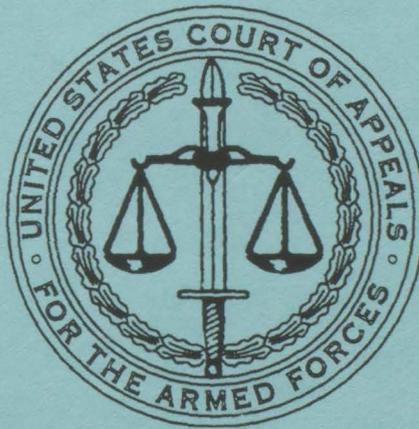


ANNUAL REPORT
of the
CODE COMMITTEE
on
MILITARY JUSTICE



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, 1997 to September 30, 1998

ANNUAL REPORT

SUBMITTED TO THE

COMMITTEES ON ARMED SERVICES

of the

United States Senate

and the

United States 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, 1997 to September 30, 1998

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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, 1997 to September 30, 1998

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, 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 1998 to consider various 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 were presented reports on pending cases and trends in court-martial activity within each of the 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 Code Committee received a report submitted by its Subcommittee on Technology, and determined that a copy of this report should be forwarded to the Secretaries of Defense and Transportation noting certain areas that had been identified in which the use of technology could enhance the efficiency and effectiveness of the military justice system. In addition, the Committee received and considered an interim report of its Subcommittee on the Commemoration of the 50th Anniversary of the Uniform Code of Military Justice.

A representative of the Joint-Service Committee on Military Justice presented the results of a recent survey revealing a serious problem in the recruiting and retention of military lawyers who were not being compensated in a

manner that would allow them to pay off student loans incurred as a result of their legal education. As a result of the discussion of this problem, the Code Committee agreed that a letter should be sent to the Chairman and Ranking Minority Members of both the Senate Committee on Armed Services and the House Committee on National Security expressing the Code Committee's concern with respect to this problem and urging Congress to consider appropriate remedial legislation. Other subjects discussed by the Code Committee included the public availability of copies of the Manual for Courts-Martial, issues under review by the Joint-Service Committee on Military Justice, and publication of the opinions of the United States Court of Appeals for the Armed Forces and of the various Armed Forces Courts of Criminal Appeals.

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 Committees on Armed Services of the United States Senate and 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 JOHN E. SHKOR, 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, 1997 to October 1, 1998

The Judges of the United States Court of Appeals for the Armed Forces submit their annual report on the administration of the Court and military justice during the 1998 Term of Court to the Committees on Armed Services of the United States Senate and 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.

THE BUSINESS OF THE COURT

The number of cases carried over on the Court's Petition Docket at the end of the 1998 Term of Court reflected an increase of 23% from the number of cases pending at the end of the prior reporting period. (See Appendix A.) However, the number of cases carried over on the Master Docket decreased substantially by 64% during the same period. (See Appendix B.)

During the 1998 Term of Court the number of petitions for grant of review remained fairly constant compared with the prior reporting period. (See Appendix J.) The number of oral arguments increased by 14% during the 1998 Term of Court and the number of opinions released by the Court increased by the same percentage compared with the prior reporting period. (See Appendices C and D.)¹

The average processing time from the date of filing a petition to the date of a grant by the Court remained fairly constant during the 1998 Term of Court when compared with the prior reporting period. (See Appendix E.)

¹ Although not part of the business of the Court, it is noted that during its 1998 Term the Court was notified that petitions for writ of certiorari were filed with the Supreme Court of the United States in 30 Master Docket cases in which the Court issued a final decision.

Although the average processing time from the date of grant to the date of oral argument increased by 17%, the processing time from the date of oral argument to final decision remained fairly constant compared with the prior reporting period. (See Appendices F and G.) The average processing time from the filing of a petition to final decision on the Petition Docket decreased by 17%, and the same overall average on the Master Docket decreased slightly by 2%. (See Appendix H.) The overall average processing time from filing to final decision in all cases during the 1998 Term of Court increased by 19%. (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 Kenneth F. Ripple, United States Court of Appeals for the Seventh Circuit, and the Honorable H. Robert Mayer, United States Court of Appeals for the Federal Circuit, to sit as judges of the United States Court of Appeals for the Armed Forces during the 1998 Term of Court. Additionally, Senior Judge Robinson O. Everett was recalled and participated in the review and decision of several cases during the same reporting period.

During its 1998 Term the Court admitted 319 attorneys to practice before its Bar, bringing the cumulative total of admissions before the Bar of the Court to 31,160.

PUBLIC AWARENESS PROJECT (PROJECT OUTREACH)

Pursuant to its 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. during the 1998 Term of Court. 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. Hearings were conducted without objection of the parties at Fort Bliss, Texas; the University of Texas School of Law, Austin, Texas; the Wake Forest University School of Law, Winston-Salem, North Carolina; the Catholic University of America Columbus School of Law, Washington, D.C.; the George Washington University School of Law,

Washington, D.C.; the United States Coast Guard Academy, New London, Connecticut; the United States Military Academy, West Point, New York; the United States Air Force Academy, Colorado Springs, Colorado; and the Naval War College, Newport, Rhode Island.

This program has continued to promote an increased public awareness of the fundamental fairness of the military criminal 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 the 1998 Term of Court 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 7 and 8, 1998, 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 and a presentation by the Honorable Walter T. Cox III, Chief Judge, United States Court of Appeals for the Armed Forces, on the "State of the Court," followed by speakers for this year's Conference who included Professor Mark V. Tushnet, Georgetown University Law Center; Dean Donald N. Zillman, Dean and Godfrey Professor of Law, University of Maine School of Law; Professor Robert P.

Mosteller, Duke Law School; the Honorable John J. Farley, III, Associate Judge, United States Court of Veterans Appeals; Lieutenant Colonel Lawrence J. Morris, Major Maurice A. Lescault, Jr., and Major Norman F.J. Allen, III, The Judge Advocate General's School, United States Army; Professor Stephen A. Saltzburg, George Washington University Law School; Lieutenant Colonel Anne L. Burman, The Judge Advocate General's School, United States Air Force; Eugene R. Fidell, Esquire; Mr. Thomas E. Ricks, National Military Reporter, Wall Street Journal; Richard Parker, Deputy Chief of the Civil Division, United States Attorney's Office, Eastern District of Virginia; Robert C. Erickson, Assistant United States Attorney, Eastern District of Virginia; and Lieutenant Commander Tammy P. Tideswell, Naval Justice School, United States Navy.

The Judge Advocates Association Awards for outstanding career attorneys in each of the Armed Forces were presented by Colonel William R. Hagan, USA (Ret.), President of the Judge Advocates Association.

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

1998 TERM OF COURT

CUMULATIVE SUMMARY

CUMULATIVE PENDING OCTOBER 1, 1997

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

CUMULATIVE FILINGS

Master Docket	216
Petition Docket	1197
Miscellaneous Docket	<u>21</u>
TOTAL	1434

CUMULATIVE TERMINATIONS

Master Docket	400
Petition Docket	1142
Miscellaneous Docket	<u>25</u>
TOTAL	1567

CUMULATIVE PENDING OCTOBER 2, 1998

Master Docket	105
Petition Docket	290
Miscellaneous Docket	<u>3</u>
TOTAL	398

OPINION SUMMARY

<u>CATEGORY</u>	<u>SIGNED</u>	<u>PER CURIAM</u>	<u>MEM/ORDER</u>	<u>TOTAL</u>
Master Docket	117	8	275	400
Petition Docket	0	0	1142	1142
Miscellaneous Docket	<u>5</u>	<u>0</u>	<u>20</u>	<u>25</u>
TOTAL	122	8	1437	1567

FILINGS (MASTER DOCKET)

Remanded from Supreme Court	3
Returned from Court of Criminal Appeals....	3
Mandatory appeals filed	0
Certificates filed	32
Reconsideration granted	3
Petitions granted (from Petition Docket)...	<u>175</u>
TOTAL	216

TERMINATIONS (MASTER DOCKET)

Findings & sentence affirmed	317	
Reversed in whole or in part	81	Signed 117
Granted petitions vacated	0	Per curiam . . 8
Other disposition directed	<u>2</u>	Mem/order .. <u>275</u>
TOTAL	400	TOTAL 400

PENDING (MASTER DOCKET)

Awaiting briefs	34
Awaiting oral argument	32
Awaiting lead case decision (trailer cases)	31
Awaiting final action	<u>8</u>
TOTAL	105

FILINGS (PETITION DOCKET)

Petitions for grant of review filed	1185
Petitions for new trial filed	1
Cross-petitions for grant filed	4
Petitions for reconsideration granted	5
Returned from Court of Criminal Appeals ...	<u>2</u>
TOTAL	1197

TERMINATIONS (PETITION DOCKET)

Petitions for grant dismissed	1	
Petitions for grant denied	898	
Petitions for grant granted	175	
Petitions for grant remanded	49	Signed 0
Petitions for grant withdrawn	19	Per curiam .. 0
Other	<u>0</u>	Mem/order.. <u>1142</u>
TOTAL	1142	TOTAL 1142

PENDING (PETITION DOCKET)

Awaiting briefs	137
Awaiting Central Legal Staff review	46
Awaiting final action	<u>107</u>
TOTAL	290

FILINGS (MISCELLANEOUS DOCKET)

Writs of error coram nobis sought	1
Writs of habeas corpus sought	1
Writs of mandamus/prohibition sought	1
Other extraordinary relief sought	3
Writ appeals sought	<u>15</u>
TOTAL	21

TERMINATIONS (MISCELLANEOUS DOCKET)

Petitions withdrawn	0	
Petitions remanded	0	
Petitions granted	4	
Petitions denied	20	Signed 5
Petitions dismissed	1	Per curiam. 0
Other	<u>0</u>	Mem/order.. <u>20</u>
TOTAL	25	TOTAL 25

PENDING (MISCELLANEOUS DOCKET)

Awaiting briefs	0
Awaiting Writs Counsel review	0
Awaiting final action	<u>3</u>
TOTAL	3

RECONSIDERATIONS & REHEARINGS

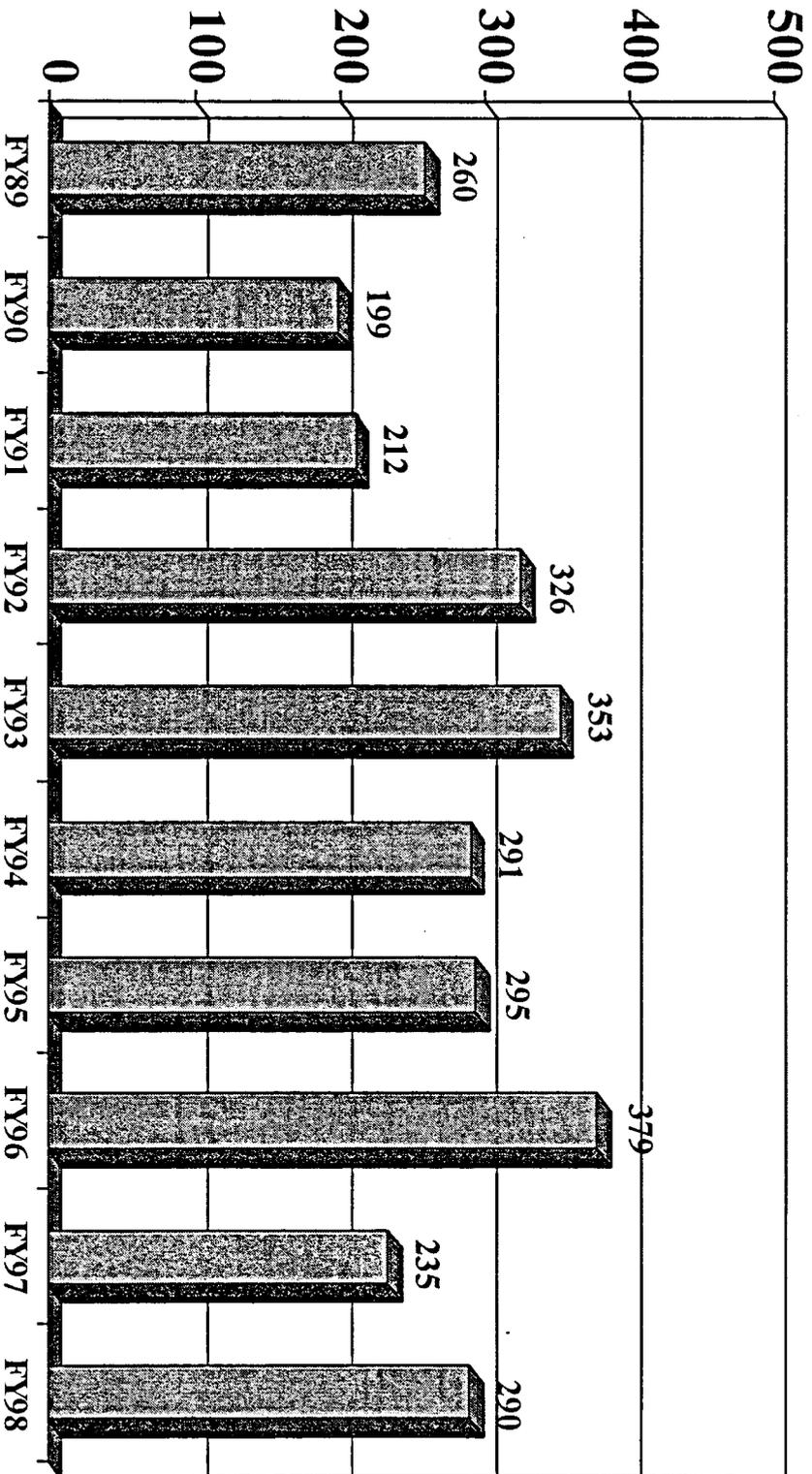
CATEGORY	BEGIN	FILINGS	END	DISPOSITIONS		
	PENDING		PENDING	Granted	Denied	Total
Master Docket	1	80	6	3	72	75
Petition Docket ..	0	28	0	5	23	28
Misc. Docket	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
TOTAL	1	108	6	8	95	103

MOTIONS ACTIVITY

CATEGORY	BEGIN	FILINGS	END	DISPOSITIONS			
	PENDING		PENDING	Granted	Denied	Other	Total
All motions	23	822	25	736	76	8	820

