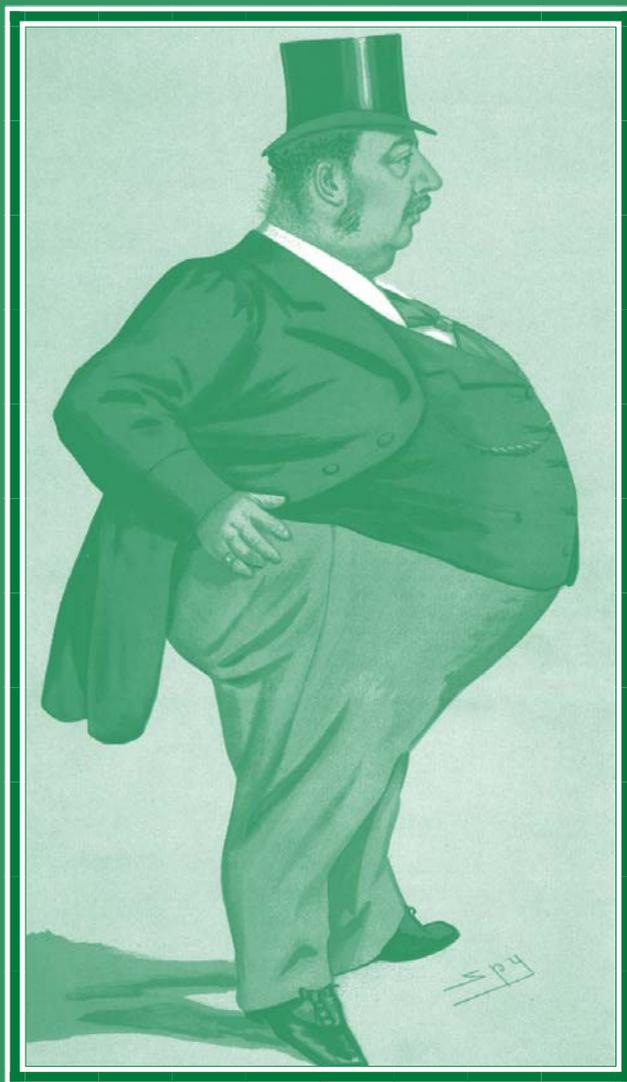


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The Reporter

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FROM THE EDITOR

In this issue of *The Reporter* we are fortunate to have the insight of Major Adam Oler, a military judge in Europe, on the do's and don'ts of crafting an effective and compelling sentencing argument. Major Andrew Turner and Master Sergeant William Johnson offer some key insight into the applicability of the Jencks Act in today's courtroom practice. Our usual offerings are further supplemented by Lieutenant Colonel Lisa Turner, who discusses the recent changes to the IG complaint process and its governing operating instruction. This issue of *The Reporter* also recognizes the 50th anniversary of the paralegal career field, first with leadership advice from two of our retiring chiefs, and secondly with a brief historical review of the career field's origins and how far it has come since 1 May 1955. Finally, we say farewell to the commandant of the JAG School, Colonel Michael D. Murphy, who is off to be the PACAF SJA. Aloha!

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Contributions from all readers are invited. Items are welcome on any area of the law, legal practice or procedure that would be of interest to members of The Air Force Judge Advocate General's Corps. Items or inquiries should be directed to The Air Force Judge Advocate General School, CPD/JAR (150 Chennault Circle, Maxwell AFB AL 36112-6418) (Comm (334) 953-2802/DSN 493-2802)

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The Commandant's Corner...

Colonel Michael D. Murphy

In an effort to be recognized as the repository for intellectual capital in the field of military law, the Air Force Judge Advocate General School has begun to undergo some dynamic changes. It started in February with a relook at our overall course schedule, focusing a critical eye at the courses currently being offered and determining whether or not changes were necessary. My faculty and staff closely examined each and every course offered and was asked to answer some very important questions. Is the material being taught still timely and relevant? Should certain courses be cut back or expanded? Due to evolving mission requirements, should some of our courses be offered on a less frequent basis? The results led to immediate changes in the FY05 schedule and you can expect a significant difference in the FY06 calendar. We believe these changes will enhance our ability to provide our judge advocates and paralegals with the knowledge and training they need to keep them on the forefront of military law.

In addition to focusing attention on our overall course schedule, I challenged my course directors to critically review individual schedules of courses and look at ways to improve those courses. No curriculum has received more consideration and attention than the Judge Advocate Staff Officer Course (JASOC). Our goal was not simply to make change for the sake of change, but rather to craft a curriculum that will prepare every new JAG to competently address the issues and challenges they will face during their first two years at the base legal office. To accomplish this we sought direct input from our MAJCOM SJAs, seeking their advice as to which topics they need us to teach based on the skills they expect from their new base office JAGs. As a result, core areas such as civil law and military justice have been enhanced, with significant emphasis being placed on critical topics including leadership and advocacy. Additionally, an important goal was to marry our approach to the new JASOC curriculum with the tenants of Air Force doctrine in the area of legal support to commanders. That legal support to commanders includes operational readiness, legal information mastery, authoritative counsel, compelling advocacy and litigation, fair military justice, and robust legal programs. Our goal is to ensure that we are training JAGs to provide the kind of services and support commanders expect.

In their first two years at the base legal office, JAGs will be called upon to provide Law of Armed Conflict (LOAC) training, claims assistance, preventive law and legal assistance, and military justice advice. They will be expected to review base support plans as well as provide reachback assistance for deployed forces. They will be tasked to provide analysis and evaluation of various circumstances, identify options, and assess risks, ultimately providing timely advice to commanders. But most importantly they will serve the commander and the airman by advocating the law. The new JASOC curriculum will incorporate Air Force doctrine in a way that will prepare them to become a JAG, will guide them when serving the airman, the commander, and the force, and will give them a foundation that can be built upon throughout their Air Force career.

And finally, with this issue we celebrate the 50th anniversary of the paralegal career field. Inside you will find leadership advice from two of our retiring chiefs, as well as some perspective on the history of the career field and the contributions its members have made to the Air Force and the JAG Corps.

Michael D. Murphy, Commandant

Mission-Focused Motivation: A Leadership Tool

Chief Master Sergeant Alan Wise

There are many definitions of leadership, and you've probably learned several during your career. My personal definition comes from a quote I found in an issue of Reader's Digest. I even posted it on my office door when I was the Law Office Manager at Nellis AFB. The quote reads, "Leadership is getting your people to do the mission because they want to do it." To make that happen, I've used the following five motivational building blocks -- along with my "secret weapon."

Ask for performance

First, conduct a thorough review of your troop's records to determine their skills and knowledge. Then prepare feedback outlining your expectations. Always ensure your feedback describes the job to be done, explains how to do it, and sets specific expectations in a way that the subordinate understands. Then, and only then, sit down with the person and conduct feedback.

Give personalized positive reinforcement

Don't take acceptable work for granted. Thank folks for what they do. Praise them each time you see improvement in their performance. Most importantly, remember that positive reinforcement doesn't have to be saved until a formal situation. It can be done anytime, anywhere.

Build relationships

Take time to get to know your people. Know what they want to do and what motivates them. People respond best when you respect and understand their individuality.

Model what you expect

When you lead by example, people follow. Approach your work with a sense of urgency, use your time efficiently, and meet your personal goals. By doing these things, you set a positive example and exhibit those behaviors you desire your subordinates to emulate. Others will follow your lead.

Refuse to accept poor performance

At times, we must tell people that their performance isn't meeting expectations. This can be the hardest building block to implement, but one of the most important. By not accepting substandard performance, you demonstrate that quality and performance matter.

The "secret weapon" that makes these work and leads to success: attitude. Having the right attitude, whether you are leading or following, sets the tone for success. Without the proper attitude, it is very hard to motivate your troops. The best expression I've seen about attitude was on the business card of CMSgt (Ret.) Dan Garza. It read, "Attitudes are contagious...is yours worth catching?"

So, what should you do when you find yourself thinking, "How can I motivate my folks to do something because they want to?" First, examine yourself and ensure your attitude is one worth catching. Then, try these five building blocks.

CMSgt Alan Wise recently retired after 30 years of service to the United States Air Force. His final position was as the Agency Paralegal Manager, AFLSA, Bolling AFB, DC. In that capacity he planned, managed, and directed the overall training, assignment, and development of all paralegals and civilian legal support personnel assigned to the Air Force Legal Services Agency/National Capital Region and its Detachments throughout the world. He first entered the Air Force in 1975 as a Administrative Specialist, 3353rd School Squadron, Chantute AFB, IL and subsequently held a variety of paralegal positions at a number of assignments both stateside and overseas. He and his wife Tammy are retiring to Las Vegas, Nevada. We wish them all the best and extend out thanks to Chief Wise for his 30 years of service!

Leadership is Continuous Training

Chief Master Sergeant Deborah Wilson

CMSgt Dillard-Bullock recently hosted a leadership and teamwork workshop. It was very worthwhile, as even the "old hands" learned how we could do better. The workshop reminded me that no matter what your rank or job title, improving leadership skills is a continuous process. In light of this, here are nine ideas that have served me well over the years, including some I continue to work on to this day.

1. Remain outwardly calm. Be patient and respectful of others at all times, even when stress is building. Remember, when the supervisor acts in a stressed or impatient manner, the attitude permeates the entire office.

2. Separate emotions from fact -- don't take "it" personally. Becoming defensive, especially when receiving "constructive" criticism, is usually a waste of energy. Be objective and fair even when counseling someone who has made you angry. Remain focused instead on solving the problem.

3. Do the right thing, even when it's tough. Ensure your supervisors know where you stand as appropriate, and take a stand when it's required. Don't get pushed into doing the wrong thing. And, of course, be loyal to your supervisor even when a decision is unpopular.

4. Fairness. Listen, and be compassionate, but fair, across the board. You can be empathetic to an individual's situation, but you need not change your decision.

5. Training. Make training a priority and be creative to get it done.

6. Set your folks up for success. Provide them appropriate "opportunities to excel," along with proper support and credit. Opportunities to learn leadership skills are all around us: at work, in professional organizations, at your church, and in your community. As junior Airmen gain confidence by succeeding at incrementally more difficult challenges, they often develop outstanding leadership skills quickly.

7. Publicly recognize others and celebrate their successes. Embrace the additional work involved to ensure a thriving recognition program. Never be threatened by your folks' successes. If they do well, that reflects well on you. But more importantly, it allows you to have made a difference to others.

8. Set the example for all. For enlisted, remember that most officers value your mentorship, and many will emulate the leadership examples you set. Make those examples good examples.

9. Study leadership. Read about different philosophies, solicit feedback from people you trust, observe and learn from leaders in action, and commit to being a leader.

Above all, keep it challenging, keep it fun, and don't forget about those at home who love you!

CMSgt Deborah K. Wilson recently retired after 24 years of service both in the United States Navy and the United States Air Force. Her last position was as Law Office Manager for Eighth Air Force, Barksdale AFB, LA. In that capacity she managed all paralegal and administrative support to a ten-attorney staff advising the three-star NAF commander on a wide range of military justice, operations law, and civil law matters. She began her military career as an Ocean Systems Technician with the U.S. Navy and went on to serve in a variety of capacities as an Air Force paralegal both stateside and overseas. Chief Wilson and her husband, Brian, are retiring in Benton, LA. Best wishes to the entire Wilson family!

Fine Lines and Sharp Points – The Nuances of Proper Sentencing Argument

Major Adam Oler

Although Air Force counsel often describe courts-martial as either “litigated” or “not litigated”, there is in military practice no such thing as an unlitigated trial. Unlike civilian trials, convictions always provide an opportunity for counsel – and frequently the more junior counsel involved – to present argument. Indeed, although some cases may involve countless witnesses and scores of exhibits, others may involve no testimony and only minimal evidence. The one constant in every military case resulting in a conviction is the sentencing argument. It is, therefore, a fundamental opportunity for litigators, especially new ones, to hone their advocacy skills. Yet despite the sentencing argument’s critical importance, there appears to be only limited overall guidance on the law governing this pivotal area.

What follows is an attempt to present an introduction to the legal “do’s and don’ts” of sentencing arguments. Hopefully it will provide SJAs anxious to train new judge advocates and junior counsel alike with some important background in this fundamental area of courts-martial practice.¹

Where to Begin?

The Manual for Court-Martial provides the best starting point for this analysis. Rule for Courts-Martial (R.C.M.) 1001(g) *Argument* states,

After introduction of matters relating to sentence under this rule, counsel for the prosecution and defense may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than that court-martial may adjudge. Trial counsel may, however, recommend a specific lawful sentence and

may also refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection.²

As presently written, R.C.M. 1001(g) codifies several developments stemming from appellate court decisions.³ However, its terms also leave much room for discussion and debate, and the analysis of those issues will be the continuing focus of this article.

Burden of Proof and Order of Argument

Unlike proof of charges during trial on the merits, there is no burden of proof on either party during sentencing proceedings, unless the sentence could include capital punishment.⁴ Therefore, although trial counsel can allude to the defense’s failure, for example, to show the impact of a punitive discharge,⁵ this is the first of many areas where caution is advised. The absence of a burden of proof for the government does not necessarily create one for the defense, and any suggestion the defense is obliged to produce evidence is almost certainly improper. For example, suggesting the members discount defense evidence of financial hardship because the accused “failed to prove” he lacked money could bring unfavorable appellate scrutiny.

On a related issue, either counsel may comment upon the opponent’s argument in an attempt to show why it is not persuasive.⁶ However, counsel should not comment on matters not introduced before the members or on facts in others cases.⁷ It would be equally improper for a trial counsel to comment about what she had seen opposing counsel do in other cases.⁸ Though counsel may presume a judge-alone forum relaxes this rule a little bit, both counsel “should always conduct themselves with the same high standards in arguing to a military judge as they would in arguing to a court constituted with members.”⁹

Closely related to the issue of burden is the question of who gets to argue and when. Rule for Court-Martial 1001(a)(1) states trial counsel’s sentencing argument will “ordinarily” precede defense coun-

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sel's,¹⁰ followed by rebuttal arguments in the discretion of the military judge.¹¹ Trial counsel should not ordinarily be allowed to choose whether to argue first or last and a military judge commits procedural error by leaving the trial counsel with the alternative.¹²

Furthermore, if trial counsel is offered rebuttal argument, the defense attorney must be offered surrebuttal.¹³ As a general rule, there is no right of government counsel to present rebuttal argument, and the trial judge's decision to permit it depends upon whether the trial counsel intends to "address only matters newly raised by the defense in its sentencing argument."¹⁴ The Navy-Marine Corps Court of Military Review has specifically held that before making his or her ruling, the military judge must first discern the prosecutor's true, legitimate interest in rebutting matters raised by the defense and resolve whether the substance of the defense counsel's argument justifies additional "explanation or counteraction," or whether the rebuttal argument would be merely a "modified recitation" of the Government's previous argument.¹⁵ Arguably, as far as the Navy-Marine Court is concerned, until the military judge has heard the defense counsel's sentencing argument, there is generally no means to determine whether a government rebuttal argument would be appropriate.¹⁶ There is some indication from the Air Force Court that this requirement is not quite so strict in Air Force practice, and that an Air Force military judge can, in his discretion, offer rebuttal so long as surrebuttal is offered to the defense.¹⁷

Arguing for a Specific Sentence

As R.C.M. 1001(g) makes clear, counsel may argue for a specific sentence. This includes arguing for a sentence which exceeds the limits of a Pretrial Agreement.¹⁸ Counsel may not, however, argue sentences from other cases since, as the Court of Military Appeals stated forty-five years ago, "sentences imposed on other persons involving different facts do not add to the seriousness of the crime committed, nor do they aid the court in fitting the punishment to the person on trial."¹⁹

In addition to the caveats imposed by R.C.M. 1001(g), there are ethical limits upon what sentences counsel may ask for. Counsel have obligations of candor towards the courts-martial before which they appear²⁰ and cannot interfere with the military judge's responsibility to determine in a meaningful way an appropriate sentence in a misleading manner.²¹ This is rarely an issue, but one counsel should nonetheless be wary of.

Finally, when recommending a specific sentence, it is improper for trial counsel to argue the convening authority has already considered mitigating and ex-

tenuating factors when he or she decided to refer the case to a special court-martial.²² In general, commenting that an accused could or should have been at a general court-martial (and has thus already received a lighter punishment) is never appropriate. Counsel should limit such comments to the authorized punishments of the venue in which they find themselves.

Punitive Discharges are Punishment, *not* Retention Decisions

Doubtless, one seemingly counterintuitive matter concerns arguments for punitive discharges. Though awarding as a "discharge," members are not supposed to consider the matter of retention in arriving at their decision. Even the accused was not allowed to raise the "collateral" matter of retention until a trio of C.A.A.F. opinions in 1998 changed the landscape.²³ Arguably, there is still confusion over what constitutes permissible comment in this area.²⁴ Nonetheless, certain general principles have emerged and must be adhered to. Chief among them is the need for prosecutors to focus on the issue of *punishment* as opposed to *retention*.²⁵ Trial counsel cannot attempt to "mislead the members" by painting a punitive discharge as a simple labeling of the accused's service and must not attempt to blur the distinction between a punitive discharge and an administration separation.²⁶ The focus must be on the former and it is error for trial counsel to suggest to the members that if they do not give the accused a punitive discharge he will be working for someone else in the Air Force.²⁷ Even if the accused is so close to his normal separation date he would receive an honorable discharge if no punitive discharge is adjudged, trial counsel cannot argue the point.²⁸ On the other hand, where an accused is "knocking on retirement's door," a trial counsel may properly argue that failure to adjudge a punitive discharge will result in member's retirement.²⁹

This particular area of the law is extremely nuanced. It is easy to blur the line when for example, a trial counsel comments that an accused's behavior makes him unsuitable for military service and that his commission should be taken away.³⁰ In such cases, the appellate courts will examine the trial counsel's argument as a whole and determine whether the prosecutor's focus is improperly on whether an accused should be retained as opposed to whether the seriousness of the offense warrants a punitive discharge.³¹

Arguing the Five Sentencing Principles

The often cited principles of sentencing discussed in R.C.M. 1001(g) are well-rooted in American jurisprudence. In *Williams v. New York*, Justice Black authored a unanimous opinion discussing the evolution

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of sentencing from mere retribution to its more enlightened purposes today.³² Written just before the promulgation of the UCMJ, *Williams* outlined four of our current sentencing principles, and implicitly included the fifth (specific deterrence).³³ Justice Black also noted these factors inherently require a “study of each case upon an individual basis,”³⁴ the very basis of the military’s sentencing system.

