"This Better Be Good": The Courts Continue to Tighten the Burden in Unlawful Command Influence Cases

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Introduction

Commanders and, notably, their legal advisors, again found new ways to invite scrutiny for their justice-related actions. Allegations of unlawful command influence continue to be a fertile source of appellate litigation, generating eight reported opinions in the past year, six of them by the Court of Appeals for the Armed Forces (CAAF). In only one of those opinions was a conviction reversed outright. In most circumstances, the courts granted no relief, often finding that the defense failed to meet its burden of developing and litigating the command influence in a thorough and timely manner and with a specific showing of prejudice. Effectively, the courts have told the defense community that any charge of unlawful command influence "better be good," or it will not be strong enough to raise the issue, to shift the burden, and to require the government to respond. This article analyzes the command influence cases of the past term and highlights numerous instances in which counsel, staff judge advocates, and military judges can learn from the tactics and practices of those who participated in these cases.

Burden of Proof: Sifting Cases at the Threshold

When assessing the strength of a command influence case, counsel must understand the burden of proof and likely method of analysis to be employed by the courts. In last year's cases, the courts further reinforced the *Ayala-Stombaugh* test for shifting the burden and determining, at the outset, the likely result of a command influence case. Ever since the rulings in *United States v. Stombaugh*[1] in 1994 and *United States v. Ayala*[2] in 1995, the courts have increasingly relied on these two cases, often coupled together, to clarify the standard of review under Article 37.[3] Despite the frequent and solitary criticisms by Judge Sullivan, it is clearer than ever that a command influence allegation must pass through the winnowing gate of *Ayala-Stombaugh* before it is likely to gain the full attention of the courts.

Stombaugh supplies the current test for command influence[4] and most frequently is cited for the proposition that unlawful command influence requires that the alleged source of command influence have acted with the "mantle of command authority."[5] In *Stombaugh*, this meant that the Naval lieutenants who pressured their peer to decline or to refuse to testify in a court-martial might have engaged in improper conduct, but it was not a violation of Article 37 because there was no *command* aspect to the pressure.[6] In *Ayala*, the CAAF decided that a sheaf of affidavits that asserted command influence, collected after trial by a friend of the accused, was insufficient to shift the burden of proof to the government. *Ayala* frequently has been cited for its controlling proposition: "The burden of disproving

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1. 40 M.J. 208 (C.M.A. 1994).

2. 43 M.J. 296 (1995).

3. *See* UCMJ art. 37 (West 1995). The pertinent portion of Article 37 of the Uniform Code of Military Justice provides:

> No authority convening a . . . court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

Id.

4. *See Stombaugh*, 40 M.J. at 213. The current test for *actual* unlawful command influence, enunciated in *Stombaugh* and purloined from Judge Cox's concurring opinion in *United States v. Levite*, requires the complainant to: "(1) 'allege sufficient facts which, if true, constitute unlawful command influence'; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the proximate cause of that unfairness." *Id.*, *quoting* United States v. Levite, 25 M.J. 334, 341 (C.M.A. 1987) (Cox, J., concurring).

5. The language actually predates *Stombaugh*, but it effectively became part of the test for command influence in *Stombaugh*. *See Stombaugh*, 40 M.J. at 208. On the same page, the *Stombaugh* court speaks of "the mantle of *official* command authority," but later citations of *Stombaugh* have not included the (probably gratuitous) modifier, "official." *See generally* United States v. Kitts, 23 M.J. 108 (C.M.A. 1986). When introducing the term "mantle of authority," the *Kitts* court refers to *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986), a case of significant and improper staff judge advocate involvement in selection of substitute panel members; the *McClain* court, however, did not actually use the "mantle" phrase.

the existence of unlawful command influence or proving that it did not affect the proceeding does not shift to the [g]overnment until the defense meets its burden of production."[7]

The pairing of *Ayala* and *Stombaugh* has permitted the courts, at times, to accomplish with some finesse what they would otherwise have to do in plain English: declare that a case is just not strong enough to require them to engage in tortured command influence analysis. In *United States v. Denier*,[8] a defense witness named Mr. Farrell complained after trial that he had overheard two court members in the men's room say that the accused, an Air Force major on trial for drug and sexual offenses, was receiving harsh treatment because of fallout from the Tailhook scandal.[9] Based on this allegation,[10] the military judge directed that the members answer a questionnaire under oath, after which he held a post-trial Article 39(a) session. The CAAF, hamstrung in part by the equivocal findings of the military judge,[11] relied on *Stombaugh* to hold that, even if such a conversation occurred, it still did not constitute unlawful command influence, because the speaker did not carry the mantle of command authority.[12] The court, citing *Ayala*, concluded that the accused did not meet his burden.[13]

Judge Sullivan, in one of his many separate opinions in the command influence area, took the occasion to criticize the majority for what he considers to be the extra-judicial expansion of the plain language of Article 37. He further believes that the "mantle of command authority" language "misreads or misinterprets [Article 37] in a way that significantly narrows a servicemember's protection from an unfair trial."[14] He believes that the majority has inflicted "[a]n added burden" on an accused, requiring him "not only . . . to prove that the trial was improperly influenced by a military member subject to the UCMJ (the statute's only requirement) but also that the military member was wearing something—a 'mantle of command authority'—whatever that means."[15]

Judge Sullivan makes a plausible case for strict statutory construction. He asserts that "all that needs to be proved . . . is that someone subject to the UCMJ tried to improperly influence the vote of the court members," and he further states that "Article 37 clearly indicates on its face that rank or grade or command does not matter when the fairness of a court-martial is at issue."[16] He is not incorrect. Article 37 begins by forbidding commanders and convening authorities from interfering with the court-martial process.[17] In its next sentence, however, the statute broadens its scope: "*No person* subject to this chapter

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6. *Stombaugh*, 40 M.J. at 213-14. The lieutenants also pressured a petty officer in the case. The Court of Military Appeals found that the pressure on the petty officer "amounted to unlawful command influence," though it found no prejudice. *Id*. The late Judge Wiss' concurrence in *Stombaugh* provides the most precise and measured critique of the "mantle" language of *Stombaugh*. He wrote that he would accept the mantle language in an effort to broaden the first sentence of Article 37(a) beyond literal commanders, but said he "part[ed] company with the majority . . . with its implication that the 'mantle of command authority' is limited to the formal structure of some particular command." *Id*. at 214, 215 (Wiss, J., concurring in part and in the result). He emphasized that the "very essence of military relationships is that the orders of *superior commissioned officers, warrant officers, noncommissioned officers, and petty officers*—not just superior commanders—will be obeyed (in the absence of their illegality)." *Id*. at 215 (emphasis in original).

7. United States v. Ayala, 43 M.J. 296, 299 (1995) (holding that "[t]he defense has the initial burden of producing *sufficient evidence* to raise unlawful command influence" (emphasis added)). The court did not further define "sufficient," so the combination of the relatively malleable "sufficiency" test of *Ayala* and the *Stombaugh* three-prong test and "mantle of command authority" language has provided appellate courts with plenty of agility and maneuver room in which to cull and discard sketchy claims of unlawful command influence.

8. 47 M.J. 253 (1997).

9. *Id*. at 257 (quoting the witness' letter to the Secretary of the Air Force). According to the witness, "[t]he gist of the conversation" by the supposed panel members "was that if it weren't for the 'fuck up' at tail hook (sic) and the command interest, this guy would get off with a slap on the wrist." *Id*. Tailhook was the notorious Navy episode of public sexual misconduct, which was followed by cover-ups, investigations, and disciplinary actions.

10. *Id.* In his letter, Mr. Farrell continued:

> They were USAF LTC's in their Blue uniforms and as such, members of the jury. I could not see their names, and since they were all about the same size I could not be sure which ones they were. I did notice both were rated aviators, and one was additionally wearing jump wings.

Id.

11. *Id*. at 266. In extensive findings, the military judge wrote that he was "convinced" that the witness "now sincerely believes that the conversation he describes occurred; and secondly, that the conversation was at the time and is now being filtered through the emotionally charged memory of an individual who has seen a close friend, of whose innocence he remains absolutely convinced, convicted . . . ." *Id*.

12. *Id.* at 260.

13. *Id.*

14. *Id.* at 261 (Sullivan, J., dissenting) (citation omitted).

15. *Id.*

16. *Id.*

[the UCMJ] may attempt to coerce or, by any unauthorized means, [to] influence the action of a court-martial . . . in reaching the findings or sentence . . . ."[18]

Judge Sullivan's analysis is hampered by two factors: a strawman illustration and a bridge-burning posture toward his fellow judges. Seeking to challenge the "mantle" rubric, he offered a hypothetical involving a panel member whose participation was influenced by the secret, written orders of an airbase commander.[19] In that hypothetical scenario, "mantle" analysis would be superfluous, because all could readily agree that unlawful command influence occurred. Judge Sullivan's purpose is to show that the funnel of unlawful influence cases is improperly constricted by the narrowing throat of the "mantle of command authority." His simplistic hypothetical fails to refute the utility of the mantle analysis in less obvious situations. Judge Sullivan also seems determined not to enlist anyone else in his cause. His sardonic comment about commanders having to be "wearing something" surely does not advance his cause or make a modification of *Stombaugh* likely. Similarly, in a concurrence in *United States v. Johnson*,[20] another unlawful influence case from last year, Judge Sullivan unleashed another of his customary sarcastic metaphors, admonishing Judge Crawford that "a court must use its nose as well as its eyes to search for command influence. I would not say the dissent needs stronger reading glasses but perhaps they are suffering from a temporary nasal cold."[21] To be fair, Judge Sullivan has been consistent in his critique of the "mantle" language, starting with *Stombaugh* itself,[22] but there is no evidence that the court's majority is at all uncomfortable with the test it formulated in *Stombaugh*.

Judge Sullivan's critique illuminates the limits and imprecision of the term command influence.[23] Article 37 is entitled "Unlawfully influencing the action of court."[24] Though it most typically has been applied to actions of commanders, analysts have to assume that Congress chose the language in the statute advisedly. When it wrote the first sentence of Article 37, it clearly contemplated commanders. Just as clearly, the clause "No person subject to this chapter," which is written in the broader second sentence, clearly encompasses anyone who wears a military uniform.