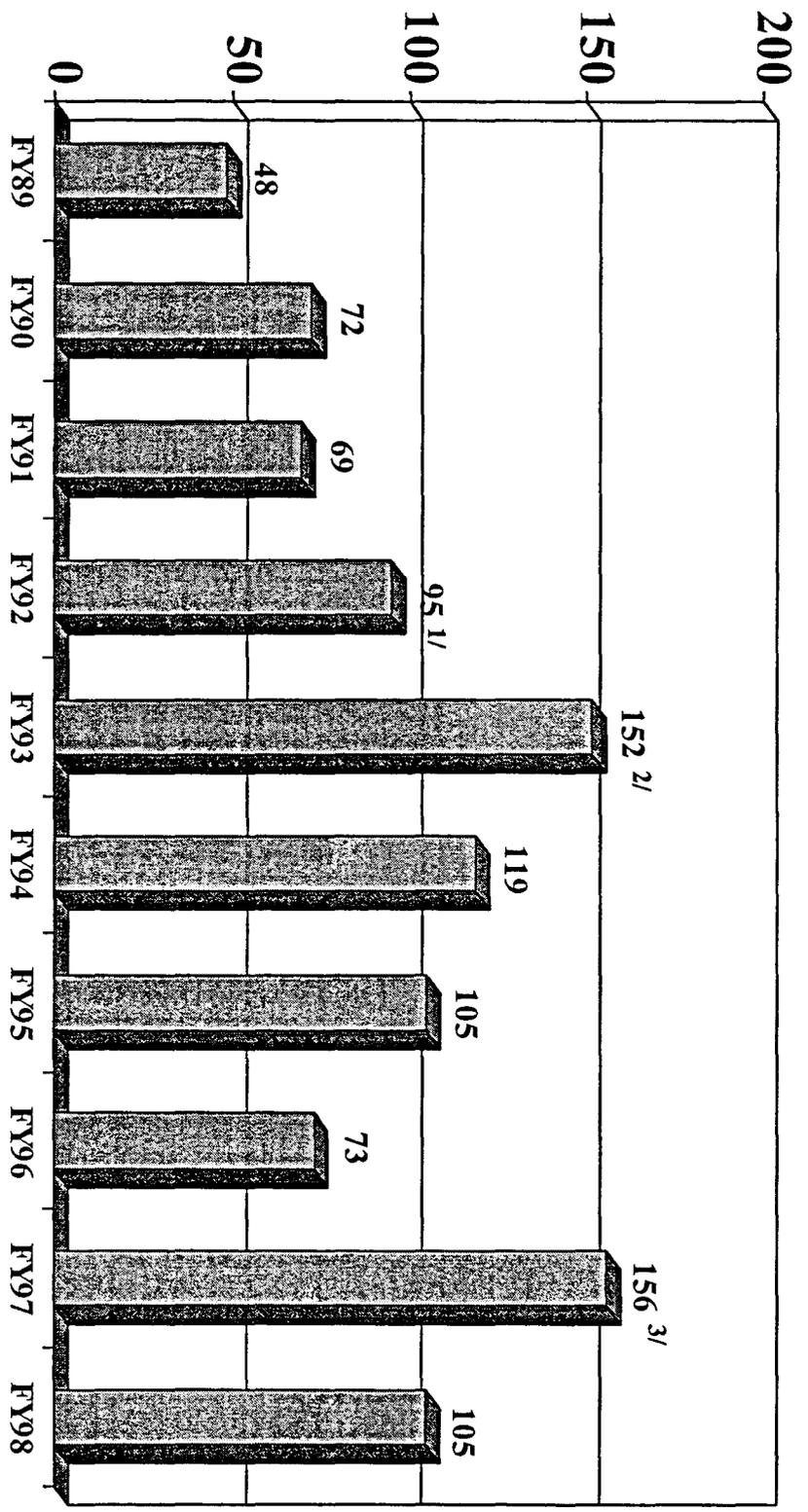
APPENDIX A

Petition Docket Year End Pending



Master Docket Year End Pending

APPENDIX B



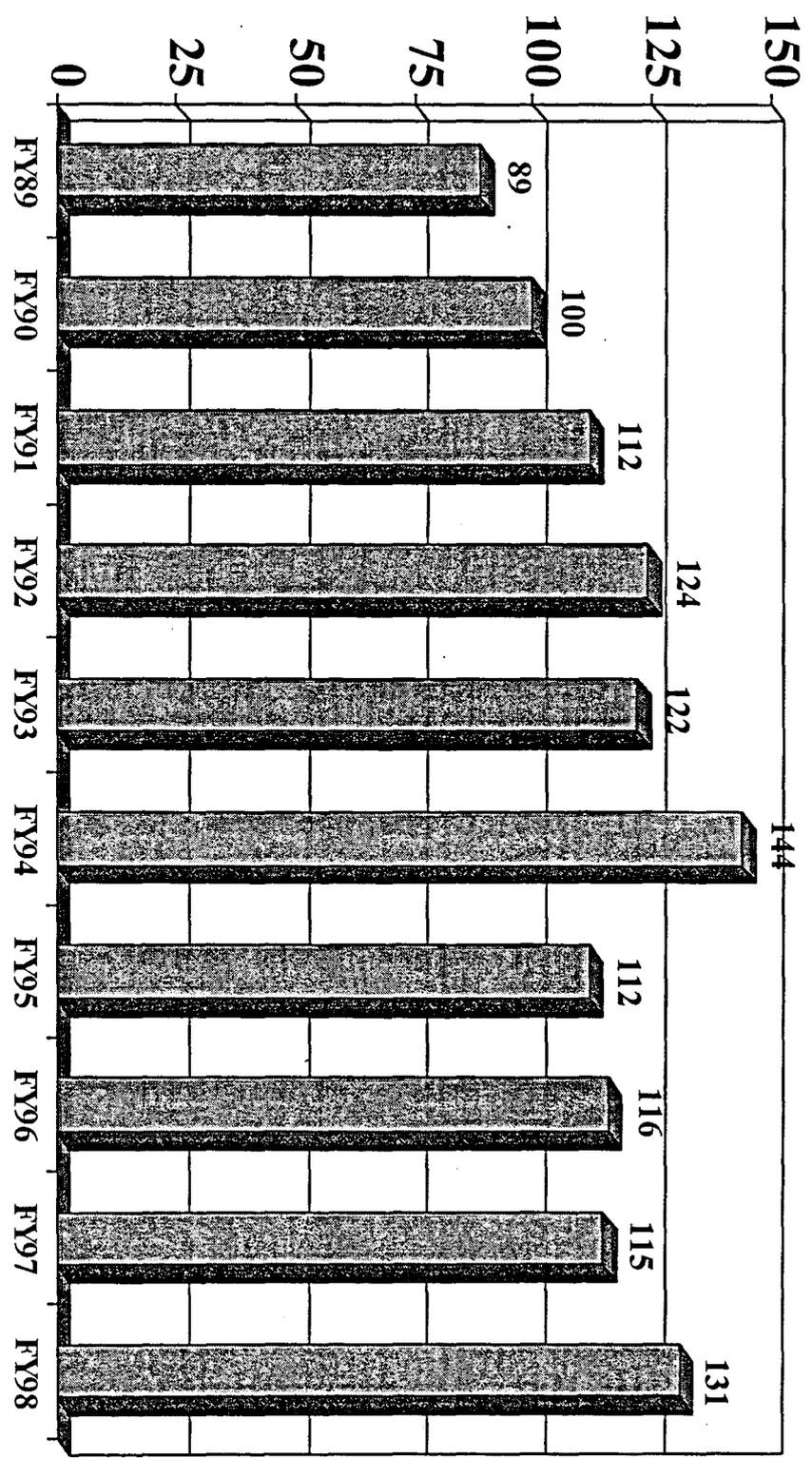
1/ This figure does not include 16 trailer cases to United States v. Watson, No. 68206/MC, and 8 trailer cases to United States v. Weiss, No. 67869/MC.

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.