Of the five principles, the one requiring most careful treatment is general deterrence. The focus of considerable appellate discourse in the late 1970s and early 1980s, at one point the Court of Military Appeals created a rule resulting in “the discarding of the time-honored concept . . . of the factor of general deterrence.”³⁵ The court feared focus upon general deterrence defeated the purpose of individualized sentencing. Instead of predicating a sentence upon factors in aggravation, the court concluded consideration of general deterrence would result in sentences “not supported by testimony and which operate as a one-way street against the accused [because he] cannot possibly rebut [them] by any reasonable means.”³⁶

Although the court reinstated general deterrence as a proper factor for consideration in sentencing, it remains well-established law that general deterrence is a matter to be included within the maximum punishment, but is not a separate aggravating circumstance that justifies an increase in punishment beyond what would be a just sentence for the individual accused.³⁷ In argument, counsel should remember that “general deterrence is much criticized and cannot justify mechanistic imposition of stiff sentences,”³⁸ and its effects have to be considered along with the individual circumstances of each accused.³⁹ Put another way, an accused who is “being properly sentenced is not being made an example of for crimes committed by others.”⁴⁰

All of this means counsel are certainly permitted to discuss general deterrence in their arguments. However, they must be careful not to make general deterrence the central theme of their argument or suggest a heavy penalty should be imposed primarily to serve as a deterrent to others.⁴¹ Repeated suggestions to the members that they “send the right message” or draw on their own experiences and “send the right message just like everyone else has” invites trouble.⁴² When counsel violate this precept, military judges may well want to instruct the members that they cannot increase an otherwise appropriate sentence for purposes of general deterrence. At the same time, by focusing on the need to send a message to the accused (i.e., specific deterrence), trial counsel can likely achieve the same goal without crossing this important line.

Mendacity

Closely related to the sentencing principle of rehabilitation is the matter of mendacity. An accused’s mendacity may be considered in sentencing, subject to certain restrictions.⁴³ When sentencing is by members, the military judge must instruct the members that they may not consider trial counsel’s mendacity argument unless they conclude the accused did lie under oath and that such lies are, in the members’ mind, “willful and material.”⁴⁴ Of critical importance, a trial counsel may comment on an accused’s perjury as it impacts on repentance and amenability to rehabilitation, but he or she cannot exhort members to increase the punishment for the false testimony itself.⁴⁵

This, too, is an area involving a thin line. The Air Force Court of Military Review once strongly cautioned trial counsel “to choose their words carefully when making a ‘mendacious accused’ argument to insure that they do not slip over the line into a forbidden comment on an accused’s failure to admit guilt.”⁴⁶ The court held that using words such as “he cannot take responsibility for his actions” comes dangerously close to improper argument.⁴⁷ For trial counsel making a mendacity argument, the best approach is to couch it specifically in the context of the accused’s potential for rehabilitation. Defense counsel should be on the lookout for any implications beyond that.

Arguing the Accused’s Failure to Plead Guilty or Accept Responsibility as Opposed to his Failure to Express Remorse

Another area fairly described as “a thin line” concerns trial counsel’s ability to comment properly on the accused’s failure to express remorse. This area is particularly complicated because it can often tread upon an accused’s Constitutional rights. Though appellate courts will always look at the particular facts of each case,⁴⁸ some general guidelines in this area are discernable.

Certainly, if an accused testifies or makes an unsworn statement and either expresses no remorse “or his expression of remorse can be arguably construed as being shallow, artificial, or contrived, trial counsel may comment upon his lack of remorse.”⁴⁹ However, even with that precise foundation, the trial counsel can never comment on the accused’s right to remain silent.⁵⁰

Counsel must, therefore, be very careful not to confuse a failure to express remorse with a failure to admit guilt, something which has brought strong condemnation from the Court of Military Appeals. In its view, such comments “convey the intolerable unspoken message that it is proper to punish an accused who has put the prosecution to the test, not just for the crime itself, but also for inconveniencing the Govern-

ment. . . . An accused has a fundamental right to plead not guilty, a plea of not guilty is simply an exercise of an absolute Constitutional protection, and improper comment on this right is ‘intolerable.’”⁵¹

It would be similarly improper for a prosecutor to encourage members to punish an accused based on inconvenience of the court members or to somehow “validate” or reward the efforts of law enforcement officers through their sentence.⁵²

Defense counsel and military judges are well-advised to spot instances where counsel cross this line. It is, in fact, plain error to allow court members to deliberate on their sentence with an impression they can properly consider the fact an accused had not admitted guilt as evidence he was not rehabilitated.⁵³

The bottom line is that while counsel may comment on an absence of remorse, they must steer well clear of comments on the accused’s right to plead not guilty or make the government prove guilt.

Future Dangerousness

Trial counsel must also be careful to argue possible future dangerousness only where it can be based on reasonable inferences derived from the evidence.⁵⁴ For example, where an accused sexually abused his two stepdaughters, it was proper for the trial counsel to argue the accused represented a possible danger to his 2-year-old natural daughter.⁵⁵ However, the use of pejorative terms, such as calling an accused a “predator” in absence of evidence to support that characterization, is improper, especially when accompanied by rhetorical questions to the members concerning whether they could trust the accused patrolling their neighborhoods.⁵⁶

A future dangerousness argument is not necessarily rendered improper merely because possible victims are mentioned, but counsel should be careful not to interpose the members’ family into the class of people the accused could someday harm.⁵⁷ Such arguments could also violate the so-called “golden rule,” the next area of discussion.

Golden Rule/Inflammatory Argument

The foundation for the “golden rule” is the premise that trial counsel cannot “seek unduly to inflame the passions or prejudices of the court members.”⁵⁸ Although not every golden rule violation will result in a reversal, and courts will look at the facts of each case individually,⁵⁹ counsel should be very careful in this area. As a general premise, it is improper for the trial counsel to ask the members to picture themselves as the victim, or closely related to the victim, or put themselves in the shoes of the victim when they determine an appropriate sentence.⁶⁰

For example, trial counsel cannot suggest that members consider themselves as the helpless husband who witnesses the gang rape of his wife,⁶¹ and it is inappropriate for trial counsel to urge the court members to consider a victim as their child.⁶² It is equally improper for a prosecutor to argue that an accused is stealing from the court members when he shoplifts from the Base Exchange.⁶³ And although it is not necessarily plain error to do so, counsel should be wary before using terms such as “traitor” when describing an accused’s conduct.⁶⁴

On the other hand, it is entirely permissible for a prosecutor to ask the court to imagine the fear of the victim because such argument is analogous to asking the court members to consider victim impact evidence.⁶⁵

Trial practitioners need to know where this thin line rests because one changed word can be the difference between a proper argument and plain error. If the line is crossed, military judges have a duty to interrupt and give corrective instructions.⁶⁶

Commenting on Race and Religion

One area where there is appropriately no thin line concerns arguments referring to matters of race. Clearly, counsel must avoid invocation of race in argument, and absent a logical basis for the introduction of race as an issue, and strong evidentiary support for its introduction, any such comment rises to the level of plain error.⁶⁷ The intent of the trial counsel is not the issue; the sole question is whether the trial counsel’s comments might evoke racial animus.⁶⁸ The Army Court of Criminal Appeals has found in this area that “more than just harm to the individual is involved There is harm to the integrity of the criminal justice system. . . .we will not allow even a hint of this impression [of unequal justice] to be associated with a court-martial proceeding.”⁶⁹ More recently, C.A.A.F. noted that, while improper invocation of race in argument will be tested for prejudice (as opposed to applying the Army’s presumption of prejudice), “unwarranted references to race or ethnicity have no place in either the military or civilian forum.”⁷⁰

Though not necessarily constituting plain error, argument by either counsel appealing to “religious impulses or beliefs as an independent source of higher law calling for a particular result” are also improper.⁷¹ Therefore, counsel should normally steer clear of references to ecclesiastical notions of proper punishment or directly quoting from the bible. On the other hand, if an accused first introduces the matter of religion into a sentencing case, comment by trial counsel may, in that situation, become appropriate.⁷²

Arguing MOS/AFSC as an Aggravating Factor

LEAD ARTICLE

One area given significant attention by Air Force appellate courts concerns the degree to which, if ever, a trial counsel can comment upon an accused's Air Force Specialty Code as a matter in aggravation. Simply put, absent evidence that an accused's crimes in any way affected his duty, such argument is impermissible.⁷³ It is, for example, improper for a trial counsel to use an accused's position as a security forces member "as a sword in the absence of a discernible connection between the duty assignment and the offense."⁷⁴ On the other hand, if a security forces member uses his position as a cop to further his crime, trial counsel can fully argue abuse of position.

Similarly, it is improper for a prosecutor to argue that an airman-accused assigned to the base hospital damaged his community's trust in the hospital unless the offenses charged were facilitated by the accused's position in that hospital or he abused his status in committing them.⁷⁵

Here, too, however, there are lines that must be recognized. For example, notwithstanding the lack of a connection between the accused's security forces status and his offenses, when the accused places his security forces duty performance in issue in his unsworn statement, the trial counsel may fairly comment on that status.⁷⁶

In addition, the abuse of position involved apparently need only be reasonably inferred from the evidence. For example, where an SJA uses his position to convince a subordinate their improper relationship was appropriate, his SJA status becomes fair game.⁷⁷ Such is all the more so if the accused's integrity as the base's chief legal officer was compromised by his misconduct.⁷⁸

Distinct from the issue of an accused's AFSC is the matter of his or her rank. While commenting upon a member's job may be problematic, referring to his or her status as a noncommissioned officer is not. Because the NCO offender violates a "special trust," when that NCO violates the UCMJ, his "NCO status" is, arguably at least, always an appropriate aggravating factor for consideration by the sentencing authority.⁷⁹ For similar reasons, referring to an officer-accused's status would also be appropriate.

Commenting on the Findings Evidence

For nearly 50 years, it has been axiomatic that trial counsel "may strike hard blows, but they must be fair" during argument so long as these arguments are reasonably based on the evidence.⁸⁰ Clearly, "a criminal trial is not a tea dance, but an adversarial proceeding to arrive at the truth [and] both sides may forcefully urge their positions so long as they are supported by the evidence."⁸¹ Therefore, counsel may argue any

reasonable inferences derived from the evidence.⁸² Just because a trial counsel subjects evidence to closer scrutiny than an accused may prefer, his argument does not automatically become improper.⁸³

There are, of course, limits as to what can be argued. A trial counsel violates due process if he specifically asks members to not only consider an accused's bad acts, but also to sentence him for them.⁸⁴ It is also improper for a trial counsel to argue an accused "knowingly jeopardized the lives of countless air crews by permitting known drug users to work on those planes, to work on mission-critical systems, systems that if they failed, could cause a major aircraft accident" in the absence of evidence that the accused was under the influence of drugs while on duty.⁸⁵ Once again, whether such an argument is improper, however, must be decided on a case-by-case basis. For example, because LSD has flashback risks, it is proper to comment on accused's duty as an air traffic controller even when there is no evidence of on-duty drug use.⁸⁶

Though trial counsel may have a different take on a case's facts than those expressed by an accused during his unsworn statement, counsel must be wary when arguing contrary criminal theories. "While it is proper for the trial counsel to argue the accused's story is not credible," her comments should be limited to evidence in the record and to such fair inferences as may be drawn there from.⁸⁷

One area of recent development concerns arguing greater offenses when the accused has a PTA. The Army Court once held that, even where such an inference may be drawn from the evidence, a trial counsel cannot argue a greater offense when a pretrial agreement's purpose explicitly establishes an accused is solely guilty of the LIO.⁸⁸

Recently, however, the Court of Appeals for the Armed Forces clarified this point. A trial counsel may, in some circumstances, now argue the greater offense of rape after an accused pleads guilty to assault consummated by battery even when the plea was in accordance with a pretrial agreement. Citing R.C.M. 811(e), the court noted that "nothing prohibits a trial counsel from presenting evidence as to aggravating facts not expressly or implicitly covered by the stipulation."⁸⁹ Therefore, the court held that argument as to the occurrence of a rape not particularly addressed in the stipulation was not prohibited.

Certainly, the military judge must ensure the parties are arguing only those facts that are in evidence. Furthermore, it is plain error for a trial counsel to argue in sentencing "have you heard/did you know" questions as though they were facts in evidence and a military judge should, *sua sponte*, inform members of the error

if committed by the trial counsel.⁹⁰

Victim Impact in General

R.C.M. 1001(b)(4) (discussion) permits evidence in aggravation to show the social impact of a crime on “any . . . entity which was the victim of” that crime. Examples can include a victim’s family members or coworkers. There is one distinction that should be recognized however, and that relates to where the offense occurred. In an Article 134 case, it is not error for the trial counsel to suggest members “consider the impact on the civilian community and how it has harmed their view of the military.”⁹¹ As noted earlier, since such argument is analogous to asking the court members to consider victim impact evidence, it is proper for a trial counsel to ask the court to imagine the fear of the victim so long as TC does not ask the court to place themselves in the position of the victim.⁹²

The exception, however, appears to be impact upon foreign communities. Absent evidence that an accused’s crimes had an adverse impact on host country-American relations, it is improper for a trial counsel to argue host-country relations were harmed.⁹³

This limitation has apparently been in effect for quite some time, certainly since Vietnam.⁹⁴ This limitation on the consideration of host-country impact is limited, and does not apply, for example, to questions that may be asked by a military judge during a providence inquiry.⁹⁵ Furthermore, some relaxation of the principle may be afoot.⁹⁶ Nonetheless, counsel and military judges should be aware of the law in this area, especially those practitioners who are serving overseas.

Commenting on the Accused’s Unsworn Statement

Another area subject to close scrutiny concerns comments upon an accused’s unsworn statement. Merely urging the court members to consider an unsworn statement for what it is [that is, an unsworn statement] falls within the boundary of fair prosecutorial comment.⁹⁷ Such comment may not, however, constitute an invitation for the court members to draw an adverse inference against the accused. So, where a trial counsel’s comments in argument emphasize the fact that, by making an unsworn statement, the accused prevented “a full exploration” of his testimony, such remarks are improper and, upon objection by defense counsel, require cautionary instructions by the military judge.⁹⁸ Along those same lines, it is also error for trial counsel to argue the accused, by choosing to make an unsworn statement in mitigation, did not subject himself to questioning by the members and counsel.⁹⁹

Once again, this presents a thin line. One approach

would be for counsel who insist upon commenting on an unsworn statement to quote from the judge’s instructions and leave it at that. The better approach may be not to comment upon it at all. Either way, a military judge errs if he fails to instruct the court that no adverse inference can be drawn from the accused’s election to make an unsworn statement,¹⁰⁰ an instruction that should always be given and repeated *sua sponte* if a trial counsel crosses the line.

Commenting on Common Knowledge Matters – Who Really Knows What?

Standard 3-5.9 of the American Bar Association Standards for Criminal Justice states trial counsel may argue “matters of common public knowledge based on ordinary human experience.”¹⁰¹ Some matters are of such common knowledge that they may be addressed as fair comment in argument. For example, where veracity and integrity are at issue, comment upon the honesty displayed by Washington and Lincoln is appropriate, and where identification is at issue, the sometimes fallibility of eyewitness identification later belied by scientific evidence may be defense counsel’s best rationale.¹⁰² Counsel may also comment on contemporary history or matters of common knowledge within the community,¹⁰³ though certainly some limits do apply.¹⁰⁴

Where counsel sometimes cross the line, however, is when their comments on common knowledge also suggest the members consider matters of policy. As noted before, comments on policy have no place in a proper sentencing case.¹⁰⁵ Typically, appellate courts consider cases individually, but some helpful guidelines can be inferred from appellate decisions.

One such area concerns the phrase “war on drugs.” The “war on drugs” itself is clearly a matter of common knowledge,¹⁰⁶ as are the serious, “menacing problems to any society associated with drug trafficking.”¹⁰⁷ Therefore, comments by trial counsel referring to an accused’s lengthy service “in an Air Force where everybody knows that drugs aren’t tolerated,” merely state an obvious fact.¹⁰⁸ It is also well understood that the U.S. government is actively engaged in trying to keep illegal drugs from being smuggled into the United States, and that the armed forces play a part in that coordinated effort.¹⁰⁹ A trial counsel may even properly argue drug trafficking is an enemy of the United States.¹¹⁰

General references to the “war on drugs” and the military’s intolerance for drug abuse are permissible because referring to military and national “intolerance” to drug abuse does not suggest that any particular sentence must be adjudged.¹¹¹ That is, at least in the cases cited thus far, the counsel involved did not base their

arguments on an enforcement of policy basis. By comparison, reading or inviting the court members' attention to a policy directive issued by the Secretary of the Navy concerning drug abuse is a form of command influence and amounts to "general prejudice,"¹¹² because reference to departmental or command policies can create the appearance of unlawful command influence.¹¹³

In similar vain, repeated references to the "war on drugs" can cross over from proper comments on common knowledge to implicit suggestions of policy, even if the term "zero tolerance" is not used.¹¹⁴ Doubtless, any reference to policy matters is an area where counsel are well advised to "tread lightly."¹¹⁵

For similar reasons, referring in any capacity to a Convening Authority by name or otherwise bringing the Convening Authority into a sentencing argument is improper¹¹⁶ as is any reference to command policies "in a manner which in effect brings the commander into the deliberation room."¹¹⁷ For example, speaking in euphemisms and attempting to bring into the deliberation room the Navy's anti-drug policy as a factor for the members to consider is plain error.¹¹⁸

Certainly, not all references to policy during a sentencing argument are improper. Comment on policy can be proper to show an accused was aware of the Navy's policy on sexual harassment; that the accused knew better, but only so long as the trial counsel is careful not in any way to suggest the policy requires a certain result or sentence.¹¹⁹

Another example of the thin line between proper and improper use of what could be labeled as "policy matters" concerns comment upon core values. Again counsel should tread very carefully in this area, but at least two service courts have discerned there is nothing inherently prohibited about making reference to core values themselves. Per the Air Force Court, because there is "nothing in the Air Force Core Values, 'relative to punishment,' that incorporates a departmental policy mandating a discharge or any other result," mere reference to them does not constitute plain error.¹²⁰ Similarly, the Navy's core values (honor, courage, and commitment) do not constitute guidance from higher authority related to punishment but are, instead, "aspirational concepts which all Navy personnel are expected to know and follow."¹²¹

In evaluating a trial counsel's reference to core values, the test is not whether the core values are mentioned, but whether some sort of mandated or required punishment implicitly flows there from. Military judges in particular must be highly attentive in this area because, when a trial counsel does cross the line and makes references to command policy, the judge risks reversal if he fails to give a *sua sponte* curative

instruction to the members.

