

**“Physician Heal Thyself”¹:
How Judge Advocates Can Commit Unlawful Command Influence**

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Unlawful command influence (UCI) occurs whenever there is even the appearance that the authority of rank has constrained, coerced, or otherwise improperly influenced the independent discretion of any of the key players in the military justice system.² Unlawful command influence deprives Soldiers of due process³ and erodes the credibility of the military justice system in the eyes of the public.⁴ The Uniform Code of Military Justice (UCMJ) was enacted, and the Judge Advocate General’s Corps formed, largely to combat UCI.⁵ As such, it is essential that judge advocates be part of the solution rather than part of the problem when it comes to UCI.

This article will address some of the ways in which judge advocates may intentionally or unintentionally commit UCI. It will begin by describing the role of the military justice system and demonstrating how the objectives of the system are corrupted by UCI. It will then examine some of the more common areas of UCI involving judge advocates, beginning with instances where rank disparity between judge advocates results in UCI. It will then look at UCI impacting the independence of the trial judiciary, both through the judicial chain of command and through improper interference by judge advocates outside the judiciary structure. Finally, it will look at some of the other less obvious ways in which judge advocates can commit, or contribute to, UCI. The article will conclude by briefly discussing the proper role for judge advocates in identifying and eliminating UCI and preserving the integrity of the military justice system.

The military justice system is a commander’s system; it exists to allow commanders to enforce good order and discipline among their troops.⁶ To enable commanders to

effectively accomplish that task, they have been invested with significant authority within the military justice system.⁷ Yet, a commander must exercise his military justice authority in a manner that is distinct from his exercise of traditional command authority. With regard to the mission and most of the day-to-day functions of a unit, the commander is the final arbiter.⁸ If the commander sees something he does not like, he orders it changed. If he perceives a need for his command, his orders ensure the need is met.⁹ His decisions are final and, by and large, they may be as arbitrary as his judgment and the mission require.

However, a commander cannot exercise his military justice function in the same authoritarian manner in which he commands his troops.¹⁰ To the contrary, a commander must be fair and impartial when he takes adverse action; moreover, he must actively protect the system from even the perception that his command authority dictates the course of military justice. Even though it is his good order and discipline that has been effectively victimized by misconduct, a commander is expected to step aside from his traditional authoritarian role and assume the neutral and detached affect of a judicial officer.¹¹ A commander may not simply order justice done. Instead, he must set aside his personal feelings to fully and fairly evaluate each case and take only that action which is appropriate under all of the facts and circumstances.¹²

In addition to maintaining his own neutrality, a commander must work to ensure the neutrality of any of his subordinates who play parts in the military justice system. Although the members of a military organization typically exercise some level of independence in carrying out the mission of the unit, that independence is always shaped by

¹ Luke 4:23.

² See UCMJ art. 37 (2008); *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)) (Congress is equally concerned with eliminating both actual and apparent command influence.).

³ *United States v. Cruz*, 20 M.J. 873, 879–80 (A.C.M.R. 1985) (unlawful command influence poses a special threat to military due process).

⁴ *United States v. Harvey*, 64 M.J. 13, 17–18 (C.A.A.F. 2006) (noting the invidious impact of unlawful command influence on the public perception of military justice and the court’s role in curing it).

⁵ *Id.* at 30 (Baker, J., dissenting). See also Colonel Robert Burrell, *Recent Developments in Unlawful Command Influence*, ARMY LAW., May 2001, at 2.

⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. 1, pmbll., ¶ 3 (2008) [hereinafter MCM].

⁷ *Id.* R.C.M. 306(c) (describing the options available to commanders faced with the report of an offense in their unit).

⁸ U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-1 (18 Mar. 2008) (a commander is responsible for everything his unit does or fails to do).

⁹ *Id.* paras. 1-5, 3-2, and 4-3.

¹⁰ *Id.* para. 4-7 (“Discretion, fairness, and sound judgment are essential ingredients of military justice.”).

¹¹ MCM, *supra* note 5, R.C.M. 504(c)(1) (an accuser may not convene a court-martial). An accuser is one who has either preferred the charges or one who has other than an official interest in the case. UCMJ art. 1(9) (2008).

¹² MCM, *supra* note 5, R.C.M. 306(b) discussion.

the commander's intent.¹³ Commanders must be ever mindful of this deference to their intent and exercise caution so that the members of their commands who fulfill justice functions, such as witnesses, panel members, and subordinate commanders, do not allow their perceptions of command intent to constrain their independent discretion. Likewise, commanders must be aware that anyone subject to the code can commit UCI.¹⁴ They must ensure that their subordinate leaders and staff officers do not intentionally or unintentionally use the authority derived from their relation to the commander to influence the course of military justice.

In most instances, commanders understand their role in the military justice system and perform it properly. Unfortunately, there continue to be instances where commanders and those vested with the mantle of command authority, intentionally or unintentionally, use their authority to influence the administration of military justice towards a desired result.¹⁵ This is UCI.¹⁶ The most common targets of UCI are subordinate commanders, witnesses, and panel members.¹⁷ The typical offenders are commanders. However, it is important to recognize that not all command influence is committed by commanders. Subordinate leaders, non-commissioned officers, and staff officers all carry the mantle of command authority and therefore have the potential to either commit or contribute to the commission of UCI.¹⁸ Judge advocates are staff officers who play a central role in the enforcement of good order and discipline within a command. Because of their prominent role in the administration of military justice, judge advocates must be mindful of their potential to commit UCI.

The courts have repeatedly noted that the military judge (MJ) is the last sentinel in identifying and curing UCI.¹⁹ If that is true, then judge advocates are both the forward

observers and the rapid reaction force against the dangers of UCI. Judge advocates are charged with providing fair and accurate military justice advice to their commanders.²⁰ Their presence in the military justice system ensures that commanders apply their military justice authority correctly. Judge advocates, as trial counsel (TC), chiefs of justice, brigade judge advocates (BJAs), and SJAs, are responsible for training commanders and their staffs on the dangers of UCI.²¹ As TC, defense counsel, and MJs, judge advocates are responsible for identifying UCI as soon as possible and taking appropriate action to cure it. Given these important roles in protecting the system against UCI, it is particularly damaging when judge advocates themselves become involved in UCI.

One way in which judge advocates can commit UCI is through their relationship with subordinate judge advocates. The authority that comes with superior rank is at the heart of UCI.²² Obviously, some judge advocates outrank others and therefore have the capacity to intentionally or unintentionally exert influence through their superior rank or position. This is particularly true where that influence impacts the independent discretion of subordinate judge advocates acting as legal advisors to convening authorities. The case of *United States v. Chessani*²³ provides an example of this type of UCI.

