Revitalizing the Last Sentinel: The Year in Unlawful Command Influence

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Sirs, take your places and be vigilant.
If any noise or soldier you perceive
Near to the walls, by some apparent sign
Let us have knowledge at the court of guard.

* * *

Thus are poor servitors,
When others sleep upon their quiet beds,
Constrain'd to watch in darkness, rain, and cold.[1]

Introduction

Congress established the Court of Appeals for the Armed Forces (CAAF) as a bulwark against unlawful command influence.[2] The court, in turn, views the military judge at trial as "the last sentinel protecting an accused from unlawful command influence."[3] The CAAF reinvigorated military judges' vital role in maintaining the integrity of the military justice system last term in *United States v. Gore*,[4] in which the court upheld the military judge's decision to dismiss all charges and specifications with prejudice due to the convening authority's interference in the case. The rarity of the remedy of dismissal with prejudice for unlawful command influence,[5] coupled with the CAAF's unanimous vote upholding the military judge's application of that remedy in *Gore* reminds the judiciary of its responsibilities and rejuvenates its function as the guardians against the "mortal enemy of military justice."[6] In addition, both *Gore* and a second CAAF case involving alleged unlawful

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[1] WILLIAM SHAKESPEARE, KING HENRY VI, pt. I, act 2, sc. 1.

[2] United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986) (citing *A Bill to Unify Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 608 (1949)). UCMJ art. 37 (2002) prohibits unlawful command influence. Article 37 states, in pertinent part:

> Art. 37. Unlawfully influencing action of court
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> (a) No [convening] authority, 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 exercise of its or his functions in the conduct of the proceeding. 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. . . .

UCMJ art. 37(a). Article 37 is not a punitive article. It is enforced through the provisions of Article 98, UCMJ, which states, in pertinent part, that "Any person . . . who knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused, shall be punished as a court-martial may direct." UCMJ art. 98(b).

[3] United States v. Rivers, 49 M.J. 434, 443 (1998).

[4] 60 M.J. 178 (2004).

[5] *Gore* marks the first time in seven years that a reported opinion of the CAAF or any service court set aside a case due to unlawful command influence. Both the CAAF and the Navy-Marine Court of Criminal Appeals (NMCCA) set aside findings and sentence due to unlawful command influence issues in cases in 1997. *See* United States v. Bartley, 47 M.J. 182 (1997) (setting aside findings and sentence, but allowing rehearing, where court was not convinced beyond a reasonable doubt that command influence issue did not induce appellant's guilty plea, and where a *sub rosa* agreement existed to preclude the defense from raising an unlawful command influence motion); United States v. Plumb, 47 M.J. 771, 781 (N-M. Ct. Crim. App. 1997) (setting aside findings and sentence, but authorizing rehearing where unlawful command influence "permeated" appellant's trial and the court could not find beyond a reasonable doubt that neither findings nor sentence were tainted). Dismissal with prejudice due to unlawful command influence is exceedingly rare. "[A] rehearing is ordinarily the appropriate remedy for unlawful command influence." United States v. Baum, 30 M.J. 626, 631 (N.M.C.M.R. 1990) (citing United States v. Thomas, 22 M.J. 388, 400 (C.M.A. 1986)). One other case dismissing the charges and specifications with prejudice due to unlawful command influence is United States v. Hunter, 13 C.M.R. 53, 53 (C.M.A. 1953) (convening authority unlawfully influenced members by holding a "pretrial conference" in which the convening authority expressed the opinion that "a previous court-martial had adjudged a much too meagre [sic] punishment").

[6] *Thomas*, 22 M.J. at 393.

command influence, *United States v. Stirewalt*,[7] remind practitioners and military judges of the importance of detailed findings of fact and standards of review in the appellate litigation of these issues.

The CAAF decided a third case last term in addition to *Gore* and *Stirewalt* that included unlawful command influence allegations,[8] and the Navy-Marine Court of Criminal Appeals (NMCCA) decided two cases as well, one of which is now pending before the CAAF.[9] Neither *Stirewalt* nor the additional trio of opinions granted any relief for the unlawful command influence alleged. In fact, three of the four cases determined that the defense failed even to raise the issue with sufficient evidence to merit government rebuttal of the allegations.

This article begins with a review of the basic framework for analysis of unlawful command influence issues as set forth by the CAAF in *United States v. Biagase.*[10] Next, the article discusses two NMCCA opinions, *United States v. Toohey*[11] and *United States v. Harvey*,[12] where the court determined the defense did not present sufficient evidence to even raise unlawful command influence as an issue. Third, the article examines the CAAF's finding in *United States v. Taylor*[13]—a case involving an allegation that the convening authority was not acting impartially in carrying out his post-trial duties— that the defense did not present sufficient evidence in an issue related to unlawful command influence. Fourth, the article dissusses *United States v. Stirewalt*,[14] a case alleging unlawful command influence by the convening authority's interference with the independent discretion of a lower commander. Fifth and finally, the article discusses *Gore* and its unanimous affirmance of a military judge fulfilling his critical role as the last sentinel.

Framework for Analysis: United States v. Biagase

The CAAF clearly set forth the framework to analyze unlawful command influence issues in its 1999 decision in *United States v. Biagase*.[15] The military judge's assessment of the issue at trial, and the appellate courts' assessment of the issue on appeal, both follow a two-stage inquiry focusing first on the defense requirement to properly raise the issue, and then, if necessary, shifting the burden to the government to rebut the issue.[16]

The defense bears the initial burden of raising an unlawful command influence issue.[17] The threshold to raise the issue is low, but is more than a mere allegation or speculation.[18] The defense must produce "some evidence"[19] of facts which, if true, "constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings,"[20] or, if raised on appeal, that the proceedings were unfair.[21]

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[7] 60 M.J. 297 (2004).

[8] United States v. Taylor, 60 M.J. 190 (2004). *See infra* notes 84-116 and accompanying text.

[9] United States v. Toohey, 60 M.J. 703 (N-M. Ct. Crim. App. 2004); United States v. Harvey, 60 M.J. 611 (N-M. Ct. Crim. App. 2004), *pet. granted*, 2005 CAAF LEXIS 281 (Mar. 9, 2005). *See infra* notes 28-83 and accompanying text.

[10] 50 M.J. 143 (1999).

[11] *Toohey,* 60 M.J. at 703.

[12] *Harvey,* 60 M.J. at 611.

[13] *Taylor,* 60 M.J. at 190.

[14] 60 M.J. 297 (2004).

[15] 50 M.J. 143 (1999).

[16] *See generally id*.

[17] *Id*. at 150 (citing United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994)).

[18] *Id*. (citing United States v. Johnston, 39 M.J. 242, 244 (C.M.A. 1994)).

[19] The court described this evidentiary standard for raising the issue as the same as required to raise an issue of fact. *Id*. (citing United States v. Ayala, 43 M.J. 296, 300 (1995)).

[20] *Id*.

[21] *Id*.

