assignment. The Chief Trial Judge, his military judge assistant and, as

of late July 1997, one noncommissioned officer are assigned to the Trial Judiciary headquarters.

The Chief Trial Judge made supervisory visits to all three CONUS circuits and both of the overseas circuits to review workload and facilities. The Trial Judiciary now has a website, available to trial judges. The website replaces *The DICTA*, which was previously published on a quarterly basis.

The Twenty-Third Interservice Military Judges' Seminar was conducted by the Trial Judiciary at The Air Force Judge Advocate General's School, Maxwell AFB, Alabama, from 27 April to 2 May 1997. This seminar was attended by 70 military judges from the trial judiciaries of the Army, Navy, Marine Corps, Coast Guard, and the Air Force, and by the Chief Military Trial Judge of the Canadian Forces.

In June 1997, six military judges attended the Special Problems in Criminal Evidence Course at the National Judicial College, Reno, Nevada, and one judge attended the Managing Trials Effectively Course, also at the National Judicial College in Reno. Seven trial judges attended the three-week Military Judges' course conducted by The Army Judge Advocate General's School in Charlottesville, Virginia, from 12 through 30 May 1997. Finally, each of the judicial circuits conducted two or three-day educational workshops during the year. All workshops were held in conjunction with trial and defense counsel workshops for the respective circuits; the Chief Trial Judge attended and participated in the European, Pacific, Eastern, and Central Circuit workshops.

The former Chief Trial Judge, Colonel (Ret.) James E. Heupel, attended both the mid-year and annual meetings of the American Judges Association. The new Chief Trial Judge, Colonel Michael B. McShane, arrived in July 1997, and attended the annual meeting of the American Judges Association as well as the annual meeting of the American Bar Association where he was named to the Executive Committee of the National Conference of Special Court Judges. These interactions with civilian judges are most beneficial in promoting a greater mutual understanding of the military and civilian justice systems and the roles of military and civilian judges.

## **GOVERNMENT TRIAL & APPELLATE COUNSEL DIVISION**

### **Appellate Government Counsel**

The appellate government counsel review records of trial of courts-martial, analyze legal issues, and write legal briefs presenting the position of the United States. They argue the Government's position before the Air Force Court of Criminal Appeals and the United States Court of Appeals for the Armed Forces. They also advise prosecutors throughout the Air Force on trial strategy and recent developments in the law.

The appellate government counsel continued to manage the Advocacy Continuing Education (ACE) Program. In the last fiscal year, a web page dedicated to the ACE program was created and placed on the FLITE server at Maxwell AFB. Ready access to this material benefits trial counsel worldwide. Hard copies of ACE materials continue to be distributed.

Easy access to this material supplements the briefings provided at both the Trial and Defense Advocacy Course (TDAC), the Advanced Trial and Defense Advocacy Course (ATAC), and the Major Command Staff Judge Advocate Conferences.

Appellate government counsel contributed to "Project Outreach," sponsored by USCAAF and the AFCCA, by conducting oral arguments before audiences at the United States Air Force Academy and Howard University Law School, demonstrating the fairness and professionalism of the military justice system.

The Chief, Government Trial and Appellate Counsel Division and one appellate government counsel attended trial counsel workshops in all five judicial circuits. They participated in the workshops as instructors and seminar participants.

Four reserve judge advocates, assigned as appellate counsel, continued to provide excellent support. In addition to preparing written briefs, two of the reserve counsel presented oral argument before the Court of Appeals for the Armed Forces during the fiscal year.

Appellate practice before USCAAF and AFCCA is cyclic as indicated below.

AFCCA	<u>FY 95</u>	<u>FY 96</u>	<u>FY 97</u>
Briefs Filed	412	329	434
Cases Argued	33	27	22
USCAAF	<u>FY 95</u>	<u>FY 96</u>	<u>FY 97</u>
Briefs Filed	71	80	85
Cases Argued	33	52	58
SUPREME COURT	<u>FY 95</u>	<u>FY 96</u>	<u>FY 97</u>
Petition Waivers Filed	24	4	15
Briefs Filed	2	0	0

#### **Circuit Trial Counsel**

During the fiscal year 1997, there were 15 Circuit Trial Counsel (CTC) divided equally between three circuit offices in CONUS. 4 other CTCs covered the Pacific and European theaters, two per theater. CTCs tried 259 general courts-martial or 48% of all general courts-martial. In addition, CTCs tried 33 special courts-martial and represented government interests in eight of the nine officer discharge boards held Air Force wide. Several CTCs attended the Criminal Law New Developments Course at the Army JAG School in Charlottesville, Virginia. Workshops for base-level prosecutors were conducted by the CTCs in all five judicial circuits; CTCs also conducted one-on-one training of assistant trial counsel during pretrial case preparation and trials. CTCs also utilized their talents by teaching as adjunct instructors at the Trial and Defense Advocacy Course (TDAC) and the Advanced Trial and Defense Advocacy Course (ATAC).

