Recent Developments in Unlawful Command Influence

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Introduction

The Court of Appeals for the Armed Forces (CAAF) released several cases involving unlawful command influence (UCI) this year. The types of UCI issues varied case-to-case, and included "something old, something new." The "something new" involved the media-besieged case of *United States v. Simpson.*[1] Here, the CAAF addressed UCI in the context of pretrial publicity and its potential effect on the court-martial proceedings. *Simpson* demonstrates to military justice practitioners, particularly defense counsel, how difficult it is to connect either pretrial statements made by senior military leaders or extensive pretrial publicity with an actual unfairness in the court-martial proceedings.

The old flavor this year is something old indeed—statements by convening authorities. Two Air Force cases provide judge advocates (JA) and convening authorities with timely reminders of the potential harm caused when convening authorities address the emotional issue of crime within the command by expressing their opinions regarding those who commit the crimes.[2] Although the CAAF sends a clear message about the dangers of such statements, the court also provides excellent guidance concerning the permissible role for convening authorities in addressing crime and its effect on good order and discipline.

When Does Apparent UCI Become Actual UCI?

The much publicized court-martial of Staff Sergeant (SSG) Delmar Simpson reached its appellate apex this year. Staff Sergeant Simpson sexually assaulted female trainees at Aberdeen Proving Ground (APG), Maryland, between November 1994 and September 1996.[3] A general court-martial composed of officer and enlisted members convicted SSG Simpson and sentenced him to a dishonorable discharge, twenty-five years confinement, total forfeitures, and reduction to the grade of E-1.[4] As aptly described by the Army Court of Criminal Appeals (ACCA), the pre-court-martial allegations of trainee abuse at Aberdeen created a "media feeding frenzy."[5] Accordingly, Simpson alleged that the pretrial publicity and UCI unfairly tainted his court-martial and thereby deprived him of due process under the Fifth Amendment.[6]

The appellant was a member of the U.S. Army Ordnance Center and School (USAOC&S) when the allegations against him surfaced. Shortly after the criminal investigation began, the command transferred the appellant and other cadre members under investigation to the U.S. Army Garrison Command (USAG). The officer who exercised general court-martial convening authority over the appellant was the USAG Commander, Major General (MG) Longhouser, not MG Shadley, the Commander of the USAOC&S.[7] The Army leadership held press conferences before referral of Simpson's case to a general court-martial. The substance of the relevant Army press conferences generally centered around the Aberdeen investigation and trainee abuse.[8] During the processing of the case, both senior civilian and military leadership stepped into the spotlight with statements about the investigation and allegations.[9] Not mentioned in the CAAF's opinion, but detailed in the ACCA's opinion, is the pretrial congressional interest garnered by the allegations. "A congressional delegation visited APG and talked with a number of trainees. Several members of Congress

1. 58 M.J. 368 (2003).

2. *See* United States v. Davis, 58 M.J. 100 (2003); United States v. Dugan, 58 M.J. 253 (2003).

3. *Simpson*, 58 M.J. at 370. Among the charges and specifications were rape (eighteen specifications), forcible and consensual sodomy (three specifications), indecent assault (twelve specifications), and cruelty and maltreatment of subordinates (two specifications).

4. *Id*.

5. United States v. Simpson, 55 M.J. 674, 682 (Army Ct. Crim. App. 2001), *aff'd*, 58 M.J. 368 (2003). Documentation of the media attention encompasses five volumes of the appellant's record of trial. *Simpson*, 58 M.J. at 372.

6. *Id.* at 370.

7. *Id*. at 371.

8. *Id*.