Once raised, the burden shifts to the government to show either there was no unlawful command influence or the unlawful command influence will not affect the proceedings or, if raised on appeal, did not affect the proceedings.[22] According to *Biagase*, the government may carry its burden in any one of three ways. First, the government may "disprove[e] the predicate facts on which the allegation of unlawful command influence is based."[23] Second, the government can "persuad[e] the military judge or the appellate court that the facts do not constitute unlawful command influence."[24] Third, at the trial level, the government can "produc[e] evidence proving that the unlawful command influence will not affect the proceedings;"[25] on appeal, the government can "persuad[e] the appellate court that the unlawful command influence had no prejudicial impact on the court-martial."[26] Regardless of which of the three options the government chooses, its burden of persuasion is the same at trial and on appeal: beyond a reasonable doubt.[27]

Raising the Issue: United States v. Toohey *and* United States v. Harvey

The NMCCA issued two published opinions last term, *United States v. Toohey*[28] and *United States v. Harvey,*[29] examining the question of whether the defense produced "some evidence" sufficient to raise the issue of unlawful command influence. In both cases, the court determined the defense did not successfully raise the issue. Accordingly, the burden never shifted to the government to prove there was no unlawful command influence or that any influence would not affect the proceedings, or if on appeal, did not affect the proceedings.

United States v. Toohey involves an allegation of unlawful command influence in the deliberation room.[30] As part of the appellant's post-trial matters, his trial defense counsel submitted an affidavit in which the counsel related a conversation he had with one of appellant's panel members.[31] Prepared more than one year after trial, the affidavit claimed that one of the members, a major, stated that, prior to determining the announced adjudged sentence, the members originally voted for a

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[22] *Id*. at 151.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] 60 M.J. 703 (N-M. Ct. Crim. App. 2004). In *Toohey*, a general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of rape and assault consummated by a battery, in violation of UCMJ articles 120 and 128 (2002). The members sentenced the appellant to a dishonorable discharge, confinement for twelve years, forfeiture of all pay and allowances, and reduction to E-1, and the convening authority approved the adjudged sentence. *Id*. at 705. In addition to the allegation of unlawful command influence discussed here, the appellant also alleged on appeal that:

> (1) the evidence is factually and legally insufficient to sustain his conviction on the rape charge; (2) that evidence of the invocation of his right to counsel was unfairly presented to and argued before the members; (3) that the military judge erred in ruling that the appellant's possession of child pornography could be used to rebut evidence of the appellant's peacefulness; . . . and [(4)] that he is entitled to relief based upon the doctrine of "cumulative error." . . . In addition, the appellant, both through counsel and *pro se*, has raised several issues regarding the conditions of pretrial and post-trial confinement and the delays in the post-trial processing of his case.

Id. (citation omitted).

[29] 60 M.J. 611 (N-M. Ct. Crim. App. 2004), *pet. granted*, 2005 CAAF LEXIS 281 (Mar. 9, 2005).

[30] In the normal course, no party may pierce the panel members' deliberative veil, and "a member may not testify as to any matter or statement occurring during the course of the deliberations . . . ." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 606(b) (2002) [hereinafter MCM]. There are three exceptions to this general rule. Panel members may testify concerning: "whether extraneous prejudicial information was improperly brought" to a member's attention; "whether any outside influence was improperly brought to bear upon any member"; and "whether there was unlawful command influence." *Id*.

[31] *Toohey*, 60 M.J. at 718.

lighter sentence.[32] Following that vote, the member at issue said, "If you don't reconsider this, I'm leaving."[33] The record of trial disclosed that the members requested instructions on reconsideration from the military judge.[34]

Based on this evidence, the NMCCA held that the defense failed to even "raise the specter of unlawful command influence."[35] Restating the *Biagase* test to raise unlawful command influence on appeal—(1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the cause of the unfairness—the court found that "taken at face value, [the major's] comments merely show that the sentencing deliberations became somewhat heated. This is insufficient to raise the issue of unlawful command influence."[36]

The court focused on three facts to support its conclusion. First, the major's threat was "empty" because the court-martial was his place of duty and the court was "quite skeptical that he would have left his appointed place of duty without authority."[37] Second, the major was not the senior member, and he did not write or provide input into any other member's fitness report.[38] Third, and "most important, there is no indication that [the] [m]ajor . . . attempted to use his grade, or invoke the grade of some higher authority, to influence the other members."[39]

An interesting contrast to *Toohey* is the CAAF's decision two terms ago in *United States v. Dugan.*[40] In *Dugan,* the CAAF found just the opposite of the NMCCA in *Toohey*, and provides guidance for defense counsel seeking to produce "some evidence" of unlawful command influence in the deliberation room.

In *Dugan*, the appellant was convicted of wrongful use of the drug ecstasy, unauthorized absence, failing to pay a just debt, and several other miscellaneous military offenses.[41] After trial, the junior panel member provided defense counsel a clemency letter.[42] Among other concerns, the panel member stated the panel discussed a recent "Commander's Call" the convening authority held in which he discussed "the increasing problem of Ecstasy use."[43] The junior panel member claimed that, during sentencing deliberations, another member reminded the venire that the convening authority would review their sentence and they needed to "send[] a consistent message."[44] In addition, "another member pointed out that we needed to make sure it didn't look like we took the charges too lightly because those reviewing our sentence wouldn't necessarily be aware of the mitigating factors. [This] was especially important because our names would be identified as panel members."[45] Defense counsel requested a post-trial Article 39(a) session to conduct *voir dire* of the members on the issues the letter raised; the military judge denied the request.[46] The Air Force Court of Criminal Appeals found no abuse of discretion in the military judge's decision and affirmed the findings and sentence.[47]

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[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] *Id*.

[40] 58 M.J. 253 (2003). *See* Lieutenant Colonel James F. Garrett, *Recent Developments in Unlawful Command Influence*, ARMY LAW., May 2004, at 8.

[41] United States v. Dugan, 58 M.J. 253-54 (2003). *See* UCMJ arts. 112a, 86, and 134 (2002). The panel sentenced the appellant to a bad-conduct discharge, confinement for nine months, total forfeitures, and reduction to E-1, and the convening authority reduced the forfeitures but otherwise approved the adjudged sentence. *Dugan*, 58 M.J. at 254.

[42] *Dugan*, 58 M.J. at 255.

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *Id*. *See* UCMJ art. 39(a).

[47] United States v. Dugan, No. 34477, 2002 CCA LEXIS 69, *6-12 (A.F. Ct. Crim. App. 2002) (unpub.), *set aside and remanded*, 58 M.J. 253 (2003).

The CAAF held that the defense successfully raised the issue of unlawful command influence, set aside the sentence, and remanded the case for an additional fact finding hearing pursuant to *United States v. DuBay*, or if that proved impractical, a sentence rehearing.[48] Specifically, the CAAF found that "to the extent that the military judge and the Court of Criminal Appeals concluded Appellant did not meet his initial burden of raising the issue of unlawful command influence, they erred."[49] The court found that the member's letter

> contain[ed] assertions which, if true, suggest[ed] that members of Appellant's court-martial who attended the Commander's Call unfairly based his sentence, at least in part, on a concern they would be viewed unfavorably by the convening authority (their commanding officer) if they did not impose a sentence harsh enough to be "consistent' with the convening authority's "message" at the Commander's Call that drug use is incompatible with military service."[50]

The CAAF refused to ignore this possibility in *Dugan*, finding it "exactly this type of command presence in the deliberation room—whether intended by the command or not—that chills the members' independent judgment and deprives an accused of his or her constitutional right to a fair and impartial trial."[51]

Unlike the allegations in *Toohe*y, the CAAF found the member's comments in *Dugan* were more than "mere speculation because it is 'detailed' and 'based on her own observations.'"[52] In contrast, the affidavit in *Toohey* was a defense counsel's hearsay recounting of a statement made without including more than the barest context or surrounding circumstances.[53] Most importantly, the member's statement in *Toohey* did not bring the convening authority (or any member's commanding officer) into the deliberations room.