Lieutenant Colonel Jeffery Chessani was the most senior Marine facing charges related to an incident in Haditha, Iraq, in which a group of Marines allegedly killed approximately twenty-four Iraqi civilians.²⁴ The incident occurred in 2005 while appellant was the commander of Kilo Company, Third Battalion, 1st Marine Division, a subordinate command of 1st Marine Expeditionary Force (I MEF).²⁵ As the investigation into the incident was taking shape, the Commandant of the Marine Corps designated the commander of U.S. Marine Corps Central Command (MARCENT) as the Consolidated Disposition Authority (CDA) for all disciplinary action related to the Haditha incident.²⁶ Lieutenant General (LtGen) James T. Mattis, as the MARCENT Commander, therefore had disposition authority for appellant's case. Lieutenant General Mattis

¹³ AR 600-20, *supra* note 7, para. 2-1.

¹⁴ UCMJ art. 37. *See also* *United States v. Stombaugh*, 40 M.J. 208, 211 (C.M.A. 1994) and *United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986) (staff judge advocate carries the mantle of command authority).

¹⁵ *See, e.g.*, *United States v. Wiechmann*, 67 M.J. 456 (C.A.A.F. 2009); *United States v. Reed*, 65 M.J. 487 (C.A.A.F. 2008); *United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006); *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004).

¹⁶ *United States v. Simpson*, 58 M.J. 368, 373-75 (C.A.A.F. 2003) (as corrected 9 July 2003 and 14 July 2003).

¹⁷ DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE PRACTICE AND PROCEDURE* §§ 6-3 to 6-8 (2008) (detailing Article 37's protection of these key groups); Lieutenant Colonel Mark L. Johnson, *Unlawful Command Influence—Still with Us; Perspectives of the Chair in the Continuing Struggle Against the "Mortal Enemy" of Military Justice*, ARMY LAW., June 2008, at 110.

¹⁸ UCMJ art. 37 ("no person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . ."). *See also id.* art. 98 (making it an offense for any person subject to the code to unnecessarily delay or knowingly or intentionally fail to comply with the manual provisions regulating the proceedings of a court-martial).

¹⁹ *United States v. Rivers*, 49 M.J. 434, 443 (1998).

²⁰ *See generally* UCMJ art. 6; MCM, *supra* note 5, R.C.M. 406; *United States v. Argo*, 46 M.J. 454 (C.A.A.F. 1997) (SJA is usually in a position to give neutral advice); *United States v. Engle*, 1 M.J. 387, 389 (C.M.A. 1976) (UCMJ art. 6 (SJA disqualification provisions intended to assure the accused a fair and impartial review of his case); Major General John L. Fugh, *Address to the JAG Regimental Workshop*, ARMY LAW., June 1991, at 3.

²¹ U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 19-5 (16 Nov. 2005).

²² UCMJ art. 37.

²³ NMCCA 200800299, CCA LEXIS 84 (N-M. Ct. Crim. App. 2009).

²⁴ *Id.* at *2.

²⁵ *Id.* at *3.

²⁶ *Id.*

was a dual-hatted commander, also serving as the Commander, I MEF. Lieutenant General Mattis's two commands, MARCENT and I MEF, each had their own staff judge advocate (SJA).²⁷ The SJA for MARCENT, and therefore the CDA, was Lieutenant Colonel (LtCol) Bill Riggs.²⁸ The SJA for I MEF was Colonel (Col) John Ewers, a well-known and respected judge advocate who had served with LtGen Mattis during prior tours.²⁹

Based upon his experience and prior relationship with LtGen Mattis, Col Ewers was appointed to assist in the investigation of the Haditha incident on behalf of I MEF.³⁰ In the course of the investigation, Col Ewers interviewed appellant and advised and assisted in drafting the final official report of investigation into the incident.³¹ After the investigation was complete, MARCENT, as the CDA, had authority to take punitive action on any cases arising out of the incident. Charges were preferred against appellant for failing to properly report and investigate the incident.³² The case belonged to MARCENT, as the CDA; therefore, Col Ewers was not responsible for advising LtGen Mattis on the case. That responsibility fell to LtCol Riggs as the MARCENT SJA.³³ Nonetheless, Col Ewers attended several meetings where LtGen Mattis and the MARCENT SJA, LtCol Riggs, discussed disposition of appellant's case.

At trial, defense counsel alleged that Col Ewers had improperly participated in advising LtGen Mattis on disposition of appellant's case. Accordingly, the defense filed a motion asking the MJ to dismiss all charges based upon UCI.³⁴ In response to the defense motion, the Government called both LtGen Mattis and Col Ewers as witnesses.³⁵ The Government did not call LtCol Riggs. The testimony and other evidence demonstrated that Col Ewers was present at meetings where LtGen Mattis and LtCol Riggs discussed disposition of the Haditha cases, including appellant's. Both LtGen Mattis and Col Ewers agreed that although Col Ewers was present, he did not offer any advice to LtGen Mattis on disposition of appellant's case.³⁶

Nonetheless, after hearing all of the evidence offered, the MJ granted the defense motion to dismiss all charges, without prejudice, as a result of UCI.³⁷ The MJ also

disqualified LtGen Mattis and Col Ewers from any further participation in the case.³⁸ Specifically, the MJ found that the Government failed to meet its burden of proving beyond a reasonable doubt that Col Ewer's presence "did not chill subordinate legal advisors from exercising independence and providing potentially contrary advice."³⁹ The MJ further found that the Government failed to prove that "the legal advice and recommendations of the SJA and deputy SJA of MARCENT were not improperly influenced" by Col Ewer's presence.⁴⁰ Finally, the MJ ruled that he was convinced beyond a reasonable doubt that Col Ewer's presence at the meetings in questions created the perception of UCI.⁴¹

The Government appealed the ruling of the MJ pursuant to Article 62, UCMJ, and Rule for Courts-Martial (RCM) 908.⁴² On appeal, the Navy-Marine Court of Criminal Appeals (NMCCA) reiterated the legal test for UCI and stressed the Government's burden to prove beyond a reasonable doubt that either the predicate facts alleging UCI untrue; or that even if the facts were true, the facts did not constitute UCI; or even if UCI did occur, that the UCI did not affect the proceedings.⁴³ After establishing the standard to be applied, the court noted that the case contained allegations of both actual and apparent UCI.⁴⁴ The court began its analysis by examining the appearance of UCI.⁴⁵

The court noted that the appearance of UCI "exists where an objective, disinterested observer fully informed of all of the facts and circumstances would harbor significant doubt about the fairness of the proceeding."⁴⁶ The court observed that the Government's response on appeal focused on the absence of influence flowing upwards from Col Ewers to LtGen Mattis, the convening authority.⁴⁷ However, the court was more concerned with potential influence flowing downward from Col Ewers to LtCol Riggs, who was the official legal adviser in appellant's case.⁴⁸ The court chastised the Government for failing to present any testimonial or documentary evidence from LtCol Riggs or

²⁷ *Id.* at *3-4.

