

Watchdog or Pitbull?: Recent Developments in Judicial Review of Unlawful Command Influence

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Implied bias is reviewed through the eyes of the public The focus 'is on the perception or appearance of fairness of the military justice system.'

United States v. Youngblood, 47 M.J. 338 (1997) (citations omitted).

The primary responsibility for the maintenance of good order and discipline in the services is saddled on commanders, and we know of no good reason why they should not personally participate in improving the administration of military justice. No doubt the personal presentation of that subject by the commander is impressive, but that is as it should be. The question is not his influence but, rather, whether he chartered it through forbidden areas.

United States v. Youngblood, 47 M.J. 338 (1997) (Crawford, J., dissenting) (citing *United States v. Danzine*, 30 C.M.R. 350, 352 (C.M.A. 1961)).

Introduction

The recent spate of high-profile courts-martial in the military services¹ has brought heightened attention to the unique role of the military commander in the world of military justice. The dilemma facing commanders was recognized by the then Court of Military Appeals² in 1961. This dilemma has continued to bedevil the military justice system for the past thirty-eight years.

Compounding the problem for today's commander is the recent crush of the media and general public's interest in military justice and its perceived differences from civilian criminal justice systems. Perhaps the most scrutinized distinction between the two systems is the broad role of the convening authority, in particular the tri-partite power they wield over

which cases to prosecute, the level of court (and therefore potential sentence), and personal selection of the members who will serve on the court. This power is commonly referred to as command influence, or, depending on one's point of view, unlawful command influence.

Allegations of command influence were common to almost every recent high-profile case, including the courts-martial of First Lieutenant Flynn, Sergeant Major McKinney, the Aberdeen and Leonard Wood trainee abuse cases, and the most recent trials of Major General Hale and the Marine aviators involved in the Aviano cable car incident. The high-profile nature of these cases made them particularly susceptible to such allegations. This is due partly to the media and the general public's thirst for on-the-spot, up-to-the-minute, information. From the media and general public's perspective, there is no better source for that information than *the commander*, or better yet, *the Pentagon*. When senior commanders comment on cases early in the process, prior to action or recommendation by subordinate commanders, allegations of unlawful command influence are almost certain to follow.

While none of the above cases has resulted in reported opinions addressing unlawful command influence, they do raise red flags for anyone associated with the prosecution or defense of a high-profile case. Judge advocates confronted with a high-profile case must take steps to ensure that commanders at every level understand the significance and the potential impact of pretrial comments or conduct that may be viewed as unlawful command influence.

Prior to analyzing decisions from the most recent term, there are three other military justice trends relating to unlawful command influence that are worth discussing. The most obvious trend is the steep ten-year decline in court-martial prosecutions in the Army. In fiscal year 1989, the Army tried 3985 courts-martial, including 1585 general courts-martial. By fiscal year 1998, those numbers had decreased to 1461 and 685, respectively.³ Jurisdictions that historically tried ten, twenty, or thirty cases a year, are now trying sometimes as few as two or three cases a year. Consequently, senior commanders and staff judge

1. For example, *United States v. McKinney*, *United States v. Flynn*, the Aberdeen sexual assault cases, the Aviano pilot cases, Tailhook, and most recently, the trial of Major General David Hale.

2. On 5 October 1994, the United States Court of Military Appeals was renamed the Court of Appeals for the Armed Forces.

3. Statistics provided courtesy of the Clerk of Court, Army Court of Criminal Appeals.

advocates (SJAs) in these prosecution-starved jurisdictions may be tempted to over-manage the one or two cases that do arise during their brief tours.

Such top-down management of courts-martial clearly violates the fundamental tenet of military justice that demands independent discretion at every level of command.⁴ It is easy to understand why commanders are inclined to operate in such a fashion. Giving (and receiving) guidance from the top down is how the military generally operates. Only the practice of military justice requires senior commanders to refrain from giving “commander’s guidance” or “commander’s intent” to their subordinates. Since the practice of military justice runs counter to the general way the Army does business, judge advocates, particularly those at installations with a reduced criminal justice load, must ensure that senior commanders “hold their fire” until cases work their way up to their level.

Another recent change in Army life that may foster an atmosphere conducive to unlawful command influence is the increased number of relatively short tour deployments of military forces. Many of these deployments are performed with split operations between rear detachments and forward-deployed units. Such “split-ops” are ripe for unlawful command influence. It is not uncommon for deploying units to leave their “problem” soldiers with the rear detachment rather than disrupt the deploying force. While most units leave these discipline problems completely to the discretion of the rear detachment commander, some commanders succumb to the temptation of providing the often less experienced rear detachment commanders specific instructions on how to dispose of these cases involving “problem” soldiers.

Other commanders on short deployments may choose to maintain open lines of communication with the rear commander at the home station throughout the period of deployment. While this may be a worthy practice for many important aspects of command, it clearly raises the specter of unlawful command influence if these commanders influence the military justice decisions of the stay behind commander. Judge advocates (who may themselves be less experienced) must take extra precautions to ensure that rear detachment commanders understand that it is their responsibility to make justice-related decisions while in command. They should not unduly concern themselves with what they think the deployed commander would want if he were still in command.

The final trend of note are the recent initiatives to exclude the convening authority from the military justice process. Two major changes have been suggested involving the convening authority’s power to select court members and to decide which cases will be referred to trial. Congress recently directed the Secretary of Defense and service secretaries to consider alternative methods of court member selection, including the possibility of some type of random selection process.⁵ A report on the feasibility of alternative methods was due to Congress by 15 April 1999. Another proposal, discussed at various levels, would transfer authority to refer cases to trial from the convening authority to a central prosecutor.⁶ While neither proposal appears likely to be implemented in the near future, they nevertheless reflect a growing sentiment among the civilian leadership that military commanders are unable to manage (even with the advice and support of judge advocates) a fair and impartial system of military justice.⁷ This growing sense of distrust among the military’s civilian leadership, and critical media reports on the practice of military justice, have clearly put supporters and military justice practitioners on the defensive.

Exactly where these trends will lead is far from clear. One thing remains certain, however, decisions from the Court of Appeals for the Armed Forces (CAAF), as they have for almost fifty years, will continue to play a critical role in the future shape of military justice. In particular, the CAAF’s resolution of command influence issues will likely take center-stage.

The current public spotlight on the military justice system raises a difficult issue for military appellate courts—when military courts conclude that certain conduct manifests unlawful command influence, do such opinions bode well or poorly for the future of the current system? From one point of view, the answer is easy—such opinions reflect poorly upon the military justice system, as the public will note an incident where the system failed. Yet, if the problem is viewed from a much broader perspective, it may lead to a different conclusion. By concluding that certain conduct constitutes unlawful command influence and issuing an appropriate remedy (dismissal, a rehearing, sentence relief), military appellate courts demonstrate their ability to stand guard against the *mortal enemy*⁸ of military justice. Proactive decisions by military appellate courts that quash unlawful command influence prove that *the system* (the bigger system that includes military appellate courts) can and does work.