9. *Id*.

made public statements demanding various actions on the part of military officials . . . ."[10] Not coincidentally, a senator from Maryland wrote letters to the Secretary of Defense and the Secretary of the Army "demanding the Army take action to 'severely' punish wrongdoers."[11] In response to the media and congressional interest, the Secretary of the Army created a task force to review sexual harassment in the Army.[12] Further, the Chief of Staff sent a letter to all general officers affirming "zero tolerance" on sexual harassment and requiring all Army personnel to be trained on the "zero tolerance" policy.[13]

The CAAF addressed the appellant's due process violation claim in two parts. First, the court reviewed the pre-trial "media frenzy" and its alleged effect on the court-martial.[14] The court found the extensive pretrial media attention given to the trainee abuse in the case did not adversely impact the appellant's court-martial. The court based its conclusion, in part, on the trial judge's actions. The court noted that the military judge issued an order to all "primary and alternate court members at the initial Article 39a session to avoid exposure to print and electronic media stories concerning the investigation of sexual misconduct at Aberdeen."[15] Additionally, the military judge allowed counsel the latitude to conduct a wide-ranging voir dire.[16] Probably to the surprise of many close followers of the case, most members expressed little knowledge of the investigation and the attendant issues.[17] Thus, the appellant's counsel did not challenge any member based on exposure to pretrial publicity.[18]

The CAAF then turned its attention to the second prong of the appellant's due process violation argument: the UCI claim. Throwing the proverbial "mud against the wall" in the hope that some would "stick," Simpson alleged both the appearance of UCI and actual UCI affected his court-martial. Although not distinguishing between the two, he specifically alleged UCI clouded the decision-making of commanders in his chain of command on the disposition of his case, and that UCI invaded the inner sanctum of the panel.[19]

In addressing the appellant's UCI claim, the unanimous CAAF revisited[20] the test outlined in *United States v. Biagase*,[21] which provided military justice practitioners with a template to use when confronted with a potential UCI issue. The *Biagase* court asserted that during the trial, the defense must raise "facts which, if true, constitute unlawful command influence."[22] The defense must then establish a causal connection to the court-martial by showing the alleged UCI will potentially cause unfairness.[23] If the defense counsel identifies UCI and potential impact on the defendant, the burden shifts to the government to rebut the allegation.[24] The government may successfully rebut the allegation in one of three ways. First, the government may "disprove the predicate facts on which the allegation of unlawful command influence is based."[25] Second, the government may choose to "persuade the military judge 'that the facts do not constitute unlawful command influence.'"[26] Finally, the government may show "that the unlawful command influence will not affect the proceedings."[27] The military judge must

10. *Simpson*, 55 M.J. at 682.

11. *Id*.

12. *Simpson*, 58 M.J. at 371.

13. *Id*. at 372.

14. *Simpson*, 55 M.J. at 682.

15. *Id*. at 371.

16. *Id*. at 373.

17. *Id*.

18. *Id*. Additionally, the court noted that the defense did not request a change in venue due to the extensive media interest in the investigation and subsequent court-martial. *Id*. at 376.

19. *Id*. at 373.

20. *Id*. The CAAF recently explained the test in *United States v. Stoneman*, 57 M.J. 35 (2002).

21. 50 M.J. 143 (1999).

22. *Id*. at 150.

23. *Id*.

24. *Id*. at 151.

25. *Id*.

26. United States v. Simpson, 58 M.J. 368, 373 (2003) (citing *Biagase*, 50 M.J. at 151).

weigh the government's rebuttal using the beyond a reasonable doubt standard.[28] At the appellate level, the UCI claim is viewed through a retrospective lens, using essentially the same *Biagase* template.[29]

The CAAF divided Simpson's unlawful influence claim into two parts: publicity and statements made by senior leaders. After applying the *Biagase* template to the pretrial publicity issue, the court concluded that the appellant had not satisfied the initial defense burden of sufficiently raising facts constituting UCI.[30] The appellant had alleged that the extensive media coverage combined with the military leadership's involvement in press conferences was so overwhelming that the appearance of UCI created a "presumptive prejudice."[31] The court quickly rejected the argument, noting that the leadership did not orchestrate press conferences and other media mediums to improperly influence the court-martial.[32] Moreover, the court specifically noted that the senior civilian and military leadership have an obligation to inform the American public of the state of discipline within the military.[33] It is within that context that the CAAF next addressed the second part of the appellant's UCI claim–statements made by senior Department of Defense (DOD) and Department of the Army (DA) leaders.[34]

