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FROM THE EDITOR

In this issue of *The Reporter* we take a comprehensive look at recent case law in the area of child pornography prosecutions since the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*. Also in this edition, an article reprinted from *The Army Lawyer* that will help shed some considerable light on the Servicemembers Civil Relief Act and how that new legislation differs from it's predecessor. The summary court martial is discussed in an excellent article by Maj James McLaren and Capt Jennifer Whitko, providing practical advice on this often misunderstood member of the court-martial family. And finally, Maj Bradley Mitchell and Capt Keith Scherer take a slightly different approach to the discussion of how best to prepare your case for trial. This is one checklist you will definitely want to keep handy, although following it could get you into a bit of trouble! Good reading.

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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...

Col Thomas L. Strand

Along with its active duty training mission, your JAG School has a rich tradition as the legal education headquarters for members of our Air Reserve Component. During FY 2004, we welcomed 600 members of the ARC to the Annual Survey of the Law, Reserve Forces Judge Advocate Course, and Reserve Forces Paralegal Course. We also routinely have Reservists and Guard members joining the active duty as students in many of the 35 other courses we offer, and it is always a pleasure to reconnect with these critical contributors to the Total Force team.

As with the active duty, however, the education we provide the reserve component must evolve with the Air Force mission. In October 2003, for example, we hosted our first RFJAC Operations Law Course. Employing a large cadre of deployment-experienced reservists as faculty and seminar leader complements to our School faculty, we took the traditional RFJAC curriculum and infused each block with relevant operational considerations. Over 97 percent of the attendees, most of whom were National Guard and Category A reservists, gave the course their highest ratings, and we are hard at work preparing for this fall's encore.

That course is not unique, either in its operational focus or as an example of our efforts to provide precisely the right training, at the right time, to the right people. Along with our regular Operations Law Course, International Law Course, and a beefed-up operations law block in JASOC, the Dickinson Law Center operations-related lineup now includes the Deployed Fiscal Law and Contingency Contracting Course, the Homeland Defense Workshop, the Civil Affairs/Civil Military Operations Course, and the Total Air Force Operations Law Course. Recognizing that the threats are not always international, we have also added a Domestic Violence/Legal Aspects of Sexual Assault Workshop.

As the United States Air Force becomes a more effective warfighting transformational team of Airmen, it is undoubtedly one of the most dynamic organizations in the world today. The training and education it provides its JAGs and paralegals, both active and reserve, must be nothing less. Recommendations for new joint, combined and total force legal curricula are always welcome at the Air Force Judge Advocate General's JAG and Paralegal School. Send them to 150 Chennault Circle, Maxwell AFB, AL. 36112 or email me directly at thomas.strand@maxwell.af.com.

Thomas L. Strand

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Lost in Translation—Adapting to Child Pornography Prosecutions After *Ashcroft v. Free Speech Coalition*

Captain Taylor Smith

I remember well how my father would tuck my brothers and me into bed at night, and how I looked forward to hearing the pearls of wisdom that would inspire and motivate me. Unfortunately, the best he could muster, after "Utah by five," was "nothing in life is ever easy."

How right he was. The child pornography laws, which once seemed so simple, have been rent asunder by a bomb called Ashcroft v. Free Speech Coalition.[1] Not only has this case placed appellate cases in jeopardy, but it has raised significant questions of how to best approach the prosecution of child pornography cases in the future.

A Short History of Child Pornography Law

New York v. Ferber[2] was the landmark case in child pornography. In Ferber, the Supreme Court held child pornography is speech outside the protections of the First Amendment. The Court determined images of child pornography do not qualify as free speech and could be banned even if the images are not obscene under the standards of Miller v. California.[3] Issued in 1982, Ferber was prior to the growth of the internet, computers, and digital imaging. The concept of "virtual" anything was foreign to the Court. Consequently, its decision in Ferber referred only to children, making no distinction between real and virtual children. Riding on the coat-tails of the Ferber decision, Congress passed the Child Protection Act of 1984, outlawing the distribution, sale or possession of material depicting children engaged in sexual activity.[4]

However, the Internet was making it increasingly difficult to prosecute child pornographers. During hearings on the Child Pornography Prevention Act of 1996 (CPPA), Assistant Attorney General Kevin Di Gregory testified:

> In addition to our expectation that this material (computer-generated child pornography) will pose serious problems in the future, we have already been confronted with cases in which child pornographers attempted to use the gap in existing law as a legal defense. For example, in the first-ever federal trial involving charges of importation of child pornography by computer, United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995), the defendant offered evidence that currently available computer programs could be used to alter a photograph of an adult so that it looked like a photograph of a child. From that evidence, the defense then argued that the Government had the burden of proving that each item of alleged child pornography did, in fact, depict an actual minor rather than an adult made to look like one, and that the defendant should be acquitted if the government did not meet that burden.
>
> In that case, the defense was overcome through a carefully executed cross-examination and production, in court, of some of the original magazines from which the computer-generated images were scanned. But it is also true that in 1993, when the Kimbrough case was tried, the technology was still at an early stage of development and as such, the defense was not as potent as it might become in the future. Moreover, magazine archives will be of less value to prosecutors since child pornography produced today will no longer predate the availability of graphic imaging software. Thus, the Government will no longer be able to produce the original child pornography magazine against which comparison may be made.[5]

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The CPPA was created in response to the growth of the Internet and was meant to close the loopholes which existed in the law. The Congressional findings underlying the CPPA demonstrate the dangers of virtual child pornography and the difficulties faced in prosecuting child pornography offenses:

> (5) new photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct;
>
> . . .
>
> (9) the danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct;
>
> . . .
>
> (13) The elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession, sale, or viewing of visual depictions of children engaging in sexually explicit conduct. . . .[6]

The CPPA criminalized child pornography with the intent of stopping the use of the Internet to traffic in child pornography. The definition of child pornography provided in the Child Protection Act of 1984 was amended to include "virtual" children (images of child pornography created solely out of computer graphics), morphed images (images of a child's head transposed on an adult's body), and images of adults purporting to be children, as well as images of actual children.[7] However, even while the CPPA was being created, some senators, such as Ted Kennedy, Paul Simon and Russ Feingold, questioned its constitutionality.[8]

In Free Speech Coalition, the Supreme Court confirmed the prophecy of Senators Kennedy, Simon, and Feingold, ruling 18 U.S.C. §§ 2256(8)(B) and (D) were overbroad and unconstitutional when applied to a certain type of virtual child pornography; specifically, an image "created by using adults who look like minors or by using computer imaging."[9] Free Speech Coalition believed Ferber banned child pornography because of the effect on the children captured in the images and because the images were a record of the sexual abuse the children suffered.[10] However, with virtual child pornography, these harmful effects do not exist; therefore, there is no justification for a *per se* ban on those images.[11] Consequently, the portions of the CPPA which criminalized images which "appeared to be" or "conveyed the impression of" children were found to be overbroad and unconstitutional.[12]

The Court in Free Speech Coalition also observed "[t]he new technology . . . makes it possible to create realistic images of children who do not exist."[13] Images not necessarily obscene under the standards set forth in Miller v. California nor child pornography under the standard of New York v. Ferber, were prohibited under the auspices of the CPPA.[14] However, the Free Speech Coalition decision concluded the CPPA could not ban these types of virtual images and that the overbroad language in the CPPA's definition of child pornography operated as an unconstitutional burden upon freedom of speech.[15]

In response to the Free Speech Coalition decision, the "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003" was enacted. Known as the PROTECT Act, it:

> [w]ould improve the prosecution of child pornography offenses by: (1) creating a new definition of "identifiable minor" that would include images that are "virtually indistinguishable" from actual children; (2) creating an absolute affirmative defense for any pornographic image that was not produced using any actual children; (3) creating a new offense for certain offers to buy or sell child pornography; (4) creating a new offense for obscene child pornography; (5) creating a new civil cause of action for those aggrieved by the production, distribution or possession of child pornography; and (6) expanding

> the categories of sexually explicit images covered by existing record keeping requirements.[16]

The findings of the PROTECT Act not only demonstrate the dangers of child pornography, virtual or otherwise, but also attempt to provide for the successful prosecution of child pornography in the aftermath of Free Speech Coalition:

> (3) The Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Ferber, 458 U.S. at 760.
>
> (5) Evidence submitted to the Congress, including from the National Center for Missing and Exploited Children, demonstrates that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated. The technology will soon exist, if it does not already, to computer generate realistic images of children.
>
> (7) There is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children.
>
> (8) Child pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker. An image seized from a collector of child pornography is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child.
>
> (9) The impact of the Free Speech Coalition decision on the Government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in Free Speech Coalition. After that decision, prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image. This is a fraction of meritorious child pornography cases. The National Center for Missing and Exploited Children testified that, in light of the Supreme Court's affirmation of the Ninth Circuit decision, prosecutors in various parts of the country have expressed concern about the continued viability of previously indicted cases as well as declined potentially meritorious prosecutions.
>
> (11) Leading experts agree that, to the extent that the technology exists to computer generate realistic images of child pornography, the cost in terms of time, money, and expertise is—and for the foreseeable future will remain—prohibitively expensive. . . . It will not, however, be difficult or expensive to use readily available technology to disguise those depictions of real children to make them unidentifiable or to make them appear computer-generated.
>
> (12) Child pornography results from the abuse of real children by sex offenders; the production of child pornography is a byproduct of, and not the primary reason for, the sexual abuse of children. There is no evidence that the future development of easy and inexpensive means of computer generating realistic images of children would stop or even reduce the sexual abuse of real children or the practice of visually recording that abuse.
>
> (13)In the absence of congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse. The mere prospect that the technology exists to create com-

> posite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution; for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused. This threatens to render child pornography laws that protect real children unenforceable. Moreover, imposing an additional requirement that the Government prove beyond a reasonable doubt that the defendant knew that the image was in fact a real child—as some courts have done—threatens to result in the de facto legalization of the possession, receipt, and distribution of child pornography for all except the original producers of the material.[17]

Based on these findings, the PROTECT Act amended 18 U.S.C. § 2256 by adding a new paragraph.

> (11) The term 'indistinguishable' used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.[18]

Most significantly, perhaps, the PROTECT Act created an affirmative defense for those charged under certain provisions of 18 U.S.C. §2252A.

> (c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that —
>
> (1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and
>
> (B) each such person was an adult at the time the material was produced; or
>
> (2) the alleged child pornography was not produced using any actual minor or minors.[19]

The validity of this affirmative defense, however, will probably be challenged. In Free Speech Coalition, the Supreme Court discussed a government argument similar to the new affirmative defense and made the following observations:

> To avoid the force of this objection, the Government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused to prove the speech is lawful. In this connection, the Government relies on an affirmative defense under the statute, which allows a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. See *18 U.S.C. § 2252A(c).*
>
> The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction.
>
> We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms.[20]

In spite of the PROTECT Act, the concerns voiced by the Supreme Court have not changed. The first conviction under the PROTECT Act will potentially result in significant appellate litigation over the validity of the affirmative defense. Consequently, it remains to be seen whether the affirmative defense set forth in the PROTECT Act can pass muster.

Application of Child Pornography Law to the Military

The reaction to the Free Speech Coalition decision began in the Air Force Court of Criminal Appeals (AFCCA). The decisions of the AFCCA pre-saged what would eventually become the new paragraph eleven of 18 U.S.C. § 2256. In United States v. Appeldorn, the AFCCA had the opportunity to review the providency of a guilty plea to possessing 22 computer images of child pornography and 19 pages of printed computer images.[21] Analyzing the case in light of the Free Speech Coalition decision, the Court determined:

> We have carefully reviewed the appellant's guilty plea inquiry and are convinced his pleas were provident. The appellant admitted that the children were under the age of 18, or at least he believed them to be. Under these circumstances, that is sufficient. *See United States v. Faircloth*, 45 M.J. 172, 174 (1996). *Cf. United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987) (an accused's plea is provident if he is convinced of his guilt based on reliable evidence). In addition, the images he received and possessed, which were admitted into evidence along with his stipulation, are undeniably children under the age of 18. We are convinced beyond a reasonable doubt that these images were not "virtual child pornography" or visual depictions of adults that appear to be children.[22]

Apparently, the AFCCA examined the images themselves and determined they were not virtual child pornography. This type of analysis became more pronounced in United States v. Polfliet.

