Recent Developments in Appellate Review of Unlawful Command Influence

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In this case, the military judge forcefully and effectively discharged his duties as the last "last sentinel" to protect the court-martial from unlawful command influence.[1]

Unlawful command influence can take many shape and forms, and can arise at any stage of the court-martial process.[2] Because of the unique role of commanders, the rank structure, and the normal methods by which information and guidance is transmitted within the military, there will always be the potential for conduct which runs counter to the protections afforded by Article 37 of the Uniform Code of Military Justice (UCMJ).[3] From preferral of charges to post-trial review, the "mortal enemy of military justice"[4] is always a threat to a fair trial. When allegations of unlawful command influence arise, the command and trial participants at the trial level have the first and, perhaps, best opportunity to take remedial measures to ensure a fair trial. Since this is such a contentious issue, however, it is often left to the appellate courts to determine if the intent of Article 37 has been carried out. Even more important is the guidance that the appellate courts provide for dealing with unlawful command influence issues in the future.

In this past year, the Court of Appeals for the Armed Forces (CAAF) and the service appellate courts had several opportunities to determine if various types of conduct violated Article 37. There are examples of many of the faces of unlawful command influence. For the most part, there are no new developments, with one notable exception. In the most significant opinion of the year, the CAAF further clarified the burden on the government in litigating unlawful command influence motions at the trial level. The courts continued the trend of past years of putting the accused and defense counsel to the test in substantiating allegations of unlawful command influence. By continuing to emphasize the importance of a complete record and applauding the efforts of proactive trial judges, the courts also sent a clear message that allegations of unlawful command influence are best addressed and resolved at the trial level.

The Burden of Proof in Litigation of Unlawful Command Influence Allegations

Perhaps the most significant unlawful command influence decision in the past year was *United States v. Biagase*,[5] not so much because of the conduct which led to the allegations of unlawful command influence–the basic allegation was whether certain conduct by the chain of command amounted to witness intimidation, resolved at trial and on appeal against the appellant. Rather, *Biagase* is significant because it gave the CAAF another opportunity to underscore the importance of a conducting a complete inquiry, preparing a complete record for review, and implementing remedial measures at the trial level. In *Biagase*, the court also definitively answered one critical question that will always arise in the litigation of unlawful command issues at the trial level.

1. United States v. Biagase, 50 M.J. 143, 152 (1999).

2. *See* DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE, PRACTICE AND PROCEDURE § 6-3 (5th ed. 1999) (summarizing how unlawful command influence can arise at any stage of the court-martial process).

3. *Id. See also* UCMJ art. 37 (LEXIS 2000) which provides, in part:

> (a) No authority convening a general, special, or summary 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. The foregoing provisions of the subsection shall not apply with respect to
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> (1) 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, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

4. *See* United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

5. 50 M.J. at 14.

Lance Corporal (LCpl) Biagase was charged with attempted robbery, conspiracy to commit robbery, robbery, and assault consummated by battery. In his confession to the Naval Investigative Service, LCpl Biagase described in detail how he and some of his friends "jacked people . . . beat them up, kicked them, and took their money . . . ."[6] A copy of LCpl Biagase's confession was given to his company commander, who in turn gave it to his first sergeant with the directive to use it to teach other [noncommissioned officers] about "what's going on with our Marines."[7] He told his first sergeant to get the word out that "this type of behavior will not be tolerated within the command."[8] The company commander also told the company at a weekly formation that "we had a Marine do something that Marines do not do, and we will not tolerate this type of behavior."[9] He expressed ". . . that he was appalled and disgusted . . . and that any Marine who portrayed this type of behavior does not deserve to wear the uniform."[10]

The first sergeant, convinced there was a void of leadership in the unit, made copies of the confession and gave them to LCpl Biagase's section chief.[11] He also told the non-commissioned officers (NCOs) in the unit that he did not understand how this type of incident could happen, and that it was their obligation to set the record straight–"good Marines did not do these types of things."[12] Another senior NCO told the unit "that the military really couldn't tolerate situations like that because it was unbecoming."[13]

At trial, the accused made a motion to dismiss all charges based on unlawful command influence, asserting that the circulation of his confession in the unit, and the various lectures to unit formations had a chilling effect on potential witnesses who could testify as to his good character.[14] During the motion, the trial judge heard testimony from two NCOs who stated that they did not feel intimidated or prevented from testifying. One stated that he did think that testifying for LCpl Biagase might affect how some people thought of him as a person and staff NCO.[15] The other testified that he was initially reluctant to testify because he thought it might be "harder for him in the unit . . . or maybe his leave might be canceled."[16] The second NCO also stated that other Marines in the section "don't want to have anything [to do] with it just because of the way the statement was read out and the things they read."[17] On examination by the military judge, the second NCO testified that when the statement was disclosed, he thought the command would look unfavorably on anyone who testified on behalf of the accused . . . that the command would think he just wants to be like him."[18] Both NCOs testified that, notwithstanding their initial reluctance, they were willing to testify on behalf of the accused.[19]

The trial judge *sua sponte* directed that the company commander, first sergeant, section officer-in-charge (OIC), and the other senior NCO involved in publishing and distributing the accused's confession be brought into court to testify.[20] After hearing their testimony, the military judge asked the defense

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6. *Id.* at 144. The exact language used by Biagase was:

> When I say "jack people" I mean that we beat them up, kick them or whatever we have to do until they are hurt pretty bad and do not resist us any more. After the people are down, laying on the ground and cannot resist because we hurt them, we take their money or whatever else we want to take.

Id.

7. *Id.* at 146.

8. *Id.*

9. *Id.*

10. *Id.* at 147.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 144-45.

15. *Id.* at 145.

16. *Id.*

17. *Id.*

18. *Id.* at 146.

19. *Id.*

20. *Id.*

counsel if any witnesses had refused to testify. Defense counsel agreed that no witnesses had refused to testify, but argued that dissemination of the statement "definitely had an impact on them by painting the accused as a bad character, even before the trial began."[21]

The trial judge, in ruling on the motion, expressed displeasure and concern with the series of events that led up to the motion for dismissal.[22] He found that the defense had met its initial burden of presenting some evidence of unlawful command influence, but also found that the government had met its burden "by clear and convincing evidence"[23] that there was no unlawful command influence in this case. He also stated that he was convinced beyond a reasonable doubt that there was no unlawful command influence in this case.[24] Even though the military judge found no unlawful command influence, he felt it appropriate to take remedial measures. In open court, with very strong language, he chastised the company commander, first sergeant, section OIC, and senior NCOs for distributing and commenting on the accused's confession.[25]

The trial judge then directed that the first sergeant be removed from the reporting chain of anyone who testified for the accused; directed that if the evaluation of anyone who testified for the accused is lower than their last rating, that written justification be attached; allowed the defense great latitude during voir dire of members; agreed to grant liberal challenges for cause; and offered to issue a blanket order to produce any defense witnesses that were otherwise reluctant to testify out of fear or concern for their well-being.[26] It is noteworthy that these are the types of remedial measures normally put into place after a finding of unlawful command influence.[27]

On review by the CAAF, the court faced two basic issues: first, whether the trial judge applied the correct legal test in concluding that there was no unlawful command influence, and second, whether there was unlawful command influence in this case which would have entitled the accused to relief.