The court directed trial judges and appellate courts to look at both actual and apparent UCI when confronted with a potential UCI issue.[35] The CAAF called specific attention to the difference between actual UCI and the appearance of UCI, and for the second time in a one-year period, the CAAF appears to require a two-part UCI analysis. Using language from *United States v. Stoneman*,[36] the court stated, "Even if there [is] no actual unlawful command influence, there may be a question whether the influence of command placed *an intolerable strain* on public perception of the military justice system."[37]

In *Simpson*, the appellant argued that statements by senior DOD and DA leaders, and the Army Chief of Staff's emphasis on a "zero tolerance" of sexual harassment created the appearance of UCI.[38] The CAAF bifurcated the contention and applied the *Biagase* analysis to the "zero tolerance" argument. In addressing the statements by senior DOD and DA leaders, however, the court evaluated the government's burden to rebut the UCI allegation using only one of the three options under *Biagase*.[39]

In addressing the appellant's "zero tolerance" contention, the court determined that the appellant failed to raise evidence of UCI sufficiently enough to shift the burden to the government.[40] The court reasoned there was no causal connection between the Army's "zero tolerance" regarding sexual harassment or its attendant training programs and the impact on the court-martial. The CAAF reached this conclusion by reviewing two of the three common Article 37 "protected target groups."[41] First, the appellant could not demonstrate the policy adversely impacted the decision-making of the commanders charged with disposing of the allegations.[42] Second, the court pointed out the

27. *Id*. (citing *Biagase*, 50 M.J. at 151).

28. *Id*.

29. *Id*. at 374 (citing *Biagase*, 50 M.J. at 143 (citing United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994))). At the appellate level, the defense must still establish that the facts constitute UCI, the court-martial was unfair, and most importantly, the UCI was the reason for the unfairness. *Id*.

30. *Id*.

31. *Id*.

32. *Id*.

33. *Id*.

34. *Id*.

35. *Id*. In doing so, the court again stressed the mandate it previously provided in *United States v. Stoneman*. 57 M.J. 35 (2002).

36. *Id*.

37. *Simpson*, 58 M.J. at 374 (citing *Stoneman*, 57 M.J. at 43) (emphasis added).

38. *Id*. at 374-75.

39. *Id*.

40. *Id*. at 375.

41. *Id*. Article 37 generally protects the independent discretion of subordinate commanders, panel members, and witnesses in court-martial proceedings from wrongful influence. *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE PRACTICE AND PROCEDURE § 6-3 to 6-8 (1999) (containing a thorough overview of Article 37's protection of these three groups).

42. *Id*.

members' answers during voir dire provided the appellant with no factual basis to link the "zero tolerance" policy with a potential cause of unfairness during the court-martial proceedings.[43] The court repeated the answers of one panel member who stated he believed a violation of the policy required "appropriate action" and not any stated disposition.[44] To demonstrate the propriety of its conclusion, the court analyzed the issue as if the defense had successfully shifted the burden to the government. The court then asserted that the government, using the voir dire answers and testimony from the special and general court-martial convening authorities, would have successfully rebutted beyond a reasonable doubt the assertion the "zero tolerance" policy created unfairness during the proceedings.[45]

The court addressed the appellant's "zero tolerance" contention using an actual influence analysis, which relied upon factually based answers from both commanders and panel members. The court only briefly mentioned the potential for the "zero tolerance" policy to create the appearance of UCI, stating that "the manner in which the military judge considered these issues at trial rebuts any reasonable inference that references to 'zero tolerance' created the *appearance* of unlawful command influence."[46]