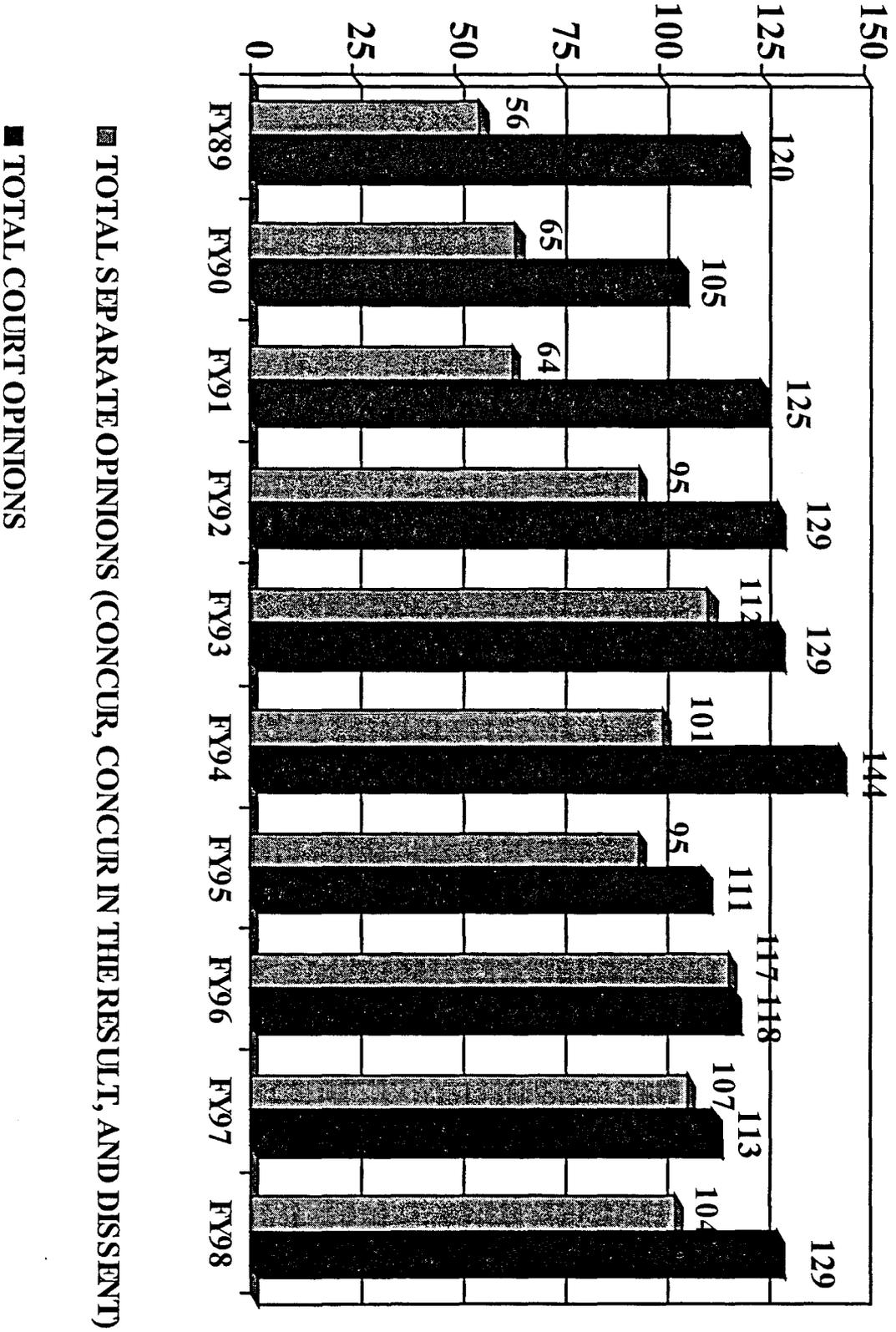
APPENDIX C

Oral Arguments Per Year



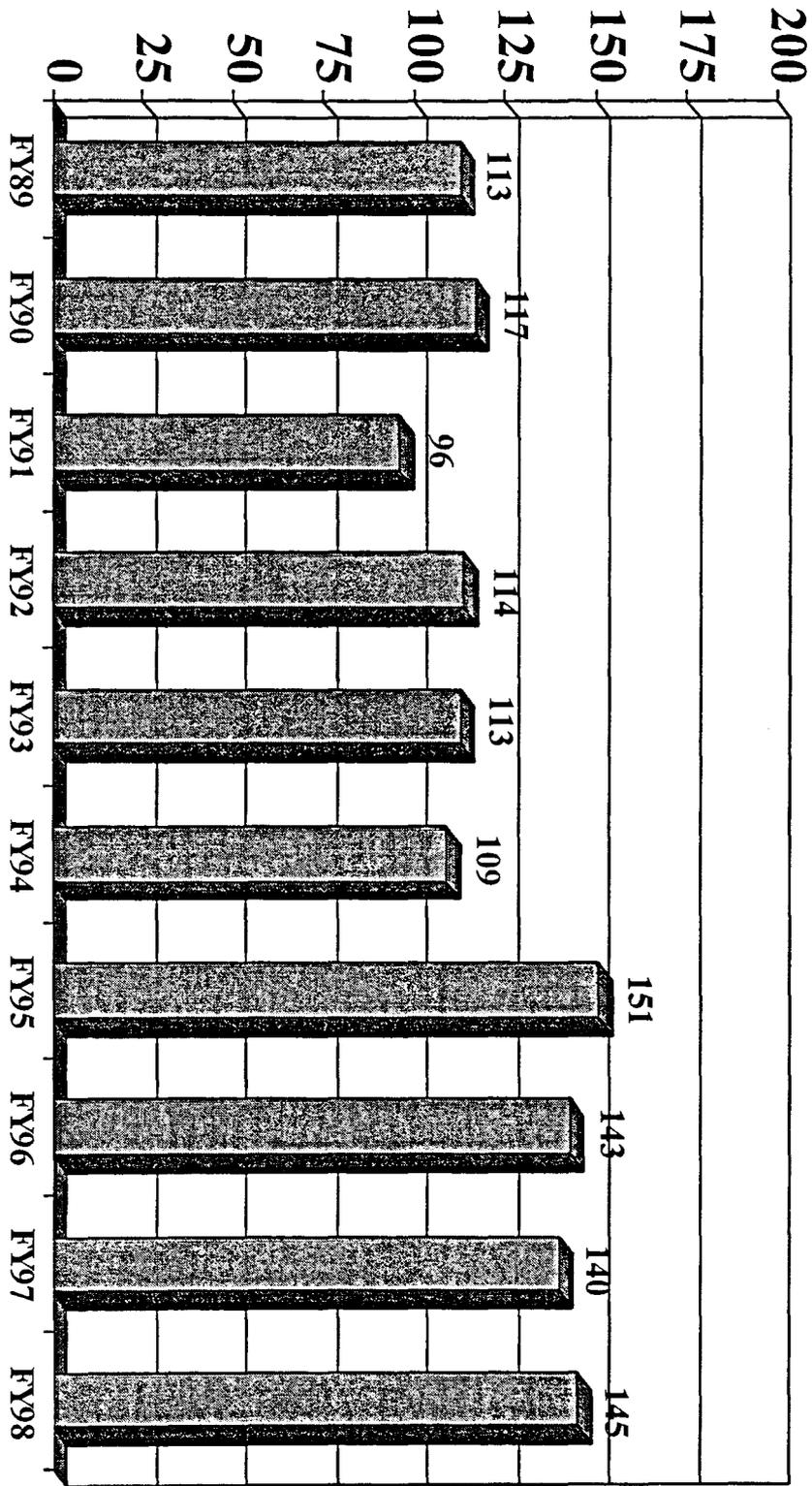
Total Opinions Per Year

APPENDIX D



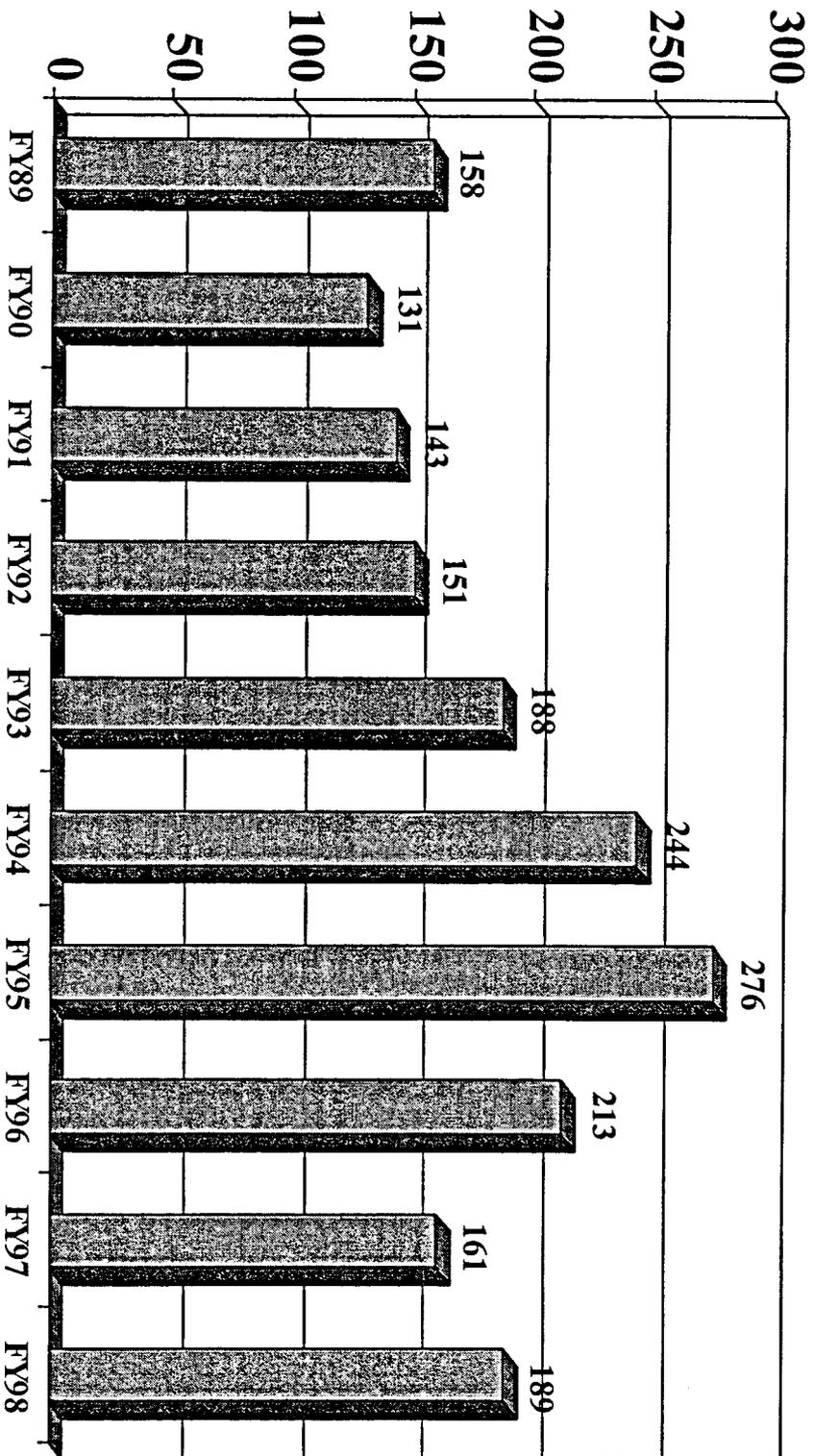
APPENDIX E

Days from Petition Filing to Grant



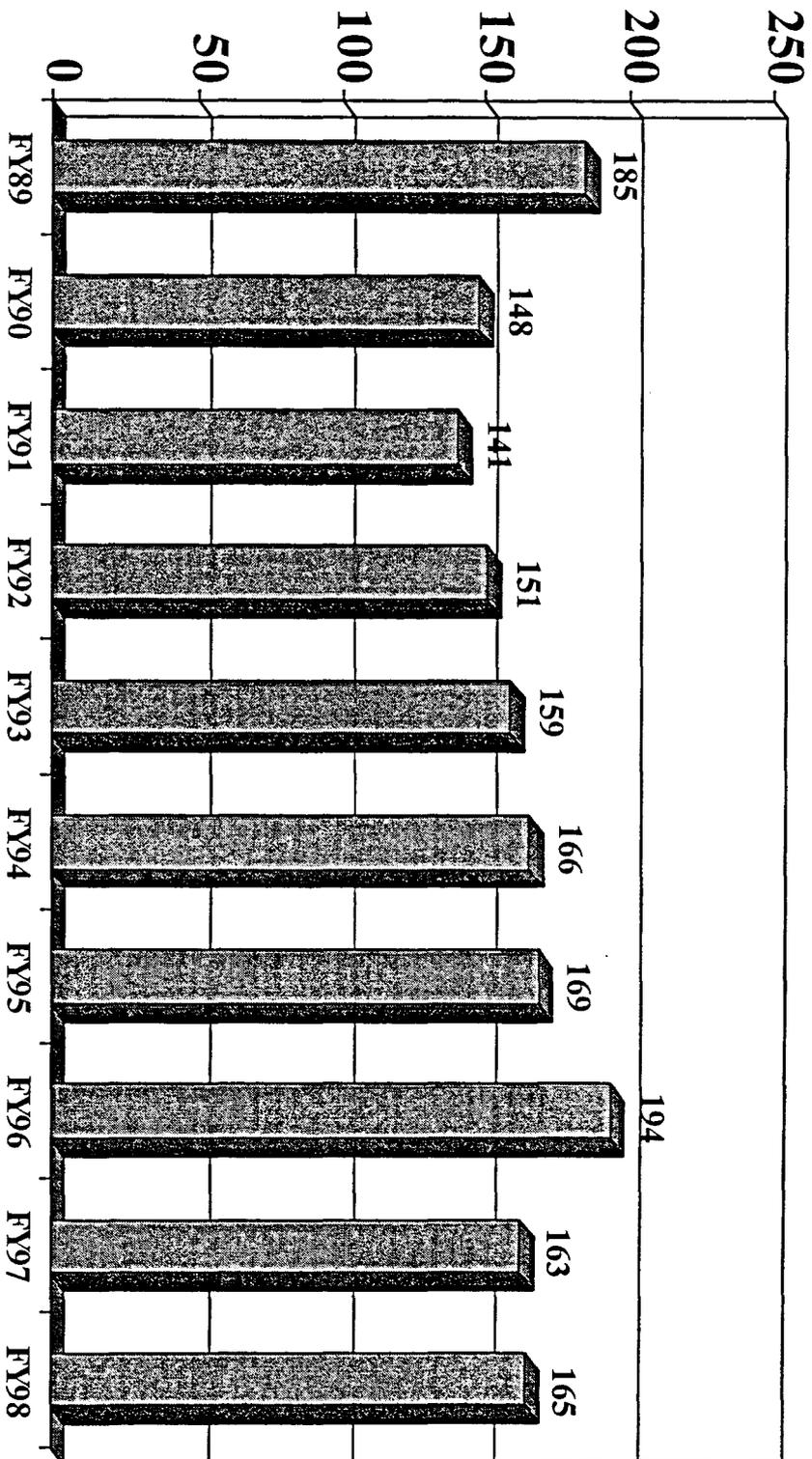
APPENDIX F

Days from Petition Grant to Oral Argument



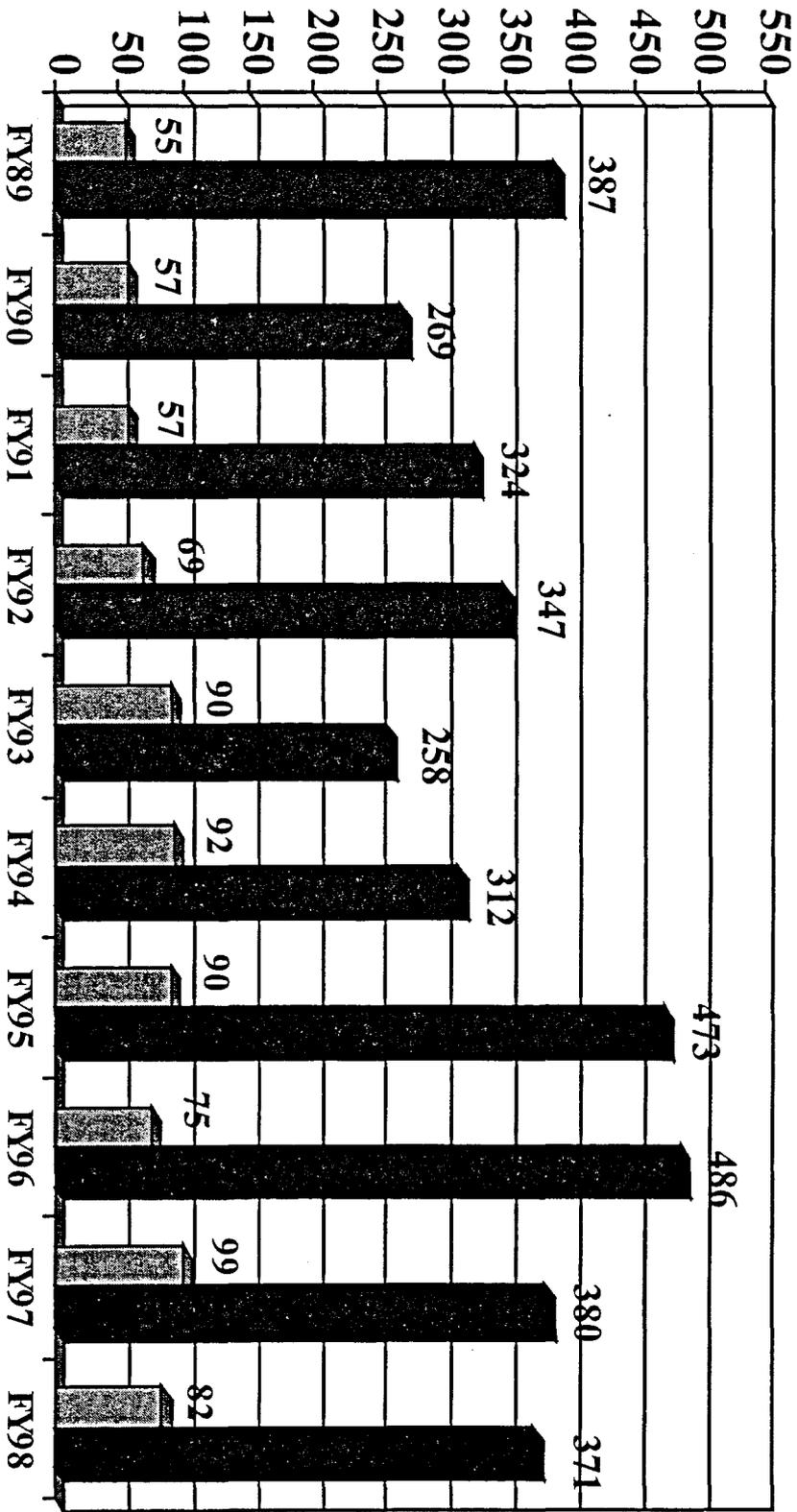
APPENDIX G

Days from Oral Argument to Final Decision



APPENDIX H

Days from Petition Filing to Final Decision

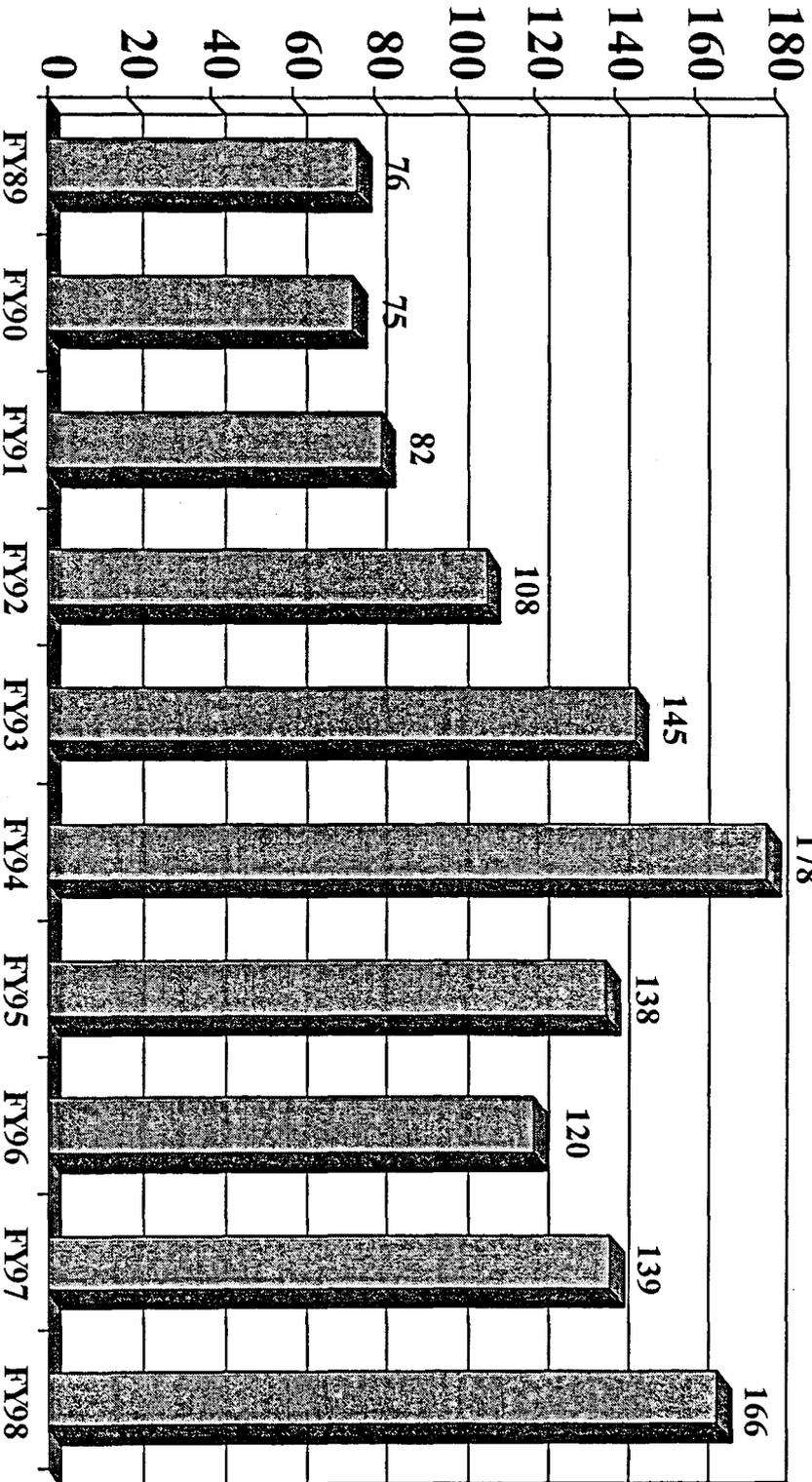


■ PETITION DOCKET (DENIAL/DISMISSAL/WITHDRAWAL)

■ MASTER DOCKET (GRANTED/CERTIFIED/DEATH CASES)

