

Still Waters Run Deep? The Year in Unlawful Command Influence

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*“Smooth runs the water where the brook is deep;
And in his simple show he harbours treason.
The fox barks not when he would steal the lamb.
No, no, my sovereign, Gloucester is a man
Unsounded yet, and full of deep deceit.”¹*

* * *

“We have deep depth.”²

Introduction

Unlawful command influence is “the improper use, or perception of use, of superior authority to interfere with the court-martial process.”³ It is the “ultimate threat to the impartiality of military criminal law.”⁴ Congress attempted to eradicate this pernicious evil when it enacted the Uniform Code of Military Justice (UCMJ) in 1951, and, in particular, when it prohibited unlawful command influence in Article 37 of the Code.⁵ Article 37 is not limited to unlawful command influence by commanders. Rather, it applies to all those acting with the “mantle of command authority,” such as staff judge advocates and others who speak on behalf of the convening authority.⁶

Congress directed other provisions of the UCMJ against the problem of command influence, as well. For example, Article 6, UCMJ, requires convening authorities “at all times [to] communicate directly with their Staff Judge Advocates in matters of military justice”⁷ and also requires The Judge Advocate General or “senior members of his staff . . . [to] make frequent inspection in the field in supervision of the administration of military justice.”⁸ The UCMJ created the Court of Appeals for the Armed Forces’ (CAAF) predecessor, the Court of Military Appeals (COMA), which was filled with civilian

¹ WILLIAM SHAKESPEARE, KING HENRY VI, pt. II, act 3, sc. 1.

² Yogi Berra, *Yogi Berra Quotes*, BRAINYQUOTE, http://www.brainyquote.com/quotes/authors/y/yogi_berra.html (last visited June 20, 2006).

³ 2 FRANCIS A. GILLIGAN & FREDRIC I LEDERER, COURT-MARTIAL PROCEDURE § 18-28.00 (2d ed. 1999).

⁴ *Id.* § 15-90.00.

⁵ *Id.* Article 37, UCMJ, states, in pertinent part:

Art. 37. Unlawfully influencing action of court

(a) No [convening] authority, nor any commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts .

10 U.S.C.S. § 837(a) (LEXIS 2005). While not punitive, violations of Article 37 can be enforced through the provisions of Article 98, UCMJ, which states, in pertinent part, that “Any person . . . who knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused, shall be punished as a court-martial may direct.” UCMJ art. 98(b) (2005).

⁶ *United States v. Stombaugh*, 40 M.J. 208, 211 (C.M.A. 1994); *see United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986) (“A staff judge advocate generally acts with mantle of command authority.”).

⁷ UCMJ art. 6(b).

⁸ *Id.* art. 6(a). Judge advocates commonly refer to these inspections as “Article 6 visits.”

judges, to “erect a further bulwark against impermissible command influence.”⁹ It is not an exaggeration to state that the central driving force behind Congress’s enactment of the UCMJ, including many of its cornerstone provisions, was an attempt to eliminate the improper influence of command authority over the court-martial process.

With that history as a backdrop, the 2004-2005 term of court marks the first time since the inception of the annual *Military Justice Symposium* eleven years ago¹⁰ that the CAAF did not issue any opinions addressing unlawful command influence. There were, however, some notable decisions from the service courts. In addition, there are cases involving unlawful command influences pending decision by the CAAF in the 2005-2006 term that ends on 30 September 2006.