United States v. Harvey[54] is the second case from the NMCCA last term to examine the issue of whether the defense successfully raised the issue of unlawful command influence and answer it in the negative. In *Harvey*, a special court-martial convicted the appellant of various drug offenses, false official statement, conspiracy, and communicating a threat.[55] On appeal, the appellant contended that the court-martial convening authority who convened her court, a major, engaged in apparent and actual unlawful command influence by sitting in the courtroom during a portion of the proceedings.[56] The military judge *sua sponte* noted the convening authority's presence during counsel's closing arguments for the record.[57] The trial defense counsel immediately requested a mistrial "because of his presence . . . ."[58] The defense counsel contended that it was "obvious during the whole closing argument that the panel was looking over our shoulder."[59] The military judge replied that he "didn't see that," and denied the request for a mistrial, but offered to give a limiting instruction to the members and to

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[48] *Dugan*, 58 M.J. at 260. *See* United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).

[49] *Dugan*, 58 M.J. at 258.

[50] *Id*.

[51] *Id*. A military judge conducted a factfinding hearing, after which she ordered a sentence rehearing. The AFCCA affirmed the findings and sentence adjudged at the rehearing, and the CAAF recently affirmed the AFCCA. United States v. Dugan, No. 34477 (A.F. Ct. Crim. App. Oct. 25, 2004) (Opinion of the Court Upon Further Review) (unpub.), *aff'd*, 2005 CAAF LEXIS 261 (Mar. 8, 2005) (summary disposition).

[52] *Dugan*, 58 M.J. at 259 (citing United States v. Baldwin, 54 M.J. 308, 311 (2001)).

[53] *See* United States v.Toohey, 60 M.J. 703, 718 (N-M. Ct. Crim. App. 2004).

[54] 60 M.J. 611 (N-M. Ct. Crim. App. 2004), *pet. granted*, 2005 CAAF LEXIS 281 (Mar. 9, 2005).

[55] *Id*. at 612. *See* UCMJ arts. 112a, 107, 81, and 134 (2002). The members sentenced appellant to confinement for sixty days, reduction to E-1, forfeiture of $639.00 per month for two months, and a bad-conduct discharge. *Harvey*, 60 M.J. at 612.

[56] *Harvey*, 60 M.J. at 612-13. The officer in the courtroom, a major, was the convening authority when the appellant's court-martial was convened and the charges referred. "He signed the convening order, detailing five officer members. He also signed the amendment to the convening order detailing four enlisted members and removing an officer member. After challenges, one officer and three enlisted members remained to hear the case." *Id.* at 613. By the time of trial, the major was no longer the convening authority; he was the convening authority's executive officer. *Id*.

[57] *Id*.

[58] *Id*.

[59] *Id*.

allow the defense to *voir dire* any of the members.[60] The defense rejected both offers, and declined any other remedy as well.[61]

The NMCCA held that the defense did not meet its initial burden of raising the issue of unlawful command influence.[62] "The threshold for raising [unlawful command influence,] a showing of 'some evidence', is low . . . . While the threshold is low, it requires more than a speculative allegation . . . ."[63] The presence of the convening authority alone was not enough to raise the issue in the court's view, and the "trial defense counsel's motion for a mistrial amounted to nothing more than an unsupported allegation," which, when "subjected to scrutiny, is dependent on speculation, buttressed by further speculation."[64] In particular, the defense failed to set forth any evidence that any of the members saw the convening authority, or recognized him as the convening authority.[65] Most importantly, the defense presented no evidence that the convening authority unfairly influenced the members.[66] While the court "encouraged" the military judge to "inquire into these matters and make appropriate findings of fact"[67] based on the state of the record, "any suggestion that the members were focused on [the convening authority] is just that, a suggestion, assumption or speculation without deeper meaning and not supported by the record."[68] Because the defense failed to meet the threshold test to raise unlawful command influence, the court refused to order further inquiry.[69]

One judge vociferously dissented on this issue and would order a factfinding hearing on the issue.[70] He concluded that the defense counsel's statement that the panel was "looking over his shoulder" was sufficient evidence on its own to raise the issue of unlawful command influence, placing faith in the declarations of the defense counsel.[71] "When an officer of the court tells the military judge that he has seen something in the courtroom, I consider that something more than mere speculation."[72] Unfortunately to the dissenting judge, once the defense raised this allegation, "neither the trial defense counsel nor the military judge tried to get to the bottom of the factual issues inherent in this specter of unlawful command influence in the courtroom."[73]

The dissenter, in contrast to the majority, put the onus on the sentinel—the military judge—to flesh out the facts when they indicate that unlawful command influence "might have occurred under the very nose of the military judge in his courtroom."[74] Relying on pre-*Biagase* precedent, *United States v. Rosser*,[75] the dissent argued that the military judge has the duty to uncover the facts once an allegation of unlawful command influence in the courtroom is raised and a motion for mistrial made.[76]

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[60] *Id*.

[61] *Id*.

[62] *Id*. at 614.

[63] *Id*.

[64] *Id*.

[65] *Id*.

[66] *Id.*

[67] *Id*. at 614 n.2.

[68] *Id.* at 614.

[69] *Id*.

[70] *Id*. at 617 (Price, J., concurring in part and dissenting in part).

[71] *Id.* at 617-18 (Price, J., concurring in part and dissenting in part).

[72] *Id*. at 618 (Price, J., concurring in part and dissenting in part).

[73] *Id*. (Price, J., concurring in part and dissenting in part).

[74] *Id*. at 619 (Price, J., concurring in part and dissenting in part).

[75] 6 M.J. 267 (C.M.A. 1979).

[76] *Harvey*, 60 M.J. at 618-19 (Price, J., concurring in part and dissenting in part).

Rosser, in turn, involved a company commander, the accuser in the case, who, among other activities, "eavesdropped" on the court-martial proceedings by stationing himself outside the door "and at one point looking in the courtroom window" where witnesses for both the government and defense observed his conduct.[77] The military judge at trial denied a motion for a mistrial which the Court of Military Appeals (COMA), the CAAF's predecessor, held was an abuse of discretion, finding that the judge was "insensitive to the delicate sphere of appearances at stake . . . ."[78] In particular, the COMA declared that the military judge's "inquiry into the particular facts and circumstances . . . was so perfunctory as to provide an inadequate factual basis for his decision."[79] Further, the COMA found the judge "remiss in his affirmative responsibilities to avoid the appearance of evil in his courtroom and to foster public confidence in court-martial proceedings."[80]

The majority in *Harvey* distinguished *Rosser*. The majority described the company commander's actions in *Rosser* as "patent meddling in the proceedings," and his presence, including looking through the courtroom window, as "ubiquitous."[81] These facts, according to the majority in *Harvey*, would meet even the *Biagase* test to raise the issue of unlawful command influence.[82] In contrast, "the only undisputed fact" in *Harvey*, "is that the officer who convened the court-martial was present in the courtroom during closing arguments."[83]

Both sides of the argument are joined, and the CAAF, which granted review of the unlawful command influence issue in *Harvey*, will weigh in soon. The CAAF could conceivably reach a middle ground, reaffirming the military judge's duty to flesh out the facts when the defense alleges unlawful command influence in the courtroom, but only after the moving party, the defense, sets forth the bare *Biagase* minimum—*some evidence* of those facts beyond a mere allegation. The defense's failure in *Harvey* to accept the military judge's offer to *voir dire* the members on the issue could prove critical—and fatal—to the defense.