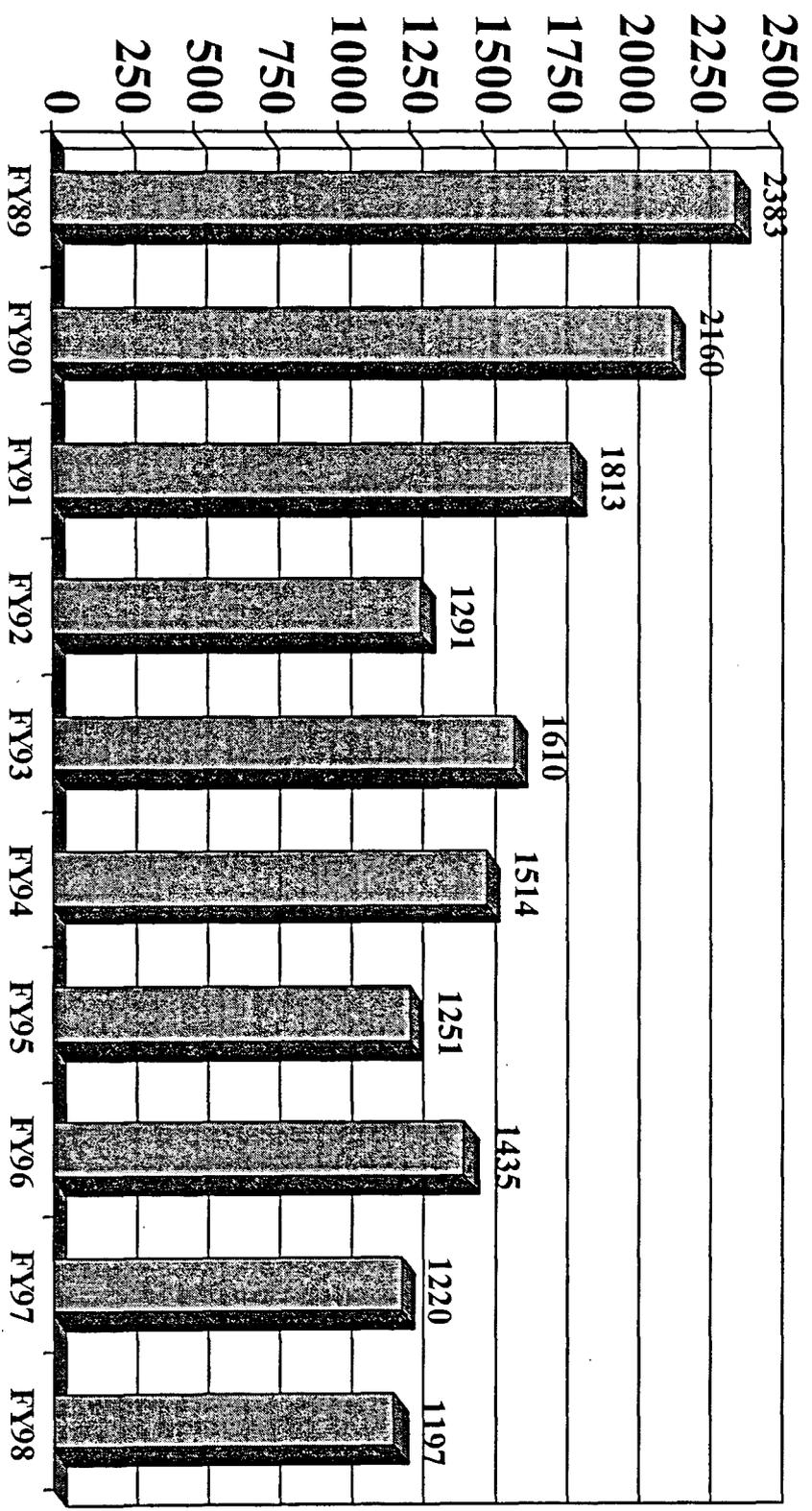
APPENDIX I

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 FORCES¹

PUBLIC ACCESS TO ARTICLE 32 PROCEEDINGS

Citing previous cases of the Court which held that the right to a public trial set forth in the Sixth Amendment to the Constitution applied to courts-martial, the Court held in ABC, Inc. v. Powell, 47 MJ 363 (1997), that in the absence of cause shown that outweighs the value of openness, a military accused is entitled to a public Article 32, UCMJ, pretrial investigative hearing. The Court further held that when an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied. However, the Court declined to adopt a position advanced by the news media that requiring a witness to testify about personal sexual history never qualified as a basis for closing such a pretrial hearing. Rather, the Court held that a decision on this specific issue must be made on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis as to whether closure is necessary to protect the welfare of a victim or alleged victim of sexual assault. After noting that the decision to close the Article 32 hearing in the case at hand had been made for unsubstantiated reasons, the Court ordered it opened to the public and the news media unless future compelling circumstances dictated a different result.

¹This 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.

FORFEITURES AND REDUCTION IN GRADE

In United States v. Gorski, 47 MJ 370 (1997), the Court held that the 1996 addition of Article 58b, UCMJ, and the amendment of Article 57(a)(1), UCMJ, mandating forfeitures for certain sentences and providing an earlier reduction in grade violate the Ex Post Facto Clause of Article I, § 9, of the Constitution when applied to court-martial offenses committed prior to the effective date of this legislation. The Court held in this regard that a change in a minimum sentence was protected by Article I, § 9, and that the same rationale should apply to forfeiture of pay and allowances since they constitute a form of punishment under the military justice system.

Similarly, the Court held in Goldsmith v. Clinton, 48 MJ 84 (1998), that a statute which had been enacted after an accused military officer was tried and sentenced could not be used to drop him from the rolls and place him in a non-pay status.²

MENTAL RESPONSIBILITY

Reviewing a decision by a Court of Criminal Appeals that limited the proof of lack of mental responsibility by an accused to objective evidence, the Court in United States v. Dubose, 47 MJ 386 (1998), ruled that such a holding was error since all relevant evidence, both objective and subjective, should be considered by the trier of fact. In this regard, the Court ruled that the testimony of experts in the fields of psychology and neuropsychology was relevant and properly admissible in evaluating whether a military accused had met the statutory burden of proving lack of mental responsibility by clear and convincing evidence.

EXPERT TESTIMONY

Examining the parameters of expert testimony in United States v. Birdsall, 47 MJ 404 (1998), the Court held that certain opinion testimony of a medical doctor and a psychologist exceeded the scope of Military Rule of Evidence 701 and resulted in reversible error in a sexual assault case. The Court held in this regard that the trial

² The Supreme Court of the United States subsequently reversed this decision in Clinton, et al., v. Goldsmith, 119 S.Ct. 1538 (1999).

judge erred by allowing a medical doctor to express his opinion as to whether the alleged child sexual victims had been sexually abused and by allowing a psychologist to state her opinion on the credibility of the same alleged victims. The Court emphasized in its ruling on this issue that the testimony in question involved the ultimate issue which the court-martial members were equally capable of resolving and constituted an improper comment on the victims' credibility.

EXTRAORDINARY PROCEEDINGS IN A CAPITAL CASE

The Court in Loving v. Hart, 47 MJ 438 (1998), addressed the constitutionality of a death sentence in the context of an extraordinary writ-appeal case after the Court of Criminal Appeals denied a petition for extraordinary relief which challenged such a sentence. The extraordinary relief challenge was litigated after the Court had affirmed the death sentence in this case on direct review, United States v. Loving, 41 MJ 213 (1994), modified on reconsideration, 42 MJ 109 (1995), and after the Supreme Court of the United States had affirmed this decision (517 U.S. 748, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996)). Citing a number of its prior decisions the Court concluded it had jurisdiction to consider the merits of the accused's claim under the provisions of the All Writs Act, 28 USC § 1651(a). The accused's claim was predicated on a question raised during oral argument before the Supreme Court of the United States as to the validity of an aggravating factor set forth in Rule for Courts-Martial 1004(c)(8) which used the phrase "actual perpetrator of the killing" in reference to a felony murder conviction under Article 118(4), UCMJ. In ruling thereon, the Court held the conviction and death sentence to be sufficient to withstand such a constitutional challenge. Citing several Supreme Court cases concerning this issue, the Court held that the military judge's failure to define the phrase "actual perpetrator of the killing" in a manner to require an intent to kill was not constitutionally deficient in view of existing Supreme Court precedent and the evidence of record, since there was no reasonable possibility that the court members understood the term "actual perpetrator of the killing" to mean anything other than an intentional killing. In addition, the Court ruled that, even assuming arguendo that the phrase should have been further defined by the military judge, such error was harmless beyond a reasonable doubt under the circumstances of this case.

STATUTE OF LIMITATIONS

Recognizing that the Uniform Code of Military Justice constituted the primary expression by Congress of the rights and responsibilities of servicemembers, the Court addressed the scope and purpose of the Right to Financial Privacy Act (RFPA), 12 USC §§ 3401-3422, in United States v. Dowty, 48 MJ 102 (1998), and ruled that such act provided protection to military servicemembers charged with violations of the Uniform Code. Thus, the Court held that a military accused could properly contest the Government's attempt to obtain his financial records by filing a motion in the appropriate United States District Court. However, disagreeing with the ruling of the military trial judge on a statute of limitations issue in the context of an appeal by the United States under Article 62, UCMJ, the Court ruled that the provisions of the RFPA that tolled the statute of limitations also applied to Article 43, UCMJ, and that the military trial judge had erroneously dismissed certain charges against this accused. The Court held in this regard that a citizen, whether military or civilian, cannot claim coverage of the RFPA to protect against intrusion by the Government into his private records while, at the same time, disclaiming coverage of the RFPA to toll the running of a statute of limitations during their exercise of the very process under the statute by which they claim that protection.

DEFENSE COUNSEL

Resolving an allegation by an accused in United States v. Russell, 48 MJ 139 (1998), that his trial defense counsel was ineffective for failure to locate a witness, the Court established a standard for review of such claims by holding that an accused must allege specific information that counsel could have located the witness after a reasonable investigation, that the witness would have been available to testify, and that the substance of the witness's testimony would have assisted the accused's defense. After analyzing the record, the Court held that the established standard had not been satisfied by the accused in this particular case.

In United States v. Calhoun, 49 MJ 485 (1998), the Court addressed an issue of first impression by rejecting a defense assertion that no defense counsel employed by the

Government could be free from command influence when his prior defense counsel's office was searched by military investigators after a question was raised that such defense counsel may have been involved in the subornation of perjury. Rather, the Court refused to adopt a per se rule and held that the government funding of a civilian defense counsel was not required unless an objective, disinterested observer, with knowledge of all the facts, could reasonably conclude that there was at least an appearance of unlawful command influence over all military and other government defense counsel. The Court noted in this regard the extraordinary measures undertaken by the Government to protect the attorney-client privilege in military court-martial cases and ruled that no such finding was required in the case at hand.

In United States v. Clark, 49 MJ 98 (1998), the Court held that the appellant's post-trial affidavit asserting ineffective assistance of his trial defense counsel was sufficient to require a factual inquiry under its earlier decision in United States v. Ginn, 47 MJ 236 (1997). The Court noted in this negligent homicide case that appellant's allegations concerning the failure of his defense counsel to call an accident reconstruction expert witness, if left unrebutted, would overcome the presumption of competence and, thus, would suffice to establish ineffective assistance of counsel.

JURISDICTION - RESERVISTS

The Court in Willenbring v. Neurauter, 48 MJ 152 (1998), resolved an issue which questioned the applicability of Article 2(d), UCMJ, to a reservist who had committed offenses while serving on active duty not as a member of the reserves, but rather as a member of a regular component of the Armed Forces. In rejecting a defense argument that Article 2(d) was limited to an offense committed while a member of a reserve component, the Court emphasized the historical development of military criminal jurisdiction as set forth by the Supreme Court of the United States in various cases, the intent of Congress as expressed in documents formulated during consideration of the legislative proposals which led to enactment of the Uniform Code of Military Justice and amendments thereto, the Court's own prior cases, and the evolution of the reserve components into a component of the "total force" concept of the Armed Forces. The Court ruled that, in the

context of such historical development, the phrase "active duty" as used in Article 2(d) did not distinguish between reserve and regular components and that such phrase was inconsistent with the restrictive definition argued by the appellant in this case.

SELECTION OF COURT MEMBERS

In United States v. White, 48 MJ 251 (1998), the Court rejected a defense argument that the selection of a disproportionately high number of commanders for service as court members violated Article 25, UCMJ, and held that since the qualities required for selection for command were totally compatible with the statutory requirements for selection as court members, evidence that more commanders than non-commanders were selected for a court-martial panel was not sufficient to raise an issue of court packing, absent some evidence of improper motives or systematic exclusion of a class or group of eligible candidates.

MILITARY INSPECTIONS

In United States v. Jackson, 48 MJ 292 (1998), the Court rejected a defense argument that a commander's receipt of specific information about the presence of contraband in his unit precluded a valid inspection pursuant to Military Rule of Evidence 313. The Court held in this case that so long as the primary purpose of the inspection is "unit readiness" and not disciplinary proceedings, it is permissible both (1) for an inspection to take place after the commander receives specific information about the presence of contraband and (2) for an inspection for weapons or contraband to result in disciplinary proceedings. In addition, the Court ruled that a military judge could take into account the nature of the contraband in determining whether unit readiness rather than criminal prosecution of an individual was the primary purpose for conducting a particular inspection.

DURESS

In United States v. Vasquez, 48 MJ 426 (1998), the Court held that the military judge properly rejected a defense requested instruction on the defense of duress. After noting the genesis and purpose of this specific defense, the Court ruled that the issue was not raised by the accused's claim that he was concerned about the

potential mistreatment of his friends in a foreign prison, since he had a reasonable opportunity to seek appropriate legal advice concerning his apprehension about their safety. Thus, the Court noted that a nexus or causal relationship between the threat and the wrongful act was ensured by the requirement of the immediacy element of the defense of duress, which encouraged individuals to promptly report threats rather than breaking the law, and that this element directly related to the requirement of a reasonable apprehension of death or serious bodily harm.

SUBSTANTIVE LAW

In United States v. Arriaga, 49 MJ 9 (1998), the Court held that an accused could be convicted of the offense of obstruction of justice under Article 134, UCMJ, by lying to military police investigators. In reaching this decision the Court specifically rejected a defense argument that the holding of the Supreme Court in United States v. Aguilar, 515 U.S. 593, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995), that interpreted 18 USC § 1503 as precluding prosecution for lying to investigative agents alone, applied to an Article 134 prosecution for obstruction of justice. The Court emphasized that the Supreme Court's decision in Aguilar rested on a particular analysis of the repeated references in 18 USC § 1503 to "grand juror" and "petit juror" in the context of an ongoing grand jury investigation or trial and that such a restrictive analysis was inapplicable to the prosecution of obstruction of justice in military law.

NEW TRIAL

In United States v. Brooks, 49 MJ 64 (1998), the Court examined the procedures for resolving a petition for new trial under the provisions of Article 73, UCMJ, and Rule for Courts-Martial 1210(f)(2). The Court stressed that the three elements set forth in Rule 1210(f)(2) for evaluating newly discovered evidence required a determination as to whether post-trial affidavits raised any material issues of fact that must be resolved by a factfinding hearing under the criteria set out in United States v. Ginn, 47 MJ 236 (1997).

RESIDUAL HEARSAY EVIDENCE

In addressing the admissibility of an out-of-court statement made by an alleged victim under Military Rule of

Evidence 803(24), the Court held in United States v. Johnson, 49 MJ 467 (1998), that a trial judge, in evaluating the requirement for indicia of reliability, should consider both those indicia that add to a statement's reliability as well as those indicia that detract from a statement's reliability in determining its admissibility. After reviewing the record in this case, the Court concluded that the trial judge had properly admitted the statement in question.