4. See *United States v. Hawthorne*, 22 C.M.R. 83 (C.M.A. 1956).

5. See *Strom Thurmond National Defense Authorization Act for Fiscal Year 1999*, H.R. 3616, 105th Cong. (1998). See also Major Guy Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998).

6. See Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1 (1998).

7. In the 106th Congress there are 136 House members with military experience (down 4); 43 Senate members with military experience (down 5). One-fifth of the Senate-approved Clinton appointees have military experience.

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

Yet, what is to be made of decisions in which the appellate courts conclude that the conduct in question *does not* constitute unlawful command influence? Do such opinions prompt Congress and the general public to lose confidence in the independence and oversight capabilities of the military appellate court system? Stated simply, do the opinions from the military appellate courts serve to eradicate unlawful command influence or simply fan its flames? Which is better for the system—a decision that finds unlawful command influence, or one that does not?

Further complicating the equation is the fact that these decisions are not simply a matter of determining the existence or non-existence of unlawful command influence. Adding fog to the battlefield of unlawful command influence is the fact that the *mere appearance* of unlawful command influence can be just as detrimental to the system as actual command influence.⁹ In fact, the CAAF and service courts decided three such “appearance” cases during its most recent term.

Appearance is Everything

Three cases—*United States v. Youngblood*, *United States v. Rome*,¹⁰ and *United States v. Villareal*,¹¹ support the view that “appearance is everything” when it comes to unlawful command influence. Both *Youngblood* and *Rome* involved issues of implied bias of court-members. *Villareal*, on the other hand, addressed one command’s efforts to “head off” an allegation of unlawful command by transferring the case to a different convening authority during the accusative stage. Although the Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed Villareal’s conviction, it felt compelled, based purely on appearances, to substantially reduce the sentence of the accused.¹²

Several days prior to Airman First Class Youngblood’s trial, the general court-martial convening authority (GCMCA) held a staff meeting at which he and his staff judge advocate (SJA) discussed, *inter alia*, command responsibility and discipline.¹³ Three officers who later served on Youngblood’s court-martial panel, also attended this meeting. Both the GCMCA and SJA voiced their opinions that previous commanders in the Wing had “underreacted” and “shirked . . . [their] leadership responsibilities.”¹⁴ According to one member, the GCMCA said he “forwarded a letter to that commander’s new duty location expressing the opinion that ‘that officer had peaked.’”¹⁵ Another member recalled the SJA stating words to the effect that “he thought the commander probably should have been given an Article 15 for dereliction of duty and removed from his position.”¹⁶

At trial, the defense challenged all three members for cause. The military judge, however, granted only one challenge. On appeal, the defense asserted that the military judge abused his discretion when he failed to grant the other two challenges for cause. The majority of the CAAF agreed¹⁷ and set aside the sentence.¹⁸ Stating that “implied bias is reviewed through the eyes of the public,” the court observed that the focus “is on the perception or appearance of fairness of the military justice system.”¹⁹ The CAAF’s focus on appearances was evident from the fact neither the SJA nor the GCMCA was ever called to testify or provide a post-trial sworn affidavit. In a similar vein, the majority was not impressed by the members’ testimony that they could still give the accused a fair trial, despite having heard the harsh comments of both the GCMCA and the SJA. Noting how difficult it is for a “subordinate [to ascertain] . . . the actual influence a superior has on that subordinate”²⁰ the court concluded that “it was ‘asking too much’ to expect these members to adjudge an appropriate sentence without regard for its potential impact on their careers.”²¹

9. See *United States v. Youngblood*, 47 M.J. 338 (1997).

10. 47 M.J. 467 (1998).

11. 47 M.J. 657 (N.M. Ct. Crim. App. 1997).

12. *Id.* at 666.

13. *Youngblood*, 47 M.J. at 339.

14. *Id.* at 340.

15. *Id.*

16. *Id.*

17. In a concurring and a dissenting opinion, Judge Sullivan would have set aside the sentence on the basis of both implied bias and unlawful command influence. Based on its resolution of the implied bias issue, the majority declined to answer the unlawful command influence issue. *Id.* at 342 (Sullivan, J., concurring in part and dissenting in part).

18. *Id.* at 338. The court did not set aside the conviction. Such results, however, are not unusual when an accused pleads guilty to the charged offenses, and the unlawful command influence is determined to be unrelated to the decision to enter such a plea.

19. *Id.* at 341.

Judge Crawford's dissent highlighted the fundamental command dilemma of maintaining both good order and discipline and an impartial system of justice. She cited the eloquent 1961 opinion of Judge Latimer²² for the proposition that the GCMCA is not required to simply stand by, deaf, dumb, and mute, while the foundations of good order and discipline within his unit crumble around him. According to Judge Latimer:

The primary responsibility for the maintenance of good order and discipline in the services is saddled on commanders, and we know of no good reason why they should not personally participate in improving the administration of military justice. No doubt the personal presentation of that subject by the commander is impressive, but that is as it should be. The question is not his influence but, rather, whether he charted it through forbidden areas.²³

This portion of Judge Crawford's dissent is supported by the common sense notion that if a commander is responsible for discipline, he must be given the authority to influence it. To support her argument, Judge Crawford cited several UCMJ provisions permitting, in fact requiring, commanders to provide general instructional and informational classes on military justice.²⁴ While it would be a stretch to conclude that Judge Crawford's reference to Article 37, UCMJ, which permits general instruction on military justice,²⁵ was intended to cover the type of "instruction" provided by the GCMCA and the SJA in *Youngblood*,²⁶ it does support the more general position that command discussions regarding the UCMJ are permissible, if not expected.²⁷

Judge Crawford, however, stands on much stronger ground regarding her criticism of the majority's analysis of implied bias. Focusing on Supreme Court precedent that implied bias should only be used in "extreme situations," and that it is "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote,"²⁸ Judge Crawford expressed grave concerns that the majority was unnecessarily expanding the realm of implied bias. Comparing the federal and military justice systems, Judge Crawford opined that the "blue ribbon" quality of military court-martial panels calls for even rarer application of the implied bias doctrine in a court-martial.²⁹

Judge Crawford's final observations regarding the effect of the majority's opinion on the trial judiciary and military court members offers a radically different twist on exactly which "appearances" the court should focus its concern. Judge Crawford criticized the majority for undercutting the moral authority and psychological support of the trial judge who had the advantage of observing the demeanor of the parties involved.³⁰ Citing one member's testimony that he took his oath and court-martial duty very seriously, Judge Crawford heaped additional criticism upon the majority's growing distrust of officers and NCOs to serve critical roles in the administration of military justice.³¹

The competing opinions in *Youngblood* provide a telling example of whether the CAAF's decisions serve to reduce the specter of unlawful command influence or fan its flames. By relying on a fluid concept of implied bias and public perception versus that of the military judge and court members, the majority has provided a new source of oxygen for the flames of unlawful command influence to burn.

Shortly thereafter, Judge Crawford found herself expressing similar views in a dissenting opinion in *United States v. Rome*.³²

20. *Id.* (citing *United States v. Gerlich*, 45 M.J. 309, 313 (1996)).

21. *Id.* at 342.