> The military judge, as the trier of fact, could have arrived at only one rational conclusion: the images were of actual children. In addition, viewing the images ourselves, we are convinced, beyond a reasonable doubt, that the images are of actual children well under the age of 18.[23]

The reasoning exhibited in Appeldorn and Polfliet appears similar to the "virtually indistinguishable" language set forth in the PROTECT Act. However, neither case has yet been reviewed by the Court of Appeals for the Armed Forces (CAAF).[24]

The first CAAF case to deal with child pornography prosecutions after Free Speech Coalition is United States v. O'Connor.[25] The appellant in O'Connor pled guilty to forcible sodomy of a female under 16 years of age, indecent acts or indecent liberties with the same victim, obstructing justice, and receiving and possessing child pornography.[26] Because the appellant was charged under 18 U.S.C. §2252A, CAAF, in accordance with the decision in Free Speech Coalition, was required to review the providency of the appellant's guilty plea. According to CAAF, it must be shown an image of child pornography is of an actual minor as a factual predicate to a conviction under the CPPA.[27] Since no evidence was presented the images seized from the appellant's computer were of an actual minor, the Court dismissed the child pornography specifications.[28]

CAAF then considered whether the conviction could be affirmed under either Clause 1 or Clause 2 of Article 134 as a lesser-included offense.[29] However, the plea inquiry dealt with whether the appellant's conduct violated the CPPA, not whether the conduct was either service discrediting or prejudicial to good order and discipline. As there was no "conscious discussion" regarding whether the conduct was service discrediting, CAAF refused to affirm any lesser-included offense.[30]

Unfortunately, CAAF passed on the opportunity to say whether possession of virtual child pornography violates either Clause 1 or Clause 2 of Article 134:

> That same absence of focus in the record also prevents us from engaging in any broad inquiry concerning the degree to which the First Amendment protections extended to virtual images by the Supreme Court carry over into the realm of military justice. Accordingly, we do not address the question of whether, in the wake of *Free Speech Coalition*, the possession, receipt or distribution of images of minors engaging in sexually explicit conduct (regardless of their status as "actual" or "virtual") can bring discredit upon the

> armed forces for purposes of clause 2 of Article 134.[31]

CAAF specifically granted review on whether child pornography convictions can be upheld under Clause 1 or Clause 2 of Article 134 in the cases of United States v. Irvin[32] and United States v. Mason.[33] In Irvin, the appellant pled guilty to wrongfully and knowingly possessing child pornography in violation of the first two clauses of Article 134. Since the appellant pled guilty to an offense charged under Clause 1 and Clause 2 of Article 134, CAAF was required to assess the providence of the guilty plea only as it related to the elements of that offense and not the elements of a CPPA offense as discussed in Free Speech Coalition and O'Connor.[35] CAAF ultimately determined the appellant's guilty plea was provident.

> The offense that the military judge explained to [the appellant] and to which he pleaded guilty was drawn strictly in terms of "visual depictions of minors engaging in sexually explicit conduct." Also, Irvin's explanation to the military judge was not cast in terms of images that "appeared to be" child pornography as was the case in O'Connor, but rather in terms of visual depictions that he knew "were, in fact, minors engaging in sexually explicit conduct." It is these critical aspects of how [the appellant's] case was charged and pleaded to that avoids any impact from Free Speech Coalition or our decision in O'Connor.[36]

CAAF provided a more comprehensive analysis of Clauses 1 and 2 in United States v. Mason. Mason pled guilty to a charge under § 2252A in violation of Clause 3 of Article 134 for possessing child pornography.[37] When an individual is charged under Clause 3 of § 2252A, a provident guilty plea cannot implicate the unconstitutional portions of the CPPA.[38] The plea in this case was affected by the unconstitutional definitions and CAAF held his plea was improvident.[39]

However, CAAF recognized "that an improvident plea to a clause 3 offense based on federal child pornography statute may be upheld as a provident plea to a lesser-included offense under clause 2 of Article 134."[40] As opposed to O'Connor, where CAAF was unable to affirm the invalid guilty plea as a lesser-included offense under Clause 1 or Clause 2, in this case the appellant clearly understood why his conduct was service-discrediting and prejudicial to good order and discipline.[41] Although the appellant understood the nature of his conduct, CAAF also recognized Free Speech Coalition added a constitutional dimension to child pornography prosecutions.[42]

Military members are still protected by the First Amendment, but CAAF quoted from the Supreme Court's decision in Parker v. Levy in its discussion of Article 134:

> While the members of the military are not excluded from the protections granted by the First Amendment, the different character of the military community of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[43]

Relying on this language from the Supreme Court, CAAF found the appellant's guilty plea could be affirmed as a lesser-included offense under Clauses 1 and 2 of Article 134:

> We expressly acknowledged in O'Connor, but did not answer, the question as to whether, in the wake of Free Speech Coalition, the possession, receipt or distribution of images of minors engaging in sexually explicit conduct (regardless of their status as "actual" or "virtual") could constitute service-discrediting conduct for purposes of Article 134. Such inquiry must necessarily be undertaken on a case-by-case basis.
>
> In analyzing this constitutional dimension, the ultimate question is whether the status of the images in the present case as "virtual" or "actual" is of consequence in the context of assessing the providence of [the appellant's] guilty plea under clauses 1 and 2. We conclude that it is not. The receipt or possession of "virtual" child pornography can, like "actual" child pornography, be service-discrediting or prejudicial to good order and discipline. . . . Under those circumstances, the distinction between "actual" child pornogra-

> phy and "virtual" child pornography does not alter the character of [the appellant's] conduct as service-discrediting or prejudicial to good order and discipline.
>
> Even assuming the images at issue here are "virtual," [the appellant's] conduct in receiving those images on his government computer can constitutionally be subjected to criminal sanction under the uniquely military offenses embodied in clauses 1 and 2 of Article 134.[44]

Whether CAAF's decisions in Mason and Irvin will be appealed to the United States Supreme Court remains to be seen.

Prosecution of Child Pornography Cases in the Military

Needless to say, the ruling in Free Speech Coalition has sparked a flurry of trial and appellate litigation. That ruling, and the new PROTECT Act, have raised questions of the best way to charge child pornography. A common misconception through the military justice system is that child pornography can no longer be charged under the CPPA. However, only two of the four definitions of child pornography were invalidated. Images of identifiable minors can still be charged, even if the images have been morphed in some fashion.

The first step in a child pornography prosecution is to identify the children depicted. If the child can be identified, the provisions of the CPPA should still be used. Obviously, this entails more work than was previously needed in preparing a case. In some cases, the victim or a parent can testify. However, unless the child is known to the prosecutors (i.e. the accused's child), expert testimony is required to prove the image depicts an actual child. Unfortunately, this testimony is sometimes difficult to obtain. Remember, this is not an expert on Tanner Staging—testimony as to the apparent age of the child depicted will not meet the burden of proof the child is real. The expert must be someone who can say who the depicted minor is and how the minor was identified.

If an expert is unavailable to testify an image is of an identifiable minor, the possibility of a stipulation of expected expert testimony should be explored. An affidavit is a possibility, but the evidentiary rules allow an affidavit only if the witness is unavailable within the meaning of M.R.E. 804(a). It is unlikely this type of expert will ever be declared unavailable. Realistically, failure to obtain an expert to testify an image depicts an actual child is fatal to any charge made under the CPPA. Identifying the minor depicted and securing an expert who can testify the depicted minor is an actual child are the most vital steps in a prosecution under the CPPA and must be done immediately.

Another method of proving the image is a real child is the "legacy image" approach. Under this approach, it is not necessary for an expert to know the image depicts an actual child, but only that the images predate the existence of the computer programs necessary to either alter or create images of child pornography.[45]

If no child in the image can be identified, several possibilities exist. The first possibility is to simply charge the crime as an attempt to possess/receive/distribute child pornography. This presents its own evidentiary problems, namely how to prove the defendant was attempting to possess/receive/distribute real (unprotected speech), rather than virtual (protected speech), child pornography. Circumstantial evidence is often the only method of proof, particularly names of websites and how the images are labeled and filed on the computer.

The second possibility is to charge the images as obscene. Proving an obscenity charge isn't for the faint-hearted. It requires a thorough understanding of the standard set out in Miller v. California[46] and its progeny, particular community standards and how the concept of community standards applies to the military.[47]

The third possibility is to charge the child pornography as a violation of either Clause 1 or Clause 2 of Article 134. Article 134 (Clause 1) punishes "acts directly prejudicial to good order and discipline" and Article 134 (Clause 2) punishes acts that are of a "nature to bring discredit upon the armed forces."[48] In United States v. Sapp, the military judge failed to advise the accused during his plea inquiry that 18 U.S.C. §2252(a)(4)(A) required the prohibited visual depictions be contained in at least three separate matters.[49] As a result, the Air Force Court of Criminal Appeals (AFCCA) concluded appellant's pleas were improvident but "sufficient to support his conviction of service-discrediting conduct under Article 134."[50] AFCCA then modified the specification and affirmed appellant's conviction to the lesser-included offense. CAAF granted review and stated they "had no doubt that the knowing possession of images depicting sexually explicit conduct by minors, when determined to be service-discrediting conduct, is a violation of Article 134."[51]

Given the nature of military service, the prohibitions involving child pornography contained in 18 U.S.C. § 2252A appear to apply to the armed forces even if the

evidence is not sufficient to establish the use of real children. Although the Supreme Court found virtual child pornography, as defined by 18 U.S.C. §2256(8)(B) and (D), outside the scope of it's decision in New York v. Ferber, the armed forces in general are validly concerned with protecting the military's reputation in the civilian community—a concern the Supreme Court was not forced to consider. The armed forces have a compelling interest in protecting their image by prohibiting possession of images of children, or images that appear to be children, engaging in sexually explicit conduct. If the public knew service members possessed images of child pornography, real or virtual, that fact would lower the esteem of the military in the eyes of the public.

Under Clause 1, the military is permitted to prosecute an act where the effect on discipline and order is direct and palpable.[52] Such conduct must (1) be easily recognizable as criminal, (2) have an immediate and direct adverse effect on discipline, and (3) be judged in the context surrounding the acts.[53] However, if an act involves moral turpitude, it may be inherently prejudicial to good order and discipline.[54]

Under Clause 2, an act must lower the civilian community's esteem or bring the armed services into disrepute.[55] Receipt and possession of child pornography, whether virtual or not, can lower the esteem of the military in the public's eye. The trust and confidence given the armed forces could quickly erode should the public discover that service members are evidencing a sexual attraction to children through possession of child pornography.

Charges under Clause 1 and Clause 2 are easily tailored to the circumstances of the case and the elements are simple. Not so simple is proving either the service discrediting or conduct prejudicial aspects. While there is some case law supporting the concept that some conduct is *per se* service discrediting or conduct prejudicial,[56] trial counsel must look for evidence of service discrediting or prejudicial conduct, making sure to treat these concepts as the enumerated elements they are. Proving an accused possessed child pornography does not necessarily show the possession was service discrediting or conduct prejudicial to good order and discipline.

Thanks to the decisions in Mason and Irvin, it now appears the simplest way of charging child pornography is under Clauses 1 and 2 of Article 134. Remember, however, that it must be proved how an accused's conduct was either service discrediting or prejudicial to good order and discipline.

An Aside on Sentencing

Few things are more frustrating than convicting an accused of a child pornography offense and seeing all that hard work slide away with a poor sentence. All too often trial counsel are sitting back during sentencing proceedings, particularly after guilty pleas, believing the images speak for themselves and getting light sentences. The children in the images are not abstract concepts; they are real people who have to spend the rest of their lives knowing their sexual abuse has been recorded and marketed among pedophiles. These people are victims and the harms they have suffered must be presented at court-martial.[57]

The Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits all agree the child depicted, rather than society, is the primary victim of child pornography.[58] The Fourth Circuit, the only other circuit to consider this question, believes society in general is the primary victim.[59] The determination the child is the primary victim is extremely significant because of the Federal Sentencing Guidelines. The guidelines state that when determining if convictions should be "grouped" for sentencing, the primary victim of the crimes must be identified.[60] Under the Federal Sentencing Guidelines, treating each child as a victim means the specifications are not grouped, potentially leading to significant increases in the sentencing level.[61] The emphasis on the child as the victim, and the resultant increase in potential punishment, demonstrates the seriousness with which the civilian courts are treating child pornographers. The prosecutor needs to match this intensity when seeking a sentence.