PEREMPTORY CHALLENGE

In United States v. Ruiz, 49 MJ 340 (1998), the Court held that a peremptory challenge of the only female member of a court-martial panel by the trial counsel required some explanation after the defense counsel contested such challenge. Noting that it had previously decided in United States v. Whitham, 47 MJ 297 (1997), that a gender-based challenge involved the Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), requirement for some explanation by the challenging counsel, the Court further held that the per se rule formulated in United States v. Moore, 28 MJ 366 (CMA 1989), concerning a race-based peremptory challenge, should be extended to a gender-based peremptory challenge.

REHEARING

In United States v. Ruppel, 49 MJ 247 (1998), the Court rejected a defense argument that a military judge violated Rule for Courts-Martial 810(a)(3) by admitting evidence underlying an accused's conviction of a sex offense involving his natural daughter at a separate rehearing on the merits regarding offenses against the same accused involving his stepdaughter. The Court ruled in this regard that such evidence was admissible if it qualified for admissibility under Military Rule of Evidence 404(b). The Court also held that the relationship between Rule 810(a)(3) and Rule 404(b) was similar to the relationship between Rule for Courts-Martial 910(g)(3), relating to the prohibition against notifying court members of a guilty plea of an accused prior to findings on contested offenses, and Military Rule of Evidence 404(b), citing United States v. Rivera, 23 MJ 89 (CMA 1986).

SENTENCING EVIDENCE

The Court held in United States v. Loya, 49 MJ 104 (1998), that the military judge committed reversible error by rejecting defense evidence, during sentencing proceedings, of the quality of medical treatment provided to the victim when the accused was convicted of involuntary manslaughter. The Court observed that the proffered defense evidence tended to show additional facts and circumstances surrounding the death of the victim which would provide a more complete picture of the tragic event.

EVIDENCE

In United States v. Morris, 49 MJ 227 (1998), the Court considered whether an appellate court could disagree with the ruling of a trial judge that excluded an accused's confession in determining whether other evidence that was admitted at trial was tainted and thereby constituted improper derivative evidence of that confession. Citing its own prior cases the Court held that, by considering the accused's confession, the Court of Criminal Appeals did not reverse the trial judge's ruling since the circumstances surrounding the confession were being considered only with respect to whether other evidence which was admitted at trial was properly admissible or was tainted. In addition, the Court held that the enactment of Article 62, UCMJ, which gave the Government the right to appeal certain rulings of the trial judge, did not overrule its earlier decision in United States v. Nargi, 2 MJ 96 (CMA 1977), but that Article 62 and Nargi are complementary: Nargi allowing an appellate court to examine the underlying basis for a ruling which excludes evidence, and Article 62 providing a procedure for reversing a ruling on admissibility and compelling the military judge to admit evidence.

In United States v. Blanchard, 48 MJ 306 (1998), the Court addressed a question concerning the standards for admissibility of taped conversations and rejected appellant's argument that the seven-prong test employed in some federal circuits for admissibility of a taped conversation should be applied in courts-martial. Noting that disagreement existed among the federal circuits as to the appropriate test for authentication and admissibility of taped conversations and that Military Rule of Evidence 901(b) (5) particularly addressed authentication of voices on tape recordings and expressly contemplated the more

flexible approach employed by several federal circuits for this type of evidence, the Court held that the tape recordings in this case were properly presented to the court members for their determination as to authenticity.

CHALLENGES FOR CAUSE

In reviewing a military judge's denial of a defense challenge for cause for abuse of discretion the Court ruled in United States v. Ovando-Moran, 48 MJ 300 (1998), that in order for a court member's vocational or professional experience to be disqualifying, the member must demonstrate a bias or prejudice resulting from or inseparable from this experience. Thus, the Court held that the military judge in this sexual assault case did not err in denying a challenge for cause against a medical doctor who had limited experience in the subject matter of the expert testimony given at trial, since there was no indication that this court member would thereby be rendered unable to impartially listen to and evaluate such testimony.

SECTION 3

REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY

REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY

OCTOBER 1, 1997 TO SEPTEMBER 30, 1998

During fiscal year 1998 (FY 98), the Office of The Judge Advocate General (OTJAG) continued to monitor courts-martial, review and prepare military publications and regulations, and develop and draft changes to the Manual for Courts-Martial (MCM) and the Uniform Code of Military Justice (UCMJ). Through its Field Operating Agencies, OTJAG provided judicial and appellate services, advice, assistance, and professional education to ensure the orderly and efficient administration of military justice. Numbers in this report are based on military end strength of 484,054 in FY 98 and 487,812 in FY 97.

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

(See Attached Table)

U.S. ARMY LEGAL SERVICES AGENCY

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

U.S. ARMY JUDICIARY

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

U.S. ARMY TRIAL DEFENSE SERVICE

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

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

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

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

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

TRIAL COUNSEL ASSISTANCE PROGRAM

During FY 98, the U.S. Army's Trial Counsel Assistance Program (TCAP) fulfilled its mission of providing information, advice, training, and trial assistance to military prosecutors world-wide. In addition to services provided to Army attorneys, TCAP had an expanded constituency among prosecutors in the Air Force, Navy, Marine Corps, and Coast Guard. TCAP provided four basic categories of services during FY 98: (1) telephone/e-mail inquiry assistance; (2) advocacy training courses; (3) publications; and (4) trial assistance.

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

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

Beyond this extensive support to trial counsel, TCAP attorneys prepared 8 Answers and Returns to Habeas Corpus petitions filed with the Office of the U.S. Attorney for the District of Kansas or the United States Court of Appeals for the Tenth Circuit and one for the Eastern District of North Carolina. TCAP reviewed, monitored, and responded to 8 Extraordinary Writs filed in either the Army Court of Criminal Appeals or the Court of Appeals for the Armed Forces and handled three Government Appeals. Finally, they prepared briefs and presented oral argument four times before the Army Court of Criminal Appeals.

CRIMINAL LAW DIVISION

The Criminal Law Division, OTJAG, advises The Judge Advocate General on military justice policy, legislation, opinions, and related criminal law actions. Specific responsibilities include: promulgating military justice regulations and reviewing Army regulations for legal sufficiency, military corrections, the Army's drug testing program, federal felony and magistrate court prosecutions, legal opinions for the Army Staff, statistical analysis and evaluation, and Congressional inquiries.

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

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

The Army acts as Executive Agent for the JSC on a permanent basis. In addition the Army representative served as the Chairman of the Joint Service Committee until June 1, 1998.

During FY 98, the JSC completed its fourteenth annual review of the MCM. This review was published in the Federal Register for public comment and a public meeting was held to receive comments from interested parties. Highlights of the annual review's proposed changes include: setting forth the rules for issuing protective orders preventing the parties and witnesses from making out of court

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

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

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

FOREIGN CRIMINAL JURISDICTION

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

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

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

With the exception of Foreign Jurisdiction Recalls, there was a slight increase in all categories. This increase was proportional across all categories in certain major offenses, such as robbery, larceny, aggravated assault, simple assault, drug offenses, as well as in certain minor offenses, such as traffic offenses, disorderly conduct, drunkenness and others.

This year, foreign authorities released 22 of the 187 exclusive foreign jurisdiction cases involving military personnel to U.S. authorities, for disposition. In concurrent jurisdiction cases in which the foreign countries had the authority to assert primary jurisdiction, U.S. military authorities were able to obtain waivers of the exercise of this jurisdiction in 2,752 cases. Overall, waivers were obtained by the U.S. in 86.1 percent of all exclusive and concurrent jurisdiction cases. This figure reflects a 10 percent increase in such waivers from 1995-1996, when the relevant figure was 75.6 percent.

During the last reporting period, civilian employees and dependents were involved in 1,336 offenses. Foreign authorities released 192 of these cases (14.4 percent of this total) to U.S. military authorities for administrative action or some other form of disposition. This year, civilian employees and dependents were involved in 1,487 offenses. The foreign authorities released 250 of these cases (16.8 percent of the current total).

Foreign authorities tried a total of 1,231 cases. Eighteen trials, or 1.5 percent, resulted in acquittals. Those convicted were sentenced as follows: 18 cases resulted in executed confinement; 64 cases resulted in suspended confinement; and 1,131 cases (91.9 percent of the total trials) resulted in only fines or reprimands.

PROFESSIONAL RESPONSIBILITY

The Standards of Conduct Office (SOCO) manages TJAG's professional responsibility program. This program includes tasking judge advocates for field inquiries into allegations of professional

misconduct, reviewing reports of inquiry, and advising The Assistant Judge Advocate General on appropriate resolution of ethics cases. SOCO oversees the operation of TJAG's Professional Responsibility Committee and its issuance of advisory ethics opinions. It is also responsible for overseeing professional responsibility training within the Army. Working closely with TJAGSA, SOCO assists judge advocates in implementing training programs in their commands and offices.

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

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

LITIGATION

The number of civil lawsuits against the Department of the Army and its officials dropped slightly from previous years, with about 600 actions filed in FY 98. Cases that require civilian courts to interpret the UCMJ constitute a small but significant portion of this total. Most of these cases are filed by (former) soldiers seeking collateral review of courts-martial proceedings in district courts, usually via petitions for writs of habeas corpus, or in the Court of Federal Claims in back-pay actions. Other suits involve challenges to confinement conditions, to decisions to deny clemency or parole, to revoke parole, or to other administrative actions taken by confinement facility officials.

One case of particular note involved a habeas petition brought by a soldier seeking to stay his pending court-martial for refusing to obey orders to wear United Nations accouterments (blue beret and brassard) incident to his unit's deployment to Macedonia. During FY 98, an appellate court affirmed the district court's decision

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

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

EDUCATION AND TRAINING

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

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

The unrivaled success of *The Advocacy Trainer, A Manual for Supervisors* was clearly the highlight of 1998. Over 300 copies were distributed worldwide and to sister services. The *Trainer* contains numerous skill development drills in all aspects of court-martial practice. The package of scripted and videotaped training scenarios is designed to give supervisors - primarily chiefs of justice and senior defense counsel - the ability to conduct "off the shelf" training in all trial-related skills. World-wide distribution was made and orders were received from the Air Force, Navy and Marine Corps as well. Following closely on its heels was the *ATII 1998 Supplement*.

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

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

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

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

PERSONNEL, PLANS, AND POLICIES

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

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

The diverse composition of the Active Army Judge Advocate General's Corps included 111 African-Americans, 44 Hispanics, 42 Asians and Native Americans, and 349 women. The Active Army FY 98 end strength of 1,499 compares with an end strength of 1523 in FY 97, 1541 in FY 96, 1561 in FY 95, 1575 in FY 94, 1646 in FY 93, and 1710 in FY 92. The Active Army grade distribution was 4 general officers; 129 colonels; 212 lieutenant colonels; 315 majors; 749 captains; and 36 first lieutenants. Sixty warrant officers, 357 civilian attorneys, and 1,487 enlisted soldiers supported Active Army legal operations worldwide.

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

Two hundred and five Judge Advocate officers completed the following resident service schools:

U.S. Army War College	2
National War College	1
Industrial College of the Armed Forces	2
Department of Justice Fellowship	1
U.S. Army Command and General Staff College	16
The Judge Advocate Officer Graduate Course	56
The Judge Advocate Officer Basic Course	127

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

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

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

U.S. ARMY MILITARY JUSTICE STATISTICS

Period: FISCAL YEAR 1998

20 JANUARY 1999

PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)

TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
GENERAL	685	639	46	- 7.5%
BCD SPECIAL [A]	273	250	23	-12.5%
NON-BCD SPECIAL	14	11	3	+ 7.6%
SUMMARY	489	464	25	+23.4%
OVERALL RATE OF INCREASE (+)/DECREASE (-) OVER LAST REPORT				0%

PART 2 - DISCHARGES APPROVED [B]

GENERAL COURTS-MARTIAL (CA LEVEL)			
NUMBER OF DISHONORABLE DISCHARGES (+ DISMISSALS)		138 (+14)	
NUMBER OF BAD CONDUCT DISCHARGES		406	
SPECIAL COURTS-MARTIAL (SA LEVEL) [A]			
NUMBER OF BAD CONDUCT DISCHARGES		148	

PART 3 - RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG

FOR REVIEW UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL	581	
FOR REVIEW UNDER ARTICLE 66 - BCD SPECIAL COURTS-MARTIAL	150	
FOR EXAMINATION UNDER ARTICLE 69 - GENERAL COURTS-MARTIAL	193	

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

TOTAL ON HAND BEGINNING OF PERIOD		98 [C]	
GENERAL COURTS-MARTIAL	[D]		
BCD SPECIAL COURTS-MARTIAL	[D]		
REFERRED FOR REVIEW		771 [C]	
GENERAL COURTS-MARTIAL			
BCD SPECIAL COURTS-MARTIAL			
TOTAL CASES REVIEWED		783 [E]	
GENERAL COURTS-MARTIAL			
BCD SPECIAL COURTS-MARTIAL			
TOTAL PENDING AT CLOSE OF PERIOD		85 [C]	
GENERAL COURTS-MARTIAL			
BCD SPECIAL COURTS-MARTIAL			
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		+6.0%	

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

NUMBER	720	
PERCENTAGE	98.49%	

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

PERCENTAGE OF CCA REVIEWED CASES FORWARDED TO USCAAF	326 OF 783	41.6%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		-10.5%
PERCENTAGE OF TOTAL PETITIONS GRANTED	46 OF 326	13.6%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		+37.2%
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY USACCA		5.8%
RATE OF INCREASE (+)/DECREASE (-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD	50 IN FY97; 54 IN FY98	+ 7.4%

PART 7 - APPLICATIONS FOR RELIEF, ARTICLE 69

PENDING AT BEGINNING OF PERIOD		5	
RECEIVED		27	
DISPOSED OF		24	
GRANTED	2		
DENIED	9		
NO JURISDICTION	13		
WITHDRAWN	0		
TOTAL PENDING AT END OF PERIOD		8	

PART 8 - ORGANIZATION OF COURT

TRIALS BY MILITARY JUDGE ALONE			
GENERAL COURTS-MARTIAL		514	
SPECIAL COURTS-MARTIAL		214	
TRIALS BY MILITARY JUDGE WITH MEMBERS			
GENERAL COURTS-MARTIAL		171	
SPECIAL COURTS-MARTIAL		73	

PART 9 - COMPLAINTS UNDER ARTICLE 138

NUMBER OF COMPLAINTS			
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PART 10 - STRENGTH

AVERAGE ACTIVE DUTY STRENGTH	484054		
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PART 11 - NONJUDICIAL PUNISHMENT (ARTICLE 15)

NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED	41,447		
RATE PER 1,000	85.6		
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD	+3.7		

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.

SECTION 4

REPORT OF THE JUDGE ADVOCATE GENERAL OF THE NAVY

REPORT OF THE JUDGE ADVOCATE GENERAL OF THE NAVY

OCTOBER 1, 1997 TO SEPTEMBER 30, 1998

**SUPERVISION OF THE ADMINISTRATION OF
MILITARY JUSTICE**

In compliance with the requirement of Article 6(a), Uniform Code of Military Justice (UCMJ), 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

Sixty-four general courts-martial records of trial not statutorily eligible for automatic review by the Navy-Marine Corps Court of Criminal Appeals (NMCCA) were forwarded for examination to the Office of the Judge Advocate General in fiscal year 1998. Three required corrective action by the Judge Advocate General. One was forwarded by the Judge Advocate General to NMCCA for review pursuant to Article 69(d), UCMJ. Twenty-one cases were pending review at the close of fiscal year 1998.