In *Stombaugh*, the CAAF was confronted with young Navy lieutenants who pressured one of their peers not to testify for the accused, a seaman.[25] The court employed the "mantle of command authority" language in trying to find a common strain among cases involving unlawful influence of court members. Strictly, the "mantle" language should only apply to such cases. Moreover, the fact that there is such a common strain in the cases cited in *Stombaugh* does not mean that Congress intended such a limitation when it drafted the broadly-worded "no person" portion of Article 37. Thus, counsel who raise non-panel command influence claims should not assume that the "mantle" requirement of *Stombaugh*, not yet four years old, precludes their fashioning cases of command influence where the actors are not reasonably cloaked with such authority.

Regardless of the long-term viability of the mantle analysis, *Stombaugh* has altered the method of analysis in unlawful command influence cases. Together with *Ayala*, it allows trial and appellate courts to sift command influence cases on a more mechanical threshold standard, instead of subjecting every case to a detailed factual analysis. It also gives counsel a rule of thumb to gauge the prospects of prevailing in pretrial motions, and counsel can discard those that generate smoke—but smoke that is too wispy to attract close appellate scrutiny.

Denier contains lessons for military judges as well as for counsel. The trial judge's apparent equivocation significantly limited the ability of the reviewing courts to do what the facts required: state that there was simply not enough evidence to warrant disturbing a verdict based on weak, after-the-fact speculation, when the witness could have raised it much closer in time.[26] The military judge ruled that he was "convinced" that the complainant "now sincerely believe[d] that the conversa-

17. *See* UCMJ art. 37 (West 1995). "No [convening] authority . . . nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge or counsel . . . [regarding] the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions . . . ." *Id*.

18. *Id.* (emphasis added).

19. *Denier*, 47 M.J. at 261 (Sullivan, J., concurring).

20. 46 M.J. 253 (1997).

21. *Id.* at 255.

22. *See* United States v. Stombaugh, 40 M.J. 208, 215 (C.M.A. 1994) (Sullivan, C.J., concurring). Concurring in *Stombaugh*, then-Chief Judge Sullivan wrote to "reject [the] dissection [of Article 37] and the suggestion that Article 37 is inapplicable to situations where courts-martial are unlawfully influenced by persons other than commanders . . . . Wavering in this matter conflicts with nearly a half century of tradition and practice at this Court." *Id*.

23. *See generally* Lawrence J. Morris, *In with the Old: Creeping Developments in the Law of Unlawful Command Influence*, ARMY LAW., May 1997, at 39, 43 (proposing that command influence is a restrictive misnomer); Deana Willis, *The Road to Hell is Paved With Good Intentions: Finding and Fixing Unlawful Command Influence*, ARMY LAW., Aug. 1992, at 3.

24. UCMJ art. 37 (West 1995).

25. *Stombaugh*, 40 M.J. at 211.

tion he describe[d] occurred."[27] The judge continued, "I do not find the argument that Mr. Farrell has manufactured this incident to be credible; on the other hand, however, his interpretation of the conversation similarly lacks credibility."[28] It is hard to interpret such analysis as anything other than the strained attempt of a judge to pass the case to the appellate court to sort out.

The trial judge made the following three inconsistent findings: (1) Mr. Farrell believed the story, (2) Mr. Farrell did not make up the story, and (3) Mr. Farrell's interpretation was not credible. Mr. Farrell's *interpretation*, however, was irrelevant and not really at issue in the dispute. It was the conversation, as reported by the "credible" Mr. Farrell, that was at issue.[29] No one sought or considered his *interpretation*, because it did not matter—it was only the interpretation of the panel members that mattered, if they engaged in such a conversation at all.

The point, simply, is that trial judges play a critical role in sifting information in command influence cases, as in any consequential trial motion. The trial judge's ambivalence in *Denier* tied the hands of the appellate courts, constraining the CAAF, in particular, because it, unlike the courts of criminal appeal, lacks independent fact-finding power.[30] As discussed earlier, the mushy facts put the CAAF through a mildly tortured analysis before the court disposed of the case. Had the judge made clearer findings—for example, "there is no basis for believing that the conversation occurred, if at all, in the manner reported by Mr. Farrell"—less ink would have been spilled, and cleaner, more forthright analysis would have been possible.

Counsel also can learn from *Denier*. When Mr. Farrell's claim regarding the conversation came to the judge's attention, he ordered the members to complete questionnaires under oath, in which they answered specific questions about the purported conversation.[31] One of the members signed only one of the two pages on the questionnaire, a matter not pursued at trial but raised on appeal. The majority found that "[t]he opportunity to obtain a fuller explanation of the member's affidavit was thereby waived."[32] Command influence or not, the courts are going to require trial-level counsel to develop the facts and will not indulge raising them later, when the earlier opportunity clearly was present. "The defense's disinterest in seeking more information when the opportunity was afforded moots further speculation."[33]

Even if the conversation occurred as reported, it would not necessarily generate a finding of unlawful command influence, because trials do not occur in a vacuum. The CAAF held that, even if the conversation occurred, it reflected "[m]ere common knowledge . . . of front page newsworthy events [which did] not equate to" unlawful command influence.[34] A wholly different method of analysis would be implicated if there were evidence that any member "believed that a particular result should be obtained to please the command."[35] In such a circumstance, the mantle of authority would be irrelevant, "because the issue of impartiality focuses on the belief of the member, not the position of the command."[36]

The tardiness of the sketchy complaint in *Denier* was a factor in the CAAF's disinclination to disturb the verdict. Any evi-

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26. His tardiness was a significant factor, as the CAAF ruled that the complainant "had abundant opportunity to alert defense counsel or appellant of this impending injustice during recesses in the court-martial, [and] he did not do so." United States v. Denier, 47 M.J. 253, 255 (1997).

27. *Id.* at 266.

28. *Id.*

29. If Mr. Farrell was, in fact, telling the truth, a serious case of panel member misconduct may have occurred; however, the conversation between the panel members may not have been enough to cross the stringent threshold of Military Rule of Evidence 606(b), which narrowly limits the circumstances in which a verdict may be impeached. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 606(b) (1995) [hereinafter MCM].

30. *See* UCMJ art. 66(c) (West 1995). Article 66(c) gives the courts of criminal appeals fact-finding authority in addition to the normal power accorded to an appellate court. *Id*. The CAAF has no such power, though it need not accord the same weight to factors found by lower courts. The CAAF majority said: "[W]e accept the assumptions of the courts below that Farrell was not fabricating in claiming that he overheard a conversation relating to the Tailhook scandal . . . ." *Denier*, 47 M.J. at 260.

31. *Denier*, 47 M.J. at 257-58. The military judge showed great initiative in drafting and mailing the questionnaires, as not all members were available to attend a post-trial session in person.

32. *Id.* at 260.

33. *Id*. While Chief Judge Cox probably means lack of interest, not disinterest, the point is clear: speak up when the opportunity to create the record exists, or do not complain later. "[W]hen of (sic) the matter of the affidavits was expressly before the court-martial in post-trial session, the defense offered no objection to the documents, and it affirmatively declined the opportunity to call additional witnesses. The opportunity to obtain a fuller explanation of the member's affidavit was thereby waived." *Id*.

34. *Id.*

35. *Id.* at 261.

36. *Id.*

dence that the defense is hedging its bets in a command influence case is not likely to sit well with appellate courts. The Air Force Court of Criminal Appeals drove this message home in *United States v. Hill*.[37] Hill was in pretrial confinement for attempted burglary (among other things) when his apparently energetic and thorough defense counsel decided, before the Article 32 investigation, to visit the crime scene. The defense sought permission to have Hill ride along to the crime scene, but received "half a loaf" from the government: Hill could ride along, but he could not leave the car.

At the crime scene, the defense counsel shuttled between the car, which was parked in the front of the residence, and the rear window of the house, where the burglar allegedly entered. Hill could just as well have been 1000 miles away as 100 meters away if the government was not going to let him see the rear of the house with his counsel. The defense counsel, however, said nothing further about this contretemps throughout the court-martial, and Hill ultimately was convicted.

Long after trial,[38] the defense raised the issue of denying Hill the chance to accompany his lawyer to the rear of the house—and cloaked it in command influence language.[39] The Air Force court rejected the argument and chided the defense for its apparent indolence—or hedging of its bets. The court noted that the defense "sat through [the Article 32] without raising the issue"; "sat through the entire trial without so much as a word about it, although several other pretrial issues were vigorously contested"; and "did not raise the issue in post-trial submissions to the convening authority."[40] Though it gently chided the government for its strange practice in this case,[41] the Air Force court reinforced the now-solid line of cases that finds that accusative-stage command influence is waived if not raised.[42] The court ruled that the defense asserted "a perceived wrong capable of being remedied by a motion" but "forfeited the issue" by failing to do so in a timely manner.[43]

The court addressed the command influence concerns, but it was careful not to characterize the case as primarily one of unlawful command influence. It cited *United States v. Hamilton*[44] for the proposition, since reinforced in *United States v. Drayton*[45] and *United States v. Brown*,[46] that an accused forfeits accusative phase unlawful command influence claims when he does not raise them before trial.[47] The defense earns credit in this scenario for creatively packaging the interference with defense preparation as a command influence issue in the first place—it turned *Stombaugh* against the government for a change, arguing that the denial was cloaked with the mantle of command authority.[48] The case still stands, however, as another object lesson in the near-absolute principle that pretrial command influence is waived if not raised.

Forfeiture of the Issue

Although the CAAF has added the "mantle" gloss to the "no person" language, it has made clear that it will strictly construe Article 37 to restrict its reach to the adjudicative stage of courts-martial. Article 37 states that its proscriptions apply to "the findings or sentence."[49] Since *United States v. Hawthorne*[50] in 1956, courts have struggled with the extent to which Article 37 applied to actions that precede findings and sentence—the pro-

37. 46 M.J. 567 (A.F. Ct. Crim. App. 1997).

38. The trial defense counsel submitted the complaining affidavit "over 10 months after appellant's trial." *Id.* at 572.