The court took this opportunity to trace the development of the standard of proof once an accused raises the issue of unlawful command influence in a court-martial. The court traces the "clear and positive evidence" standard back to *United States v. Adamiak*,[28] and *United States v. Rosser*,[29] cases where the facts were not in dispute. The only issue in *Adamiak* and *Rosser* was whether the government had rebutted the presumption of prejudice by clear and convincing evidence once the accused had sufficiently raised unlawful command influence as an issue. In essence, the government was only required to show that unlawful command influence had not tainted the proceedings.

The first appearance of proof beyond a reasonable doubt as the standard for unlawful command influence allegations was in *United States v. Thomas*,[30] one of the 3d Armored Division's unlawful command influence cases. It was at this point that the court began to treat unlawful command influence as "an error of constitutional dimension,"[31] thus mandating proof beyond a reasonable doubt as the appropriate standard of review at the

21. *Id.* at 148.

22. *Id.* The military judge stated:

> Certainly, I do not deem it appropriate that a statement of an accused be Xeroxed, somehow reproduced, and provided to various members of the command, even though it may have been with good intentions; that is, even though it may have been for the purpose, as expressed here, to teach others of the kind of conduct that should not be tolerated . . . .

Id.

23. *Id.*

24. *Id.*

25. *Id.* The military judge later stated:

> Ladies and gentlemen, I have, after a lot of searching, denied a defense motion for unlawful command influence. I do not believe that there has been unlawful command influence. That is not to say that I believe things were done properly. I believe that you have come carelessly close to compromising the judicial integrity of these proceeding, and I want to make sure that all of you understand that this is a Federal Court of the United States, and I will not under any circumstances tolerate anybody that even remotely attempts to compromise the integrity of these proceedings . . . .

26. *Id.*

27. *See, e.g.*, United States v. Rivers, 49 M.J. 434 (1998).

28. 15 C.M.R. 412 (C.M.A.1954).

29. 6 M.J. 267 (C.M.A. 1979).

30. 22 M.J. 388, 394 (C.M.A. 1986).

31. *Biagase*, 50 M.J. at 150.

appellate level. In a series of cases, the court further clarified the burden of proof on the defense to raise the issue, and the government to rebut the presumption of prejudice once the issue was raised.[32] All of these cases, however, involved appellate review of a completed trial and described the burden of proof for affirming a conviction in a case where defense counsel had shown unlawful command influence did, in fact, exist. These cases did not address the appropriate standard of proof that the military judge must apply at trial. In only one previous case had the court even raised the question of whether there should be a distinction between the standard of proof applied in determining whether there is a presumption of command influence and the presumption of prejudice to an accused.[33]

In *Biagase*, the court definitively answers that question. All determinations associated with the litigation of unlawful command influence allegations are exceptions to the Rule for Court-Martial (R.C.M.) 905(c)(1)[34] preponderance of the evidence standard normally applicable to the resolution of factual issues necessary to decide a motion. The beyond a reasonable doubt standard applies to all determinations at both the trial and appellate level.[35] The initial burden to present some evidence of unlawful command influence still rests with the accused and defense counsel. Once that burden is met, the onus shifts to the government which must prove beyond a reasonable doubt that either: (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or affect the findings and sentence.[36]

Turning to the facts of *Biagase*, the court refused to disturb the trial judge's ruling that there was no unlawful command influence, even though it was based on the incorrect legal test. What is key in this case is that, even though the trial judge found no unlawful command influence, he treated the case as if he had. The court noted that there are steps that the government and trial judge can take to protect the proceedings from any adverse effects from unlawful command influence.[37] As noted above, the trial judge took the same types of remedial measures in this case. The military judge conducted an exhaustive examination of the facts, chastised the entire chain of command in open court, removed the first sergeant from the rating chain of anyone who testified, required written justification for any downward turn in rating, and required that any witness who indicated reluctance to testify be produced. Further, all members of the chain of command who knew the accused testified favorably during both phases of the trial. Finally, the defense counsel stated on the record that no witnesses refused to testify. Under these circumstances, the court found beyond a reasonable doubt that the court-martial was not affected by unlawful command influence.

This decision is instructive for both trial counsel and defense counsel. The key for the government is that there will be a higher burden of proof once unlawful command influence is raised, and that burden applies to all three steps in the *Ayala-Stombaugh* test.[38] This opinion also underscores the importance of conducting a complete examination and creating a complete record once defense counsel adequately raises the issue. Finally, the importance of preventive measures cannot be overstated, even where the trial judge finds no unlawful command influence. Arguably, the court's opinion includes an implicit finding of unlawful command influence. Judge Sullivan criticizes the majority for not stating as much.[39] Were it not for the remedial measures put in place by the trial judge, the court's conclusion that the proceedings were not tainted by unlawful command influence would have been significantly more difficult, if not impossible.

Commander's Independent Discretion

Article 37 also protects a commander's independent discretion to dispose of misconduct in whatever manner that commander deems appropriate. Except in certain limited circumstances,[40] when a commander directs a subordinate to dispose of misconduct in a certain way, or otherwise limits the discretion of a subordinate, another face of unlawful command

32. *See* United v. Ayala, 43 M.J. 296 (1995); United States v. Stombaugh, 40 M.J. 208 (C.M.A. 1994); United States v. Reynolds, 40 M.J. 198 (C.M.A. 1994); United States v. Levite, 25 M.J. 334 (C.M.A. 1987). The defense must show (1) facts, which, if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that unlawful command influence was the cause of the unfairness. To show unfairness, the defense must produce evidence of proximate cause between the unlawful command influence and the outcome of the court-martial.

33. *Biagase*, 50 M.J. at 150; *see* United States v. Gerlich, 45 M.J. 309 (1996).

34. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 905(C)(1)(1998) [hereinafter MCM].

35. *Biagase*, 50 M.J. at 150-51.

36. *Id. See supra* note 32.

37. *See* United States v. Rivers, 49 M.J. 434 (1998).

38. *See supra* note 32 and accompanying text.

39. *Biagase*, 50 M.J. at 152-53.

40. *See* MCM, *supra* note 34, R.C.M. 306(a), (b).

influence appears. The CAAF addressed this aspect of unlawful command influence in two cases this last year.

In *United States v. Haagenson*,[41] the circumstances under which the convening authority withdrew charges from a special court-martial and later referred them to a general court-martial led to allegations of unlawful command influence. The case also involved several sub-issues normally associated with unlawful command influence allegations–the adequacy of the record and the battle of affidavits, the mantle of authority,[42] and the waiver of accusative stage unlawful command influence.[43]

A special court-martial convening authority (SPCMCA) originally referred charges of fraternization against Chief Warrant Officer (CW2) Haagenson to a special court-martial. After a discussion with his legal advisor, the SPCMCA withdrew the charges and referred them for a pretrial investigation under UCMJ Article 32(b). The fraternization charges and two additional charges were subsequently referred to a general court-martial. Chief Warrant Officer Haagenson challenged the decision to withdraw and re-refer the charges as being the result of unlawful command influence.