Some Important Guidelines for Defense Counsel

Though much of this article focuses on guidelines largely impacting trial counsel, certain boundaries must be recognized by the defense practitioner. One often-reviewed area concerns comment by the defense counsel either explicitly or implicitly suggesting the accused desires a punitive discharge. Before engaging in such argument, the defense counsel not only has a burden to first get his client's permission, he also must tell the military judge of his intended position.¹²² If the record is silent regarding an accused's desires, defense counsel may not concede that a punitive discharge is appropriate.¹²³ Appellate courts will set aside the sentence if there is some evidence in the record which fairly indicates that the accused desires to be retained in the service despite his conviction, and defense counsel argues or implies that a punitive discharge is an appropriate punishment.¹²⁴ Where defense counsel asks for a punitive discharge contrary to the client's desires, there is ineffective assistance of counsel.¹²⁵ Though instances arise where courts have not found error in like situations,¹²⁶ doubtless the best practice is to inform the military judge in advance whenever a defense counsel plans to argue for a punitive discharge, either directly or by implication.

Furthermore, counsel must exhibit care whenever a punitive discharge or lengthy confinement are conceded. Last year, a divided C.A.A.F. addressed the issue of whether such concessions rise to the level of ineffective assistance of counsel.¹²⁷ In her concurring opinion, Judge Crawford stressed the need for appellate courts to give appropriate deference to tactical decisions lest the courts "encourage counsel to be timid in employing pro forma sentencing arguments simply to avoid ineffectiveness claims."¹²⁸ Perhaps the best approach for military judges would be to ask defense counsel whether concessions of a punitive discharge or lengthy confinement are being made for legitimate tactical purposes.

It is never permissible for defense counsel to impeach the members' findings during their argument.¹²⁹ Although the members may reconsider findings at any time prior to the announcement of sentence,¹³⁰ the defense counsel may not argue for reconsideration during the sentencing phase of the court-martial and, in effect, relitigate the findings.¹³¹ During the sentencing phase of the trial an accused is permitted only to introduce matters in extenuation and mitigation and is not permitted to challenge or relitigate the prior findings of the court.¹³² Defense counsel should accordingly restrict themselves in argument to those matters that explain the offense and its circumstances.¹³³

Finally, but perhaps most importantly, defense counsel should carefully listen to each aspect of the trial counsel's argument and must be prepared to object at all appropriate times. On appeal, the legal test for improper argument is whether the argument was erroneous and failure to object to improper sentencing argument constitutes waiver of any error in the absence of plain error, a much higher standard for an accused to overcome.¹³⁴

The area of sentencing argument is particularly nuanced and requires substantial attention by trial litigators. The line between a proper "fair blow" and an improper comment is often quite fine. Nonetheless, certain guidelines – some clearer than others – have developed and are well worth heeding. Like every other aspect of court-martial litigation, however, the best way to learn the "do's and don'ts" is through trial experience. There is no substitute.

¹From the outset I wish to emphasize that much of the information in this article is based upon the collective past work of the Air Force Trial Judiciary, and in particular its most junior members. By tradition, each year the most junior Air Force trial judge is responsible for producing a sentencing argument outline for interservice-judicial use. Most recently updated by Lt Col Sharon Shafer in 2003, and by numerous nascent judges before her, that outline served as an invaluable starting point for this project.

²Manual For Courts-Martial, United States (2002 Ed.).

³See, e.g., *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983).

⁴*United States v. McGee*, 30 M.J. 1086, 1087 (N.M.C.M.R. 1989).

⁵*United States v. Green*, ACM 32301, p.5 (N-M. Ct. Crim. App. Jul. 21, 1997) (unpub. op.).

⁶*United States v. Johnson*, ACM 34889, p. 14 (A.F. Ct. Crim. App. May 21, 1996) (unpub. op.), citing *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983).

⁷*Id.*

⁸*Id.*

⁹*United States v. Barnack*, 10 M.J. 799, at 800 (A.C.M.R. 1993). The court held the arguments so unacceptable that, "in the interests of justice, and the appearance of justice," it reassessed the sentence. *Id.*

¹⁰Rule for Court-Martial 1001(a)(1)(D) and (E).

¹¹Rule for Court-Martial 1001(a)(1)(F).

¹²*United States v. Martin*, 39 M.J. 481, 482 (C.M.A. 1994).

¹³*Id.*

¹⁴*United States v. McGee*, 30 M.J. 1086, at 1087 (N.M.C.M.R. 1989).

¹⁵*Id.*

¹⁶*Id.* See also, *Martin*, *supra* note 13, at 1087-88.

¹⁷See *United States v. Mantilla*, ACM 31778, p. 10 (A.F. Ct. Crim. App. Sep. 12, 1996) (unpub. op.), (holding that a military judge did not abuse his discretion in allowing TC rebuttal argument. Defense counsel did not object and did not request surrebuttal even though the military judge previously stated he would consider granting such a request. Whether defense counsel should ever waive surrebuttal in a members trial is a question of advocacy, though one imagines such instances are rare).

¹⁸*United States v. Rich*, 12 M.J. 661, 663 (A.C.M.R. 1991). Clearly, the defense counsel is allowed to argue for a lower sentence. See *United States v. Wood*, 48 C.M.R. 528, 533 (C.M.A. 1974), as cited in *Rich*, *Id.*

¹⁹*United States v. King*, 30 C.M.R. 71, at 74 (C.M.A. 1960).

²⁰See, e.g. Rule 3.3, Rules of Professional Conduct, Judge Advocate

General Instruction 5803.1 series.

²¹*United States v. Cassidy*, 36 M.J. 759, 764 (N.M.C.M.R. 1992). *Cassidy* also provides valuable guidance concerning the hazards of unorthodox pretrial agreements.

²²*United States v. Luby*, 14 M.J. 619, 621 (A.F.C.M.R. 1982). In *Luby*, the military judge's curative instruction likely prevented a new sentencing hearing. The instruction is not quoted in the opinion, however.

²³*United States v. Grill*, 48 M.J. 131 (C.A.A.F. 1998), *United States v. Jeffery*, 48 M.J. 229 (C.A.A.F. 1998), *United States v. Britt*, 48 M.J. 233 (C.A.A.F. 1998).

²⁴See, e.g. *United States v. Sowell*, 59 M.J. 954 (N-M. Ct. Crim. App. 2004), cert. granted, 60 M.J. 394 (C.A.A.F. Nov 16, 2004).

²⁵See, e.g. *United States v. Ohrt*, 28 M.J. 310, 306 (C.M.A. 1989).

See also, *United States v. Brown*, (A.F. Ct. Crim. App. Oct. 2, 2001) (unpub. op.).

²⁶*Id.* at 306.

²⁷*United States v. Motsinger*, 34 M.J. 255, 256-7 (C.M.A. 1992).

²⁸*United States v. Stoll*, ACM 29806, p. 2-3 (A.F.C.M.R. Nov. 4, 1993) (unpub. op.).

²⁹*United States v. Stargell*, 49 M.J. 92, 93 (C.A.A.F. 1998). In *Stargell*, the accused had 19.5 years of service. Judge Effron and Judge Sullivan both dissented and offered a strong analysis why this argument may well have been improper.

³⁰See *United States v. Hubble*, p.6 (A.F. Ct. Crim. App. Feb. 28, 2005) (holding trial counsel errs "by arguing in favor of a bad-conduct discharge on the ground that the accused "cannot fulfill the military standards.").

³¹See, e.g., *United States v. Sanchez*, 50 M.J. 506, 512 (A.F. Ct. Crim. App. 1999). See also *United States v. Britt*, *supra* note 24 (holding a prosecutor may argue during sentencing that a punitive discharge is a way to characterize an accused's service or enlistment, but emphasizing that the focus must be on punishment.).

³²337 U.S. 241 (1949)

³³*Id.* at 248 n.13.

³⁴*Id.*

³⁵*United States v. Varacalle*, 4 M.J. 181 at 182 (C.M.A. 1978), citing *United States v. Mosely*, 1 M.J. 350 (C.M.A. 1976).

³⁶*Mosely, Id.*, at 352.

³⁷*Id.*

³⁸*United States v. Lania*, 9 M.J. 100 at 103 (C.M.A. 1980).

³⁹*Id.* at 104.

⁴⁰*Varacalle, supra* note 36, at 182.

⁴¹*United States v. Ludlow*, 5 M.J. 411 (C.M.A. 1978).

⁴²*United States v. Hogg*, NMCM 97 00493, p.11 (N-M. Ct. Crim. App. Jun. 5 1998) (unpub. op.). The court included the following strong caution in its opinion: "Although we do not set aside the sentence in this case, we would caution all attorneys involved in the trial process that our patience, and, no doubt, that of our superior court, is not unlimited. Trial counsel should no more seek to circumvent the rules against improper argument through euphemisms than to elicit improper testimony before the court. At the same time, defense counsel must be alert to improper argument, make timely objection, and request appropriate curative instructions. If counsel in this case had registered a timely objection and the military judge had failed to provide relief, we would have no trouble sending this case back for a new sentencing hearing. In that case we are also confident that the appellate defense counsel would have identified the issue."

⁴³*Id.*

⁴⁴*United States v. Jenkins*, 54 M.J. 12, 19-21 (C.A.A.F. 2000).

⁴⁵*Id.*

⁴⁶*United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992). In the earlier decision of *United States v. Warren*, 13 M.J. 278 (C.M.A. 1982), which *Edwards* relied upon heavily, the court similarly held a military judge or court members may consider an accused's lack of truthfulness in his own defense as a factor relating to his prospects for rehabilitation. It therefore permitted the trial counsel to argue for its consideration by the judge or members. Both *Warren* and

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- Grayson* are largely premised on *United States v. Grayson*, 438 U.S. 41 (1978). On the limits of mendacity in sentencing, see also, *United States v. Standifer*, 31 M.J. 742 (A.F.C.M.R. 1990).
- ⁴⁶*United States v. Marsh*, 35 M.J. 505 at 510, n4 (A.F.C.M.R. 1992).
- ⁴⁷*Id.*
- ⁴⁸See, e.g., *United States v. Garren*, 53 M.J. 142 at 144 (C.A.A.F. 2000) (holding the trial counsel's argument that accused did not accept responsibility was "wholly fair and accurate under the circumstances of this case and did not constitute improper comment on accused's right to plead not guilty." CAAF held, "The evidence in this case was overwhelming. The issue centered around the [accused's] statements to investigators as to whether he was merely joking or really instigating the theft of the motorcycle. There is adequate reason on the record to reject accused's 'joking' explanation." *Id.* It is very unclear, however, whether the decision would have been the same had the defense counsel preserved the issue).
- ⁴⁹*Edwards*, supra note 46, at 355.
- ⁵⁰*United States v. Toro*, 37 M.J. 313, 318 (C.M.A. 1993).
- ⁵¹*United States v. Johnson*, 1 M.J. 213 at 215 (C.M.A. 1975).
- ⁵²*United States v. Abilar*, ACM 34380, p. 10 (A.F. Ct. Crim. App. Oct 31, 2001) (unpub. op.) (holding "[i]t is improper to ask court members to fashion a sentence in order to improve the self-worth of law enforcement personnel.").
- ⁵³*United States v. Jones*, 30 M.J. 898, 901 (A.F.C.M.R. 1990).
- ⁵⁴See, e.g., *United States v. Robinson*, 43 M.J. 501, 506-7 (A.F. Ct. Crim. App. 1995).
- ⁵⁵*Id.*
- ⁵⁶*United States v. Myers*, NMCM 200201623, p. 6-7 (N-M. Ct. Crim. App. Feb. 10, 2005) (unpub. op.).
- ⁵⁷See, e.g., *United States v. Williams*, 23 M.J. 776, 778 (A.C.M.R. 1987).
- ⁵⁸*United States v. Clifton*, 15 M.J. 26 at 30 (C.M.A. 1983).
- ⁵⁹See, e.g., *United States v. Baer*, 53 M.J. 235 (C.A.A.F. 2000), a case in which the court affirmed the conviction and sentence in a murder case even though the trial counsel arguably made a Golden Rule argument by urging the members to imagine they were the victim in the case. While noting that the Golden Rule argument is generally prohibited, the court examined the argument "in the context of the entire court-martial" and found no error. The court made this finding even though a timely objection had been made.
- ⁶⁰*United States v. Meeks*, 41 M.J. 150, 158 (C.M.A. 1994).
- ⁶¹*United States v. Shamberger*, 1 M.J. 377, 379 (C.M.A. 1976).
- ⁶²*United States v. Wood*, 40 C.M.R. 3 (C.M.A. 1969). Both *Wood* and *Shamberger*, supra note 61, are highly instructive in this area and frequently serve as starting points for appellate court analyses of these matters.
- ⁶³*United States v. Ortega*, ACM 30776, p. 2 (A.F. Ct. Crim. App. Mar. 17, 1995) (unpub. op.).
- ⁶⁴*United States v. Barrazamartinez*, 58 M.J. 173 (C.A.A.F. 2003). The term "traitor" arguably carries with it a sense of betrayal by the accused to the very members who are due to sentence him. See Judge Baker's dissent for a convincing explanation as to why.
- ⁶⁵*United States v. Edmonds*, 36 M.J. 791 (A.C.M.R. 1993) *Edmonds* is particularly helpful in distinguishing proper argument from those arguments condemned in *Wood* and *Shamberger*. See *Edmonds* at 793.
- ⁶⁶See *United States v. Williams*, 23 M.J. 525 (A.C.M.R. 1986) (holding that judges must interrupt *sua sponte* whenever there is a fair risk that an accused's substantive due process rights are impacted, such as when a trial counsel incites the passion of the members by inviting them to place their daughters as accused's next victim. For an example where the Air Force Court of Criminal Appeals cited a military judge's timely *sua sponte* instructions as curing any potential error during trial counsel's closing argument. See *United States v. Hensley*, ACM 34000, (A.F. Ct. Crim. App. Jun 21, 2001) (unpub. op.).
- ⁶⁷*United States v. Lawrence*, 47 M.J. 572, 575 (N.M. Ct. Crim. App. 1997).
- ⁶⁸*Id.* at 574.
- ⁶⁹*United States v. Thompson*, 37 M.J. 1023 at 1028 (A.C.M.R. 1993).
- ⁷⁰*United States v. Rodriguez*, 60 M.J. 87, 89-90 (C.A.A.F. 2004).
- ⁷¹*United States v. Kirk*, 41 M.J. 529 at 533 (C.G.Ct. Crim. App. 1994).
- ⁷²*United States v. Rodriguez*, NMCCA 200200740 (N-M. Ct. Crim. App. Nov. 26, 2003) (unpub. op.). Where accused had first introduced matter of religion into sentencing case, it was not improper for TC to argue, "Render unto Cesar [sic] what is Cesar's [sic] and unto God what is God's."
- ⁷³*United States v. Gruninger*, 30 M.J. 1142 (A.F.C.M.R. 1990). In a strongly worded admonishment to trial practitioners of the time, the Air Force Court noted, "Of late, we have reviewed several arguments in which trial counsel seeks to secure an appropriate sentence by showing the appellant menaced the Air Force because of his or her duty. An argument of this sort might seem logically available to prosecutors in every situation. Such an approach ignores a line of respectable precedent from this Court cautioning that -- absent evidence an accused's crimes in any way affected his duty -- such argument is impermissible. (Citations omitted)." *Id.* The Air Force Court went on to stress its establishment of "viable precedents that are not simply institutional nostalgia" and specifically "urge trial practitioners to be cautious in this area." *Id.*
- ⁷⁴*United States v. Chrystal*, ACM 33361, p.5 (A.F. Ct. Crim. App., 2000), citing *United States v. Collins*, 3 M.J. 518 (A.F.C.M.R. 1977) *aff'd*, 6 M.J. 256 (C.M.A. 1979). Multiple Air Force Court opinions in this area rely upon Judge Orser's analysis in *Collins*.
- ⁷⁵*United States v. Goodson*, 7 M.J. 888, 891 (A.F.C.M.R. 1990).
- ⁷⁶*United States v. Diamond*, ACM 3360, p. 4 (A.F. Ct. Crim. App. Aug. 12, 1999) (unpub. op.), *pet. denied*, 53 M.J. 13 (1999).
- ⁷⁷*United States v. Alis*, 47 M.J. 817, 826 (A.F. Ct. Crim. App. 1998).
- ⁷⁸*Id.* In holding the trial counsel's argument proper, the Air Force Court noted, "Confidence waned; rumors reached commanders on and off base who began to question the competency of the legal office and the integrity of the officer in charge."
- ⁷⁹*United States v. Everett*, 33 M.J. 534 at 535 (A.F.C.M.R. 1979).
- ⁸⁰*United States v. Doctor*, 21 C.M.R. 252 at 259 (C.M.A. 1956). The court's holding in *Doctor* is cited with great frequency in military practice, often as the starting point for supporting a questionable argument. *Doctor* itself relies on the Supreme Court's decision in *Berger v. United States*, 295 U.S. 78 (1935).
- ⁸¹See *United States v. Rodriguez*, 28 M.J. 1016, 1023 (A.F.C.M.R. 1989) *quoted in*, *United States v. Gillery*, 56 M.J. 113 (C.A.A.F. 2001).
- ⁸²See, e.g., *United States v. Conway*, 40 M.J. 859, 863 (A.F.C.M.R. 1994), *relying upon*, *Rodriquez*, supra note 73, *Doctor*, supra note 81 and *Edwards*, supra note 46.
- ⁸³*Conway*, supra note 33, at 863.
- ⁸⁴*United States v. Weisbeck*, 48 M.J. 570, 575-6 (A.C.C.A. 1998) (*rev'd on other grounds*, 50 M.J. 461 (C.A.A.F. 2000)).
- ⁸⁵*United States v. Hansen*, ACM 31908, p.2 (A.F. Ct. Crim. App. Oct. 1, 1996) (unpub. op.).
- ⁸⁶*United States v. Adams*, ACM 28314, p.2 (A.F.C.M.R. Apr. 23, 1990) (unpub. op.).
- ⁸⁷*United States v. Rutherford*, 29 M.J. 1030 at 1031 (A.C.M.R. 1990).
- ⁸⁸*Id.*
- ⁸⁹*United States v. Terlep*, 57 M.J. 344 at 348 (C.A.A.F. 2002).
- ⁹⁰*United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993).
- ⁹¹*United States v. Siebe*, ACM S29160, p.2-3 (A.F. Ct. Crim. App. Oct 31, 1996).
- ⁹²*Edmonds*, supra note 56, at 793.
- ⁹³*United States v. Childress*, 33 M.J. 602, 606 (A.C.C.A. 1991).
- ⁹⁴See, e.g., *United States v. Boberg*, 38 C.M.R. 199, 203-04 (C.M.A. 1968), holding the trial counsel's appeal to the members to consider the impact of the accused's crimes on relations between United States military personnel and the Vietnamese community was im-

proper. See also, *United States v. Cook*, 28 C.M.R. 323 (1959); *United States v. Mamaluy*, 27 C.M.R. 176, 181 (1959), and *United States v. Spence*, 3 M.J. 831 (A.F.C.M.R. 1977). Apparently, appellate courts have felt such arguments impossible to defend against and too prejudicial to be relevant. Of course, if there is evidence to support trial counsel's contention of host-country impact, argument may be permissible. For example, host-country impact may be relevant in an Article 134 offense in order to prove the service-discrediting element. See e.g., *United States v. Joyner*, 39 M.J. 965, 967 (A.F.C.M.R.).