Inflexible Attitude Toward Post-Trial Duties: United States v. Taylor

The convening authority is the centralized power that exercises three critical functions in the military justice system: he exercises prosecutorial discretion when he refers cases to trial by court-martial; he selects the members who will render a verdict in the case and, if necessary, adjudge a sentence; and he acts impartially to review the findings and sentence.[84] This consolidation of power is historically a lightning rod for criticism of the military justice system.[85]

"In the performance of post-trial duties, a convening authority acts in a "role . . . similar to that of a judicial officer."[86] The accused's right to an individualized and impartial review of his sentence "is violated where a convening authority cannot or will not approach post-trial responsibility with the requisite impartiality. Under such circumstances, a convening authority must be disqualified from taking action on a record of court-martial."[87] Convening authorities are disqualified from performing their post-trial duties for two reasons: first, if the convening authority is an "accuser" (the person who preferred

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[77] *Rosser*, 6 M.J. at 269-70.

[78] *Id*. at 273.

[79] *Id*.

[80] *Id*.

[81] *Harvey*, 60 M.J. at 614 (citing *Rosser*, 6 M.J. at 271-72).

[82] *Id*.

[83] *Id*.

[84] *See, e.g*., MCM, *supra* note 30, R.C.M. 407, 503, and 1107. *See also* UCMJ arts. 22-25, 60 (2002).

[85] *See, e.g*., United States v. Crossley, 10 M.J. 376 (C.M.A. 1981):

> Among the most vehement complaints against military justice are those which concern the role of the military commander, who has the responsibility for maintaining discipline and yet appoints the court-martial members and reviews the findings and sentence. Congress has made the determination that in this situation a commander may "carry water on both shoulders."

Id. at 379 (Everett, C.J., concurring).

[86] United States v. Fernandez, 24 M.J. 77, 78 (C.M.A. 1987) (citing United States v. Boatner, 43 C.M.R. 216 (C.M.A. 1971)).

[87] United States v. Davis, 58 M.J. 100, 102 (citing *Fernandez*, 24 M.J. at 79, United States v. Howard, 48 C.M.R. 939, 944 (C.M.A. 1974)).

the charges, ordered another to prefer the charges, or has an other than official interest in the outcome of the case);[88] second, if he "display[s] an inelastic attitude toward the performance of [his] post-trial responsibility."[89] This is not a pure unlawful command influence issue; however it merits discussion with other unlawful command influence cases due to its nature—inflexibility on the part of the convening authority that results in unfairness to the accused.

United States v. Taylor[90] concerns the latter reason for convening authority post-trial disqualification—an allegation that the convening authority should be disqualified from acting post-trial because he displayed an inelastic attitude toward those duties. *Taylor* reinforces the principle that the convening authority may disavow attempts to impute such an attitude to him.

During appellant's sentencing hearing for his conviction for viewing pornography on a government computer and dereliction of duty,[91] the military judge refused to admit adverse personnel records due to administrative mistakes in their preparation.[92] Eight days later, the trial counsel published an article in the base newspaper warning commands of the consequences of shoddy personnel records.[93] The trial counsel stated that "In a recent court-martial the panel was not given a complete picture of the member's military service record including numerous adverse actions . . . ."[94] The trial counsel continued:

> The interests of justice were clearly not met . . . the members were never informed of the full measure of [the accused's] previous [involvement with the UCMJ]. Further, they were not informed that he was not a good candidate for rehabilitation as evidenced by his failure to properly respond to lesser forms of corrective measures." The article then reiterated, "Justice was not served."[95]

Although the article did not specifically name the appellant, the proceeding described in the article was easily tied to the appellant's trial.[96] The defense sought to disqualify the staff judge advocate (SJA) and the convening authority from participating in post-trial review of the case if the article could be imputed to either party.[97] While the SJA conceded that the article could be imputed to him, he nonetheless failed to disqualify himself from providing the post-trial recommendation to the convening authority.[98] The convening authority failed to recuse himself, and took two additional actions.[99] First, prior to taking action on the case, the convening authority signed an indorsement to the SJA recommendation stating that he was "neither involved in the writing of, nor has my action been influenced in any way by the newspaper article" at issue.[100] Second, after he took action on the case approving the adjudged sentence, he executed an affidavit stating that, prior to the defense calling his attention to the trial counsel's article, he was "unaware of its existence" and "played no role in the preparation or publication of the article."[101] Finally, the convening authority stated in the affidavit that he "did not allow any information in the article brought to my attention by the defense to influence my decision."[102]

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[88] *Id.* (citing United States v. Voorhees, 50 M.J. 494 (1999); United States v. Crossley, 10 M.J. 376 (C.M.A. 1981); United States v. Conn, 6 M.J. 351 (C.M.A. 1979); United States v. Jackson, 3 M.J. 153 (C.M.A. 1977)). *See also* UCMJ art. 1(9).

[89] *Davis,* 58 M.J. at 102 (citing *Fernandez*, 24 M.J. at 79; *Howard***,** 48 C.M.R. at 944)).

[90] 60 M.J. 190 (2004).

[91] *See* UCMJ art. 92. The members sentenced the appellant to a bad-conduct discharge and reduction to E-1. *Taylor*, 60 M.J. at 191.

[92] *Taylor*, 60 M.J. at 191.

[93] *Id.* at 191-92.

[94] *Id.*

[95] *Id*. at 192 (quoting trial counsel's article in the base newspaper).

[96] *Id.*

[97] *Id*. As to the convening authority, the defense counsel noted that he "is the first person named as part of the [newspaper] Editorial Staff." *Id*.

[98] *Id*.

[99] *Id.* at 192-93.

[100] *Id*.

[101] *Id*. at 193.

[102] *Id*.

The CAAF held that the convening authority was not disqualified from participating in the post-trial review.[103] The SJA was disqualified, however, as he candidly admitted the article could be imputed to him.[104] Accordingly, the CAAF remanded the case for a new post-trial review and action by a different staff judge advocate.[105] While the court applied a *de novo* standard of review to the question of whether the SJA or convening authority were disqualified, the defense "has the initial burden of making a prima facie case" for disqualification.[106] Based on the convening authority's uncontradicted affidavit denying knowledge or imputation of the trial counsel's article, the defense did not carry that burden.[107]

Practitioners should compare last term's CAAF decision in *Taylor* to *United States v. Davis,* decided two terms ago.[108] Davis was convicted of absence without leave and drug use.[109] Defense counsel submitted a post-trial affidavit objecting to the convening authority taking action on the case, citing several earlier statements the convening authority made, including that "people caught using drugs would be prosecuted to the fullest extent, and if they were convicted, they should not come crying to him about their situations or their families[']."[110] Despite the defense objection, the convening authority took action, approving the sentence as adjudged.[111] Of note, the SJA's addendum was silent as to the objection and alleged comments.[112] The CAAF set aside the action and remanded the case for a new review and action before a different convening authority, finding that the convening authority's comments were the "antithesis to the neutrality required . . . ."[113]

In *Taylor*, the CAAF referred to *Davis* as an example of a case where a convening authority was disqualified due to his remarks reflecting "an inflexible attitude toward the proper fulfillment of post-trial responsibilities."[114] "Concern for both fairness and integrity suggests that these neutral roles cannot be filled by someone who has publicly expressed a view prejudging the post-trial review process's outcome."[115] The difference in *Taylor* is that the convening authority did not make the questionable remarks nor could they be imputed to him, did not endorse the remarks, and specifically disavowed that the remarks influenced his action in the case. The convening authority's steps to disavow and distance himself from the article "disprove[d] the very premise on which the defense's challenge . . . was based."[116]

Interfering with Lower Commander's Independent Discretion: United States v. Stirewalt

One of the basic principles of the military justice system is that every commander at every level must exercise independent discretion in military justice matters.[117] "A superior commander may not limit the discretion of a subordinate commander to act on cases over which" the superior has not withheld jurisdiction.[118] This basic principle often collides with

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[103] *Id*. at 194.