²⁸ *Id.*

²⁹ *Id.* at *4-5.

³⁰ *Id.*

³¹ *Id.* at *5-6.

³² *Id.*

³³ *Id.* at *6-8.

³⁴ *Id.* at *9.

³⁵ *Id.*

³⁶ *Id.* at *10.

³⁷ *Id.* at *10-12.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at *12.

⁴³ *Id.* at *13-15.

⁴⁴ *Id.* (citing *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)) (quoting *United States v. Rosser*, 6 M.J. 276, 271 (C.M.A. 1979) ("Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with 'eliminating even the appearance of unlawful command influence at courts-martial.'").

⁴⁵ *Id.* at *14-15.

⁴⁶ *Id.* at *15-16 (citing *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)).

⁴⁷ *Id.* at 17-18.

⁴⁸ *Id.*

his staff “to ameliorate . . . the appearance that the MARCENT SJA’s legal advice may have been impermissibly influenced” by the presence of Col Ewers at MARCENT legal meetings.⁴⁹ Without such evidence, the Government was unable to meet its burden of disproving that Col Ewer’s presence created the impermissible appearance of UCI.⁵⁰

Having affirmed the MJ’s finding of apparent UCI, the court declined to address the allegations of actual command influence. Instead, the court went on to analyze the propriety of the MJ’s remedy: dismissal without prejudice. The court recognized that the MJ is the “last sentinel”⁵¹ in protecting the court-martial process from UCI.⁵² The court reasoned that the MJ’s remedy was directed at eradicating the taint of UCI on the proceedings and ensuring that any future proceedings would not be similarly tainted.⁵³ Accordingly, dismissing the charges and ensuring that they could only be resurrected by an untainted command was well within his purview. As such, the court held that the MJ did not abuse his discretion by dismissing the case without prejudice, disqualifying the MARCENT and I MEF commanders as well as Col Ewers and LtCol Riggs from further participation in the case.⁵⁴

In reaching its decision, the Navy-Marine court ignored a more obvious approach to focus on UCI. Article 6, UCMJ, states that no person who has acted as an investigating officer in any case may later act as SJA or legal officer to any reviewing officer in the same case.⁵⁵ The parties clearly recognized that Col Ewers had acted as an investigating officer in the case and was therefore disqualified from acting as an SJA in the *Chessani* case.⁵⁶ Accordingly, the court could have simply analyzed the issue under Article 6 and focused on the improper appearance created by Col Ewers involvement in a case from which he was disqualified.⁵⁷ This approach would have allowed the court to resolve the issue without reference to UCI.

⁴⁹ *Id.* at 18.

⁵⁰ *Id.* at *20–21.

⁵¹ *Id.* at *22 (citing *United States v. Biagase*, 50 M.J. 143, 152 (C.A.A.F. 1999)).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at *24.

⁵⁵ UCMJ art. 6(c) (2008). Article 6 specifically states “no person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as staff judge advocate or legal officer to any reviewing authority upon the same case.”

⁵⁶ *United States v. Chessani*, NMCCA 200800299, CCA LEXIS 84, at *6–7 (N-M. Ct. Crim. App. 2009). The record indicates that LtCol Riggs recognized that Col Ewers was disqualified because of his role as an investigator in the case..

⁵⁷ UCMJ art. 6(c).

Instead, the court elected to address the issue in terms of the potential UCI flowing from the senior ranking SJA to the junior SJA. This focus demonstrates the importance our system accords to the neutral and detached advice of an SJA.⁵⁸ This reminder is important because there are many circumstances where judge advocates are expected to exercise independent discretion when providing legal advice.⁵⁹ Under *Chessani*’s UCI analysis, if the actions of a senior ranking judge advocate directly influence, or even create the appearance that they have influenced, the independent discretion of a junior judge advocate, then there is a potential UCI issue. As such, the case signals a caution for some aspects of the practice of military justice.

In particular, the *Chessani* court’s reasoning could impact the interactions between Army division or installation SJAs and judge advocates assigned directly to brigades within the same general court-martial convening (GCMCA) authority jurisdiction. Until recently, Army TC typically provided direct advice to brigade commanders on matters related to military justice.⁶⁰ However, the TC were assigned to the Office of Staff Judge Advocate (OSJA) and they represented the SJA when they advised commanders. For purposes of Article 6, the SJA was still ultimately responsible for providing legal advice to convening authorities at all levels and simply used the TC as a conduit for that advice. Under those circumstances, it was both common and appropriate for a senior ranking SJA to shape, influence, or even direct the content of advice his subordinate TC provided to brigade and battalion commanders.

A recent paradigm shift in the Army Judge Advocate General’s Corps has altered the long standing relationship between division or installation SJAs and junior ranking judge advocates serving within the same command.⁶¹ In the new paradigm, brigade combat teams and other modular brigades have a BJA assigned directly to the brigade as staff officers. The BJAs are in the technical and rating chain of

⁵⁸ *See, e.g.*, *United States v. Dresen*, 47 M.J. 122 (C.A.A.F. 1997) (Officers providing important statutory advice, such as post-trial recommendations, must be and appear to be fair and objective.). *See also* UCMJ arts. 6 and 34 and MCM, *supra* note 6, R.C.M. 1106.

⁵⁹ *See, e.g.*, MCM, *supra* note 6, R.C.M. 406(b) discussion (“[T]he staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice.”).

⁶⁰ U.S. DEP’T OF ARMY, FIELD MANUAL, 1-04 (27-100), LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 4-4 (Apr. 2009).

⁶¹ To support the Army’s implementation of the modular brigade program, The Judge Advocate General provided guidance on the assignment of judge advocates directly to the staff of Brigade Combat Teams. Policy Memorandum 06-7, The Judge Advocate General, subject: Location, Supervision, Evaluation, and Assignment of Judge Advocates in Modular Force Brigade Combat Teams (10 Jan. 2006). *See also* TJAG SENDS, *Brigade Judge Advocates—The Cutting Edge of Military Legal Practice*, vol. 3, Mar. 2005.

the installation or division SJA;⁶² however, they are not assigned to the OSJA, nor do the work directly for the SJA.⁶³ Therefore, it could be argued that the BJA is the brigade's SJA for Article 6 purposes, while the division or installation SJA advises only the commanding general as the GCMCA.⁶⁴ The BJA would be expected to carry out the Article 6 function and provide neutral and detached legal advice to his convening authority on matters related to military justice. Consistent with the court's reasoning in *Chessani*, a senior ranking SJA, or even a senior deputy staff judge advocate or chief of justice, could commit UCI, or create the appearance of UCI, by interfering with or otherwise seeking to shape the advice a BJA provides to his commander on military justice matters.