## APPELLATE DEFENSE COUNSEL DIVISION

The Appellate Defense Division provide appellate defense services for military personnel. This includes assistance to appellants at all stages of the appellate process which extends to submission of written briefs and conducting oral arguments before military appellate tribunals and the U.S. Supreme Court.

In response to a petition filed by the United States Solicitor General, the United States Supreme Court granted certiorari in the case of *United States v. Scheffer*. This was the first Air Force case to be granted review by the Supreme Court. The division filed its Brief for the Respondent in August 1997.

The division continued to provide appellate updates to counsel in the field through Circuit Defense Counsel Workshops. In addition, appellate counsel taught new Area Defense Counsel at Area Defense Counsel Orientation Courses.

During this period, the division filed its brief to the Court of Appeals for the Armed Forces in the case of *United States v. Simoy*, the only Air Force death penalty case currently on appeal.

The following figures reflect the division's workload over fiscal year 1997:

### AFCCA

Cases Reviewed	505
Oral Arguments	22
Other Motions	191

### USCAAF

Supplement to Petitions	527
Grant Briefs	85
Oral Arguments	58
Other Motions	111

### Supreme Court

Petitions	13
Briefs in Opposition	2
Briefs on the Merits	1

## TRIAL DEFENSE DIVISION

The Trial Defense Division is responsible for providing legal defense services within the Air Force to all Air Force members and, in certain cases, civilian employees of the Air Force and members of the other Armed Forces through Area Defense Counsel (ADC), Defense Paralegals (DP), Circuit Defense Counsel (CDC), and Chief Circuit Defense Counsel (CCDC). They report to the Chief, Trial Defense Division, who in turn reports directly to the Director, USAF Judiciary.

Defense counsel assigned to the Division represent military members in interrogation situations; UCMJ Article 32 investigations; pretrial confinement hearings; summary, special, and general courts-martial; and all post-trial and clemency matters. They also serve as respondents' counsel in involuntary discharge, demotion, and nonjudicial punishment proceedings; flying evaluation, physical evaluation, and medical credentials boards; and various, other adverse personnel actions. Overseas-assigned counsel act as military legal advisors in foreign jurisdiction cases as well.

As has been the case for the past several years, the Trial Defense Division continued its realignment of personnel and offices. In July 1997, the ADC offices and personnel at both Wright-Patterson AFB OH and Scott AFB IL were realigned from the Central Circuit to the Eastern Circuit. This move will improve span of control in the Central Circuit and the balance among the CONUS circuit offices.

Additionally, in July 1997, the Division opened a new office at Los Angeles AFB CA, adding both an ADC and a DP to the rolls. In August, the Andrews AFB MD office added one attorney, bringing that office to two ADCs and one DP.

As of 30 September 1997, the Division had 81 ADCs stationed at 70 installations worldwide. They received support from 70 DPs. Spread throughout the 5 circuits were 21 CDCs and 5 CCDCs. The CCDCs, along with all but four of the CDCs, were stationed at the circuit offices at Bolling AFB, DC; Randolph AFB, TX; Travis AFB, CA; Ramstein AB, Germany; and Yokota AB, Japan.

One of the most welcomed personnel developments in many years was the approval by the commander, Air Force Legal Services Agency, of the assignment of a Defense Paralegal to the Office of the Chief, Trial Defense Division, in July 1997. Due to the large number of bases and paralegals assigned to the Division, this paralegal has proven to be invaluable in assisting in the management of a formidable legal and administrative workload.

Trial defense counsel training remained one of the division's highest priorities. This training includes periodic ADC Orientation Courses for new ADCs and annual one-week workshops at each of the circuits. The Division also provided adjunct faculty members for the Trial and Defense Advocacy Course and the Advanced Trial Advocacy Course, both of which are conducted at The Air Force Judge Advocate General School, Maxwell AFB, AL. In addition, on-the-job training was continuously conducted by CDCs and CCDCs.