The CAAF’s lack of activity this past term should not cause practitioners to conclude that the military justice system has “solved the problem” of unlawful command influence. It remains the “mortal enemy of military justice”¹¹—the single most dangerous assault on the fairness, and appearance of fairness, of the system. Due to the preeminent role of the commander in the military justice system,—he decides what cases go to trial,¹² selects the members of the panel who decide guilt or innocence and, where necessary, an appropriate sentence,¹³ and he acts on cases after trial by bestowing mercy if he so chooses¹⁴—improper use of command authority to interfere with the court-martial process potentially impacts servicemembers’ most cherished fundamental rights. Depending on the form of interference involved in a particular case, unlawful command influence could affect the presumption of innocence, the right to a fair trial embodied in the Due Process Clause of the Fifth Amendment, the right to present a defense, the right to compulsory process of witnesses, and the right to effective assistance of counsel guaranteed by the Sixth Amendment, or the right to a fair and impartial panel guaranteed by Article 25 of the UCMJ.¹⁵ Simply stated, unlawful command influence turns “military justice” into an oxymoron.

This article discusses three published cases the service courts of criminal appeals issued during the 2004-2005 term. The cases deal with unlawful command influence allegations in court member selection, improper arguments of trial counsel, and inappropriate attempts by the staff judge advocate and trial counsel to cause a military judge to recuse herself. All three cases concern allegations that participants in the military justice system *other than commanders* attempted either directly or indirectly tried to manipulate the process.

This article then discusses a series of cases alleging that commanders’ intemperate remarks constituted unlawful command influence. The Navy-Marine Court of Criminal Appeals (NMCCA) was concerned enough about this apparently recurring issue that it commented on it in one of the cases.¹⁶ Despite its obvious concern, the court did not publish any of these opinions, so the holdings do not have precedential value.¹⁷ They nonetheless have merit as both a warning and a reminder to judge advocates to remain constantly vigilant and proactive in this critical area.

⁹ See *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986) (citing *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. Of the House Comm. On Armed Services*, 81st Cong., 1st Sess. 608 (1949)). See generally Patricia A. Ham, *Revitalizing the Last Sentinel: The Year in Unlawful Command Influence*, ARMY LAW., May 2005, at 1.

¹⁰ Colonel Larry Morris, Chair of the Criminal Law Department from 1995-98, originated the *Military Justice Symposium* in March 1996. *The Army Lawyer* has published an annual review of criminal law cases every spring since that inception.

¹¹ *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986) (citations omitted).

¹² See UCMJ art. 22-24; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 601 (2005) [hereinafter MCM].

¹³ See UCMJ art. 25.

¹⁴ See *id.* art. 60; MCM, *supra* note 12, R.C.M. 1107.

¹⁵ *Thomas*, 22 M.J. at 393.

¹⁶ *United States v. Fortune*, No. 200300779, 2005 CCA LEXIS 119, *12 (N-M. Ct. Crim. App. Apr. 13, 2005) (unpublished). See *infra* notes 136-145, and accompanying text for a full discussion of the decision.

¹⁷ It is important to note that unreported or unpublished decisions issued on or after 1 January 2007 can be cited in federal courts of appeal. Joseph P. Beckman, *Appellate Procedure: Supreme Court Approves Modified Rule on Unpublished Opinions*, July 2006, http://discussions.abanet.org/litigation/mo/Premium-lt/columns/litigationnews/july2006/0706_article_unpubopinion.html.

Unlawful Command Influence in Court Member Selection

Servicemembers are not entitled to trial by jury nor are they entitled to a representative cross-section of the military community, a jury of their peers, or a jury that is randomly selected, all of which are contrary to the rights guaranteed to civilian citizens by the Sixth Amendment.¹⁸ Instead, servicemembers have a right to a fair and impartial panel under Article 25, UCMJ.¹⁹ This right is “the cornerstone of the military justice system.”²⁰ The convening authority employs the criteria Congress set forth in Article 25 to select the members of the court-martial panel.²¹

A convening authority may not “stack” a court-martial to achieve a desired result.²² “Improper court stacking may occur by inclusion or exclusion.”²³ “Court-stacking does not deprive the court-martial of jurisdiction, but it is ‘a form of unlawful command influence.’”²⁴ “An element of unlawful court stacking is improper motive. Thus, where the convening authority’s motive is benign, systematic inclusion or exclusion may not be improper.”²⁵

