Recent Developments in Unlawful Command Influence

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The good news is that there were only a handful of appellate opinions dealing with unlawful command influence this past year. The bad news is that unlawful command influence is still alive. This year's developments showcase the enduring nature of this most contentious issue. Unlawful command influence has been with us since well before enactment of the Uniform Code of Military Justice (UCMJ), over fifty years ago. It continues today, just as contentious as it was half a century ago when Congress sought to eliminate it from the military justice system with the UCMJ.

Unlawful command influence will not go away as long as commanders are responsible for the military justice system and execute those responsibilities. Commanders exert influence in all that they do, including maintaining good order and discipline in their commands. The challenge for judge advocates is to assist commanders in taking those actions that both maintain discipline and protect the integrity of the military justice system. In other words, judge advocates must be able to assist commanders in exerting lawful command influence. The challenges for military justice practitioners are to be able to distinguish between lawful and unlawful command influence, and to be prepared to address and remedy those instances where a commander or other leader crosses the line.

Over the years, the Court of Appeals for the Armed Forces (CAAF) has added definition and clarity to the prohibition on unlawful command influence found in Article 37 of the UCMJ.[1] It is generally accepted that unlawful command influence can, and does, take many forms. The clearest examples are those instances where a commander directs or implies that a case be disposed of in a certain manner,[2] selects court-members to achieve a particular result,[3] exerts pressure on court members,[4] or attempts to influence witnesses.[5] Unlawful command influence can also take other forms, such as a convening authority who exhibits an inflexible attitude toward disposition or punishment,[6] imposes pretrial punishment with a view toward ensuring that an accused receives severe punishment,[7] or seeks

1. Article 37 states:

> (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 (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.
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> (b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

UCMJ art. 37 (2000).

2. *See* United States v. Rivers, 49 M.J. 434 (1998) ("There is no place in the Army for illegal drugs or for those who use them."); United States v. Gerlich, 45 M.J. 309 (1996) (brigade commander improperly ordered subordinate commander to set aside Article 15, UCMJ proceedings, and directed reinvestigation); United States v. Martinez, 42 M.J. 327 (1995) (commander suggested a "starting point" for NCOs involved in alcohol-related offenses).

3. *See* United States v. Hilow, 32 M.J. 439 (C.M.A. 1991) (stating that the division deputy adjutant general developed a list of nominees who where supporters of "harsh discipline"); United States v. McClain, 22 M.J. 124 (C.M.A. 1986) (improper exclusion of junior enlisted soldiers from the pool of potential panel members); United States v. Redman, 33 M.J. 679 (A.C.M.R. 1991) (stating that the panel was replaced because of "results that fell outside the broad range of being rational").

4. *See* United States v. Youngblood, 47 M.J. 338 (1997) (stating that it was improper for convening authority and the staff judge advocate to offer opinions in presence of sitting panel members that certain commanders had "underreacted " to misconduct).

5. *See* United States v. Gleason, 43 M.J. 69 (1995) (stating that the battalion commander expressed opinion that he believed accused was guilty and that TDS was the "enemy"); United States v. Stombaugh, 40 M.J. 208 (C.M.A. 1994) (stating that officer pressured by other officers to not testify on behalf of the accused).

to put pressure on the military judge.[8] Military justice practitioners must be able to recognize the various forms that unlawful command influence can take. More important, though, is understanding the framework for analyzing the facts. In cases such as *United States v. Thomas*,[9] *United States v. Ayala*,[10] and *United States v. Stombaugh*,[11] the CAAF provided a methodology for analyzing allegations of unlawful command influence. In the most recent significant unlawful command influence decision, *United States v. Biagase*,[12] the CAAF further refined the methodology for dealing with this issue. The CAAF traced the development of the burden of proof once an accused raises the issue. The CAAF also clarified that the burden of proof for all determinations associated with the litigation of unlawful command influence allegations is proof beyond a reasonable doubt.[13]

There were no decisions of *Biagase* significance this past year. The opinions of the service courts and the CAAF do underscore, however, that it is difficult to define a template for unlawful command influence. The courts also continued to emphasize the importance of litigation and resolution at the trial level, and the importance of remedial measures. In one instance, however, the opinion of the court warns that we may become overly cautious on this issue.