The CAAF next turned its attention to the appellant's last claim that specific statements made by certain senior leaders improperly influenced the disposition of charges and unfairly tainted the court-martial proceedings. The relevant pretrial statements included conclusions like: "There is no such thing as consensual sex between drill sergeants and trainees"; the UCI claim also extended to phrases such as "no leniency," "severe punishment," and "abuse of power."[47] Instead of following the other UCI claims and sequentially applying the *Biagase* test, the CAAF swept around and attacked the issue from the rear. The CAAF refused to address the first prong of *Biagase* and chose not to determine whether the statements factually amounted to UCI.[48] Instead, the CAAF concluded the government demonstrated that the statements made by senior Army leaders "did not taint Appellant's court-martial with UCI," and thus "met the third prong of *Biagase*."[49] Ultimately, the CAAF did not seize the opportunity to send a stringent message to senior leaders that statements of this nature cast a significant shadow on the integrity of the military justice system at a minimum, and at worst, cause subordinates or panel members to act in conformity with the statements.[50]

In addition to the brief reference to the appearance of UCI arising from the "zero tolerance" policy, the CAAF provided detailed findings for why the proceedings were not tainted with the *appearance* of UCI. The court specifically pointed to pretrial command actions, decisions by the military judge, as well as other extrinsic factors, in reaching the conclusion that the alleged appearance of UCI created by the media "frenzy," the statements made by senior leaders, and the emphasis on the Army's sexual harassment policy did not infect the appellant's court-martial.[51] The court's conclusion in regard to this issue raises two questions. First, was there, in fact, an appearance of UCI in the case? The court did not indicate whether the defense had met its initial requirement under *Biagase* to raise facts which constituted UCI. Consequently, the opinion fails to address whether there was an appearance of UCI. Regardless of the classification of the type of influence, the court provides a helpful template to address the potential for harm at the court-martial proceedings. Second, how are practitioners, military judges in particular, to address the appearance of UCI? The opinion seems to create a standard of review by implication. The language *Simpson* adopted from *Stoneman* indicates the standard of review is "whether the influence of command

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43. *Id*.

44. *Id*.

45. *Id*.

46. *Id*. at 376 (emphasis added).

47. *Id.* The Secretary of the Army, the Assistant Secretary of the Army for Manpower and Reserve Affairs, and the Chief of Staff made these statements in various media forums. *Id.*

48. *Id*. at 376.

49. *Id*.

50. *Id*. The court did, however, issue cautionary dicta.

> [W]e note that senior officials and attorneys who advise them concerning the content of public statements should consider not only the perceived needs of the moment, but also the potential impact of specific comments on the fairness of any subsequent proceedings in terms of the prohibition against unlawful command influence.

Id. at 377.

51. *Id*. In support of its finding, the court enumerated the following facts: (1) the transfer of the accused to another unit; (2) the decision to select panel members from other commands; (3) the military judge's order to members not to view, listen to, or read media coverage; (4) the alternative dispositions of like cases arising from the same command; (5) the "extensive ventilation" of UCI at trial; and (6) the fact that the defense did not seek a change of venue. *Id.*

placed an intolerable strain on public perception of the military justice system."[52] The court did not resolve the issue further. After explicitly directing military judges to consider apparent UCI as well as actual UCI, and incorporating the *Stoneman* language, the CAAF chose not to answer the question in this case. In fact, the court side-stepped the issue. The court ignored its own mandate to determine whether there was an intolerable strain on the public perception of the military justice system. As a result, military judges do not have a clear standard to measure whether the strain is "intolerable" or to gauge public perception.

One of the more recent cases involving the public perception of the military justice system is *United States v. Wiesen*.[53] Although *Wiesen* is an implied bias case,[54] the analysis of public perception remains the same as in a UCI setting. The *Wiesen* majority asked a rhetorical question in its analysis of public perception, which led the court to reach a conclusion based on speculation rather than fact.[55] Reviewing for UCI and its potential to cause unfairness is a fact-based analysis;[56] straining to determine public perception is not. Further, there is a debate in the CAAF concerning the status of public perception of the military justice system. One side argues the American public, when provided all the facts, would be insightful enough to form reasoned opinions regarding the fairness of the military justice system.[57] The other side takes a more paternalistic approach in its opinion as to how the American public approaches the military justice system.[58] Regardless of the accuracy of either's view of the American public, the practitioner is still left without clear guidance when facing the question of whether an issue places an intolerable strain on the public's view of the military justice system. There are simply no objective standards to use to reach a sound conclusion.