22. *United States v. Danzine*, 30 C.M.R. 350 (C.M.A. 1961).

23. *Id.* at 352.

24. *See Youngblood*, 47 M.J. at 344-45 (Crawford, J., dissenting) (citing UCMJ art. 137 (West 1999)).

25. "The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial . . ." UCMJ art. 37(a).

26. *Youngblood*, 47 M.J. at 344-45 (Crawford, J., dissenting).

27. *See* UCMJ art. 37 (requiring an explanation of the UCMJ to members upon initial entrance on active duty, and again after six months, and upon the occasion of every re-enlistment).

28. *Youngblood*, 47 M.J. at 345 (quoting *United States v. Phillips*, 455 U.S. 209, 217 (1982)).

29. *Id.* at 346.

30. *Id.*

31. *Id.*

Like *Youngblood*, the issue on appeal concerned the implied bias of a court member. Private First Class Rome was convicted of attempted robbery and sentenced to a Bad-Conduct Discharge and two years of confinement. During voir dire, the military judge announced that in a previous trial he had found that one of the current panel members had committed an unintentional act of unlawful command influence, and had been “kind of grilled” by Rome’s current defense counsel at a prior court-martial. The defense counsel stated that she was not concerned so much that the member had committed an act of unlawful command influence, but that she had caused trouble for him in a prior high-profile case with media attention. During voir dire by the trial counsel, the member stated that the defense counsel “did a good job, in my opinion, of supporting her client,” and that his previous encounter with her would not affect his ability to sit impartially in this case. No further information was developed, and the defense challenge for cause was denied. The defense preserved the issue by challenging the member peremptorily.³³

As in *Youngblood*, a four-judge majority concluded that the military judge abused his discretion by not granting the challenge for cause on the basis of implied bias.³⁴ In almost verbatim language to that in *Youngblood*, the CAAF held that “[i]n the eyes of the public, the appearance of fairness would have been compromised by allowing LTC M to sit after being personally and professionally embarrassed by appellant’s defense counsel.”³⁵ “Allowing LTC M to sit would have been ‘asking too much of both him and the system.’”³⁶

Judge Crawford launched a three-pronged attack on the majority opinion. First, she stated that the majority was applying the “liberal grant”³⁷ mandate at the appellate level. Second, she explained that its application of the implied bias standard was too subjective to be of use. Finally, Judge Crawford

believed that the majority’s expansive view of implied bias called into question the ability of any officer or non-commissioned officer (NCO) to serve as a court member.³⁸ Common to each of Judge Crawford’s concerns was the subjective application of the implied bias doctrine—that an “I know it when I see it” approach to the theory of implied bias leaves trial judges and counsel without clear guidelines.³⁹

Judge Crawford’s concern that the majority’s opinion raises the question whether any officer or NCO can serve as a court member borders on the extreme. Nevertheless, the majority should not underestimate the potential broad impact that its opinions may have on the overall future of military justice. The relative ease with which it finds otherwise competent, honest, “blue ribbon” members unfit for court-martial duty may generate undue criticism of the military justice system and the people who are sworn to administer it fairly. As a result, the military justice system may someday become void of military participants.

In *United States v. Villareal*⁴⁰ the Navy-Marine Corps Court of Criminal Appeals also decided a case solely on the basis of appearances. Despite finding that there was no actual command influence, the Navy court reduced the accused’s sentence from ten years to seven and one-half in order to “rectify the specter of apparent unlawful command influence.”⁴¹

Aviation Ordnanceman Airman Villareal was charged with several offenses, including aggravated assault, involuntary manslaughter, and obstruction of justice.⁴² The original GCMCA signed a pretrial agreement permitting the accused to avoid a murder conviction, and requiring the GCMCA to suspend any confinement in excess of five years.⁴³ After discussing the case with his old friend, who happened to be his senior officer, the GCMCA decided to withdraw from the pretrial

32. 47 M.J. 467 (1998).

33. *Id.* at 468-69.

34. *Id.* at 469.

35. *Id.* (emphasis added).

36. *Id.*

37. On numerous occasions the CAAF has enjoined military judges to be liberal in granting challenges for cause. *See, e.g.,* *United States v. Smart*, 21 M.J. 15, 21 (C.M.A. 1985).

38. *Rome*, 47 M.J. at 470-72.

39. *Id.* at 472.

40. 47 M.J. 657 (N.M. Ct. Crim. App. 1997).

41. *Id.* at 665-66.

42. The charges stemmed from playing a game similar to Russian roulette in the barracks room, in which one of the victims ended up killing himself with a bullet through the head.

43. *Villareal*, 47 M.J. at 658-59.

agreement.⁴⁴ Upon the sound advice of his SJA, the GCMCA transferred the case to a different GCMCA to avoid allegations of unlawful command influence. Although the accused attempted to reach a similar pretrial agreement with the new GCMCA, he was unable to do so, and was eventually tried, convicted, and sentenced to ten years confinement.⁴⁵

Prior to trial, the accused filed a motion to abate the proceedings until the new GCMCA would agree to abide by the terms of the original pretrial agreement. The trial judge denied the accused's request. The military judge concluded that the decision to withdraw was not based on comments from the senior commander, but from a ten-page letter from the victim's family criticizing the original GCMCA's decision to enter into a pretrial agreement that did not include the murder charge.⁴⁶ The judge was also satisfied that the new GCMCA was not tainted by even the appearance of the original unlawful command influence.⁴⁷

On appeal, the Navy court held that the early pretrial transfer of the case to a neutral GCMCA was a satisfactory remedy that provided the accused his basic right to individual consideration of his case by a commander who was free from unlawful command influence.⁴⁸ The court refused to order specific performance of the original pretrial agreement for two reasons. First, the court reasoned that convening authorities are free to withdraw from pretrial agreements at any time before the accused begins to perform his end of the bargain. Second, the accused offered no evidence of detrimental reliance on the original agreement during the three days it was in effect.⁴⁹

Despite finding that the "appellant enjoyed a convening authority unaffected by any perceived command influence," a two to one majority of the court nevertheless believed that the accused was entitled to "some relief" to fulfill the court's statutory obligation to "preserve both the reality *and appearance* of fairness of the military justice system."⁵⁰ The court exercised its Article 66(c), UCMJ, power to reassess the sentence and reduced it from ten to seven years and six months of confinement. The court asserted that this action was not based on

clemency, but rather on the court's "power to seek and do justice and to protect the integrity of the military justice system."⁵¹

The exercise of such unrestricted appellate relief, based purely on appearances, is not good for the military justice system. As noted by Judge Dombroski in his dissenting opinion, such attempts to "split the baby" have no basis in law and equity.⁵² Judge Dombroski disagreed with the majority's finding that the accused was only "largely" made whole by the transfer of the case to a neutral GCMCA. According to Judge Dombroski, the accused "entered the arena once again on an even keel" and ultimately "asked for and received his day in court without taint of partiality or unlawful command influence."⁵³

At the tactical trial court level, these three cases provide a rather simple lesson for defense counsel. In addition to arguing that certain conduct constitutes actual unlawful command influence, counsel should also argue that "it looks bad, your honor, and you should be concerned with more than just actual command influence." Government counsel, on the other hand, must be creative in their efforts to rebut such arguments that unlawful command influence, like beauty, is in the eyes of the beholder. Despite objective proof that no actual unlawful command influence occurred or affected the trial, the government may still find itself on the short end of the result based on guidance military judges will take from these three decisions reinforcing the importance of appearances.