Pretrial Publicity—United States v. Ayers

Pretrial publicity can pose a variety of problems for trial counsel and defense counsel, not the least of which is the potential for unlawful command influence. Comments made by the command can reflect predisposition, and possibly affect court members and potential witnesses. Of course, establishing that remarks to the press, arguably, violate UCMJ art. 37 is not enough. There must be some showing that the unlawful act was the proximate cause of some unfairness in the case at trial.[14] It was this lack of nexus between the remarks to the press and unfairness at trial that the CAAF relied on in denying relief in *United States v. Ayers.*[15]

Staff Sergeant Ayers was tried and convicted by general court-martial at Fort Lee, Virginia, for attempted adultery, attempted violation of a lawful general regulation, adultery, and indecent assault. He was sentenced to a dishonorable discharge, confinement for four years, total forfeitures, and reduction to the lowest enlisted grade.[16] All of the offenses grew out of his conduct as an instructor. The two victims were female soldiers undergoing Initial Entry Training.[17] Charges were preferred against Sergeant Ayers in December 1996. At trial, defense counsel moved to dismiss the charges because of the appearance of unlawful command influence. The basis for the motion was the contemporaneous press coverage, and official comments regarding the cadre-trainee sex scandal at Aberdeen Proving Ground.[18]

The defense counsel first expressed concern about pretrial publicity at the Article 32 investigation. He focused on the command climate at Fort Lee because of the press coverage of the sex scandal at Aberdeen Proving Ground that broke about the same time as the command was processing charges against Sergeant Ayers. In the recommendation, the Article 32 investigating officer noted that "he had felt no pressure from any individual or agency associated with the Army, Fort Lee, the local chain of command or the media."[19]

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6. *See* United States v. Fernandez, 24 M.J. 77 (C.M.A. 1987) (stating that the presence of inelastic attitude suggests that a convening authority will not adhere to legal standards in post-trial review process); United States v. Howard, 48 C.M.R. 939 (C.M.A. 1974) (stating that the commander who is predisposed to disapprove clemency in drug cases denies an accused the right to a careful and individualized review of his sentence).

7. *See* United States v. Cruz, 25 M.J. 326 (C.M.A. 1987).

8. *See* United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976); *see also* United States v. Mabe, 33 M.J. 200 (C.M.A. 1991).

9. 22 M.J. 388 (C.M.A. 1986).

10. 43 M.J. 296 (1995).

11. 40 M.J. 208 (C.M.A. 1994).

12. 50 M.J. 143 (1999).

13. *Id.* at 150-51.

14. United States v. Stombaugh, 40 M.J. 208 (1994); *Biagase*, 50 M.J. at 143.

15. 54 M.J. 85 (2000).

16. *Id.* at 87.

17. *Id.*

18. *Id.*

19. *Id.* at 92.

The defense counsel raised the issue again at trial, which began in March 1997, requesting that the court dismiss the charges because of unlawful command influence associated with pretrial publicity. Defense counsel also moved for appropriate relief and change of venue. In support of the motion, defense counsel introduced newspaper clippings, transcripts of news conferences, and television program transcripts, in which senior military leaders commented on the allegations of drill instructor sexual misconduct at Aberdeen Proving Ground. Specifically, the defense counsel focused on the impact that these senior leader comments had on court members in Sergeant Ayers' trial. The trial judge denied the defense motions.[20]

It is noteworthy that the defense counsel did not voir dire the court members specifically on the issue, nor was there any other reference by trial counsel to the comments by senior leaders at trial.[21] However, the issue was raised again on appeal, the argument being that the enormous pretrial publicity, to include clear commentary by the Army's military and civilian leaders on sexual harassment type cases, created the appearance of unlawful command influence.

The CAAF identified four categories of evidence related to the issue: condemnation,[22] investigation,[23] training,[24] and disciplinary action.[25] The issue at the CAAF was whether public statements about the misconduct at Aberdeen Proving Ground and sexual misconduct cases in general constituted actual or apparent unlawful command influence with respect to Sergeant Ayers' court-martial. When unlawful command influence is raised at trial, defense counsel and the accused must satisfy two requirements. They must: (1) allege sufficient facts which, if true, constitute unlawful command influence; and (2) establish a logical connection between the unlawful command influence and the potential for unfairness in the court-martial in question.[26] The CAAF concluded that Sergeant Ayers and his defense counsel failed on both counts.