⁹⁵*Id.* at 967 (A.F.C.M.R. 1994).

⁹⁶*United States v. Sherman*, 32 M.J. 449 (C.M.A. 1991) suggests such argument may now be allowed in some circumstances. See *Joyner*, *supra* note 95, at 967.

⁹⁷*United States v. Breese*, 11 M.J. 17, 24 (C.M.A. 1981).

⁹⁸*United States v. Lewis*, 7 M.J. 958 at 961 (A.F.C.M.R. 1979).

⁹⁹*United States v. Murphy*, 8 M.J. 611, 612 (A.F.C.M.R. 1979).

Murphy is distinguishable from *Lewis*, *supra* note 99, because the defense counsel in *Murphy* sought to equate an unsworn with sworn testimony. Nonetheless, the Air Force Court found error and reassessed the sentence.

¹⁰⁰*Id.*

¹⁰¹See, *The Prosecution Function at 3.91* (2d ed, 1986) as cited in *Meeks*, *supra* note 51, at 158.

¹⁰²*United States v. Turbeville*, NMCM 200000889, p.6-7 (N-M. Ct. Crim. App. Nov. 21, 2001) (unpub. op.).

¹⁰³*United States v. Kropf*, 39 M.J. 107, 108 (C.M.A. 1994).

¹⁰⁴*United States v. Fletcher*, ACM 34945, (A.F. Ct. Crim. App., Feb. 27, 2004) (unpub. op.), *pet for review granted*, 60 M.J. 326 (C.A.A.F. 2004), (holding trial counsel's references to prominent individuals who used drugs as a way to counter the servicemember's character evidence constituted arguing facts not in evidence, but the comments were harmless given the strength of the case against the servicemember).

¹⁰⁵Rule For Courts-Martial 1001(g), Manual For Courts-Martial, United States (2002 Ed.) states, "A trial counsel may not, in a sentencing argument, purport to speak for the convening authority or any higher authority, or refer to the views of such authorities."

¹⁰⁶*Barrazamartinez*, *supra* note 65, at 174-7.

¹⁰⁷*United States v. Potteet*, 50 C.M.R. 73 at 76 (N.M.C.M.R. 1975).

See also, *United States v. Thornton*, ACM S29598, (A.F. Ct. Crim. App. Jun. 20, 2000) (unpub. op.) (holding that trial counsel who argues an Air Force position that drugs are not tolerated merely states an obvious fact.)

¹⁰⁸*United States v. Martin*, 36 M.J. 739 at 742 (A.F.C.M.R. 1993).

¹⁰⁹*United States v. Mahoney*, ACM 34209, p. 20-1 (A.F. Ct. Crim. App. Dec. 13, 2001) (unpub. op.) *reversed on other grounds*, 58 M.J. 346 (C.A.A.F. 2003) (holding that when the trial counsel asked how would it look to the people involved in that effort if the accused was not appropriately punished for using an illegal drug, the trial counsel had made a perfectly appropriate argument, which would not inflame the members but merely orient them to one aspect in sentencing, punishment of the wrongdoer.)

¹¹⁰*United States v. Turbeville*, NMCM. 200000889, (N-M. Ct. Crim. App. Nov. 21, 2001) (unpub. op.).

¹¹¹*Martin*, *supra* note 109 at 742.

¹¹²*United States v. Allen*, 43 C.M.R. 157 at 158 (C.M.A. 1971).

¹¹³*Kropf*, *supra* note 104 at 108-9. C.A.A.F. once again stressed this to "be an area in which trial counsel are well advised to tread lightly. The danger of interjecting the command structure into the members' deliberations is ever present. Likewise, defense counsel should be ever vigilant to object and seek a curative instruction where appropriate." *Id.* at 109-10.

¹¹⁴See, e.g., *United States v. Martin*, NMCM 96 00201, p.4-7 (N-M. Ct. Crim. App. Feb 21, 1997) (unpub. op.), in which the court had "no difficulty concluding that trial counsel stepped over the line during his sentencing argument" where he emphasized that drug use cannot be "tolerated . . . in our Navy," that "the Navy frowns upon

drug use," and that the members should "send the right message: drugs aren't tolerated, not on our watch."

¹¹⁵*Id.*

¹¹⁶*United States v. Sparrow*, 33 M.J. 139 (C.M.A. 1991). Comments such as these are "susceptible to a sinister interpretation." *Id.* at 141.

¹¹⁷*United States v. Grady*, 15 M.J. 275 at 276 (C.M.A. 1983). It is the specter of command influence which permeates such a practice and creates "the appearance of impropriety influencing the court-martial proceedings [which] must be condemned." *Id.*

¹¹⁸*Martin*, *supra* note 115. See also, *United States v. Riddiough*, NMCM 96 02472, p.5-8 (N-M. Ct. Crim. App. Apr. 29, 1997) (unpub. op.) holding a trial counsel committed plain error when he made repeated references to the Marine Corps' "zero tolerance drug policy" and "did not even speak in euphemisms." The court found the trial counsel was trying to convince the military judge that it was his job to discharge the accused, whom he had convicted of using drugs. His argument "attempted to bring into the deliberation room the Marine Corps' anti-drug policy as a factor for the military judge to consider."

¹¹⁹*United States v. Jimenez*, NMCM 98 00755, p.5-7 (N-M. Ct. Crim. App. Jan. 20, 2000) (unpub. op.).

¹²⁰*United States v. Thornton*, ACM S29598, p.2-7 (A.F. Ct. Crim. App. Jun. 20, 2000) (unpub. op.).

¹²¹*United States v. Former*, 48 M.J. 882 at 883

(N.M.Ct.Crim.App.1998). Failure to comply with the Navy's core values does not necessarily require any specific punishment or disposition and it was therefore not improper for the trial counsel to argue the accused, by sexually abusing his 12-year-old stepdaughter, had fallen so far short of the standards expected of Navy personnel that a dishonorable discharge was appropriate. *Id.*

¹²²See, e.g., *United States v. Lyons*, 36 M.J. 425, 427 (C.M.A. 1993).

¹²³*Id.*

¹²⁴*Id.* citing *United States v. Volmar*, 15 M.J. 339, 341 (C.M.A.).

¹²⁵*Lyons*, *supra* note 123, at 427. See also, *United States v. Robinson*, 25 M.J. 43 (C.M.A. 1987); *United States v. Webb*, 5 M.J. 406 (C.M.A. 1978); and *United States v. Holcomb*, 43 C.M.R. 149 (1971), all cited in, *United States v. Burt*, 56 M.J. 261 AT 264 (C.A.A.F. 2002).

¹²⁶*United States v. Bolkan*, 55 M.J. 425 (C.A.A.F. 2001).

¹²⁷*United States v. Quick*, 59 M.J. 383 (C.A.A.F. 2004).

¹²⁸*Id.* at 388. For another divided opinion addressing similar issues, see *United States v. Pineda*, 54 M.J. 298 (C.A.A.F. 2001).

¹²⁹*United States v. Vanderlip*, 28 M.J. 1070 at 1072 (N.M.C.M.R. 1990).

¹³⁰R.C.M. 924

¹³¹R.C.M. 1001(g). See also, *United States v. Teeter*, 16 M.J. 68, 72, 73 (C.M.A. 1983); *United States v. Tobita*, 12 C.M.R. 23 (C.M.A. 1953), both as cited in *Vanderlip*, *supra* note 130, at 1072.

¹³²*United States v. Brown*, 13 M.J. 890 -1 (A.C.M.R. 1982).

¹³³*Id.*

¹³⁴*United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (holding the standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument. The legal test for improper argument is whether it was error, and whether it materially prejudiced the substantial rights of the accused. If the defense counsel fails to object or request a curative instruction, the court will grant relief only if the improper argument is plain error." *United States v. McBee*, ACM 35346, p.7-12 (A.F. Ct. Crim. App. Jan 28, 2005) (unpub. op.). See also, *United States v. Toro*, 37 M.J. 313 (C.M.A. 1993). If the plain error is of a constitutional dimension, the test for constitutional error is "whether the error was harmless beyond a reasonable doubt." *United States v. Walker*, 57 M.J. 174, 178 (C.A.A.F. 2002) (citing *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)).

Jencks Act Application to Attorney Notes: When Work-Product Meets Witness Statement

Major Andrew J. Turner
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This article discusses when attorney notes – of government or defense counsel – may be subject to disclosure under the Jencks Act and Rule for Courts-Martial (R.C.M.) 914. The Supreme Court has long recognized the necessity that “a lawyer work with a certain degree of privacy” and that, if unfettered discovery of attorney notes and memoranda were permitted;

[M]uch of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.¹

But there are circumstances when attorney notes may be subject to disclosure, including when an attorney’s notes of a witness interview constitute a witness “statement” for purposes of the Jencks Act.

Consider this scenario: a prosecution witness is testifying at a court-martial. Under direct examination, she describes seeing a man with short hair and wearing a red jacket enter a house. After direct examination, defense counsel requests a session outside of the presence of the court members under Article 39(a) of the Uniform Code of Military Justice (UCMJ). During the Article 39(a) session, defense counsel explains that he wants to challenge the witness’ recollection of the events. Defense counsel requests and is provided an opportunity to question the witness during the Article

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39(a) session about a pre-trial interview conducted by government trial counsel. In response to defense questioning, the witness testifies that the government trial counsel asked a number of detailed questions during her interview about the man seen entering the house, and took extensive notes. Defense counsel then moves the court to order government trial counsel to produce a copy of the notes, arguing that the notes constitute a “statement” subject to disclosure under the Jencks Act and R.C.M. 914. Must the notes be produced? What if the government trial counsel took verbatim notes during the interview, read the notes back to the witness, and the witness initialed the statements attributed to her?

Disclosure of attorney notes under the Jencks Act will often be in tension with the attorney work-product privilege. While not typical, attorney notes from a witness interview can constitute a witness “statement” subject to disclosure under the Jencks Act if certain factors are present, such as when the notes are taken verbatim and are signed by the witness.

If attorney notes are requested by one party and the other party opposes, the military judge will – as with any document claimed to constitute a witness statement – determine whether any or all of the notes constitute a statement subject to disclosure. To the extent attorney notes constitute a witness statement subject to disclosure, those notes will not be deemed attorney work-product. The Jencks Act and R.C.M. 914 provide for redaction of intermingled attorney notes that do not constitute a witness statement, such as an attorney’s impressions or ideas. The Jencks Act and R.C.M. 914 require striking the testimony of a witness if the party in possession of the witness’s statement elects not to comply with an order to produce the statement, and allows for dismissal if the government refuses to comply with an order to produce a statement and dismissal is in the interest of justice.

Jencks Act and R.C.M. 914

Jencks v. United States

In *Jencks v. United States*,² the president of a mine, mill and smelter workers union challenged his conviction for making false statements regarding Communist

Party affiliation. The government case was based largely on the testimony of two witnesses who observed the union president's activities. The two witnesses were paid by the FBI to report Communist Party activities. Prior to trial, the witnesses submitted reports to the FBI of activities allegedly participated in by the union president. At trial, the defense moved the court to order the prosecution to produce the reports for potential use in cross-examining the witnesses. The prosecution opposed, arguing that there was no foundation for inconsistency between the witnesses' testimony and the witness's earlier reports. The trial court denied the motion. The Fifth Circuit Court of Appeals affirmed, upholding the denial of the witness reports and the conviction.

The Supreme Court reversed, holding that the lower courts erred in requiring a preliminary foundation of inconsistency. Noting the "crucial nature" of the witnesses' testimony and that impeachment of the testimony was "singularly important" to the defense, the Court explained:

"Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, as in *Gordon*, the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected. For the interest of the United States in a criminal prosecution '... is not that it shall win a case, but that justice shall be done....'"³

The Court held that the defense was entitled to an

order directing production of the witness reports. Responding to the government's argument that "safeguarding the privacy of its files" was at stake, the Court held that a "criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at trial."⁴

Jencks Act

The *Jencks* decision carried broad implications for the government, and Congress acted quickly in 1957 to codify and at the same time circumscribe its effect. As the Supreme Court explained in *Palermo v. United States*:

"The decision promptly gave rise to sharp controversy and concern. The day following our opinion the House of Representatives was told that the decision in *Jencks* posed a serious problem of national security and that legislation would be introduced. 103 Cong. Rec. 8290. The same day H. R. 7915, the first of eleven House bills dealing with what became the *Jencks* problem, was introduced in the House. Defendants' counsel began to invoke the *Jencks* decision to justify demands for production far more sweeping than that involved in *Jencks*, and under circumstances far removed from those of that case, and some federal trial judges acceded to those excessive demands. ... The Act was approved on September 2, and became law as § 3500 of the Criminal Code, 18 U. S. C."⁵

The *Jencks Act*, P.L. 85-269, 71 Stat. 595 (Sept. 2, 1957),⁶ reads as follows:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement

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relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term “statement”, as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means--

- (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
- (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
- (3) a statement, however taken or recorded, or a

transcription thereof, if any, made by said witness to a grand jury.

The Supreme Court first interpreted the Jencks Act in *Palermo*, which involved a defense request for a memorandum prepared by an IRS agent summarizing an interview of a prosecution witness. Noting Congress’s intent that “only those statements which could properly be called the witness’s own words should be made available to the defense for purposes of impeachment,” the Supreme Court held that the trial court properly denied the request because the memorandum did not constitute a “statement” for purposes of Jencks Act.⁷ The Court observed that the Jencks

“Disclosure of attorney notes under the Jencks Act will often be in tension with the attorney work-product privilege.”

Act provides the “sole standard governing production of the agent’s memorandum.”⁸ Finally, the Court expressed approval for an *in camera* determination by the trial judge where there is doubt whether production of a document is compelled by the Act because the “statute governs the production of documents; it does not purport to affect or modify the rules of evidence regarding admissibility and use of statements once produced.”⁹

R.C.M. 914

The Jencks Act provisions for the production of witness statements are procedural in nature, not evidentiary. Accordingly, the Jencks Act is implemented through rules of criminal procedure: Federal Rule of Criminal Procedure 26.2 and its military counterpart R.C.M. 914. R.C.M. 914, which mirrors the federal rule, provides:

Rule 914. Production of statements of witnesses

(a) Motion for production. After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is:

- (1) In the case of a witness called by the trial counsel, in the possession of the United States; or
 - (2) In the case of a witness called by the defense, in the possession of the accused or defense counsel.
- (b) Production of entire statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testi-

fied, the military judge shall order that the statement be delivered to the moving party.

(c) Production of excised statement. If the party who called the witness claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the military judge shall order that it be delivered to the military judge. Upon inspection, the military judge shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of a statement that is withheld from an accused over objection shall be preserved by the trial counsel, and, in the event of a conviction, shall be made available to the reviewing authorities for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) Recess for examination of the statement. Upon delivery of the statement to the moving party, the military judge may recess the trial for the examination of the statement and preparation for its use in the trial.

(e) Remedy for failure to produce statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice.

(f) Definition. As used in this rule, a "statement" of a witness means:

- (1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness;
- (2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or
- (3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a Federal grand jury.

Both R.C.M. 914 and Fed. R. Crim. P. 26.2 go a step further than the Jencks Act by establishing procedures for the production of defense witness statements as well as prosecution witness statements.¹⁰ The Jencks Act and R.C.M. 914 require striking the testimony of a witness if a party in possession of the witness's state-

ment "elects" not to comply with an order to produce the statement, and allow dismissal if the government refuses to comply with an order to produce a statement and dismissal is in the interest of justice.¹¹

Production of Attorney Notes

Work-Product Privilege

The Supreme Court has recognized the attorney work-product privilege

"for certain materials prepared by an attorney 'acting for his client in anticipation of litigation.' ... As the Court recognized in *Hickman v. Taylor*, 329 U.S. at 508, the work-product doctrine is distinct from and broader than the attorney-client privilege. ... At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. ... Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case."¹²

However, attorney notes are subject to production under the Jencks Act and R.C.M. 914 to the extent the notes constitute a witness "statement."

Jencks Act Production of Attorney Notes

The Supreme Court addressed whether attorney notes are subject to Jencks Act production in *Goldberg v. United States*.¹³ In *Goldberg*, the president of an insurance company challenged his mail fraud conviction. The key prosecution witness at trial was a co-worker of the company president. The co-worker testified as to the alleged fraudulent insurance policy scheme and transactions. On cross-examination, the co-worker testified that he was interviewed by prosecution attorneys prior to trial, that the attorneys took notes during the interview, and that the attorneys would read their notes back to him and make any corrections he requested. At this point in the trial the defense moved, pursuant to the Jencks Act, for an order directing the prosecution to produce their handwritten notes of the interviews. The trial judge denied the motion without reviewing the notes on the ground that the notes constituted attorney work-product. The Ninth Circuit Court of Appeals affirmed on the separate ground that the notes did not constitute a witness "statement" under the Jencks Act.