On the strategic, policy making level, this trilogy of "apparent" unlawful command influence cases reveals a disturbing trend among our military appellate courts; a trend now focused on the general public's perception of military justice rather than that of the commanders, lawyers, and judges most responsible for maintaining good order and discipline in our armed forces. Having said that, it should be noted that these three decisions represent a marked contrast from previous terms in which military appellate courts raised the bar on the accused's burden to establish sufficient facts to raise the issue of unlawful command influence.⁵⁴

44. This officer was not in favor of the deal and asked: "What would it hurt to just send it to trial and let the members decide?" *Id.* at 660.

45. *Id.* at 659.

46. *Id.* at 660.

47. *Id.*

48. *Id.* at 661.

49. *Id.* at 662.

50. *Id.* at 665 (emphasis added).

51. *Id.* at 666.

52. *Id.* at 666-67 (Dombroski, J., dissenting).

53. *Id.*

Dubay, or not Dubay, That is the Question

With the exception of “apparent” command influence cases, resolution of alleged unlawful command influence normally requires a fully developed record. This often presents appellate courts with the decision of whether to order a post-trial Article 39(a), or *Dubay*⁵⁵ hearing. This was precisely the issue in two CAAF and two service court decisions that were decided during the 1998 term.

In *United States v. Norfleet*,⁵⁶ the accused won “the battle of *Dubay*” by getting the Air Force Court of Criminal Appeals to order a *Dubay* hearing, but lost the war of establishing unlawful command influence based on the live testimony presented during the hearing. After being convicted of marijuana use and sentenced to a bad-conduct discharge and reduction to E-1, Staff Sergeant Norfleet⁵⁷ alleged, on appeal, that the SJA had improperly discouraged his deputy SJA (DSJA) from testifying on her behalf. To support her allegation, the accused provided affidavits from herself and another paralegal in the office. The SJA and the DSJA provided opposing affidavits. The Air Force Court ordered a *DuBay* hearing to resolve the conflict.⁵⁸

Based on the live testimony of all four witnesses at the *Dubay* hearing, the trial judge found that the SJA never attempted to discourage the DSJA from testifying, and, in fact, had encouraged her to do what she thought was right.⁵⁹ Supporting the judge’s finding was his observation that the affidavits submitted by the accused and her fellow paralegal were

“suspiciously similar.” On review, the Air Force court was convinced beyond a reasonable doubt that the SJA did not attempt to influence the testimony of his DSJA. The court agreed with the military judge and concluded that the facts pointed to “a fabrication of the allegations by a desperate appellant.”⁶⁰

A slightly different Air Force Court reached a similar conclusion in *United States v. Bradley*⁶¹ (*Bradley II*), after reviewing the SJA’s testimony in a *Dubay* hearing. In *Bradley I*,⁶² the court ordered a *Dubay* hearing based on allegations that the SJA: (1) pressured a defense witness not to testify, (2) published a post-trial article in the local newspaper that tainted the convening authority, (3) engaged in conversation with the president of the court-martial during a break, and (4) rejected defense counsel’s request for a verbatim transcript of the Article 32(b) investigation with a less than professional comment regarding counsel’s effectiveness.⁶³ To support her appellate allegations, the accused submitted an affidavit from the master sergeant whom the SJA was accused of intimidating, and the SJA’s memorandum denying the defense request for the verbatim transcript of the Article 32(b) investigation.⁶⁴

Based on the SJA’s memorandum, the fact the SJA authored an article that appeared in the base newspaper two weeks after trial,⁶⁵ and the unrebutted affidavit claiming the SJA had discouraged a defense witness from testifying, the Air Force Court had “grave concerns” that the accused had not received a trial free from improper command influence.⁶⁶ Sensing an “unfair atmosphere hanging over the case,” the court provided the SJA a chance to tell his side of the story before reaching a conclusion concerning unlawful command influence.⁶⁷ In its order

54. See Lieutenant Colonel Lawrence J. Morris, “*This Better be Good*”: *The Courts Continue to Tighten the Burden in Unlawful Command Influence Cases*, ARMY LAW., May 1998, at 49 (containing a complete review and analysis of the 1997 term of unlawful command influence cases).

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

56. No. ACM 829280, 1998 WL 433022 (A.F. Ct. Crim. App. 1998).

57. A paralegal with 18 years service.

58. *Norfleet*, 1998 WL 55402, at *5.

59. *Id.*

60. *Id.* at *6.

61. 48 M.J. 777 (A.F. Ct. Crim. App. 1998) [hereinafter *Bradley II*]. In Judge Snyder’s place was Judge Pearson.

62. 47 M.J. 715 (A.F. Ct. Crim. App. 1997).

63. *Id.* at 720. The SJA’s reply included the following response to defense counsel’s concern that he would be incompetent without a verbatim transcript of the victim’s Article 32(b) testimony: “Unfortunately, the competency of any military or civilian defense counsel is largely beyond control of this office. Should you have further concerns about your competency, however, I urge you to notify your Chief Circuit Defense Counsel.” *Id.* at 722.

64. *Id.*

65. *Id.* at 721.

66. *Id.* at 722.

67. *Id.* at 723.

directing a *Dubay* hearing, the court provided detailed instructions on each issue the court wanted the trial judge to address.⁶⁸

Based on the record developed at the *Dubay* hearing, the *Bradley II* court had little trouble resolving the allegations of command influence in favor of the government.⁶⁹ Observing that the entire issue might possibly have been avoided had the government provided an affidavit from the SJA during *Bradley I*,⁷⁰ the court concluded that the SJA's testimony was much more credible than that of the witness he allegedly discouraged from testifying.⁷¹ The court was also convinced that the article that the SJA wrote for the local paper did not constitute unlawful command influence since there was no evidence that the GCMCA ever considered it prior to taking action on the case.⁷² The court was also satisfied that the SJA's conversation with the president of the court concerned matters that were unrelated to the trial at hand. It also helped that the SJA brought the discussion to the attention of the defense counsel who chose not to pursue the issue at trial. The court's only remaining concerns were the SJA's comments regarding the competence of the defense counsel. Finding the comments "ill-advised," the majority nevertheless empathized with the SJA, finding his remarks to be the result of frustration as opposed to evidence of a bias towards the accused."⁷³

The lesson for government counsel to take from *Bradley I* and *II* is that aggressive appellate advocacy may help avoid the need for costly, troublesome *Dubay* hearings. By obtaining affidavits from all parties involved, the government may be able to provide the appellate courts with a sufficient factual basis to resolve some allegations of error without the need for an additional post-trial proceeding.⁷⁴ Although such affidavits may not always prevent the appellate courts from ordering such

hearings, they will certainly ensure that courts do not decide the issue on the basis of un rebutted defense affidavits. In *Bradley I*, the court was quick to suspect the SJA of unlawful command influence based on the un rebutted defense submissions. In fact, the court was quite critical of the SJA's performance in *Bradley I*. Only after it reviewed the SJA's *Dubay* testimony, did the *Bradley II* court become somewhat apologetic for its critical dicta regarding the SJA's behavior in *Bradley I*.⁷⁵