The analysis employed by the court in *Ayers* is quite interesting, and clearly illustrates how the two requirements in the initial burden on the accused are interrelated. On the surface, the burden appears to be a two-step process. Theoretically, a military judge or appellate judge could find that the facts alleged by an accused do not constitute unlawful command influence and end the inquiry. Arguably, there would be no reason to address whether there was a logical connection between the conduct and the court-martial. The court in *Ayers*, however, found that the accused failed to show that the remarks by senior military leaders constituted actual or apparent unlawful command influence.[27] Though not stated in the opinion, one can assume that the court unanimously concluded that the remarks made by senior military leaders did not fit the definition of unlawful command influence. However, the court did not stop there. The court also addressed the issue of whether there was a logical connection between those remarks and the potential for unfairness in Sergeant Ayers' court-martial, and found none.[28] Specifically, the court found that the views expressed by the senior leaders were never "interjected" into Sergeant Ayers' trial. The court also found that they were not directed at his

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20. *Id*. at 93.

21. *Id.*

22. The comments attributed to the Secretary of the Army included: "[S]exual harassment is particularly repugnant when it involves the abuse of authority." *Id.* The Army Chief of Staff stated that "everyone is deeply troubled by the allegations of rape which occurred" and later referred to the conduct as "unacceptable." *Id*. The Chief of Staff was "particularly troubled by the abuse of power" and resented the allegations because they "tarnished the Army's reputation." *Id.* The Training and Doctrine Command Commander stated that "America deserves better than this. Our soldiers deserve better than this and our Army is better than this." *Id.* The Aberdeen Proving Grounds Commander stated, "What we want out in front of the formation is a leader, not a lecher." *Id.*

23. The Chairman of the Joint Chiefs of Staff stated on a November 1996 news program that the services must "bring every complaint to the surface, investigate it properly and set what's wrong right." *Id.* at 94. He stated that the Services must "ensure that we find exactly how widespread it is and bring to justice all those who should be brought to justice." *Id*. A separate news program reported that the Secretary of Defense "ordered the entire military, not just the Army, to weed out sex offenders." *Id.* The Secretary of the Army directed the Army Inspector General to "assess the responsibility and accountability of the chain of command." *Id.* The Secretary of the Army also created a Senior Review Panel to "examine how Army leaders throughout the chain of command view and exercise their responsibility to address sexual harassment, together with recommendations for improvement." *Id.*

24. A November 1996 news program reported that the Army Chief of Staff sent out a personal letter to all general officers on active duty underscoring the Army's position on sexual harassment and that the Army had followed the letter on "training packages" including a video sent to "targeted commanders of the Army around the world." *Id.*

25. The Secretary of the Army stated: "If violations have occurred, we will hold the perpetrators accountable. We will eradicate them. This is about noncommissioned officers who violated the law in the first instance. . . . When we punish, the word goes out." *Id.* The Chairman of the Joint Chiefs of Staff echoed "the outrage and commitment to seeing justice done that have been expressed by other senior defense officials." *Id*. The Army Chief of Staff stated: "The service's leadership would move swiftly to ensure that those responsible are brought to justice." *Id.* Finally, a Fort Lee spokesman stated that "disciplinary action in appellant's case could range from a reprimand to a general court-martial, but that the lower end of the range is probably not going to be considered." *Id.*

26. United States v. Biagase, 50 M.J. 143, 150 (1999).

27. *Ayers*, 54 M.J. at 95.

28. *Id*.

trial; there was no suggestion that Sergeant Ayers was guilty, nor any evidence presented that his court-martial was "unfair" because of the publicity associated with the Aberdeen cases.[29]

While one could question whether this second step was even necessary in this case,[30] the result would have been the same. The opinion also recognizes that senior leaders will, and should, comment on military justice challenges that are facing the Department, and can do so without violating Article 37.

Comments by the Convening Authority—
United States v. Baldwin

Despite the CAAF's decision in *Ayers*, commanders speaking publicly about how certain types of cases should be handled, and what are appropriate punishments for certain offenses and categories of offenders, is fraught with danger. These types of remarks are particularly troubling when they refer to cases currently pending court-martial. Depending on the content of the remarks and the message received by the audience, an allegation of unlawful command influence will certainly follow, as occurred in *United States v. Baldwin.*[31]

Captain Baldwin was tried and convicted by general court-martial of larceny, conduct unbecoming an officer, mail tampering, and obstruction of justice. She was sentenced to a dismissal, confinement for one year, and total forfeitures.[32] Nine months after her conviction, Captain Baldwin filed an affidavit[33] with the Army Court of Criminal Appeals. She alleged that during the period of her court-martial, the general co/urt-martial convening authority held two Officer Professional Development (OPD) sessions where the topic was officer misconduct. She alleged that the convening authority expressed his sense that the court-martial sentences for officers were too lenient and that the minimum sentence should be one year of confinement. She further alleged that the second session included the general theme that officers should not be allowed to resign, but should be court-martialed.[34]