39. *Id.* at 572, 573. It appears that the staff judge advocate forbade Hill from accompanying his lawyers to the rear of the house. The staff judge advocate refused to reconsider his decision after a defense request. *Id.*

40. *Id.* at 573.

41. *Id.* The court said that it "strongly recommend[s] more sensitivity to legitimate defense preparation needs." *Id.* There may have been a reason for the command's extreme caution in this case, perhaps a fear that Hill would flee if he were let out of the car. Still, reasonable restraints (such as handcuffs and leg irons) could have been placed on Hill to ensure that he did not flee but still give him a reasonable opportunity to view the residence. Though the government properly prevailed on the thin and tardy command influence claim, *Hill* is yet another example of the government's purchasing an avoidable issue by conduct that, at least as the facts appear on appeal, seems unduly intransigent.

42. *See generally* United States v. Brown, 45 M.J. 389 (1996); United States v. Drayton, 45 M.J. 180 (1996); United States v. Hamilton, 41 M.J. 32 (C.M.A. 1994).

43. *Hill*, 46 M.J. at 573. Still, the court says, "the crux of the appellant's complaint is that he was hamstrung in his trial preparation" when he was denied permission to leave the car, "a perceived wrong capable of being remedied by a motion to the military judge for appropriate relief" under Rule for Courts-Martial 906(a). *Id.* *See* MCM, *supra* note 29, R.C.M. 906(a).

44. 41 M.J. 32 (C.MA. 1994).

45. 45 M.J. 180 (1996).

46. 45 M.J. 389, 399 (1996).

47. *Id.*

48. *Hill*, 46 M.J. at 572-73.

cess of preferring, investigating, and referring charges, referred to as the "accusative" stage of trial.[51] In recent years, the CAAF has made it clear that Article 37 applies only to the adjudicative phase.[52] The CAAF added an extra nail in the accusative coffin on the last day of the 1996 term in *United States v. Brown*,[53] when it ruled that "[f]ailure to raise the issue of command influence as to the accusatorial process, as in this case at the trial, waives the issue."[54] This is probably the clearest proposition in the doctrine of unlawful command influence: if the defense is aware of command influence in the accusative stage of trial and does not raise it in pretrial motions, the issue is waived.

Since *United States v. Weasler*[55] in 1995, it is also clear that accusative stage command influence may be waived as part of a pretrial agreement. The courts have not yet expressly addressed whether adjudicative-stage command influence can be waived as part of a plea agreement. In fact, such a scenario is hard to conjure, because mid-trial plea bargaining is infrequent and, in the event of a mistrial or retrial, what might have been adjudicative-phase command influence in a prior trial becomes accusative-stage command influence in the subsequent case.

Back from Obscurity: Censure of Counsel

The portion of Article 37 regarding improper criticism or manipulation of counsel and judges has received scant attention over the past generation, largely because of increased sensitivity to command influence and the institutional independence of military judges and the military defense services.[56] In *United States v. Crawford*,[57] the Coast Guard resurrected the issue this year. The accused and his counsel, acting on an apparent Coast Guard tradition, paid a "courtesy call" on the convening authority just before the accused began to serve his sentence.[58] The convening authority complained that the sentence, which included one month in the brig and a punitive discharge, was too light. He then upbraided the defense counsel, telling her that the accused had lied to her and "used" her.[59]

Article 37 makes it unlawful for a convening authority "or any other commanding officer [to] censure, [to] reprimand, or [to] admonish the court or any member, military judge, *or counsel . . . [regarding] the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions* . . . ."[60] The Coast Guard Court of Criminal Appeals found that the convening authority's conduct in *Crawford* "clearly amounted to censure for the manner in which [the defense counsel] represented appellant at trial, particularly with regard to the sentence."[61]

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49. UCMJ art. 37 (West 1995).

50. 22 C.M.R. 83 (C.M.A. 1956). *Hawthorne*, which involved a policy letter that required a general court-martial anytime a soldier faced a third court-martial (such a scenario is impossible to fathom in today's one-strike-and-you're-almost-always-out military), is frequently cited for the proposition that any command influence at any stage cannot be waived. The court wrote that "any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned." *Id*. at 87. In fact, careful reading of *Hawthorne* shows that its frequently-quoted language does not mean that command influence can never be waived or that a certain level of relief is always mandated. It is also worth noting that *Hawthorne* was issued when the Court of Military Appeals and the UCMJ were barely five years old; today's courts, notwithstanding the persistence of command influence, have greater equanimity regarding the dangers of command influence to the integrity of the military justice system.

51. *See* United States v. Weasler, 43 M.J. 15, 17 (1995). The accusative stage includes "preferral, forwarding, [and] referral" of charges. *Id*.

52. *See id*. at 18. The adjudicative stage includes the court-martial itself, and interference with this part of the process includes "interference with witnesses, judges, members, and counsel." *Id*.

53. 45 M.J. 389 (1996). In *Brown*, another case in which the SJA's conduct raised the issue of unlawful command influence by conduit, there was a question whether a brigade commander had forfeited his ability to be a convening authority because of statements he made on television about the near-mutiny of National Guard troops in training during Operation Desert Shield. The defense's failure to raise the issue in a timely manner meant that the courts did not have to reach the merits of the command influence claim.

54. *Id.* at 399.

55. 43 M.J. 15 (1997).

56. Counsel and judge manipulation is probably the most futile form of command influence.

57. 46 M.J. 771 (C.G. Ct. Crim. App. 1997).

58. *Id.* at 774. The sentence included a month in the brig and a bad-conduct discharge.

59. *Id*. He said that he believed that Crawford "had lied to counsel and had encouraged her to present false and misleading evidence during the presentencing portion" of his guilty plea. *Id*. He emphasized that "he was not accusing her of any wrongdoing, merely that she was being used by her client, who had been lying to her all along." *Id*. He also told the accused that when he returned to the ship, after confinement but before his bad-conduct discharge was final, "he would be very closely observed and would have to work very hard," which counsel took to be "an attempt to chill appellant's exercise of his appellate rights." *Id*. at 775. He was also handcuffed as he left the ship, though he was not a flight risk and was convicted of nonviolent offenses, such as lying and marijuana use. *Id*.

60. UCMJ art. 37(a) (West 1995) (emphasis added).

Crawford illustrates the vitality of Article 37(a) and the wisdom of convening authorities keeping such opinions to themselves. It also, however, reflects how the government can act swiftly to lawfully contain the damage from such comments. Because there was nothing about the convening authority's statements that could reasonably be said to "relate back" to the findings or sentence, they were unaffected by the conduct and not part of the court's analysis.

Such comments reflect an intemperance that is inconsistent with continuing to act as a convening authority. It cannot reasonably be said that the accused would receive a disinterested review of his case from such a person. The convening authority, on the advice of his staff judge advocate (SJA), disqualified himself from further involvement in the case and did not take action on the record,[62] a course of conduct that the court endorsed.[63] Because of this, the court found no prejudice to the accused.[64]

Future defense counsel could try to argue, based on the convening authority's reported statements, that he was unfit to act as a convening authority. Such an argument would likely fail, however, because: (1) intemperance is generally not found to disqualify a convening authority in the accusative stage[65] and (2) there is probably nothing about his statements in this case that could be used to build a case of witness, subordinate, or panel member intimidation in future cases.[66] Such conduct, however, is improper and yielded a measured reproach from the Coast Guard court. "[C]onduct of the kind encountered here is not only unbecoming a commanding officer, but also constitutes a rebuke of counsel in the performance of defense counsel duties, in violation of Article 37 of the UCMJ and, therefore, must be avoided at all times."[67]

Kicking a Case Back

Not infrequently, the CAAF will find that it has insufficient information on which to base a final decision in a command influence case. It is a long-standing doctrine that, although the burden of proof for the government at the trial level is preponderance of the evidence,[68] the CAAF will not affirm a case unless it is convinced beyond a reasonable doubt that the verdict was unaffected by unlawful command influence.[69]

In *United States v. Johnson*,[70] the court was faced with confusing facts. The accused, Lieutenant Johnson, was convicted of committing various sexual offenses, including sodomy on his young son.[71] Before trial, it appears that the accused's commanding officer, a Navy captain, recommended to the convening authority that any adjudged dismissal be suspended. This intention to suspend the dismissal was corroborated by a later memorandum from a Navy judge advocate (also a captain), who was the legal advisor to the Chief, Naval Personnel.[72] After a change of convening authorities but before initial action on the accused's case, it appears that his commanding officer "withdrew his support [for commuting the dismissal] because of 'top down command pressures'; and appellant's sentence to a dismissal was thereafter approved."[73] Citing *United States v.*

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61. *Crawford*, 46 M.J. at 776.

62. *Id.* at 775 (noting that the convening authority voluntarily relinquished "his position as convening authority, upon advice from the government").

63. *Id.* at 776 (stating that "the motion to disqualify him from acting further in the case was well justified, as was his voluntarily taking this step").

64. *Id.* at 775.

65. *See generally* United States v. Thomas, 22 M.J. 388, 394 (C.M.A. 1986) (indicating that a commander's attitude generally does not disqualify him unless it is evident that "he then possessed a disqualifying personal interest in the outcome . . . . [E]ven then any defect in referral (as a result of command influence) would not have been jurisdictional").

66. Still, vigilant defense counsel should scrutinize all such statements for evidence that could be used to frame future command influence motions. The widely broadcast sentiments of a convening authority who is disgusted with a defense counsel who simply appeared to do her job zealously (and ethically) could conceivably chill future counsel or future witnesses. The convening authority in *Crawford* made the statement in the presence of witnesses, including a chief petty officer who had testified for the accused. No prejudice arose from the exchange, however, because the chief even testified in the accused's subsequent summary court-martial. *Crawford*, 46 M.J. at 774, 776. Those who come to know of the exchange, however, could be intimidated, providing fodder for defense claims of witness intimidation.

67. *Id*. at 776. The court clearly disapproved of the convening authority's actions, but saying that such conduct should be "avoided" suggests something short of an absolute dissatisfaction or prohibition. There should be no wiggle room for convening authorities who intimidate counsel or witnesses.