Chief Warrant Officer Haagenson's evidence of unlawful command influence on appeal consisted of an affidavit from the SPCMCA's executive officer, which described a meeting between the SPCMCA and the chief of staff for the base commander around the time of referral and withdrawal of the charges.[44] According to the executive officer, the chief of staff was "very angry, yelling, enraged, and showed anger beyond normal, professional irritation."[45] The chief of staff allegedly told the SPCMCA that CW2 Haagenson should not be in the Marine Corps any more, and stated, "I want her out of the Marine Corps."[46] In the executive officer's opinion, it was as if the chief of staff had something personal against the accused, and described his level of hostility as irrational and unprofessional. According to the executive officer, the chief of staff stated that "this is going to be the last nail in her coffin."[47]

The SPCMCA, through an affidavit, responded that he could not specifically recall why he withdraw the charges, except that it was on the advice of counsel.[48] He further stated that there was "absolutely no command influence associated with this decision," and that the chief of staff never said anything in his presence regarding any personal animosity toward CW2 Haagenson.[49]

The Navy-Marine Corps court found that there was nothing in the record of trial to support the allegation that the SPCMCA had been subjected to unlawful command influence.[50] The CAAF disagreed. Applying the standard of producing some evidence of unlawful command influence,[51] the court found the affidavit of the executive officer sufficient to raise unlawful command influence as an issue. In light of the SPCMCA's affidavit, however, it deemed the record insufficient to resolve the issue.[52] The trial counsel misinformed the court about the existence of the prior referral, and there was no other explanation for the withdrawal in the record as required by the *Manual for Courts-Martial*.[53] Consequently, the CAAF was left with no alternative but to return the record for additional fact-finding proceedings.[54] The court offered the alternative of setting aside the findings and sentence and returning the case to the SPCMCA for appropriate disposition.[55]

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41. 52 M.J. 34 (1999).

42. United States v. Stombaugh, 40 M.J. 208 (C.M.A. 1994).

43. *See* United States v. Hamilton, 41 M.J. 32 (CMA 1994).

44. *Haagenson*, 52 M.J. at 36. The SPCMCA was a subordinate commander of the base commander.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* There is some indication that the commander was not aware that a special court-martial could not impose confinement or a punitive discharge on a warrant officer. It appears that was first brought to his attention by his legal advisor. Additional charges were preferred against CW2 Haagenson between the time of withdrawal and re-referral to general court-martial.

49. *Id.*

50. *Id.*

51. *See* United States v. Johnston, 39 M.J. 242, 244 (C.M.A. 1994); *see also* United States v. Ayala, 43 M.J. 296, 300 (1995).

52. *Haagenson*, 52 M.J. at 37.

53. *See* MCM, *supra* note 34, R.C.M. 604(b).

54. *Haagenson*, 52 M.J. at 37.

Chief Judge Crawford and Judge Gierke dissented from the majority on two grounds. The court has distinguished between unlawful command influence which occurs during the accusative stage of a court martial–preferral and forwarding of charges–and that which occurs during the adjudicative stage, after referral.[56] For the dissenting judges, the decisions to withdraw charges, prefer additional charges, and order an Article 32(b) investigation all fall within the accusative stage. As such, the court's holding in *Hamilton* requires that the accused raise the issue at trial to avoid waiver. The dissenting judges went on to test for plain error, and found none. They also implicitly applied the "mantle of authority" test enunciated in *United States v. Ayala*.[57] The dissenting judges concluded that since the chief of staff was not in the chain of command, was of equal military grade, and there was no rating relationship, there was no unlawful command influence. There was no plain error, a requirement to overcome the waiver rule announced in *Hamilton*.[58]

Because the case was being returned for additional fact-finding, the majority did not directly address the analysis offered by Chief Judge Crawford and Judge Gierke. Judge Effron, writing for the majority, does propose in a footnote, however, that the accusative stage includes only the preferral and forwarding of charges, not the referral. Consequently, the waiver rule announced in *Hamilton* did not apply.[59] His rationale is that since withdrawal necessarily follows referral, and the *Manual for Courts-Martial* requires some explanation of withdrawal in the record of trial, withdrawal and re-referral falls within the adjudicative stage of a court-martial.[60] Judge Effron also cites other cases which suggest that referral is a judicial act[61] and, as such, would most logically be considered part of the adjudicative stage of trial.

For the practitioner, until the CAAF decides this issue, perhaps the safest approach is to treat withdrawal and re-referral as part of the accusative stage. Certainly, to the extent that this distinction may affect tactical decisions, this is the best approach. Practitioners should also note the dissenting opinion, particularly the discussion of whether a chief of staff can actually influence the decisions of a subordinate commander in that command. Is the court signaling a more restrictive view of the mantle of authority? That question remains for another day, maybe after additional fact-finding in this case.

The effect of a conversation between a superior and a subordinate was also at issue in *United States v. Villareal*.[62] The circumstances surrounding the convening authority's unilateral withdrawal from the agreement, and transfer of the case to another convening authority, was the basis for the allegation of unlawful command influence.

Aviation Ordnanceman Airman (AOA)Villareal was charged with murder and various weapons charges. Early in the trial process, he entered into a pretrial agreement with the original convening authority that would allow him to plead guilty to involuntary manslaughter and some of the other charges. In exchange, the convening authority agreed to approve no confinement in excess of five years, and also agreed to limit forfeitures to one-half of his pay for sixty months.[63] Responding to pressure from the victim's family who was dissatisfied that the pretrial agreement allowed AOA Villereal to plead guilty to manslaughter instead of murder, the convening authority sought the advice of an "old friend and shipmate," who happened to be his acting superior convening authority at the time.[64] The superior simply asked, "What would it hurt to send the issue to trial?"[65] Against the advice of his staff judge advocate, the convening authority withdrew from the pretrial agreement and transferred the case to a third convening authority.[66] Aviation Ordnanceman Airman Villareal was subsequently convicted of involuntary manslaughter and other charges, and sentenced to ten years confinement.

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55. *Id.*

56. United States v. Hamilton, 41 M.J. 32 (C.M.A. 1994).

57. 43 M.J. 296, 300 (1995).

58. *See supra* note 56 and accompanying text.

59. *Haagenson*, 52 M.J. at 36, n.3.

60. *Id.*

61. *Id.*

62. 52 M.J. 27 (1999).

63. *Id.* at 29.

64. *Id.*

65. *Id.*

66. *Id.*

Aviation Ordnanceman Airman Villareal viewed the statement by the superior convening authority as unlawful command influence and sought either dismissal of the charges, or specific performance of his original pretrial agreement. Even though the military judge concluded that the telephone call created the appearance of unlawful command influence, the CAAF disagreed. Emphasizing that the subordinate initiated the call, the majority concluded that there was no violation of R.C.M. 104.[67] The court did not address whether the conversation between the commanders created an appearance of unlawful command influence. In dicta, the court held that even if there was an appearance of unlawful command influence, as found by the military judge, the transfer of the case to a new convening authority removed any possibility of prejudice.[68]

Judge Effron wrote a strong dissent in this case, taking issue with the majority's focus on who initiated the conversation. His approach was simple–when reviewing this type of allegation of unlawful command influence, it should not matter who initiates a conversation.[69] Once an accused presents evidence of unlawful command influence, the burden shifts to the government to disprove the facts or prove that there was no prejudice to the accused. The original convening authority's testimony that the advice caused him to reexamine his position and ultimately withdraw from the pretrial agreement satisfies the first step.[70] Judge Effron opined that the military judge correctly concluded there was unlawful command influence in this case. Further, he and Judge Sullivan agreed that transfer of the case to a different convening authority is an inadequate remedy. Judge Effron proposed a novel solution–transfer the case with the pretrial agreement intact, and let the new convening authority decide.[71] That would be the only way to remove the taint of unlawful command influence from the original convening authority's decision to withdraw from the pretrial agreement.