On appeal, Captain Baldwin asserted that these actions by the convening authority constituted unlawful command influence, and that her sentence and the rejection of her resignation packet were a direct result of these comments.[35] The CAAF was not convinced by the government's argument that Captain Baldwin had not met her threshold burden of production. Quite to the contrary, the court was more concerned about the possibility that a command meeting was used to purposefully influence court members, even though the only evidence of such a meeting was Captain Baldwin's affidavit.[36] Unlike in *Ayers*, there appeared to be a connection in this case between the commander's comments and Captain Baldwin's court-martial, both in terms of timing and in terms of content. Further, the court noted that there was no evidence from the government to the contrary. The court chose not to grant Captain Baldwin relief based on her affidavit, but felt it sufficient to warrant a *DuBay* hearing on the unlawful command influence issue.[37]

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29. *Id*.

30. The court limited its decision to the facts of this case and left open the question of whether these remarks may have injected unlawful command influence into the courts-martial at Aberdeen. *Id*.

31. 54 M.J. 308 (2000).

32. *Id*.

33. The text of Captain Baldwin's affidavit stated, in part:

> At that particular [Officer Professional Development (OPD)], one of the topics discussed was an incident that happened with three of the officers in 31st [Air Defense Artillery Brigade] that were being court-martialed. The address included comments that the court-martial sentences were too lenient and that the minimum sentence should be at least one year and that Officers should be punished harsher than enlisted soldiers because Officers should always set the example and be above reproach. The day after this OPD one of the officers from the 31st was to be sentenced . . . . On the day of my conviction and sentence, the final part of the trial was delayed for another OPD that was mandatory for all Officers on post. This OPD dealt with the situation Lt. Kelly Flynn was embroiled in [sic]. The theme about this OPD was that she [1LT Kelly Flynn] should not have been allowed to resign, but should have been court-martialed . . . . I submitted a Resignation for the Good of Service [sic] . . . and it was held and never sent up as the regulation states . . . . That afternoon after the officers on my panel went to the OPD, I was convicted and sentenced to 1 year at Fort Leavenworth. It should be noted that four of the officers on my panel were in the same rating chain . . . .

Id. at 309.

34. *Id*.

35. *Id*.

36. *Id*. at 310.

37. *Id*. at 312.

Collateral Investigations—United States v. Johnson

Collateral administrative actions often accompany the processing of court-martial charges, and commanders must make various recommendations and decisions in these contemporaneous actions. For example, a commander may conclude, based on an *Army Regulation 15-6*[38] or *JAGMAN*[39] investigation into officer misconduct, that relief from command is the appropriate action to take. This decision necessarily requires that the commander approve the findings and recommendations of the investigating officer, and decide the merits of the allegations based on the evidence collected in the investigation. Add the usual consultation up and down the chain of command that usually accompanies such actions and you have the recipe for disaster if the same officer misconduct results in the preferral of court-martial charges. It is imperative that the command maintain a firewall between such contemporaneous actions to avoid the potential for unlawful command influence. A recent example of how contemporaneous administrative and court-martial actions can result in unlawful command influence allegations is *United States v. Johnson.*[40]

Lieutenant Johnson, a Navy dentist, was charged with and ultimately convicted of two specifications of oral sodomy on his fifteen-year-old son.[41] When the allegations first arose, the command was faced with three interrelated, but quite different issues: First, whether Lieutenant Johnson should be allowed to continue to practice dentistry on minors; second, whether he should be processed administratively for homosexual conduct; and third, whether court-martial charges should be preferred.[42] As could be expected, there was consultation up and down the chain of command on the first two issues. For example, the command conducted a local peer review on whether Lieutenant Johnson should be allowed to continue to practice dentistry, a matter which was reviewed all the way up to the Naval Bureau of Medicine (NBM).[43] On the second issue, the local command decided not to process Lieutenant Johnson administratively for homosexual misconduct, a decision that was also reviewed all the way up to the Navy Personnel Bureau (NPB). Complicating matters, an internal NPB memorandum, written by legal counsel, was leaked to the press. The memorandum specifically mentioned Lieutenant Johnson's case, and advocated mandatory processing for separation for homosexual conduct with children.[44]

Lieutenant Johnson asserted that the consultation and discussion that accompanied these administrative actions had an adverse impact on his court-martial. Specifically, he asserted that they prompted his immediate commander to withdraw his recommendation for suspension of any dismissal adjudged in his case, a course of action that the convening authority was giving consideration.[45] Unfortunately for Lieutenant Johnson, there was a change of convening authorities before final action was taken on his court-martial and the evidence adduced at the DuBay hearing revealed that the new convening authority never considered suspending the dismissal.[46] Lieutenant Johnson also alleged that there were attempts from higher level commanders, communicated through staff judge advocates, to influence the new convening authority's decision on suspension of the dismissal.