68. *See* United States v. Stombaugh, 40 M.J. 208, 214 (C.M.A. 1994).

69. *See* United States v. Thomas, 22 M.J. 388 (C.M.A. 1986).

70. 46 M.J. 253 (1997).

71. *Id.* at 253.

72. *Id.* at 254. That memorandum said "'full commutation is expected' of [Johnson's] sentence." *Id.*

73. *Id.* at 254.

Thomas,[74] a four-judge majority said that "these uncontested facts are sufficient to require that appellant be afforded the opportunity to make his case" of unlawful command influence.[75]

Judge Crawford's querulous dissent is difficult to understand for its vehemence. She accurately and appropriately cites *Stombaugh* and *Ayala* on the issue of shifting the burden of proof.[76] She then makes a strained, speculative, and ultimately unpersuasive case for the proposition that the convening authority, a major general, could not have been affected by the disputed memorandum, in part because of the disparity in rank and because of the geographical distance between the two.[77] Judge Crawford said that the defense failed to meet the *Ayala* threshold to shift the burden of proof, because the author of the contested memorandum in the case was located in Washington, D.C., and the convening authority was at Camp Pendleton, California. "Perhaps appellant would have a closer case if the [author] and the convening authority shared an office or, at least, a base, but they do not,"[78] Judge Crawford wrote. She said that the defense failed to establish any method (for example, fax) by which the convening authority could have been aware of the memo; this failure, she wrote, meant that the facts were "simply not sufficient to meet the first prong of the command influence test."[79] She went on to question whether Johnson's commander actually withdrew his letter.[80] Again, such elemental facts should not still be in dispute at this stage of the litigation. Judge Crawford makes the more significant legal point, though buried at the end of her dissent, that the memo in question was not addressed to the convening authority but was addressed to a Navy judge advocate captain. She notes pointedly that the convening authority was a major general, who approved the SJA's recommendation, further dimming the credibility of a charge of command influence.[81]

This bit of post-hoc speculation lends credence to Judge Sullivan's criticism, in his concurring opinion, that Judge Crawford holds the defense to an "unbelievably high threshold of proof."[82] The defense makes a more than plausible case that the author of the memo may have influenced the captain to withdraw his recommendation and deprived the convening authority of its benefit when making his decision. This still should qualify as Article 37 interference with the court-martial process, because it deprived the convening authority of crucial information.[83] This case demonstrates again that the term "*command* influence" is imprecise and unduly narrow.

Finally, Judge Crawford tips her result-oriented hand in this case with her concluding paragraph. Here, she asserts accurately and unhappily that the sentence of dismissal and three year's confinement "was extremely light considering his offense—sexual abuse of his 16-year-old son."[84] It is also irrelevant. Even when a trial judge delivers what appears to be a light sentence, an appellate judge cannot decide that the command influence is harmless because the accused was able to gain such lenient disposition. The command influence in this case relates to the convening authority's action (approving the dismissal), so the analysis begins at that stage of the proceedings; the judge's seeming leniency should not affect the analysis.[85]

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74. 22 M.J. 388 (C.M.A. 1986).

75. *Johnson*, 46 M.J. at 254. Judge Sullivan wrote a concurrence that added nothing to the majority opinion, but it took shots at the dissenting opinions, which were written separately by Judges Crawford and Gierke. *See id*. at 255 (Sullivan, J., concurring). The concurrence included the following uncontroversial language: "Command influence is normally a secret thing, not easily discovered and even if discovered, not easily admitted." *Id*.

76. *See id*. at 256 (Crawford, J., dissenting).

77. *Id.* at 254-55.

78. *Id.* at 256 (Crawford, J., dissenting).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 255 (Sullivan, J., concurring). "We should not affirm a case where there exists an unresolved question of command influence on the record." *Id.* at 254.

83. *See generally* United States v. Hilow, 32 M.J. 439 (C.M.A. 1991) (holding that it was improper for a division deputy adjutant general, a captain in charge of procuring court member nominees, to submit only the names of "supporters of a command policy of hard discipline"). In *Hilow*, the conduct in question was a violation of Art. 25, but the convening authority himself knew nothing of it. The court found the convening authority's ignorance to be irrelevant, because the process still affected the pool that was made available to him. "[U]nlawful influence in the military justice system can be exerted on a convening authority from many directions and in unsuspected ways." *Id*. at 442.

84. *Johnson*, 46 M.J. at 256 (Crawford, J., dissenting). She is correct—though wrong about the boy's age, as the charge was for sodomy and other exploitation of a child *under* 16. *Id*. at 253.

85. *Id*. In fact, had the dismissal been approved in this case, the accused would have been free virtually immediately, as the convening authority had approved a pretrial agreement in which he suspended the confinement but which did not address discharge.

Judge Gierke's briefer, extremely fact-based dissent views *Johnson* as another *Ayala* case, founded on "unsupported speculation."[86] Judge Gierke could also be correct, and the majority's terse recitation of the facts could be skewed. Still, opinions of the military's highest appellate court should not read like partisan appellate briefs. As relayed by the court, the facts of *Johnson* are insufficiently developed, still another example (it seems) of trial-level disinclination or inability to create an adequate record. Regardless, if the majority's rendition of the facts is *essentially* correct—it is written by Chief Judge Cox, not a knee-jerk author on command influence issues, and it refers to "unrebutted" inferences and "uncontested facts"[87]—that should be enough to require the government to disprove the existence of unlawful command influence, following the *Stombaugh* test.

On the issue of producing facts, the government should never fear a fully developed record. There may be a natural reluctance to place all of the facts on the record, in fear of giving an appellate court information on which to hinge a decision to remand or to grant relief. More likely, an ill-developed record will result in a CAAF majority drawing the conclusions and making the inferences that Chief Judge Cox did in *Johnson*, thereby burdening the government years later (in *Johnson*, forty-two months later[88]) to reconstruct a complex scenario, colored by faded memories and, invariably, jaded or self-interested perspectives.

"Who's Kidding Whom?": Words Still Matter

In *United States v. Bartley*,[89] the CAAF showed that there still is nothing more important in a potential command influence case than the words uttered or written by a convening authority. The commander of Norton Air Force Base, an Air Force major general, published a poster, entitled "Who's Kidding Whom?," in which he sought to debunk several "myths" regarding discipline and justice, especially in cases involving illegal drugs.[90] Bartley claimed that the poster amounted to unlawful command influence and induced him to plead guilty at his court-martial.

Constrained by an indulgent opinion of the Air Force Court of Criminal Appeals and a defense decision not to raise a pretrial motion of unlawful command influence, the CAAF made no finding of command influence. It did, however, reverse the Air Force court and set aside the findings and sentence, because it was "not convinced beyond a reasonable doubt . . . that the command influence issue did not induce the guilty plea."[91]

This was the only case in the past year in which a military appellate court reversed a lower court based on unlawful command influence. Though the CAAF was hampered by unclear facts that led to the discovery and litigation of the command influence issue, *Bartley* makes it clear that commanders still will be held accountable for the way that their language potentially affects the court-martial process. The poster at issue, which appears in full as an appendix to the CAAF opinion,[92] is a polemical, 615-word document that effectively reproaches (and potentially intimidates) witnesses who might testify for airmen at trial,[93] as well as others involved in the military justice system.[94]

Three of the "myths" relate directly to drug charges, but all seven reasonably can be interpreted to affect the three populations through whose perspectives the courts commonly evaluate command influence: (1) subordinate commanders (ensuring that they are not robbed of their independent discretion to make recommendations or decisions regarding misconduct;[95] (2) panel members (who must be unaffected by the opinions or perceptions of the convening authority when they deliberate and vote);[96] and, probably most critically in this case, (3) potential witnesses (who must be free to testify candidly about their perceptions and opinions).[97] The potential adverse

86. *Id*. at 256 (Gierke, J., dissenting). His critique is well taken (the defense claim is based on a series of actions from which inferences may be drawn), but great weight should be accorded to the lead opinion, written by the measured Chief Judge Cox. As Chief Judge Cox observed, "top-down pressure" led to withdrawal of the clemency recommendation. *Id*. at 254.

87. *Id.* at 254.

88. *Id.* at 254, 255. He was convicted and sentenced on 6 December 1993, and the court's decision was released on 7 July 1997.

89. 47 M.J. 182 (1997).

90. *Id.* at 188. The seven myths appeared on the poster in capital letters, followed by substantial explanatory text:

> 1. DUTY PERFORMANCE REPRESENTS THE PREEMINENT CRITERION IN EVALUATING SUBORDINATES . . . . 2. OFF-DUTY ACTIVITIES SHOULD NOT AFFECT EPR EVALUATIONS . . . . 3. DRUG ABUSERS STILL CAN BE CONSIDERED WELL ABOVE AVERAGE MILITARY MEMBERS . . . . 4. ABUSES INVOLVING SMALL AMOUNTS OF DRUGS ARE NOT SERIOUS OFFENSES . . . . 5. DRUG ABUSERS CAN BE TRUSTWORTHY, DEPENDABLE AIRMEN . . . . 6. SKILLED AIRMEN ARE TOO VALUABLE TO LOSE DUE TO OFF-DUTY MISCONDUCT . . . . 7. ANYONE WHO CAN BE REHABILIATED SHOULD BE.

Id. at 188.

91. *Id.* at 187.

92. *Id.* at 188.

impact of the poster was heightened by the particular places where it was displayed: the waiting room of the convening authority's office[98] and the wall of the staff judge advocate's office.[99] In this circumstance, the defense appears to have met its burden of production by showing that the words and predilections of the convening authority were communicated in such a public and unequivocal manner.

It is not a *Stombaugh-Ayala* case of forcing the defense through the three-part test for prejudice. Effectively, it is a case of *apparent* command influence when, in the absence of solid evidence of affected witnesses, members, or commanders (such evidence is difficult to generate in a guilty plea case), a court will find that it cannot affirm a case when soldiers or members of the public might lose confidence in the system.[100] *Bartley* did not ripen (or had not ripened) into a classic case of actual command influence, because the defense was unable to show witnesses or others who were affected by the poster. The CAAF did not classify the case as one of either actual or apparent command influence. Still, it refused to affirm the findings and sentencing in a case where the commander's contact had the unquestioned potential to intimidate witnesses, commanders, and panel members.