Conclusion

As much as I hate to admit it, my father was right: "Nothing in life is ever easy." Trial counsel cannot sit back and complacently wait for a military judge to hand down a sentence. Few crimes are as evil as the sexual abuse of a child. Few crimes have such long lasting effects on the victims of the sexual abuse. And few crimes have such potential to tear apart unit morale and cohesiveness. While it may be an accused has never personally sexually abused a child, by possessing child pornography he has supported those who have. It is the duty of every trial counsel to fully prepare with an eye to maximizing the sentences of those who participate in the sexual abuse of children.

The success of a child pornography prosecution depends on the diligence of the prosecutor. No amount of good intentions can overcome a complete investigation, thorough legal research, and meticulous witness preparation. This is hard work and is certainly not easy, particularly in light of the difficulties Free Speech Coalition has caused. However, the successful prosecution and sentencing of an accused is the reward for all those hours of effort.

[1]535 U.S. 234 (2002).
[2]458 U.S. 747 (1982).
[3]413 U.S. 15 (1973).
[4]See Pub. L. No. 98-292, 98 Stat. 204 (1984).
[5]S. Rep. No. 358 at 18.
[6]Id. at 2-3.
[7]18 U.S.C. § 2256.
[8]S. Rep. No. 358 at 31-35. "However, the failure of S. 1237 to abide by Supreme Court precedent in this area undermines the goal of protecting children and risks that this legislation will likely be struck down as unconstitutional." Id. at 33.
[9]18 U.S.C. § 2256 (8)(B) prohibited any visual depiction of child pornography where "such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256 (8)(D) prohibited any visual depiction of child pornography where "such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."
[10]Free Speech Coalition, 535 U.S. at 249.
[11]Id. at 250.
[12]Id. at 256.
[13]Id. at 241.
[14]Id. at 240.
[15]See Id. at 244
[16]S. 151 at 1-2.
[17]Id. at 70-74.
[18]Id. at 77.
[19]Id.
[20]Free Speech Coalition, 535 U.S. at 255-256.
[21]United States v. Appeldorn, 57 M.J. 548, 548 (A.F. Ct. Crim. App. 2002).
[22]Id. at 550.
[23]United States v. Polfliet, ACM 34652 (A.F. Ct. Crim. App. 10 Jan 2003)(unpub. op.); see also United States v. Richardson, 304 F.3d 1061, 1064 (11th Cir. 2002) cert. denied 123 S. Ct. 930, 154 L. Ed. 2d 832 (2003) ("We have examined the images shown to the jury. The children depicted in those images were real; of that we have no doubt whatsoever.").
[24]United States v. Polfliet, 59 M.J. 32 (C.A.A.F. 2003); United States v. Appeldorn, 57 M.J. 312 (C.A.A.F. 2002).
[25]58 M.J. 450 (C.A.A.F. 2003).
[26]Id. at 451.
[27]Id. at 453.
[28]Id.
[29]Id. at 454-455.
[30]Id. at 455.
[31]Id.
[32]United States v. Irvin, No. 03-0224 (C.A.A.F. 10 June 2004).
[33]United States v. Mason, No. 02-0849 (C.A.A.F. 10 June 2004).
[34]Irving, No. 03-0224.
[35]Id.
[36]Id.
[37]Mason, No. 02-0849.
[38]Id.
[39]Id.
[40]Id.
[41]Id.
[42]Id.
[43]Id. (quoting Parker v. Levy, 417 U.S. 733, 758 (1974)).
[44]Id. (internal citations omitted).
[45]See United States v. Guagliardo, 278 F.3d 868 (9th Cir. 2002).
[46]413 U.S. 15 (1973).
[47]See United States v. Maxwell, 45 M.J. 406 (1996) (Air Force standard may not be proper for a conviction based on the U.S. Code).
[48]*Manual For Courts-Martial, United States*, Part IV, ¶¶ 60c(2)(a), (3). See United States v. Sapp, 53 M.J. 90 (2000); United States v. Williams, 17 M.J. 207 (C.M.A. 1984); United States v. Mayo, 12 M.J. 286 (C.M.A. 1982); United States v. Long, 6 C.M.R. 60 (C.M.A. 1952).
[49]Sapp, 53 M.J. at 91.
[50]Id.
[51]Id. at 92.
[52]*Manual for Courts-Martial, Section IV*, ¶ 60(c)(2)(a).
[53]Parker v. Levy, 417 U.S. 733, 752 (1974). See United States v. Davis, 26 M.J. 445 (C.M.A. 1988) (cross-dressing on board ship).
[54]United States v. Johnson, 39 M.J. 1033 (Army Ct. Crim. App. 1994) (citing United States v. Lowe, 16 C.M.R. 228 (C.M.A. 1954)).
[55]*Manual for Courts-Martial, Section IV*, ¶ 60(c)(3).
[56]In a prosecution under Article 133 for possession of child pornography, the Navy-Marine Court of Criminal Appeals held:
One can hardly imagine actions that might pose a greater threat to an officer's own honor or standing, than the possession of obscene, lewd, and lascivious visual depictions of minors. The fact that Appellant was regularly downloading images of female minors being sexually abused created a significant risk that his stature as an officer would be greatly diminished. That his conduct was private in nature was of no import. *See United States v. Norvell, 26 M.J. 477, 478 (C.M.A. 1988)*(stating that "conduct which is entirely unsuited to the status of an officer and gentleman often occurs under circumstance where secrecy is intended.")
United States v. Mazer, 58 M.J. 691 (N.M.Ct.Crim.App. 2003).
[57]See United States v. Probel, 214 F.3d 1285 (11th Cir. 1999) (the term "distribution" should be given its ordinary meaning and any distribution of child pornography causes the continued exploitation of the victims depicted); United States v. Johnson, 221 F.3d 83 (2nd Cir. 2000) ("the use of computers to traffic in child pornography heightens the difficulty of detection by law enforcement, has the potential of vastly expanding the market for such materials, and creates unique access to minors."); United States v. Boos, 127 F.3d 1207 (9th Cir. 1997) (primary victim of defendant's distribution of child pornography was the young girls depicted in the distributed images); United States v. Harvey, 2 F.3d 1318 (3rd Cir. 1993) (possession of child pornography is not a victimless crime); United States v. Rugh, 968 F.2d 750 (8th Cir. 1992) (primary victim of child pornography is the depicted child); United States v. Kirkland, 107 F.3d 872 (6th Cir. 1997) (unpublished decision) (primary victim under 18 U.S.C. § 2252 is the exploited child); United States v. Tillmon, 195 F.3d 640 (11th Cir. 1999) (the children depicted in pornographic images are the primary victims when the images are created and when the images are distributed from individual to another). But see United States v. Toler, 901 F.2d 399 (4th Cir. 1990) (society is the primary victim in transportation of child pornography charge, child portrayed is secondary victim).
[58]United States v. Rugh, 968 F.2d 750 (8th Cir. 1992); United States v. Ketchum, 80 F.3d 789 (3rd Cir. 1996); United States v. Boos, 127 F.3d 1207 (9th Cir. 1997); United States v. Hibbler, 159 F.3d 233 (6th Cir. 1998); United States v. Norris, 159 F.3d 926 (5th Cir. 1998); United States v. Tillmon, 195 F.3d 640 (11th Cir. 1999)(per curiam); United States v. Sherman, 268 F.3d 539 (7th Cir. 2001).
[59]United States v. Toler, 901 F.2d 399 (4th Cir. 1990).
[60]Elias Manos, Note, *Who Are the Real Victims of Child Pornography? After United States v. Sherman, the Answer is Becoming Clear*, 10 VILL. SPORTS & ENT. L. FORUM 327, 327-328 (2003).
[61]Id. at 331-332.

PRACTICUM

PROTECT THE PROVIDENCE OF A GUILTY PLEA

You have spent weeks getting ready for trial. It doesn't really matter whether you are trial or defense counsel. Trial counsel may have spent their time between discussing the investigation with Security Forces investigators or AFOSI special agents, interviewing prospective witnesses, ensuring availability of necessary evidence, and drafting charges and specifications. Defense counsel may have spent their time getting to know their client and analyzing the evidence. Both sides may have also done a lot of preparation for an Article 32 hearing, and certainly both spent a great deal of time preparing for the trial date. Then, some time before trial, the defense indicates the accused will plead guilty, perhaps as part of a pretrial agreement. Both may think their jobs just became a whole lot easier. Or have they really?

As trial approaches, the witnesses needed for a litigated trial may be released from having to travel in anticipation of the plea. Neither side may have any reason to anticipate there will be any problem with the providence inquiry. In fact, you may even have a completed stipulation of fact that admits all the necessary facts and elements of the charged offenses. The case should now be a breeze, shouldn't it? Clearly, that is not necessarily the case.

In *United States v. Hardeman*, 59 M.J. 389 (2004), the Court of Appeals for the Armed Forces addressed a situation where an accused attempted to plead guilty, in accordance with a pretrial agreement, to an unauthorized absence and efforts by the military judge to save the plea following a statement inconsistent with the plea were insufficient to sustain the conviction. Although the opinion is silent, it is abundantly clear there were no potential concerns expressed by trial counsel prior to the military judge's acceptance of the plea.

Hardeman was a 26-year-old Senior Airman with 44 months of active duty service when he reported to a new duty station. Before joining his new unit, he was expected to attend some training, which he failed to do. Eventually, he was released from the training and did not report to work for 45 days and was finally apprehended at his home. He entered a plea of guilty and entered into a stipulation of fact stating that his supervisor would testify that he told Hardeman to report for duty two days after being released from the training. However, during the providence inquiry, Hardeman said his supervisor didn't give him a specific day to report for duty and that he expected a phone call advising him when he should report. He also said, based upon questions from the military judge, that he had no accrued leave and that he should have called his unit after some amount of time passed. The military judge accepted the plea based upon the stipulation and answers to his questions.

On appeal, Hardeman argued his plea was improvident because the statements regarding when and where he was to report for duty were inconsistent with his guilty plea. The Court of Appeals for the Armed Forces unanimously agreed.

Where an accused sets up a matter inconsistent with a plea or it appears a plea of guilty was entered improvidently, a court may not accept the plea. Article 45(a), UCMJ. Moreover, the court must make an inquiry of the accused that satisfies the military judge that there is a factual basis for the plea before the plea may be accepted. R.C.M. 910(e). *See United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969). Only where the record of trial "demonstrates a substantial basis in law and fact for questioning the plea" may the military judge reject the plea. *See United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

Hardeman's comments about the report date and expectation of a phone call were inconsistent with the elements of an unauthorized absence offense. An Article 86, UCMJ, unauthorized absence offense is committed when the accused absents himself or herself from his or her unit at which he or she was required to be; the absence was without authority from a person competent to grant the leave; and the absence was for a certain period of time. Termination by apprehension may be an aggravating element.

The problems with Hardeman's comments were they prevented the judge from determining a precise inception date and the maximum punishment for the unauthorized absence. Additionally, Hardeman's failure to reveal the date he absented himself without authority caused him to fail to admit an essential element of the offense. An inception date is critical for an unauthorized absence prosecution for several reasons: without an inception date, it is impossible to determine if an unauthorized absence occurred at all; without an inception date, the certain period of time of the absence can't be established; and the duration of the absence is an essential element in determining the maximum sentence imposable for the offense.

The military judge attempted to have Hardeman admit that he knew he had an obligation to call or return to his unit and should have known better than simply staying away. Unfortunately, the focus should have been on the precise date for the absence's inception.

Because Hardeman did not concede his absence was without authority on the charged date (or any specific date), there was a substantial basis in law and fact to

question the plea. The conviction for unauthorized absence and the sentence were set aside and the Court authorized a rehearing.

If Hardeman had admitted a specific date that he was required to be with his unit and that he absented himself as of that time, an appellate court might have been able to at least sustain a conviction for some certain period of unauthorized absence. Both sides could have avoided the uncertainty of a rehearing.

In another recent case, *United States v. Hansen*, 59 M.J. 410 (2004), the Court of Appeals for the Armed Forces addressed a situation where a guilty plea was determined to have been improvident due to a deficient plea inquiry by the military judge. The Court was not swayed by the military judge's comments following the *Care* inquiry that the accused has "knowingly, intelligently, and consciously waived [his] rights against self-incrimination, to a trial of the facts by [the] court-martial, and to confront the witnesses . . ." or the defense's lack of response or objection to those comments. The Court determined that the military judge failed to adequately advise Hansen of his constitutional right to confrontation and the right against self-incrimination. By failing to advise the accused of these rights, the military judge could not establish that the accused consciously, voluntarily and intelligently waived those rights.