*United States v. Dingis*⁷⁶ involved a rare allegation that the special court-martial convening authority (SPCMCA) was an *accuser*.⁷⁷ Convinced that appellant's post-trial allegations were sufficiently reliable, the CAAF ordered a *Dubay* hearing to develop the facts under "the crucible of an adversary proceeding."⁷⁸ While pursuing a doctorate degree at the University of Oklahoma, Captain Dingis volunteered as an assistant scoutmaster with a local Boy Scout troop. Shortly thereafter, Boy Scout officials brought allegations of homosexual activity to the attention of an Air Force officer [Colonel M]. Colonel M, himself a Boy Scout district chairman, was not in the accused's chain of command. Additionally, Captain Dingis did not fall under Colonel M's special court-martial jurisdiction. Nevertheless, Colonel M ordered the AFOSI to investigate the allegation, and he eventually requested that the accused be assigned to his unit to initiate the criminal process. Charges were preferred and forwarded to Colonel M. As the SPCMCA, Colonel M directed an Article 32(b) investigation and subsequently forwarded the charges to the GCMCA with a recommendation for a general court-martial.⁷⁹

At trial, the accused pleaded guilty and was sentenced to a dismissal, total forfeitures, and five months confinement.⁸⁰ After completing his period of confinement the accused discovered, through a Freedom of Information Act request, new infor-

68. The trial court was ordered, at a minimum, to obtain the testimony of the two key witnesses, and to obtain a copy of the newspaper article written by the SJA. The order also directed the trial judge to make specific findings of fact and conclusions of law on several issues. *Id.* at 723.

69. *United States v. Bradley*, 48 M.J. 777 (A.F. Ct. Crim. App. 1998).

70. *Id.* at 779 (citing *United States v. Ginn*, 47 M.J. 236 (1997) (appellate courts may not resolve disputed questions of fact based on conflicting affidavits submitted by parties)).

71. The court found that this defense witness "had clearly become a zealous advocate for appellant, both during and after the trial . . . Her negative outburst immediately following appellant's conviction . . . is evidence of her bias in the case." *Id.* at 780.

72. *Id.*

73. *Id.* at 781.

74. *See United States v. Ginn*, 47 M.J. 236, 248 (discussing the principles of when an appellate court may resolve an issue without further evidentiary proceedings).

75. "Suffice it to say that, if the government had presented a post-trial affidavit from Lt Col Dent at the time we originally considered this case, we might well have approached the case from an entirely different perspective. Rather than suggesting in our opinion that there appeared to be possible command influence . . . we would not have suggested in our original opinion that things did not look good for Lt Col Dent." *Bradley II*, 48 M.J. at 779.

76. *Id.*

77. *See* UCMJ art. 1(9) (West 1999); *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, R.C.M. 601 (1998).

78. *United States v. Dingis*, 49 M.J. 232 (1998).

79. *Id.* at 233-34.

mation concerning Colonel M's involvement in the case. This information supported the allegation that Colonel M was "so closely connected with the offense that a reasonable person would conclude he had a personal interest in the case."⁸¹ Satisfied that the facts alleged by the accused were sufficient to raise the issue that Colonel M should be disqualified from acting as a SPCMCA in the case, a unanimous CAAF directed a *Dubay* hearing to further develop the facts.⁸²

Appellate counsel should take note of the CAAF's footnote explaining why it did not apply waiver in *Dingis*. The CAAF acknowledged the general rule that non-jurisdictional defects in the pretrial process not raised at trial are normally waived. Nevertheless, the court declined to apply waiver in *Dingis* based on appellant's representation that he did not discover the potentially disqualifying information until well after the trial.⁸³ This should discomfort government appellate counsel since there was no evidence of intentional non-disclosure by the trial counsel. Colonel M's involvement in the case was certainly information that was discoverable by the defense prior to trial. Government appellate counsel should also heed the CAAF's criticism that the government failed to submit an affidavit from Colonel M during the appellate process.⁸⁴ Had the government submitted an affidavit from Colonel M, the government may well have convinced the CAAF that a *Dubay* hearing was unnecessary to resolve the issue.⁸⁵

The CAAF reached a different conclusion in *United States v. Ruiz*,⁸⁶ and refused to order a *Dubay* hearing to gather additional evidence of post-trial allegations of unlawful command influence. Prior to final action by the convening authority, the civilian defense counsel asked the convening authority, on five separate occasions, to order a post-trial Article 39(a) session to address two allegations of unlawful command influence. The first issue he raised was that a court member deliberately concealed information during voir dire. The other issue concerned "newly discovered evidence" that the convening authority held a briefing prior to trial in which he stated his opinion regarding the "appropriate punishment for offenses such as fraternization."⁸⁷

Despite repeated requests from the civilian defense counsel, the convening authority refused to order a post-trial hearing. His response on each occasion was that the allegations were unsubstantiated.⁸⁸ Citing the Air Force Court's conclusion that the convening authority had "no obligation, under the circumstances, to develop evidence to support appellant's allegations," the CAAF was satisfied that the convening authority did not abuse his discretion in not ordering a post-trial Article 39a hearing.⁸⁹ Both the Air Force Court and the CAAF were satisfied the accused "had ample opportunity to support his accusations of misconduct" but had failed to do so.⁹⁰

The CAAF's opinion in *Ruiz* is consistent with its recent trend of placing an increased burden on the accused to produce sufficient evidence of unlawful command influence.⁹¹

80. *Id.* at 232.

81. *Id.* at 234. The information included e-mails and affidavits from airmen in Colonel M's office that indicated Colonel M was a District Chairman in the Boy Scouts, that Boy Scout officials had contacted Colonel M because of his position in the Boy Scouts, that Colonel M had the investigation initiated despite having no command authority over the accused, and that Colonel M requested that the accused be transferred to his command. *Id.*

82. *Id.*

83. *Id.* at 234 n.2.

84. *Id.* at 234 n.3.

85. The court clearly indicated the willingness to resolve the issue without a *Dubay* hearing, but felt constrained in the absence of an affidavit from Colonel M. Noting that the government had submitted affidavits from "other, less critical players," the court lamented the absence of an opportunity to "examine those matters in the context of other circumstances that might bear on the questions of whether Col. M.'s involvement was official or personal for purposes of the applicable provisions of the Code and the Manual." *Id.* at 234. The government clearly missed an opportunity to create a sufficient record through the back door of a post-trial affidavit.

86. 49 M.J. 340 (1998).

87. *Id.* at 347.

88. *Id.*

89. *Id.* at 348.