It is important to note that *Chessani* is an unpublished opinion from one service court; as such it holds no real precedential value. Moreover, the court seems to suggest that its analysis would have been different had the Government presented some evidence explaining any potential impact Col Ewers's presence might have had on LtCol Riggs's advice.⁶⁵ Finally, because the *Chessani* case arose out of an extremely high-profile international incident, both the trial and appellate courts may have exercised extraordinary caution to ensure that the attention the incident received did not unfairly taint the process. Accordingly, practitioners should not read too much into the opinion.

Nonetheless, it is important that SJAs and other senior ranking judge advocates keep UCI in mind when they interact with subordinates. Some level of communication between superior and subordinate SJAs is both permissible and expected. Rule for Courts-Martial 105(b) entitles SJAs to communicate directly with either superior or subordinate SJAs or even with The Judge Advocate General.⁶⁶

⁶² Policy Memorandum 08-1, The Judge Advocate General, subject: Location, Evaluation, Supervision, and Assignment of Judge Advocates in Modular Force Brigade Combat Teams (17 Apr. 2008).

⁶³ *Id.* The established rating and technical chain relations between a division SJA and a BJA provide a crucial distinction from the relationship between the two SJA in the *Chessani* case. This distinction should be noted by counsel who find themselves responding to UCI allegations involving SJAs and junior ranking BJAs.

⁶⁴ FM 1-04 (27-100), *supra* note 59, paras. 4-36 to -39 (implying that brigade judge advocates are part of the SJA's technical chain of command for purposes of Article 6). However, the issue has not been tested before a court. Additionally, paragraph 4-9 states that the brigade judge advocate is the brigade commanders primary legal advisor. Other portions of the doctrine identify the brigade legal staff as having responsibility for providing brigade commanders with advice and support on military justice, administrative separations, and the general enforcement of good order and discipline.

⁶⁵ *United States v. Chessani*, NMCCA 200800299, CCA LEXIS 84, at *18-21 (N-M. Ct. Crim. App. 2009).

⁶⁶ MCM, *supra* note 5, R.C.M. 105(b). It is interesting to note that this rule would have allowed the two SJAs in *Chessani* to communicate directly with each other. As such, any of the influence the court was concerned might have occurred in the convening authority's office could have just as easily occurred under circumstances sanctioned by the *Manual*.

Likewise, general guidance and mentoring from a superior regarding military justice typically does not constitute UCI.⁶⁷ However, in the case of BCTs, SJAs who go too far and direct, or create the appearance that they are directing, the advice of subordinate BJAs may well face allegations of UCI.⁶⁸ The key to avoiding UCI when advising and mentoring subordinate BJAs is ensuring that the subordinate clearly understands that she has the independent discretion to provide her commander with whatever legal advice she believes is appropriate in a particular case.

This focus on independent discretion is not limited to relations between SJAs and BJAs. There are many situations in the military justice process where judge advocates are expected to exercise independent discretion and therefore could be subject to influence by senior ranking judge advocates. Company grade judge advocates are frequently assigned as military magistrates to review pre-trial confinement and to authorize searches and seizures.⁶⁹ As magistrates, they are expected to make only those rulings that they, in their independent discretion, believe are legally correct based on the information presented.⁷⁰ It would be improper for a senior ranking judge advocate to unduly influence the decisions of a military magistrate.⁷¹ At times, judge advocates also serve as Article 32 investigating officers who are expected to independently review a case to determine if there are reasonable grounds to believe the accused committed the offense charged.⁷² Again, it would be improper for a senior ranking judge advocate to interfere with the investigating officer's deliberative process.⁷³

Independent discretion is perhaps most important to judge advocates when they are serving as MJJs. For obvious reasons, MJJs must maintain their independence in executing their immense responsibility within the military justice

⁶⁷ Larry A. Gaydos, *What Commanders Need to Know About Unlawful Command Control*, ARMY LAW., Oct. 1986, at 15 n.43 (citing *United States v. Rogers*, CM 442663 (A.C.M.R. 29 Mar. 1983)).

⁶⁸ In the relationship between SJAs and BJAs, this is particularly true in situations where the brigade commander has independent discretion to act. For example, the decision to either administer non-judicial punishment or forward a case with a recommendation for court-martial rests within the independent discretion of the brigade commander. He should make that decision in consultation with his legal advisor, the BJA. It would be improper influence for the SJA to direct the BJA's advice towards a certain outcome, just as it would be improper influence for the convening authority to direct the brigade commander to the same outcome. If the SJA disagrees with the recommendations being made by the BJA, she should recommend that the convening authority withdraw the case to his own level for disposition.

⁶⁹ *Id.*

⁷⁰ AR 27-10, *supra* note 20, ch. 9.

⁷¹ *United States v. Rice*, 16 M.J. 770 (A.C.M.R. 1983) (addressing military judge's contact with magistrate at behest of the deputy staff judge advocate).

⁷² MCM, *supra* note 5, R.C.M. 405(j).

⁷³ *United States v. Argo*, 50 M.J. 504 (A.F. Ct. Crim. App. 2000).

system. To that end, the UCMJ requires MJs at the GCM level to be designated by, and directly responsible to, The Judge Advocate General or his designee.⁷⁴ The UCMJ also prohibits any convening authority or his staff from preparing or reviewing fitness reports related to the performance of MJs.⁷⁵ Moreover, each service has its own regulations for managing their trial judiciaries.⁷⁶ These regulations serve to further insulate the MJ from command influence. Unfortunately, there are still instances where MJs have been subject to undue influence both from within their own chain of command and from other judge advocates outside that chain of command.

*United States v. Mabe*⁷⁷ is the seminal case on UCI from within the judicial chain of command. In *Mabe*, the Chief Trial Judge for the Navy received several complaints about lenient sentences coming out of one particular circuit.⁷⁸ The complaints related specifically to sentences in unauthorized absence cases.⁷⁹ In response, the chief trial judge sent a letter to the chief judge of the circuit in question. The letter indicated that the circuit had become the “forum of choice for an accused” largely due to lenient sentences.⁸⁰ While advising the circuit judge that he had complete “discretion and control” to address the matter as he saw fit, the chief trial judge stressed that there were “grumblings” and “dissatisfaction [and] criticism” directed towards the circuit.⁸¹ He further reminded the circuit judge that “when we tilt to [sic] far in any direction, someone inevitably complains.”⁸²

Fortunately, the chief circuit judge recognized that the letter posed an UCI issue. The circuit judge notified the Navy Judge Advocate General of the letter from his supervisor, disclosed it to counsel practicing in the circuit, and provided copies to other MJs in the circuit.⁸³ Further, he allowed counsel to voir dire him on the letter and ensured them that it would not impact his decisions or independence. For his part, the Navy Judge Advocate General wrote the circuit judge and told him to disregard the letter and indicated that the chief judge would be removed from his rating chain.⁸⁴