While the Court noted that "a particular incantation" of constitutional rights is not required, it held the record must demonstrate that the accused was aware of the substance of those rights, understood them, and knowingly and intelligently waived them.

Although the military judge is responsible for ensuring the providence of a guilty plea before accepting the plea, trial counsel and defense counsel must also be diligent in listening for any matters inconsistent with the pleas or failure to adequately explain constitutional rights. Not only should counsel be acutely aware of the questions asked and "facts" admitted during the colloquy with the military judge, they must critically examine the give and take. Counsel must be satisfied that the questions and responses indicate understanding of rights and a knowing and intelligent waiver. Counsel must critically consider the judicial admissions in light of the essential elements of the offense. When the military judge asks counsel whether they believe the plea is provident or any additional questions should be asked, trial and defense counsel can protect the record by addressing factual or elemental concerns and ensure that waiver of the accused's basic constitutional rights is knowing and intelligent. Further, defense counsel will protect their client's interest by preserving any benefits under a pretrial agreement.

[1]Whether the appellate court could affirm the sentence adjudged would depend upon what impact the total admitted duration had on the maximum sentence as considered by the court. In any case, the duration of an admitted absence may significantly change the authorized period of confinement and whether a punitive discharge is a valid sentencing option.

CAVEAT

WITH ALL DUE DEFERENCE

In *United States v. Sollman*, *59* MJ 831 (A.F.Ct.Crim.App. 2004), an issue was whether the SJA provided accurate advice to the convening authority regarding his authority to defer automatic forfeitures. A few days after the trial ended, trial defense counsel requested that the convening authority defer and waive automatic forfeitures pursuant to Article 57 (a)(2), UCMJ. Subsequently, the SJA advised the convening authority that the cited Article of the Code only authorized deferment of forfeitures actually adjudged at trial (none were adjudged in this particular case), not automatic forfeitures arising under Article 58b, UCMJ. The SJA added that, in his view, there was a sufficient family need to approve the defense waiver request. The convening authority approved the defense request for waiver of automatic forfeitures, beginning about three weeks after the trial, but denied the deferment request on the basis of his SJA's advice.

The Air Force court determined that the SJA had improperly advised his convening authority. The court noted that, on its face, Article 57(a)(1), UCMJ, would appear to apply only to adjudged forfeitures. It added, however, that Article 58b(a)(1), which provides for automatic forfeitures, states that "[t]he forfeitures pursuant to this section shall take effect on the date determined under … [article 57(a)] and may be deferred as provided in that section." The court further concluded that the convening authority abused his discretion in denying the request for deferment and that the error materially prejudiced the accused's substantial rights since the convening authority would have approved the deferment had he received correct legal advice. To remedy the error, the court decreed that the accused was entitled to the amount of automatic forfeitures withheld from the time the convening authority was notified of the defense request until the effective date of the waiver of automatic forfeitures, a period of about a week.

The lesson learned is that forfeitures of pay and allowances, whether adjudged in a sentence of a court-martial or imposed as an automatic consequence of a sentence covered by Article 58b, UCMJ, may be deferred as provided in Article 57.

THE CHOSEN FEW

In another Air Force case, *United States v. Fenwrick*, 59 M.J. 737 (A.F.Ct.Crim.App. 2003), the military judge granted a defense motion for selection of new court-martial members based upon a finding of improper selection of the original members. The specific defense contention was that the convening authority had systematically excluded officers below the rank of captain. After ordering the government to return to the convening authority to select new officer court members, the court recessed. Following an unsuccessful motion for reconsideration, the government appealed the judge's decision to the Air Force Court of Criminal Appeals pursuant to Article 62, UCMJ.

Upon consideration, the court found there was no systematic exclusion of qualified lieutenants in the case, and thus no violation of Article 25, UCMJ, the codal provision that prescribes the detailing of court members on the basis of best qualified for the duty by reason of age, education, experience, length of service, and judicial temperament. Although the convening authority had only selected one lieutenant as a court member on the 14 cases he had referred to trial during fiscal year 2003, in the previous fiscal year he had selected lieutenants as court members at least six times. The evidence also showed that there had been no exclusion of certain ranks from the list of nominees presented to the convening authority for his consideration. Moreover, the convening authority signed an affidavit and testified under oath that in detailing officers to serve as court members he considered junior ranking officers. Based on the facts presented, the Air Force court set aside the judge's dismissal of the charges and remanded the case for further proceedings.

This case should serve as an excellent primer for military justice practitioners on the "dos and don'ts" of the court-martial panel selection process.

ADMINISTRATIVE LAW

COMMAND AUTHORITY AND CIVILIAN LED ORGANIZATIONS

During this ongoing period of military transformation, judge advocates are being tasked to review and comment on the legality of proposed organizational changes throughout the Air Force. A fundamental principle of the law of command, grounded in Article II Section 2 of the United States Constitution, is that an unbroken chain of command must extend from the President to every military member. This central tenet, as further delineated by Congress in numerous statutes, makes clear that command authority is the exclusive responsibility of military officers and that civilian employees are legally incapable of exercising such authority over a military member.

The reason for limiting command to military officers is simple and self-evident: command authority is unique because it requires the strict and complete obedience of subordinates to lawful orders. The distinctiveness of the Armed Forces has been long recognized by the law, and is based on the fundamental mission of the military "to fight or be ready to fight wars should the occasion arise." *United States ex. rel. Toth v. Quarles, 350 US 11, 17 (1955).* The United States Supreme Court has noted that law of the military is "obedience." "No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." *In re Grimley, 137 US 147, 153* (1890). Military officers hold a particular position of responsibility and command in the Armed Forces:

> The President's commission . . . recites that 'reposing special trust and confidence in the patriotism, valor, fidelity and abilities' of the appointee he is named to the specified rank during the pleasure of the President. *Parker v. Levy, 417 US 733, 744 (1973) citing Orloff v. Willoughby, 345 US 83, 91 (1951).*

Section 8013 of Title 10 authorizes the Secretary of the Air Force to "organize" the Air Force. Any exercise of this authority, however, must preserve the fundamental principle of an unbroken military chain of command. While civilians may exercise high levels of supervisory responsibility, they may not lead those Air Force organizations that are intrinsically linked to the identification of the "chain of command." Thus, organizations such as "squadrons," "groups" and "wings" may only be led by military officers exercising command authority. This is not simply a matter of policy, but a regulatory reflection of a Constitutional mandate.

Civilians may lead organizations such as agencies, directorates, departments, divisions, branches, and various staff functions as they do not require the exercise of command authority. However, the civilian leader of these organizations may not hold the titles of "commander," "vice-commander," "deputy commander," or "deputy to the commander." Likewise, the responsibilities of the civilian may not impact the chain of command or risk confusion over the exercise of command authority. For example, the civilian leader may not exercise certain "oversight responsibilities" requiring command action, such as UCMJ or administrative discharge actions. Chain of command requirements for military members on duty with civil-

ian led organizations are satisfied if they report to the commander of the unit of which the civilian led organization is a part, or if they are attached to an Air Force unit commanded by a military officer. Accordingly, while civilians may supervise a wide variety of Air Force organizations, they may not lead those organizations intrinsically linked to the exercise of command authority. For more discussion on this issue, see the following opinions from The Judge Advocate General: OpJAGAF 1998/36, 26 March 1998; OpJAGAF 1997/50, 18 April 1997; OpJAGAF 1996/149, 2 October 1996; OpJAGAF 1995/80, 25 September 1995; OpJAGAF 1991/7, 5 February 1991; OpJAGAF 1989/24, 20 April 1989; OpJAGAF 1986/5, 23 January 1986; OpJAGAF 1978/4, 11 January 1978).

TORT CLAIMS AND HEALTH LAW

RES GESTAE

The 2004 Medical Law Mini-Course will be held from 25-29 Oct 2004 at Travis AFB, California. This annual one week intensive course has been given since 1985 and allows claims attorneys, paralegals, and quality assurance/risk management personnel to gain greater insight on the health care specialties, their standards of care, and topical issues of malpractice case processing and defenses, informed consent, bioethics, and quality assurance.

VERBA SAPIENTI

WE ARE NOT ALONE: HOW USING OTHER BASE AGENCIES CAN HELP IN INVESTIGATION AND DEFENSE OF CLAIMS

Recently, several cases have been presented to JACT that were investigated well and thoroughly, however the legal office had overlooked resources that could have strengthened their investigation and report immeasurably. While most of the work in any investigation will center around the facts and the law surrounding the incident, when an accident occurs on base, there often are overlooked resources that can aid in the determination of liability and damages.

A high percentage of general tort claims (e.g., slip and fall claims, motor vehicle accident claims) against the AF allege that there was a defect in a building, sidewalk or road that was due to negligence on the part of the AF and led to the damages the claimant suffered. Most bases do a good job of researching the law regarding negligence, and rulings regarding conditions in previous cases. Overlooked, however, are other agencies on base that can assist in finding facts that may impact on the case, and in demonstrating that the AF was not negligent.

When liability is alleged due to the conditions of either a physical facility, or roadway on a base, the investigator should bear in mind that other agencies play a key role in the management and maintenance of these, and may have information that will be vital to the investigation. Every facility on a base will have a manager, and a safety program. The facility manager should have a record of known accidents, conditions reported as hazardous, and what they have done to correct dangerous conditions. These records are important to determine several crucial facts. First, if there was a hazardous condition and the AF was aware of it, then liability for an accident caused by that condition is far more likely. Conversely, if the claimant is stating a hazardous condition existed and we knew or should have known about it, demonstrating that we kept records of accidents and complaints, and that the condition present in the claimant's case had not been reported, nor had there been previous accidents related to it, would support a vigorous defense of the claim. In either case, the building manager should be consulted, and copies of the records obtained.

In addition to records regarding the particular facility and its accident or hazard history, bear in mind that almost every aspect of buildings, roads and other facilities will be covered by a number of governmental standards. If an accident occurred in the performance of a job, the Occupational Safety & Health Administration (OSHA) will probably have regulations covering the job, the manner in which it should be performed, and any safety equipment that should be used. The State where the accident occurred may also have regulations and laws governing the matter, and the AF may well have Instructions on the subject. All of these will provide guidance as to the reasonableness of the task and the manner in which it was conducted. The AF may well also have Instructions on the inspection of the facility, including the manner in which inspections should be conducted, and the frequency they are required. While demonstrating that we complied with our own regulations may not satisfy a court that we were not negligent, it would certainly assist any fact finder in concluding we were not. It would be vital to anyone considering settlement of the case to know if we were in violation of our own rules as well.

Most of the guidance on these matters will fall within the control of the Civil Engineers. To provide two examples: Air Force Instruction (AFI) 32-1024, *Standard Facility Requirements*, 31 May 1994, provides the requirements to be followed in most of the buildings the Air Force owns or manages, and AFI 32-6001, *Family Housing Management*, 23 January 2002,

lays out the requirements to be followed in housing controlled by the service. These Instructions cite many other sources of law and guidance that will assist your research, such as United States Code provisions, Office of Management and Budget Circulars, DoD Publications, and Air Force Publications.

The civil engineers may also be able to provide you with other valuable pieces of information, such as scale maps, contracts regarding building upkeep, and schedules for maintenance and repair. Their offices will be familiar with any state regulations that may govern the standards for construction, maintenance and inspect of the building in question. The bioenvironmental engineers on base may also have the OSHA guidelines applicable to your case. A good web site to search for information on structures and other facilities on base is maintained by HQ AFCESA/CESC, 139 Barnes Drive Suite 1, Tyndall AFB, FL 32403 and is found on the web at http://www.afcesa.af.mil/ces/cesc/index.asp.

Another agency on base you will want to consult is Safety. They have several AFIs you may need, from Air Force Occupational Safety and Health (AFOSH) Standards to AFI 91-204, *Safety Investigations and Reports*, 11 December 2001. Prior to 3 October 2000, investigations involving ground, explosive, and industrial mishaps were generally not privileged so the entire report could be accessed. As of 3 October 2000, all mishap investigations (aircraft, space, missile, ground, explosives and nuclear safety investigation reports) include privileged reports that contain both privileged and non-privileged information. Even so, there may be non-privileged information that you will find useful, and that you should be aware of it as the claim is processed.