Unlawful command influence in the court-martial panel selection process may also occur when a subordinate stacks the list of panel nominees presented to the convening authority.²⁶ *United States v. McKinney* involved an allegation against a staff judge advocate advising a convening authority on the methodology of panel selection.²⁷ Specifically, Staff Sergeant McKinney alleged that unlawful command influence occurred during panel member selection in his general court-martial at Hickam Air Force Base (AFB), Hawaii.²⁸ Based on flawed pretrial advice that the staff judge advocate drafted under the provisions of Article 34, UCMJ,²⁹ McKinney contended, inter alia, that the convening authority improperly excluded categories of officers from consideration as panel members and thereby engaged in “court-stacking.”³⁰

¹⁸ *United States v. Dowty*, 60 M.J. 163, 169 (2004); see *United States v. Upshaw*, 49 M.J. 111, 116 (1998) (Efron, J., dissenting).

¹⁹ *Dowty*, 60 M.J. at 169.

²⁰ *Id.* (citing *United States v. Hilow*, 39 M.J. 439, 442 (C.M.A.1991)).

²¹ UCMJ art. 25 (2005). The convening authority personally selects the members by determining who, “in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.” *Id.* art. 25(d)(2).

²² *Upshaw*, 49 M.J. at 113

²³ *Id.* (citing *United States v. Smith*, 27 M.J. 242 (CMA 1988) (involving female members who were selected because the case involved a sex crime); *United States v. McClain*, 22 M.J. 124, 126 (C.M.A. 1986) (involving systematic exclusion of junior officers and enlisted members in pay grade E-6 and below to avoid “unusual sentences”); *United States v. Daigle*, 1 M.J. 139, 140-141 (C.M.A. 1975) (involving the exclusion of lieutenants and warrant officers); see also *United States v. Yager*, 7 M.J. 171, 173 (CMA 1979) (permitting exclusion of soldiers in pay grades E-1 and E-2 as presumptively unqualified under Article 25(d)).

²⁴ *Upshaw*, 49 M.J. at 113. (citing *United States v. Lewis*, 46 M.J. 338, 341 (1997) and *United States v. Hilow*, 32 M.J. 439, 441 (C.M.A. 1991)).

²⁵ *Id.* (citing *Lewis*, 46 M.J. at 340-41) (finding that a disproportionate number of female members were detailed but no evidence of improper motives); *Smith*, 27 M.J. at 249 (holding that it is not improper to insist that an “important segment of the military community - such as blacks, Hispanics, or women” be included)).

²⁶ *Upshaw*, 49 M.J. at 113.

²⁷ 61 M.J. 767 (A.F. Ct. Crim. App. 2005), *rev. denied*, 2005 CAAF LEXIS 1486 (Dec. 20, 2005). Two unpublished Air Force cases concern the same issue and same advice by the staff judge advocate. See *United States v. Brooks*, No. ACM 35420, 2005 CCA LEXIS 277 (A.F. Ct. Crim. App. Aug. 30, 2005) (unpublished); *United States v. Carr*, No. ACM 35300, 2005 CCA LEXIS 278 (A.F. Ct. Crim. App. Aug. 25, 2005) (unpublished).

²⁸ A general court-martial composed of officer members convicted Staff Sergeant McKinney, contrary to his pleas, of one specification of damage to non-military property, one specification of larceny, and two specifications of communicating threats, in violation of Articles 109, 121, and 134, UCMJ. *McKinney*, 61 M.J. at 768. Pursuant to his pleas, the court-martial convicted him of one specification of adultery, in violation of Article 134, UCMJ. *Id.* The panel sentenced him to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, a contingent fine of \$30,000 (additional confinement for one year if fine is not paid), and reduction to the grade of E-1. *Id.* The convening authority approved the adjudged sentence. *Id.*

²⁹ Article 34, UCMJ, requires that, prior to referring a case to general court-martial, the convening authority must seek binding advice from his staff judge advocate. Article 34 reads, in pertinent part:

The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that-

- (1) the specification alleges an offense under this chapter;
- (2) the specification is warranted by the evidence indicated in the report of investigation under [Article 32, UCMJ] . . . ; and
- (3) a court-martial would have jurisdiction over the accused and the offense.