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The Supreme Court held in *Goldberg* that attorney notes may be subject to production under the Jencks Act if they fall within the statutory definition of “statement,” and remanded to the district court to make that determination. The Court determined that “a writing prepared by a Government lawyer relating to the subject matter of the testimony of a Government witness that has been ‘signed or otherwise adopted or approved’ by the Government witness is producible under the Jencks Act, and is not rendered nonproduced because a Government lawyer interviews the witness and writes the ‘statement.’”¹⁴ The Court explained that production of such “statements” does not conflict with the attorney work-product privilege:

“Proper application of the Act will not compel disclosure of a Government lawyer’s recordation of mental impressions, personal beliefs, trial strategy, legal conclusions, or anything else that ‘could not fairly be said to be the witness’ own” statement. “If a government attorney has recorded only his own thoughts in his interview notes, the notes would seem both to come within the work-product immunity and to fall without the statutory definition of a ‘statement.’” *Saunders v. United States*, 114 U.S. App. D.C. 345, 349, 316 F. 2d 346, 350 (1963) (Reed, J.). Furthermore, if a witness has for some reason “adopted or approved” a writing containing trial strategy or similar matter, such matter would be excised under § 3500(c) as not relating to the subject matter of the witness’ testimony or direct examination. Thus, the primary policy underlying the work-product doctrine - *i.e.*, protection of the privacy of an attorney’s mental processes, *United States v. Nobles*, *supra*, at 238 - is adequately safeguarded by the Jencks Act itself.”¹⁵

The Court further noted that “writings must be produced only to the extent they are ‘statements’” and that the Jencks Act “expressly provides a procedure for excising any matter not relevant to the witness’ direct testimony.”¹⁶ Finally, the Court observed:

“[a] witness interview will, of course, involve conversation between the lawyer and the witness, and the lawyer will necessarily inquire of the witness to be certain that he has correctly understood what the witness has said. Such discussions of the general substance of what the witness has said do not constitute adoption or approval of the lawyer’s notes within § 3500(e)(1), which is satisfied only when the witness has “signed or otherwise adopted or

approved” what the lawyer has written. This requirement clearly is not met when the lawyer does not read back, or the witness does not read what the lawyer has written.”¹⁷

The Court of Appeals for the Armed Forces addressed the relationship between the attorney work-product privilege and Jencks Act requirements with respect to attorney interview notes in *United States v. Vanderwier*. In *Vanderwier*, defense counsel requested notes of prosecution interviews of a government witness. The prosecution opposed, arguing all information in the notes relating to the witness interviews was given to the defense in “lead sheets” and the notes “were the prosecution’s personal work product and not discoverable.”¹⁸ The defense did not request that the military judge review the notes *in camera*, and the military judge denied the motion without reviewing the notes. Citing *Goldberg*, the Court of Military Appeals noted that lawyer interview notes are subject to production under the Jencks Act when they relate to the subject matter of the testimony of a witness and have been “signed or otherwise adopted or approved by” the witness.¹⁹ The Court found the notes were not subject to production under the Jencks Act because there was nothing indicating the witness had adopted or approved the notes.²⁰ The Court acknowledged the “military judge could have requested to see the notes for an inspection before ruling on the motion,” but noted “the defense did not request that the judge inspect the notes.”²¹ Finally, the Court observed that, “[e]ven though liberal, discovery in the military does not justify unwarranted inquiries into the files and mental impressions of an attorney.”²²

Factors Considered by the Courts

Since *Goldberg* was decided, a number of courts have addressed whether attorney notes are subject to disclosure under the Jencks Act. The courts consider whether the notes constitute a “statement” under the Jencks Act; *i.e.*, whether the witness “signed or otherwise adopted or approved” the notes or whether the notes constitute a “substantially verbatim” transcription “recorded contemporaneously” with the witness interview.²³ Courts rarely find that attorney notes of a witness interview constitute a Jencks Act statement. The factors frequently considered by the courts include:

- Whether the notes are an essentially verbatim account of a witness interview or, conversely, are short or cryptic.²⁴
- Whether the notes are personal recollections or memoranda.²⁵

- Whether the notes constitute reminders or mind joggers.²⁶
- Whether the notes evaluate the evidence or discuss legal or tactical considerations.²⁷
- Whether the attorney has done more than merely read notes back to a witness.²⁸
- Whether the witness reviewed the notes.²⁹
- Whether the witness signed the notes.³⁰

Military practitioners should be aware that notes of witness interviews may be subject to disclosure when they meet the Jencks Act definition of a “statement.” This awareness should not chill thorough trial preparation, nor do the authors suggest that parties should routinely seek attorney witness interview notes. As the Supreme Court explained in *Goldberg*, proper application of the Jencks Act will not intrude upon attorney work-product. The discussion and examples above indicate most attorney notes would not constitute a witness statement under the Jencks Act and, therefore, would not be subject to production.

There could be an occasion, however, when an attorney would want to take interview notes in a manner likely to constitute a witness statement for Jencks Act purposes. For example, a witness may say something during an interview that is of such value to the case that the attorney determines that getting the witness to sign or initial a verbatim quote is worth potential production of the notes (or at least part of the notes, knowing that other parts of the notes may be subject to excision under R.C.M. 914(c)). Similarly, there may be times when an attorney will want to voluntarily disclose notes of a witness interview prior to trial in order to resolve issues and avoid distractions or delays during trial. Indeed, the Advisory Committee Notes to Fed. R. Crim. P. 26.2 advise that the “rule is not intended to discourage the practice of voluntary disclosure at an earlier time so as to avoid delays at trial.”³¹

Finally, military practitioners should also be mindful of independent discovery obligations, including the disclosure obligations set forth in R.C.M. 701. For a recent discussion of general discovery obligations of military counsel, see Captain Christopher M. Schumann, *Why Can't We All Just Get Along? The Discovery Process and You, The Reporter*, Vol 31, No. 3, September 2004, p. 20.

¹*Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

²353 U.S. 657 (1957)

³*Id.* at 667-68, citing *Berger v. United States*, 295 U.S. 78, 88

⁴*Id.* at 670, 672

⁵360 U.S. 343, 346-48 (1959)

⁶18 U.S.C. § 3500

⁷*Id.* at 352, 355

⁸*Id.*

⁹*Id.* at 354; *c.f. United States v. Romano*, 46 M.J. 269 (1997) (“we would expect the military judge to examine in camera any documents for which the work-product privilege is claimed”); *see generally United States v. Dixon*, 8 M.J. 149, 150 n. 1 (C.M.A. 1979) (citing cases holding that the Jencks Act applies to the military).

¹⁰According to the Advisory Committee Notes to Fed. R. Crim. P. 26.2, the provision for production of defense witness statements accounts for the Supreme Court’s decision in *United States v. Nobles* that, to facilitate full disclosure of all relevant facts, the federal judiciary has the inherent power to order the production of both prosecution and defense witness statements. 422 U.S. 225 (1975).

¹¹Note that the Jencks Act, 18 U.S.C. § 3500(d), and R.C.M. 914(e) require a judge or military judge to order that a witness’s testimony be disregarded where a party “elects” not to comply with an order to deliver the witness’s statement. The R.C.M. 914(e) requirement to order testimony disregarded is subject to good faith and harmless error exceptions. *United States v. Marsh*, 21 M.J. 445, 451-52 (C.M.A. 1986); *United States v. Cook*, 2001 CCA LEXIS 19 (A.F. Ct. Crim. App. 2001) (unpub. op.) (military judge did not err in deciding not to strike testimony of witness where accidental loss of pretrial statement occurred during move and other notes of the same witness interview were available). The sanctions for defense non-compliance are, by necessity, limited to striking or precluding the testimony of the witness – not declaring a mistrial.

¹²*United States v. Nobles*, 422 U.S. 225, 237-39 (1975)

¹³425 U.S. 94 (1976)

¹⁴*Id.* at 98

¹⁵*Id.* at 106

¹⁶*Id.* at 105

¹⁷*Id.* at 110, n. 19

¹⁸25 M.J. 263, 268 (1987)

¹⁹*Id.*

²⁰*Id.*

²¹*Id.* at 269.

²²*Id.*

²³18 U.S.C. § 3500(e)(1) and (2); R.C.M. 914(f)(1) and (2)

²⁴*United States v. Fowler*, 608 F.2d 2 (D.C. Cir. 1979) (short, very cryptic prosecutor’s notes only setting forth a few references to scattered facts were incomplete and could do nothing more than jog prosecutor’s memory; the notes fell far short of being “statements” and were not required to be produced under the Jencks Act); *compare United States v. Jameson*, 25 M.J. 211 (C.M.A. 1987) (agent’s rough notes of pretrial statement “were not statements of the agent within the meaning of the Jencks Act”).

Compare pre-*Goldberg* decisions in *NLRB v. Safway Steel Scaffolds Co.*, 383 F.2d 273 (5th Cir. 1967) (NLRB attorney notes taken during interview with union official who testified for government should have been produced for examination to determine whether the notes were a substantially verbatim recital of what witness said during the interview) and *Saunders v. United States*, 316 F.2d 346 (D.C. Cir. 1963) (where substantially verbatim notes of witness remarks are taken by government attorney, production of the notes would no more imperil government files than if any other government agent had done so).

²⁵*Re Grand Jury Proceedings*, 473 F.2d 840 (8th Cir. 1973) (personal recollections, notes, and memoranda of a prospective criminal defendant’s attorney are “within the rubric of the work product definition” and “of a type that the Government would not be required to produce under the Jencks Act”); *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974) (interview memoranda prepared by government attorney that were summaries, conclusions, and interpretations of the attorney and which were not signed, adopted, or approved by the witness were not Jencks Act statements).

²⁶*United States v. Goldberg*, 435 F.Supp. 1172 (D. Arizona 1977) (attorney interview notes that comprise mind joggers and reminders

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and which were never read back to or adopted by witness are not subject to production under Jencks Act).

²⁷*United States v. Pfingst*, 477 F.2d 177 (2d Cir. 1973) (portions of memoranda describing interviews of witness by government attorney consisting solely of summaries and evaluation of evidence and discussion of legal and practical problems of prosecution were not Jencks Act “statements”); *see also* pre-*Goldberg* decision in *United States v. Franzese*, 321 F.Supp. 993 (E.D. NY 1970) (prosecutor memorandum containing notes of conversations with prison inmates indicating willingness of inmates to testify against defendant not required to be produced because selections, interpretations, and interpolations do not constitute witness statement under Jencks Act).

²⁸*United States v. Smaldone*, 484 F.2d 311 (10th Cir. 1973) (there is no work-product exception to the Jencks Act, but courts have shown reluctance to treat attorney notes as “statements” absent showing statutory definition met; making some notes of interview and occasionally reading the notes back to the witness not sufficient to render notes a “statement”).

²⁹*United States v. Harris*, 542 F.2d 1283 (7th Cir. 1976) (prosecutor’s witness interview notes were not Jencks Act statements where the notes were prepared after the interview and the witness did not see the notes); *United States v. Goldberg*, 582 F.2d 483 (9th Cir. 1978) (attorney notes, which were never read back to witness and never read by witness, were not Jencks Act statement); *United States v. Traylor*, 656 F.2d 1326 (9th Cir. 1981) (government attorney notes taken simultaneously with witness interview but never reviewed with witness were not Jencks Act statement).

³⁰*United States v. Strahl*, 590 F.2d 10 (1st Cir. 1978) (interview notes taken by government lawyer are subject to the Jencks Act only if signed or otherwise adopted or approved by government witness). *Compare United States v. Vanderwier*, 25 M.J. 263 (1987) (prosecution interview notes not subject to Jencks Act production where nothing in record indicated witness had adopted or approved the notes).

³¹Federal Criminal Code and Rules, 124 (West 2004 ed.)



PRACTICUM

AFI 36-2911 ADDRESSES ISSUE OF RESPONSIBLE COMMANDER WHILE IN PCS STATUS

It's the middle of the night when the phone rings. Your Wing commander tells you that a servicemember, AWOL from another base, has been apprehended nearby and is being held at your base confinement facility. "That's easy," you say. "Return him to his unit of assignment." Unfortunately, this servicemember was in PCS travel status when he went AWOL, and it is unclear which unit he belongs to. What do you do?

Determining a member's commander for military justice-related purposes seems simple, and for the most part, it is. However, when a member who is absent without leave (AWOL) while in Permanent Change of Station (PCS) status is apprehended, determining the responsible commander can waste valuable time and cause unnecessary confusion. Because the commander at the member's place of duty is responsible for conducting a pretrial confinement review to determine if continued confinement is appropriate, it is imperative that clear-cut guidance be readily available.

The case of *U.S. v. Stroud*, 27 M.J. 765 (1988), is a prime example of the complications that may arise when an accused's responsible unit is in question. Airman Timothy S. Stroud was in PCS status from Lowry AFB, Colorado to Torrejon AB, Spain, on leave en route when he went AWOL. Instead of reporting to Torrejon AB, he got married and moved to Las Vegas, Nevada, where he was apprehended three months later. Airman Stroud was returned to Lowry AFB and placed in pretrial confinement. At trial, he pled guilty to being AWOL from Lowry AFB and was convicted.

On appeal, Stroud argued that his plea of guilty to being AWOL from Lowry AFB was improvident in that he had no legal obligation to return to that base. He relied on *U.S. v. Pounds*, 23 U.S.C.M.A. 152, 48 C.M.R. 769 (1974), which held that once a servicemember had received orders to another base on a certain date, he no longer had any duty to remain at or return to his previous base of assignment. In other words, he was absent from the place he was required to be (Torrejon AB) and not from his previous unit at Lowry, the unit set forth in the desertion specification. Stroud argued that there was a fatal variance between the allegations and the proof, in that he was convicted of absence from Lowry, when he was in fact absent from Torrejon.

At the time of *U.S. v. Pounds*, Air Force Manual 35-15 set a specific date for transferring a member from the losing unit's strength report to the gaining unit's

strength report, in order to ensure members were only counted once. This meant that while the losing unit might be responsible for recording an unauthorized absence, it might not necessarily be the proper unit to name in the desertion charge. On the other hand, the Manual for Courts-Martial, in discussing AWOL under Article 86 of the UCMJ, provided, "A person undergoing transfer between activities is ordinarily considered to be attached to the activity which ordered the report." Subsequently, Air Force personnel procedures were updated to specifically address members who absented themselves during PCS travel.

During the period of Stroud's absence, Air Force Regulation (AFR) 35-71, *Desertion and Unauthorized Absence*, provided that "if the absence began while the member was in PCS travel status from CONUS to an overseas base and the member returns to a CONUS base other than the port of embarkation regardless of the length of absence... then the disposition is return to the losing unit." The court pointed out that AFR 35-73 was specifically drafted to avoid the problems seen in cases like *U.S. v. Pounds*, and concluded that there was no fatal variance between the charge and the proof in this case, and that Stroud's plea of guilty to an unauthorized absence from Lowry was provident.

A direct descendant of AFR 35-73, AFI 36-2911, *Desertion and Unauthorized Absence*, now provides clear guidance to follow when a member is returned to military control after absenting himself during a PCS move. Table 4.1, *Disposition of Members Returned to Control at Other Than the Unit of Assignment*, lists several possible scenarios and provides the following:

- If the absence began while the member was in PCS travel status from one CONUS base to another, and the member has been returned to the military somewhere other than the gaining base (see note), the member is returned to the losing unit.
- If the absence began while the member was in PCS travel status from one CONUS base to another, and the member has been returned to the military at the gaining base, the member will remain at the gaining unit.
- If the absence began while the member was in PCS travel status from CONUS to an overseas base and the member returns to the port of embarkation after an absence of 31 days or more (see note), or returns to a CONUS base other than the port of embarkation regardless of the absentee's length (see note), the member is returned to the losing unit.

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- If the absence began while the member was in PCS travel status from CONUS to an overseas base and the member returns to the port of embarkation after an absence of less than 31 days, or returns to an overseas base in the gaining theater, the member will continue to the gaining unit.
- If the absence began while the member was in PCS travel status from one overseas base to another or from overseas to CONUS and the member has departed the overseas country of assignment, the member will continue to the gaining unit.
- If the absence began while the member was in PCS travel status from one overseas base to another or from overseas to CONUS and the member returns to the country from which absent, the member will return to the losing unit.

*NOTE: Exception: If the gaining commander gave the member permission to report after the report not later than date (RNLTD), the member continues to the gaining unit.

The identification of an AWOL servicemember's unit commander is critical. When the member is in PCS status, this identification can be confusing and time-consuming. Thanks to the clear guidance set forth in AFI 36-2911, you can provide this valuable information quickly and accurately.

CAVEAT

HOW GOOD WAS IT?

In accordance with R.C.M. 1106(d)(3), the staff judge advocate's recommendation (SJAR) to the convening authority must include, among other matters, "concise information" as to "[a] summary of the accused's ... character of service." Usually, a staff judge advocate preparing the post-trial review fulfills this requirement by adopting the service characterization supplied by the unit commander in transmitting the charges to the next superior commander.

In the recent case of *United States v. Parsons*, ___ M.J. ___ (A.F. Ct. Crim. App. 2005), the accused's commander signed two transmittal documents relating to the accused, the first for the original charges and the second for subsequently discovered additional offenses. In the original transmittal, the commander described the accused's prior performance and service as "nothing short of outstanding." In transmitting the

second set of charges, the unit commander did not specifically characterize the accused's service, but understandably spoke rather disparagingly about his conduct and its impact on the unit.

In his post-trial review, the SJA simply informed the convening authority that the accused's service was "above average." On appeal, the accused asserted that was an incorrect characterization of his service. In its decision, the Air Force court opined that despite the common practice of using characterization language from transmittal documents, there is no requirement that those documents serve as the sole source of that information. The critical question, reasoned the court, is not whether the SJAR characterization fairly reflects the opinion of the commander in the transmittal documents, but whether the language used by the SJA fairly characterizes the accused's service. In this case, the court was satisfied that it did. The bottom line is that the SJA is not obligated to adopt the description of the accused's service used by the unit commander, but has the independent responsibility of providing a fair and accurate characterization in order to assist the convening authority in deciding the appropriate action.