The security police may also have information and Instructions that will have a bearing on the processing of a claim. Within their regulations are those governing traffic (AFI 31-204, *Air Force Motor Vehicle Traffic Supervision*, 14 July 2000), use of force (Air Force Manual 31-222, *Security Forces Use of Force Manual*, 1 June 2001), investigations (AFI 31-206, *Security Forces Investigations Program*, 1 August 2001), civil disturbances (Air Force Manual 31-201, Volume 6, *Civil Disturbance*, 17 May 2002), and standards and procedures (AFI 31-201, *Security Police Standards and Procedures*, 4 December 2001). These AFIs can provide strong support for the police in claims against them, assuming that the actions taken were in compliance with the Instructions.

In conducting the investigation you may also want to call on the resources of the audio/visual support staff of the base, not just for still photography, but also for videotape or other aids that may make it easier to understand what happened in a case. Even if they cannot support you directly, the staff on your base may be able to provide you with ideas that will make understanding a sequence of events much easier for someone unfamiliar with the case or the scene where the events transpired.

Issues that turn on the condition of the commissary's physical plant may require you to look off base to get the information you need to complete the claims package. Defense Commissary Agency (DeCA) contracts are processed and maintained at Randolph Air Force Base, and their serving attorney is at HQ AETC/JA. Understanding the provision of contracts can be important in determining third party liability, and learning what other parties the US may need to involve in the lawsuit or settlement. In an era when more and more repair, maintenance and construction is contracted out, this issue is becoming more important than it was when the AF performed most of the tasks in house.

While in most cases federal law and regulation will govern issues on a base, there are also State regulations and standards that may be relevant to the outcome of a claim. Many professions are licensed by the State, and State law will govern the requirements for holding a qualification, such as master plumber or electrician, in a State. When a contractor working on a base files a claim against the AF for injuries that occurred on the job, obtaining the qualifications and knowledge requirements for the worker to hold a license can assist in determining their contributory negligence. State standards for safety may also be useful to demonstrate the base was not negligent, even if the AF was not technically bound to follow the State standards.

It is important to remember when investigating claims that though JAG effort and knowledge are vital to a fair result, in many cases the Corps does not have the knowledge in house to resolve a claim. Use of the other resources the AF has can go a long way in understanding the facts, and obtaining a fair result for both the AF and the claimant. In addition to the resources touched on here, there are other resources available from other bases, through higher headquarters, or sister services that may help your investigation. If your base doesn't have a resource that would be helpful in resolving claim, some other office or agency within AF, DoD, or federal government may have it. Look around and contact JACT if you have questions that require expertise you can't find on your on base.
(Lt Col Ted Essex, Staff Attorney, JACT)

ARBITRIA ET IUDICIA

A case in the mid-west exemplifies the importance of pharmacy's duty to warn patients of contraindicated medications. In *Happel v. Wal-Mart Stores, Inc*., 766 N.E.2d 1118 (Ill. 2002), the court found that the Wal-Mart pharmacy in question has failed to exercise a duty to warn a patient with know allergies that taking the drug Toradol could have adverse consequences. What makes the case significant is that the pharmacy had a computer data base of the patient's history, including her allergy problem. When a contraindicated medication was put into the system, a warning on the computer should have alerted the pharmacist to verify why the drug was prescribed, and warn the patient of the potential. The pharmacy, despite the computer alert system, apparently decided to dispense the drug anyway. The patient subsequently went into shock after taking the medication.

At the hearing, the defendant tried to argue the "learned intermediary" doctrine, claiming that the physician is responsible for the proper medication to be given, and for the pharmacy to be warning patients about use of validly prescribed drugs would be tantamount to practicing medicine without at license. The court, however, did not accept this argument, and ruled that the pharmacy was merely passing along factual information that the drug was known to be contraindicated. This did not amount to making any medical judgments. The court also rejected the defendant's contention that this duty would have a chilling effect on pharmacies not to gather information about drugs in order not to be burdened with a duty to inform. The court noted that, by collecting drug data, customers come to rely on pharmacies to monitor their prescriptions through cross-referencing of the patient's health histories.

This case serves as a good learning tool for our own Medical Treatment Facility pharmacies in being vigilant overseers of prescribed medications. Courts are placing greater onus on pharmacies to protect patients, and pharmacies can no longer count on proper drug selection to be solely within the physician's responsibility.

Servicemembers Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act

Mr. John Meixell

On December 19, 2003, President Bush signed Public Law Number 108-189,[1] a major amendment to the Soldiers' and Sailors' Civil Relief Act (SSCRA).[2] Prior to these changes, the last major revision of the SSCRA occurred in 1940.[3] Other than minor changes in 1942 and 1991, the current version largely reflects the Act as written in 1918.[4] Now, after over sixty years, a complete revision and update of the SSCRA has been enacted. The President's signature relegates the SSCRA to history and we will now operate under the new Servicemembers Civil Relief Act (SCRA).[5]

The SCRA reflects the combined effort of the House and Senate Committees on Veterans Affairs and will serve as a source of important protections for our servicemembers, active and reserve, in the future. Much of the resulting legislation reflects a 1991 Department of Defense draft revision of the SSCRA, which was updated in 2002. The three goals of this draft were: "to make the Act easier to read and understand by clarifying its language and putting it in modern legislative drafting form; to incorporate into the Act many years of judicial interpretation; and to update the Act to take into account generally accepted practice under its provisions and new developments in American life not envisioned by the original drafters."[6] The resulting SCRA accomplishes these three goals.

This note will not attempt to review the history of this legislation or analyze the new law. It is only intended to alert practitioners to some of the more important provisions of this legislation. Citations in this article to the SCRA refer to the sections of the final version of H.R. 100. Even experienced practitioners under the SSCRA will have to acquaint themselves with these new section numbers.[7]

TITLE I--GENERAL PROVISIONS

The SCRA definition of "military service" incorporates the changes made to the SSCRA in 2002.[8] This extends coverage to members of the National Guard serving "more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds."[9] Prior to the 2002 amendment, the SSCRA only applied to members of the National Guard if they were serving in a Title 10 status. The SCRA applies to National Guard personnel serving in either Title 10 status or Title 32 status as defined in the Act.

Next, the SCRA expands the definition of "court" to include "an administrative agency of the United States or of any State."[10] Previously, the SSCRA did not apply to administrative hearing. The increasingly widespread use of administrative hearings had left a large gap in the intended protection of servicemembers. This extension to administrative proceedings is emphasized again when the SCRA specifically defines its applicability as including "any judicial or administrative proceeding commenced in any court or agency."[11]

Finally, Section 109 of the SCRA adds a provision concerning a legal representative of the servicemember. A legal representative is defined as either "[a]n attorney acting on the behalf of a servicemember" or "[a]n individual possessing a power of attorney." Under the SCRA a servicemember's legal representative can take the same actions as a servicemember.[12] Also, the SSCRA referred to dependents, but never defined the term. Section 101(4) of the SCRA now contains a definition of the term "dependent."[13]

TITLE II--GENERAL RELIEF

Section 201 of the SCRA establishes requirements that must be met before a court can enter a default judgment. This complete revision of the corresponding provision of the SSCRA clarifies the procedures required before a court can enter a default judgment but provides little substantive change. One addition is language defining when a court should grant a stay when the defendant is in military service and has not received notice of the proceedings.[14] The court must grant a stay for at least ninety days upon request of the court appointed attorney if there may be a defense which cannot be presented in the absence of the servicemember, or the attorney has been unable to contact the servicemember to determine the existence of a defense. This stay procedure is unrelated to the new

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required stay procedures where the servicemember has received actual notice of the proceedings and requests a stay.[15]

The SSCRA gave the court discretion to grant a stay of proceedings when the servicemember's military service materially affected his ability to participate in the case.[16] The SCRA substantially revises this provision, mandating an initial stay. Additionally, the previously discussed extension of the SCRA to administrative hearings expands the reach of this stay provision to include administrative proceedings. The SCRA mandates an automatic stay for at least ninety days upon the servicemember's request.[17] The request[18] must explain why the current military duty materially effects the servicemember's ability to appear, provide a date when the servicemember can appear, and include a letter from the commander stating that the servicemember's duties preclude his appearance and that he is not authorized leave at the time of the hearing. Prior practice discouraged a direct application to the court for a stay in fear that the court may treat such a request as an appearance. Section 202(c) of the SCRA eliminates this concern. This new provision makes clear that a request for a stay "does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense."[19] Servicemembers who remain unable to appear may use similar procedures to request further stays at the discretion of the court. In another new requirement, the court must appoint counsel to represent the servicemember if the court denies the request for an additional stay.[21]

The six percent interest cap[22] was one of the most frequently used provisions of the SSCRA. This provision requires the reduction of interest on any pre-service loan to six percent. One area of ambiguity was whether the interest in excess of six percent is forgiven, deferred, or subject to some other treatment. Section 207 of the SCRA resolves this issue. It also, for the first time, details the steps that a servicemember must take to obtain the interest rate reduction. The servicemember must make a written request to reduce the interest to six percent and include a copy of his applicable active duty orders.[23] Once the creditor receives notice, the creditor must grant the relief effective as of the date the servicemember is called to active duty. The creditor must forgive any interest in excess of the six percent with a resulting decrease in the amount of periodic payment that the servicemember is required to make.[24] As under the SSCRA, the creditor may avoid reducing the interest rate to six percent only if it can convince a court that the servicemember's military service has not materially affected the servicemember's ability to pay.[25]

TITLE III--RENT, INSTALLMENT CONTRACTS, MORTGAGES, LIENS, ASSIGNMENT, LEASES

Section 300 of the SSCRA provided that, absent a court order, a landlord may not evict a servicemember or the dependents of a servicemember from a residential lease when the monthly rent is $1200 or less.[26] The SCRA increases the applicable rent ceiling to $2400 per month for the year of 2003.[27] The Act provides a formula to calculate the rent ceiling for subsequent years.[28] Using this formula, the 2004 monthly rent ceiling is $2465.[29]

Perhaps the most significant changes are found in Section 305 of the SCRA. Its counterpart in the SSCRA allowed a servicemember to terminate a pre-service "dwelling, professional, business, agricultural, or similar" lease executed by or for the servicemember and occupied for those purposes by the servicemember or his dependents.[30] This provision did not provide any relief to an active duty soldier required to move due to military orders. It also failed to address automobile leases. Section 305 remedies these problems. Leases covered under Section 305 include the same range of leases that the SSCRA covered.[31] The section still applies to leases entered into prior to entry on active duty.[32] It adds a new provision, however, extending coverage to leases entered into by active duty servicemembers who subsequently receive orders for a permanent change of station (PCS) or a deployment for a period of ninety days or more.[33] The section also contains a totally new provision addressing automobiles leased for personal or business use by servicemembers and their dependents.[34] Servicemembers may cancel pre-service automobile leases if the servicemember receives orders to active duty for a period of one hundred and eighty days or more.[35] Also, servicemembers may terminate automobile leases entered into while the servicemember is on active duty if the servicemember receives PCS orders to a location outside the continental United States or deployment orders for a period of one hundred and eighty days or more.[36]

TITLE IV--LIFE INSURANCE

Article IV of the SSCRA permits servicemember to request deferments of certain commercial life insurance premiums and other payments for the period of military service and two years thereafter. If the Department of Veterans Affairs approves the request, the United States will guarantee the payments, the policy shall continue in effect, and the servicemember will have two years after the period of military service to repay all premiums and interest.[37] The total amount of life insurance that this program could cover was lim-

ited to $10,000.[38] The SCRA increases this total amount to the greater of $250,000 or the maximum limit of the Servicemembers Group Life Insurance.[39]

TITLE V--TAXES AND PUBLIC LANDS

The important changes within this Title are found in Section 511, Residence for Tax Purposes. The SSCRA provided that a nonresident servicemember's military income and personal property are not subject to state taxation if the servicemember is present in the state only due to military orders.[40] Some states, however, have included the amount of the nonresident servicemember's military income when calculating the applicable state income tax bracket for the servicemember's spouse. The result often places the spouse in a higher tax bracket. Thus, while the military income is not directly taxed, the servicemember and spouse pay more in state income tax than if the state did not consider the servicemember's military pay. This practice will end as Section 511(d) of the SCRA precludes states from using the military pay of nonresident servicemembers to increase the state income tax of the nonresident servicemember or spouse. Section 511 also contains a new provision that clarifies that the protections of this section extend to servicemembers who are legal residents of a Federal Indian reservation.[41]

The remaining changes in this Title are minor. Most of the changes merely clarify language and update the legislative format. The SRCA eliminates three sections of the SSCRA relating to homestead rights to public lands[42] as the programs no longer exist.