Despite these efforts, *Mabe* challenged his conviction and sentence for unauthorized absence and missing movement based upon UCI exerted on his trial judge. Procedurally, the case was complicated and required a remand by the Court of Military Appeals (CMA) to the service court.⁸⁵ In the end, both the former Navy Court of Military Review⁸⁶ and the CMA found that the actions of the chief judge constituted UCI.⁸⁷ However, the CMA agreed with the service court that any UCI was cured by the actions of The Judge Advocate General and the circuit judge.⁸⁸ As such, there was no evidence that appellant suffered any prejudice as a result of the letter.⁸⁹

A similar issue presented itself in the case of *United States v. Campos*.⁹⁰ In *Campos*, the MJ, Colonel (COL) Mitchell, indicated on the record that he was being replaced as senior trial judge at Fort Hood, Texas, by a COL Green. Colonel Mitchell further expressed that the move might create the appearance that he was being relieved due to the perception that he was too lenient on sentencing.⁹¹ He noted that COL Green had a reputation for harsher sentences.⁹² However, COL Mitchell also explained on the record that he had spoken with his chief circuit judge and the Chief Trial Judge for the Army. Both offered benign reasons for his replacement.⁹³ Both COL Green and COL Eggers, the former Chief of the Army Trial Judiciary, were later called as witnesses and described for the record the reasons they had replaced COL Mitchell.⁹⁴ Those reasons were unrelated to COL Mitchell’s sentencing philosophy. In denying the defense motion to recuse himself, COL Mitchell stressed that he had no reason to believe that he was being replaced due to his sentencing philosophy, and he indicated that he could perform his duties in a fair and just manner.⁹⁵

At a post-trial session, trial defense counsel requested the opportunity to present new evidence demonstrating that the decision to replace COL Mitchell was based to some extent on his sentencing philosophy.⁹⁶ The new evidence indicated that two SJAs at Fort Hood had relayed their concerns about COL Mitchell’s lenient sentences to the

⁷⁴ UCMJ art. 26 (2008).

⁷⁵ *Id.*

⁷⁶ See, e.g., AR 27-10, *supra* note 201, ch. 8. U.S. DEPT. OF THE NAVY, JUDGE ADVOCATE GENERAL INSTR. 5813.4G, NAVY-MARINE CORPS TRIAL JUDICIARY (Feb. 10, 2006).

⁷⁷ 33 M.J. 200 (C.M.A. 1991).

⁷⁸ *United States v. Mabe*, 30 M.J. 1254, 1258 (N.M.C.M.R. 1990).

⁷⁹ *Mabe*, 33 M.J. at 201–02.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Mabe*, 30 M.J. at 1258.

⁸⁴ *Id.* at 1259.

⁸⁵ *Id.* at 1256 (citing *United States v. Mabe*, 28 M.J. 326 (C.M.A. 1989)).

⁸⁶ *Id.* at 1267.

⁸⁷ *Mabe*, 33 M.J. at 206.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 42 M.J. 253 (C.A.A.F. 1995).

⁹¹ *Id.* at 258.

⁹² *Id.* at 260.

⁹³ *Id.* at 258.

⁹⁴ *Id.* at 259.

⁹⁵ *Id.*

⁹⁶ *Id.* at 259–60.

Corps SJA, who was then COL Gray.⁹⁷ Colonel Gray was later selected for promotion to general officer and went on to become the Commander of the U.S. Army Legal Services Agency.⁹⁸ The Commander of the U.S. Army Legal Services Agency also served as the Chief of the Trial Judiciary.⁹⁹

There was some evidence that Brigadier General (BG) Gray passed along concerns about COL Mitchell to the Chief Trial Judge of the Army whom he supervised as Chief of the Trial Judiciary.¹⁰⁰ Likewise, there was evidence that the new Corps SJA had independently relayed similar concerns to the Chief Trial Judge.¹⁰¹ However, there was no evidence that either the Chief Trial Judge or BG Grey took any action based upon the complaints of the various SJAs.¹⁰² To the contrary, the evidence indicated that COL Green's assignment as the senior judge at Fort Hood was based on other legitimate considerations.¹⁰³ After considering the new post-trial evidence, the MJ stood by his initial ruling and again stressed that he was confident that he was fair and impartial in appellant's case.¹⁰⁴ Accordingly, he declined to grant any further relief.

On appeal, the CMA condemned the "calculated carping to the judge's judicial superiors about his sentencing philosophy."¹⁰⁵ However, the court noted that the trial judge heard all of the evidence and found that the complaints about his sentencing philosophy played no role in the decision to replace him with COL Green. The court was willing to accept the findings of the MJ. Moreover, the court agreed that any appearance of UCI was cured by full litigation of the issue during and after the trial and by COL Mitchell's repeated assurances that the perception of his lenient sentencing philosophy would not impact his deliberations.¹⁰⁶ As such, the court affirmed the findings and sentence.

The *Mabe* and *Campos* cases demonstrate the potential for senior judges to exert UCI. The *Campos* case also demonstrates the potential for UCI that might arise from the interactions between SJAs and MJs serving in their jurisdictions. Dissatisfaction by SJAs with the performance of a particular MJ is as old as the trial judiciary. Problems arise when the SJA communicates his dissatisfaction in a

manner that is either intended to or has the appearance of influencing the future actions of the MJ.

The most recent example of this type of judicial interference is the case of *United States v. Lewis*.¹⁰⁷ In *Lewis*, a civilian defense counsel (CDC), who was a former judge advocate, represented the appellant at his court-martial for a variety of drug-related offenses.¹⁰⁸ The CDC did not enter her appearance at the first session before the trial judge. At that time, neither side expressed any grounds for challenge against the MJ. However, when the CDC did appear at the next session, the TC then elected to voir dire the MJ on her impartiality.¹⁰⁹ The grounds offered by the TC were that (1) the MJ presided over two companion cases; (2) the MJ had a prior professional relationship with the CDC while the CDC was on active duty; (3) the appearance created by the number of cases presided over by the MJ where the same CDC represented the accused; (4) the extent of social interactions between the MJ and the CDC; and (5) the MJ had expressed displeasure with the Government at being subject to voir dire on the same subjects in prior cases.¹¹⁰

In the course of responding to the voir dire, the MJ indicated that she had only limited social interaction with the CDC at a stable where they both boarded horses.¹¹¹ Nonetheless, the TC challenged the MJ and asked that she recuse herself.¹¹² When the MJ denied the motion, the TC then requested the MJ reconsider her denial of the motion.¹¹³ The TC also presented a previously prepared written pleading on the challenge. The written motion contained proffered evidence that the MJ had, in fact, been observed attending a play with the CDC in a nearby city.¹¹⁴ The Government obviously knew about that alleged incident at the time of the original voir dire but elected not to raise the matter at that time and thereby allow the MJ to respond on the record.¹¹⁵

After reviewing the motion, the MJ admitted on the record that she had forgotten about the play.¹¹⁶ Nonetheless, the MJ denied that Government's motion. Finally, the TC requested a continuance to file a Government appeal.¹¹⁷

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 260.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 261.