In addition to the staff judge's advocate's recommendations under Article 34,—that there is jurisdiction over the accused and offense; that there is probable cause to believe that a crime was committed and the accused committed it; and that the specification states an offense³¹—the staff judge advocate's pretrial advice in *McKinney* also contained recommendations to assist the convening authority's panel selection process.³² After recounting the Article 25, UCMJ, criteria the convening authority must apply to his personal selection of members, the staff judge advocate advised the commander of the following: "At Tab 2 is a listing of officers assigned to Hickam AFB. You may select any of these officers as court-members. Additionally, I have eliminated officers who would most likely be challenged for cause (i.e., JAGs [Judge Advocates], chaplains, IGs [Inspectors General], or officers in the accused's unit)".³³ The accused contended that by eliminating JAGs, chaplains, and IGs, "the [staff judge advocate,] and thus the convening authority, raised doubts about the fairness of the panel selection process, which doubts should be resolved in the appellant's favor."³⁴

The Air Force court analyzed the issue under the guidelines the CAAF set forth in *United States v. Biagase*.³⁵ Under *Biagase*, the defense bears the initial burden to present "some evidence" of facts which, if true, "constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings."³⁶

Once raised, the burden shifts to the government to show either there was no unlawful command influence or the unlawful command influence will not affect the proceedings, or if raised on appeal, did not affect the proceedings. . . . The government may carry its burden in any one of three ways. First, the government may disprove the predicate facts on which the allegation of unlawful command influence is based. Second, the government can persuade the military judge or the appellate court that the facts do not constitute unlawful command influence. Third, at the trial level, the government can produce evidence proving that the unlawful command influence will not affect the proceedings in this case; on appeal, the government can persuade the appellate court that the unlawful command influence had no prejudicial impact on the court-martial. Regardless of which of the three options the government chooses, its burden of persuasion is the same at trial and on appeal: beyond a reasonable doubt.³⁷

Applying this framework, the Air Force court found "no basis for concluding that unlawful command influence occurred."³⁸ While the court did not endorse the staff judge advocate's advice, it found no improper motive—an element of court-stacking—by him or the convening authority.³⁹ To the contrary, the staff judge advocate "acted to promote trial efficiency and to 'protect the fairness of the court-martial, rather to improperly influence it.'"⁴⁰ The officers the staff judge advocate excluded from the convening authority's selection are those most likely to be removed by challenges for cause or peremptory challenges at trial and "whose presence on a panel might itself raise questions about the fairness and impartiality of the proceedings."⁴¹ Accordingly, *McKinney* failed to satisfy the first *Biagase* criterion.⁴² Even if there was unlawful

UCMJ art. 34(a) (2005). The staff judge advocate must also recommend what action the convening authority should take regarding each specification. UCMJ art. 34(b). In contrast to the binding staff judge advocate's advice Article 34(a) mandates, this recommendation is not binding on the convening authority. *Id.*

³⁰ *McKinney*, 61 M.J. at 768.

³¹ *See* UCMJ art. 34(a).

³² *McKinney*, 61 M.J. at 769.

³³ *Id.* (emphasis added).

³⁴ *Id.*

³⁵ 50 M.J. 143 (1999).

³⁶ *Id.* at 150.

³⁷ Ham, *supra* note 9, at 3 (footnotes and internal quotations omitted).

³⁸ *McKinney*, 61 M.J. at 769.

³⁹ *Id.*

⁴⁰ *Id.* at 770 (quoting *United States v. Brocks*, 55 M.J. 614, 617 (A.F. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 11 (2002)).