90. *Id.* The defense submission consisted of unsubstantiated allegations that one of the members attended a briefing in which the convening authority allegedly expressed his opinion regarding punishment for fraternization: "Col [H] relayed the findings of the meeting and his interpretation of the Commander's intent to a junior officer under his command. Capt. [N] is prepared to give testimony regarding his knowledge of the meeting and the impact it had on Col [H]." *Id.*

91. See *United States v. Newbold*, 45 M.J. 109, 111 (1996) (citing *United States v. Stombaugh*, 40 M.J. 208, 211 (C.M.A. 1994)). See also Lieutenant Colonel Lawrence J. Morris, "This Better Be Good": *The Courts Continue to Tighten the Burden in Unlawful Command Influence Cases*, ARMY LAW., May 1998, at 49 (containing an excellent discussion of this rising trend).

Although *Ruiz* involves factual *allegations* that are similar to those in *Youngblood*, the two can be distinguished based on the degree of evidence produced by the defense. In *Youngblood*, the defense offered considerable evidence of the command briefing on the record during voir dire. Counsel in *Ruiz*, on the other hand, despite repeated requests from the convening authority, failed to offer any additional evidence beyond the assertion that “Capt. N is prepared to give testimony.”

Shortcuts in the Court Member Selection Process

There were three cases in the past year involving alleged short cuts in the court member selection process, two from the CAAF, and one from the Air Force Court of Criminal Appeals. All three cases involved guidance from the convening authority regarding the court member nomination process. The CAAF cases, *United States v. White*⁹² and *United States v. Upshaw*,⁹³ were ultimately affirmed, while the lone Air Force case, *United States v. Benson*,⁹⁴ was reversed.

In *White*, the new convening authority observed that few commanders were appointed to court-martial duty, and that several nominated members were not available due to temporary duty, leave, or permanent change of station orders. In an attempt to tighten up the nomination process, the convening authority issued directives to his subordinate commanders to “nominate your best and brightest staff officers” and that he regarded “all his commanders and their deputies as available to serve as members.”⁹⁵ At trial, the accused claimed that his court-martial panel was the result of improper application of the court member selection criteria set forth in Article 25(d), UCMJ. To support his allegation, the defense offered proof that commanders in the jurisdiction constituted less than eight-percent of the officer population but constituted eighty-percent of

the court-martial membership. Eight of the ten nominees and seven of the nine ultimately selected for appellant’s court were commanders.⁹⁶

The military judge denied the accused’s motion for three reasons. First, the trial judge found no evidence that commanders were selected because they were believed to be stricter disciplinarians. Second, he relied upon the well-established principle that court-martial panels need not represent a cross-section of the military population. Finally, he observed that “commanders have unique military experience that is conducive to selection as a court-martial member.”⁹⁷

The CAAF agreed with all three findings of the military judge. Most notable was the court’s discussion of what constitutes unlawful court-packing by a convening authority. A three-member majority⁹⁸ was clearly satisfied that the convening authority’s directive did not stem from an improper motive to stack the court. In fact, they concluded that his directives reflected a “commendable effort . . . to ensure that the ‘best and brightest’ members of his command serve as court members.”⁹⁹

More controversial are the court’s comments regarding the alleged disproportionate number of commanders who were chosen to sit as members. Citing a 1985 Army Court of Military Review opinion,¹⁰⁰ the court opined that the criteria for command selection “are totally compatible” with the Article 25(d), UCMJ, criteria for court-member selection.¹⁰¹ As a result, the court was not convinced that the selection of more commanders than non-commanders, absent improper motive, constituted unlawful court packing.¹⁰²

In a concurring opinion, Judge Effron acknowledged that while these facts do not present a case of unlawful command influence under Article 37, UCMJ,¹⁰³ he was nonetheless trou-

92. 48 M.J. 251 (1998).

93. 49 M.J. 111 (1998).

94. 48 M.J. 734 (A.F. Ct. Crim. App. 1998).

95. *White*, 48 M.J. at 253.

96. *Id.* The defense also offered evidence that in the three courts-martial preceding appellant’s, commanders constituted six of nine, seven of nine, and eight of nine members respectively.

97. *Id.*

98. The court’s decision was unanimous; however, Judges Effron and Sullivan wrote separate concurring opinions.

99. This is well supported by the two memoranda that included language that the convening authority, in addition to considering all commanders and deputies available, wanted the subordinate commands to nominate their “best and brightest staff officers.” *White*, 48 M.J. at 255.

100. *United States v. Carman*, 19 M.J. 932, 936 (A.C.M.R. 1985).

101. “Like selection for promotion, selection for command is competitive . . . officers selected for highly competitive command positions . . . have been chosen on the ‘best qualified’ basis, [and] . . . the qualities required for exercising command . . . are totally compatible with the statutory requirements for selection as a court member.” *White*, 48 M.J. at 255.

102. *Id.*

bled over the majority's analysis of the convening authority's application of the Article 25(d), UCMJ, criteria. Though he was ultimately convinced that the convening authority complied with the Article 25(d), UCMJ, criteria,¹⁰⁴ Judge Effron expressed two major objections to the majority's opinion. His greatest concern was the majority's unnecessary willingness to equate the criteria for command selection with that for court-members selected pursuant to Article 25(d), UCMJ. Viewing the convening authority's automatic consideration of all commanders as a short-cut application of the Article 25(d), UCMJ, criteria, Judge Effron expressed doubts that the majority vigilantly exercised its duty to ensure that convening authorities demonstrate strict compliance with their statutory obligations under Article 25(d), UCMJ. Second, concluding that selection for command may be a factor for convening authorities to consider, Judge Effron thought it unfair to infer that all commanders are "best qualified" to serve as members simply because they were selected for command.¹⁰⁵

In a related concern, Judge Effron suggested that the convening authority's memoranda praising the qualifications of commanders might unintentionally encourage subordinate commands to systemically exclude non-commanders from the nomination process.¹⁰⁶

In *United States v. Upshaw*,¹⁰⁷ a four to one CAAF majority concluded that an honest administrative mistake regarding the rank of the accused that resulted in the systematic exclusion of E-6s from the court-martial selection process, did not prejudice the accused. While preparing the court-martial nomination memorandum, the SJA erroneously believed that the accused was an E-6. As a result, he instructed his staff to prepare a list of nominees in the grades of E-7 and above.¹⁰⁸ At trial, the defense conceded that there was no "bad faith" on behalf of the SJA; that it was "just simply a mistake." Unfortunately for the

accused, rather than request that the convening authority select additional members or start the selection process anew, the defense moved to dismiss the case for lack of jurisdiction. The military judge denied the motion.¹⁰⁹

The CAAF upheld the trial judge's conclusion. While noting that members may not be selected nor excluded solely on the basis of rank,¹¹⁰ the court, in language similar to *White*, found no evidence of improper motive on behalf of the convening authority. Based on the defense counsel's concession at trial that the exclusion of E-6s was "just simply a mistake," the CAAF concluded that the issue of unlawful court stacking was not raised. Though the CAAF concluded that it was error for such potential members to be excluded, it found no prejudice to the accused.¹¹¹

Judge Sullivan seized the opportunity to draft a concurring opinion expressing his view that cases challenging the convening authority's court member selection methods would no longer be an issue if Congress were to require random selection of court members.¹¹² Judge Crawford also authored a separate opinion to reinforce her position that allegations of accusative stage¹¹³unlawful command influence are waived unless they are raised at trial. Additionally, she opined that it was the responsibility of military appellate courts to enforce this principle by refusing to consider such unraised issues on appeal.¹¹⁴

In his continuing effort to account for the fact that members of the armed forces are denied their Sixth Amendment right to a trial of their peers, Judge Effron authored a strong dissent, in effect, demanding strict scrutiny of any deviation from the statutory requirements of Article 25(d), UCMJ. In Judge Effron's view, the government was placed on notice that the selection process was flawed and in need of correction. Despite an ill-phrased request for relief from the defense,¹¹⁵ Judge Effron con-

103. This conclusion is based on the absence of any evidence regarding improper motives on behalf of the convening authority. *Id.* at 259.