ARTICLE 69(b), UCMJ, APPLICATIONS

In fiscal year 1998, 20 applications under Article 69(b), UCMJ, were received for review. Additionally, seven such applications remained pending from fiscal year 1997. Of these 27 applications, 14 were denied on the merits, while relief was granted in whole or in part in one case. Twelve cases are currently pending review.

ARTICLE 73, UCMJ, PETITIONS

In fiscal year 1998, one petition for new trial was received by the Office of the Judge Advocate General and that petition was denied.

APPELLATE DEFENSE DIVISION

Appellate Defense Practice. Appellate Defense received 1982 records of trial in fiscal year 1998. A total of 2249 cases were filed, ending the backlog generated over previous years. This accomplishment was the work of the 17 active duty and 25 reserve Navy and Marine Corps judge advocates assigned to Appellate Defense. A total of 27% were fully briefed to the Navy-Marine Corps Court of Criminal Appeals, and another 13% were summarily assigned. In addition, 353 cases were petitioned to the Court of Appeals for the Armed Forces, and three to the Supreme Court of the United States.

Capital Litigation. The Defense Capital Litigation Center completed its first full year of work in this most visible area of law. The Center, headed by Captain Henry Lazzaro, JAGC, USNR provides advice on trial and plea strategies, including research, motion-drafting, identification of expert witness issues, and expert witness identification. In fiscal year 1998, the Center provided its expertise in seven Navy and Marine Corps trial level cases where the death penalty was sought or seriously considered.

The Center also provided advice, coordination, and the procurement of Reserve counsel and funding for four pending appellate level cases in which the death penalty was approved in the initial action. The Center maintained liaison with and provided mutual assistance to its counterparts in the Army and Air Force concerning the three capital cases on appeal in those services. Finally, the Center plays a large role in training trial defense counsel and appellate counsel both at the Naval Justice School in Newport, Rhode Island and at Marine Corps Air Station, Cherry Point, North Carolina.

Trial Defense Assistance. Appellate Defense provides advice to trial defense counsel in the field on a continuing basis. The advice is available electronically via extremely current reports on the status of appellate case law and by telephone with the senior Appellate Division who are detailed as field liaison officers.

Reserve Support. The reserve component continues to provide outstanding support to the Appellate Defense Division. The reserve units include: NAMARA (Defense) 111 in Oklahoma City, Oklahoma, which has six reserve attorneys (plus one additional duty attorney) and is headed by Captain Kristy L. Christen, JAGC, USNR;

NAVJAG 109 in Columbus, Ohio, which has four reserve attorneys (plus 1 part-time additional duty attorney), headed by Captain Ben J. Piazza, JAGC, USNR; and NR VTU 0614, which has three reserve attorneys; and six independent Marine Corps Reservists. These twenty-one reserve attorneys reviewed 1314 cases in 1998, nearly 60% of the Division's caseload. In addition, several reserve attorneys provided specialized assistance in capital cases. The Appellate Defense Division supplies a tremendous example of reserve and active duty commands working as a team to accomplish a mission that neither could possibly do alone.

APPELLATE GOVERNMENT DIVISION

Appellate Representation. The eight Navy and five Marine Corps judge advocates assigned to the Appellate Government Division filed a total of 1753 pleadings last year; 1416 with the Navy-Marine Corps Court of Criminal Appeals and 337 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 that 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 1998, prompt assistance was provided in response to almost 750 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 12 Electronic Viewpoints to the field dealing with a variety of current legal issues.

Presentations. Government counsel participated in the 1998 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., the Trial Services Office, Pearl Harbor, Hawaii, the Trial Services Office, Seattle, Washington, 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.

NAVY-MARINE CORPS TRIAL JUDICIARY

The Navy-Marine Corps Trial Judiciary (NMCTJ) consists of 34 active duty judges and 24 reservists serving in 13 circuit and four branch offices. During fiscal year 1998, NMCTJ provided judicial services in 470 general courts-martial and 2322 special courts-martial. These numbers represent a decrease in general courts-martial (78) and special courts-martial (376), compared to fiscal year 1997.

NMCTJ provided judicial services to Fleet and Shore activities, and Marine Forces in the United States and around the world. Additionally, NMCTJ provided judicial services to Coast Guard activities in Alaska.

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 Inter-Service Military Judges' Seminar. NMCTJ also provided training at various levels,

including the Navy-Marine Corps Senior Officer Course 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 58 offices world-wide: eight Navy Legal Service Offices (NLSOs), five Trial Service Offices (TSOs), the Naval Justice School, and 45 detachments and branch offices. NAVLEGSVCCOM provides counsel for courts-martial, administrative separation 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/DON personnel.

Over the last year NAVLEGSVCCOM closed several NLSO and TSO detachments and branch offices. NLSO Southwest Branch Office, Guantanamo Bay and NLSO Europe and Southwest Asia Branch Office, London closed. TSO East Branch Offices, Brunswick, Earle, and Newport closed. TSO Southeast Detachments, Memphis and Gulfport closed, as well as the Branch Office at Guantanamo Bay. TSO West Branch Office, Port Hueneme closed, as well as TSO Pacific Branch Office, Guam. These closures were necessary due to a loss of funding in fiscal year 1999 for 20 enlisted and 18 officers, which forced NAVLEGSVCCOM to consolidate functions into regional hubs.

The field version of the Military Justice Management Information System (MJMIS) was not as successful as we originally anticipated. We have reverted back to JAGMIS for the tracking of services provided and courts-martial and hope to implement a new management information system in the near future.

NAVLEGSVCCOM is commanded by the Deputy Judge Advocate General of the Navy and includes 311 officers, 218 enlisted, and 250 civilians.

NAVAL JUSTICE SCHOOL

Organization. Naval Justice School (NJS) reports to Commander, Naval Legal Service Command, for administrative and operational control. The main NJS facility is located in Newport, Rhode Island. Teaching detachments are based in San Diego, California, and Norfolk, Virginia (areas of Fleet concentration). Also reporting to Commanding Officer, NJS, is the Defense Institute of International Legal Studies (DIILS), operating under the Expanded International Military Education and Training (EIMET) Program.

Mission Statement. NJS oversees training of judge advocates, Limited Duty Officers (Law), and Legalmen to ensure their career-long professional development and readiness; provides comprehensive formal training to all Sea Service judge advocates and other legal personnel

to promote justice and ensure the delivery of quality legal advice and other legal services; and trains 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 and the Commandants of the Army and Air Force JAG Schools meet semi-annually to discuss new initiatives and opportunities for cross-training and to increase cooperation and efficiency in the training of legal personnel within the Department of Defense.

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

1. Accession Judge Advocate Course. This nine-week course, offered four times per fiscal year, 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 courts-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. Fiscal year 1998 graduates include:

Navy:	84
Marine Corps:	50
Coast Guard:	19
Air Force:	2
International:	3

2. Accession Legalman Course. This nine-week course, offered three times per fiscal year, trains enlisted personnel selected for conversion to the legalman rating. In fiscal year 1998, the course consisted of two phases: (a) Paralegal, dedicated to training Navy legalmen in military justice practice (six weeks), and (b) Court Reporters (three weeks). There were 43 fiscal year 1998 graduates.

3. Senior Officer Course (SOC) in Military Justice and Civil Law. This four-day course is taught in Newport, Rhode Island, and other areas of Fleet and Fleet Marine Force concentration. In fiscal year 1998, the course was offered 18 times at 11 different locations. The course prepares senior officers (typically O4-O6) to execute their legal responsibilities inherent in command. The majority of the course focuses on such areas as nonjudicial punishment and courts-martial procedures. Fiscal year 1998 participants in SOCS included:

Navy:	678
Marine Corps:	210
Coast Guard:	8
Civilian:	7
Air Force:	4

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 prepares these collateral duty legal officers (typically pay grades O-1 to O-3) to assume legal duties in their respective commands. This course is offered a total of 16 times per fiscal year at Newport, Rhode Island, San Diego, California, and Norfolk, Virginia. Fiscal year 1998 legal officers trained included:

Navy:	422
Marine Corps:	55
Coast Guard:	1
International:	3

5. Legal Clerk Course. Legal clerks are typically assigned to assist non-lawyer legal officers within a command. This is usually a collateral duty for a command yeoman, or personnelman, or a Marine Corps legal services specialist. This two-week course provides training in the preparation of legal forms and reports, service record entries, post-mast and post courts-martial procedures. In fiscal year 1998, the course was offered a total of 20 times at Newport, Rhode Island, San Diego, California, and Norfolk, Virginia. Fiscal year 1998 participants included:

Navy:	276
Marine Corps:	19
Civilian:	3

In addition to the above "core" courses, NJS offered numerous continuing legal education programs throughout the fiscal year that contained detailed instructions relating to UCMJ functions. These included:

<u>Officer Courses</u>	<u>Length</u>
Reserve Judge Advocate Course	Two weeks
Staff Judge Advocate Course	Two weeks
Capital Litigation Course	Three days
(Separate offerings for Prosecution and Defense)	each
Intermediate Trial Advocacy Course	One week
Advanced Trial Advocacy Course	Two days
Coast Guard Law Specialist Course	One week
Reserve JAGC Military Law Update Workshops	Two days
Computer Crimes	Two days
National College of District Attorneys Course	One week
Senior Leadership Military Justice Refresher	Two days

<u>Enlisted Courses</u>	<u>Length</u>
Reserve Legalman Course	Two weeks
Army Reserve Court Reporting Course	Two weeks
Mid-Career Legalman Course	Two weeks
Coast Guard Legal Clerk Course	Three weeks
Senior Legalman Course	One week

International Programs. DIILS provides expertise in over 150 legal topics related to Military Law, justice systems, and the rule of law, with an emphasis on the execution of disciplined military operations. DIILS has presented programs to over 9,600 senior military and civilian government officials in 66 countries worldwide since its inception in late 1992. Teams consisting of judge advocates from all uniformed services utilize the UCMJ and personal experiences to compare, contrast, and develop military justice systems in emerging democracies. In fiscal year 1998, DIILS presented 53 weeks of seminars in 39 developing nations. Significantly, 24 percent of the participants have been civilian members of these governments who determine policy and create new 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 1998, Volume 45 of the *Naval Law Review* was published and contained several articles related to Operational and International Law. NJS also updated several of its study guides.

MARINE CORPS ACTIVITIES

The Marine Corps judge advocate community consisted of approximately 392 judge advocates during fiscal year 1998. Nearly half of all judge advocates were company grade officers, in pay grade 0-3 or below. Forty-one 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, ten 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 (ELP) (LAW). Twelve officers are currently assigned to FLEP and 15 are now attending law school under the ELP(LAW).

Twelve judge advocates attended resident professional military education courses in fiscal year 1998. Six majors and two lieutenant colonels 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 lieutenant colonels completed top level schools and two majors received LL.M. degrees through the Special Education Program (SEP). Fifteen officers are currently attending resident professional military education courses and two are assigned to the SEP. As unrestricted officers, Marine

Corps judge advocates continued to fill numerous non-legal billets. Two judge advocates serve in command billets, one at Company F, Marine Security Guard Battalion, Frankfurt, Germany, and the other at Headquarters Battalion, Marine Corps Base, Hawaii. During fiscal year 1998, two judge advocates (one colonel and one lieutenant colonel) were approved for command. Ten judge advocates continued to serve in joint billets.

The Marine Corps Reserve judge advocate community averaged 393 officers during fiscal year 1998. Approximately 300 of these officers were actively participating in the Reserve. One reserve colonel judge advocate currently serves as appellate judge on the Navy-Marine Corps Court of Criminal Appeals. Eleven reserve judge advocates, major through colonel, serve as appellate counsel in 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, California. Reserve judge advocates are also found serving in non-legal billets at various combat arms and supporting commands.

JOHN D. HUTSON

Rear Admiral, USN

The Judge Advocate General of the Navy

Period: _____

PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)

TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
GENERAL	470	459	11	-14%
BCD SPECIAL	2322	2309	13	-14%
NON-BCD SPECIAL	0	0	0	0%
SUMMARY	1783	1762	21	+ 9%
OVERALL RATE OF INCREASE (+)/DECREASE (-) OVER LAST REPORT				- 6%

PART 2 - DISCHARGES APPROVED

GENERAL COURTS-MARTIAL (CA LEVEL)		
NUMBER OF DISHONORABLE DISCHARGES		173
NUMBER OF BAD CONDUCT DISCHARGES		199
SPECIAL COURTS-MARTIAL (SA LEVEL)		
NUMBER OF BAD CONDUCT DISCHARGES		1658

PART 3 - RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG

FOR REVIEW UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL	413
FOR REVIEW UNDER ARTICLE 66 - BCD SPECIAL COURTS-MARTIAL	1550
FOR EXAMINATION UNDER ARTICLE 69 - GENERAL COURTS-MARTIAL	60

PART 4 - WORKLOAD OF THE Navy-Marine Corps Court of Criminal Appeals

TOTAL ON HAND BEGINNING OF PERIOD		2008
GENERAL COURTS-MARTIAL	488	
BCD SPECIAL COURTS-MARTIAL	1520	
REFERRED FOR REVIEW		2002
GENERAL COURTS-MARTIAL	431	
BCD SPECIAL COURTS-MARTIAL	1571	
TOTAL CASES REVIEWED		2518
GENERAL COURTS-MARTIAL	468	
BCD SPECIAL COURTS-MARTIAL	2050	
TOTAL PENDING AT CLOSE OF PERIOD		1495
GENERAL COURTS-MARTIAL	453	
BCD SPECIAL COURTS-MARTIAL	1042	
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD		+25%

PART 5 - APPELLATE COUNSEL REQUESTS BEFORE Navy-Marine Corps Court of Criminal Appeals

NUMBER	2002
PERCENTAGE	100%

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

PERCENTAGE OF COMR REVIEWED CASES FORWARDED TO USCMA	16%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD	-1%
PERCENTAGE OF TOTAL PETITIONS GRANTED	12%
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD	-2%
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY COMR	2%
RATE OF INCREASE (+)/DECREASE (-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD	+4%

PART 7 - APPLICATIONS FOR RELIEF, ARTICLE 69

PENDING AT BEGINNING OF PERIOD		7	
RECEIVED		20	
DISPOSED OF		15	
GRANTED	1		
DENIED	14		
NO JURISDICTION			
WITHDRAWN			
TOTAL PENDING AT END OF PERIOD		12	

PART 8 - ORGANIZATION OF COURT

TRIALS BY MILITARY JUDGE ALONE			
GENERAL COURTS-MARTIAL		346	
SPECIAL COURTS-MARTIAL		2143	
TRIALS BY MILITARY JUDGE WITH MEMBERS			
GENERAL COURTS-MARTIAL		130	
SPECIAL COURTS-MARTIAL		180	

PART 9 - COMPLAINTS UNDER ARTICLE 138

NUMBER OF COMPLAINTS	171	
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PART 10 - STRENGTH

AVERAGE ACTIVE DUTY STRENGTH	550,287	
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PART 11 - NONJUDICIAL PUNISHMENT (ARTICLE 15)

NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED	31,575	
RATE PER 1,000	57.3	
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD	-7%	

SECTION 5

REPORT OF THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE

REPORT OF THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE

OCTOBER 1, 1997 TO SEPTEMBER 30, 1998

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 workload and production has remained relatively stable over the past two years. Court manning has dropped from nine to seven judges, with two of the seven judges (Chief Judge Rothenburg and Judge Morgan) scheduled to leave the Court by the middle of fiscal year 1999. The Court's ability to maintain a level of production commensurate with the number of cases referred for review has been largely attributable to the record-setting work of two judges (Judge Senander and Judge Morgan). With the pending departure of Chief Judge Rothenburg and Judge Morgan, the number of cases awaiting review will increase until the Court is once again fully manned.