Convening Authority as Accuser

An accuser, as defined in UCMJ, Article 1(9) is disqualified from referring charges to a special or general court-martial.[72] The convening of a court-martial by an officer who is also an accuser is generally considered to be a form of unlawful command influence.[73] The CAAF addressed the issue of disqualification as an accuser in two cases last year, the first of which is *United States v. Voorhees*.[74]

Pursuant to a pretrial agreement, Lance Corporal (LCpl) Voorhees pled guilty to introduction, distribution, and use of LSD.[75] During the providency inquiry, in response to questions from the military judge regarding whether anyone had threatened or forced him to plead guilty, LCpl Voorhees revealed that both his company commander and battalion commander had approached him about his case.[76] His company commander told him that his civilian defense counsel would be more of a hindrance than help in his court-martial. His battalion commander, who was also the convening authority, asked him if he had signed the pretrial agreement. When Voorhees responded that he and his defense counsel still had questions, his battalion commander told him that if he did not accept the pretrial agreement, he was "going to burn him."[77]

On appeal, LCpl Voorhees alleged that the battalion commander, based on their conversation and his threat to "burn him," was an accuser and was therefore disqualified from further involvement in the case.[78] More specifically, LCpl Voorhees' position was that, if the battalion commander (the convening authority) was an accuser, his involvement in the pretrial agreement process invalidated the findings and sentence.[79] The CAAF applied the Article 1(9) and Article 23(b)[80] tests for determining whether the convening authority was an

67. *Id.* at 30. The majority distinguished *United States v. Gerlich*, 45 M.J. 309 (1996), where the court emphasized that "a subordinate is in a tenuous position when it comes to evaluating the effects of unlawful command influence being exerted on him or her." In *Gerlich*, there was no curative action.

68. *Id.*

69. *Id.* at 32. Judges Effron and Sullivan agree that *Gerlich* controls.

70. *Id.*

71. *Id.* at 33.

72. UCMJ, art. 1(9) (LEXIS 2000). Article 1(9) provides: The term "accuser" means a person who signs and swears to harges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

73. *Id.* arts. 1(9), 22, 23. These articles combine to disqualify an accuser from referring charges to a special court-martial or general court-martial.

74. 50 M.J. 494 (1999).

75. *Id.* at 495.

76. *Id.*

77. *Id.* at 496-97.

78. *Id.* at 498. This argument was based on the CAAF's decision in *United States v. Nix*, 40 M.J. 6 (1994), in which the court held that a commander who was an accuser was disqualified from making a disposition recommendation. The *Nix* court set aside the findings and sentence.

accuser–"so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter"–and concluded that there was no evidence in the record of personal interest in this case.[81] Since LCpl Voorhees and his defense counsel were fully aware of the issue at trial and chose not to fully litigate it, the court did not feel any obligation to do more to resolve the complaint about the validity of the pretrial agreement.[82] Further, since LCpl Voorhees and his defense counsel chose not to raise the disqualification issue as it may have impacted post-trial action, and actually sought clemency from the convening authority, there was no plain error nor ineffectiveness assistance of counsel which would warrant granting relief to LCpl Voorhees.[83]

This decision offers guidance on how to apply the definition of accuser to a given set of facts. It also shows the reluctance of the court to intervene where all the facts are known to the accused and defense counsel at the time of trial, and the issue is not raised. The court never specifically applied waiver,[84] but the analysis and the end result would have been the same. Lance Corporal Voorhees got the benefit of his bargain in a case where it appears that was his and his defense counsel's ultimate goal.

Another case this past year in which the accused sought disqualification of the convening authority based on personal interest in the case was *United States v. Rockwood*.[85] A general court-martial convicted Captain (CPT) Rockwood of failure to repair, conduct unbecoming an officer, leaving his appointed place of duty, disrespect toward a superior commissioned officer, and willful disobedience of a superior commissioned officer.[86] Captain Rockwood, a counter-intelligence officer, deployed with his unit to Haiti as part of Joint Task Force 190 for Operation Uphold Democracy. He was personally concerned about the conditions in the national penitentiary in Haiti, so much so that he attempted to initiate an inspection of the prison. Dissatisfied with the division commander's decision to increase operational security instead of ordering an inspection, he took matters into his own hands.[87] Captain Rockwood went to the prison, without authority, to conduct his own inspection. When he returned to his unit, he was ordered into the local hospital for psychiatric evaluation.[88] He left the hospital without permission and later became involved in a heated exchange with his supervisor over his going to the prison and leaving the hospital without authority. Based on his conduct, CPT Rockwood was offered non-judicial punishment, which he refused.[89]

One of several issues raised at trial and on appeal was that the convening authority was disqualified based on a conflict of interest.[90] Captain Rockwood's theory was that since he had disobeyed the commander's orders and had continued to criticize the conduct of the entire operation, the entire command was put in the position of defending its own conduct and, therefore, had a personal interest in the outcome of his court-martial.[91]

The court again noted that under Article 1(9), a convening authority who is an accuser–has an interest other than an official interest in the prosecution of an accused–is disqualified and cannot refer charges to trial by special or general court-martial.[92] The court found nothing in the record, however, to support the allegation that the convening authority in this case had

79. *Id.*

80. Article 23(b) of the UCMJ provides: "If such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered advisable by him." UCMJ art. 23(b) (LEXIS 2000).

81. *Voorhees*, 50 M.J. at 494.

82. *Id.*

83. *Id.* at 494-96.

84. *See supra* note 56 and accompanying text. Application of the *Hamilton* waiver rules to this case would have been problematic. The pretrial agreement negotiation process and, certainly, the conversation between Voorhees and the convening authority occurred after referral and, based on the *Hamilton* and *Drayton* analyses, would not have been waived.

85. 52 M.J. 98 (1999).

86. *Id.* at 102. The convening authority disapproved the finding of guilty of conduct unbecoming an officer.

87. *Id.* at 100-01.

88. *Id.*

89. *See id.* at 100-102 for a complete recitation of the facts.

90. *Id.* at 102.