¹⁰⁷ 63 M.J. 405 (C.A.A.F. 2006).

¹⁰⁸ *Id.* at 406.

¹⁰⁹ *Id.* at 407.

¹¹⁰ *Id.* at 407-09.

¹¹¹ *Id.* at 408.

¹¹² *Id.* 409.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

That request was denied as was the Government's request for a three-hour continuance to seek a stay.¹¹⁸

At the next session, the defense filed a motion seeking dismissal of all charges based upon prosecutorial misconduct.¹¹⁹ The SJA was called as a witness and gave contentious testimony on the motion.¹²⁰ The SJA's testimony indicated that he had played a behind the scenes role in the voir dire of the MJ.¹²¹ He testified that he had passed along information to the TC and provided general advice on conducting the voir dire.¹²² Part of the information passed on by the SJA was what he described as "some evidence out there that, in fact, the defense lawyer had been on a date with the military judge" while appellant's case was pending.¹²³ The SJA also testified that he had discussed that case with the Chief of the Navy-Marine Corps Appellate Government Division.¹²⁴

At the conclusion of one further Article 39a session, the MJ again concluded that she could continue to sit on the case. However, the very next day, after considering the matter overnight, the MJ again reconsidered her decision to remain on the case and instead elected to recuse herself.¹²⁵ A second MJ was detailed, but after reviewing the record, he recused himself because he was so offended by the conduct of the Government that he did not feel he could be unbiased.¹²⁶ A third judge was brought in temporarily before a fourth judge was detailed to finally hear appellant's case. To cure any possible taint from UCI, the final trial judge disqualified the SJA from any further participation in the case and directed that the post-trial action on the case be handled by a new convening authority.¹²⁷ The appellant agreed to trial by MJ alone and pled guilty. Nonetheless, following his conviction, the accused filed an appeal based upon UCI.

The Navy-Marine Court of Criminal Appeals reviewed the case and concluded that the SJA had, in fact, committed UCI. However, that Navy-Marine court found that the actions taken by the MJ were sufficient to cure the taint of UCI. Accordingly, no relief was granted.¹²⁸

Appellant then appealed to the Court of Appeals for the Armed Forces (CAAF). The CAAF held that the decision of the court below, which concluded that there was UCI, was the law of the case.¹²⁹ Accordingly, the only issue before the Court was whether the Government had met its burden of proving beyond a reasonable doubt that the actions of the trial judge had cured any actual command influence as well as the perception of UCI. On this count, the court did not agree with the service court.¹³⁰

The court began by analyzing the process by which MJ's are selected and detailed to cases. The court demonstrated how the UCMJ and service regulations dictate that a MJ be detailed by a standing service trial judiciary.¹³¹ The court observed that while the rules allow either party to question and challenge an MJ, neither the Government nor the defense has the authority to remove or otherwise unseat a properly certified and detailed MJ.¹³²

In appellant's case, the court found that the SJA exceeded the bounds of a good faith challenge to an MJ and instead committed actual UCI.¹³³ The court was not convinced beyond a reasonable doubt that the actions of the MJ had cured the actual UCI.¹³⁴ The court expressed particular concern for the fact that the TC, who is the SJA's instrument in the courtroom, remained on the case.¹³⁵ The court also found that the actions of the SJA and Government counsel created the appearance of UCI.¹³⁶ Again, the court was not convinced that the remedial actions of the trial judge were sufficient to cure the apparent UCI.¹³⁷ Finally, the court concluded that the only sufficient remedy for the UCI in the case was dismissal of all charges with prejudice.¹³⁸

Obviously, the circumstances in *Lewis* were unique; however, the desire of an SJA to influence a detailed MJ is not uncommon. *United States v. Ledbetter*¹³⁹ involved an Air Force non-commissioned officer convicted of larceny and conspiracy to commit larceny.¹⁴⁰ He was sentenced to a

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 409–10.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 410–11.

¹²⁶ *Id.* at 411.

¹²⁷ *Id.*

¹²⁸ 61 M.J. 512, 521 (N-M. Ct. Crim. App. 2005).

¹²⁹ *Lewis*, 63 M.J. at 412.

¹³⁰ *Id.* at 416.

¹³¹ *Id.* at 414 (citing U.S. DEPT. OF THE NAVY, JUDGE ADVOCATE GENERAL, INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) para. 1030a(1) (Mar. 15, 2004); U.S. DEPT. OF THE NAVY, JUDGE ADVOCATE GENERAL, INSTR. 5813.4G, NAVY-MARINE CORPS TRIAL JUDICIARY para. 6 (Feb. 10, 2006)).

¹³² *Id.*

¹³³ *Id.* at 414–15.

¹³⁴ *Id.* at 416.

¹³⁵ *Id.* at 414.

¹³⁶ *Id.* at 415.

¹³⁷ *Id.* at 416.

¹³⁸ *Id.* at 416–17.

¹³⁹ *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976).

¹⁴⁰ *Id.* at 39.

one grade reduction, forfeiture of \$300 per month for one year, and confinement for one year.¹⁴¹ The MJ also recommended that the convening authority suspend the automatic reduction provision found in Article 58a.¹⁴² At some point after the trial, the MJ submitted a memorandum detailing calls he received from judge advocates at the Air Force Office of The Judge Advocate General.¹⁴³ The callers, who were junior in rank to the MJ, indicated that there had been complaints about lenient sentences in at least three of the cases presided over by the MJ.¹⁴⁴ The callers asked the MJ to explain his rationale for the sentences so that their superiors, presumably The Judge Advocate General, could respond to the inquiries.¹⁴⁵ In a further memorandum, the MJ described being questioned by the installation SJA about the appellant's case. The SJA asked the MJ why he did not sentence Ledbetter to a discharge, and he told the MJ that the commander was not pleased with the sentence.¹⁴⁶

The MJ also described a phone call from Major General Harold R. Vague, Assistant Judge Advocate General for the Air Force. Major General Vague inquired about another case in which the MJ found the accused guilty but sentenced him to no punishment.¹⁴⁷ Major General Vague asked the MJ why he did not at least sentence the accused to a small forfeiture for the sake of appearances.¹⁴⁸

The Court of Military Appeals stressed the impropriety of such contacts as well as the need to ensure that MJ's are insulated from UCI. The court rejected the Government's argument that the inquiries by the Office of The Judge Advocate General were consistent with his supervisory role over MJs.¹⁴⁹ In the absence of specific action by Congress establishing a process for reviewing the actions of the MJ, the court specifically barred all official inquiries which "question or seek justification for a judge's decision."¹⁵⁰ However, because all of the contact with the MJ took place after appellant's trial had concluded, the court ruled that there was no evidence of prejudice.¹⁵¹

These cases point out the dangers of intentionally or unintentionally invading the independent discretion of the MJ. An independent judiciary is essential to the integrity of

our military justice system. Judge advocates within and outside of the trial judiciary must avoid actions that impact, or create the appearance of impacting, the independent discretion of individual MJs. Staff judge advocates and other judge advocates should bear in mind that sentencing philosophies will differ among judges. Moreover, a court-martial is an adversarial process in which both sides present evidence. Military judges have the benefit of considering all of the evidence, whereas SJAs are often only aware of the Government's case.