[104] *Id*.

[105] *Id.* at 196.

[106] *Id*. at 194 (citing United States v. Wansley, 46 M.J. 335, 337 (1997)).

[107] *Id.*

[108] 58 M.J. 100 (2003).

[109] *Id*. at 101. *See* UCMJ arts. 86 and 112a (2002). The members sentenced him to a bad-conduct discharge and confinement for three months. *Davis*, 58 M.J. at 101.

[110] *Davis*, 58 M.J. at 102-03.

[111] *Id.* at 102.

[112] *Id.*

[113] *Id*. at 104.

[114] United States v. Taylor, 60 M.J. 190, 193 (2004) (citing *Davis*, 58 M.J. at 103).

[115] *Id*.

[116] *Id*. at 194.

[117] MCM, *supra,* note 30, R.C.M. 306(a). *See also id.* R.C.M. 401(a) (discussion); United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956).

[118] MCM, *supra*, note 30, R.C.M. 306(a).

the duty of superiors to mentor their subordinates in all matters germane to command, including maintaining good order and discipline in their units.

> The fine line between lawful command guidance and unlawful command control is determined by whether the subordinate commander, though he may give consideration to the policies and wishes of his superior, fully understands and believes that he has a realistic choice to accept or reject them. If all viable alternatives are foreclosed as a practical matter, the superior commander has unlawfully fettered the discretion legitimately placed with the subordinate commander.[119]

In *United States v. Stirewalt*,[120] the CAAF faced the issue of whether a commander "unlawfully fettered" his subordinate's discretion. Under the facts of the case, the CAAF answered that question in the negative, although the practitioner is left wondering whether that is the correct result.

The CAAF opinion in *Stirewalt* is the fourth in a somewhat unusual path of appellate review. A general court-martial originally convicted Stirewalt of numerous consensual and nonconsensual sexual offenses, including maltreatment by sexual harassment, rape, forcible sodomy, assault consummated by a battery, and adultery, and sentenced him, *inter alia*, to ten years confinement and a dishonorable discharge.[121] The Coast Guard Court of Criminal Appeals (CGCCA) set aside the conviction for some of the offenses, including rape, forcible sodomy, assault consummated by a battery, and indecent assault, due to the military judge's erroneous exclusion of evidence under Military Rule of Evidence 412.[122]

On rehearing for the offenses the CGCCA set aside and resentencing for the remaining original offenses, Stirewalt moved to dismiss all charges and specifications due to unlawful command influence.[123] Specifically, Stirewalt contended, among other allegations,[124] that unlawful command influence tainted the original decision to order an Article 32 investigation of the charges.[125]

> Although the military judge denied Stirewalt's motion to dismiss, he did order several remedial measures that he characterized as "necessary to ensure that the accused receives a fair trial and to restore the public confidence in the present case." The military judge found no unlawful command influence in terms of the initial referral of the charges or any "taint" of the member pool, but he did conclude that the Government had failed to demonstrate beyond a reasonable doubt that improper interference with witnesses had not occurred. He also found that the Article 32 investigating officer "was not aggressive enough in his attempts to shield himself from subsequent action on the same case that he served as the [investigating officer]."
>
> In light of those conclusions the military judge ordered that certain steps be taken to ensure full access to witnesses by the defense and that the convening authority designate a new place of trial. He also ordered that the Article 32 investigating officer take no further steps with regard to the case and remove himself from the rating chain of the assistant trial counsel.[126]

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[119] United States v. Rivera, 45 C.M.R. 582 (A.C.M.R. 1972) (citations omitted).

[120] 60 M.J. 297 (2004).

[121] *Id*. at 298. *See* UCMJ arts. 93, 120, 125, 128, and 134 (2002).

[122] *Stirewalt*, 60 M.J. at 299. *See* United States v. Stirewalt, 53 M.J. 583 (C.G. Ct. Crim. App. 2000).

[123] *Stirewalt*, 60 M.J. at 299.

[124] Stirewalt contended that four actions of the command constituted unlawful command influence:

> (1) the original decision to request an investigation of the charges pursuant to Article 32, UCMJ, 10 U.S.C. § 832 (2000) was tainted by unlawful command influence; (2) witnesses had been discouraged from coming forward on his behalf; (3) actions of the command had tainted the member pool; and (4) the Article 32 investigating officer lacked independence and later improperly acted as the staff judge advocate in providing advice on the case.

Id.

[125] *Id*.

[126] *Id*.

The military judge addressed the issue as to whether higher commanders unlawfully interfered with the decision to order the Article 32 investigation in some detail.[127] He determined that, prior to ordering an Article 32 investigation, the commander who ordered the investigation and subsequently recommended referral of the charges to a general court-martial, a lieutenant commander (O-4), was involved in a four-way conversation with his immediate supervisor, a captain (O-6), that officer's immediate supervisor—another captain, and a third captain in the chain of command.[128] During that conversation, one of the captains "very clearly and forcefully" told the lieutenant commander "that the allegations were too serious to go to captain's mast and that they warranted an airing at an Article 32."[129] The military judge also determined that, during this same discussion, another of the captains made it clear to the lieutenant commander "that the decision as to the disposition of the case was his to make."[130]

Although neither the captain who made the "very clear[] and forceful[]" statements nor the lieutenant commander could specifically recall the conversation, one of the other captains who participated in the conversation testified that he "did not view [the] statement as constituting any constraint on [the] [l]ieutenant [c]ommander," and the lieutenant commander was "'obviously' the decision maker in regard to the necessity of an Article 32 investigation."[131]

The military judge denied the defense motion to dismiss, and the defense filed a petition for extraordinary relief in the nature of a writ of *mandamus* with the CGCCA.[132] The CGCCA denied the writ.[133] Stirewalt ultimately pled guilty to consensual sodomy, and, pursuant to his pretrial agreement, the government dismissed the rape, forcible sodomy, assault, and indecent assault charges with prejudice.[134] "At that point, Stirewalt stood convicted of sexual harassment, adultery, and indecent assault from his first trial and of sodomy from the rehearing. The military judge sentenced Stirewalt to 90 days' confinement, reduction in pay grade to E-4, and a reprimand. The convening authority approved the sentence."[135] In the course of Stirewalt's Article 66 appeal, the CGCCA affirmed the findings and sentence.[136]

The CAAF affirmed the CGCCA's decision.[137] The CAAF reviewed the military judge's findings of fact, described above, for clear error, and found none.[138] Moreover, the facts the military judge found did not support a *de novo* conclusion that unlawful command influence occurred.[139] "There is nothing inherently suspect about an officer in [the] [l]ieutenant [c]ommander's . . . position electing to consult with his chain of command concerning potential investigative and procedural options when faced with allegations of serious misconduct."[140] Additionally, the subordinate officer, the lieutenant commander initiated the conversation.[141] Although the statement that the allegations were too serious to go to a captain's mast, while "viewed in a void could be seen as unlawful command influence," the military judge filled that void "with

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[127] *Id*. at 301.