When CAAF first reviewed this case, there was marked disagreement on whether the evidence presented by Lieutenant Johnson even raised the issue of unlawful command influence.[47] After the Dubay hearing, the court unanimously agreed that unlawful command influence did not affect the decision in this case.[48] The court acknowledged that there were discussions up and down the chain of command regarding administrative processing of Lieutenant Johnson's case. Notwithstanding, the court concluded that there was no evidence

38. U.S. Dep't of Army, Reg. 15-6, Procedures for Investigating Officers and Boards of Officers (30 Sept. 1996).

39. U.S. Dep't of the Navy, Jag Instr. 5800.7c, Manual of The Judge Advocate General (3 Oct. 90).

40. 54 M.J. 32 (2000).

41. *Id*. at 34. Lieutenant Johnson pleaded guilty and was sentenced to a dismissal and three years confinement. United States v. Johnson, 46 M.J. 253 (1997).

42. *Johnson*, 54 M.J. at 34-35.

43. *Id.* at 34. The NBM overruled the local decision, barring Lieutenant Johnson from practicing pending disposition of the court-martial charges.

44. *Id.*

45. *Id.* at 34. After Lieutenant Johnson was convicted, his immediate commander also wrote the Chief of Naval Personnel, requesting that Lieutenant Johnson not be separated from the service because "his retention . . . would be in the best interest of his family and in the best interest of the Navy." *Johnson*, 46 M.J. at 254.

46. *Id*.

47. *Johnson*, 46 M.J. at 254-56. Then Chief Judge Cox, Judge Effron, and Judge Sullivan believed that Lieutenant Johnson's then unrebutted affidavit was sufficient to warrant a fact-finding hearing. Chief Judge Crawford and Judge Gierke concluded that the affidavit was insufficient to raise the issue because there was no evidence that Lieutenant Johnson's immediate commander had withdrawn his recommendation.

48. Judge Sullivan still viewed leaking of the memorandum as problematic because of its content, but concluded that the memorandum did not prejudice Lieutenant Johnson. *Ayers*, 54 M.J. at 36.

that anyone on the personnel-administrative side of these actions contacted anyone on the military justice side.[49] In essence, there was no unlawful command influence.

Lawful or Unlawful Command Influence— United States v. Francis

The Army Court of Criminal Appeals (ACCA) probably made the strongest statements in an unlawful command influence case this year. In *United States v. Francis*,[50] the ACCA strongly challenged the military judge's conclusion that unlawful command influence was proven, and the military judge's imposition of remedial measures in the case.

At his court-martial for absence without leave and wrongful use of marijuana and LSD, Private First Class Francis alleged that his squad leader and platoon leader told fellow soldiers not to associate with him. He also alleged that his squad leader and platoon leader directed that he be separated from the rest of the soldiers.[51] His theory was that these actions constituted unlawful command influence on potential witnesses in his case. In support of these allegations, three enlisted soldiers testified. These soldiers testified that they were never told not to testify for the accused, nor were they threatened in any way.[52] In response, the government called the squad leader and platoon leader, who testified that the gist of their comments to other soldiers was that they should not hang out with the wrong crowd, because they would get into trouble as well.[53] The gist of the platoon leader's testimony was that he told the noncommissioned officers in the platoon not to put Private Francis in positions of responsibility. He also told them to make sure that Private Francis did not hurt himself, and ensure that he did not get into more trouble.[54]

The defense theory was that the comments by the squad leader and platoon sergeant inhibited soldiers from coming forward to testify on behalf of Private Francis. He had no evidence, however, to support his theory and conceded as much.[55] Based on the testimony of the witnesses, the military judge found that, despite the comments by the leaders, there was no evidence that witnesses were pressured not to testify, nor had any witnesses been discouraged from testifying. Further, the military judge found that Private Francis had not been hindered in any way in obtaining evidence for trial.[56] The military judge did find, however, that the actions by the squad leader and platoon leader "could be reasonably understood by the listener as an attempt to influence or interfere with potential witnesses, and thus constitute . . . unlawful—command influence," thus satisfying the first prong of *Stombaugh.*[57] The military judge was not satisfied, however, that the accused had satisfied the second and third prongs of the Stombaugh analysis.[58] In other words, the accused had not shown how the proceedings would be unfair, nor how he might be hampered in obtaining favorable evidence. This finding notwithstanding, the military judge concluded that some remedial measures were appropriate and directed six different remedial measures of the type employed in *United States v. Rivers*[59] and *United States v. Biagase.*[60] All of these remedial measures were designed to offset what the military judge described as perceived taint and to prevent future interference with witnesses.[61]