The *ex post facto* application of UCMJ Articles 57(a) and 58b to adjudged sentences, as well as other post-trial issues, presented a significant portion of the Court's workload. The Court implemented a state-of-the-art Internet webpage that provides access to its published opinions, rules, and other appellate information of interest to practitioners and the public. The Court has also laid the groundwork for one of the first electronic filing of pleading systems in the federal courts. The courtroom is undergoing a full renovation, scheduled to be complete by May 1999. The Court will hear oral arguments at the Washington Navy Yard and Andrews AFB in the meantime.

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 Air Force Trial Judiciary had an average of 20 active duty trial judges, 5 reserve trial judges, and 9 noncommissioned officers assigned throughout 5 judiciary circuits worldwide. The Chief Trial Judge, his military judge assistant and one noncommissioned officer are assigned to the Trial Judiciary headquarters. 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. 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 made supervisory visits to all three continental United States (CONUS) circuits and both of the overseas circuits to review workload and facilities. The Trial Judiciary has a Website on the Internet for trial judges. The Website contains reference materials and is updated continually.

The Twenty-Fourth Interservice Military Judges' Seminar was conducted by the Trial Judiciary at The Air Force Judge Advocate General's School, Maxwell AFB, Alabama, from 19-24 April 1998. This seminar was attended by 65 military judges from the trial judiciaries of the Army, Navy, Marine Corps, the Air Force and by a military trial judge from Canada.

Five active duty trial judges and two reserve trial judges attended the three-week Military Judges' course conducted by The Army Judge Advocate General's School in Charlottesville, Virginia, from 4 through 22 May 1998. In November 1997, two active duty judges attended the Trying Capital Cases Course in Reno, Nevada conducted by the National Judicial College. In August 1998, seven judges, six active duty and one reservist, attended the Special Problems in Criminal Evidence Course in Reno, Nevada.

The Chief Trial Judge attended both the mid-year and the annual meeting of the American Bar Association. He serves on the Executive Committee of the National Conference of Special Court Judges and as Chair of the Military Courts Committee. He also serves as the Chair of the Military Courts Committee of the Judiciary Division, Federal Bar Association. 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

In November 1997, the Chief, Trial and Appellate Government Counsel Division and three appellate counsel traveled to The Army Judge Advocate General's School to attend the Criminal Law New Developments Course. This course covered the latest military cases in all significant areas of criminal law. In addition to providing the newest counsel an update in the most recent criminal law developments, it was an opportunity for both appellate counsel and trial counsel to spend several hours together outside of the classroom to discuss ways to better serve the base legal offices.

Appellate government counsel helped develop and plan the first-ever Military Justice Administration Workshop (MJAW) designed to assist numbered Air Force and base legal offices in understanding the complexities and problems associated with administering a military justice program. In December 1997, two appellate government counsel taught at the first MJAW conducted at the Air Force Judge Advocate General's School at Maxwell AFB, Alabama. These same two appellate government counsel also provided instruction at the MJAW conducted at the HQ SPACECOM legal office in February 1998.

Appellate government counsel also prepared and provided an appellate update on United States Court of Appeals for the Armed Forces (USCAAF) and Air Force Court of Criminal Appeals (AFCCA) decisions and trends in case law for each of the trial counsel workshops in the five judicial circuits. Additionally, appellate government counsel provided instruction on a myriad of military justice topics at the Trial and Defense Advocacy Course, the Advanced Trial and Defense Advocacy Course, and the Staff Judge Advocate Course conducted at the Air Force Judge Advocate General's School.

The Trial and Appellate Government Counsel Division continues to manage the Advocacy Continuing Education (ACE) Program. The web page dedicated to the ACE Program is routinely updated with materials of assistance to trial counsel worldwide, including the Trial Counsel Deskbook annually prepared by appellate government counsel. Easy access to these materials supplements the briefing provided by appellate government counsel at the Trial and Defense Advocacy Course and the Advanced Trial and Defense Advocacy Course.

Appellate government counsel have contributed to "Project Outreach," sponsored by USCAAF and the AFCCA, by conducting oral arguments before audiences at the United States Air Force Academy and Air Force Judge Advocate General's School, educating personnel about the fairness and professionalism of the military justice system.

Currently there are seven reserve judge advocates assigned as appellate government counsel. They continue to provide superb support, greatly assisting the Trial and Appellate Government Counsel Division in carrying out its mission. In addition to preparing written briefs, three of the reserve counsel have 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>	<u>FY 98</u>
Briefs Filed	412	329	434	320
Cases Argued	33	27	22	10
USCAAF	<u>FY 95</u>	<u>FY 96</u>	<u>FY 97</u>	<u>FY 98</u>
Briefs Filed	71	80	85	48
Cases Argued	33	52	58	59
SUPREME COURT	<u>FY 95</u>	<u>FY 96</u>	<u>FY 97</u>	<u>FY 98</u>
Petition Waivers Filed	24	4	15	17
Briefs Filed	2	0	0	0

CIRCUIT TRIAL COUNSEL

The manning authorizations for the fiscal year included 18 Circuit Trial Counsel (CTC) at three circuit offices in CONUS, while four CTCs cover the Pacific and European theaters, two per theater. During fiscal year 1998, Circuit Trial Counsel had tried 268 general courts-martial or 56% of all general courts-martial. In addition, Circuit Trial Counsel had tried 44 special courts-martial and represented government interests in 10 officer discharge boards held Air Force wide. Several CTCs attended the Criminal Law New Developments Course at the Army Judge Advocate General's School in Charlottesville, Virginia. Workshops for base-level prosecutors were conducted by the CTCs in all five judicial circuits. Circuit Trial Counsel also utilize their talents by teaching as adjunct instructors at the Trial and Defense Advocacy Course and the Advanced Trial and Defense Advocacy Course.

APPELLATE DEFENSE COUNSEL DIVISION

The past year has again been an eventful one for the Air Force Appellate Defense Division. In response to a petition filed by the United States Solicitor General, the United States Supreme Court granted *certiorari* in the case of *Clinton v. Goldsmith*. This is the second consecutive year that division personnel have been involved in an Air Force case in which the Supreme Court granted *certiorari*. The division is currently preparing its Brief for the Respondent.

During this period, the case of *United States v. Simoy* was argued by division personnel, including a reserve attorney, and decided by the United States Court of Appeals for the Armed Forces. This case was the only Air Force death penalty case.

Issues concerning Articles 57(a) and 58b, UCMJ, were again major issues this year before both the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces.

Appellate counsel continued to support trial defense counsel in the field through active participation in Circuit Defense Counsel Workshops. Counsel provided briefings at the workshops to field trial defense practitioners on new developments in military criminal law. Appellate counsel also taught new Area Defense Counsel at Area Defense Counsel Orientation Courses.

The following figures reflect the division's workload over fiscal year 1998:

AFCCA

Cases Reviewed	603
Oral Arguments	10

USCAAF

Supplements to Petitions	424
Grant Briefs	40
Oral Arguments	59

Supreme Court

Petitions	17
Briefs in Opposition	1
Briefs on the Merits	0

TRIAL DEFENSE DIVISION

The Trial Defense Division is responsible for providing all defense services within the Air Force through Area Defense Counsel (ADC), Defense Paralegals (DP), Circuit Defense Counsel (CDC), and Chief Circuit Defense Counsel (CCDC). These personnel report directly to the Chief, Trial Defense Division (JAJD), who reports to the Director, United States Air Force Judiciary (JAJ).

The ADC office at Howard AFB, Panama, was closed this year due to impending closure of the installation, and a new defense office was opened at Hanscom AFB, Massachusetts. Both of these changes took place within the Eastern Circuit. The Division is manned with 81 ADCs stationed at 71 bases worldwide. They receive paralegal support from 72 DPs. The Division has 21 CDCs and 5 CCDCs. The CCDCs, along with all but four of the CDCs, are stationed at the circuit offices located at Bolling AFB, DC; Randolph AFB, TX; Travis AFB, CA; Ramstein AB, Germany; and Yokota AB, Japan. A single defense paralegal is assigned to each of the three CONUS circuits.

The continuing success of the Air Force's Area Defense Program is largely attributable to its independence and its energized personnel. Other than advising and representing clients, training remains the division's top priority. Aside from on-the-job training and mentoring that is provided by CCDCs and CDCs, newly appointed defense counsel receive formal training at the Area Defense Counsel Orientation and at various Circuit-sponsored workshops. DP training was broadened in 1998 with the introduction of Circuit DP Conferences. The Division also provided adjunct faculty members for the Trial and Defense Advocacy Course and the Advanced Trial Advocacy Course, held at the Air Force Judge Advocate General's School, Maxwell AFB, AL.

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). On 1 June 1998, the division chief became the chairman of the 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 120 formal opinions concerning such applications. They also received 374 inquiries in specific cases requiring either formal written replies or telephonic replies to senior officials, including the President and members of Congress. The Division took the lead in developing, planning, and teaching the first two Military Justice Administration Workshops. 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 77 records of trial for review under Article 69(a), UCMJ. On 30 December 1997, The Judge Advocate General referred one of those cases, *United States v. Rogers*, to the Air Force Court of Criminal Appeals for review pursuant to Article 69(d)(1), 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 1998, a total of 403 Air Force personnel were in post-trial confinement, a six-percent decrease from last fiscal year. Of those, 178 inmates were in long-term confinement at the United States Disciplinary Barracks (USDB), Fort Leavenworth, Kansas, and 66 are serving time in the Federal Bureau of Prisons (BOP) system. There were 12 inmates in the Return-to-Duty Rehabilitation (RTDR) Program, with two graduating and being returned to duty during this period. The number of Air Force inmates on parole at the end of fiscal year 1998 was 153, a 16 percent increase from last fiscal year.

AIR FORCE JUDGE ADVOCATE GENERAL'S SCHOOL

The Air Force Judge Advocate General's School (AFJAGS), is one of seven professional continuing 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*; 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:

- Accident Investigation Officers
- 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
Military Justice Administration (First time ever held in FY 98)
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, the AFJAGS conducted four "Surveys of the Law" 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 and civil law. During fiscal year 1998, over 600 reserve and Air National Guard judge advocates and paralegals attended the AFJAGS Survey of the Law. In addition, the AFJAGS conducted two "road shows" in EUCOM and PACOM to update Air Force, Army, and Navy personnel assigned overseas 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 was 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 Officers School; Basic Officers' Training Course; Commissioned Officers' Training Course; 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 1998.

Publications

The school published two 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 updated and redistributed substantial numbers of its most popular publication, *The Military Commander and the Law*, a 600+ page compendium of legal topics addressing the issues confronting today's Air Force commanders. *The Military Commander and the Law* is also available to military users on WebFLITE, where it is revised every six months.

LEGAL INFORMATION SERVICES

LEGAL INFORMATION SERVICES, also known as JAS, released version III of the Automated Military Justice Accounting and Management (AMJAMS III) software this summer. AMJAMS III moves this program onto a Microsoft Windows compatible format and incorporates the trial judiciary and appellate processing of a case. AMJAMS now tracks each AF military justice case from preferral through each case's final appellate action. The cooperation of the Appellate Government and Defense communities, the Trial Judiciary, and the Air Force Court will allow us to have one database to track all military justice actions from cradle to grave.

WebFLITE, our legal research database, stays involved in our military justice program. WebFLITE usership has increased ten-fold over the past five years, converting it to the Department's communications hub as well as a world class legal research asset. JAS hosts the public web sites for USCAAF and AFCCA. JAS plans to provide the same service to the Discharge Review Boards for all of the Services. Last year, Judge Cox, Chief Judge of USCAAF, asked the WebFLITE staff to work with him to create a system for the electronic filing of documents with the Court. The Air Force Court of Criminal Appeals agreed to participate and to be the test bed for the project. A test of the system, starting with enlargements of time, is scheduled to begin in fiscal year 1999.

The JAS Resources Division, working with an Air Force paralegal process action team, is examining the use of voice recognition software to transcribe records in Court-Martial cases. JAS has purchased two units from the Audioscribe Corporation, and they have been given to two experienced court reporters to test in the field. Initial results are very favorable. Both court reporters are happy with the units and legal offices are impressed with the time they can save normally devoted to transcribing a record of trial. Following the completion of the test program, the team will examine ways in which this new technology can be distributed and used in the field.

PERSONNEL

As of 30 September 1998, there were 1,328 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 15% lieutenant colonels.

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

Period: Fiscal Year 1998

PART 1 - BASIC COURTS-MARTIAL STATUS (Persons)

TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE(+)/ DECREASE (-) OVER LAST REPORT
GENERAL	442	411	31	-16.1%
BCD SPECIAL	304	288	16	-24.9%
NON-BCD SPECIAL [A]				
SUMMARY	76	73	3	+8.6%
OVERALL RATE OF INCREASE (+) / DECREASE (-) OVER LAST REPORT				-18.0%

PART 2 - DISCHARGE APPROVED

GENERAL COURTS-MARTIAL (CA LEVEL)		
NUMBER OF DISHONORABLE DISCHARGES		44
NUMBER OF BAD CONDUCT DISCHARGES		269
SPECIAL COURT-MARTIAL (CA LEVEL)		
NUMBER OF BAD CONDUCT DISCHARGES		53

PART 3 - RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG

FOR REVIEW UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL		359
FOR REVIEW UNDER ARTICLE 66 - BCD SPECIAL COURTS-MARTIAL		141
FOR EXAMINATION UNDER ARTICLE 69 - GENERAL COURTS-MARTIAL		74

PART 4 - WORK LOAD OF THE AIR FORCE COURT OF CRIMINAL APPEALS

TOTAL ON HAND BEGINNING OF PERIOD		368	
GENERAL COURTS-MARTIAL	271		
BCD SPECIAL COURTS-MARTIAL	97		
REFERRED FOR REVIEW		562	
GENERAL COURTS-MARTIAL	411		
BCD SPECIAL COURTS-MARTIAL	151		
TOTAL CASES REVIEWED		576	
GENERAL COURTS-MARTIAL	407		
BCD SPECIAL COURTS-MARTIAL	169		
TOTAL PENDING AT CLOSE OF PERIOD		354	
GENERAL COURTS-MARTIAL	275		
BCD SPECIAL COURTS-MARTIAL	79		
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD			-3.5%

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

NUMBER	561
PERCENTAGE	99.8%

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

PERCENTAGE OF AFCCA REVIEWED CASES FORWARDED TO USCAAF (457/576)	79.3%	
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD	-9.0%	
PERCENTAGE OF TOTAL PETITIONS GRANTED (74/457)	16.2%	
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD [B]	-30.7%	
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY AFCCA (74/576)	12.8%	
RATE OF INCREASE (+) / DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD (527:457)		-13.3%

PART 7 - APPLICATIONS FOR RELIEF, ARTICLE 69		
PENDING AT BEGINNING OF PERIOD		0
RECEIVED		6
DISPOSED OF		4
GRANTED	0	
DENIED	4	
NO JURISDICTION	0	
WITHDRAWN	0	
TOTAL PENDING AT END OF PERIOD		2
PART 8 - ORGANIZATION OF COURT		
TRIALS BY MILITARY JUDGE ALONE		
GENERAL COURTS-MARTIAL		246
SPECIAL COURTS-MARTIAL		164
TRIALS BY MILITARY JUDGE WITH MEMBERS		
GENERAL COURTS-MARTIAL		196
SPECIAL COURTS-MARTIAL		140
PART 9 - COMPLAINTS UNDER ARTICLE 138		
NUMBER OF COMPLAINTS	23	
PART 10 - STRENGTH		
AVERAGE ACTIVE DUTY STRENGTH	378,981	
PART 11 - NONJUDICIAL PUNISHMENT (ARTICLE 15)		
NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED		7984
RATE PER 1,000		21.07
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD		-5.9%
[A] The Air Force does not convene Non-BCD SPCMs. Of the 304 BCD SPCMs tried, there were 121 convictions with a BCD adjudged and 167 convictions without a BCD adjudged.		
[B] The percentage decrease is a result of the aberration caused by the FY 1997 petitions granted pertaining to <u>U.S. v. Gorski</u> , 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, 1997 to SEPTEMBER 30, 1998

The table below shows the number of court-martial records received and filed at Coast Guard Headquarters during FY-98 and the five preceding years.