[128] *Id*.

[129] *Id*.

[130] *Id*.

[131] *Id*.

[132] *Id*. at 299. *See* Stirewalt v. Pluta, 54 M.J. 925, 927 (C.G. Ct. Crim. App. 2001). The defense requested that the court order the convening authority to withdraw and dismiss the charges "or, alternatively, that the convening authority be disqualified and a substitute general court-martial convening authority be appointed." *Id.* at 926.

[133] *Pluta*, 54 M.J. at 927.

[134] *Stirewalt*, 60 M.J. at 299.

[135] *Id*.

[136] *Id*. at 300. *See* United States v. Stirewalt, 58 M.J. 552 (C.G. Ct. Crim. App. 2003). *See also* UCMJ art. 66 (2002). Interestingly, Stirewalt's ultimate sentence would not normally entitle him to full appellate review before the court of criminal appeals, the jurisdiction of which is limited to service members with an approved sentence that includes a discharge and/or confinement for one year or more. *Id*. art. 66(b)(1).

[137] *Stirewalt*, 60 M.J. at 298.

[138] *Id*. at 300. "Where the issue of unlawful command influence has been litigated on the record, we review the military judge's findings of fact under a clearly erroneous standard. United States v. Johnson, 54 M.J. 32, 34 (2000). The question of command influence flowing from those facts, however, is a question of law that we review de novo." *Id*.

[139] *Id*.

[140] *Id*. at 301.

[141] *Id*.

extensive factfinding regarding the context in which it was made and a thorough legal analysis" resulting in the determination that no unlawful command influence occurred.[142]

While at first blush, the CAAF's opinion seems obvious, the defense argument gains traction when one examines what remained of the government's case at the end of the day. What began as a case involving allegations of rape, forcible sodomy, and indecent assault, ended as a mixed plea to consensual sodomy, adultery, maltreatment by sexual harassment, and indecent assault, which resulted in a sentence beneath the jurisdictional appellate review authority of the courts of criminal appeals. The offenses of which the appellant ultimately stood guilty could legitimately be disposed of at a forum less than a general court-martial. In this context, the defense argument that unlawful command influence tainted the decision to order an Article 32 investigation is more persuasive. This interference also could not help but taint the same commander's decision to forward the original charges instead of taking action at his level, and resulted in the original trial by general court-martial. Those original charges ultimately fizzled to leave offenses that, on their own, may not merit a pretrial investigation and general court-martial.

On the other hand, one can agree with the CAAF that the military judge's inquiry into the matter and detailed findings of fact dispelled the defense contention. Those findings of fact, however, were based in part on the testimony of one of the higher ranking officers involved in the conversation that allegedly influenced the lieutenant commander who ordered the Article 32 investigation, specifically that higher ranking officer's opinion that the statements did not constrain the lieutenant commander's discretionary exercise of authority.[143] This type of self-serving testimony should not carry much weight. When one takes into account the other shenanigans the military judge found the command and SJA engaged in throughout this proceeding,[144] there is hardly resounding proof—beyond a reasonable doubt—that unlawful command influence did not taint this trial.

Witness Intimidation: United States v. Gore

The military judge's extensive factfinding also took center stage in *United States v. Gore.*[145] In *Gore*, the CAAF issued a unanimous decision affirming the power of the military judge to dismiss charges and specifications with prejudice in the face of unlawful command influence, despite the fact that the appellant negotiated a pretrial agreement prior to the facts which gave rise to the unlawful command influence. In so doing, the court clarified the appellate standards of review of the military judge's actions when faced with allegations of unlawful command influence, and reaffirmed the role of the military judge as the "last sentinel" to protect a court-martial from unlawful command influence. The military judge's use of compelling and descriptive findings of fact, particularly in describing the specific demeanor of witnesses that led him to conclude that certain witnesses were and were not worthy of belief, resulted in the CAAF's affirmance of the judge's remedy of dismissal with prejudice.

The government charged Gore with desertion (two specifications) and unauthorized absence.[146] He negotiated a pretrial agreement whereby he agreed to plead guilty.[147] The unlawful command influence involved a "commanding officer who ordered a senior enlisted chief petty officer not to testify in support of Appellant and may have deterred others at the command from testifying on behalf of Appellant."[148]

A couple of days prior to trial the defense traveled to Gore's unit to obtain sentencing witnesses.[149] The defense counsel went to the chief petty officer's (chief) office, where the chief "immediately said, 'Well, I'll testify. Do you need me to

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[142] *Id*.

[143] *Id*.

[144] *See supra* note 126 and accompanying text.

[145] 60 M.J. 178 (2004).

[146] *Id*. at 179. *See* UCMJ arts. 85 and 86 (2002).

[147] *Gore*, 60 M.J. at 179.

[148] *Id*. at 178-79.

[149] *Id*. at 180.

testify? I'll testify.'" [150] The chief opined that he thought the Appellant "was a really nice guy . . . [and that he] should be retained."[151] The chief also identified three senior enlisted personnel who "felt the same way" about Gore, agreed to distribute additional questionnaires to other potential defense witnesses, and arranged for the defense counsel to return the next day for the questionnaires.[152]

On the afternoon of the day before trial, the defense returned to the unit and contacted the chief, concerned that he had not contacted the defense or provided the questionnaires.[153] The chief met the defense counsel and told him, "I can't help you . . . I'm not testifying . . . My skipper said no way. He said that I can't help Constructionman Gore."[154] The chief "also refused to testify telephonically."[155] As to the questionnaires the chief agreed to distribute, the defense counsel testified that the chief stated, "[M]y CO said we cannot help Constructionman Gore. End of story," and that the conversation should remain "between me and you."[156]

The defense counsel left and returned shortly with his supervising officer-in-charge, and the following conversation ensued:

> [The chief] stated that neither he, nor anyone else in his command, would testify on behalf of Appellant in light of the order by the commanding officer, Commander Morton. [The chief] "alluded to negative ramifications that would stem from testifying and terminated the meeting . . . ." He reinforced this point when he grabbed his collar device and stated that he attained his present grade of chief in 11 years when he was expected to make it in 16 years and that one gets ahead by not bucking the system.[157]

Based on these events, the defense counsel "prepared a Motion to Dismiss due to unlawful command influence and informed trial counsel of this issue." [158] The chief ultimately arrived at the trial location and the defense counsel thought that the command resolved the "problem and [the chief] would testify favorably for the defense as he had initially indicated he would."[159] Accordingly, the defense counsel met with the chief one more time to discuss his testimony.[160] The chief once again told the defense counsel that he would not help them, so the defense proceeded with its motion to dismiss, and detailed defense counsel became the first witness. [161] The defense counsel testified that the chief told him:

> "Lieutenant, I'm here. The CO told me to be here, but I'm not going to be any help to you. The CO told me to toe the line and that's what I'm doing. I'm not testifying." [The chief] further stated that the accused was going to be released within 30 days and the accused was not worth risking his career. He conceded that the commanding officer did exert pressure over his prospective testimony. [Defense counsel] also testified that [the chief] told him that "he had to recognize that the Commanding Officer authorized his fitness reports."[162]

The defense counsel continued, testifying that the chief also said that:

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[150] *Id*.