⁴¹ *Id.* at 769 (citations omitted).

command influence, the court determined that the proceedings were fair, and the defense lodged no objection to the selection process at trial. Accordingly, the second and third *Biagase* criteria were not met either.⁴³

What should practitioners learn from *McKinney*? Unless one's particular service formally excludes categories of personnel from consideration for service as panel members, those personnel are eligible to serve. For example, the court noted in *McKinney* that an Air Force regulation excludes chaplains from consideration.⁴⁴ An Army regulation excludes chaplains, medical, dental, and veterinary officers, and IGs from service as panel members and permits nurses and medical specialist corps personnel to serve as members only when nurses or medical specialist corps personnel are "involved in the proceedings."⁴⁵ The Navy and Marine Corps have a policy similar to the Air Force policy.⁴⁶

McKinney cited previous cases that disparaged the selection of lawyers and IGs as panel members.⁴⁷ Additional caselaw also recommends excluding military police from consideration.⁴⁸ Finally, the Air Force court previously upheld excluding members of the accused's own unit from consideration.⁴⁹ Despite these prior rulings, *McKinney* "did not endorse" the staff judge advocate's panel selection advice, which apparently relied on those prior decisions.⁵⁰ "To the contrary, the convening authority should give appropriate consideration to all categories of members who may legitimately be assigned court-martial duty."⁵¹ *McKinney*'s view is that mere judicial disparagement is not enough to per se exclude these personnel from consideration for selection as panel members. Nonetheless, motive is key, and without a nefarious motive to drive a particular result by the exclusions, such exclusions will not result in appellate relief for an accused.

Improper Attempt to Influence Members—Trial Counsel Argument

"The history of military justice is filled with examples of court members attempting to comply with the real or perceived desires of the convening authority (their commander) as to findings or sentence or both."⁵² Prior to the UCMJ, the convening authority was not prohibited from actually reprimanding the members if he was unhappy with the findings or sentence in a particular case. These reprimands were known as "skin letters."⁵³ As a result, "it was customary in many commands to

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 770 (citing U.S. DEPT OF AIR FORCE, INSTR. 52-101, PLANNING AND ORGANIZING para. 2.1.7 (1 May 1999)).

⁴⁵ U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE paras. 7-2-7-6 (16 Nov. 2005).

⁴⁶ U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1730.7B, RELIGIOUS MINISTRY SUPPORT WITH THE DEPARTMENT OF THE NAVY (12 Oct. 2000).

⁴⁷ *McKinney*, 61 M.J. at 769 (citing *United States v. Hedges*, 29 C.M.R. 458, 459 (C.M.A. 1960) (selecting lawyers and IGs as panel members creates the "appearance of a hand-picked court")).

⁴⁸ *United States v. Swagger*, 16 M.J. 759, 760 (A.C.M.R. 1983) ("At the risk of being redundant - we say again - individuals assigned to military police duties should not be appointed as members of courts-martial. Those who are the principal law enforcement officers at an installation must not be.").

⁴⁹ *United States v. Brocks*, 55 M.J. 614, 617 (A.F. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 11 (2002) (summary disposition); *see also* *United States v. Simpson*, 55 M.J. 674, 691-92 (Army Ct. Crim. App. 2001), *aff'd*, 58 M.J. 68 (2003) (absent improper motive, convening authority's deliberate exclusion of personnel assigned to appellant's unit from court-martial selection did not violate Article 25, UCMJ).

⁵⁰ *McKinney*, 61 M.J. at 770.

⁵¹ *Id.*

⁵² GILLIGAN & LEDERER, *supra*, note 3, § 15-90.00.