#### **MILITARY JUSTICE DIVISION**

The Military Justice Division prepares opinions and policy positions for The Judge Advocate General and for the Air Force Board for Correction of Military Records. They also assemble reports on military justice requested by the White House, Congress, DoD and the Air Staff. The division chief represents the Air Force on the Joint Service Committee on Military Justice (JSC).

During the course of the past year, the Military Justice Division served as the action agency for the review of military justice issues on

applications submitted to the Air Force Board for Correction of Military Records. The Division provided 102 formal opinions concerning such applications. They also received 1,406 inquiries in specific cases requiring either formal written replies or telephonic replies to senior officials, including the President and members of Congress. Finally, the Military Justice Division provided representatives to all interservice activities involving military justice and support for the Code Committee. The Military Justice Division also reviewed 88 records of trial for review under Article 69, UCMJ.

#### **CLEMENCY, CORRECTIONS & OFFICER REVIEW DIVISION**

The primary responsibilities of the Clemency, Corrections and Officer Review Division are to (1) recommend appropriate disposition of statutorily required sentence review actions by the Secretary of the Air Force in officer and cadet dismissal cases; (2) recommend action by The Judge Advocate General or the Secretary of The Air Force, as appropriate, to effect statutorily authorized clemency for members of the Air Force under court-martial sentence; (3) represent The Judge Advocate General on the Air Force Clemency and Parole Board; (4) make recommendations for the Secretary of the Air Force to the Attorney General on Presidential Pardon applications by court-martialed Air Force members; and (5) advise The Judge Advocate General and Security Force Command on corrections issues.

#### **Confinement**

At the end of fiscal year 1997, a total of 429 Air Force personnel were in post-trial confinement. Of those, 232 inmates were in long-term confinement at the United States Disciplinary Barracks (USDB), Fort Leavenworth, Kansas, and 18 are serving time in the Federal Bureau of Prisons (BOP) system. There were nine inmates in the Return-to-Duty Rehabilitation (RTDR) Program, with five graduating and being returned to duty during this period. The number of Air Force inmates on parole at the end of fiscal year 1997 was 132, a seven percent decrease from last fiscal year.

#### **AIR FORCE JUDGE ADVOCATE GENERAL SCHOOL**

The Air Force Judge Advocate General School (AFJAGS), is one of seven professional continuing education schools organizationally aligned as part of Air University's Ira C. Eaker College for Professional Development at Maxwell Air Force Base, Alabama. The William L. Dickinson Law Center is home to the school, and the David C. Morehouse Center supports Paralegal Studies. The AFJAGS conducts legal education for attorneys and paralegals from all military services; provides instruction at other Air University schools and colleges; publishes *The Reporter* and *The Air Force Law Review*; manages HQ USAF's Preventive Law Clearinghouse; and maintains JAG Department liaison with civilian professional organizations, law schools, and states requiring continuing legal education.

## Resident Courses

The AFJAGS conducted some 50 classes in-residence covering nearly 30 different courses (some courses are held more than once a year), which were attended by approximately 3,600 students. Courses, seminars, and workshops conducted at the AFJAGS included:

- Advanced Environmental Law
- Advanced Labor and Employment Law
- Advanced Trial Advocacy
- Claims and Tort Litigation
- Deployed Air Reserve Components Operations and Law
- Environmental Law
- Environmental Law Update
- Federal Employee Labor Law
- Federal Income Tax Law
- International Law
- Judge Advocate Staff Officer
- JAG Family Team Building
- Law Office Managers'
- Legal Aspects of Information Operations
- Military Judges'
- Operations Law
- Paralegal Apprentice
- Paralegal Craftsman
- Reserve Component WebFLITE
- Reserve Forces Judge Advocate
- Reserve Forces Paralegal
- Staff Judge Advocate
- Trial and Defense Advocacy

Included in this curriculum, were four "Surveys of the Law" conducted by the AFJAGS for both judge advocates and paralegals in the reserve components. The surveys are conducted at a civilian conference center in Denver, Colorado. The surveys provide concentrated legal updates and include extensive reviews of recent developments in military justice. During fiscal year 1997, over 600 Reserve and Air National Guard judge advocates and paralegals attended an AFJAGS Survey of the Law. In addition, the resident course figures reflect two "road shows" put on by AFJAGS in EUCOM and PACOM to update overseas bases on a host of legal topics, including military justice and professional ethics.