<u>Fiscal Year</u>	<u>98</u>	<u>97</u>	<u>96</u>	<u>95</u>	<u>94</u>	<u>93</u>
General Courts-Martial	18	6	22	11	9	14
Special Courts-Martial	21	9	16	8	23	31
Summary Courts-Martial	8	10	14	14	15	11
Total	47	25	52	33	47	56

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

Nine of the 18 accused tried by general courts-martial this fiscal year were tried by military judge alone. Two of the 9 accused tried by military judge alone received a dishonorable discharge and 5 received a bad-conduct discharge. Four of the 9 accused tried by general courts-martial with members received sentences which included a punitive discharge. Nine accused elected to be tried by general courts-martial which included enlisted members and no accused elected to be tried by a court which included only officer members. All but one of the general courts-martial resulted in convictions. Five of the accused whose charges were referred to general courts-martial were nonrated (pay grades E-1 through E-3), 7 were petty officers (pay grades E-4 through E-6), 5 were chief petty officers (pay grades E-7 through E-9), and one was a junior officer (W2 through O-3).

The following is a breakdown of the sentences adjudged in general courts-martial tried by military judge alone (9 convictions):

<u>Sentence</u>	<u>Cases Imposed</u>
dishonorable discharge - - - - -	2
bad conduct discharge - - - - -	5
confinement - - - - -	9
reduction in rate - - - - -	8
fined (total \$20,000.00)- - - - -	1
forfeiture of all pay and allowances - - - - -	4

The following is a breakdown of sentences adjudged in general courts-martial tried by members (8 convictions).

Sentence	Cases Imposed
dishonorable discharge	1
bad-conduct discharge	3
confinement	3
reduction in rate	8
hard labor without confinement	5
restriction	5
forfeiture of all pay and allowances	1

The following indicates the frequency of imposition of the four most common punishments imposed by general courts-martial in the past five fiscal years.

FY	Number of Convictions	Forfeitures	Confinement	Reduction in Grade	Punitive Discharge/Dismissal
98	17	5 (29%)	12 (71%)	16 (94%)	11 (65%)
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%)

The following table shows the distribution of the 440 specifications referred to general courts-martial.

Violation of the UCMJ, Article	No. of Specs.
80 (attempts)	13
83 (fraudulent enlistment)	1
86 (absence without leave)	4
92 (failure to obey order or regulation)	34
93 (cruelty and maltreatment)	14
107 (false official statement)	7
108 (wrongful disposition of military property)	1
112a (wrongful use, possession, etc. of controlled substances)	6
120 (rape or carnal knowledge)	8
121 (larceny or wrongful appropriation)	82
123 (forgery)	4
123a (making, drawing or uttering check, draft, or order without sufficient funds)	136
125 (sodomy)	4
128 (assault)	11
129 (burglary)	4
134 (general)	111

GENERAL COURTS-MARTIAL SUMMARY

Fifty per cent of the accused tried by general courts-martial were tried by military judge alone. There was a 66% increase in general courts-martial records received and filed at Coast Guard Headquarters in this fiscal year over last fiscal year. Due to the relatively small

size of the Coast Guard this change is not statistically significant when viewed as a single-year change. Over the past five years the Coast Guard has averaged approximately 14 general courts-martial per year.

SPECIAL COURTS-MARTIAL

Nineteen of the 21 accused tried by special courts-martial this fiscal year were tried by military judge alone. Four bad-conduct discharges were adjudged, all by the military judge. Two accused elected to be tried by courts consisting of officer members. No accused elected to be tried by a court consisting of enlisted members. Three of the accused whose charges were referred to special courts-martial were nonrated (pay grades E-1 through E-3), 12 were petty officers (pay grades E-4 through E-6), 5 were chief petty officers (pay grades E-7 through E-9), and one was a junior officer (W2 through O-3).

The following is a breakdown of sentences adjudged in special courts-martial tried by military judge alone (19 convictions).

Sentence	Cases Imposed
bad-conduct discharge	4
confinement	7
reduction in rate	16
partial forfeiture of pay	8
restriction	7
confinement at hard labor	2
hard labor without confinement	12
fined (total \$6,000.00)	3

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

Sentence	Cases Imposed
reduction in rate	1
partial forfeiture of pay	1
restriction	1
hard labor without confinement	1
reprimand	1

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

FY	Number of Convictions	Forfeitures	Confinement	Reduction in Grade	BCD
98	20	9 (45%)	9 (45%)	17 (85%)	4 (20%)
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%)

The following table shows the distribution of the 184 specifications referred to special courts-martial.

Violation of the UCMJ, Article	No. of Specs.
81 (conspiracy) - - - - -	3
83 (fraudulent enlistment) - - - - -	2
85 (desertion) - - - - -	2
86 (unauthorized absence)- - - - -	3
87 (missing movement)- - - - -	1
90 (assaulting or willfully disobeying a superior commissioned officer) - - - - -	2
92 (failure to obey order or regulation) - - - - -	34
93 (cruelty and maltreatment)- - - - -	2
107 (false official statements) - - - - -	15
108 (sale, loss, damage, destruction, or wrongful disposition of military property of the U.S.)- - - - -	3
112a (wrongful use, possession, etc., of controlled substance) - - - - -	31
116 (riot or breach of the peace) - - - - -	1
117 (provoking speech or gestures)- - - - -	1
121 (larceny or wrongful appropriation) - - - - -	26
123 (forgery) - - - - -	3
123A (insufficient funds)- - - - -	14
128 (aggravated assault)- - - - -	1
129 (burglary)- - - - -	5
133 (conduct unbecoming an officer) - - - - -	3
134 (general) - - - - -	32

SPECIAL COURTS-MARTIAL SUMMARY

Ninety per cent of the accused tried by special courts-martial were tried by military judge alone. Five 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 75% increase in special courts-martial received and filed at Coast Guard Headquarters this fiscal year over last fiscal year. Due to the relatively small size of the Coast Guard this change is not statistically significant when viewed as a single-year change. Over the past five years the Coast Guard has averaged approximately 18 special courts-martial per 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 169 officers designated as law specialists (judge advocates) serving on active duty - 129 are serving in legal billets and 40 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 (6 to graduate in 1999, 2000, and 2001, respectively). Seventeen Coast Guard officers (5 postgraduates and 12 direct-commissioned 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. Approximately \$180,000.00 was spent on legal training during the fiscal year.

U. S. COAST GUARD COURT OF CRIMINAL APPEALS

Following the retirement of several senior law specialists, the number of judges on the Court dropped from five judges to four in January 1997 and has remained at that number with the following judges during fiscal year 1998:

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

For much of the past year, the Court has frequently operated with only three judges, since many cases on the docket stemmed from the period when Judge McClelland was Chief Trial Judge. Of necessity, she was precluded from participating in decisions where she had acted in some capacity as trial judge. One case of note in which Judge McClelland did participate was a petition for extraordinary relief in the nature of a writ of habeas corpus, *Frazier v. McGowan*, which was filed with the Court on 28 May 1998. The Court issued a show cause order on 29 May 1998, received briefs from the parties and heard oral argument five days later on 3 June 1998. That same day the Court issued an order releasing the petitioner from confinement and deferring confinement until resolution of the issue raised by the petition, whether the action of the convening authority changing a bad conduct discharge to twelve months confinement was lawful. That decision, which found the convening authority's action to be lawful, but continued deferment until the decision becomes final or is rescinded, was issued on 3 August 1998, after briefs from the parties and the National Institute Of Military Justice, as *amicus curiae*, were received and oral argument heard.

In addition to the decisional work of the Court, as reflected in Appendix A, the judges of the Court have been involved in various professional conferences, committees and seminars during the past fiscal year. In March 1998, the judges of the Court participated in the William S. Fulton Jr. Appellate Military Judges Conference at the Federal Judicial Center in Washington, D.C. It was the first year for this annual conference to be held under its new name honoring retired Colonel William S. Fulton Jr. who has played such an important role in enhancing the quality of military justice during his fifty four years of military and government service, which included service as Appellate Judge on the Army Court of Military Review and Clerk of that Court and the Army Court of Criminal Appeals. This year's conference

was hosted by the Army and featured two presentations in the morning, one on Extraordinary Writs by an instructor from the Army Judge Advocate General's School and the other on military case perspectives at the Supreme Court level by retired Major General William K. Suter, Clerk of the U.S. Supreme Court, and Mr. Michael Dreeben, U.S. Deputy Solicitor General. Afternoon panel presentations on Article 66, UCMJ, fact finding powers and opinion publication included Judges Weston and McClelland of this Court as panel participants.

In May 1998, the judges of the Court attended The Judicial Conference of the United States Court of Appeals for the Armed Forces at George Washington University in Washington, D.C. This two-day conference included presentations on a variety of topics including direct and cross-examination of experts, law of sexual harassment in the workplace, post-trial proceedings, trial and appellate advocacy, and new developments in cyberspace.

The 1998 Appellate Military Judges Training Seminar was held on two days in September 1998, at the Federal Judicial Center in Washington, D.C. and was attended by Chief Judge Baum, Judge Kantor, and Judge Weston. It was the sixth year for this training seminar, created and maintained expressly for military appellate court judges by Chief Judge Frank Nebeker of the Court of Veterans Appeals. It was hosted this year by the Army and covered presentations on subjects such as the art of appellate judging; appellate opinion writing; ethics for appellate judges; and stress, collegiality and the judicial decision making process. Chief Judge Baum chaired a panel of judges discussing the scope of court of criminal appeals review under Article 66, UCMJ.

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 a member of the Pentagon Chapter and as immediate past Chair of the association's Judiciary Division.

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.

JOHN E. SHKOR
Rear Admiral, USCG
Chief Counsel, U. S. Coast Guard

APPENDIX A

Period: 1 October 1997 - 30 September 1998

PART 1 - BASIC COURTS-MARTIAL STATISTICS (Persons)

TYPE COURT	TRIED	CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
GENERAL	18	17	1	+66%
BCD SPECIAL	21	20		+75%
NON-BCD SPECIAL	0	0	0	UNCHANGED
SUMMARY	8	8	0	-20%
OVERALL RATE OF INCREASE (+)/DECREASE (-) OVER LAST REPORT				+40%

PART 2 - DISCHARGES APPROVED

GENERAL COURTS-MARTIAL (CA LEVEL)			
NUMBER OF DISHONORABLE DISCHARGES		3	
NUMBER OF BAD CONDUCT DISCHARGES		8	
SPECIAL COURTS-MARTIAL (SA LEVEL)			
NUMBER OF BAD CONDUCT DISCHARGES		4	

PART 3 - RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG

FOR REVIEW UNDER ARTICLE 66 - GENERAL COURTS-MARTIAL	13	
FOR REVIEW UNDER ARTICLE 66 - BCD SPECIAL COURTS-MARTIAL	6	
FOR EXAMINATION UNDER ARTICLE 69 - GENERAL COURTS-MARTIAL	3	

PART 4 - WORKLOAD OF THE COAST GUARD COURT OF CRIMINAL APPEALS

TOTAL ON HAND BEGINNING OF PERIOD		14	
GENERAL COURTS-MARTIAL	7		
BCD SPECIAL COURTS-MARTIAL	7		
REFERRED FOR REVIEW		19*	
GENERAL COURTS-MARTIAL	13		
BCD SPECIAL COURTS-MARTIAL	6		
TOTAL CASES REVIEWED		11*	
GENERAL COURTS-MARTIAL	5		
BCD SPECIAL COURTS-MARTIAL	6		
TOTAL PENDING AT CLOSE OF PERIOD		23	
GENERAL COURTS-MARTIAL	15		
BCD SPECIAL COURTS-MARTIAL	8		
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD			58% increase in number referred. 56% decrease in number reviewed.

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

NUMBER	23	
PERCENTAGE	100%	

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

PERCENTAGE OF COMR REVIEWED CASES FORWARDED TO USCMA	4/11	36%	
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		+6%	
PERCENTAGE OF TOTAL PETITIONS GRANTED	0/4 **	0%	
PERCENTAGE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS REPORTING PERIOD		-62%	
PERCENTAGE OF PETITIONS GRANTED OF TOTAL CASES REVIEWED BY COMR	0/11	0%	
RATE OF INCREASE (+)/DECREASE (-) OVER THE NUMBER OF CASES REVIEWED DURING LAST REPORTING PERIOD			-50%

PAGE 1 OF 2

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.

* *Frazier v. McGowan*, originally addressed by the CGCCA as a Petition for Extraordinary Relief (habeas corpus) and remains pending reconsideration at CAAF on that issue. It has also been referred for review by the CGCCA under Art. 66, UCMJ.

** The 3 petitions granted in FY98 were for cases reviewed in FY97.

PART 7 - APPLICATIONS FOR RELIEF, ARTICLE 69

PENDING AT BEGINNING OF PERIOD		0	
RECEIVED		0	
DISPOSED OF		0	
GRANTED	0		
DENIED	0		
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		9	
SPECIAL COURTS-MARTIAL		19	
TRIALS BY MILITARY JUDGE WITH MEMBERS			
GENERAL COURTS-MARTIAL		9	
SPECIAL COURTS-MARTIAL		2	

PART 9 - COMPLAINTS UNDER ARTICLE 138

NUMBER OF COMPLAINTS	2	
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PART 10 - STRENGTH

AVERAGE ACTIVE DUTY STRENGTH	35,293	
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PART 11 - NONJUDICIAL PUNISHMENT (ARTICLE 15)

NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED	921	
RATE PER 1,000	26.10	
RATE OF INCREASE (+)/DECREASE (-) OVER PREVIOUS PERIOD	+8.9%	