104. To support a violation of Article 25(d), Judge Effron would require either: (1) direct evidence of improper intent, or (2) greater statistical evidence than that offered by the accused. *Id.*

105. Judge Sullivan shared the same view in his concurring opinion. *Id.*

106. *Id.*

107. 49 M.J. 111 (1998).

108. *Id.* at 112. The SJA testified that he routinely avoids nominating members of the same rank as an accused to avoid risks of administrative mistakes regarding dates of rank and thereby inadvertently nominating a member who is junior to the accused. *Id.*

109. *Id.*

110. *Id.* at 113.

111. *Id.*

112. *Id.* at 114.

113. *See United States v. Drayton*, 45 M.J. 180 (1996).

114. *Upshaw*, 49 M.J. at 114.

cluded that the government should nevertheless have taken corrective measures to ensure compliance with Article 25(d), UCMJ. The government's failure to do so, after having been put on notice of the defect, would justify reversal in Judge Effron's view.¹¹⁶ Although Judge Effron could not sway the majority, his admonition to the government to "play by the rules" should not go unheeded by trial counsel. The deviation in *Upshaw* was relatively minor. More egregious deviations from the requirements of Article 25(d), UCMJ, even those that do not rise to the level of actual command influence, may create enough *apparent* command influence to convince a majority of the court to take some type of remedial action.¹¹⁷

In *United States v. Benson*,¹¹⁸ the Air Force Court had no trouble finding reversible error when a subordinate level SPCMCA systematically excluded all ranks below E-7 from court-martial membership. In his memorandum soliciting court member nominees, the SPCMCA directed subordinate commanders to nominate officers in all grades and "NCOs in the grade of master sergeant or above" for service as court members.¹¹⁹ The list forwarded to the GCMCA included four E-7s and four E-8s. The GCMCA ultimately selected four E-7s and one E-8 to sit on the accused's panel.¹²⁰

At trial, the accused raised the issue of improper application of the Article 25(d), UCMJ, selection criteria. The SPCMCA offered the following testimony: "I felt like, and I still feel like, in most cases, again, it's not excluded that I couldn't find a tech sergeant [E-5] or staff sergeant [E-6] that would meet the proper qualifications. But in general a master sergeant [E-7] has been around long enough in the Air Force, has that additional education level, maturity level, and experience with the Air Force. So it is a general guideline, I guess you might say."¹²¹ He also

acknowledged on cross-examination that he had never appointed an E-5 or E-6 to sit on a court-martial panel.

Based on this testimony, the Air Force Court was convinced the SPCMCA improperly used rank as a shortcut application of the Article 25(d), UCMJ, criteria. After taking judicial notice of the educational and experience level of Air Force NCOs (including E-4s), the court criticized the systematic exclusion of all ranks below E-7,¹²² and set aside both the findings and sentence. The court emphasized three basic rules for court member selection: (1) grade alone cannot be used as a shortcut for the Article 25(d) criteria, (2) convening authorities cannot systematically exclude any grade above E-2, and (3) the defense bears the burden of demonstrating such systematic exclusion.¹²³

Undoing Unlawful Command Influence

Two cases from the most recent term demonstrate the ability (and inability) of the command and military judge to take corrective measures to overcome acts of actual unlawful command influence. In *United States v. Rivers*,¹²⁴ the government and military judge were able to salvage both the conviction and sentence despite three separate allegations of unlawful command influence. In *United States v. Plumb*,¹²⁵ the Air Force Court set aside the findings and sentence after criticizing both the military judge and the command for its failure to take remedial efforts in what the court labeled the worst case of wrongful government conduct it had seen in its combined ninety-plus years of service.

In *United States v. Rivers*, the defense alleged three acts of unlawful command influence. The first involved a command

115. The defense did not ask that new members be selected. Instead, the defense moved to dismiss the charges for lack of jurisdiction arising from the improperly constituted court. *Id.* at 112.

116. *Id.* at 116.

117. See *United States v. Villareal*, 46 M.J. 657 (N.M. Ct. Crim. App. 1997) (reducing the sentence from ten to seven and one half years confinement to rectify the specter of apparent command influence).

118. 48 M. J. 734 (A.F. Ct. Crim. App. 1998).

119. *Id.* at 738. An Air Force master sergeant is an E-7.

120. *Id.*

121. *Id.*

122. *Id.* at 739. The court also expressed concern over the SPCMCA's apparent bottom-line consideration of only E-5s. The court observed that this violated the minimum standard established in *United States v. Yager*. See *United States v. Yager*, 7 M.J. 171 (C.M.A. 1979) (permitting convening authorities to systematically exclude E-2s and E-1s from consideration).

123. *Benson*, 48 M.J. at 740. The court also expressed concern over additional guidance in the convening authority's memorandum that stated that officers and NCOs "have a responsibility to ensure a disciplined force" and "I expect those selected for this important duty to fulfill their responsibility." *Id.* at 738. The court considered such gratuitous comments as the equivalent of asking subordinates to nominate "hardliners," which would constitute unlawful command influence. *Id.* at 740.

124. 49 M.J. 434 (1998).

125. 47 M.J. 771 (A.F. Ct. Crim. App. 1997).

policy letter on physical fitness published by the GCMCA that included the phrase “[t]here is no place in our Army for illegal drugs or for those who use them.”¹²⁶ The second allegation of unlawful command influence involved public comments from the accused’s battery commander advising soldiers to stay away from other soldiers involved with drugs.¹²⁷ The final allegation was that the battery first sergeant discouraged four defense witnesses from testifying for the defense by reading them their Article 31, UCMJ, rights prior to questioning.¹²⁸

At trial, the government conceded that the GCMCA and the battery commander had committed acts of unlawful command influence.¹²⁹ Rather than challenge the underlying acts of alleged unlawful command influence, the government presented evidence to the military judge that the accused’s trial was not tainted by these acts of unlawful command influence. To support its position, the government offered evidence of the GCMCA’s retraction memorandum and a corrected copy of his physical fitness policy memorandum. In his retraction memorandum he stated he did not believe that all drug offenders must be discharged from the service, and that it was his strong belief that all soldiers deserved individual assessment of their cases.¹³⁰