91. *Id.*

92. *Id.* at 103; *see* UCMJ art. 1(9) (LEXIS 2000).

a personal interest in the outcome.[93] Further, with regard to the challenge to the military judge, panel members, and witnesses, the court noted the procedural safeguards available to any accused to ensure that these parties are not biased or improperly influenced in carrying out their duties.[94] Although the court noted the protection against unlawful command influence afforded an accused under Article 37 and the relationship between unlawful command influence and disqualification of an accuser, it chose to treat the issue in this case as one of bias. The court noted that, except for challenge of the military judge, CPT Rockwood and his defense counsel employed all available safeguards in this case.[95] Further, the court noted that to disqualify a command from acting on misconduct based on public criticism of operational decisions would make the military justice system virtually useless in an operational setting.[96] Judge Sullivan, in a concurring opinion, felt that the trial court should have called the commander for the limited purpose of determining whether his interest was personal or official.[97] He concluded that the error was harmless because, in his opinion, any commander would have referred charges under these circumstances.[98]

The lesson for the practitioner from *Voorhees* and *Rockwood* is that something more than a bare allegation of personal interest is required before an accused can avail himself of the accuser disqualification rules. Lance Corporal Voorhees could not convince the court that his commander had interest other than normally attributed to a convening authority. Similarly, CPT Rockwood and his defense counsel could not convince the trial or appellate courts that the procedural safeguards available were not sufficient to insure a fair trial.

Inflexible Attitude Toward Punishment

A commander who exhibits an inflexible attitude toward clemency may also be challenged under the umbrella of unlawful command influence.[99] The theory is that a commander who has an inflexible attitude towards punishment will not apply the appropriate legal standards during the post-trial review process.[100] In *United States v. Vasquez,*[101] the appellant made that argument to the Navy-Marine Corps Court of Criminal Appeals. After his conviction and sentencing for larceny, Gunner's Mate Vasquez submitted a request for deferment of his forfeitures and reduction in rank, as well as a waiver of all automatic forfeitures.[102] In his written denial of the requests, the convening authority stated "Any request for deferment, regardless of the circumstances, would not be *considered* [emphasis added]."[103]

The Navy-Marine Corps court found that the convening authority had not abandoned his impartial role, thus becoming disqualified to take final action on the court-martial.[104] In essence, the court interpreted the convening authority's response as an unfortunate choice of words, and accepted, as evidence that the convening authority did consider the appellant's requests, the fact that the convening authority's response was specific and detailed.[105] The court simply refused to place form over substance.

Court Member Selection

The manner in which court-martial members are selected can also lead to allegations of unlawful command influence, where there is evidence that the convening authority improperly selected the members or selected them to achieve a certain

93. *Id.*

94. *Id.* The military judge may be challenged under R.C.M. 902(a) and (b); the court members are subject to examination, challenges for cause, and preemptory challenges under R.C.M. 912; and witnesses are subject to cross-examination.

95. *Id.*

96. *Id.* The court placed special emphasis on the established means of directing criticism that already exist within the armed forces, such as UCMJ Article 138 and inspector general channels.

97. *Id.* at 116.

98. *Id.*

99. *See* United States v. Howard, 48 C.M.R. 939, 944 (C.M.A. 1974); *see also* United States v. Fernandez, 24 M.J. 77, 79 (C.M.A. 1987).

100. *Id.*

101. 52 M.J. 597 (N.M. Ct. Crim. App. 1999).

102. *Id.* at 600.

103. *Id.*

104. *Id.*

105. *Id.*

result. The courts dealt with several such cases this past year, three of which are summarized below.

In *United States v. Roland*,[106] the method chosen for narrowing the list of potential members created the problem, and emphasized the risks associated with attempts to streamline the nomination process. The precise question was whether a process that excluded members based on rank was contrary to Article 25. The court offered very specific guidance on what is permissible in this process.[107]

The staff judge advocate (SJA) in Airman Roland's command routinely sent a quarterly letter to subordinate commanders requesting nominations for court-martial members, specifically asking for qualified nominees between the pay grades of E-5 and 0-6.[108] Two subordinate commands interpreted this guidance to preclude nomination of members below the pay grade of E-5.[109] The SPCMCA compiled the lists and sent them forward to the general court-martial convening authority (GCMCA). The SPCMCA testified by stipulation that he compiled the list from the nominees from subordinate commands, understood the Article 25[110] criteria, and also understood that he was not limited to those names submitted by subordinate commanders.[111] More importantly, he testified that he was not aware of the SJA's guidance and would have considered nominating members below the pay grade of E-5 if he deemed them qualified.[112] In addition, the SJA's memorandum transmitting the final nomination list to the GCMCA contained the standard guidance that he was not limited to the names on the list, but could select anyone assigned to his command.[113]

At trial, there was no evidence of bad faith on the part of the convening authority or the staff judge advocate. Even though the trial judge found that the method of selecting the members was "within the legally allowable system of Article 25,"[114] and denied the challenge at trial, he recommended that the command change their system for selecting members.[115]

The court took this opportunity to review the various rights and court composition options afforded a military accused. The majority opinion reemphasized that while the military accused does not enjoy all of the rights afforded an accused under the Sixth Amendment, he is entitled to a fair and impartial panel, defined as a panel selected in accordance with Article 25 and one not subjected to unlawful command influence.[116] The CAAF has refined this definition in a series of opinions,[117] but the bottom line is that while exclusion of junior members based on Article 25 criteria is permissible, exclusion based solely on rank is not.[118] The majority also endorsed what is likely standard practice in most commands of soliciting nominations to assist the commander in the panel selection process. However, this process of assisting the commander must also comply with Article 25–it cannot systematically include or exclude certain categories of service members. More importantly, the convening authority's duty to personally select court members does not automatically correct errors and improprieties in the nomination process.[119]

Turning to the facts of *Roland*, the court, by implication, held that there was evidence of improper selection, which shifted the burden to the government to show there was no impropriety. The testimony of the staff judge advocate and the special court-martial convening authority was sufficient to sat-

106. 50 M.J. 66 (1999).

107. The criteria for selecting court members is found in UCMJ art. 25(d)(2) which provides, in part: "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ art.25(d)(2) (LEXIS 2000).

108. *Id.* at 67.

109. *Id.*

110. *See* UCMJ art. 25 (defining the criteria that a convening authority can use in selecting court-martial panel members).

111. *Roland*, 50 M.J. at 67.

112. *Id.*

113. *Id.* at 68.

114. *Id.* at 68.

115. *Id.*

116. *Id.*

117. *Id.* (citations omitted).

118. *Id.*

119. *Id.* at 69.

isfy the court that the government carried its burden at trial. The court held that, even though there were no members below the pay grade of E-5 selected, there was no impropriety in this case–the selection process was not sufficiently tainted to amount to unlawful command influence.[120] What was critical to the decision in this case was the SPCMCA's testimony that he understood he could nominate members below pay grade E-5, as well as the written guidance to the general court-martial convening authority that he could select anyone from his command.

A word of caution is appropriate, however. The exclusion of certain ranks still "troubled" Judge Sullivan. He joined in the majority opinion based on his conclusion that the staff judge advocate's letter was mere guidance, the convening authority was advised that he was free to select anyone in the command, and there was no evidence of any improper motive.[121] Also noteworthy is Judge Gierke's dissent, as it traces the history of the CAAF in addressing allegations of improper selection of panel members. His conclusion is simple–intentional systematic exclusion of pay grades other than E-1 and E-2[122] is per se improper and cannot be tested for prejudice.[123]

The message in *Roland* for practitioners is that staff assistance in soliciting nominations for court members remains an acceptable practice. However, systematic exclusion, based on other than UCMJ Article 25 criteria, is not. Further, for staff judge advocates, an alternative is to have the appropriate convening authority sign the request for nominations. This approach eliminates the unpleasant challenge of the motives or intentions of the staff judge advocate and anyone else involved in the nomination process. Finally, any written guidance to the convening authority on the selection process must include, with emphasis, the UCMJ authority and mandate to consider and select any service member assigned to the command.