On appeal, the accused asserted that the military judge erred by not shifting the burden of proof to the government after the initial showing of unlawful command influence. The Army court concluded that the military judge did not commit error by not shifting the burden, but also found, contrary to the military judge's ruling at trial, that the accused did not meet his initial burden of production. In essence, the Army court found that the actions of the squad leader and platoon leader did not constitute unlawful command influence. Therefore, the findings and remedial measures employed by the military judge resulted in a windfall to the accused.[62] Specifically, the court found that the military judge's application of the *Stombaugh* analysis was

49. *Id*. at 35.

50. 54 M.J. 636 (Army Ct. Crim. App. 2000).

51. *Id*. at 638.

52. *Id*.

53. *Id*.

54. *Id.*

55. *Id.*

56. *Id*. at 639.

57. *Id.*

58. *Id*

59. 49 M.J. 434 (1998).

60. 50 M.J. 143 (1999).

flawed.[63] In essence, the court concluded that the *Stombaugh* analysis applies only to review at the appellate level, and has no application in deciding unlawful command influence motions at the trial level.[64] Rather, the appropriate test is that announced in *United States v. Biagase*.[65]

The Army court's opinion in *United States v. Francis* is noteworthy for several reasons. The court's discussion of the various burdens and standards in unlawful command influence cases, as prescribed by CAAF in *United States v. Stombaugh* and *United States v. Biagase*, is right on the mark. Particularly useful is the discussion of the distinction between the methodology employed at trial as compared to the standard applied at the appellate level. It is also noteworthy for the tenor of the attack on the findings and conclusions of the military judge. The military judge heard the testimony, viewed the demeanor of the witnesses, and entered findings that he thought were warranted by the evidence. He also imposed measures that he thought were warranted under the circumstances. Over the past few years, the CAAF and service courts, in dealing with allegations of unlawful command influence, have praised military judges who have acted as "the last sentinel" against unlawful command influence.[66] In addition to being strongly worded, the ACCA opinion in *Francis* is certainly at odds with that trend. The subtle message, however, is that not all command influence is unlawful command influence, and trial practitioners must be able to make that distinction.

The Dangers of Electronic Mail— United States v. Stoneman

There are many advantages to communicating by electronic mail (e-mail). It is fast, not limited by the duty day, and lessens the need for telephone conversations. It does have disadvantages, however. Many of the normal inhibitions that are associated with face-to-face conversations—the time to reflect, and the ability to explain and elaborate—are not available with electronic mail. Nor is the ability to recall once the "send" button is activated. These disadvantages are magnified if the subject of the e-mail just happens to be military justice or the state of discipline in a command. Judge advocates typically strongly advise against conducting military justice business through e-mail. *United States v. Stoneman*[67] is a shining example of why this advice is right on the mark.

Not too long before his court-martial, Specialist Stoneman's brigade commander "declared war on all leaders not leading by example."[68] In essence, the brigade commander was expressing his outrage at certain types of misconduct, particularly when committed by officers and noncommissioned officers, including driving under the influence, rape, drug use, larceny of government equipment, and loss of government equipment. The first medium he chose to get his message across was electronic mail.[69] He later restated his concerns in person at brigade leader training. At some point after the leader training, the command recognized the potential problems with the brigade commander's comments. Approximately two weeks later, at

61. *Francis*, 54 M.J. at 640. In directing, in general, the following remedial measures, the military judge:

> (1) required the company commander to issue a retraction which included references to the platoon leader and squad leader's statements, a reminder to soldiers of their duty to testify if called, and that all members of the platoon make themselves available for interview; (2) prohibited the government from presenting evidence in aggravation; (3) required the government to produce all witnesses requested by the defense; (4) allowed the accused to testify regarding what he thought other witness would say; (5) prohibited cross-examination of the accused during sentencing; and (6) barred the platoon leader and squad leader from the courtroom during the trial.

Id.

62. *Id*. at 640-41.

63. *Id*. at 639-40.

64. *Id*.

65. *Id*.

66. *See* United States v. Rivers, 49 M.J. 434 (1998); *see also* United States v. Biagase, 50 M.J. 143 (1999).

67. 54 M.J. 664 (Army Ct. Crim. App. 2000).