⁵³ *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. Of the House Comm. On Armed Services*, 81st Cong. 722, 785 (1949). The legislative history of the UCMJ includes the following example of one such "skin letter" issued to an officer who later testified before Congress about the letter:

Headquarters __ Corps
Office of the Commanding General
APO __, U.S. Army
12 May 1945

Subject: In adequate sentence by court

sentence the convicted accused to the maximum to permit the convening authority to do what he wished with the offender,”⁵⁴ by the convening authority setting the sentence after trial. By prohibiting improper command influence over the members and court-martial proceedings, Congress sought to ensure that servicemembers could not be “convicted and sentenced by a court-martial which was not free from external influences tending to disturb the exercise of a deliberate and unbiased judgment.”⁵⁵

To ensure that the commander’s views do not improperly influence the members’ deliberations on sentence, trial counsel are prohibited from “purport[ing] to speak for the convening authority or any higher authority, or refer[ring] to the views of such authorities or any policy directive relative to punishment.”⁵⁶ Failure to object to improper argument waives the issue for appeal in the absence of plain error.⁵⁷ Whether the trial counsel presented argument in violation of this prohibition, and thereby engaged in unlawful command influence, was the issue the Air Force Court of Criminal Appeals faced in *United States v. Mallett*.⁵⁸

Pursuant to his pleas, a panel of officers sitting as a general court-martial convicted Airman First Class Mallett of wrongfully using cocaine on divers occasions.⁵⁹ The members sentenced Mallett to a bad-conduct discharge, confinement for twelve months, and reduction to E-1.⁶⁰ On appeal, Mallett alleged that trial counsel’s improper sentencing argument injected unlawful command influence into the proceedings. Specifically, the trial commander referred to “commander’s calls” where the commander “would warn us to stay away . . . not to use drugs.”⁶¹ After stating that the commander could not impose any particular punishment, but could only send the charges to court-martial, the trial counsel then posited, “what would a commander say to get his unit’s attention and say, ‘I mean business about drugs,’ if he had the authority to be the judge and jury in a case where you are, in essence, the jury deciding this?”⁶² Rejecting lesser sentences as not “scary” enough, the trial counsel concluded that a sentence that would “get people’s attention” is “18 months [of] confinement and a bad conduct discharge.”⁶³ Trial defense counsel did not object to the argument.

To: Lt. Col. John P. Oliver, headquarters __

1. I have read a summary of the testimony in the case of Private __, Company __, __th Signal Battalion and am not pleased with the outcome. I do not consider the court to have performed its duty.

2. The decision of the court is the decision of all its members for which all must be held accountable. It would seem the court undertook to determine whether this man should have been tried by general court rather than a determination of his guilt or innocence from the evidence. Then, after finding him guilty of offenses warranting severe punishment, only a minor sentence was imposed. It is not my intention, when a case is referred to a general court-martial, that any sentence imposed be one which a special court-martial might have given. I desire in the future that this be kept in mind.

Major General, U.S. Army, Commanding

Id. at 741 (statement of Colonel John P. Oliver, JAG, Reserve, Legislative Counsel of the Reserve Association of America).

⁵⁴ *Id.*

⁵⁵ *United States v. Littrice*, 13 C.M.R. 43, 52 (C.M.A. 1953) (command’s pretrial orientation of members improperly influenced court-martial, necessitating reversal of findings and sentence).

⁵⁶ MCM, *supra* note 12, R.C.M. 1001(g).

⁵⁷ *Id.* Unobjected to error may merit relief if there is (1) error that is (2) plain and obvious, that (3) materially prejudices an appellant’s substantial rights. *United States v. Powell*, 49 M.J. 460, 463 (1998).

⁵⁸ 61 M.J. 761 (A.F. Ct. Crim. App. 2005).

⁵⁹ *Id.* at 762.

⁶⁰ *Id.* The convening authority reduced the confinement to eight months but otherwise approved the adjudged sentence. *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ The entire objectionable portion of the trial counsel’s argument was set forth in the court’s opinion:

I was trying to think about how could I articulate the need for deterrence and the value of deterrence. How could I paint a picture of this that’s not just abstract legal talk? I think back to commander’s calls that I’ve been at where the commander would warn us to stay away, and in as bold terms as they could, not to use drugs. Bad things can happen to you in your career if you do.