## Distance Learning Courses

The AFJAGS utilizes distance learning for those educational offerings that lend themselves to effective teaching through this medium. The school presented two courses, the Air Force Systems and Logistics Contracting Course and the Fiscal Law Course via teleseminar (satellite downlink) to over 50 locations attended by more than 2000 personnel. In addition, the 5-skill level Paralegal Journeyman Course is offered as a non-resident, distance learning course in both paper-based and CD-ROM versions. The CD-ROM version is the first career development course in Air Force history to be offered in multimedia CD format.

## Outside Teaching

In addition to the resident courses, the AFJAGS faculty provided military justice instruction in the following colleges, schools, academies, and courses within Air University: Air War College, Air Command and Staff College, Squadron Officer School, College of Aerospace Doctrine, Research, and Education, International Officer School, Officer Training School, USAF First Sergeant Academy, Senior Noncommissioned Officer Academy, Group Commanders' Course, and the Chaplain Orientation Course.

The AFJAGS participated in the Expanded International Military Education and Training Program (E-IMET), one of several Security Assistance Programs mandated by Congress (22 U.S.C. 2347). The program is designed to further U.S. foreign policy goals as established in the Foreign Assistance Act. The E-IMET Program involves joint U.S. military teaching teams sent abroad to teach human rights, military justice, civilian control of the military, law of armed conflict, rules of engagement, and general democratic principles. Faculty from the AFJAGS continued to participate in a number of E-IMET program missions in fiscal year 1997.

## Publications

The school published three issues of *The Air Force Law Review*, a professional legal journal consisting of articles of interest to Air Force judge advocates, civilian attorney advisors, and other military lawyers. *The Law Review* is a scholarly publication that encourages frank discussion of relevant legislative, administrative, and judicial developments. Additionally, four issues of *The Reporter*, the JAG Department's quarterly legal publication containing articles of general interest, were distributed in March, June, September, and December. Each issue of *The Reporter* has two sections dedicated to contemporary military justice issues. A third section addresses ethical issues that have surfaced in the military justice context. The school continued to distribute substantial numbers of its most popular publication, *The Military Commander and the Law*, a 500+ page compendium of legal topics addressing the issues confronting today's Air Force commanders. In fiscal year 1997, it was placed on WebFLITE, a service available to military users, where it was revised every six months.

## PERSONNEL

As of 30 September 1997, there were 1315 judge advocates on duty. Company grade officers (captains and first lieutenants) made up almost 50% of that number. Almost 10% were colonels and above, including two major generals and three brigadier generals; 25% were majors and the remaining 13%, lieutenant colonels.

BRYAN G. HAWLEY  
Major General, USAF  
The Judge Advocate General

Period: Fiscal Year: 97

**PART 1 - BASIC COURTS-MARTIAL STATUS (Persons)**

TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE (+) OR DECREASE (-) OVER LAST REPORT
GENERAL	527	489	38	+2%
1CD SPECIAL [A]	178	178	0	-1%
NON-1CD SPECIAL	227	202	25	+3%
SUMMARY	70	69	1	+55%
OVERALL RATE OF INCREASE (+) / DECREASE (-) OVER LAST REPORT				

**PART 2 - DISCHARGE APPROVED**

GENERAL COURTS-MARTIAL (CA LEVEL)	87
• NUMBER OF DISHONORABLE DISCHARGES	
NUMBER OF BAD CONDUCT DISCHARGES	283
SPECIAL COURTS-MARTIAL (SA LEVEL)	178
NUMBER OF BAD CONDUCT DISCHARGES	

**PART 3 - RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG**

FOR REVIEW UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL	432
FOR REVIEW UNDER ARTICLE 66 - 1CD SPECIAL COURTS-MARTIAL	181
FOR EXAMINATION UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL	88

**PART 4 - WORKLOAD OF THE AIR FORCE COURT OF CRIMINAL APPEALS**

TOTAL ON HAND BEGINNING OF PERIOD	308
GENERAL COURTS-MARTIAL	231
1CD SPECIAL COURTS-MARTIAL	77
REFERRED FOR REVIEW	657
GENERAL COURTS-MARTIAL	469
1CD SPECIAL COURTS-MARTIAL	188
TOTAL CASES REVIEWED	597
GENERAL COURTS-MARTIAL	429
1CD SPECIAL COURTS-MARTIAL	168
TOTAL PENDING AT CLOSE OF PERIOD	368
GENERAL COURTS-MARTIAL	271
1CD SPECIAL COURTS-MARTIAL	97
RATE OF INCREASE (+) / DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD	-25%