68. *Id*. at 666. The first e-mail message read, in part:

> If leaders don't lead by example, and practice self-discipline, then the very soul of our Army is at risk. No more [platoon sergeants] getting DUIs, no more NCOs [noncommissioned officers] raping female soldiers, no more E7s coming up "hot" for coke, no more stolen equipment, no more "lost" equipment, no more approved personnel actions for leaders with less than 260 APFT [Army physical fitness test scores], no more leader APFT failures at DA [Department of the Army] schools,—all of this is BULLSHIT, and I'm going to CRUSH leaders who fail to lead by example, both on and off duty.

Id.

69. *Id*. The full text of both e-mail messages is reproduced in *Stoneman*. *Id.* at 674-79.

the urging of his staff judge advocate, he issued a second e-mail to clarify the first. In the second e-mail, the brigade commander emphasized that he did not intend to influence the decision-making process of subordinate commanders, witnesses, or court members. He also stated that he expected each of these groups to discharge their duties without interference from anyone.[70]

Notwithstanding the second e-mail message, in Specialist Stoneman's court-martial for rape and sodomy, his defense counsel moved to stay the proceedings until all members from the affected brigade were removed from the panel. The defense argument was that, because of having read the initial e-mail and attending the leader briefing, the members were impliedly biased. In support of the motion, they offered the testimony of a noncommissioned officer who stated that his interpretation of the message was that any soldier who got in trouble was "to be crushed."[71] Since the motion was only directed at panel members, the military judge ruled that it was premature and that the issue could be explored more fully in voir dire, which it was, both as a group and individually. Five of the members had seen the e-mail or attended the training. They testified, inter alia, that: they thought the email "suggested an 'appearance of a lack of law and order and discipline among certain elements of the brigade;'" "focused on discipline problems in the brigade . . . and encouraged leaders to 'pick up the standards;'" and "'may have had something to do with accountability [or] integrity.'" They believed "that the intent was to describe potential problem areas and to encourage leaders to prevent their soldiers from getting into trouble," and that the "message was primarily focused on problems the brigade was having with drunk driving."[72]

A sixth member attended the leader training only, and stated that he thought the focus of the briefing was "DUIs, drug abuse, spouse abuse, and sexual harassment of subordinates."[73] All six members testified that they would be fair and impartial and that they would not be swayed by either the email or leader training. They also testified that there was no direction or guidance on how to dispose of misconduct.[74]

The military judge denied the implied bias challenge against members of the brigade based on Rule for Courts-Martial 912(f)[75] and *United States v. Youngblood.*[76] The military judge also relied on the members' statements during voir dire that they would not be swayed by anything said by the brigade commander.[77]

Quick work by the staff judge advocate saved the day in *Stoneman.* The facts in this case, however, underscore the dangers of public comment by commanders on indiscipline and specific misconduct, as well as the dangers associated with addressing misconduct through e-mail. Certainly, the speed of e-mail can serve a commander well. In keeping a superior aware of the status of a serious incident, or the progress on an investigation, it is a wonderful tool, as long as the communication is going up the chain of command, and not down.

Convening Authority Testimony at Trial— United States v. Littlewood

An interesting issue is raised whenever a commander from the chain of command testifies at a court-martial. Is such testimony, per se, unlawful command influence? That was the question facing the CAAF in *United States v. Littlewood.*[78]

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70. *Id*. The full text of the second e-mail message is reproduced as appendix II to the Army Court opinion. It is an excellent example of the types of remedial measures applauded by CAAF in cases such as *United States v. Rivers*, 49 M.J. 434 (1999), and *United States v. Biagase*, 50 M.J. 143 (1999).

71. *Stoneman*, 54 M.J. at 674-79.

72. *Id*. at 667-68.

73. *Id*. at 668.

74. *Id.*

75. Rule for Court-Martial 912(f)(1)(N) provides:

> (1) *Grounds.* A member shall be excused for cause whenever it appears that the member:
>
> . . . .
>
> (N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(1)(N) (2000).

76. 47 M.J. 338 (1997).

77. *Stoneman*, 54 M.J. at 668.

78. 53 M.J. 349 (2000).