Practitioners are left with several questions in the UCI arena. First, are military judges and service courts now required to conduct a two-tiered-review in UCI cases? The answer is probably yes. When claims of actual UCI arise, it is well-settled that the issue is to be resolved using the *Biagase* test.[59] But if the government successfully rebuts the allegation, is the military judge required to conduct a second analysis using the *Stoneman* and *Simpson* standard to determine if there is "an intolerable strain on public perception of the military justice system?"[60] The answer appears to be maybe; but what standard should military judges use? How does one define public perception? When faced with only an appearance question, does the military judge have to follow the *Biagase* test sequentially? Will the military judge's decision survive appellate scrutiny if no determination of UCI is made but he or she makes findings that the government demonstrated beyond a reasonable doubt that the proceedings will not be tainted? These questions remain unanswered.

Although *Simpson* raises questions for future cases, the CAAF addressed the well-settled issues of an inflexible attitude and convening authority statements entering the deliberation room in two Air Force cases.

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52. *Id.* at 374 (citing United States v. Stoneman, 57 M.J. 34, 42-43 (2002)).

53. 56 M.J. 172 (2001), *petition for reconsideration denied*, 57 M.J. 48 (2002).

54. Implied bias stems from a Supreme Court holding that the "bias of a juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as a matter of law." United States v. Wood, 299 U.S. 123, 133 (1936). For an overview of the doctrine as it applies in the military, *see* Chief Judge Crawford's dissent in *Wiesen*, 56 M.J. at 177-81.

55. *Id*. at 176. Traditionally the standard for determining public perception is the one which tests for implied bias. Implied bias exists when "most people in the same position would be prejudiced." *Id.* at 174 (citing United States v. Armstrong, 54 M.J. 51, 53-54 (2000)).

56. *See generally Stoneman*, 57 M.J. at 34 (providing cases that were remanded to gather facts to include *United States v. Dugan*, 58 M.J. 253 (2003) and *United States v. Baldwin*, 54 M.J. 308 (2001)). *Stoneman*, 57 M.J. at 40. The military judge in *Stoneman* admirably attempted to divine what the public might have perceived.

> [I]f it [implied bias] was reviewed through the eyes of the public the responses that the court members gave, if members of the public were sitting in the back of the courtroom and heard their responses given on *voir dire* by the members of 1st Brigade who have been selected to serve in this court-martial, I think they would see the finest traditions of the United States Army as court members, and would certainly not be swayed by anything Colonel Brook [brigade commander] might say . . . .

Id. Although the CAAF majority may have agreed with the military judge's attempt, it disagreed in the final analysis. *Id.* at 42-43.

57. *Wiesen*, 56 M.J. at 180 (Crawford, J., dissenting).

58. *Id.* at 176 ("The American public should and does have great confidence in the integrity of the men and women who serve in uniform, including their integrity in the jury room.").

59. *See supra* text accompanying notes 20-29.

60. *See Stoneman*, 57 M.J. at 42-43.