You’ve been at those commander’s calls. And you know that you never hear more than that. Why is that? Because the commander

Despite the lack of defense objection, the court held that the trial counsel's comments were improper under Rule for Courts-Martial (RCM) 1001(g) and amounted to plain error.⁶⁴ The trial counsel's argument implied that "unnamed commanders" favored the sentence he proposed.⁶⁵ "Moreover, the trial counsel cloaked himself with the 'mantle of command authority,' thereby creating the appearance of unlawful command influence."⁶⁶ The comments were improper because they brought the views of outside commanders into the courtroom.⁶⁷ Further, the argument rendered the proceedings unfair, and the improper argument was the cause of the unfairness.⁶⁸ The trial counsel's eleven references to the commander during the argument rendered the error more than "a brief slip of the tongue."⁶⁹ Accordingly, Mallett suffered prejudice and was entitled to relief in the form of setting aside the sentence.⁷⁰

The dissent took issue with the majority's conclusion that the trial counsel acted with the "mantle of command authority" and that the trial counsel's argument amounted to unlawful command influence.⁷¹ Although the dissent agreed that the trial counsel's comments were "poorly conceived and obviously not influenced by common sense or critical thought," the dissent concluded that "a bad argument is not necessarily an improper one."⁷² Assessing the comments in light of the entire court-martial, including that the comments were hypothetical; the defense failed to object; the military judge instructed the members that arguments of counsel "may not be considered as the recommendation or opinion of anyone other than that counsel"; and the members failed to adjudge the trial counsel's requested sentence of eighteen months' confinement, the dissent concluded that the comments did not constitute unlawful command influence and were not improper under RCM 1001(g).⁷³

doesn't necessarily have the authority to decide to impose a bad conduct discharge, or to impose a period of confinement for 18 months. Why not? Because the commander can prefer charges and then it comes to a court, it comes to a group just like this. It's out of the commander's hands in a lot of ways.

But when you think about what if a commander could do that, what if a commander did stand up at commander's call and was able to make a promise, "If you use cocaine in my unit, this will happen to you." Make that a policy letter or something. What if the commander had the authority to do that in a unit full of airmen identical to this accused right here? What would he or she say to get their attention? Would he say, "Don't use cocaine or you'll get 40 days restriction to base, dang it?" I don't think he would. Why? Because that's not very scary, is it?

Would she say, "Don't use cocaine or you'll get 30 days extra duties?" No, she wouldn't say that. That is not scary. That doesn't get people's attention. What would a commander say to get his unit's attention and say, "I mean business about drugs," if he had the authority to be the judge and jury in a case where you are, in essence, the jury deciding this?

I submit that a sentence that would get people's attention, that would make airmen stand up and listen, and would possibly have the effect of keeping us from having so many of these cases involving airmen who have gone down this road of using cocaine and other illegal drugs is 18 months [of] confinement and a bad conduct discharge. That gets your attention. And if that doesn't get your attention, then nothing's going to get your attention.

Id.

⁶⁴ *Id.* at 764-65.

⁶⁵ *Id.* at 764.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 765.

⁷¹ *Id.* (Smith, J., dissenting).

⁷² *Id.* at 766.

⁷³ *Id.* at 767.

Mallett is an interesting case because of the Air Force court's majority analysis. The court applies a plain error analysis to what it concludes is an unlawful command issue. Plain error is normally the doctrine courts employ to determine if relief is warranted despite the defense's waiver or forfeiture of an issue by failing to object at trial.⁷⁴ However, unlawful command influence of the sort involved in *Mallett* is not waiveable.⁷⁵ Accordingly, when framed as unlawful command influence and not improper argument in violation of RCM 1001(g), the court should not subject the issue to a plain error analysis. Rather, the *Biagase* framework is the correct analysis.⁷⁶ The *Mallett* court reviewed the *Biagase* framework only as part of its analysis under the plain error doctrine.⁷⁷