TITLE VI--ADMINISTRATIVE REMEDIES

Changes within this Title merely clarify language and update the legislative format.

TITLE VII--FURTHER RELIEF

The final significant change will have special meaning to reserve judge advocates. The 1991 amendment to the SSCRA[43] allowed an individual with a pre-service professional liability (malpractice) insurance policy to suspend such coverage during the period of active military service. The insurance provider is responsible for any claims brought as a result of actions prior to the suspension. The insurance provider would not charge premiums during the period of suspension, and must reinstate the policy upon the request of the professional. This provision applied to a person "engaged in the furnishing of health-care services or other services determined by the Secretary of Defense to be professional services."[44] Mobilization orders since 1991 contain Secretarial determination that legal services are "professional services." The SCRA eliminates the need to include this provision in mobilization orders by modifying the definition of a person covered to specifically include a servicemember providing legal services.[45] The remaining changes within this Title merely clarify language and update the legislative format.

CONCLUSION

The SCRA's changes represent a long overdue update to the important protections that the SSCRA provided to servicemembers. With the prospect of continued mobilizations and deployments, our servicemembers will increasingly rely on the improved protections of the SCRA. Legal assistance attorneys must become familiar with these changes and update their SSCRA correspondence to reflect these new provisions. It will become progressively more important to educate judges, attorneys, landlords, lessors, lenders, and other affected parties of these new provisions. Hopefully this note is a first step in this process.

[1]Servicemembers Civil Relief Act, Pub. L. No. 108-189 (2003).
[2]50 U.S.C. app. sections 501-594 (2000).
[3]Act of October 17, 1940, ch. 888, 54 Stat. 1178 (codified as amended at 50 U.S.C. app. sections 501-593 (1994)).
[4]Admin. & Civil L. Dep't, The Judge Advocate General's School, US Army, JA 260, The Soldiers' and Sailors' Civil Relief Guide (July 2000) (providing a brief historical review of the SSCRA).
[5]Pub. L. No. 108-189 (2003). Section 1(a) provides that the act shall be known as the "Servicemembers Civil Relief Act.'
[6]Memorandum, Colonel Steven T. Strong, Director, Legal Policy, Office of the Under Secretary of Defense (Personnel & Readiness), to Service Legal Assistance Chiefs (October 3, 2001) (on file with author).
[7]The appendix to this article provides a cross-reference between some of the more frequently used sections of the SSCRA and the new SCRA.
[8]Veteran Benefit Act of 2002, Pub. L. No. 107-330, 116 Stat. 2820 (2002).
[9]Pub. L. No. 108-189 section 101(2)(A)(ii) (2003).
[10]*Id.* section 101(5).
[11]*Id.* section 102(b).
[12]*Id.* section 109(b).
[13]*Id.* section 101(4).
[14]*Id.* section 201(d).
[15]*Id.* sections 201(e) & (f).
[16]50 U.S.C. app. section 521 (2000).
[17]Pub. L. No. 108-189 section 202(b)(1) (2003).
[18]*Id.* section 202(b)(2). As a condition to stay proceedings, the statute requires a written request. *Id.*
[19]*Id.* section 202(c).
[20]*Id.* section 202(d)(1).
[21]*Id.* section 202(d)(2).
[22]50 U.S.C. app. section 526 (2000).
[23]Pub. L. No. 108-189, section 207(b)(1) (2003).
[24]*Id.* sections 207(a)(2) & (3).
[25]*Id.* section 207(c).
[26]50 U.S.C. app. section 530 (2000).
[27]Pub. L. No. 108-189 section 301(a)(1)(A)(ii) (2003).
[28]*Id.* section 301(a)(2).
[29]E-mail, Colonel Steven T. Strong, Director, Legal Policy, Office of the Under Secretary of Defense (Personnel & Readiness), (December 31, 2003) (on file with author).

[30]50 U.S.C. app. section 534.
[31]Pub. L. No. 108-189 section 305(b)(1) (2003).
[32]*Id*. section 305(b)(1)(A).
[33]*Id*. section 305(b)(1)(B).
[34]*Id*. section 305(b)(2).
[35]*Id*. section 305(b)(2)(A).
[36]*Id*. section 305(b)(2)(B).
[37]50 U.S.C. app. sections 540-547 (2000).
[38]*Id*. section 541.
[39]Pub. L. No. 108-189 section 402(c) (2003).
[40]50 U.S.C. App section 514 (2000).
[41]Pub. L. No. 108-189 section 511(e).
[42]50 U.S.C. App. sections 502, 503, and 510 (2000).
[43]*Id*. section 592.
[44]*Id*. section 592(a)(2)(A).
[45]Pub. L. No. 108-189 section 703(a)(2)(A) (2003).

SSCRA/SCRA Reference Guide

Provision	**SSCRA Section**	**50 U.S.C. App.**	**SCRA Section**
Definitions	101	510	101
Application & Jurisdiction	102	512	102
Persons Liable on SM's Obligation	103	513	103
Waiver of Benefits	107	517	107
Effect on Future Financial Acts	108	518	108
Legal Representatives	N/A	N/A	109
Default Judgments	200	520	201
Stay of Proceedings	201	521	202
Statute of Limitations	205	525	206
Maximum Rate of Interest	206	526	207
Eviction and Distress	300	530	301
Installment Contracts	301	531	302
Mortgage Foreclosures	302	532	303
Termination of Leases	304	534	305
Extension to Dependents	306	536	308
Residence for Tax Purposes	514	574	511
Anticipatory Relief	700	590	701
Professional Liability Protection	702	592	703
Reinstatement of Health Insurance	703	593	704
Residency for Voting	704	594	705

SUMMARY COURTS-MARTIAL: WHY AND WHEN TO HOLD THEM (AND 10 WAYS TO PREPARE FOR THEM)

Major James G. McLaren
Captain Jennifer C. Whitko

In a 1996 article on Air Force summary courts-martial, Lt Col Michael H. Gilbert wrote that because the summary court-martial was "[s]peedier than a special court-martial and more deadly than non-judicial punishment under Article 15 of the Uniform Code of Military Justice," it was "a great option for a commander who is looking at an offense that is in the gray area between an Article 15 and a special court-martial."[1] The summary court has become a more frequently used disciplinary tool in today's Air Force, but many SJAs are not sold on its merits, or are unsure about the "gray area" in which this tool is useful. The purpose of this article is not to advocate holding summary courts, but to explain why and when other SJAs have recommended their use, and to suggest guidance in preparing for summary courts.

BRIEF HISTORY OF THE SUMMARY COURT 1984-2003

A brief recent history may be useful. The Air Force averaged around 30 summary courts per year in the mid- to late- 1980s, with a high at that time of 67 in 1985.[2] These numbers are placed in perspective by the fact that the Air Force averaged 1453 courts per year between 1984 and 1986. The summary courts represented a small percentage of the total courts held. From the Gulf War to the mid-1990s, the total number of courts held in the Air Force dropped to half the levels of a decade earlier, reflecting a smaller Air Force and perhaps a more highly trained and motivated one. The number of summary courts-martial held dropped even more precipitously to the point of near invisibility. Six were held in 1993 and only one in 1994. MAJCOM staff judge advocates may have discouraged summary courts or base staff judge advocates may not have regarded them as a valuable tool and made this known to commanders. Whatever the reason, the summary court was nearly dead. It was resuscitated in 1995, when 35 summary courts were held. Since then, summary courts-martial numbers steadily increased until 2000 then gradually decreased:

1996	45
1997	69
1998	76
1999	91
2000	139
2001	126
2002	119
2003	101[3]

The growth in summary courts-martial was "discussed at length" at the 2000 CGM conference, which may explain the gradual decrease in numbers since then.[4] When there are so many summary courts it begs the question of whether they are being convened in appropriate circumstances. The percentage of summary courts is now over ten percent of all courts held. The summary court is assuming a higher profile; hence the closer scrutiny from our Corps' leadership. Staff Judge Advocates should therefore be prepared to provide reasons why they recommended a summary court-martial in any given case.

FIVE REASONS TO HOLD SUMMARY COURTS

The summary court fills the gap between NJP and the special court-martial

The gap between punishment available under Article 15 and a special court-martial is a wide one, particularly since the amendment to SPCM authority to 12 months confinement. The summary court-martial fills this gap. Judge advocates have found that their commanders give the summary court a good reception when they brief it as an option. There is no need to hold special courts-martial for relatively minor offenses where the likely sentence would be similar to that available in a summary court-martial. In the case of E-1 through E-4, this is up to 30 days confinement,

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forfeiture of two-thirds pay per month for one month, and reduction to E-1.[5] There is no reason to shoot small game with an elephant gun.

The summary court responds to different unique circumstances

The summary court can present a solution to a problem unique to the circumstances of a particular installation. Mountain Home Air Force Base, for example experienced "young, first term airmen engaging in misconduct after their requests for early separations were disapproved."[6] At other bases, "airmen who had been served notice of administrative discharge began to flout discipline with an attitude reflecting the belief that the Air Force wouldn't do anything to them. These airmen had already been given Article 15s. They were awaiting separation, but were still on the Air Force's payroll. It was unacceptable for them to be consistently late to work, disrespectful to their NCOs, or violate any base restrictions imposed by the Article 15."[7]

The summary court provided a means of punishment that was speedy and inexpensive, in the sense that it did not involve member panels which would have been a waste of Air Force resources under these circumstances.

Commanders like the summary court-martial

Commanders like to have options from which to choose. They particularly like options that provide the possibility of a speedy, highly-visible deterrent. At Malmstrom Air Force Base, several commanders chose to make the courtroom the duty station for junior members of their squadron during one or two hours of summary courts involving their airmen. This exposed the younger airmen to the justice system. It appeared to be far more effective a deterrent to watch your buddy being sentenced than to read it in the base newspaper. The offender who breaks restriction while waiting for his discharge becomes very visible in an orange prison suit when he eats at the chow hall. On the other side of the coin, the summary court martial can be rehabilitative. "A member convicted by a summary court-martial – like one found guilty under Article 15 – is not necessarily someone whom the commander is adamant about discharging. This makes it one of the strongest rehabilitative tools available to the commander."[8]

Inculcates respect for the system of justice

A wing commander can expose some of his or her commanders to the military justice system as summary court officers. In today's Air Force in which we see declining numbers of courts litigated before panels, exposure to the justice system for non-JAG officers has never been lower. Commanders value these opportunities. The Judge Advocate General's Corps also benefits by inculcating respect for our system of justice and the role played by the judge advocate.

Opportunity for experience and mentoring

Some of our counsel have argued in very few courts-martial. There is a dearth of opportunity to get on your feet and argue in a courtroom. New judge advocates can gain valuable experience by arguing the merits or sentencing phase of a summary court, especially when there is a large gallery present. The issues are non-complex and the counsel are (or should be) forced to be brief.[9] An experienced judge advocate summary court officer can spend an invaluable hour with counsel after the court discussing what they did well or poorly. Judge advocates from other installations and reservists are seen as non-threatening to new JAGs and may be useful in this role. These officers are not as readily perceived by the base community as "dependent" on the base staff judge advocate and provide the neutrality and independence necessary for justice to be seen to be done.

WHEN TO HOLD THEM - EXPLORING THE "GRAY AREA"

No one can or should define any class of cases that should go to summary court. The enhanced scrutiny of summary courts-martial by our higher echelon is to prevent that type of misjudgment. Each individual case should be judged on its own merits, taking into account the best interests of the Air Force, the rights and past history of the offender, the circumstances of the offense, and the goals of the commander. If the commander can achieve his or her deterrence objectives by using a summary court, and the ends of justice will be served by a sentence of 30 days confinement or less, then the summary court should be briefed as an option to the commander. The examination of the collective experiences of the bases may prevent an inappropriate referral to a summary court, and suggests the type of case that may fall within the "gray area." The examinations of AMJAMS records of 200 recently held summary courts-martial reveals the following "top eight" offenses:

Article 86, failure to go or unauthorized absence (29%).
Article 92, dereliction of duty offenses, and liquor violations in barracks (24%).
Article 134, disorderly conduct, communicating a threat, falsifying a pass, or giving a pass to the wrong person (22%).