Convening Authority with an Attitude, Again

Airman Basic Davis entered into a pretrial agreement with the convening authority to plead guilty to absence without leave and the use of both cocaine and marijuana.[61] An officer panel sentenced a provident Davis to a bad conduct discharge and three months confinement.[62] After the trial, Davis' trial defense counsel learned of certain comments attributed to the convening authority, Major General (Maj Gen) [F] and objected to him taking action on Davis' sentence.[63] The defense counsel objected specifically to Maj Gen [F]'s public comments that "people caught using illegal drugs would be prosecuted to the fullest extent, and if they were convicted, they should not come crying to me about your situation or your families[']" or words to that effect.[64] Major General [F] approved the adjudged sentence in the case despite the defense objection.[65]

Convening authorities have a statutory duty to consider clemency appeals from an accused.[66] A convening authority may not ignore or delegate this duty. The issue before the CAAF in *Davis* was whether the convening authority disqualified himself given the conflict between his public expressions concerning drug users and his post-trial duties.[67] The court first looked to *United States v. Howard*[68] in which a convening authority transmitted his views toward drug users in a letter published within a unit newsletter. In the letter, the convening authority indirectly but pointedly informed the accused that he would get no clemency but he would get a trip to Leavenworth to serve his full sentence.[69] The court in *Howard* held the convening authority did not fulfill his statutory post-trial duties and had disqualified himself with "an inelastic attitude toward clemency requests."[70] In the present case, the CAAF unanimously held that the convening authority "did not possess the required impartiality with regard to his post-trial responsibilities."[71] In doing so, the CAAF used an interesting tactic. The court took apart the convening authority's statement, "[d]on't come crying to me" word by word, to determine his intent.[72] The convening authority, the court determined, built a "barrier" against the accused and demonstrated an inelastic attitude toward certain offenses.[73] The CAAF set aside the action and returned the case for a new action by a different convening authority.[74]

There are two primary lessons to be extracted from *Davis* for JAs advising convening authorities. The first is to be ever vigilant for convening authority comments which reflect inelastic attitudes or a predisposition towards any action. Judge advocates should remind convening authorities they must remain detached and perform their post-trial statutory duties without the hint of partiality. In the CAAF's view, the convening authority's post-trial role is as important as the pre-trial role. The CAAF's pointed use of language from a thirty-year-old case makes this clear; convening authority statements will be subjected to heightened scrutiny.

A second lesson from *Davis* provides JAs insight into what the court views as the boundaries for convening authorities who wish to make statements regarding crime. The court uses fairly emphatic language to inform convening authorities that they do not have to shy away from public statements about criminal behavior and its adverse effects. In fact, "it is not disqualifying for a convening authority to express *disdain* for illegal drugs and their adverse effect upon good order and discipline in the command."[75] Further, "[a]dopting a strong anti-crime position, manifesting an awareness of criminal issues within a command, and taking active steps to deter crime

61. United States v. Davis, 58 M.J. 100 (2003).

62. *Id.* at 101.

63. *Id*

64. *Id*.

65. *Id*. The staff judge advocate did not address the objection in the addendum to the post-trial recommendation. *Id*. at 102.

66. UCMJ art. 60b(1) (2002).

67. *Davis*, 58 M.J. at 103.

68. 48 C.M.R. 939 (C.M.A. 1974).

69. *Id*. at 943 ("No, you are going to the Disciplinary Barracks at Fort Leavenworth for the full term of your sentence and your punitive discharge will stand. Drug dealers, is that clear?").

70. *Id.* at 944.

71. *Davis*, 58 M.J. at 104.

72. *Id.* at 101.

73. *Id*. at 104.

74. *Id*.

are consonant with the oath to support the Constitution."[76] Judge advocates writing policy letters and advising commanders may want to take note of the CAAF's language and incorporate the message. Convening authorities, however, must always take caution not to cross the line and make pronouncements about those who commit crimes or about what should happen to the "criminals."