[151] *Id*.

[152] *Id*.

[153] *Id*.

[154] *Id*.

[155] *Id*.

[156] *Id*.

[157] *Id*. at 181.

[158] *Id*.

[159] *Id*.

[160] *Id*.

[161] *Id*.

[162] *Id.*

> "Even if the CO is exposed, he's going to get a slap on the wrist. He's . . . either going to make Captain or he's a Captain-select. That's the way it works, Lieutenant." Finally, [the defense counsel] testified that [the chief] stated that the commanding officer had called him on the telephone the night before trial and told him "You're going to Pensacola and you know what the . . . command's position is on this matter." According to [the defense counsel], [the chief] said that if he did testify that he would "testify consistent with the command's wishes." [The chief] informed [the defense counsel] that there would be repercussions if he testified in support of Appellant. [The chief] did not state that the commanding officer threatened that, rather, he indicated that he believed he "would never make Senior [chief]" if he testified. [The defense counsel] testified that in a final conversation, shortly before the court-martial began, [the chief] stated that he had "a family to protect . . . [and he is] going to say exactly what the command wants [him] to say."[163]

The defense counsel's supervisor also sat in on this meeting, and testified consistent with the defense counsel.[164] The chief also took the stand.[165] He claimed that he thought he was there as a "command representative" and not as a witness, because he had "nothing positive to say" about Gore.[166] He was extremely uncomfortable testifying, and repeatedly contradicted and denied the details of his conversations with the defense counsel and the defense counsel's supervisor.[167] This included denying initially telling the defense that he would testify; in fact the chief "denied any knowledge of even being a witness."[168]

The government called the convening authority as a witness. The convening authority agreed he told the chief he was not going to go to appellant's trial, but that it was because he was upset that the defense counsel came into his "spaces, approaching one of my [c]hiefs without my knowledge, and asking them or ordering them to come to [the trial] [to testify]. So, I told the [c]hief I didn't want him to go . . . and . . . that was all there was to it."[169] Further, the convening authority testified that he thought once a pretrial agreement was arranged, the proceeding was a "done deal."[170] The convening authority denied he "did anything to influence the court-martial proceedings."[171]

Following this hearing into the substance of the defense motion, the military judge found that the defense carried its burden "by a rather exceeding [sic] level," of producing "some evidence" that unlawful command influence occurred, and that it had the potential to cause unfairness in the proceedings.[172] The military judge also determined that the government did not carry its burden of refuting the evidence, or of proving that it would not affect the proceedings beyond a reasonable doubt.[173] Accordingly, based on the egregious nature of the unlawful command influence, the military judge dismissed the charges and specifications with prejudice.[174]

Specifically, as the CAAF framed the issue:

> The contradictory testimony of the witnesses presented a credibility issue for the military judge. His detailed findings explain his reasons for believing the original defense counsel and [his supervisor] and for not believing [the chief] and the [convening authority]. The military judge found that, "the command acted

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[163] *Id*.

[164] *Id*. at 182-83.

[165] *Id*. at 181.

[166] *Id*. at 182.

[167] *Id*.

[168] *Id*.

[169] *Id*. at 183.

[170] *Id*.

[171] *Id*. at 184.

[172] *Id*. at 183. The military judge made this determination following the testimony of the defense counsel, the defense counsel's supervisor, and the chief. The defense rested on the motion following the testimony of those three witnesses, the judge entered his ruling on the "some evidence" issue, and then the prosecution called the convening authority as its only witness. *Id*.

[173] *See generally id*. at 184.

[174] *Id*.

> in a manner which would constitute unlawful command influence" and dismissed the case with prejudice, stating, "The carcinoma that is undue command influence must be cut out and radically disposed of."
>
> The judge reasoned that the [convening authority] improperly "controlled" a prospective defense sentencing witness. This resulted in changing the witness's anticipated testimony that Appellant should be retained into testimony that only supported the command decision to court-martial Appellant. In fashioning a remedy of dismissal with prejudice, the military judge stated that "the evil here spreads far beyond the four corners of this case . . . ."[175]

The government appealed the military judge's decision to the NMCCA under the provisions of Article 62, UCMJ.[176] The NMCCA remanded the case with instructions for the military judge to prepare additional findings of fact and conclusions of law concerning the decision to dismiss with prejudice.[177] The military judge complied with the order, and "reaffirmed his initial evaluation of the unlawful command influence and its impact on the case,"[178] finding that "there could not be a more crystalline example of unlawful command influence"[179] and that "the only remedy that addressed the rabid form of unlawful command influence placed before the court was dismissal with prejudice."[180]

On further review, the NMCCA agreed that there was unlawful command influence, but concluded that the military judge abused his discretion in fashioning a remedy, because the illegality only affected the sentence.[181] Accordingly, the NMCCA ordered the military judge to "select an appropriate remedy, short of dismissal of the charges, commensurate with the degree and extent of the unlawful command influence."[182] Gore appealed the NMCCA decision to CAAF.

The CAAF unanimously reversed the NMCCA and reinstated the military judge's ruling dismissing the charges with prejudice.[183] The court reviewed the military judge's findings of fact for *clear error*,[184] and the selection of an appropriate remedy for an *abuse of discretion*.[185]

This selection of an abuse of discretion standard of review appeared at first glance to depart from the court's prior analysis of unlawful command influence issues on appeal. Not so, according to the court.

> Simply stated, our prior cases have addressed only what a military judge can do, not what the military judge must do, to cure (dissipate the taint of the unlawful command influence) or to remedy the unlawful command influence if the military judge determines it cannot be cured. This distinction has an important impact as to the standard of review in the analysis of a command influence issue.[186]

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[175] *Id*. (citation omitted).

[176] *Id*. at 179. *See* UCMJ art. 62 (2002).

[177] *Gore*, 60 M.J. at 179 (citing United States v. Gore, NMCM No. 200202409, slip op. at 2 (N-M. Ct. Crim. App. 2002) (unpub.)).

[178] *Id*. at 184.

[179] *Id*.

[180] *Id*.

[181] *Id*. *See* United States v. Gore, 58 M.J. 766, 788 (N-M. Ct. Crim. App. 2003). The lower court listed other possible remedies the military judge could employ. *Id*. at 787.

[182] *Gore*, 58 M.J. at 788 (quoted in *Gore*, 60 M.J. at 184).

[183] *Gore*, 60 M.J. at 189.

[184] *Id*. at 185. Although the court deferred to the military judge's findings of fact in the absence of clear error because it was reviewing the propriety of a government appeal under Article 62, UCMJ, the court nonetheless applies the same standard in other contexts. For example, even where the court applies a *de novo* standard of review, it defers to the trial judge's findings of fact in the absence of clear error. *See, e.g.*, United States v. Melanson, 53 M.J. 1 (2000) (resolving a question of jurisdiction, a classic *de novo* issue, primarily by deferring to trial judge's findings of fact). On other issues of command influence, where the military judge does not dismiss the case, the court also "reviews the military judge's findings of fact under a clearly-erroneous standard, but we review *de novo* 'the question of command influence flowing from those facts.'" United States v. Argo, 46 M.J. 454, 457 (1997) (quoting United States v. Wallace, 39 M.J. 284, 286 (C.M.A. 1994)). *See also* United States v. Stirewalt, 60 M.J. 297, 300 (2004) ("Where the issue of unlawful command influence has been litigated on the record, we review the military judge's findings of fact under a clearly erroneous standard. United States v. Johnson, 54 M.J. 32, 34 (2000). The question of command influence flowing from those facts, however, is a question of law that we review de novo").