Article 112a, wrongful possession or use of a con trolled substance (9%).
Article 107, signing or making a false official statement (7%).
Article 121, larceny or wrongly appropriation (5%).
Article 108, selling, damaging, or losing military property (4%).
Article 111, drunk or reckless driving (4%).

There is no formula for determining when a summary court is the appropriate forum. Certain bases have found this forum useful in addressing drug use, dereliction of duty when early separations were disapproved, and disregard for authority once separation action was started.

10 WAYS TO PREPARE FOR A SUMMARY COURT-MARTIAL

1. Discuss the summary court-martial process with the commander in detail

Although summary courts-martial have gained some popularity over the last several years, many commanders are still not entirely familiar with the process. As mentioned above, the appeal to commanders is the possibility of swift justice and high visibility. However, it is important to remind commanders that the findings and sentencing phase in summary courts-martial are subject to the same high standards as special and general courts-martial. In addition to discussing the strengths and weaknesses of the case, remind commanders that the burden of proof is the same (beyond a reasonable doubt), the same rules of evidence apply, and although the accused's right to counsel is not absolute, military counsel is generally made available as a matter of policy. The commander will then be able to make a fully informed choice and will not be surprised as the process unfolds.

2. Interview primary witnesses as early as possible

Summary courts-martial are handled by one prosecuting officer, follow a much shorter script and involve far less red tape than special or general courts-martial. As a result, counsel often find themselves procrastinating summary court preparation. Failure to adequately interview and prepare witnesses will impress neither the summary court-martial officer (SCO) nor the commander. Conducting interviews and preparing witnesses as early as possible is not only a good habit to get into, but makes it less likely that (more experienced) defense counsel will catch you off guard during cross-examination.

3. Review all of the accused's military records

Taking the time to review an accused's personnel information file, UPRG, medical records[10] and other personnel records can pay off in findings and sentencing. For example, if an accused is court-martialed for drunk and disorderly conduct, you might want to check the medical records to see if the member sought medical care during the same timeframe as the alleged incident. Perhaps the accused was hung-over the morning after and placed on quarters by the hospital staff, or maybe the accused was injured and placed on restriction. This type of information can be useful for cross-examination during findings or for aggravation evidence in sentencing. You never know what you'll find, so make sure that no stone is left unturned. Further, it is important to note that under R.C.M. 1304(a), the summary court-martial officer is required to examine the accused's "immediately available personnel records" prior to trial, so you need to have these items on hand for review anyway.

4. Request derogatory data for all witnesses

One of the first things you should do when preparing to go to trial is make a derogatory data request to the Air Force Personnel Center (AFPC) for all potential witnesses and especially the accused. Sometimes units fail to properly maintain bad paper and derogatory information in members' personnel files. This measure will not only ensure that you have complete and accurate information concerning witnesses, but may also provide useful facts for your cross-examinations and reveal weaknesses in your own witnesses' testimony. Further, AFPC will be able to provide you with certified copies of any bad paper.

5. Discovery requests and responses should be timely

It is just as important to make timely requests and responses to discovery in a summary court-martial as it is in a special or general court-martial. However, sometimes counsel become lax in the summary court-martial discovery process (sending random unsigned e-mails or periodically making phone calls instead of forwarding a formal written request). These are not good practices to get into. First, failure to make timely requests and responses might cause you to overlook something. Second, in the event a discovery dispute arises, using written and timely discovery will ensure you have a paper trail and signed receipt of service ready to defend your position. Finally, actively engaging in discovery will ensure that you learn the rules and strictly adhere to them when preparing more complex special or general court-martial cases.

6. Find out as much as you can about the summary court-martial officer

Aside from a few limitations, the SCO can be any officer selected from a wide range of career fields and backgrounds.[11] Unfortunately, you do not receive a data sheet on the SCO as you do for court members in a special or general court-martial. So, it's up to you to do the legwork. Find out how long the SCO has been in the military, his career field, and if possible, whether he has any court experience, either as a summary court-martial officer or as a court member. You want to find out anything that might be relevant to the SCOs view of the case. Although it is not required, commanders routinely appoint Staff Judge Advocates to act as SCOs. As such, one of the easiest ways to learn more is to go on FLITE and do a search in the JAG roster. The experience level and background of the summary court-martial officer should frame the way you present your case.

7. Discuss the rules of engagement with the summary court-martial officer prior to trial

Since the SCO is the one running the court, it's a good idea to discuss the rules of engagement prior to trial. For example, he or she may desire to question witnesses before either counsel or have specific preferences regarding the formality of the proceedings, or the length and order of opening and closing arguments. Discussing these types of issues up front is one way to show proper deference to the SCO and can make things run a lot smoother. In turn, this will tend to make a better impression on court observers as to the fairness and seriousness of the forum.

8. Familiarize yourself with the script

Appendix 9 of the Uniform Code of Military Justice (2002) edition contains a sample summary court-martial script. However, it is important to note there are several different variations available. So, be sure to ask the summary court-martial officer which version he or she intends to use and become familiar with it. This is a simple way to make the trial run more smoothly and for you to appear more professional.

9. Don't be afraid to experiment

Summary courts-martial are a great way to hone your skills and develop your talent in a relatively low-threat environment. Don't be afraid to try new things. If you've never worked with diagrams or visual aids, this is the place to try it out. If you have a tendency to read your arguments, try to deliver arguments without your notes. The SCO will appreciate your enthusiasm and you will inevitably increase your comfort and skill level in the courtroom.

10. Don't wait until the last minute to prepare the sentencing case

Although the maximum punishment in a summary court-martial is fairly low, don't assume that conviction equals a maximum sentence. Just like court members, SCOs want as much information as possible before imposing a sentence. Prior to trial, be sure to interview the accused's co-workers, commander, and first sergeant, as well as the victim or anyone else that could provide aggravation, extenuation, or mitigation. Don't put these interviews off until the last minute as you will be more likely to miss something.

CONCLUSION

The summary court-martial is alive and well. Indeed, it is prospering to the extent that senior leadership has issued reminders to use it only in appropriate circumstances. The examination of 200 courts gives some frame of reference to the types of offenses that staff judge advocates and commanders have deemed appropriate for this forum. However, referral to a summary court is not formulaic and staff judge advocates should examine the merits of each individual case and be able to articulate reasons for referring to this forum. When used appropriately, the summary court-martial provides opportunities for commanders to participate in the military justice process, as well as to benefit from a disciplinary tool that provides a highly visible deterrent to misconduct. In addition, the JAG Corps gains higher visibility and respect, as well as an opportunity for new judge advocates to argue in the courtroom. While a certain amount of experimentation with courtroom techniques is encouraged in this venue, counsel should prepare thoroughly and present their arguments as professionally as they can. The good habits and experience gained when arguing summary cases will benefit new counsel when they are assigned to more serious cases.

[1]Lt Col Michael H. Gilbert, "Summary Courts-Martial: Rediscovering the Spumoni of Military Justice," 1996 A.F. L. Rev. 119, 119.
[2]The number of summary courts-martial held by the United States Air Force is reported by fiscal year in the appendix to the Annual Report Submitted to the Committee on Armed Services of the U.S. Senate and House of Representatives. This report is reproduced in the Military Justice Reporter. *See* 20 M.J. CLXVII (FY 1984); 23 M.J. CLX (FY 1985); 24 M.J. CLXIX (FY 1986); 26 M.J. CLIII (FY 1987); 28 M.J. CLXXXVII (FY 1988); 30 M.J. CLV (FY1989)(the figures for 1988 courts were repeated erroneously); 32 M.J. CLXXXVIII (FY 1990); 34 M.J. CXXXIII (FY 1991); 38 M.J. CLXXXIII (FY1992); 39 M.J. CLXXIV (FY 1993); 43 M.J. CCL (FY 1994); 44 M.J. CXLVII (FY 1995); 49 M.J. CXV (FY 1996); 50 M.J. CXLIX (FY 1997); 52 M.J. CLXXIX (FY 1998).
[3]The annual reports for FY 1999 through FY 2002 are available electronically at www.armfor.uscourts.gov/Annual.htm. FY 2003 statistics are unofficial and may not correspond with the official report. Those figures were compiled from Air Force reports through AMJAMS.

[4]Major General Moorman, "Message from TJAG – GCM Conference 2000 Report," AF/JAZ Flitemail Message, TJAG Online Service, 1 November 2000.
[5]RCM 1301(d)(1). The court may also adjudge 45 days hard labor without confinement, and restriction to specified limits for not more than 2 months.
[6]Gilbert, "Summary Courts-Martial" at 119.
[7]Comment of a senior judge advocate solicited on a non-attribution basis.
[8]Gilbert, "Summary Court-Martial" at 120.
[9]The authors favor using the summary court-martial in this way, provided it does not stretch a "summary" proceeding into a protracted one. One colleague has argued that any argument on the merits in a summary court-martial removes the summary nature and one might as well recommend a special court. Other judge advocates may hold similar views.
[10]When requesting medical records be sure to observe the rules and requirements of the Privacy Act and the Health Insurance Portability and Accountability Act (HIPPA). See AFI 51-301 and DoD 6025.18R.
[11]According to R.C.M. 1301(a), a summary court is "composed of one commissioned officer on active duty" and "whenever practicable, a summary court-martial should be an officer whose grade is not below lieutenant."

A MESSAGE FROM THE EDITOR:

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, or e-mail Capt Christopher Schumann at chris.schumann@maxwell.af.mil.

Planning to Fail: A Quick Checklist to Kill Your Case[1]

Major Bradley W. Mitchell
Captain Keith J. Scherer

Everyone loses a case. Many loses fall on the razor's edge of a week's jury deliberation. This is unfortunate. And it's quite avoidable, when anyone can follow our checklist and kill their case with great precision and purpose right from the start, spiking it at every key point along the way.

We start by setting out some guiding principles. Realizing that the odd case may fall outside of our checklist, taking these core ideas to heart will guide the dedicated pettifogger to sure failure regardless of the circumstances of any individual case.

After discussing these general canons, we set out very specific steps in an easy-to-use checklist. The simple steps are grouped into the stages of litigation -- but each step and each stage has the potential to kill a case. And the checklist is formatted with a column to date and initial as each item is positively ignored.

PREPARE TO FAIL FROM THE START!

There's no better place to begin failing than at the beginning. The journey of a thousand miles begins with the first step -- even if that step and the journey are in the wrong direction.

Indeed, the first step is to not even take the first step: ignore the case from the moment it's assigned. Let the Report of Investigation simmer in your inbox for a few weeks. If asked about the case, mutter something about "researching it", "complex fact patterns", or "trying to reach defense counsel."

FACTS ARE FOR LESSER ADVOCATES!

When pressed to move forward, go ahead and read the ROI. "Read" is an extreme term, of course, since perusing the case synopsis is really all that's required. Investigators have far more free time than litigators and use that time to perfectly summarize witness testimony and every aspect of the case. Every ROI is the best it can be -- bet your career on it.

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Investigators always ask every relevant question and witnesses always reveal every relevant fact in that first AF Form 1168 witness statement. Don't disturb this by asking anyone for more information.

Once you have the facts from the ROI, go with your initial instincts in drafting the charges. Don't try to discover the facts that prove up each specification. Add every possible spec to the charge sheet now -- you can always jettison them during trial. That will earn you another opportunity for face time with the Convening Authority -- and on your timetable, thanks to the ongoing trial.

CHARGING UNCLUTTERED BY THE LAW!

You are destined for greatness, so your cases are destined for greatness. Precedent is fine for lawyers who aren't as persuasive in the courtroom. You have an amazing array of legal research tools at your fingertips, along with an office of colleagues ready to share their experience. But you don't need to rely on these crutches: you will make law through your sheer force of will -- appellate courts will cite your name repeatedly!

KEEP THE STAND FRESH!

Doing little or no preparation has a great hidden benefit. It guarantees surprises for you in court. How much fun would a trial be if you knew everything before it even started?

For example, talking with witnesses before trial might taint their testimony. Leave what they have to say for trial. That "Perry Mason moment" is precious!

LET THE DEFENSE DO THE WORK!

Defense counsel must prepare thoroughly, or face an "ineffective assistance of counsel" charge on appeal. The great news is that there's no "ineffective assistance of prosecution" counterpart.