FULL DISCLOSURE

In the unpublished case of *United States v. Rogers*, ACM 35028 (A.F.Ct.Crim.App. 19 April 2005), the court addressed what it described as a novel issue in military law—whether the government was required to disclose impeachment evidence to the defense as a predicate to entering into a PTA. The evidence in question related to whether the accused's alleged sexual assault victim had made prior reports of sexual assault against another person. The Air Force court noted that although the Supreme Court has held that the United States Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant, a military accused's right to obtain favorable evidence is also grounded in statute. In that respect, Article 46, UCMJ, 10 USC § 846, provides that the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with regulations the President may prescribe. That statutory right is implemented by R.C.M. 701, which sets forth a liberal discovery policy in military justice in order to preclude "gamesmanship" and promote efficiency. Citing Drafter's Analysis, *Manual for Courts-Martial, United States (MCM)*, A21-35 (2000 ed.) The court also noted that R.C.M. 705 governs PTAs and permits either the government or defense to propose terms or conditions "not prohibited by law or public policy."

While it lists impermissible terms and conditions of PTAs for the protection of military accused, the Rule expressly allows an accused to waive “procedural requirements such as the Article 32 investigation, the right to trial by court-martial composed of member or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses in sentencing proceedings.”

The Air Force Court found nothing in the UCMJ or the RCMs that expressly requires the government to provide impeachment information to an accused before entering into a PTA. In this case, the court found it significant that: (1) the defense had not contended the government withheld evidence establishing the factual innocence of the accused regarding the offense to which he pled guilty; (2) the defense did not assert it had less than an equal opportunity to interview the alleged victim and inquire about whether she had made prior reports of sexual assault; (3) the government’s failure to disclose this information resulted from a misunderstanding not misconduct; and (4) there was no indication of government overreaching or gamesmanship. Finally, the court declined to engage in speculation about the effect the undisclosed evidence had on pretrial negotiations.

Based on the foregoing circumstances, the court concluded the accused was not entitled to relief. Despite the foregoing decision regarding impeachment information, SJAs engaged in pretrial agreement negotiations are well advised to insure that, in their dealings with the defense, they are able to pass the fairness test detailed above.

ADMINISTRATIVE LAW

THE ESTABLISHMENT CLAUSE AND RELIGIOUS EXPRESSION

Recently the Air Force has experienced an increase in the number of questions regarding the application of the Establishment Clause of the Constitution to specific workplace scenarios.¹ More specifically, the questions have asked the extent to which military officers can endorse or address religion when acting on duty or in an official capacity. Among the issues are the propriety of conducting prayers at staff or other official meetings, endorsing National Prayer Day, encouraging others to seek religious counseling, and asking others to “try out” a specific religion. As the Supreme Court has recognized, there are no easy answers to some of these questions and each may turn and be answered differently based on the surrounding facts and circumstances.² That is not to say that there are

no general guidelines that can be expressed and applied in a common sense fashion.

Freedom of religion is, of course, one of the principles underlying the Constitution. At the same time freedom to practice one’s religion is recognized, it is also recognized that the government should not become unduly entangled with religion, nor should there be an official State sponsored or endorsed religion. Consequently, in addition to providing specifically for freedom of religion, the Establishment Clause limits the actions of the government in endorsing or hindering religious beliefs or non-beliefs.

Unlike private citizens, officers represent the Executive Branch of government. In the largest sense, they are the “government” as government can only operate through the actions of its officers, officials and employees. As with other areas of Constitutional application, most notably that of freedom of speech, being a member of the military calls for a slightly modified application of the rights given under the Constitution.

The Supreme Court has repeatedly recognized that the military is, by necessity, a “separate society” in which the application of the Bill of Rights is “different” than for civilians. It is differentiated primarily because of a need for discipline and morale not experienced in society at large.³ For instance, in the freedom of speech area, it is well established that the speech of officers can be limited and they are prohibited by Article 88 of the Uniform Code of Military Justice from using contemptuous language against the President and Congress at large, among other officials. Similarly, while individuals generally have the right to practice and profess their religious beliefs freely, individuals acting for the “United States” (government employees) are limited in what they can do to endorse religion or to “aid one religion, aid all religions or favor one religion over another.” *Everson v. Board of Education of Ewing Township*, 330 US 1, 15 (1947). Therefore, when expressing religious views in a public forum, all federal employees must be sensitive to the Establishment Clause requirement that expression not create the reasonable impression that the government is sponsoring, endorsing, or inhibiting religion generally, or favoring or disfavoring any particular religion. (*See, Chaudhuri v. Tennessee*, 130 F3d 232 (6th Cir, 1997)).

Competing with the Establishment Clause is of course the Free Exercise Clause that extends freedom of the practice of religion to all. The military freely accommodates the practice of religion and the Department of Defense broadly recognizes the right of the individual to practice his or her religious beliefs (*See, DoDD 1300.17, Accommodation of Religious Practices Within the Military Services*). The Religious

Freedom Restoration Act of 1993⁵ together with the DoD guidance make it clear that, in general, for government to restrict accommodation, there must be a compelling government interest and a determination that no lesser form of government restriction will meet or accomplish the government's interest. Government interests that may require restrictions are generally safety, the need for uniformity to accomplish the government interest (e.g. training), and the need to maintain good order and discipline. Given the diversity of the workforce and the beliefs of Airmen (Christians, Muslims, Jews, agnostics, atheists, etc.), there may be times when the practice of a particular religion, in the workplace will be incompatible with a compelling government interest. Even the very broad right to practice one's religion is bounded by competing societal interests.

Unlike private citizen, military members become a part of "government" and take an express oath to "uphold and defend" the Constitution. That oath carries with it an implicit acceptance that their freedom of religion will be slightly modified. The extent to which the average officer understands this implicit acceptance is not known, as neither the oath nor commissioning documents spell out the limited, but sometimes necessary, restrictions on the free practice of religion. Most officers appear to have an inherent, common sense knowledge that there may be limits on the use of their office to further or promote religion, but no formal Department of Defense or United States Air Force guidance specifically addresses this point.

Undoubtedly, there will be times when expressions of personal faith are appropriate for Airmen, but every Airman needs to have an awareness that when, to whom, how, and under what circumstances they share their beliefs, makes a difference in judging the appropriateness of that expression. Generally the more captive the audience, the more frequent the expression, the more official the occasion, and the greater the degree of command or supervisory authority the speaker exercises over another, the greater is the danger that actions will be reasonably perceived to be an endorsement of religion in violation of the Establishment Clause. The more senior the officer or official, the greater is the danger that his or her actions will be perceived to be an attempt to use his or her position to influence the behavior of other. On the other hand, occasional expressions of faith or belief between peers, in an obviously unofficial setting or when the discussion is obviously not official in nature, would seldom if ever be found in violation of the Establishment Clause. The key is to have an awareness of the factors that must be considered.

Although it may be generally permissible to discuss

ones' faith or personal beliefs, commanders can place reasonable limitations on religious speech to preserve discipline and morale. For example, proselytizing is as protected under the First Amendment's Free Exercise Clause as other forms of religious speech, but proselytizing on duty or in an official capacity serves no government or secular purpose, and can easily create a coercive environment for those who hold differing views. Where the government can articulate a compelling interest, which includes maintaining morale and discipline in the work place, proselytizing can be controlled.

For example, no one has a right to use his or her official office or grade to create a "bully pulpit" for furthering religious or personal beliefs.⁶ If one co-worker proselytized to another co-worker about his or her "lack of faith," to the point a reasonable person would believe the comments to be divisive or harassing, a commander would have clear authority to order that person to stop expressing his/her religious faith in the work place or during duty hours. The "reasonableness" of the conduct would be fact dependent, but the determination of whether or not the conduct is reasonable or unreasonable would not be significantly different than other "reasonable man" determinations under the law. The one additional factor that must be considered is the mandate to use the least restrictive means to accomplish the compelling government purpose.

In short, the Establishment Clause places constitutional limitations on complete freedom of religious expression and practices. Understanding those limitations and applying the appropriate standards to each fact-specific scenario will meet the compelling interest test and allow the practitioner to tailor the government response to meet the government's interest in the least restrictive manner.

¹"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..." (US Constitution, Amendment 1).

²*Waltz v. Tax Commission of City of New York*, 397 US 664, 668 (1970)

³"The military is, 'by necessity, a specialized society separate from civilian society.'" *Parker v. Levy*, 417 US 733, 743 (1974).

⁵42 USC § 2000bb

⁶"Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (Religious Freedom Restoration Act of 1993)" (August 14, 1997): Employees should be permitted to engage in private religious expression in personal work areas not regularly open to the public to the same extent that they may engage in nonreligious private expression, subject to reasonable content- and viewpoint-neutral standards and restrictions. But employees must refrain from such expression when a fellow employee asks that it stop or otherwise demonstrates that it is unwelcome. In their private time, employees may discuss religion with willing coworkers in public spaces to the same extent as they may discuss other subjects, so long as the public would reasonably understand the religious expression to be that of the employees acting in their personal capacities.

TORT CLAIMS AND HEALTH LAW

RES GESTAE

The Medical Law Mini-Course will hold its 20th Anniversary session at David Grant USAF Medical Center, Travis AFB, California from 24-28 October 2005. This one week intensive course is geared to attorneys, paralegals, and healthcare risk managers who have significant contact with health law and medical malpractice issues. Classes include lectures from the major medical specialties, and also feature speakers from HQ USAF/SG and AFLSA/JACT who discuss medical claims processing and adjudication, quality assurance, standards of care, HIPAA, and bioethical concerns. Notices will be sent later in the summer to the MAJCOMS for nominees from base legal offices. Local funding is required.

VERBA SAPIENTI

The new Air Force and DoD policies on handling sexual assault include provisions for enhanced confidentiality between the victim and designated health care providers/victim advocates. This is being done to encourage victims to seek care and develop a greater sense of trust and confidence in dealing with such a traumatic event. The new rules create many challenges for investigating agencies, commanders, health providers, and judge advocates as they balance the benefits of confidentiality with the need to protect safety and welfare of the installation and its personnel. Legal offices should be familiar with the new policies and seek appropriate guidance when there are concerns about how best to proceed or interpret policy provisions.

ARBITRIA ET IUDICIA

Accuracy in documentation is a life and death matter with medical records. It is critical when writing dosages in the record to clearly and distinctly indicate correct numerals, decimal points and routes of administration. In a recent case reported in the media, a nine-month-old girl was given 10 times the dose of morphine (5 milligrams instead of .5 milligrams) she was supposed to have been given and died because a decimal point was misplaced in the record. In another case, a three-month-old child was given a heart medication intravenously instead of by mouth because the physician did not indicate after the prescription that the dose was to be given "p.o." (per os or by mouth). The particular drug given is five times more potent when given intravenously, and this child died as well. Electronic documentation may solve handwriting issues,

but it also creates new potentials for error if a wrong number is typed in and not reviewed.

ENVIRONMENTAL LAW

RECENT AIR FORCE WIN HIGHLIGHTS DFE

A recent win in the Tenth Circuit Court of Appeals highlights the applicability of the Discretionary Function Exception (DFE) in environmental contamination cases. On 26 April 2005, in Ross et al., v. United States, No. 04-6146, (10th Cir. 2005) LEXIS 7269, the Court affirmed the district court's ruling that the discretionary function exception to liability under the Federal Tort Claims Act shielded the United States from liability for waste disposal practices at Tinker AFB. In district court, plaintiffs argued the Air Force was negligent and created a public and private nuisance when hazardous substances, particularly trichloroethylene (TCE), migrated in a plume from Tinker AFB's landfill. Plaintiffs' argued the Air Force failed to properly dispose of waste, failed to stop the migration of TCE, and issued untimely and inadequate warnings to local residents. In response, the United States filed a motion to dismiss for lack of subject matter jurisdiction, citing the discretionary function exception. The district court granted the motion and dismissed the case. In affirming the district court's opinion, the Court noted that the Air Force did not violate any mandatory statute and/or regulation and Air Force's waste management decisions were grounded in public policy. If you are addressing an environmental claim, the seven-point memorandum should address the applicability of the DFE. For more DFE information, see *Aragon et al., v. United States*, 146 F.3d 819 (10th Cir. 1998). However, also take a look at and compare with *Prescott v. United States*, 973 F.2d 696 (9th Cir. 1992), which places the burden of establishing the applicability of the discretionary function exception on the government, rather than on the plaintiff asserting jurisdiction.

MOLD: A DEVELOPING AND CHALLENGING LEGAL AREA

In the Air Force, mold issues requiring legal analysis are most often seen in the form of either a household goods claim or an environmental tort claim filed under the Federal Tort Claims Act (FTCA).

On 10 May 05, HQ USAF/ILE and HQ USAF/SGO jointly published the Air Force's mold policy – "Interim Policy and Guidance for the Prevention, Surveillance, and Remediation of Water Damage and Associated Mold Contamination in Air Force (AF) Facilities." This policy implements the best available tech-

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nical guidance and applies to all Air Force active, Guard, and Reserve installations.

Currently, there are no federal statutes or regulations addressing toxic mold, although EPA has developed some guidance.

(<http://www.epa.gov/iaq/molds/moldresources.html>).

On 14 Mar 05, the "United States Toxic Mold Safety and Protection Act of 2005 (the Melina Bill) was introduced (109 H.R. 1269) to amend the Toxic Substances Control Act, the Internal Revenue Code of 1986, and the Public Buildings Act of 1959 to protect human health from toxic mold. This bill previously was introduced on 13 Mar 03 (108 H.R. 1268) and 27 Jun 02 (107 H.R. 5040). To get the text of the current bill, go to <http://thomas.loc.gov/> and search using the word "Melina."

The Melina Bill directs the Centers for Disease Control, the EPA, and the National Institutes of Health to jointly study the health effects of indoor mold growth and toxic mold. It also directs the EPA to promulgate standards for preventing, detecting, and remediating indoor mold growth. Similar to the current requirements regarding lead-based paint, the Melina Bill includes requirements for the following: (1) lessors to inspect annually and notify occupants of the results; (2) the Secretary of HUD and the Administrator of EPA to promulgate mold hazard disclosure regulations with respect to housing offered for sale or lease; (3) the EPA to promulgate standards for the certification of mold inspectors, remediators, testing laboratories, and risk assessors; and (4) the Secretary to establish inspection requirements for existing public housing and mold construction standards for new public housing and buildings.

If faced with a mold issue, installation attorneys may obtain guidance from their MAJCOM environmental attorney and should immediately notify AFLSA/JACE of FTCA related mold claims.

TRIAL NOTEBOOK

Defining The Age of A Minor

Major Brian Thompson*

Nineteen-year-old Airman Smith's 16-year-old girlfriend, with whom he had a sexual relationship, emails him four digital pictures of herself in what can only be described as sexually explicit poses. OSI agents find these pictures on Airman Smith's home computer.

Can the Government charge him with possession of child pornography under Article 134? In other words, under military law is it legal for a 19-year-old Airman

to have consensual sex with his 16-year-old girlfriend, but illegal for him to view sexually explicit pictures of her? Because under military law a "minor" is a person under the age of 16 years old, rather than 18 years old, the answer is no.

That the answer is "no" creates problems for past, present, and future Article 134 child-pornography prosecutions--sufficiency of the evidence, findings instructions, and *Care*¹ inquiries are all potentially called into question. But before discussing the potential effect, how we get to that no.

Statutory Framework

The federal Child Pornography Protection Act (CPPA)² criminalizes the possession of images showing "minors" engaged in sexually explicit conduct. In *Ashcroft v. Free Speech Coalition*,³ the United States Supreme Court held that the First Amendment requires that any prosecution under the CPPA be based on proof that the children involved are "real children," i.e. not "virtual" child pornography, not images of persons that "appear to be" children. In *United States v. O'Connor*,⁴ the Court of Appeals for the Armed Forces (CAAF) extended this holding to child-pornography charges brought under clause 3 (assimilated crimes) of Article 134.

Primarily due to the lingering constitutional issues surrounding the CPPA, the Air Force has been bringing child-pornography cases under clause 1 (prejudicial to good order and discipline) and clause 2 (service discrediting) of Article 134. The charge is usually a version of this: that the accused "wrongfully and knowingly possessed visual depictions of a minor engaging in sexually explicit conduct, which conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces." Such charges are thus brought without reference to any constitutionally suspect federal statute.⁵

Under the CPPA, a "minor" is defined as a person under the age of 18 years old.⁶ But this was not always the case. Until 1984, the CPPA defined a "minor" as a person under the age of 16 years.⁷ Under military law, however, there is no similar overarching definition of the age of a "minor" or "child" for prosecutions under Article 134, or the entire UCMJ.

Throughout the military, statutory law (*i.e.* the punitive articles), a "child" is by default defined as a person under the age of 16 years. This is true of Article 120 (carnal knowledge), Article 125 (sodomy), Article 128 (assault upon child under 16 years of age), and Article 134 (indecent acts or liberties with a child). Plainly then, a non-§2252A, child-pornography prosecution under clause 1 or 2 of Article 134 criminalizes possession of images of persons under the age of 16 years.

Resolving Potential Ambiguity

But even assuming there is ambiguity in the language of the statutory scheme on this point—*i.e.* that it is unclear what the age of a “minor” is for Article 134 prosecutions—application of basic rules of statutory construction leads to the same answer.

In this regard, CAAF has long held that the whole panoply of rules of statutory construction applies when interpreting the punitive articles of the UCMJ.⁸ While there are more than a few such rules, the basic ones are well settled: “a court should interpret the statute as a coherent whole and give consistent meaning to terms throughout the statute.”⁹ To that end, “phrases within a single statutory section be accorded a consistent meaning,” and the court must read the statute as a “coherent whole,” being mindful that “the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail.”¹⁰

In *United States v. Brinston*,¹¹ CAAF summarized the applicability of these general principles in military law contexts: legislative intent in enacting a statute should be gleaned from the statute as a whole rather than from any of its parts, “the entire act must be read together because no part of the act is superior to any other part,” and “statutes *in pari materia* must be construed together.”¹²

Reading all sections of the Act (the punitive articles of the UCMJ) as a coherent whole—“*in pari materia*”—the UCMJ contemplates a “child” or “minor” being a person under the age of 16 years. At every point where the age of a “minor” is an issue, even in Article 134 itself, the UCMJ contemplates that age as under 16 rather than 18 years. Thus, interpreting the statutory scheme to contemplate that a “minor” or a “child” is a person under the age of 16 years “produces the greatest harmony and the least inconsistency” and should be the interpretation that controls.