The "Possibility" of the Convening Authority in the Deliberation Room, Not a Good Thing

Airman (Amn.) Dugan faced sentencing by a general court-martial composed of officer members after his conviction for, among other offenses, using ecstasy.[77] The panel sentenced Amn. Dugan to a bad conduct discharge, confinement for nine months, total forfeitures, and reduction to the lowest enlisted grade.[78] Sometime after the court-martial, the junior member of the panel gave the trial defense counsel a letter to include in Dugan's clemency matters. The letter addressed several concerns, the most important of which was the mention, during the panel's sentence deliberation, of an earlier Commander's Call hosted by the general court-martial convening authority.[79] The panel member recalled other panel members making statements such as, the "sentence would be reviewed by the convening authority and we needed to make sure our sentence was sending a consistent message . . . . [We] need to make sure it didn't look like we took the charges too lightly . . . . [O]ur names would be identified as panel members."[80]

The trial defense counsel requested a post-trial Article 39a session. The military judge denied the request, ruling "any references to [the Commander's Call] during the deliberative process did not appear to chill the deliberative process."[81] The Air Force Court of Criminal Appeals affirmed the case finding the contents of the letter as a whole, "reflect the reality of the military justice system."[82]

The CAAF again reviewed the UCI issue with heightened scrutiny and unanimously set aside the sentence, returning the case for a *Dubay* hearing on the claim of UCI.[83] The court determined the letter presented by the defense after the court-martial sufficiently met the first prong of *Biagase* since the contents sufficiently raised the possibility of UCI in the deliberation room.[84] From the CAAF's perspective, the possibility of such an occurrence was too great to permit it to remain unaddressed.[85] The court found the convening authority's influence may have permeated into the deliberations and "chilled" the independence of one of Article 37's protected targets—panel members.[86]

A note worth addressing is the applicability of Military Rule of Evidence (MRE) 606(b), which applies to inquiries into panel deliberations.[87] The CAAF cautioned the military judge who may hold the *Dubay* hearing that MRE 606 prohibits member-questioning regarding the impact of statements made during deliberation.[88] Thus, the *Dugan* panel members may be questioned concerning what was said during deliberations but not how the statements impacted "on any member's mind, emotions, or mental processes."[89] This limitation almost certainly guarantees that any military judge facing this situation will

75. *Id*. at 103 (emphasis added).

76. *Id*. (emphasis added) ("A commanding officer or convening authority fulfilling his or her responsibility to maintain good order and discipline in a military organization need not appear indifferent to crime.").

77. United States v. Dugan, 58 M.J. 253, 254 (2003).

78. *Id*. at 254.

79. *Id*. at 255. The Commander's Call occurred several weeks before Amn. Dugan's court-martial. Four members attended the meeting. Among the topics discussed by the general court-martial convening authority was the prevalence of drugs on the Gulf Coast of Florida. He also mentioned that drug use was incompatible with military service. *Id*.

80. *Id*.

81. *Id*. at 256.

82. *Id*. at 256 (citing United States v. Dugan, No. 34477 (A.F. Ct. Crim. App. Mar. 20, 2002) (unpublished)).

83. *Id*. at 260.

84. *Id*. at 259.

85. *Id*.

86. *Id*.

87. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 606(b) (2002).

88. *Dugan*, 58 M.J. at 260.

receive limited evidence on the issue of whether UCI tainted the sentencing proceedings.

The better solution is to advise military judges facing even a hint of UCI within the deliberation room to proactively inquire into the facts, receive evidence, and apply the *Biagase* test to determine whether UCI has tainted the court-martial. Further, in light of MRE 606(b), a military judge should include on the record a comparison of the demeanors of the panel members during voir dire with the demeanors during the post-trial hearing. Caution dictates that military judges should reopen proceedings and take testimony while the evidence is still fresh. Only then are both parties protected from cumbersome proceedings months, if not years, down the road.

Next, the CAAF stepped out of the conventional court-martial proceedings and into the administrative discharge arena and thus, practitioners must ask the following question.

Does UCI Extend to a Post-Trial Request for Discharge?