**PART 5 - APPELLATE COUNSEL REQUESTS BEFORE THE AIR FORCE COURT OF CRIMINAL APPEALS**

NUMBER	595
PERCENTAGE	99.8%

**PART 6 U.S. COURT OF APPEALS FOR THE ARMED FORCES**

PERCENTAGE OF COMR REVIEWED CASES FORWARDED TO USCA4	527/597	88%
PERCENTAGE OF INCREASE (+) / DECREASE (-) OVER PREVIOUS REPORTING PERIOD		+4%
PERCENTAGE OF TOTAL PETITIONS GRANTED	247/527	47% [B]
PERCENTAGE OF INCREASE (+) / DECREASE (-) OVER PREVIOUS REPORTING PERIOD		+39%
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY COMR	247/597	41%
RATE OF INCREASE (+) / DECREASE (-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		34%

**PART 7 - APPLICATIONS FOR RELIEF, ARTICLE 69**

PENDING AT BEGINNING OF PERIOD		4	
RECEIVED		10	
DISPOSED OF		14	
GRANTED	1		
DENIED	12		
NO JURISDICTION	1		
WITHDRAWN	0		
TOTAL PENDING AT END OF PERIOD		0	

**PART 8 - ORGANIZATION OF COURT**

TRIALS BY MILITARY JUDGE ALONE			
GENERAL COURTS-MARTIAL		300	
SPECIAL COURTS-MARTIAL		236	
TRIALS BY MILITARY JUDGE WITH MEMBERS			
GENERAL COURTS-MARTIAL		227	
SPECIAL COURTS-MARTIAL		169	

**PART 9 - COMPLAINTS UNDER ARTICLE 138**

NUMBER OF COMPLAINTS	21	
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**PART 10 - STRENGTH**

AVERAGE ACTIVE DUTY STRENGTH	370,732	
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**PART 11 - NONJUDICIAL PUNISHMENT (ARTICLE 15)**

NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED	8,481	
RATE PER 1,000	22.87	
RATE OF INCREASE (+) / DECREASE (-) OVER PREVIOUS PERIOD	-0.74	

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- [A] SPCMs in which BCD is adjudged.  
 [B] Includes petitions granted in "automatic forfeitures" cases involving Article 58b, UCMJ. U.S. v. Gorski, 47 M.J. 370 (1997).

## **SECTION 6**

### **REPORT OF THE CHIEF COUNSEL OF THE COAST GUARD**

**REPORT OF THE CHIEF COUNSEL OF THE COAST GUARD  
OCTOBER 1, 1996 TO SEPTEMBER 30, 1997**

The table below shows the number of court-martial records received and filed at Coast Guard Headquarters during FY-97 and the five preceding years.

<u>Fiscal Year</u>	<u>97</u>	<u>96</u>	<u>95</u>	<u>94</u>	<u>93</u>	<u>92</u>
General Courts-Martial	6	22	11	9	14	16
Special Courts-Martial	9	16	8	23	31	26
Summary Courts-Martial	10	14	14	15	11	25
<u>Total</u>	<u>25</u>	<u>52</u>	<u>33</u>	<u>47</u>	<u>56</u>	<u>67</u>

**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 Chief Trial Judge, a full-time general courts-martial judge. When the Chief Trial Judge 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**

Two of the 6 accused tried by general courts-martial this fiscal year were tried by military judge alone. One of the 2 accused tried by military judge alone received a dishonorable discharge and 1 received a bad-conduct discharge. Two of the 4 accused tried by general courts-martial with members received sentences which included a punitive discharge. Two accused elected to be tried by general courts-martial which included enlisted members and 2 accused elected to be tried by a court which included only officer members. All of the general courts-martial resulted in convictions. Two of the accused whose charges were referred to general courts-martial were nonrated (pay grades E-1 through E-3), 3 were petty officers (pay grades E-4 through E-6), and 1 was a chief petty officer (pay grade E-7).

The following is a breakdown of the sentences adjudged in general courts-martial tried by military judge alone (2 convictions):

<u>Sentence</u>	<u>Cases Imposed</u>
dishonorable discharge - - - - -	1
bad conduct discharge - - - - -	1
confinement - - - - -	2
reduction in rate - - - - -	2
forfeiture of all pay and allowances - - - - -	1

The following is a breakdown of sentences adjudged in general courts-martial tried by members (4 convictions).