In fact, the Government itself has recognized that a “minor” or “child” for purposes of military law is a person under the age of 16 years old. In 1999, the President issued an executive order amending the Military Rules of Evidence to add Mil.R.Evid. 611(d) and the Rules of Courts-Martial to add R.C.M. 914A, both allowing for remote live testimony of a “child.”¹³

In *United States v. McCollum*,¹⁴ CAAF noted that the President made these changes to conform military law to federal law. Then and now, 18 U.S.C. §3509 established procedures for remote live testimony of a “child,” and defined a “child” as “a person under the age of 18.”¹⁵ But when the President promulgated Mil.R.Evid. 611(d) he defined “child” as “a person who is under the age of 16.”¹⁶ Neither *McCollum*, nor the Executive Order promulgating Mil.R.Evid. 611(d), detail why the age of “child” differs from federal

“statutory” law (*i.e.* §3509) to military “administrative” law (*i.e.* Mil.R.Evid. 611(d)(1)). The natural conclusion is that it differs because the President believed that under military law the age of a “minor” or “child” is one who is under 16 rather than 18 years.

Rule of Lenity

But even if someone could reasonably argue that the term “minor” in an Article 134 child-pornography charge is still ambiguous, that simply means the rule of lenity should apply. The United States Supreme Court has long held that in situations where the judiciary is tasked with imputing to the legislature an undeclared will, any ambiguity is resolved most favorably to the accused.¹⁷ CAAF has adopted this “rule of lenity,” particularly when construing ambiguity in the punitive articles.¹⁸

Lenity is “reserved ... for those situations in which a reasonable doubt persists about a statute’s intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.”¹⁹ But the real function of the rule of lenity is to read language to prevent surprises.²⁰ This itself corresponds to another “deeply rooted rule of statutory construction”—that an interpretation that leads to absurd results should be avoided.²¹

Lenity resolves any remaining ambiguity in favor of the accused. To the extent that the Government brings a charge under a military criminal statute (Article 134), that charge must be consistent with what the statutory scheme criminalizes. Here, that requires one to conclude that a child-pornography prosecution under clause 1 and 2 of Article 134 criminalizes the possession of images of persons under 16 years old, not those between 16 and 18 years old. To say otherwise is to lead to absurd results. To say that a “minor” for purposes of an Article 134 child-pornography charge is a person under the age of 18 years is to say that a service member could have sexual contact with a person between the ages of 16 and 18, but could not look at a naked picture of the same person. A young service member in that position would undoubtedly be surprised at this result—applying the rule of lenity ensures that there is no such surprise.

Thus, whether by a plain reading or by application of the basic rules of statutory interpretation, the conclusion is inescapable that under military law a “minor” is a person under the age of 16 years old. That this is true raises more than just theoretical problems.

The More-Than-Theoretical Potential Problems

The voluntariness of a guilty plea depends on an accurate discussion of the elements of the offense.

Defining a minor as a person under the age of 18 years old in a *Care*²² inquiry, when the law is that a minor is actually under the age of 16 years, should raise an issue as to the validity of a plea. Having instructed members that the age of a “child” is under 18 years old, when legally it should be under 16 years old, could likewise call into question guilty verdicts based on such erroneous instruction.

Admittedly, with the terrible pictures of very young children present in many child-pornography prosecutions, this may not be an issue in every plea to or conviction of possession of child pornography. But it is an issue in the more marginal cases, cases where the defense can raise a reasonable argument that the individual depicted may appear to be young, but may actually be 16 years old or older. With Tanner staging²³ based on the age of majority being 18 years old, factually it will be more difficult for the Government to prove in these weaker cases that the individual depicted is under the age of 16 years.

There does not seem to be a simple solution to this problem. Simply charging under clause 3 of Article 134 carries with it the remaining constitutional uncertainty of the CPPA. Charging under clause 1 and 2 of Article 134, but expressly defining the age of a minor as under 16 years old in the specification, raises its own issues as to the validity of such a charge. However such problems are fixed, the answer is clear: under military law a “minor” is a person under the age of 16, rather than 18, years.

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¹United States v. *Care*, 40 C.M.R. 247 (1969).

²18 U.S.C. § 2252A.

³535 U.S. 234 (2002).

⁴58 M.J. 450 (C.A.A.F. 2003).

⁵See Captain Christa S. Cothrel, *The Continuing Criminality of Virtual Child Pornography in Light of the Ashcroft Decision*, THE REPORTER (June 2002); see also *United States v. Irwin*, 60 M.J. 23 (C.A.A.F. 2004)(effectively approving of the clause (1) and (2) charging decision).

⁶18 U.S.C. § 2256(1).

⁷18 U.S.C. § 2256(1).

⁸See *United States v. Brinston*, 31 M.J. 222, 226 (C.M.A. 1990).

⁹*Castro v. United States*, 310 F.3d 900, 902 (6th Cir. 2002); see also *United States v. Maxwell*, 285 F.3d 336, 340-341 (4th Cir. 2002)(quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *United States v. Johnson*, 325 F.3d 205, 208-09 (4th Cir. 2003)(“the Supreme Court has recognized that statutory construction ‘is a holistic endeavor.’ ... We thus employ the traditional tools of statutory interpretation, examining language in the context of the statute as a whole, ... the overall statutory scheme, ... and other relevant enactments ...”)

¹⁰310 F.3d at 902 (citations omitted); see also *Market Co. v. Hoffman*, 101 U.S. 112, 115-116, (1879).

¹¹31 M.J. at 226.

¹²See also *FTC v. Ken Roberts Co.*, 276 F.3d 583, 589 (D.C. Cir. 2001)(“in pari material—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context.”)(quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972)).

¹³64 Fed.Reg. 55,155 (9 October 1999).

¹⁴58 M.J. 323, 330 (C.A.A.F. 2003).

¹⁵18 U.S.C. § 3509(a)(2).

¹⁶Mil.R.Evid. 611(d)(1).

¹⁷See *Hughey v. United States*, 495 U.S. 411, 422, (1990)(explaining that lenity principles “demand resolution of ambiguities in criminal statutes in favor of the defendant”); *United States v. Reedy*, 304 F.3d 358, 368 (5th Cir. 2002)(citing *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

¹⁸*United States v. Miller*, 47 M.J. 352, 357 (C.A.A.F. 1997); *United States v. Cartwright*, 13 M.J. 174, 176 (C.M.A. 1982)(“where there is some ambiguity growing out of congressional silence under the circumstances, the doubt must be resolved in favor of lenity.”); *Brinston*, 31 M.J. at 226.

¹⁹*Moskal v. United States*, 498 U.S. 103, 108, (1990) (internal quotation marks omitted); *United States v. McNab*, 324 F.3d 1266, 1276 (11th Cir. 2003); *United States v. Pearson*, 321 F.3d 790, 791 (9th Cir. 2003).

²⁰See *Staples v. United States*, 511 U.S. 600, 619, (1994); *United States v. Lange*, 312 F.3d 263, 266 (7th Cir. 2002).

²¹*Diaz v. United States*, 54 M.J. 880882 (N.M.C.C.A. 2000); *United States v. Hodge*, 321 F.3d 429, 434 (3rd Cir., 2003); *United States v. Tinoco*, 304 F.3d 1088, 1111 (11th Cir. 2002); *Rowley v. Yarnall*, 22 F.3d 190, 192 (8th Cir. 1994).

²²*United States v. Care*, 40 C.M.R. 247 (1969).

²³Tanner staging is a pediatric tool, designed for estimating developmental age for medical, educational, and sports purposes. Though its use as a forensic tool has been widely criticized, even by Dr. Tanner himself, the model often underlies “expert” testimony as to the age of persons depicted in contested images.

Defining The Age of A Minor: A Different Point of View

Major Chuck Wiedie*

As Major Brian Thompson eloquently points out, there is a significant difference in the “age of consent” under the federal Child Pornography Protection Act and the Articles of the UCMJ dealing with sex crimes involving “children.” While this author recognizes the issues this difference presents, I disagree that such a difference forecloses prosecution of a military member who possesses sexually explicit images of a 16 or 17 year old. Rather, these differences should be considered when determining whether to take disciplinary action against a person and, if so, the proper forum for such action.

Does the UCMJ Define the Age of a Minor?

Under the UCMJ the age of consent for sexual activity is 16. That is not in dispute. The question is whether the UCMJ actually defines a “minor” or a “child” as one under the age of 16. No express defini-

tion can be found in the UCMJ.

Three Articles of the UCMJ expressly deal with sex crimes against “children.”¹ One could argue (as Major Thompson does) that, by default, a child is defined as someone under the age of 16. In this author’s opinion, however, this ignores a plain reading of the language of the subject Articles.

Article 120, UCMJ, defines carnal knowledge as “sexual intercourse under circumstances not amounting to rape, with a person who is not the accused’s spouse and who has not attained the age of 16 years.” The age of consent is provided in this definition but the terms “child” and “minor” are not used in the definition. Furthermore, throughout Article 120, carnal knowledge is discussed in terms of sexual intercourse with a person who has not attained the age of 16 years. The term “child” is only used to describe a victim of carnal knowledge in two sections of the Article. The term “child” appears under the definition of “force and lack of consent,” but deals with a “child of such tender years he or she is incapable of understanding the nature of the act.” This clearly deals with a child well under the age of 16 years. The term “child” is also used in the maximum punishment portion of the Article. The Article distinguishes punishments for one who has committed carnal knowledge “with a child who, at the time of the offense, has attained the age of 12 years” and one who has committed carnal knowledge “with a child under the age of 12 years at the time of the offense.” This use of the term “child” without providing a definition of the term does not create an ambiguity that must be read against the Government. Carnal knowledge is, by definition, sexual intercourse with a person under the age of 16 years and, thus, it is unnecessary to define the term “child.” The simple fact that the drafters of the Article acknowledge that someone under 16 is a “child” does not mean, by default, that only those under the age of 16 years qualify as a “child” for purposes of the UCMJ.

Article 125, UCMJ, provides for different punishments for consensual sodomy with (a) “a child under the age of 12 years”; (b) “a child who ... has attained the age of 12 but is under the age of 16 years”; and (c) all others. The drafters of the code, as evidenced by the increased maximum punishment for sodomy with a child under the age of sixteen, clearly attached significance to that age. Nonetheless, the fact that they referred to “a child ... under the age of 16 years” leaves open the possibility of defining a “child” as someone under the age of 18 years for other purposes under the Code.

Similarly, Article 134, UCMJ, (indecent acts or liberties with a child) clearly refers to acts with a “child under 16 years of age.” (emphasis added). The use of

this particularized language distinguishes between the general definition of a child (under the age of 18 years) and the age under which these acts are criminal (under the age of 16 years).

While the drafters of the UCMJ clearly decided upon the age of 16 years as the age of consent for sexual activity (not amounting to sodomy), the plain language they chose to employ does not foreclose the use of a different age to address a different criminal act. If the drafters wanted to so limit the definition of a “child,” they could have done so by defining a “child” as someone under the age of 16 years in the explanation sections of the respective articles. They did not do so. Every reference to a “child” in the UCMJ clearly contains qualifying language which makes it clear that the term is not limited to someone under the age of 16 years. The UCMJ refers to a “child under the age of 16 years,”² “a person under the age of 16 years,”³ a “child of such tender years”⁴ and commission of carnal knowledge (which by definition is sexual intercourse with a person under the age of 16 years) “with a child.”⁵ No where is the term “child” used in such a way to limit its application to only those under the age of 16 years.

Child Pornography and Clauses 1 and 2 of Article 134, UCMJ

As Major Thompson noted, the Air Force has, in some instances, been bringing child-pornography cases under clause 1 (prejudicial to good order and discipline) and clause 2 (service discrediting) of Article 134, UCMJ. The benefit of charging a case this way is that it does not matter whether the child pornography in question is real or virtual, as long as the conduct in question is prejudicial to good order and discipline or service discrediting. The criminality of an Article 134, UCMJ, clause 1 or 2 offense is the adverse impact upon the military service. It is not necessary that the conduct itself otherwise be a crime. Many “non-crimes” have been successfully prosecuted under clause 1 and 2 of Article 134, UCMJ.⁶

The fact that the UCMJ establishes 16 as the age of consent for sexual activity does not prevent the use of Article 134, UCMJ, clause 1 or 2 to charge child pornography. If the Government is faced with a situation similar to the hypothetical presented by Major Thompson, *and* a decision is made to take the case to court-martial, the best course of action is to charge the offense under 18 U.S.C. §2252A. This is true for two reasons. First, the victim is a real, identifiable minor. The reason the Air Force has generally chosen to charge a case under Article 134, UCMJ, clause 1 or 2 rather 18 U.S.C. §2252A following the *Ashcroft v. Free Speech Coalition*⁷ decision is the difficulty of

proving the use of a real child in the pornography. In Major Thompson's hypothetical, this proof problem does not exist. Second, an Article 134, UCMJ, clause 1 or 2 charge may actually be harder to prove. If the accused is engaged in a legal, sexual relationship with the person depicted in the pornography, the finder of fact may be unwilling to find, beyond a reasonable doubt, that the conduct is prejudicial to good order and discipline or service discrediting.

The Military is Not Alone

The issue raised by Major Thompson is not unique to the military. In fact, many states (including Alaska,⁸ Georgia,⁹ Hawaii,¹⁰ Kansas¹¹ and Kentucky¹² to cite a few) define the age of consent for sexual activity as 16 years old but define child pornography as sexually explicit images of children under the age of 18 years. Even the United States Code establishes different ages for consent to sexual activity and the definition of child pornography. 18 U.S.C. §2252A defines child pornography, in part, as sexually explicit images of a child under the age of 18, but 18 U.S.C. §2246 makes the age of consent for sexual activity 16 years of age.

There is not an ambiguity in the law. The differences reflect a conscious decision on the part of the states and the federal government to establish different age guidelines for dealing with child pornography and the sexual conduct of minors.

The Court in *Ashcroft v. Free Speech Coalition* recognized the difference in these laws, noting "[u]nder the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations."¹³ Nonetheless, the court did not strike down the portions of 18 U.S.C. §2252A that dealt with child pornography involving real children under the age of 18 years.

While the Court's acknowledgement of the issue is far from conclusive on the issue, the Court's failure to express any concern with the differences is persuasive argument that the Court does not view the difference as an issue. Furthermore, at least one federal circuit court has addressed the issue and did not find the age distinctions to be unconstitutional.

In *United States v. Bach*,¹⁴ the 41-year-old defendant took pictures of a 16-year-old boy masturbating and engaging in oral sex. As a result, he was charged with various violations of 18 U.S.C. §2252(a). The defendant argued on appeal that these photos portrayed non-criminal, consensual sexual conduct because the boy was 16 and the age of consent under Minnesota and federal law is 16. He contended that the images were

protected by the liberty and privacy components of the due process clause of the Fifth Amendment under *Lawrence v. Texas*.¹⁵ The government responded that the relevant definition of a minor for the offenses in question is found in 18 U.S.C. §2256, which defines a minor as any person under the age of 18 years. The government further asserted that Congress had a rational basis for criminalizing pornography involving this age group and that the defendant's activities were not protected under the First or Fifth Amendments, pointing out that *Lawrence* did not involve a minor or the production and distribution of child pornography.¹⁶

The court rejected the defendant's *Lawrence* argument and concluded "that the congressional choice to regulate child pornography by defining minor as an individual under eighteen is rationally related to the government's legitimate interest in enforcing child pornography laws, and that Bach's convictions for possessing, transmitting, and manufacturing any visual depiction produced using a minor engaged in sexually explicit conduct should be affirmed."¹⁷

More to Come?

Although its decision will not be binding on the military, the Nebraska Supreme Court is set to weigh in on this issue in the very near future. Todd Senters, a 31-year-old former school teacher, was convicted under a state child pornography law for making a sexually explicit video of his 17-year-old girlfriend and former student. Under Nebraska law, like the laws of many other states, it is legal to have sex with someone 16 years of age or older but it is illegal to videotape the sex act if the person is under the age of 18. Senters has appealed his conviction relying primarily on the Supreme Court's decision in *Lawrence*. Whatever the outcome, the publicity this case has generated should increase the frequency with which this issue is raised in the state and federal courts.

Although the UCMJ does not define a "child" or "minor" as someone under the age of 16 and the courts have yet to find the age distinction in the various statutes unconstitutional, prosecutors should take the differences in the law into consideration when making charging decisions. Should a 19-year-old Airman be charged with possessing sexual explicit images of his 17-year-old girlfriend when it is not a crime for him to have sexual relations with her? The answer to that question must be driven by all of the facts of the particular case. It may be that a court-martial is inappropriate under those circumstances. Nonetheless, it is the position of this author that, under the current state of the law, the government is not precluded from bringing charges in such a case.

Because reasonable minds can differ on this issue,

defense counsel should continue to raise it and government counsel should be prepared to address it. Until the Supreme Court expressly rules on the issue, it is far from settled.

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¹Articles 120 (rape and carnal knowledge); 125 (sodomy) and 134 (indecent acts or liberties with a child), UCMJ.

²Article 125, UCMJ, paragraphs b(2); d(1); d(1)(b); e(2) and f; and Article 134, UCMJ, paragraph c(2).

³Article 120, UCMJ, paragraphs a(b)(2); a(d)(1)(B); b(2)(c); c(2); and f; and Article 134, UCMJ, paragraphs b(1)(b) and b(2)(d).

⁴Article 120, UCMJ, paragraph c(1)(b).

⁵Article 120, UCMJ, paragraphs e(2) and e(3).

⁶Offenses prosecutable under Article 133 and Article 134, UCMJ, clauses 1 and 2, include: cross-dressing (*United States v. Guerrero*, 33 M.J. 295, 298 (C.M.A. 1991)); *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988)); making false statements about military operations to a high school assembly (*United States v. Stone*, 40 M.J. 420, 424-25 (C.M.A. 1994)); asking strangers of the opposite sex intimate questions about their sexual activities (*United States v. Sullivan*, 42 M.J. 360, 366 (C.A.A.F. 1995)); displaying a non-pornographic magazine to a child (*United States v. Orben*, 28 M.J. 172, 174 (C.M.A. 1989)); writing a sexually suggestive letter to a child (*United States v. Hartwig*, 39 M.J. 125, 130 (C.M.A. 1994)); telling an enlisted service member how to avoid detection by urinalysis (*United States v. Norvell*, 26 M.J. 477 (C.M.A. 1988)).

⁷535 U.S. 234 (2002)

⁸See, Alaska Stat. § 11.61.127 (2004) (defining child pornography as a depiction of a child under 18 years of age); Alaska Stat. § 11.41.436 (2004) (making it a crime to engage in sexual penetration of a child under 16 years of age).