The CAAF could not affirm a case in which the convening authority had published, over his signature in public places where the business of military justice is conducted, statements such as: "Many bright, loyal, young Americans are waiting in line to enter the Air Force. We can ill afford to keep them waiting in order to spare criminals in our organization."[101] It is not a strained interpretation of such language to suggest that the convening authority was encouraging courts to err on the side of discharging airmen, as opposed to rehabilitating them and returning them to duty. If there were any doubt about the convening authority's views on rehabilitation, the following paragraph made it still clearer:

> Rehabilitation is a proper goal of our justice system, but it is not the 'only' goal . . . . [T]he military does not provide a perpetual rehabilitation service for social misfits . . . . We have neither the time nor the resources to restore every member who has chosen to violate our laws, then wants to remain in the Air Force.[102]

It is important to remember that there is nothing inherently improper about the opinions contained in the poster, but they are improper when publicly pronounced by a person who is entrusted with the authority to convene courts and consider requests for clemency. They reflect skepticism of favorable testimony and a predisposition toward a particular punishment (commonly, as here, a punitive discharge) and against rehabilitation. Such opinions would not automatically disqualify a court member, for example (though, depending on the context and the discussion with the military judge, they well might). They do, however, disqualify a convening authority in the exercise of his quasi-judicial responsibilities.

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93. *Id.* The text of myth #6 read as follows:

> "Sergeant _____ is the best worker I have. I need Sergeant _____ back or his unit may fall apart." In truth, no one is indispensable. Many bright, loyal, young Americans are waiting in line to enter the Air Force. We can ill afford to keep them waiting in order to spare criminals in our organization.

Id.

94. *Id.* Other targets can include subordinate commanders and panel members. Consider the language in the lead paragraph of the poster and the arguments of potential future effect that can be based on it: "Myths die hard. Those who cling to myths often are unencumbered by knowledge or insight. I am deeply concerned that many of our people persist in espousing a number of myths incompatible with Air Force concepts of discipline and justice." *Id*.

95. *See, e.g.*, United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984).

96. *See, e.g.*, United States v. Martinez, 42 M.J. 327 (1995).

97. *See, e.g.*, United States v. Gleason, 43 M.J. 69 (1995).

98. *Bartley*, 47 M.J. at 184.

99. *Id.* at 186 (stating that "the poster was prominently displayed on the wall at the Norton Air Force Base legal office"). The opinion does not mention whether the poster was displayed anywhere other than the two locations mentioned.

100. *See generally* United States v. Cruz, 20 M.J. 873, 880-90 (A.C.M.R. 1985) (providing a lucid, scholarly, and still-applicable explanation of the difference between actual and apparent command influence; the different concerns that each addresses; and the different methods of analysis for each).

101. *Bartley*, 47 M.J. at 188. The impact of such language is that discharge should be automatic (or at least very seriously considered) in drug cases, potentially affecting the discretion of all three populations: (1) commanders, who arguably would "ratchet up" their recommendations as to disposition; (2) panel members, who arguably would vote for harsher sentences, aware of the sentiments of the convening authority who chose them for court-martial duty; and (3) potential witnesses, who arguably would not testify, or would testify with greater restraint and less candor because of the convening authority's opinions.

102. *Id*.

Judge Crawford's opinion for the unanimous CAAF insightfully emphasized that such messages must be evaluated for their overall thrust. The poster contained many lines that are unremarkable and fully accurate, such as "duty performance is only one of many important criteria" to use in evaluating subordinates.[103] The attempt to "balance" the pernicious effects of the poster with such boilerplate did not mollify Judge Crawford. She wrote that the poster, "seemingly written by a lawyer, seeks to negate many defense arguments in favor of rehabilitating drug users such as appellant."[104]

As in most command influence cases, there is room for debate, and the unpublished opinion of the Air Force court, which upholds the poster, is proof that few command influence opinions command unanimity. *Bartley* reaffirms the CAAF's primary concern in command influence cases, and it extends beyond its peculiar, not-likely-to-be-repeated facts. When the CAAF first remanded the case (the published opinion was its second look at *Bartley*), it asked the Air Force court to obtain evidence on whether command influence affected "the decision to prosecute, the forwarding recommendations, or the deliberations of the court members . . . whether any witnesses were deterred from testifying; and whether waiver of the command influence issue was part of the negotiation of a plea agreement."[105] In command influence cases, the central concerns of a reviewing court, especially the CAAF, are the impact on: subordinate commanders ("the decision to prosecute, the forwarding of recommendations"); the panel ("the deliberations of the court members"); and, most importantly, witnesses ("whether any witnesses were deterred from testifying").[106]

Unclear wording in several places makes *Bartley* murkier than it ought to be. The court clearly follows the long-standing precedent of *United States v. Thomas*[107] in refusing to affirm a finding of guilty unless convinced beyond a reasonable doubt that unlawful command influence did not affect the findings or sentence. In stating the court's holding, however, Judge Crawford wrote that the unanimous court was "not convinced beyond a reasonable doubt, based on this record, that the command influence *issue* did not induce the guilty plea."[108] Though it is probably just imprecise wording, it is not the command influence *issue*, but the *possible fact* of command influence that may have induced the guilty plea, and that is why the defense sought the sub rosa pretrial agreement.

The *Bartley* court examined not only the convening authority's conduct, but also the convoluted bargaining process that led to the guilty plea at trial. The bargaining issue consumes a large part of the opinion, but it is largely historical artifact, a sort of "prequel" to the *Weasler* decision of three years ago. In *United States v. Weasler*,[109] the CAAF ruled for the first time that command influence, at least in the accusative stage, could be a subject of overt bargaining and a negotiated pretrial agreement.[110] When the negotiations occurred in *Bartley*, *Weasler* had not yet been published. Therefore, treatment of the seeming sub rosa agreement is interesting because it affords a final glimpse of the pre-*Weasler* way of doing business. *Bartley* reinforces *Weasler's* wisdom of permitting overt bargaining on issues that were otherwise discussed indirectly—potentially compromising counsel, SJAs, and convening authorities—and were, therefore, not subject to important judicial scrutiny.

In two other instances, the majority opinion (perhaps written in haste at the end of the term[111]) suffers from unclear wording. First, the civilian attorney who staffed military justice actions for the convening authority in the jurisdiction is characterized as having made a decision "not [to] recommend a plea agreement because of the unlawful command influence issue."[112] It is unclear whether this means that his recommendation in favor of a plea agreement (which there was in this case) was not motivated by the command influence issue or that he recommended against a plea agreement because of the command influence issue. In the next paragraph of the opinion, Judge Crawford writes that the "Who's Kidding Whom" poster "did not address

103. *Id*. The poster also contains such unremarkable statements as: "Military members are on duty 24 hours a day and judged by the civilian community on that basis" and "In fact, duty performance is only one of many important criteria" to use in evaluating subordinates. *Id*.

104. *Id*. at 186.

105. *Id*. at 183.

106. I would suggest that it is not simply whether witnesses were deterred from testifying but whether they were deterred from testifying freely. Some witnesses who are subject to command influence might appear in court but not testify with the vigor or candor that would have characterized their testimony in the absence of unlawful command influence.

107. 22 M.J. 388, 393 (C.M.A. 1988). The court has long held to the doctrine that a command influence case cannot be affirmed at the appellate level unless the court is convinced beyond a reasonable doubt that the findings and sentence were unaffected by unlawful command influence.

108. *Bartley*, 47 M.J. at 187 (emphasis added).

109. 43 M.J. 15 (1995).

110. *Id.* at 19.

111. *Bartley* was among several decisions released on 24 September 1997 in the final blitz of cases released during the last week of the term.

112. *Bartley*, 47 M.J. at 185.

command influence or suggest a punishment."[113] Of course it did not. In no sense did it "*address* command influence," but it surely raised command influence issues.[114]

The final lesson from *Bartley* is that an important case of convening authority misconduct almost was not corrected because of the defense counsel's decision not to raise it during the questioning of potential panel members.[115] The court reversed the case anyway, because, though it was accusatory-stage command influence, it potentially affected the entire process and because the court was not convinced beyond a reasonable doubt that unlawful command influence did not induce the guilty plea.[116] Still, the CAAF reflects its accurate understanding of the dynamics of the average court-martial in keeping the burden on counsel and military judges to explore such issues at trial. "Questions on voir dire about the poster would have required the judge, who may have known about the agreement, to examine the command influence issue on the record. However, everyone stayed clear of the subjects mentioned in the poster."[117]

What's the Boss Think?

A commander's language again drew fire in *United States v. Youngblood*,[118] another Air Force case, in which the CAAF found unlawful command influence. *Youngblood* also reinforces the fact that officials other than commanders, notably SJAs, can be sources and conduits of unlawful command influence.

Several days before the trial of Airman First Class Youngblood, the convening authority and his SJA held a staff meeting on several issues, including "[s]tandards, command responsibility, and discipline."[119] Among those present were the three most senior members of the panel that was to sentence Youngblood, who pleaded guilty to a variety of offenses.[120] *Youngblood* is probably most noteworthy for its treatment of the doctrine of "implied bias," a growth area in the case law concerning member selection and voir dire.[121] It is also highly relevant to the evolution of unlawful command influence, because it illustrates how difficult it is to discern the effects of command influence on sophisticated and intelligent court members.

At the staff meeting, the SJA mentioned a commander who had "underreacted" and "shirked his or her leadership responsibilities" in a child abuse case.[122] The convening authority emphasized that the SJA "speaks for the Wing Commander" and said that, in the instance the SJA cited, the convening authority had sent a letter to the derelict commander's new duty station "expressing the opinion that 'that officer had peaked.'"[123] One court member, a major, recalled during voir dire that the SJA had said that the commander in question should have received nonjudicial punishment for dereliction of duty.[124]

Addressing the possible command pressure, another member, a lieutenant colonel, said during voir dire:

> [Y]ou're always having to . . . justify [decisions] . . . to your boss and the boss's commander . . . . [T]here are always those pressures that are inherent with the job . . . influences from things that you hear at the stand-up, from . . . my boss, or General Marr [the convening authority], his boss, giving opinions on what they think is important with

113. *Id.*

114. If Judge Crawford is suggesting that the problem with the poster was its failure to include some sort of prophylactic boilerplate, that is a dangerous and, I think, almost certainly futile undertaking.