<u>Sentence</u>	<u>Cases Imposed</u>
confinement - - - - -	4
reduction in rate - - - - -	3
fined (\$12,000.00) - - - - -	3
forfeiture of all pay and allowances - - - - -	1

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

<u>FY</u>	<u>Number of Convictions</u>	<u>Forfeitures</u>	<u>Confinement</u>	<u>Reduction in Grade</u>	<u>Punitive Discharge/Dismissal</u>
97	6	2 (33%)	4 (66%)	5 (83%)	4 (66%)
96	22	15 (68%)	19 (89%)	20 (91%)	18 (82%)
95	11	6 (55%)	10 (91%)	9 (82%)	7 (64%)
94	7	1 (15%)	7 (100%)	6 (90%)	6 (90%)
93	14	7 (50%)	13 (93%)	11 (78%)	9 (64%)

The following table shows the distribution of the 152 specifications referred to general courts-martial.

<u>Violation of the UCMJ, Article</u>	<u>No. of Specs.</u>
80 (attempts) - - - - -	1
86 (absence without leave) - - - - -	1
92 (failure to obey order or regulation) - - - - -	4
107 (false official statement) - - - - -	30
112a (wrongful use, possession, etc. of controlled substances) - - - - -	3
116 (riot or breach of peace) - - - - -	1
120 (rape or carnal knowledge) - - - - -	2
121 (larceny or wrongful appropriation) - - - - -	33
123 (forgery) - - - - -	18
123a (making, drawing or uttering check, draft, or order without sufficient funds) - - - - -	4
128 (assault) - - - - -	2
129 (burglary) - - - - -	2
130 (housebreaking - - - - -	3
134 (general) - - - - -	48

**GENERAL COURTS-MARTIAL SUMMARY**

Sixty-six per cent of the accused tried by general courts-martial were tried by military judge alone. There was a 73% decrease in general courts-martial records received and filed at Coast Guard Headquarters in this fiscal year over last fiscal year.

**SPECIAL COURTS-MARTIAL**

Eight of the 9 accused tried by special courts-martial this fiscal year were tried by military judge alone. Five bad-conduct discharges were adjudged, all by the military judge. One accused elected to be tried by a court which included enlisted members. Two of the accused whose charges were referred to special courts-martial were nonrated (pay grades E-1 through E-3), 5 were petty officers (pay grades E-4 through E-6), and 2 were chief petty officers (pay grade E-7).

The following is a breakdown of sentences adjudged in special courts-martial tried by military judge alone (8 convictions).

<u>Sentence</u>	<u>Cases Imposed</u>
bad-conduct discharge - - - - -	5
confinement - - - - -	6
reduction in rate - - - - -	8
partial forfeiture of pay - - - - -	4
restriction - - - - -	2
reprimand - - - - -	2
hard labor without confinement - - - - -	1
fined (total fines \$10,350.00) - - - - -	2

The following is a breakdown of sentences adjudged in special courts-martial tried by members (one conviction).

<u>Sentence</u>	<u>Cases Imposed</u>
hard labor without confinement - - - - -	1
reprimand - - - - -	1
reduction in rate - - - - -	1
restriction - - - - -	1

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

<u>FY</u>	<u>Number of Convictions</u>	<u>Forfeitures</u>	<u>Confinement</u>	<u>Reduction in Grade</u>	<u>BCD</u>
97	9	4 (44%)	6 (66%)	8 (88%)	5 (55%)
96	14	11 (79%)	10 (71%)	13 (93%)	7 (50%)
95	7	3 (43%)	5 (71%)	6 (86%)	2 (29%)
94	20	6 (30%)	17 (85%)	20 (100%)	11 (55%)
93	27	8 (29%)	19 (70%)	20 (74%)	14 (52%)

The following table shows the distribution of the 86 specifications referred to special courts-martial.