⁹See, O.C.G.A. § 16-12-100 (2004) (defining a minor as under 18 years of age for the purposes of child pornography statute); O.C.G.A. § 16-6-3 (2004) (defining statutory rape as sexual intercourse with a person under the age of 16 years).

¹⁰See, HRS § 707-750 (2004) (defining a minor as under 18 years of age for the purposes of child pornography statute); HRS § 707-732 (2004) (defining the age of consent as 16 years for purposes of sexual contact).

¹¹See, K.S.A § 21-3516 (2005) (defining a minor as under 18 years of age for the purposes of child pornography statute); K.S.A § 21-3504 (2005) (defining the age of consent for sexual activity as 16 years).

¹²See, KRS § 510.060 (2004) (make it a crime to use a minor under 18 years of age in a "sexual performance"); KRS § 510.060 (2004) (setting the age of consent for sexual activity as 16 years).

¹³*Ashcroft* at 247.

¹⁴400 F.3d 622 (8th Cir. 2005)

¹⁵539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003)

¹⁶*Bach* at 628.

¹⁷*Id.* (the court further noted that "Congress changed the definition of minor in the child pornography laws in 1984 to apply to anyone under eighteen. It found that the previous ceiling of sixteen had hampered enforcement of child pornography laws. With that ceiling there was sometimes confusion about whether a subject was a minor since children enter puberty at differing ages.")



Revising the IG Complaint Process

Lieutenant Colonel Lisa L. Turner

Recently, Air Force Instruction 90-301, *Inspector General Complaints Resolution*, (8 Feb 05) was significantly revised and republished. Attorneys who advise on Inspector General (IG) matters should review the instruction in detail. Those, such as trial and defense counsel, who need to obtain IG records will find substantial changes to the release process. Legal offices should review the changes with a mind to assisting commanders and IGs in training the installation population on IG matters.

The instruction is primarily aimed at installation IGs, it streamlines and simplifies their processes. Significantly, the distinction between category I and category II investigations has been eliminated and the Report of Investigation (ROI) has been combined into a single format. The Summary Report of Investigation has been eliminated and a thorough complaint analysis is now mandatory for *all* complaints.

Protected Communications

The revision clarifies the definition of protected communications and who may receive them. For example, Command Chief Master Sergeants, First Sergeants, and their Air National Guard/Air Force Reserve equivalents are now designated, in addition to any person in the chain of command, as individuals entitled to receive protected communications. (para. 3.16.1.2.1) USAFA Cadets may also make protected communications to personnel assigned to the Cadet Counseling and Leadership Development Center. This is a significant change and IGs, commanders, Staff Judge Advocates (SJAs), and servicing legal offices should work to ensure newly designated individuals understand whistleblower protections.

Investigating Officers

There are several clarifications regarding the Investigating Officer (IO). The instruction now explicitly states that IGs and IG staff members should not be appointed as inquiry or investigation officers for com-

mander directed inquiries. (para. 1.27.3)

The instruction removes the prohibition of the IO being in the subject's chain of command. (para 2.34.5) However, it reinforces the requirement that there must be either a separation of at least one level of command between the IO and the complainant and between the IO and subject(s) of the investigation or, that the IO be separated by functional assignment from the complainant and the subject(s) of the investigation. (para. 2.34.6)

Except in Senior Official investigations, the IO will be equal to or senior in grade to the subject of the investigation. If a civil service employee is assigned as the IO, the IO will be of a civilian-equivalent or senior in grade to the subject. (para. 2.34.5) Appointing Authorities are now instructed that if an IO with the requisite grade is not "reasonably available" for appointment, the Appointing Authority *will* request a written waiver from the MAJCOM/IG. (para. 2.34.5.2)

As in the past, an IO must be appointed in writing within three duty days of any verbal appointment, the investigation will be the IO's primary duty, and appointing authorities *must* not appoint an IO who is retiring, separating, PCSing, or deploying within 180 days of the appointment. (para. 2.34.7-2.34.9)

Dismissing Complaints

When a complainant delays reporting beyond 60 days of learning of the wrongdoing, no extraordinary circumstances justify the delay, and there is no special AF interest in the matters alleged, authority is now expressly provided for the IG to dismiss the complaint if, given the nature of the alleged wrongdoing and the passage of time, there is reasonable probability that insufficient information can be gathered to make a determination. However, if it is possible to gather sufficient information, an investigation may be warranted. (Table 2.13, rule 3 and note 1) IGs should use caution in such matters and consult with the SJA or servicing legal office.

Collecting Evidence

Witness interviews are usually the primary method for the collection of evidence. Interview formats are provided, which the IOs must tailor dependent upon

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whom they are interviewing. (para. 2.42.2.1) The SJA or servicing legal office should assist in this process.

Additional clarification has been provided on subject and suspect interviews. The subject *should* be interviewed last and provided with the opportunity to respond to allegations against him or her. When significant adverse information is developed subsequent to the subject's interview, the IO should give him or her a reasonable opportunity to respond to the new information. (para. 2.42.1.2) Subjects are also to be instructed that they may submit additional relevant information for the IO's consideration within a reasonable time following the interview. (Para. 2.42.2.2)

Reports and Legal Reviews

For specific guidance on how to write a ROI, appointing authorities must refer IOs to the instruction and the SAF/IGQ *IO Guide* found on the SAF/IGQ web site (<http://www.ig.hq.af.mil/igq>.)

Legal reviews are required, at a minimum, on all ROIs before the Appointing Authority approves the report and its findings. (para. 2.61) In addition to prohibiting one individual from both advising the IO and performing the legal review, the instruction now states that a subordinate of the attorney who advises the IO must likewise not perform the legal review. (para. 2.61.2) Practically, this means that in most legal offices, the Deputy Staff Judge Advocate (DSJA) or another senior experienced attorney should advise the IO and the Staff Judge Advocate (SJA) should review the ROI for legal sufficiency.

IOs are now told in the instruction, that when counsel represents a suspect for the same matter as that under investigation, the IO must notify the counsel of a prospective interview. (para. 2.46.4) The SJA or servicing legal office will be instrumental in assisting in the determination of who is a suspect, rather than simply a subject, as well as counsel notifications.

Releasing Information

In the past, IGs were instructed that "protecting confidentiality is a fundamental principle of IG operations." The confusion caused by use of the term "confidentiality" has been removed by replacing it with a description of the IG's requirement to "safeguard" information as much as possible. (para. 2.3) The instruction now states that IGs and IOs have no authority to grant express promises of confidentiality. (paras. 2.39.10, 2.40.7) They are instructed to strictly limit disclosure of communications made to an IG (and the identify of the communicant) on an offi-

cial need-to-know basis (para. 2.3) The absolute prohibition against divulging a complainant's name to a subject or witness, or permitting a witness to read the complaint without the Appointing Authority's written approval has been removed from the instruction. IGs are now provided discretion in the releases, as they are now instructed that they "should" not, rather than "will not" release the information. (para. 2.3.2)

The process through which IG records are released is primarily addressed in chapter 4. This chapter was rewritten with a view toward making release more permissive and bringing it in line with existing release mechanisms, such as the Freedom of Information Act (FOIA). All release provisions are clarified and must be consulted, particularly because now all Official Use Requests (OUR), FOIA, and Public Affairs (PA) requests must be coordinated with the servicing legal office, and denials require written legal reviews. (para. 4.15.1)

The legal office may act on the commander's behalf when obtaining information under an OUR. (para. 4.7) This provision is particularly important as it relates to using IG information for military justice actions. For example, commanders are instructed to consult with the legal office to determine what information should be released in response to a defense counsel discovery request. Of note, the instruction carefully sets out FOIA/PA requests as a separate process. (para. 4.12) A request by an individual for their own records must be considered under both PA and FOIA, even if the requestor does not cite either act. (para. 4.15.2) The instruction also explicitly prohibits the subject and defense counsel from further releasing the IG information to anyone other than to witnesses as necessary to prepare the subject's defense (para. 4.7.1.3.3)

Special Interest Notification Requirements

Staff Judge Advocates are reminded to ensure that commanders, IGs, Equal Employment Opportunity (EEO)/Military Equal Opportunity (MEO), and civilian personnel offices are aware of and are complying with their responsibilities to *immediately* notify SAF/IGS or SAF/IGQ through their MAJCOM and chain of command of all allegations of wrongdoing or adverse information against a Senior Official, colonel (or equivalent). In addition to Article 15 and court-martial actions, notification requirements include matters resolved by lesser forms of administrative action.

Matters at the allegation stage must also be immediately reported. The exception to this requirement is if

"The significant changes in AFI 90-301 have direct impact on the IG system and the support provided to that system by all levels of legal offices."

the complaint is against a colonel (or equivalent), is obviously frivolous and which, if true, would *not* constitute misconduct, or improper or inappropriate conduct. (paras. 3.2.1.3, 3.8) A complaint is frivolous if it fails to allege facts that, if true, would constitute a violation of an articulable standard, whether defined by statute, regulation, or custom of service. At a minimum, an IG must conduct a complaint clarification before making such a determination. (Atch 1- Frivolous Allegation)

This revision also changes the procedures that EEO offices must follow to report allegations against senior officials and colonels (or equivalent) to SAF/IGS and SAF/IGQ. EEO will now report these allegations to SAF/MRBA (Air Force Civilian Appellate Review Office), who will report to SAF/IGS or IGQ, as appropriate. (para. 3.2.1.3, 3.8) Processing of Equal Opportunity Treatment (EOT) complaints is also clarified. (para. 3.45)

The significant changes in AFI 90-301 have direct impact on the IG system and the support provided to that system by all levels of legal offices. Staff Judge Advocates or servicing legal offices must be fully engaged in assisting the IG to properly interpret and implement the revised instruction, as well as to assist in training the installation population.



1 May 1955: A Career Field is Born

Master Sergeant Andre R. Allen

Prior to 1955, an enlisted legal specialty in the Air Force did not exist. Administrative specialists who received on-the-job training within legal offices accomplished “Paralegal” duties. The Paralegal career field that we know today evolved from the publishing of *Air Force Manual 35-1C, Warrant Officer and Airman Classification Manual, 1 July 1954*. This manual officially established the “legal specialist” career field, which was implemented on 1 May 1955. No longer did our early paralegal pioneers have to move from base to base with only a letter from a Staff Judge Advocate in their records as verification of their training and experience; they now had an established foundation on which to build a career field of skilled, trained enlisted professionals.

This year, as we celebrate our 50th anniversary as a career field, we should take a moment or two to reflect on our proud history. We owe a debt of gratitude to those trailblazers who paved the way; a once rough road is now a superhighway on which we can travel with ease, limited only by the speed of our imagination and creativity. Our predecessors have planted the seeds and they have taken root; today, we are a vital part of the JAG Corps. We should not be content to merely reap the fruits of the hard labor of those who have led the way; we should water and cultivate the vast garden of knowledge, history and tradition that they left behind. We should honor their legacy by planting new seeds and clearing new paths for the Air Force paralegals of tomorrow.



MSgt Andre R. Allen is currently the Special Assistant to the Senior Paralegal Manager to TJAG. He entered the Air Force in 1986 as an Aircraft Electrical Systems Specialist, where he deployed numerous times around the world. In 2001 he retrained into the paralegal career field and served as the NCOIC of Claims, Civil Law and Military Justice with Headquarters 11th Wing, Washington, D.C.



CMSgt Steve Swignowski (l) and Maj Gen James S. Cheney stand in front of a display of Chief Swignowski's memorabilia in the Air Force Judge Advocate General School Heritage Room.

CMSgt Steve Swignowski: The First Special Assistant to TJAG for Legal Airmen Affairs

Excerpt from the TJAG Corps publication: The First Fifty Years of the USAF JAG Department.

In the summer of 1970, Chief Master Sergeant Steve Swignowski was ready to retire unexpectedly, he was asked to withdraw his retirement papers so he could be considered for the Special Assistant [to TJAG for Legal Airmen Affairs] position. Initially, he was not interested, but a number of people convinced him to change his mind. One of those was General Vague (PACAF SJA) himself. Chief Swignowski had previously worked for General Vague and frequently had asked for his help in making improvements to the career field. Now General Vague told the Chief that he had a chance and therefore a responsibility to do something about it. General Cheney's Executive Officer announced on 15 Sept 1970, that CMSgt Swignowski had been selected as the first person to occupy the newly created position of Special Assistant to TJAG for Legal Airmen Affairs. His responsibilities were “managing the legal airmen career program” and he reported directly to TJAG. This appointment would

have an incredibly positive and notable affect on the enlisted legal career field.

Chief Swigonski left immediately for Washington. General Cheney told him that the number one problem he needed to tackle was the retention rate and training in the enlisted legal field. At the time, retention was an amazing 0% for first-termers. General Cheney gave the Chief carte blanche to decide how to fix these problems. Chief Swigonski decided that the best place to focus his initial efforts would be on an Air Force paralegal training course. Legal specialists at the time were still attending the Naval Justice School in Rhode Island. In early 1969, the Special Activities Group had conducted a study and proposed that the Air Force establish its own school for training legal specialists. The Air Force responded that the proposal was not feasible due to lack of funds and that it would make more sense to continue devoting scarce resources to supporting the Navy school. General Cheney thought Chief Swigonski would be "spinning his wheels" to pursue that course again, but told him if he wanted to try, it was up to him.

Chief Swigonski made a trip to the Naval Justice School in 1971 to observe the operations there. While there, he met with the Air Force attendees and was particularly shocked by the conditions. He also reviewed the courses and confirmed the course was too Navy and geared to the level of an administrative assistant, not a paralegal. He said he could not convince the staff at the school of the high level of responsibility that legal specialists had in the Air Force – they simply would not believe him.

Armed with this information, Chief Swigonski found the previous package that the Office of TJAG had submitted requesting establishment of the school and re-submitted it with additional justification. In less than a year, he received approval for the course. He picked four individuals to initiate the program, headed by MSgt Bill Sutton. The small staff was assigned a building on Keesler Air Force base. Chief Swigonski credited those four individuals with literally creating the school's facilities out of nothing, painting the

building as a self-help project and building shelves out of salvage material. The school opened in January of 1972, less than a year after Chief Swigonski first started pursuing its establishment. Seventeen years after the establishment of the career field our own paralegal course is developed and the doors open.

Another way that CMSgt Steve Swigonski sought to handle the low retention rates for enlisted legal specialists was to initiate the approval of a legal specialist badge. Chief Swigonski queried the field, and the general consensus was that the enlisted legal field needed something that would boost morale, promote team-

work and distinguish themselves as legal specialists. An enlisted specialty badge seemed to be the solution. Unfortunately, Chief Swigonski's request was disapproved.

Refusing to give up, Chief Swigonski continued his quest for increased enlisted legal specialist retention by seeking approval for the wear of a two-line nametag. The two-line nametag would easily identify the enlisted member as a legal specialist and a proud member of the JAG Department (Corps). With the Chief of Personnel's opinion as an ally, Chief Swigonski convinced TJAG to authorize the two-

line nametag in August of 1971.

From Our Humble Beginnings

Our trailblazer, Chief Swigonski is very proud of the direction we are heading. We have come an extremely long way in our training and retention of first-term paralegals. The paralegal course moved from Keesler AFB in 1993 to the JAG School at Maxwell AFB. The Paralegal Craftsman Course was developed in 1995. Paralegals are allowed to attend historically attorney only courses. We received approval for the paralegal badge in 1994, through the advocacy of CMSgt Dennis P. Spitz. We moved from 6-part AF Form 176, manual adjudication, basic data entry program CAMP to automated adjudication and electronic data collection program, AFCIMS. We went from the carbon set AF Form 3070 and AMJAM input forms to on-line web based AMJAMS which electronically generates the AF Form 3070.

Our retention rate for first-termers is 92%--Chief



Paralegal graduation photo for class 720329A after training at Keesler AFB. (front, left to right) TSgt De Shaw, SSgt D. Segin, Sgt J. Holland, AIC L. Doyle, AIC G. Outten, AIC F. Cross, Amn T. Baker, and guest speaker Lt Col C. Slagle, Jr.; (back, left to right) Sgt J. Burge, Sgt S. Hefner, Amn C. Nowack, Amn F. Wilkes, Amn S. Rumery, Amn C. Parker, and Amn L. Turner

Swigonski's efforts blazed this trail. We went from a retraining career field only to accepting Non-prior Service applicants. These are but a few of the many accomplishments we have cultivated over the past 50 years. Paralegals have supported and contributed to the security of our Nation and the Air Force, from Vietnam to OPERATION IRAQI FREEDOM and the Global War on Terrorism.

Our beginnings started with seeds planted by Chief Swigonski and watered through the years by numerous others. We continue today to cultivate and grow these seeds into the best Airmen, paralegals, professionals and leaders of the world's greatest Air Force.

EDITOR'S CORNER

THE REPORTER GOES DIGITAL!

Since 1973 *The Reporter* has been providing JAGs and paralegals in the field with timely and useful articles relevant to the day to day practice of military law. *The Reporter* will continue to provide this critical information, albeit in a different format. This issue marks the final issue of the printed version of *The Reporter*. Beginning with the September 2005 issue, *The Reporter* will transition to an all-digital format. Expect to receive quarterly e-mails providing you with a link to the latest edition, and back issues will continue to be maintained on the JAG School website. Although there will no longer be a hard copy printing of *The Reporter*, contributions for the new electronic version are strongly encouraged.

SUBMISSIONS REQUESTED FOR THE REPORTER

Have you worked an interesting issue in a recent court-martial? Have you found a great technique or approach that could help other base level attorneys or paralegals? Write a short article about it and submit it to *The Reporter*!

Contributions from all readers are invited. Items are welcome on any area of the law, legal practice, or procedure that would be of interest to members of the Air Force Judge Advocate General's Corps. Send your submissions to *The Reporter*, CPD/JA, 150 Chennault Circle, Building 694, Maxwell AFB, AL 36112, attention "Editor—*The Reporter*."



FAREWELL FROM THE EDITOR

After two years at the helm of *The Reporter*, I will be leaving the JAG School this summer to begin a new assignment as a student at the Army Judge Advocate General's Legal Center and School. I have enjoyed my time as the editor, and have found this experience to have been richly rewarding and professionally enlightening. I extend a hearty thanks to all who have contributed to making this publication a success, from the regular contributors, to the lead article authors, to my fellow JAG School faculty editors. I am confident that *The Reporter* will continue to provide useful and insightful information to JAGs and paralegals in the field and I encourage our JAG Corps readers to continue to contribute high caliber quality articles for publication.

Capt Chris Schumann, Editor