A majority of the CAAF believes that UCI may potentially extend to the administrative elimination arena. In a summary disposition, the CAAF set aside an ACCA decision and ordered a *Dubay* hearing to determine "whether [the] appellant was prejudiced by unlawful command influence when the group commander told appellant's company commander to 'not go soft on me now' regarding her recommendation on a soldier's Chapter 10 request, which led the company commander to abstain from a favorable recommendation."[90]

After his conviction for an indecent assault and an indecent act, Private (PVT) Lujan submitted a request for discharge in lieu of trial by court-martial.[91] The company commander did not submit a recommendation. The group commander, along with the staff judge advocate, recommended that the request be denied. The general court-martial convening authority denied PVT Lujan's request.[92] Later, PVT Lujan's trial defense counsel submitted an affidavit detailing a conversation with Lujan's company commander. The company commander described a conversation she had with the group commander regarding the post-trial discharge request in which the group commander told her, "don't go soft on me now."[93] The company commander affirmed the discussion in her affidavit to the ACCA.[94] The CAAF concluded that the appellant sufficiently raised evidence of UCI "because it may have deprived him of a favorable recommendation from his company commander."[95] Therefore, in order to prevail at the subsequent *Dubay* hearing, the government must rebut the appellant's contention beyond a reasonable doubt.

In her dissent, Chief Judge Crawford, brought the majority around to the salient issue in the case. As she pointed out, "there must be more than unlawful command influence in the air."[96] The "more" is the second defense prong required by *Biagase*, which the majority failed to address before setting the ACCA's decision aside.[97] However, Chief Judge Crawford worked through the second prong and, using several facts, concluded that the defense failed to meet the initial showing that the statement "don't go soft on me now," caused the appellant harm.[98] Among the facts she used, three stand out. First, the new company commander never had a favorable recommendation concerning the Chapter 10 request; thus, the group commander did not attempt to change her recommendation. Second, the company commander approached the group commander not vice versa. Finally, and most importantly, neither the company commander nor the group commander had the final say on the Chapter 10 request. The general court-martial convening authority made that determination, and the defense produced no evidence to show the conversation between the subordinate commanders had an impact on the general court-martial convening authority.[99]

The *Lujan* case is important to JAs for several reasons. First, *Lujan* shows the CAAF's sensitivity to the words "unlawful command influence." Moreover, it demonstrates how inclined the CAAF is towards remanding a case for a fact-gathering

89. *Id*.

90. United States v. Lujan, 59 M.J. 23 (2003) (summary disposition). A "Chapter 10" refers to *Army Regulation* (*AR*) *635-200*, chapter 10 which allows an accused pending charges to request discharge in lieu of trial by court-martial. U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATION ch. 10 (19 Dec. 2003).

91. *Lujan*, 59 M.J. at 23.

92. *Id*.

93. *Id*. The company commander did not assume command until after the offenses committed by the appellant. *Id.* at 26.

94. *Id.* at 23.

95. *Id.* at 24.

96. *Id*.

97. United States v. Biagase, 50 M.J. 143, 150 (1999). The defense must show that the UCI alleged has the potential to cause unfairness. *Id*.; *see, e.g*., United States v. Stombaugh, 40 M.J. 208 (1994) (providing the appellate review of UCI).

98. *Lujan*, 59 M.J. at 26.

hearing.[100] Some issues and situations, such as the one in *Lujan*, may not come to light until the appellate phase. For issues that arise before convening authority action, as each case this year illustrates, prudence dictates a full and complete disclosure of the facts on the record. Otherwise, the convening authority, or any other offender of Article 37, may have to later state, "Quote me as saying I was mis-quoted."[101]

99. *Id.* Chief Judge Crawford noted that the convening authority would most likely have been disinclined to approve the discharge request regardless of the company commander's recommendation. He had already approved the appellant's offer to plead guilty and knew of the adverse effect the assault on a female soldier had on good order and discipline within the command. *Id.*

100. The CAAF's action in *Lujan* raises an interesting and unanswered question left for another day. What is the CAAF's role in reviewing an administrative separation action? *See* Goldsmith v. Clinton, 526 U.S. 529 (1999).

101. Watchfuleye.com, *Quotes from Groucho Marx, available at* http://watchfuleye.com/groucho.html (last visited May 25, 2004).