<u>Violation of the UCMJ, Article</u>	<u>No. of Specs.</u>
86 (unauthorized absence) - - - - -	6
90 (assaulting or willfully disobeying a superior commissioned officer) - - - - -	1
91 (insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer) - - - - -	7
92 (failure to obey order or regulation) - - - - -	10
107 (false official statements) - - - - -	1
108 (sale, loss, damage, destruction, or wrongful disposition of military property of the U.S.) - - - - -	1
112a (wrongful use, possession, etc., of controlled substance) - - - - -	13
120 (rape and carnal knowledge) - - - - -	4
121 (larceny or wrongful appropriation) - - - - -	11
123 (forgery) - - - - -	5
128 (aggravated assault) - - - - -	5
129 (burglary) - - - - -	1
134 (general) - - - - -	21

**SPECIAL COURTS-MARTIAL SUMMARY**

Eighty-eight per cent of the accused tried by special courts-martial were tried by military judge alone. Eleven per cent of these accused pled guilty to all charges and specifications. None of the accused tried by special courts-martial with members pled guilty to all charges and specifications. There was a 35% decrease in special courts-martial received and filed at Coast Guard Headquarters this fiscal year over 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 164 officers designated as law specialists (judge advocates) serving on active duty - 121 are serving in legal billets and 43 are serving in general duty billets. Eighteen Coast Guard officers are currently undergoing postgraduate studies in law and 18 will be certified as law specialists at the completion of their studies. Eleven Coast Guard officers who recently graduated from law school or were direct-commission officers completed the Navy Basic Lawyer Course in Newport, Rhode Island. All have been or are in the process of being certified

under Article 27(b), UCMJ. Over \$100,000.00 was spent on legal training during the fiscal year.

#### U. S. COAST GUARD COURT OF CRIMINAL APPEALS

Captain Lane I. McClelland, former Chief Trial Judge for the Coast Guard, was assigned to the Coast Guard Court of Criminal Appeals in June 1997, and is the first woman to serve on this Court. At the close of fiscal 1997, the Court consisted of the following judges:

Chief Judge Joseph H. Baum  
Judge David J. Kantor  
Judge Ronald R. Weston  
Judge Lane I. McClelland

Issues challenging the status of this Court, first raised in 1992 with a challenge to the appointment of all military appellate judges, and continuing after the decisions of *Weiss v. United States*, \_\_U.S.\_\_, 114 S. Ct. 752 (1994) and *Ryder v. United States*, \_\_U.S.\_\_, 115 S. Ct. 2031 (1995), with questions concerning the appointment of this Court's civilian judges, were finally resolved by the U.S. Supreme Court in *Edmond v. United States*, \_\_U.S.\_\_, 117 S. Ct. 1573 (1997), with a holding that the appointment of civilian judges to this Court by the Secretary of Transportation was valid both Constitutionally and statutorily.

In addition to the decisional work of the Court, as reflected in Appendix A, the judges on the Court have participated in various professional conferences, committees and seminars during the past fiscal year. In March 1997, the Coast Guard Court co-hosted with the Navy-Marine Corps Court this year's all services appellate military judges conference at the Federal Judicial Center in Washington, D.C. The focus of this one-day conference was a presentation by Chief Judge B. Paul Cotter of the Nuclear Regulatory Commission on electronic technology available for appellate courts. A panel of commissioners from the Court of Appeals for the Armed Forces also made a presentation on the workings of that Court, which was followed by breakout sessions with judges and commissioners discussing a variety of topical issues.

In May 1997, all the judges of the Court attended the two-day Judicial Conference of the U.S. Court of Appeals for the Armed Forces at George Washington University. Also in May, Judge Fearnow represented the Court on a panel of Court of Criminal Appeals Judges as part of the instruction for the 40<sup>th</sup> Military Judges Course at the Army Judge Advocate General's School in Charlottesville, Virginia. This was one of Judge Fearnow's last official acts as an appellate military judge before his retirement at the end of June 1997.

In September of 1997, Judges Kantor, Weston and McClelland attended a two-day Appellate Military Judges Training Seminar at the

Washington Navy Yard. This seminar is a continuation of the highly successful appellate military judges program created expressly for the military appellate courts by Chief Judge Frank Nebeker of the Court of Veterans Appeals and first held in 1993. This year's seminar was hosted by the Navy-Marine Corps Court and featured presentations on judicial philosophy, evidence issues, opinion writing, judicial ethics, and war crimes prosecutions. A panel of Court of Criminal Appeals Chief Judges and Senior Judges, chaired by Chief Judge Baum of this Court, led a discussion with the attendees of various subjects relevant to court of criminal appeals judges. At lunch, Chief Judge Cox of the U.S. Court of Appeals for the Armed Forces spoke to attendees on matters of concern to that Court and of particular interest to the service courts. As indicated in previous reports, this highly beneficial seminar is now an annual event for both new and experienced judges and will be hosted next year by the Army Court.