Accordingly, even though the MJ may make a convenient foil, judge advocates should avoid criticizing MJs to other judge advocates and, especially, to commanders. Such criticism is unfair and it undermines the integrity of the court-martial system. In the overwhelming majority of cases, MJs make a good faith effort to make the correct rulings and adjudge fair sentences. If an SJA feels compelled to complain about the performance of an MJ, such complaints should be directed to the service's Chief Trial Judge. Such complaints should normally be limited to matters serious enough to call into question the fitness of the MJ under the applicable standards. Dissatisfaction with sentences or judicial philosophies are typically not legitimate reasons to contact the chief judge or otherwise disparage a sitting trial judge.

To this point, we have seen how judge advocates can potentially commit UCI through inappropriate interactions with subordinate judge advocates and MJs. However, because of the prominent and encompassing role of judge advocates in the administration of military justice, judge advocates have the potential to commit UCI in a variety of other forums. Much of this potential arises from the fact that judge advocates are often perceived as speaking for the commander on matters related to military justice. This perception is most dangerous when it is tied to a particular case. The following cases demonstrate how a judge advocate's commentary in the courtroom or in the post newspaper can be misinterpreted as reflecting the will of the commander and thereby lead to allegations of UCI.

When trying a case before members, judge advocates must take care to ensure that their arguments do not lead the panel to inappropriately bring the convening authority into their deliberations. In *United States v. Dugan*,¹⁵² the CAAF observed that "command presence . . . in the deliberation room chills the members' independent judgment and deprives an accused of his or her constitutional right to a fair and impartial trial."¹⁵³ Therefore, it is impermissible UCI for a commander to hold meetings or staff calls with the intent or effect of influencing the deliberative process of panel members in attendance.¹⁵⁴ Likewise, it is UCI for a

¹⁴¹ *Id.*

¹⁴² *Id.* at 44.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 44-45.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 45-46.

¹⁴⁷ *Id.* at 46.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 42.

¹⁵⁰ *Id.* at 43.

¹⁵¹ *Id.*

¹⁵² 58 M.J. 253 (C.A.A.F. 2003).

¹⁵³ *Id.* at 259.

¹⁵⁴ *Id.* at 258.

panel member to remind the other panel members of the commander's stance on a particular case or category of crimes.¹⁵⁵ That being the case, it is certainly inappropriate for a judge advocate to introduce the authority of the commander via argument. Rule for Courts-Martial 1001(b) specifically states that "trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relevant to punishment or to any punishment or quantum of punishment greater than that court-martial may adjudge."¹⁵⁶ Despite this clear charge, there are numerous instances where counsel have crossed the line in argument by effectively bringing the commander into the deliberation room.

In *United States v. Grady*,¹⁵⁷ the TC referenced specific command policies on drug abuse during his sentencing argument. Specifically, TC argued, "You all, though, in this court, at this base, are members of the Strategic Air Command (SAC). You know what the SAC policies are, and I think you are somewhat bound to adhere to those policies in deciding on a sentence."¹⁵⁸ Counsel then discussed the specifics of those policies, including the fact that according to the applicable policies, those caught dealing or using drugs were not eligible for rehabilitation. There was no objection and the MJ did not offer any specific limiting instruction. He did remind the panel that regardless of any policies that may have been discussed, they had to decide what sentence was appropriate.¹⁵⁹ On appeal, the CMA found that the repeated references to the command policy were prejudicial error.¹⁶⁰ The court noted that it had long condemned reference to such policies before the panel because their introduction permeates the trial process with the "spectre of command influence" and creates "the appearance of improperly influencing the court-martial proceedings."¹⁶¹ Accordingly, the court set aside the adjudged sentence and returned the case to the Air Force Judge Advocate General to order a rehearing.¹⁶²

In *United States v. Pope*,¹⁶³ the appellant, a recruiter, faced charges related to sexual misconduct with recruits. During the sentencing phase of the court-martial, TC introduced a letter which the accused's commander had

previously distributed throughout the recruiting command.¹⁶⁴ The letter cautioned recruiters against inappropriate conduct with potential recruits and indicated that "harsh adverse action" could follow.¹⁶⁵ The accused was convicted and sentenced to confinement for fifteen months and a bad conduct discharge. The Air Force Court of Criminal Appeals affirmed the findings and sentence; however, the CAAF held that introducing the letter created the appearance of UCI because it conveyed the commander's view that misconduct, such as the accused's, should be punished harshly.¹⁶⁶ Based on the potential for UCI, the CAAF set aside the sentence and ordered the case returned to The Judge Advocate General of the Air Force for further action.¹⁶⁷

In a somewhat related line of cases, TCs have also contributed to the appearance of UCI through articles they have authored for post newspapers. While it is common for judge advocates to use the media to discuss a wide range of legal issues, extra caution must be observed when the articles deal with military justice, especially when they specially reference cases that may still be pending either trial or post-trial action.

*United States v. Taylor*¹⁶⁸ addressed the appeal of a noncommissioned officer who was convicted of violating a lawful general order and willful dereliction of his duties.¹⁶⁹ The panel sentenced him to a reduction to E-1 and a bad conduct discharge.¹⁷⁰ During the sentencing portion of the case, the Government attempted to admit several negative counseling statements administered to the accused; however, the MJ refused to admit the documents because of clerical errors in their preparation.¹⁷¹ Approximately eight days after the trial, the TC authored an article in the command newspaper wherein she warned of the dangers of failing to properly prepare adverse information. She stressed that such failures could have "devastating effects in [sic] the proper administration of justice."¹⁷² She then gave the example of a recent case in which improperly completed records were, not admitted, resulting in the information being excluded and the trier of fact receiving an incomplete picture of the accused who was not, in her view, a "good candidate for

¹⁵⁵ *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983) (improper to reference drug policy during argument).

¹⁵⁶ MCM, *supra* note 5, R.C.M. 1001(b).

¹⁵⁷ 15 M.J. 275 (C.M.A. 1983).

¹⁵⁸ *Id.* at 276.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 277.

¹⁶¹ *Id.* at 276 (internal quotation omitted).

¹⁶² *Id.* at 277.

¹⁶³ 63 M.J. 68 (2006).