Since the defense must do the work anyway, why not use their enthusiasm and ride it so that they do your work? Let them draft any stipulations; so what if a few facts are shaded in their favor or left for you to prove in court. Let them spell out the terms of any pre-trial agreement; so what if that forces you into bargaining up from a low offer. Let them find the

weak areas of your case; so what if they spotlight each weakness with pretrial motions and in court.

CIRCUIT IS THE CURE!

Any work that opposing counsel doesn't do for you can wait for your Circuit Counsel. Gathering facts, speaking with witnesses, and developing the core of your case? Simply wasted effort to do any of this before Circuit Counsel arrives. Circuit Counsel rarely gets the chance to get in on the beginning of a case; you'll be doing them a favor, refreshing their ability to work on the basic details of a case. Your clever lack of preparation will surprise -- and adrenalize -- your Circuit Counsel!

It's important that you set the proper tone in your relationship with your Circuit Counsel. You live right where it all happened; Circuit comes in from an office hundreds of miles away -- so don't be bullied by their experience and pure focus on litigation. Every day, you drive right by the scene of the crime; you haven't stopped to look at the area yourself, so what can Circuit gain by it? An added benefit: once you establish the proper tone with one Circuit Counsel, all of the other Circuit Counsel will quickly learn of your reputation and litigation style!

THE "HELP" ARE THERE FOR YOUR USE!

You are the focus of the trial. After all, you are the voice of the United States. Plus, you went to law school and passed the bar exam; those are rare accomplishments and entitle you to automatic esteem.

You are above routine chores -- that's why you have a staff. You'll brighten their day by giving them massive amounts of photocopying to do at the last minute. You'll make them feel like part of the team when you give them a witness list a few days before trial; making travel plans for a dozen witnesses in a day is far more challenging than working a couple a day three weeks in advance. And more challenging work is directly more rewarding for the "little people". But let them feel that reward internally; don't thank them for their help -- except with more work on even shorter deadlines.

IN-FLIGHT FAILURE FOR SPECTACULAR RESULTS!

You've entered the courtroom, the battlefield of justice. A fact is missing? Argue the law! You haven't researched the law? Then step back and unleash all of your sophistry! Better yet, give your co-counsel a blank look and hand it off to her.

Still, you are at the table, so you need to show the panel that you're the boss. Cough, spill that ice water, close those books loudly -- whatever it takes to test your co-counsel's ability to present her case. This will also help your colleague strengthen her ability to control her anger.

Demonstrative aids? Fine for JASOC. But your expert understands titration, spectrum graph charts and all of the other tools of urinalysis. So do you -- at least enough to bluff your way through the rest. Why think of useful explanations, metaphors, and exhibits for the jury? If a panel member doesn't understand something, they'll just rely on your courtroom voice and your expert's credentials to reach that conviction.

Many experienced advocates suggest working on your closing argument very early -- even before you start preparing your opening statement. Sadly, those folks have lost all of the excitement of piecing together a closing "on the fly", while you examine and cross witnesses and try to follow the defense case.

Plus, you have the advantage of sticking with a one-note, single sentencing argument. The first time you used it, it was great. Why mess with success and pick a different theme? Sure, opposing counsel read what you said in that last trial -- but you'll be able to get 'em during rebuttal -- which the judge will surely allow because he owes you the last word.

Finally, save all those great ideas you get during the trial for after the trial. Then you can regale other attorneys with how you would have won the case if you weren't the (*assistant*) trial counsel. And at the bar after trial there's no judge on the bench to inconveniently rule otherwise!

LANDING IS HARD -- CRASHING IS EASY!

You're done, it's over, and the weekend is here. The victim cares only about the result in this one little case. You are the Gladiator and live for the next fight! If the victim didn't bring a strong case, that's her fault. The victim has the rest of her life to get over it -- and it's something she needs to do alone.

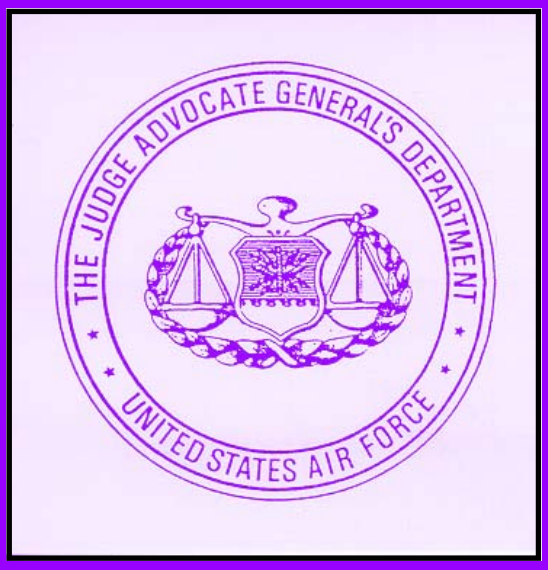
[1]This article is an attempt to use humor to highlight the importance of trial preparation and case presentation. The authors understand and appreciate the significance of the military justice system and do not intend to demean it with this article.

There are many excellent resources for building advocacy skills, including The Air Force Law Review (with its timeless Master Advocate's Edition), *The Reporter* (with timely information in each issue), courses, and colleagues. If the literary tool of humor has worked and any particular point in this article causes nervous laughter in the reader, then the authors are certain that it may be remedied by turning to these time-honored guides.

The authors apologize if the reader disagrees with the literary tool of choice; clearly, any fault is borne fully on the shoulders of Major Bradley W. Mitchell, eh, rather, make that Captain Keith J. Scherer, uh, on second thought, blame...THE EDITOR

1. PREPARE TO FAIL FROM THE START!
a. Think only like a prosecutor.
b. Don't begin your investigation until you receive the ROI.
c. Don't respond to discovery or prepare your witnesses until you get the defense's pleas and choice of forum.
d. Discovery is best handled over the phone. Simply saying you sent everything will satisfy everyone at trial, except perhaps defense counsel and the military judge.
e. Don't ask the victim embarrassing questions in the privacy of your office. You don't want to traumatize her again, do you? Instead, let defense counsel humiliate her in court and on the record.
f. Don't review the accused's character statements. And don't object to their contents. Come to think of it . . . you know they're all sentimental hogwash anyway, so why bother reading them?
g. Don't interview an accused's coworkers. They weren't at the scene of the crime, so what can they add?
h. Use the OSI's narratives when you're drafting charges.
i. Don't bother going to the OSI office to review the case file. Everything important is already in the ROI.
j. Assume that an accused's confession is admissible. It's on an 1168, isn't it?
k. Don't waste your time preparing a cross-examination of the accused. They never testify.
l. Don't take the time to learn any forensic science. That's what experts are for.
m. Always assume the accused will plead guilty -- he did it, didn't he? Why shouldn't he cooperate at trial?
n. Don't worry about the fit of your uniform or whether your ribbons are correct. You're not on trial -- he is.
2. FACT ARE FOR LESSER ADVOCATES!
a. When you do a proof analysis, just stick with the bare bones. Don't cite case law, don't anticipate objections. What does the Convening Authority want, a trial brief?
b. If you discover evidence that hurts your case, keep your mouth shut. It's not your job to ease the defense's job.
c. When you file a written answer to discovery, keep it short and sweet. Appellate courts prefer monosyllabic replies that give no clue as to what the defense was seeking.
3. CHARGE IN UNCLUTTERED BY THE LAW!
a. Don't ask your peers for advice. You don't want them to think you're dumb. And by all means, stay away from the boss -- she writes your OPR!
b. Don't waste your time reading case law. Instead, invest your hours putting rhetorical curlicues on your sentencing argument. After all, the conviction is a foregone conclusion.
c. If you do look at cases, ignore the federal circuits. This is *military* justice, after all.
4. KEEP THE STAND FRESH!
a. Don't bother preparing for witnesses for cross-examination at an Article 32 hearing. Defense counsel never litigates at an Article 32 hearing, so no harmful testimony will come out -- at least nothing that can hurt at trial.
b. Don't let your victim review her 1168s prior to testifying. She knows what she told the police.
c. Don't clutter your mind by reviewing the victim's Article 32 testimony or 1168 for inconsistencies. All that matters is what she says when she testifies at trial.
5. CIRCUIT IS THE CURE!
a. Don't let Circuit Counsel boss you around during trial prep. They don't know the burdens you have in the base office, so from time to time you may have to straighten them out.
b. If you haven't prepared your case by the time Circuit Counsel arrives, remember: they are the cavalry.
6. LET THE DEFENSE DO THE WORK!
a. Wait until the defense has spoken with witnesses before you contact them. It's better to get the last word than the first. Trial work is all about the tortoise and the hare.
b. Wait for the defense to file its motions before beginning your replies.
c. If you're responding to a motion, go ahead and stipulate to the defense's statement of facts. They're *facts*, right? While you're at it, you might as well agree with their statement of the law.
d. Let defense counsel draft stipulations of fact and of expected testimony.

7. THE "HELP" ARE THERE FOR YOUR USE!
a. While it's ok to have a paralegal along when you interview witnesses, don't let them ask questions. They're not lawyers, so what can they add?
b. Don't check with your court reporter before negotiating a trial date.
c. Indeed, don't ever speak with your court reporter. How they need exhibits marked is their problem.
d. Ignore the Bailiff. She's just doing this to get out of some other duldrum job. She might be able to clue you in to the Judge's mood or point out that you forgot the name tag on your blues -- but you don't need those distractions.
e. Some say that courts are extra duty, but you didn't sign up for that. Come beer-thirty, you're outta here. Hand an hour of work to your case paralegal on your way out, too -- it'll encourage them to become an officer.
f. Assume your witnesses will be on-station for trial. You don't have to check with them or their unit first. They're not in control here -- you are.
g. Keep child victims locked in a small room in the legal office with no windows, no toys, and no TV for several hours before they testify. It'll keep 'em focused on their testimony.
h. Tell your witnesses to dress like they are going to church. We all know what that means, so spell it out.
8. IN-FLIGHT FAILURE FOR SPECTACULAR RESULTS!
a. Script? Bah. That's for Lieutenants.
b. Save time by using canned questions for *voir dire.*
c. In your opening, preface every remark by saying, "The evidence will show." And your last line should be, "That's what the evidence will show." Primacy and recency.
d. Opening statements are mostly argument, but don't be rude and interrupt opposing counsel with objections.
e. Chat with your co-counsel in front of the jury. It lets them know you're not taking things too seriously.
f. The only useful objection is relevance, so don't waste precious free time learning the others.
g. Mimic the judge and opposing counsel. It builds rapport with them and entertains the jury and spectators.
h. Ask for a 39a session every time something happens that you didn't expect. It lets the members know you are in charge. Don't worry -- no one will infer that you're hiding anything from them.
i. When talking to the jury, show off that education you're still paying for. Use long, Latinate words and foreign phrases whenever possible. If you can throw in a *gainsay* or *daresay*, by all means do say.
j. Hearsay rules are confusing. Very few people can use them correctly. Just fake it like everyone else.
k. Be afraid to mention the accused's name. Similarly, never, ever look at the accused.
l. Don't listen as witnesses testify. Focus on the next question you're going to ask and how great it will be.
m. You possess the gift of perfect recall, so don't bother writing anything down throughout the trial.
n. When you catch someone lying on the stand, make big eyes at the jury to make sure they catch it.
o. When you want to make a point but feel insecure about your position, use words like "clearly" and "obviously" repeatedly and forcefully, so the judge and jury know you're right.
p. When the accused cries during his unsworn statement, roll your eyes so the jury knows not to be suckered in.
9. LANDING IS HARD -- CRASHING IS EASY!
a. Begin your findings argument with a civics lesson. Inform the jury of the grand history of our trial system, then let them know how tough this case is to prove and that they have a difficult job.
b 80% of jurors decide the case by the end of opening statements, so don't waste time on your findings argument.
c. Don't squander the court's time with demonstrative exhibits. This goes double for cases tried by judge alone.
d. The courtroom is no place for PowerPoint. Just because every Air Force meeting uses PowerPoint to highlights topics, facts and conclusions, don't fall into that persuasive trap and tap into your panel's mindset.
e. Freely -- and loudly -- disparage the accused while waiting for the verdict. This has prompted more than one parent in a nearby waiting room to learn how to correspond with their Congressional Representative.
f. If you get the verdict deserved, there's a post-trial bonus: the Record of Trial for an acquittal is easy to review!


THE JUDGE ADVOCATE GENERAL'S DEPARTMENT
UNITED STATES AIR FORCE