115. *See Bartley*, 47 M.J. at 186. "[D]efense counsel did not explore the poster's impact on the members during voir dire, though the poster was prominently displayed on the wall at the Norton Air Force Base legal office." *Id*.

116. *Id.* at 187.

117. *Id.* at 186.

118. 47 M.J. 338 (1997).

119. *Id.* at 339.

120. *Id*. at 338, 340. There does not appear to have been similarity between Youngblood's offenses and those of the cases the general and the SJA addressed. The briefing is described as having been "of a general nature." The one case in which the command was said to have "underreacted" was a child abuse case, while Youngblood was on trial for drugs, larceny, and altering military ID cards. *Id*.

121. *See generally* Major Gregory B. Coe, *"Something Old, Something New, Something Borrowed, Something Blue": Recent Developments in Pretrial and Trial Procedure*, ARMY LAW., Apr. 1998, at 44.

122. *Youngblood*, 47 M.J. at 340.

123. *Id*.

124. *Id*.

> regard to the good order and discipline of their unit and your specific unit . . . . [T]here are factors that are just inherent with the job that are influences that I know enter into anyone in a command position.[125]

He also said that he would "do what was right" on the panel, but he said that the remarks by the SJA and commanding general were "at a minimum in my subconscious and, you know, parts of it are very clearly in my conscious."[126] The major said that her opinion could "be somewhat influenced by guidance and information out there, but it's ultimately mine."[127] A third member, another lieutenant colonel, had a more benign recollection of the staff meeting, but he did clearly remember the story about forwarding a letter to the gaining command of the "peaked" commander. "The impression definitely was there. The way it was left with me was there was a presentation, the Wing Commander was dissatisfied with the way things had happened, and he wrote a letter to the individual's now present supervisor."[128]

A divided CAAF upheld the findings in *Youngblood* (a guilty plea), but set aside the sentence.[129] In the well-reasoned majority opinion, Judge Gierke, joined by Chief Judge Cox and Judge Effron, held that it is unreasonable to expect commanders to sit as impartial court members when they have heard the convening authority's strongly expressed views on military justice—views that were reinforced by his SJA and by action such as sending critical letters to gaining commanders.[130]

The court's three most mainstream judges combined in *Youngblood* to deliver an opinion that essentially states one of the core assumptions undergirding the whole concept of unlawful command influence: military subordinates take seriously what their superiors say. When those superiors make strong statements about military justice, it is unreasonable to expect that those subordinate commanders can block out those opinions and perceptions and make decisions wholly unaffected by their superiors' statements. Moreover, it is unreasonable to expect non-lawyers to put command pressure in neat boxes; that is, the court did not take seriously the argument that the three officers in this case were likely to be unaffected in their duties as panel members, because the pressure actually related to their roles as commanders. The majority wrote:

> We recognize that the remarks at issue were directed at the commander's role in initiating disciplinary action rather than an officer's role as a member of a court-martial. Nevertheless [a lieutenant colonel] left the staff meeting with the clear impression that a fellow commander's career was in danger of being abruptly ended because BG Marr considered his response to a disciplinary situation inadequate . . . . Under the circumstances, we hold that it was "asking too much" of [the officers] to expect them to impartially adjudge an appropriate sentence without regard for its potential impact on their careers.[131]

The CAAF majority cited the most applicable recent precedent, *United States v. Gerlich*,[132] in which pressure from the local inspector general to the general court-martial convening authority traveled all the way back to the major who imposed nonjudicial punishment on the accused. The Article 15 was set aside, charges were preferred, and, ultimately, the accused was convicted at court-martial and received a bad-conduct discharge[133] until the CAAF reversed the conviction.[134]

Some of the testimony in *Gerlich* sounds similar to that of the court members in *Bartley*. *Gerlich* involved commanders trying to discern the pressure to change their minds about disposition of a case, whereas *Bartley* involved prospective panel members gauging the pressure they were feeling, but the problem was the same. In both cases, officers with military justice matters admitted keeping their antennae attuned to perceived desires or proclivities of senior commanders.[135] Judge Cox captured the problem in his majority opinion in *Gerlich*, describing

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125. *Id*. at 339.

126. *Id*. at 340.

127. *Id*.

128. *Id*.

129. *Id*. at 342.

130. *Id*. at 340-41.

131. *Id*. at 342.

132. 45 M.J. 309 (1996).

133. *Id*. at 312.

134. *Id*. at 314.

"the difficulty of a subordinate ascertaining for himself/herself the actual influence a superior has on that subordinate."[136]

The majority does not take the extreme view that commanders are barred from making *any* statements about discipline. Though that issue was not squarely before the court, the majority strongly implied that commanders, even commanders who are convening authorities, are not required to remain silent in the face of indiscipline.[137] The court has never taken that position. It does, however, strongly reinforce the proposition that "the effect of subtle pressure" cannot be minutely calibrated and that such pressure, combined with a tender sensitivity to public and soldier perceptions of the fairness of the military justice system, requires erring on the side of finding command influence and correcting it—in this instance, by liberally granting challenges for cause of the affected court members.[138]

Youngblood returns to the fundamentals in evaluating command influence—the military commander has primary roles in military operations *and* in military justice; no one's words, attitudes, or actions are more consequential. Because of this, the words of commanders warrant the greatest scrutiny. A CAAF majority, unencumbered by a predilection to defend commanders reflexively, is likely to find unlawful command influence when those words come from both the commander and his primary legal advisor, are "recent . . . in the minds of court members," and constitute a specific threat buttressed by a recent example.[139] The motives of the speakers are relatively unimportant when analyzing influence. This means that courts need not waste time divining intent or indicting commanders (and, in this instance, SJAs), but courts should instead focus on the reasonable recipient of the message. Here, when all three officers acknowledged a degree of intimidation, it would have been unreasonable for the court to have found no effect on the process. The majority emphasized that its "focus is on the impact of the remarks on the members rather than the exact language, intentions, or motivations of the speakers."[140]

Finally, while too much can be made of any one opinion, *Youngblood* reflects what may well be the emerging dynamic on the CAAF. Judge Crawford dissented strongly. Frequently the source of the court's most insightful legal analysis, especially in matters of constitutional criminal procedure and military post-trial concerns, Judge Crawford seemed like an apologist for commanders, unconcerned about the effects of perception in the tender area of unlawful command influence. Judge Sullivan, characteristically dissenting in part and concurring in part, has long professed a Douglas-Black-like absolutism regarding command influence, forfeiting the opportunity to exert greater influence in the area.[141] Judge Sullivan's partial concurrence and dissent sheds no light on the command influence controversy, but Judge Crawford's dissent stakes out the position that the military justice system is a discipline-based system in which commanders are expected to take active roles.[142] Judge Crawford cites prior cases of commanders' pretrial statements that were not found to be offensive, but none of them is sufficiently similar to *Youngblood* to qualify as compelling support.[143] She also cites *United States v. Martinez*,[144] one of the more benign command influence cases in recent years, before concluding that "the impact on the members in this case

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135. *See id*. at 313. A colonel in the case, who was both recipient and conduit of command pressure, testified that he wondered, "Is the boss trying to tell me something? . . . . What is the boss trying to say? Is he trying to say anything on this?" *Id*.

136. *Id*.

137. *See* United States v. Youngblood, 47 M.J. 338, 341 (1997). The majority wrote, "We recognize a commander's responsibility for discipline, the need occasionally for a more senior commander to intervene to prevent a miscarriage of justice, and the reality that an officer's lax attitude toward discipline may reflect inaptitude for command." *Id*.

138. *Id*.

139. *Id.* at 342. The majority acknowledged, for example, that "the remarks at issue were directed at the commander's role in initiating disciplinary action rather than an officer's role as a member of a court-martial," but ultimately found this to be a thin distinction, as it was reasonable for all three officers to feel that their court performance would be similarly (and improperly) scrutinized. *Id*. The majority concluded "that it was 'asking too much' . . . to expect them to impartially adjudge an appropriate sentence without regard for its potential impact on their careers." *Id*.

140. *Id*. at 339. At the end of the opinion, the court reiterated that "[t]he perceived message rather than the actual message is what controls . . . because we are concerned with how the message may have affected the impartiality of the court members." *Id*. at 341.

141. *See, e.g.*, United States v. Weasler, 43 M.J. 15, 20-21 (1995) (Sullivan, C.J., concurring in result). In *Weasler*, Judge Sullivan wrote that the majority was endorsing "bartered justice"; condoning "private deals between an accused and a commander to cover up instances of unlawful command influence"; and permitting an accused to "blackmail the guilty commander, subverting the integrity of the military justice system . . . [to] the private interests of an accused and a convening authority." *Id*.

142. *Youngblood*, 47 M.J. at 344 (Crawford, J., concurring) (citation omitted). "The primary responsibility for the maintenance of good order and discipline in the services is saddled on commanders, and we know of no good reason why they should not personally participate in improving the administration of military justice." *Id*. This sentiment is consistent with her strong pro-command stands in prior cases, including last year's *Gerlich* dissent, in which she wrote: "The majority's message to superior commanders appears to be that they may not exercise responsible command leadership by suggesting reconsideration of a particular disposition of a case." United States v. Gerlich, 45 M.J. 309, 314 (1996) (Crawford, J., dissenting).

143. *See Youngblood*, 47 M.J. at 344-45 (citations omitted).

is far from obvious."[145] "Obviousness," however, is not a requirement in the subtle realm of command influence.