The government also offered evidence of the additional remedial steps the command took to ensure the battery commander’s conduct did not taint the proceedings. The evidence included the results of an informal investigation ordered by the GCMCA, which resulted in a written memorandum of reprimand issued to the commander. The battery commander was also ordered to make a public retraction and apology to the members of the battery in the presence of the battalion and division artillery commander. The fact the battery commander’s tour of command ended prior to trial also supported the government’s position that his conduct did not adversely affect the proceedings.¹³¹

The command’s remedial efforts were supplemented by additional corrective measures ordered by the military judge. These measures included: (1) the admission as stipulations of

expected testimony, the testimony from twenty-two soldiers questioned during the informal investigation; (2) instructions to each defense witness to report any perceived retribution based upon their testimony to the military judge; (3) banishment of the battery commander from the court room; and (4) notice to the defense counsel that he would “favorably consider” any other remedial measures requested by the defense.¹³²

Regarding the allegations against the battery first sergeant, the military judge ordered a post-trial session to obtain additional evidence. After considering testimony from numerous witnesses, the military judge made detailed findings of fact, concluding that the first sergeant’s decision to advise potential defense witnesses of their Article 31, UCMJ, rights did not constitute unlawful command influence.¹³³

On appeal, the CAAF was satisfied beyond a reasonable doubt that appellant’s case was not tainted by unlawful command influence, and that the accused had not been deprived of any witnesses on the merits or on sentencing.¹³⁴ In fact, a unanimous CAAF heaped praise upon the government for its “prompt corrective actions,” and the military judge for his “aggressive and comprehensive actions to ensure that any effects of unlawful command influence were purged and that appellant’s court-martial was untainted.” This case provides counsel and military judges in the field an excellent illustration of how to “undo” acts of unlawful command influence that are identified early in the process.

If *United States v. Rivers* sets the standard for how to “undo” acts of unlawful command influence, *United States v. Plumb*¹³⁵ provides a “how to manual” for those intending to commit unlawful command influence. Captain Plumb was a special agent for the Air Force Office of Special Investigations (AFOSI) who came under suspicion for fraternization, adultery, and conduct unbecoming an officer. The ensuing investigation resulted in allegations of unlawful command influence and witness intimidation against commanders, criminal investigators and legal advisors who were involved in the case.

126. *Rivers*, 49 M.J. at 438.

127. *Id.* at 440.

128. *Id.* at 441. This allegation was raised *sua sponte* by the military judge prior to the close of the trial.

129. *Id.* at 440.

130. *Id.* at 439. The government offered additional evidence that the SJA had reviewed and recommended deletion of the phrase “or those who use them,” but that those changes were not made by the staff principle who was responsible for the memorandum.

131. *Id.* at 441.

132. *Id.* at 441. At trial, the military judge, upon noticing the new battery commander was in the courtroom, ordered him to depart.

133. *Id.* at 442.

134. *Id.* at 443.

135. 47 M.J. 776 (A.F. Ct. Crim. App. 1997).

Concluding that they had never seen, in their combined ninety-plus years as judge advocates, a case “so fragrant with the odor of government misconduct” and command influence, the Air Force Court, in laundry list fashion, described the specific acts of improper and illegal conduct in the following manner:

While they failed to so find, our Army brethren have noted that “a case may occur in which the appearance of unlawful command influence is so aggravated and so ineradicable that no remedy short of reversal of the findings and sentence will convince the public that the accused has been fairly tried We have found just such a case—a case where witnesses believed investigators were trying to influence them; where government investigators [with the advice and assistance of the local SJA office] obtained “emergency” approval for a wire surveillance which had been disapproved by the Air Force General Counsel; where those same investigators prepared an inaccurate transcription of that surveillance which implicated the appellant in crimes he did not commit; where commanders and supervisors alike warned witnesses away from the trial and appellant; where witnesses were punished or denied favorable treatment in part because they associated with the appellant or supported his defense; where government investigators denied the defense access to evidence and threatened defense counsel; where a government investigator socialized with a court-member immediately before trial; where defense witnesses were warned of their rights against self-incrimination for having made minor errors in prior statements, while one government witness was merely encouraged to reconsider his statement and another was simply re-interviewed; and where at least one

witness was told not to talk to defense counsel.¹³⁶

The Air Force Court was highly critical of the trial judge’s inadequate reaction to these multiple allegations of unlawful command influence, in particular the shallow two-step analysis he conducted pursuant to *United States v. Stombaugh*.¹³⁷ Although in agreement with the trial judge’s conclusion that the defense had presented ample evidence to satisfy the first prong of the *Stombaugh* test,¹³⁸ the Air Force Court roundly criticized the military judge’s analysis and conclusion that the defense failed to satisfy the second prong of the test regarding unfair prejudice to the accused. The trial judge based this finding on the fact that every witness who testified on the motion stated they were not affected by the government conduct. The AFCCA condemned this finding for two reasons. First, because the trial judge failed to take any corrective measures at trial to prevent further interference with the witnesses and defense counsel. Like the CAAF in *Rivers*, the Air Force Court observed that the trial judge should have ensured that all witnesses were reminded of their duty to testify if called as a witness for the defense, and that no adverse action would follow from such testimony. The military judge should not have relied upon their statements that they were not affected by the government conduct. The Air Force Court also criticized the trial judge for failing to ban from the courtroom the AFOSI agent who threatened the defense counsel.¹³⁹

The court also found error, as a matter of law, in the trial judge’s singular focus on the existence of “actual” harm to the accused.¹⁴⁰ The court observed that the inquiry into command influence cases does not stop with the absence of “actual” influence. Trial judges must also review the case for the “appearance” of unlawful command influence. Failure to do so in the instant case, one involving the appearance of such a “veritable cavalcade”¹⁴¹ of unlawful command influence, required nothing short of setting aside both the findings and sentence, despite the testimony of a few witnesses stating they were not influenced by such behavior.¹⁴²

136. *Id.* at 780 (citations omitted) (emphasis added).

137. 40 M.J. 208 (C.M.A. 1994).

138. *Id.* The first prong requires the accused to allege sufficient facts, which, if true, constitute unlawful command influence.

139. *Plumb*, 47 M.J. at 779.

140. *Id.* at 780.

141. *Id.*

142. *Id.*

Conclusion

The Air Force Court's concerns over appearances in *Plumb*¹⁴³ brings us back full circle to cases discussed earlier in this article involving the CAAF's similar concerns with the general public's perception of military justice.¹⁴⁴ Based on public interest in our military justice system, it is likely that our military appellate courts' will continue to approach unlawful command influence with a great deal of deference to the general public's perception. Trial advocates, trial judges, and appellate advocates should not underestimate the appellate courts' con-

cern with more than actual command influence. While trial advocates and judges have made great strides in correcting or minimizing acts of actual command influence,¹⁴⁵ the courts have yet to establish a method for analyzing and perhaps correcting conduct that looks bad to the general public. Since military justice can never know when appellate courts will find that something looks bad enough to require a remedy, we must all remain ever vigilant in preventing such conduct before it happens.

143. "Our concern in apparent unlawful command influence cases is not only that the appellant receive a fair trial, but also that the public perceives military justice as fair and impartial." *Id.*

144. *See supra* notes 11-54 and accompanying text.

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