Another case that focuses on the manner in which court members were selected was *United States v. Bertie*.[124] A general court-martial composed of officer and enlisted members convicted Specialist (SPC) Bertie of assault with a dangerous weapon. One of the issues raised in this case was whether the convening authority improperly stacked the court-martial with senior officers and noncommissioned officers.[125] At trial and on appeal, SPC Bertie asserted that the composition of his court-martial panel and others in the command over time created a presumption that the commander improperly considered grade and rank as criteria for selecting court members.[126] His defense counsel noted that there was a consistent absence of junior officers and noncommissioned officers below the pay grade of E-7 on courts-martial panels in this particular command, and those facts alone established improper court-stacking.[127]

The court, citing prior precedents, again noted that a military accused is not entitled to a court-martial panel that is a representative cross-section of the military community. By the same token, however, systematic exclusion of lower grades and ranks is not permitted in the court-martial system.[128] That said, the court declined to grant relief to SPC Bertie, primarily because there is no precedent for the presumption of irregularity relied on by the defense.[129] While the court did not close the door on a statistical analysis as partial proof of improper exclusion of court-martial panel members based on rank, it made it quite clear that something more is required. This type of statistical evidence must be combined with other evidence of improper intent.[130] Further, where there is evidence that the staff judge advocate properly advised the convening authority that he must rely on the Article 25 criteria only[131] and the convening authority acknowledges using that criteria, as was done in this case, a court-stacking claim is not established.[132]

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120. *Id.*

121. *Id.* at 70.

122. United States v. Yager, 7 M.J. 171 (C.M.A. 1979).

123. *Roland*, 50 M.J. at 70-71.

124. 50 M.J. 489 (1999).

125. *Id.* at 490.

126. *Id.* at 490-91.

127. *Id.* The argument, specifically, was that the convening authority was using rank as a criteria for selection of panel members, contrary to Article 25.

128. *Id.* at 492. *See supra* notes 114-115 and accompanying text (citations omitted).

129. *Id.*

130. *Id.*

131. *Id.* The SJA advised the convening authority, in writing, that "neither rank, race, gender, duty position, or any other factor may be used for the deliberate or systematic exclusion of qualified persons for court-martial membership." *Id.*

The *Bertie* court did not close the door on the use of statistical analysis as part of a challenge to court-martial panel composition, nor did it repudiate the "appearance of impropriety" language in earlier precedents.[133] The court did make clear, however, that a bare allegation is not enough.

A third decision dealing with the nomination and selection process, *United States v. Tanksley*,[134] comes from the Navy-Marine Corps Court of Criminal Appeals. Captain (Capt) Tanksley was charged and convicted of making false official statements, taking indecent liberties with a female under the age of sixteen, communicating a threat, and false swearing.[135] Because of the seniority of the accused, the staff judge advocate recognized the need for additional panel members and asked subordinate commands for nominees. Due to other personnel moves, the trial counsel in Capt Tanksley's court-martial was involved in obtaining a list of officers from one of the subordinate commands.[136] Normally, a trial counsel should avoid involvement in the nomination and selection of court-members.[137] What created the issue in this case was the trial counsel providing additional information on three of the nominees to the superior staff judge advocate who, in turn, passed that information on to the convening authority.[138]

Captain Tanksley alleged that the court-martial panel was improperly selected because of the improper participation of the trial counsel. The Navy-Marine Corps court considered every possible approach to this issue in concluding that Capt Tanksley was not entitled to relief. First, the court found that there was no violation of UCMJ Article 25 or Article 37. Second, the court applied waiver because the issue was not raised at trial. Third, the court found that Capt Tanksley had not met his burden of providing sufficient facts to raise unlawful command influence. Finally, the court found that the information relayed from the trial counsel to the convening authority did not prejudice Capt Tanksley's right to a fair trial.

While the court made relatively short shrift of this issue, one of several raised by the accused on appeal, it is worthy of further discussion. Application of waiver to this set of facts is problematic for two reasons. First, Capt Tanksley and his defense counsel were not made aware of the information on the third nominee until after trial. Second, it is questionable whether the selection of court-martial panel members can be considered part of the accusative stage of trial to which waiver applies.[139] Further, while an accused must offer more than mere speculation regarding unlawful command influence, the threshold is still low. In this case, the government did provide information on a potential panel member to the convening authority under circumstances where that information would not be available to the accused and his defense counsel.[140] Ultimately, the most solid basis for denying relief to Capt Tanksley may be that there was no prejudice to his substantial rights; applying the three-step analysis, the proceedings were fair.

Unlawful Command Influence in the Deliberation Room

Another way that unlawful command influence can manifest itself in the military justice system is the improper use of rank in the deliberation room.[141] In *United States v. Mahler*[142] the court was faced with precisely that allegation.

In a hotly contested trial, a general court-martial convicted Corporal (CPL) Mahler of assault consummated by battery and murder of his seventeen-month old son, and sentenced him to life in prison, a dishonorable discharge, total forfeitures, and reduction to the pay grade of E-1.[143] Corporal Mahler asserted

132. *Id.*

133. *Id.* at 493; *see* United States v. Nixon, 33 M.J. 433 (C.M.A. 1991).

134. 50 M.J. 609 (N.M. Ct. Crim. App. 1999).

135. *Id.* at 611.

136. *Id.* at 614-15.

137. *See* United States v. Marsh, 21 M.J. 445 (C.M.A. 1986); *see also* United States v. Cherry, 14 M.J. 251 (C.M.A. 1982).

138. *Tanksley*, 50 M.J. at 615. The trial counsel informed the SJA that one of the members was Tanksley's officer-in-charge and a possible witness; a second nominee was pending disciplinary action; and a third had "an inventive flair with military uniforms, creating inter-service ensembles which had caused the trial counsel to question whether the nominee was actually a Naval officer, or was, instead an impostor . . ." The information on the third nominee was not disclosed until after trial, during post-trial litigation.

139. *See* United States v. Drayton, 45 M.J. 180 (1996); *see also* United States v. Hamilton, 41 M.J. 32 (C.M.A. 1994).

140. *Tanksley*, 50 M.J. at 616. The author agrees with the Navy-Marine Corps court that R.C.M. 502(f) requires that disqualifying information be brought to the attention of the proper authority. The additional question, however, is whether this must always be done as a matter of record, as was apparently done with the other two members in this case.

141. *See* United States v. Accordino, 20 M.J. 102 (C.M.A. 1985) (holding that it is improper for senior ranking members to use rank to influence the vote within the deliberation room).