¹⁶⁴ *Id.* at 75.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 69. See also *United States v. Mallet*, 61 M.J. 761 (A.F. Ct. Crim. App. 2005) (counsel committed prejudicial error by referencing commanders eleven times in argument to panel).

¹⁶⁷ *United States v. Pope*, 63 M.J. 68, 76 (C.A.A.F. 2006) (stating that a rehearing on sentence was authorized by the court).

¹⁶⁸ 60 M.J. 190 (C.A.A.F. 2004).

¹⁶⁹ *Id.* at 191.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 191-12.

¹⁷² *Id.* at 192.

rehabilitation.”¹⁷³ Although she did not name the accused, someone familiar with the case could have easily determined his identity.¹⁷⁴ She concluded by opining that justice had not been served.¹⁷⁵

At the time the article was released, the appellant’s case was still pending post-trial action by the convening authority. Defense counsel drafted two memoranda to the convening authority complaining that the article showed a lack of impartiality on the part of the TC and the SJA.¹⁷⁶ In her second memorandum, defense counsel argued that the entire SJA office should be disqualified from providing post-trial advice on appellant’s case.¹⁷⁷ Defense counsel also observed that the convening authority’s name was listed among the editorial staff of the paper. Defense counsel argued that if the letter could in any way be imputed to the convening authority, then he would be disqualified as well.¹⁷⁸

The SJA submitted an addendum to the post-trial action in which he admitted that the article could be imputed to him; however, he advised that convening authority that the article did not demonstrate any improper bias on behalf of the SJA.¹⁷⁹ The SJA also concluded that there were no grounds for the convening authority to disqualify himself from taking post-trial action.¹⁸⁰ For his part, the convening authority submitted an affidavit with the record of trial that indicated he was unaware of the article until it was brought to his attention by defense counsel, and that, in any event, it did not influence his action on the case.¹⁸¹

On review by the CAAF, the court looked at whether either the convening authority or the SJA were disqualified.¹⁸² The court accepted the convening authority’s affidavit stating that he had not been involved in or aware of the contents of the article. Accordingly, the court concluded that the convening authority was not disqualified. However, the court did take exception to the actions of the SJA. The court noted that in the addendum, the SJA admitted that the article could be imputed to him. Since the article expressly stated that justice was not served and that the unnamed subject was not a good candidate for clemency, imputing the article to the SJA created the

impression he had prejudged the case.¹⁸³ According to the court, this disqualified the SJA from providing post-trial advice to the convening authority, and the court returned the case for a new post-trial action.¹⁸⁴

*United States v. Wansley*¹⁸⁵ is a similar case with a somewhat different result. Captain Wansley was convicted of carnal knowledge and indecent acts with his fifteen year old step-daughter.¹⁸⁶ Following his conviction, but prior to action on his case, the chief of military justice authored a short article for the post newspaper about the case. The article stated that appellant had “exhibited an extreme abuse of integrity and honor” and that appellant’s conviction “sends a strong message of deterrence to people who prey upon children.”¹⁸⁷ In his post-trial submissions, appellant’s defense counsel contended that the article reflected “prejudgment” by the command and, therefore, appellant would not receive a fair post-trial review.¹⁸⁸ In the addendum, the SJA stated that neither the SJA nor the convening authority made the comments.¹⁸⁹ He further stressed that the chief of military justice was not speaking on behalf of the convening authority and had no input on the clemency decision.¹⁹⁰

The convening authority took action and the case was subsequently affirmed by the Court of Criminal Appeals.¹⁹¹ On appeal to the CAAF, appellant contended that the legal center’s participation in preparing the article disqualified the SJA from preparing the post-trial recommendation. However, the court held that the defense failed to rebut the SJA’s statements that neither the SJA nor the commander approved or relied upon the article written by the chief of justice. Likewise, the defense failed to rebut the SJA’s contention that the chief of justice was not involved in preparing the SJA’s recommendation.¹⁹² Accordingly, the court found the issue to be without merit and affirmed the lower court.

The distinction between *Taylor* and *Wansley* rests on the response of the SJA. In *Taylor*, the SJA admitted in his post-trial recommendation that the article could be imputed to him. Whether or not his assessment was legally accurate was not an issue. Based upon his admission, the court was

¹⁷³ *Id.* at 194.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 192.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 192–93.

¹⁸² *Id.* at 193.

¹⁸³ *Id.* at 194.

¹⁸⁴ *Id.* at 195–56.

¹⁸⁵ 46 M.J. 335 (C.A.A.F. 1997).

¹⁸⁶ *Id.* at 335.

¹⁸⁷ *Id.* at 336.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 337.

willing to find the SJA had been disqualified. In *Wansley*, the SJA denied that the article could be imputed to him. Again, without discussing the merits of that argument, the court was willing to accept it and hold that the SJA was not disqualified.

These cases do present a lingering issue of concern for practitioners. The court has yet to address when the comments of a subordinate judge advocate in a local paper can be attributable to the SJA as a matter of law. For the time being, the court appears willing to accept the opinion of the SJA on that issue. However, in *Wansley*, the court suggested that the defense could have rebutted the SJA's contention but failed to do so.¹⁹³ As such, in a given case, a defense counsel might demonstrate that an article by subordinate counsel could be attributed to the SJA. Accordingly, counsel should exercise caution in publishing articles about specific cases prior to final action. Such articles should focus on the evidence admitted, findings, and sentence, while avoiding opinion on the propriety of the former or on the actions of the accused. Doing so will protect the command from allegations of UCI.

The role of the judge advocate is essential to the fair administration of military justice. This is particularly true in regards to UCI, "the mortal enemy of military justice." Judge advocates are responsible for understanding UCI, training their commands on avoiding it,¹⁹⁴ identifying it when it occurs, and taking all possible measures to alleviate its impact when it does occur.¹⁹⁵ Judge advocates must endeavor to ensure the system is fair and that they always give advice that is legally correct and untainted by the influence of command authority.¹⁹⁶ Accordingly, judge advocates must avoid becoming part of the problem by committing UCI themselves. Neither rank nor supervisory authority can be allowed to impede the independent discretion of other judge advocates, whether they are magistrates, investigating officers, trial and defense counsel, or MJs. Familiarity with the concepts and cases discussed above should alert judge advocates to the UCI minefields that pervade our practice.

¹⁹³ *Id.*

¹⁹⁴ Johnson, *supra* note 16, at 108.

¹⁹⁵ See generally *United States v. Rivers*, 49 M.J. 434 (1998), *United States v. Biagase*, 50 M.J. 143 (1999); *United States v. Francis*, 54 M.J. 636 (A. Ct. Crim. App. 2000); and *United States v. Clemons*, 35 M.J. 770 (A.C.M.R. 1992).

¹⁹⁶ *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006) (citing *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998), and *United States v. Sullivan*, 26 M.J. 442, 444 (C.M.A. 1988)).