This past year, Chief Judge Baum served another term as a member of the rules advisory committee of the U.S. Court of Appeals for the Armed Forces, working on proposed rule changes for that Court. He also continued to play an active role in the Federal Bar Association, as both a member of the association's National Council and as Chair of the association's Judiciary Division for the second year. Under his chairmanship, the Judiciary Division held its annual reception at the U.S. Supreme Court in November to honor newly appointed judges, after presenting an informative bench/bar program earlier that same day at the Federal Judicial Center. Later, in the spring, the Division hosted a reception for foreign judges attending a conference of common-law country judges at the Federal Judicial Center. Chief Judge Baum, as Chair of the Judiciary Division, also participated this year in two separate presentations to visiting Russian and Chinese judges.

#### **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.

PAUL M. BLAYNEY  
Rear Admiral, U. S. Coast Guard  
Chief Counsel

Period: 1 OCTOBER 1996 - 30 SEPTEMBER 1997

**PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)**

TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
GENERAL	6	6	0	-73%
BCD SPECIAL	9	9		-35%
NON-BCD SPECIAL	0	0	0	UNCHANGED
SUMMARY	10	10	0	-28%
OVERALL RATE OF INCREASE (+)/DECREASE (-) OVER LAST REPORT				-50%

**PART 2 - DISCHARGES APPROVED**

GENERAL COURTS-MARTIAL (CA LEVEL)			
NUMBER OF DISHONORABLE DISCHARGES		2	
NUMBER OF BAD CONDUCT DISCHARGES		2	
SPECIAL COURTS-MARTIAL (SA LEVEL)			
NUMBER OF BAD CONDUCT DISCHARGES		5	

**PART 3 - RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG**

FOR REVIEW UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL	6
FOR REVIEW UNDER ARTICLE 66 - BCD SPECIAL COURTS-MARTIAL	9
FOR EXAMINATION UNDER ARTICLE 69 - GENERAL COURTS-MARTIAL	1

**PART 4 - WORKLOAD OF THE COAST GUARD COURT OF MILITARY REVIEW CRIMINAL APPEALS**

TOTAL ON HAND BEGINNING OF PERIOD		26
GENERAL COURTS-MARTIAL	20	
BCD SPECIAL COURTS-MARTIAL	6	
REFERRED FOR REVIEW		12
GENERAL COURTS-MARTIAL	5	
BCD SPECIAL COURTS-MARTIAL	7	
TOTAL CASES REVIEWED		25*
GENERAL COURTS-MARTIAL	18	
BCD SPECIAL COURTS-MARTIAL	6	
TOTAL PENDING AT CLOSE OF PERIOD		14
GENERAL COURTS-MARTIAL	7	
BCD SPECIAL COURTS-MARTIAL	7	
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD	25% increase over FY96.	

**PART 5 - APPELLATE COUNSEL REQUESTS BEFORE COAST GUARD COURT OF MILITARY REVIEW CRIMINAL APPEALS**

NUMBER	9
PERCENTAGE	100%

**PART 6 - U. S. COURT OF MILITARY APPEALS ACTIONS - APPEALS FOR THE ARMED FORCES ACTIONS**

PERCENTAGE OF COMR REVIEWED CASES FORWARDED TO USCMA	8/26	30%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		-3%
PERCENTAGE OF TOTAL PETITIONS GRANTED	5/8	62%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		+29%
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY COMR	5/26	19%
RATE OF INCREASE (+)/DECREASE (-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		+9%

PAGE 1 OF 2

\*Includes one Reconsideration of Decision.

NOTE: A BCD Special or BCD Special Court-Martial is a court-martial authorized to impose a BCD, whether or not a BCD was imposed by the court-martial.

**PART 7 - APPLICATIONS FOR RELIEF, ARTICLE 69**

PENDING AT BEGINNING OF PERIOD		1	
RECEIVED		0	
DISPOSED OF		1	
GRANTED	0		
DENIED	1		
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		2	
SPECIAL COURTS-MARTIAL		8	
TRIALS BY MILITARY JUDGE WITH MEMBERS			
GENERAL COURTS-MARTIAL		4	
SPECIAL COURTS-MARTIAL		1	

**PART 9 - COMPLAINTS UNDER ARTICLE 138**

NUMBER OF COMPLAINTS	3	
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**PART 10 - STRENGTH**

AVERAGE ACTIVE DUTY STRENGTH	34,341	
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**PART 11 - NONJUDICIAL PUNISHMENT (ARTICLE 15)**

NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED	845	
RATE PER 1,000	24.60	
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD	+0.11%	