142. 49 M.J. 558 (1998).

on appeal that the President of the court-martial panel improperly influenced the deliberation process during his court-martial.[144] In support of his claim, he offered an affidavit from his civilian defense counsel, which asserted that the sister of one of the panel members at the appellant's trial contacted him. The defense counsel asserted that the sister told him that her brother told her that there was division among the members and that the President pressured other members to change their verdict from not guilty to guilty.[145] He further asserted that the sister stated that her brother was uncomfortable with this but was a career Marine and concerned about what the panel President could do to him.[146] Appellate defense counsel talked to the panel member, who disagreed completely with the statements attributed to him. Although appellate defense counsel indicated that they would obtain an affidavit from the member, in light of the other evidence of record, the CAAF did not deem it necessary.[147]

Relying on the general rule that panel members are presumed to follow the military judge's instructions, including the charge that superiority of rank cannot be used to attempt to control the independence of members,[148] the court framed the issue as one of sufficiency of the evidence to raise unlawful command influence and rebut the presumption that the members followed the instructions. Applying the test from *Ayala-Stombaugh* the court concluded that the appellant had not come close to reaching the low threshold for triggering an inquiry into allegations of unlawful command influence.[149] In the words of the court, "hearsay several times removed . . . inherently untrustworthy and unreliable" does not meet the requirement.[150] Most damaging to the appellant, however, was the fact that no other member submitted affidavits, and the member to whom the statements were attributed specifically disagreed with the defense counsel's recitation of the facts. The court concluded that there simply was not enough evidence of outside pressure on court members to warrant a *Dubay*[151] hearing. The message for trial defense counsel is clear–you must support this type of allegation with the strongest, most credible evidence.

Staff and Subordinate Unlawful Command Influence

Unlawful command influence committed by staff members also poses a problem for the military justice system.[152] In *United States v. Richter*,[153] in addressing allegations of staff unlawful command influence, the court was again faced with two recurring issues: sufficiency of the evidence to raise unlawful command influence; and circumstances under which the issue is waived.

A general court-martial convicted Technical Sergeant (TSgt) Richter of larceny and wrongful disposition of government property.[154] Although not raised at trial, one of the issues raised by TSgt Richter on appeal was that the legal office pressured his commander into preferring charges.[155] Specifically, TSgt Richter alleged that his commander stated that he was threatened with removal from TSgt Richter's command if he did not prefer charges.[156] In support of his allegation, TSgt Richter offered his own affidavit, an affidavit from another airman pending charges related to his own, and an affidavit from that airman's wife. According to Tsgt Richter, his commander told him that he had been pressured into preferring charges. He also referred to a similar statement allegedly made by his former first sergeant to his co-accused.[157] Technical Sergeant Richter

143. *Id.* at 560.

144. *Id.* at 565.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* (citations omitted).

149. United States v. Mahler, 49 M.J. 558, 565 (1998). *See* United States v. Ayala, 43 M.J. 296, 299 (1995); United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994); and United States v. Levite, 25 M.J. 334, 341 (C.M.A. 1987).

150. *Mahler*, 49 M.J. at 566.

151. United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).

152. *See* United States v. Hamilton, 41 M.J. 32 (1994) (communicating directive to prefer charges); United States v. Hilow, 32 M.J. 439 (C.M.A. 1991)(showing staff officer's compilation of list of nominees who were supporters of "harsh discipline").

153. 51 M.J. 213 (1999).

154. *Id.* at 214.

155. *Id*. at 223. Technical Sergeant Richter stated in his affidavit that he first became of the information after his court-martial, but before convening authority action.

156. *Id.*

did not submit affidavits from his commander or former first sergeant.

The issue in this case–an allegation after trial that someone coerced a commander into preferring charges–is not new.[158] In light of past precedents, the result in this case was predictable. The Air Force court, in an unpublished opinion, held that the affidavits were insufficient to raise the issue of unlawful command influence.[159] Citing *Hamilton*, the CAAF held that, even if raised, the accused waived the issue since it was not raised at trial.[160] This decision is noteworthy, however, for a couple of reasons. First, it does underscore the substantial burden on an accused and defense counsel in successfully raising and obtaining relief on an unlawful command influence allegation at the appellate level. Implicit in the rationale for the Air Force court's decision is the conclusion that the quality and quantity of the evidence submitted by Richter was not up to par. Certainly, the absence of statements from his former commander and first sergeant doomed any chance for success in this case. More importantly, though, is what has become a consistent trend since the CAAF recognized in *Hamilton* and reinforced in *Drayton* a distinction between the accusative stage–preferral and forwarding of charges–and the adjudicative stage of trial. If an allegation of unlawful command influence in the accusative stage is not raised at trial, in the absence of unlawful command influence that precludes the accused from raising the issue, or concealment of evidence by the government, the issue is waived.[161] Judge Sullivan, dissenting from this portion of the decision, restated his position from *Hamilton*–any waiver of this issue must be clear and knowing, and on the record.[162] If the court had accepted TSgt Richter's assertion that he did not become aware of this information until after trial, a clear and knowing waiver would have been impossible in this case. Nevertheless, the court concluded that he was not entitled to relief. The practical point for defense counsel is that they must marshal as much evidence as possible to support this type of allegation. The practical impact of this decision, however, is that it will continue to be extremely difficult to overcome waiver if the issue of unlawful command influence during the accusative stage is first raised after trial.

In *United States v. Bradley*[163] the CAAF faced an allegation that the staff judge advocate had committed several violations of Article 37.[164] The court's opinion, however, reemphasized the importance of providing facts to support allegations of unlawful command influence, and being able to show actual prejudice.

A general court-martial convicted Staff Sergeant Bradley of rape and indecent assault. On appeal, he alleged that the staff judge advocate had improperly influenced his court-martial in four ways: (1) by pressuring a witness not to testify, (2) by engaging in an ex parte conversation with a panel member, (3) by publishing an article in the post newspaper which prejudiced his chance for clemency, and (4) by dissuading a panel member from providing a letter in support of his request for clemency.[165]

On the first allegation, while Bradley characterized the staff judge advocate's conduct as "blatantly improper, causing the witness to be less than enthusiastic," the CAAF agreed with the service court's conclusion that there was nothing improper about the conversation between the staff judge advocate and the witness.[166] Further, the court held that, since the witness did testify and there is no authority for the proposition that loss of enthusiasm equals prejudice, the accused is not entitled to relief under these circumstances.[167] Similarly, the court relied on the Air Force court's conclusion that any conversation between the staff judge advocate and a panel member was totally unrelated to Bradley's court-martial and, therefore, held that there was no unlawful command influence in fact or law.[168] Further, the court held that an unsigned newspaper article that does no more than report the results of a court-martial to the military commu-

157. *Id.* at 223.

158. *See* United States v. Hamilton, 41 M.J. 32 (1994); *see also* United States v. Drayton, 45 M.J. 180 (1996).

159. *Richter*, 51 M.J. at 224.

160. *Id.*

161. *Id.*

162. *Id.*

163. 51 M.J. 437 (1999).

164. UCMJ art. 37 (LEXIS 2000).

165. *Bradley*, 51 M.J. at 442.