In *Youngblood*, defense counsel appear once again to have forfeited the chance to develop the record better. The majority noted that neither the convening authority nor the SJA in question was asked to testify, leaving the court with "only the fragmentary recollections of those who heard his remarks."[146] The CAAF made it clear that the controlling factor was the *perception* of the remarks rather than the remarks *per se* or the motivations of the speakers. Still, the defense lost at trial (only one of its three challenges for cause was granted) and lost at the Air Force Court of Criminal Appeals. Perhaps if it had gained frank acknowledgments from the SJA and the convening authority about what happened in the meeting—acknowledging that their motivations were irrelevant, though invariably to be developed by the government—the defense would have had a better chance of prevailing at an earlier stage of the proceedings. A resentencing ordered on 27 September 1997 is cold comfort for an airman who received a sentence of two years' confinement on 21 February 1995. A rehearing, if ordered at all, will be capped by the two-year prior sentence and almost certainly will yield a lesser sentence—paper relief that will not compensate her for time already served.

Just this past month the CAAF considered still another implied bias case, finding that a military judge abused his discretion when he refused to grant a challenge for cause against a member who, inter alia, had been found by the same judge to have committed unlawful command influence in a prior court-martial. In *United States v. Rome*,[147] the judge found that the lieutenant colonel member "had crossed the line in counseling or talking to some NCOs who had written statements on behalf of the accused in that [prior] case."[148] The majority found that this command influence, coupled with some other factors,[149] justified excusing the member for implied bias. Judge Crawford blistered the majority, arguing that the loose combination of command influence and relatively routine factors such as a rating relationship between panel members goes to the core of the military justice system's ability to assert discipline. As in *Youngblood*, Judge Crawford appeared to lecture her fellow judges, reminding them of the unique role of the military justice system:

> This Court must always remember that the military criminal justice system is a worldwide system of justice administered by the armed forces and responsible to civilian authority. Commanders are entrusted with the mission of carrying out the civilian leadership's direction to assure that this country remains a super-power and maintains a strong national defense. *In order to do so, commanders must ensure that sevicemembers are responsive to orders*. Discipline is an integral part of this mission. Commanders and senior NCOs are responsible for maintaining discipline, and they should be trained on how to do so.[150]

There was no issue of "training" regarding justice in this case, so it is unclear whether Judge Crawford is making the point that more or better justice training is called for, or that training should be permitted beyond the relatively strict bounds permitted by Article 37.[151] Addressing the delicate relationship between implied bias theory and command influence, Judge Crawford continued that, in light of the majority's interpretation of implied bias theory, "one must now question whether commanders and senior NCOs can ever serve as court members. Even the random selection of court members would not resolve this matter to the majority's satisfaction."[152]

Implied bias doctrine, as developed in *Youngblood* and *Rome* provides fertile ground for the defense to assert, to liti-

144. 42 M.J. 327 (1995). In *Martinez*, the convening authority wrote a "We Care About You" letter to members of his command. In the letter, he suggested a "starting point" for drunk driving punishments that were resolved at Article 15. Eight days after the letter was published, a court-martial for a drunk-driving-related negligent homicide was held in the same jurisdiction. The CAAF found that the letter, though improper, had no effect on the members because it did not imply that they should find the accused guilty and that full disclosure and voir dire cured the good faith error by the convening authority. *Id*. at 332-33.

145. *Youngblood*, 47 M.J. at 345 (Crawford, J., concurring).

146. *Id*. at 341. Not only the majority was frustrated with the sketchy facts. Judge Crawford makes a similar observation in her dissent, writing, "The full details of the conference are unclear." *Id*. at 344 (Crawford, J., concurring). The "full details" should not still be "unclear" at this stage, and the failure to develop them at trial provides an easy out to a judge who is inclined to uphold the government.

147. 47 M.J. 467 (1998).

148. *Id.* at 468-69.

149. The defense counsel who had "grilled" the lieutenant colonel in the prior case was the defense counsel in this case; the lieutenant colonel knew a prosecution witness, for whom his daughter babysat; and the lieutenant colonel was the battalion commander of a staff sergeant (E-6) on the panel, though each assured the judge that they would not be embarrassed or restrained by each other's presence on the panel. *Id.* at 469, 486.

150. *Id.* at 472 (Crawford, J., dissenting) (emphasis added).

151. Article 37(a) permits only "general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial." UCMJ art. 37(a) (West 1995).

gate, and to preserve command influence claims. *Rome* seems to represent, in effect, a sort of "totality of the circumstances" test in which the command influence claim supplies the critical mass that tips the scales toward sustaining the implied bias claim. Judge Crawford's dissent may seem hyperbolic, but it shows that command influence can be an effective wedge in perfecting an implied bias challenge—one that, reasonably, is most unlikely otherwise to have been granted. The broader issue raised by Judge Crawford is the more interesting one: the extent to which the subjective realm of implied bias, coupled with the military's liberal challenge bent and salted by command influence, can shake the foundation for the long-standing system of military panels.

Command Influence by Conduit: SJAs Can Be Live Wires

The SJA's unfortunate role in *Youngblood* is not anomalous, and, if anything, last year was the year of the SJA in command influence cases, though it is not a new phenomenon.[153] Also last year, an Air Force SJA overstepped his responsibilities when his intimate and relentless involvement in all stages of prosecution jeopardized a conviction in *United States v. Argo*.[154] Argo, an Air Force lieutenant, was on trial for adultery and disobedience. The SJA advised the squadron commander (a lieutenant colonel) regarding a no-contact order, the violation of which formed the basis for some of the charges. He also swore the squadron commander to the charges and received the charges on behalf of the wing commander, the summary court-martial convening authority.[155] He signed for the wing commander (from a different squadron) in appointing a judge advocate to be the Article 32 investigating officer.[156] The case developed in a contentious atmosphere and included a controversy over whether the SJA threatened his counsel with nonjudicial punishment for "leaks" regarding the controversial prosecution.[157] The SJA frequently visited the investigating officer, ostensibly concerned (there was an unresolved dispute about his intent) that the defense was "pushing around" the investigating officer, a judge advocate who was not under the SJA's direct supervision.[158] When the defense suggested that the SJA might be exerting command influence on the investigating officer, the SJA asked that the Article 32 investigation be reopened to explore the issue.[159]

Though the CAAF expressed displeasure with much of the SJA's conduct, it did not find that the conduct amounted to unlawful command influence. Several years ago, Judge Sullivan admonished that an SJA is not a "potted plant."[160] The SJA in this case got himself in trouble by being a whirling dervish, and it is his omnipresence and meddling that purchased much of the court's scrutiny and disapproval. The CAAF found that there was nothing improper about the SJA's asking to have the investigation reopened to address the command influence issue, as it was clearly within the scope of his authority as the wing commander's representative.[161] The CAAF saw no grounds for relief, because the court "cannot discern how appellant could have been prejudiced by a full investigation of his allegations of unlawful command influence."[162]

Ex parte contact by a legal advisor (here, the SJA) with an Article 32 investigating officer is improper,[163] but there was no prejudice in this instance because the investigating officer

152. *Rome*, 47 M.J. at 472 (Crawford, J., dissenting).

153. In 1986, the court addressed SJA misconduct in *United States v. Kitts*, in which an Army SJA advised the convening authority about ways to minimize the participation of junior ranks in courts-martial. 23 M.J. 105 (C.M.A. 1986). The CAAF found that, under the circumstances, the SJA's involvement carried the "mantle of command authority." *Id.* at 108.

154. 46 M.J. 454 (1997).

155. *Id*. at 458. The wing commander was probably the summary and special court-martial convening authority, in accordance with the common Air Force practice, but it is unclear from the majority opinion. In Judge Sullivan's concurrence, he characterized the wing commander as the special court-martial convening authority. *Id*. at 465 (Sullivan, J., concurring). In receiving the charges for the summary court-martial convening authority, the SJA tolled the statute of limitations. *See* UCMJ art. 43 (West 1995); *see also* MCM, *supra* note 29, R.C.M. 403(a).

156. *Argo*, 46 M.J. at 456.

157. *Id*. at 457. Two subordinates recalled such a threat. They recalled that the SJA "threatened nonjudicial punishment for any further office 'leaks.' [The SJA] testified that he had no specific recollection of mentioning nonjudicial punishment but that it was possible." *Id*.

158. *Id.* at 458. The investigating officer was from Sheppard Air Force Base (AFB) but was appointed by the Reese AFB commander, for whom the SJA in question served.

159. *Id*. at 457-58.

160. In *United States v. Martinez*, Judge Sullivan was critical of a convening authority's ability to make fundamental military justice errors (writing a policy letter that suggested specific, minimum punishments for drunk driving offenses at Article 15), observing: "Where was the SJA? We know the typical SJA is not a 'potted plant.'" 42 M.J. 327, 332 (1995).

161. *Argo*, 46 M.J. at 458.

162. *Id*.

"resisted [the SJA's] advocacy, sought independent advice from her SJA . . . and exercised her independent judgment."[164] In short, if the SJA were attempting improperly to influence the proceedings, the court was "satisfied from the evidence of record that his efforts failed."[165]

As in so many cases in recent years, actions taken or foregone by trial-level counsel enable the CAAF to avert potentially harder questions. While the court is most unlikely to find that an SJA's or legal advisor's contact with an investigating officer is automatically command influence, it was spared a difficult call in this case because of the defense's decision or inability to pursue the command influence issue as it ripened. Writing for the court, Judge Gierke observed that the "defense did not ask the appointing authority to appoint a new investigating officer or ask the military judge to order a new Article 32 investigation."[166]

Argo is significant because it makes clear that the CAAF will not disturb a conviction simply out of dissatisfaction with the conduct of an SJA. Most importantly, the court will examine the honesty and independence of those who are subject to attempted influence. This case survived appellate scrutiny despite the SJA's overbearing conduct,[167] because the investigating officer proved herself impervious to it.

Argo also provided still another opportunity for the CAAF to reinforce *Stombaugh*,[168] in finding that the defense has (and in this case failed to meet) the burden of production in command influence cases. That burden, the court reiterated, "'is on the party raising the issue.' While 'the threshold triggering further inquiry should be low . . . it must be more than a bare allegation or mere speculation.'"[169] Aggressive staff judge advocates should draw little comfort from *Argo*, however. The court was clearly unhappy with the SJA's conduct, and it reemphasized that SJAs certainly can function as agents of command influence. Judge Gierke wrote that if the SJA "had attempted to influence [S's] testimony, either as a command representative or in his individual capacity, such conduct would violate Article 37."[170] This is significant because it suggests that *Argo*'s outcome hinged more on the SJA's failure to affect the course of the proceedings than on the conduct standing alone. It also suggests a broader view of Article 37 by Judge Gierke, and Judges Cox and Crawford, who joined in the opinion of the unanimous court. If the SJA could have violated Article 37 *in his individual capacity*, it suggests breathing life back into the "no person" language of Article 37, in contravention of the opinion in *United States v. Denier*,[171] which suggests its decline or demise through strict application of the "mantle of command" rubric.