Staff Sergeant Littlewood was tried and convicted of several UCMJ Article 134 sexual assault offenses. Over defense counsel's objection, the military judge allowed Staff Sergeant Littlewood's squadron commander to offer his opinion as to whether Staff Sergeant Littlewood's conduct was prejudicial to good order and discipline and service discrediting.[79] The majority of the court analyzed this as an evidentiary issue, and ruled that the military judge abused his discretion in receiving the testimony as opinion testimony under Military Rule of Evidence 701. The court concluded, however, that any error was harmless.[80] Three judges thought the issue significant enough to warrant further comment. Judge Gierke, joined by Chief Judge Crawford, opined that the government simply failed to lay an adequate foundation for the testimony. The opinion goes on to disagree with the majority's suggestion that such testimony could foster the appearance of unlawful command influence.[81] The court did qualify this portion of its opinion by noting that this case was tried before military judge alone, thereby eliminating any possibility of unlawful command influence.[82] While that may be true, Judge Gierke does not address whether there should be different considerations in a case tried before members. Senior Judge Cox, concurring in the result, but disagreeing with Judge Gierke's analysis of this issue, correctly identified the potential for unlawful command influence in this type of testimony. It is because of the "razor-thin line between expertise and command influence," that Judge Cox advises against using a commanding officer to express opinions on whether conduct is service discrediting and prejudicial to good order and discipline.[83]

"Non-Commander" UCI— United States v. Pinson

As the courts have noted in the past, improper or ill-advised conduct by a commander, or a representative of the commander, is not automatically unlawful. Faced with an allegation of improper conduct by the staff judge advocate, the Air Force court reached that same conclusion in *United States v. Pinson.*[84]

Senior Airman Pinson was tried and convicted of disobeying lawful orders, subornation of perjury, communicating threats, adultery, and assault. He was sentenced to a bad-conduct discharge, confinement for three years, and reduction to E1.[85] One of several issues he raised on appeal was the staff judge advocate's role in the completion of the Article 32 investigation. He asserted that the staff judge advocate, by giving the investigating officer a letter requesting that she address specific issues, deprived him of a fair and impartial trial. Although Airman Pinson couched the allegation in terms of prosecutorial misconduct, the Air Force court viewed the issue as unlawful command influence and made short work of it.[86] As the representative of a commander who could direct that an investigating officer reopen an investigation, the court concluded that there was nothing improper in the staff judge advocate doing just that.[87]

Contact between the staff judge advocate and court members was the issue in *United States v. Miller.*[88] In Master Sergeant Miller's general court-martial for numerous offenses, there was some concern for security in the courtroom. The military judge directed the use of a variety of security measures, including a metal detector, closing entrances to the courtroom, and posting an Air Force Office of Special Investigation agent in the courtroom.[89] Master Sergeant Miller asserted that contact between the staff judge advocate and the president of the court-martial panel regarding the reasons for the security measures amounted to unlawful command influence.[90] There was no question that a conversation between the staff judge advocate and the president of the panel occurred, but there was significant disagreement about the content of the conversation. Notwithstanding, the Air Force court concluded that a conversation

79. *Id*. at 352.

80. *Id*. at 353. The majority concluded that the testimony was conclusory, not supported by the facts, and couched in legal terminology. As such, it was not helpful to the factfinder, but the error was deemed harmless in this case.

81. *Id*. at 355.

82. *Id*.

83. *Id*. at 354 (Cox, J., concurring).

84. 54 M.J. 692 (A.F. Ct. Crim. App. 2001).

85. *Id*. at 694.

86. *Id*. at 698.

87. *Id*.

88. 53 M.J. 504 (A.F. Ct. Crim. App. 2000).

89. *Id*. at 507.

90. *Id.*

between the staff judge advocate and a court member regarding the details of a court-martial in progress was improper and logically connected to the court-martial, and thus satisfied Master Sergeant Miller's initial burden.[91] The only remaining question was whether this contact resulted in some harm to Master Sergeant Miller, or some unfairness in the trial. The court concluded that the proceedings were fair.[92] The key to the decision was the fact-finding hearing, which revealed that the staff judge advocate informed the panel member that the security measures were for the protection of Master Sergeant Miller. The hearing also revealed that the panel president never briefed the other members, nor were any members aware of alleged threats against the prosecutor, the military judge, or themselves until after the trial was over. Even more important, all of the members stated that the information that they were exposed to had no impact on them.[93] Under these circumstances, the court found that the staff judge advocate's conduct had no impact on the fairness of the trial.

Conclusion

What lessons can be learned from the most recent decisions from the appellate courts on unlawful command influence? The most obvious lesson is that it remains a contentious issue, requiring the vigilance of all military justice practitioners to keep it in check. These cases also underscore the dangers associated with commander comments on discipline and misconduct, whether through OPDs or through electronic mail. The most important lesson, however, may be the challenge from the Army Court in *Francis* to recognize that there is still a line between lawful and unlawful command influence.

91. *Id.*

92. *Id.* at 508.

93. *Id.*