166. *Id.*

167. *Id.* at 442. *See United States v. Bradley*, 47 M.J. 715 (A.F. Ct. Crim. App. 1997) (reciting the facts of the case); *see also* United States v. Bradley, 48 M.J. 777, 779 (A.F. Ct. Crim. App 1998). The *Dubay* hearing in this case disclosed that the witness initiated the call, seeking general information about Bradley's pending trial. When the SJA discovered that he was a potential defense witness and might be reluctant to testify, he informed her that she had no choice and should not be influenced by anything that he might have said.

nity does not violate Article 37.[169] Finally, on the allegation that the staff judge advocate dissuaded a panel member from submitting a recommendation for clemency, the court departed slightly from the lower court's approach to resolution.

The Air Force court, relying on testimony from the *Dubay* hearing in this case, held that Bradley's complaint was without merit.[170] The CAAF, after noting the incomplete findings of fact in this case, concluded that, in any event, Bradley had not alleged sufficient facts to show a legal claim.[171] Central to the CAAF's conclusion on this issue was its view that the content of any clemency letter was speculative.[172] The court also pointed out that there was a possibility that the letter would contain statements that would be contrary to the protections afforded by Military Rule of Evidence 606(b).[173] Finally, the court expressed its view that even if Bradley had the benefit of the member's recommendation for clemency, the convening authority would not have changed his action. The court's conclusion on the fourth allegation makes sense as a matter of judicial economy.[174]

There are some valuable lessons for practitioners in this case. In addition to reinforcing the importance of obtaining affidavits to obviate the need for *Dubay* hearings,[175] the facts of this case underscore that there is a limit to how involved a staff judge advocate should be in the processing of a particular court-martial. While the government was successful in rebutting all allegations lodged against the staff judge advocate, this type of involvement will almost always result in unnecessary litigation.

Miscellaneous

In *United States v. Calhoun*,[176] the CAAF addressed what, in most respects, has become a novel issue in the military justice system: how independent is the trial defense service. More specifically, the court addressed the issue of whether the head of trial defense services in the Air Force's involvement in the search of a defense counsel's office created the "objectively reasonable concern that all other government defense counsel would be subject to unlawful command influence."[177]

A brief recitation of the facts is necessary to frame precisely the issue addressed by the CAAF. The government obtained a copy of a letter from a defense counsel to a civilian defense counsel, which suggested that the military defense counsel was aware of their mutual client's intent to use a false alibi.[178] Even though the letter indicated that the accused had changed his mind about the alibi witness, that witness ultimately testified at trial. The base staff judge advocate asked the Air Force Office of Special Investigations to investigate the defense counsel on suspicion of subornation of perjury and conspiracy to commit perjury.[179] As required by an Air Force policy letter, the staff judge advocate notified the Air Force Legal Services Agency of their intent to search defense counsel's office for additional evidence.[180] In executing the search, the local authorities went to great lengths to protect any evidence found, and to protect the attorney-client privilege of other clients. The evidence recovered in the search indicated that the defense counsel had no

168. *Bradley*, 51 M.J. at 443.

169. *Id.*

170. *Id*. at 444. *See* United States v. Bradley, 48 M.J. 777, 780 (A.F. Ct. Crim. App. 1998). At the *Dubay* hearing, the military judge simply held that the staff judge advocate's testimony that he remembered a conversation with the panel member, but denied dissuading him from submitting a clemency recommendation, was more credible.

171. *Bradley*, 51 M.J. 444.

172. *Id.*

173. *Id.*

174. Recall that two opinions by the Air Force court were sandwiched around a *Dubay* hearing in this case. Further, while MRE 606(b) does protect the deliberative process, it does not preclude panel members from recommending clemency in a given case. The court appropriately notes that R.C.M. 1105 specifically allows an accused to submit recommendations for clemency from any member.

175. *See* Lieutenant Colonel James Kevin Lovejoy, *Watchdog or Pitbull?: Recent Developments in Judicial Review of Unlawful Command Influence*, ARMY LAW., May 1999, at 25.

176. 49 M.J. 485 (1998).

177. *Id.* at 488.

178. *Id.* at 487-87.

179. *Id.*

180. Air Force defense counsel are independent in that they report up a chain of command separate from the base legal office. Nonetheless, the Air Force Legal Services Agency commander is at the top of the chain of command for Air Force defense counsel and circuit prosecutors. United States v. Calhoun, 47 M.J. 520, 528 (A.F. Ct. Crim. App. 1997).

knowledge of what really happened, and the defense counsel was cleared of any wrongdoing.[181]

The appellant obtained the services of a second civilian defense counsel for his pending Article 32. He was also offered a new military defense counsel from another base because there was thought to be a potential conflict of interest between him and his first trial defense counsel.[182] The appellant refused the military defense counsel on the basis that all government defense counsel were subject to unlawful command influence and searches of their offices.[183] He demanded that the Air Force provide funds so that he could obtain civilian defense counsel for his pending court-martial. The Air Force Court of Criminal Appeals held that, under the circumstances of this case, where the government takes the extraordinary measure of searching a military defense counsel's office, it was not unreasonable for an accused to fear that a defense counsel in that chain of command might be inhibited in presenting arguments to a court-martial which might impugn the judgment of his superiors.[184]

The CAAF disagreed. Analogizing to the resolution of requests for specific expert witnesses, where the accused's position is that government-funded experts would not provide unbiased and objective evidence, the court held that there is no right to private civilian counsel paid for by the government. The government should not be obligated to pay for private counsel unless an objective, disinterested observer, with knowledge of all the facts, could reasonably conclude that there was at least an appearance of unlawful command influence over all military and other government defense counsel.[185] In other words, the key inquiry is whether the process would seem unfair or compromised to an outsider.[186] The court concluded that the threshold was not met in this case because the commander's role was limited to being notified of the search and discussing it with the SJA.[187] The Air Force Legal Services Agency commander was not involved in authorizing the search. Further, the search was conducted in a manner so as to protect other defense counsel and their clients. Finally, the personnel who conducted the search and reviewed the materials were independent of the base SJA office. Under the circumstances, the court concluded that the "sole target of the investigation was the appellant's prior defense counsel."[188] There was no reason, under these facts, to conclude that any other Air Force lawyers, or any other government lawyers, should be disqualified.[189]

Conclusion

The many faces of unlawful command influence remains a concern for the appellate courts, as evidenced by their decisions this past year. While there were not any truly new developments this past year, the CAAF's opinion in *Biagase* should be read closely by anyone dealing with an unlawful command influence issue. The clarification of the burden of proof on the government once the issue is raised, and the emphasis on the remedial measures employed by the military judge make it clear that this is an issue that is best resolved at the trial level. If there were ever any doubt, that doubt has been removed. Further, it is clear that defense counsel must present evidence of improper motive to succeed on an unlawful command influence motion. Finally, all practitioners should note that the appellate courts are consistently applying waiver to unlawful command influence during the accusative stage if not raised at trial.

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181. *Id.* at 486-87

182. *Id.*

183. *Id.*

184. *Calhoun*, 47 M.J. 520, 528.

185. United States v. Calhoun, 49 M.J. 485, 488 (A.F. Ct. Crim. App 1998).

186. *See* United States v. Allen, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd* 33 M.J. 209 (C.M.A. 1991); United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985), *rev'd on other grounds*, 25 M.J. 326 (C.M.A. 1987).

187. *Calhoun*, 49 M.J. at 489.

188. *Id.*

189. *Id.*