Judge Effron's thoughtful concurrence is noteworthy for its conclusion that the SJA's actions "did not have any material effect" on the Article 32 investigation, "the referral decision by the general," or the trial or post-trial process.[172] Judge Effron's sentiments could form the working draft of a more nuanced harmless error analysis for the court, which has shown an inclination in recent years to assess the significance of command influence in the overall atmosphere of a developing case.[173]

As almost always in command influence cases, Judge Sullivan wrote separately to express his acute concern for the integrity of the military justice system. He said that *Argo* was "really about fairness in the military justice system and the concern of Congress that military prosecutions be perceived as fair by servicemembers *and the American public*."[174] He called the SJA's actions "a perceived manipulation of a military justice proceeding," a perception he called "not unreasonable" but one which yielded "no reasonable possibility of prejudice."[175] Judge Sul-

163. *See generally* MCM, *supra* note 29, R.C.M. 405(d)(1) discussion. "The investigating officer may seek legal advice concerning the investigating officer's responsibilities from an impartial source, but may not obtain such advice from counsel for any party." *Id*.

164. *Argo*, 46 M.J. at 459.

165. *Id*.

166. *Id.*

167. *Id*. "While we do not condone [the SJA's] conduct, we hold that appellant was not prejudiced by [the SJA's] improper ex parte contacts with the Article 32 investigating officer." *Id*. Judge Effron was similarly cautionary in his concurrence: "These are serious allegations, and the majority is careful to place these matters in context without endorsing activities of the individuals concerned." *Id.* at 464 (Effron, J., concurring).

168. 40 M.J. 208, 213 (C.M.A. 1994).

169. *Argo*, 46 M.J. at 461 (citations omitted).

170. *Id*.

171. 47 M.J. 253 (1997).

172. *Argo*, 46 M.J. at 464 (Effron, J., concurring).

173. *Compare id. with* United States v. Gleason, 43 M.J. 69 (1995) (holding that absence of defense witnesses from unit to testify at general court-martial for popular sergeant major warrants reversal based on atmosphere of paranoia fostered by battalion commander/summary court-martial convening authority) *and* United States v. Newbold, 44 M.J. 109 (1996) (providing that a ship commander's characterization of accused sailors as "scumbags" and "rapists" did not require relief because the commander was not the convening authority and the ship's population was excluded from the pool of potential panel members).

livan remains the member of the court who is most sensitive to command influence concerns. He has not, however, suggested a clear, alternative method of analyzing such cases, risking his being relegated to the role of court rogue on a critical issue. After concluding that there was no prejudice in *Argo*, he criticized the majority for a sort of obtuseness on the issue, but he concurred in the result.[176]

Command Influence Never Dies

By its terms, Article 37 applies to conduct that affects the findings or sentence of a court-martial. The conduct, however, may have occurred in a prior proceeding that is not itself subject to Article 37, if that conduct can be said to affect the court-martial. The CAAF rarely has been unanimous on command influence issues in recent years, but the five judges agreed in a remarkably unanimous opinion without concurrences that the defense may collaterally attack a properly filed and adjudicated Article 15 on command influence grounds when the government seeks to introduce it at court-martial.

In *United States v. Lorenzen*,[177] the court ultimately held that the Article 15 at issue would not have affected the result but said it was a proper issue for scrutiny at trial.[178] The Air Force Court of Criminal Appeals had held that the command influence issue evaporated when the accused chose to accept adjudication under Article 15 and not to demand trial by court-martial.[179] The CAAF expressly held otherwise. Writing for the unanimous court, Judge Crawford found that Lorenzen "did not waive his unlawful command influence claim by electing Article 15 nonjudicial punishment rather than demanding trial."[180] She wrote, however, that even if unlawful command influence were involved in the Article 15, the accused was unable in this instance to show that his trial was unfair (the second prong of the three-part *Stombaugh* test).[181] Because the Article 15 was admitted with other reprimands and counselings, the CAAF was satisfied that the possible command influence did not carry over to the sentence.[182]

In *Lorenzen*, the CAAF makes several critical points for counsel. The first and most obvious is that Article 15s are never "final" and that defense counsel should aggressively assert possible command influence whenever it has a good faith basis. In particular, acceptance of nonjudicial punishment does not waive command influence as to later use of the Article 15 at court-martial. Equally clear, however, is that the government benefits from smothering the record with as much derogatory information as it can find.

The CAAF did not have to make the tough call in this case—determining whether there was command influence in the contested Article 15—because the other derogatory sentencing evidence enabled the CAAF simply to find that the Article 15 standing alone would not have made enough difference.[183] In arguing a command influence motion, the defense needs to assert aggressively the uniquely prejudicial effect of Article 15 evidence. When the government's sentencing case consists of an Article 15 and "two other reprimands and counselings,"[184] it should not be so easy for the court to say that, essentially, the Article 15 merges into a generally negative picture of the accused and "'any command influence . . . did not [carry over

174. *Argo*, 46 M.J. at 464 (Sullivan, J., concurring) (emphasis in original). Judge Sullivan wrote further, "I am concerned that the conduct of the SJA may have unnecessarily jeopardized public confidence in this prosecution." *Id*.

175. *Id*. at 465.

176. *Id*. at 465. Judge Sullivan returned to the garden for his metaphor in this case when criticizing his brethren for lacking his breadth of vision.

> The process of a criminal prosecution may be viewed as a plant that grows in the soil of justice. The majority here has looked at this case only as to the results that are above ground—the referral of the case for trial, the trial, and the appeal. The majority has declared this referral [etc.] to be valid, and I agree. However, my view also goes beneath the ground to critically look at the main root of this criminal process—the pretrial investigation (the military equivalent of the grand-jury process). If this root is rotten, then the entire plant will eventually fail and die. I find the root damaged by the interference of the SJA, but the damage is not fatal.

Id.

177. 47 M.J. 8 (1997).

178. *Id*.

179. *Id*. at 15.

180. *Id*.

181. *Id*.

182. *Id*.

183. *Id*.

184. *Id*.

to] affect the findings or sentence' in this court-martial."[185] Defense counsel should be emboldened to assert in good faith the possibility of command influence in any adverse evidence the government introduces during the sentencing phase of trial. Besides trying to refute such evidence where possible, the government should seek a diversity of evidence so that its case does not rise or fall based on a single potentially questioned document.

Conclusion

When analyzing the command influence cases of recent years, it is important to remember the purposes of the proscriptions against command influence and the reasons that Congress included Article 37 in the UCMJ. Broadly, there are two reasons for Article 37's existence: to preclude overt corruption of the system (pressuring decision-makers and witnesses) and to maintain and to foster confidence in the justice system by its constituents (service members under the UCMJ) and the public. The first area is conventional command influence, and it hinges on the perceptions of the participants in the court-martial process. The second area, apparent command influence, is less common. It arises when there is no real effect on the trial, but when the public or rank and file might lose faith in the system. Courts and commentators frequently say that not only must justice be done, but it must be *seen* to be done.[186]

When counsel analyze their cases, they do well to keep both concerns in mind. These purposes have shaped the tests for command influence and the "fixes" available to correct incipient problems. The command influence issues of the recent term ranged from the grossly ill-considered (the "Who's Kidding Whom" poster) to the murky (the uncertain paper trail on the homosexuality issue in *United States v. Johnson*) to the arcane (Lorenzen's Article 15). Courts broke very little new ground in the past year. A majority of the CAAF clearly is comfortable with the *Stombaugh* test for command influence, and the *Stombaugh-Ayala* combination in winnowing command influence cases. Judge Crawford remains most sympathetic to commanders, and Judge Sullivan apparently feels as though he is the lone crusader for pure justice in the command influence realm. Military justice practitioners can learn from the strategies and their counterparts in this year's cases when framing and responding to command influence issues in the future.

Finally, a word about the Air Force. Six of the eight reported command influence decisions by the military appellate courts from the past year came from the Air Force (one came from the Navy and one came from the Coast Guard). It is nothing but conjecture to speculate about the cause. It simply could have been a bad year for the Air Force, it could reflect in part the entrusting of significant responsibility to relatively junior judge advocates (for example, the major (O-4) SJA in *Argo*), or it could suggest a disinclination to rein in stubborn commanders (the three-star general who generated and posted the "Who's Kidding Whom?" poster in *Bartley*). It could have nothing at all to do with the culture of a particular service. On the other hand, it could reflect the aggressiveness and unity of the Air Force defense counsel in ferreting and aggressively pursuing command influence claims. Regardless, the cases as a whole reflect that commanders and their advisors continue to find new ways to slip in the area of command influence. Overall, the burden remains high on the defense, and the CAAF in particular shows a continued determination to hold the defense to that high burden.

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185. *Id.*, *quoting* United States v. Stombaugh, 40 M.J. 208, 214 (C.M.A. 1994) (bracketed language appears in *Lorenzen* opinion).

186. As two authors state:

> To be strictly accurate, a justice-based system must be perceived to be fair and reasonably accurate. Although justice is a valid goal in and of itself, a discipline-oriented perspective emphasizes what the "troops" will need for high morale, and in the short term a perception of fairness will suffice in lieu of its actuality.

1 Francis A. Gilligan and Fredric I. Lederer, Court-Martial Procedure 7-8 (1991). *See* United States v. Youngblood, 47 M.J. 338, 343 (1997) (Sullivan, J., concurring in part and dissenting in part) (stating that "[a] jury system must appear fair for it to be recognized as fair"); United States v. Ayala, 43 M.J. 296, 304 n.4 (1995) (Sullivan, J., concurring in part and dissenting in part) (stating that "[a] system of justice must not just be fair, it must appear to be fair").