[185] *Gore*, 60 M.J. at 187.

[186] *Id*. at 186.

Where the military judge takes corrective action and concludes that the taint of unlawful command influence is purged, the court reviews the judge's actions *de novo*.[187] "Our task on appeal [in such cases is] . . . to determine beyond a reasonable doubt if the military judge was successful in purging any residual taint from the unlawful command influence."[188] In those cases, the court's *de novo* review "ensure[s] that the unlawful command influence had no prejudicial impact on the court-martial."[189]

Here in contrast, the military judge terminated the proceedings, so there was no need for the court to review *de novo* whether any prejudice remained—obviously where no case remains no prejudice remains either. The issue is whether the military judge "erred in fashioning the remedy for the unlawful command influence that tainted the proceedings."[190] The CAAF determined this issue is reviewed for an abuse of discretion.[191]

The abuse of discretion standard of review "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range."[192] While the court has long held that dismissal is a drastic remedy for unlawful command influence, "dismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings."[193] The CAAF found that the military judge "precisely identified the extent and negative impact of the unlawful command influence in his findings of fact."[194] The military judge explained in detail why he found the testimony of the defense counsel and his supervisor credible and the testimony of the chief petty officer incredible, and buttressed that explanation with extensive findings of fact concerning the witness' demeanor.[195] "The military judge further concluded that the Government failed to prove that the unlawful influence had no impact on the proceedings."[196]

The judge also explained why he determined any remedy less than dismissal with prejudice was insufficient. Dismissal without prejudice and allowing for a re-referral was insufficient because it "would not have removed the pool of prospective witnesses from the firm grasp of an interloping commanding officer who, as [the chief] noted, writes the fitness reports of prospective witnesses."[197] The military judge rejected other remedies as well, concluding that there was no chance for a fair trial and "the only available remedy was dismissal with prejudice."[198]

In particular, the CAAF noted that Gore's negotiation of a pretrial agreement did not undermine the military judge's conclusions, because the existence of a pretrial agreement "does not mean that he is not entitled to a fair trial . . . Appellant had not yet entered pleas and remained free to plead not guilty. We view the possible future guilty plea of Appellant as irrelevant."[199] A "negotiated future guilty plea did not afford the commanding officer license to violate the mandate of Article 37, UCMJ, prohibiting unlawful command influence."[200]

What should practitioners and military judges conclude from *Gore*? More importantly, what should practitioners and military judges *not* conclude from *Gore*? Certainly, the CAAF's opinion sends the message that the court will "watch the back" of military judges who exercise their considerable discretion and conclude that dismissal is the appropriate remedy for

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[187] *Id*. (citing United States v. Biagase, 50 M.J. 143, 151 (1999); United States v. Rivers, 49 M.J. 434, 443 (1998)).

[188] *Id*.

[189] *Id*.

[190] *Id*. at 186-87.

[191] *Id*. at 187.

[192] *Id*.

[193] *Id*. (citations omitted).

[194] *Id*.

[195] *Id*. at 187-88.

[196] *Id*. at 188.

[197] *Id*. at 189.

[198] *Id*.

[199] *Id*.

[200] *Id*.

unlawful command influence. As *Gore* demonstrates, in order to merit the CAAF's affirmance, the military judge must back up that exercise of discretion with detailed and comprehensive findings of fact.

Gore, however, does *not* stand for the principle that the CAAF *agrees* with the military judge's action in the case. Dismissal is a last resort—even where a military judge finds unlawful command influence occurred. At its essence, the CAAF's opinion is a resounding affirmance of the *standard of review* it determined applied in the case—abuse of discretion.

The standard of review, that is, the amount of deference accorded a trial judge's decision, is the key to understanding the CAAF's opinion in *Gore* and is the enduring legacy of the case. As the court stated,

> An abuse of discretion means that 'when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'[201]

In another context, the court described the abuse of discretion standard of review as follows: "To reverse for an abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged action must . . . be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous,' in order to be invalidated on appeal."[202]

In applying an abuse of discretion standard of review, the court accepted the military judge's findings of fact in the absence of clear error. This "clearly erroneous" standard is also extremely broad. "A frequently quoted definition of this standard of review is this colorful description: 'At least one court has defined the clearly-erroneous standard by stating that it must be 'more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.'"[203]

The CAAF applied the abuse of discretion standard of review, including finding no clear error in the military judge's findings of fact, "mindful that as to this sensitive issue, the judge's evaluation of the demeanor of the witnesses is most important."[204] The military judge's findings of fact were very comprehensive in this regard, describing in very specific detail the chief petty officer's demeanor while testifying. As found by the military judge:

> "[The chief's] demeanor continued to betray dishonesty, both in the ashen tone of his skin, which varied as his testimony continued, and his constant movement in the witness box." Also, "his face was red and head bowed when answering the question," he appeared to be "acutely uncomfortable," and "his eyes were averted from the direction of the Court." [The chief] appeared to the court as being under "considerable duress." He was a man desperate to please his commanding officer. He impressed the court as a witness "who did not feel free to express his true opinions or accurately recount what he knew to be true." The chief, "under rather intense questioning from the Court finally conceded that he had been told by the commanding officer that he was not going to testify in the case." The military judge found that this concession ran "afoul of the chief's testimony that he did not know that he was desired as a witness." He conceded to the court that "he did in fact tell detailed defense counsel that it was unwise to buck the system," which caused the court to further question why he testified that he did not believe he would be called as a witness.[205]

Because the military judge's findings of fact were not clearly erroneous, and because the CAAF strictly applied the abuse of discretion standard of review that the court held applied to its review of the military judge's decision, the court reinstated the military judge's decision in the case. As the CAAF concluded, "[The military judge's] findings of fact were supported by the evidence and his decision to dismiss with prejudice was in the range of remedies available and not otherwise a clear error of judgment."[206]

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[201] *Id*. at 187 (quoting United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993)).

[202] United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (quoting United States v. Yoakum, 8 M.J. 763 (A.C.M.R. 1980)). *See* Lieutenant Colonel Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—the Why and How,* ARMY LAW., Mar. 2003, at 17-20.

[203] Ham, *supra* note 202, at 17 (quoting United States v. French, 38 M.J. 420, 425 (C.M.A. 1993) (citing Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988)).

[204] *Gore*, 60 M.J. at 187 (citation omitted).

[205] *Id*. at 188.

[206] *Id*. at 189.

Conclusion

This past term of court, the CAAF continued its primary role as the bulwark against unlawful command influence. While the court did not issue any earth-shattering pronouncements on the issue, the CAAF signaled very clearly that it will support military judges who stand guard protecting the accused from the unlawful interference of the command in courts-martial proceedings. More importantly, the CAAF will "watch the backs" of military judges who, in their role as the "last sentinel," fully and thoroughly document a decision to dismiss a case due to unlawful command influence.