The dissent in *Mallett* asserts that the majority stretches the notion of the "mantle of command authority" too far by concluding that the notion applies to the trial counsel's comments.⁷⁸ According to the dissent, this principle reaches commanders, convening authorities, and staff judge advocates or "other participant[s] in [the] case," but not improper arguments by trial counsel where there is "no evidence . . . of direct improper involvement" by one of the entities the principle covers.⁷⁹

Whether the trial counsel's statements in *Mallett* are categorized as improper argument in violation of RCM 1001(g) or unlawful command influence in violation of Article 37, UCMJ, there is no question that the arguments were ill-advised and ill-conceived. The commander's views on appropriate punishment, hypothetical or not, have no place in the courtroom. "A trial must be kept free from substantial doubt with respect to fairness and impartiality. . . . This appearance of impartiality cannot be maintained in trial unless the members of the court are left unencumbered from powerful external influences."⁸⁰

Improper Actions of the Trial Counsel and Staff Judge Advocate

Actions of personnel other than commanders and convening authorities also took center stage in *United States v. Lewis*.⁸¹ In *Lewis*, the NMCCA held that the unprofessional actions of the staff judge advocate that successfully resulted in the military judge recusing herself constituted unlawful command influence.

A military judge sitting as a general court-martial convicted Lance Corporal Lewis, pursuant to his pleas, of various drug offenses involving ecstasy, ketamine, lysergic acid diethylamide, and methamphetamine, and sentenced him, inter alia, to five years confinement and a dishonorable discharge.⁸² A civilian defense counsel (CDC) represented Lewis at trial. The CDC did not appear at the first session of the court-martial, the arraignment. Neither side, however, had any voir dire or challenge of the military judge at the arraignment or at a second court session where the accused entered pleas.⁸³

⁷⁴ See *United States v. Powell*, 49 M.J. 460 (1998); see *supra* note 56 (outlining the test for plain error in the military justice system as set forth by the CAAF in *Powell*).

⁷⁵ See, e.g., *United States v. Baldwin*, 54 M.J. 308, 310 n.2 (2001) ("We have never held that an issue of unlawful command influence arising during trial may be waived by a failure to object or call the matter to the trial judge's attention.") (citing *cf. United States v. Weasler*, 43 M.J. 15 (1995) (finding that a pretrial agreement initiated by the accused waived any objection to unlawful command influence in the referral and referral of charges)); *United States v. Richter*, 51 M.J. 213, 224 (1999)).

⁷⁶ In a pre-*Biagase* case addressing an improper argument/unlawful command influence issue, the COMA, the CAAF's predecessor, refused to apply RCM 1001(g)'s waiver provision. *United States v. Sparrow*, 33 M.J. 139, 141 (C.M.A. 1991) (while "we might, in other circumstances, apply the rule of waiver set out in R.C.M. 1001(g)," the court declined to do so because of its "special interest" in the possibility of illegal command influence."). *Mallett* cites *Sparrow*'s refusal to apply waiver, but nonetheless proceeds to analyze the issue using plain error. *Mallett*, 61 M.J. at 763, 764-65.

⁷⁷ *Mallett*, 61 M.J. at 764-65.

⁷⁸ *Id.* at 765 (Smith, J., dissenting) (citing *United States v. Stombaugh*, 40 M.J. 208, 211 (C.M.A. 1994)).

⁷⁹ *Id.*

⁸⁰ *United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983) (setting aside the sentence where trial counsel repeatedly referred to the Strategic Air Command's policies on drug use and stated that the members were "somewhat bound to adhere to those policies in deciding on a sentence"). "What is improper is the reference of such policies before members in a manner which in effect brings the commander into the deliberation room." *Id.*

⁸¹ 61 M.J. 512 (N-M. Ct. Crim. App. 2005), *pet. granted*, 62 M.J. 448 (2006).

⁸² *Id.* at 513. The convening authority approved the adjudged sentence but suspended confinement in excess of fort-two months. *Id.*

⁸³ *Id.* at 514.

During a third court session to hear motions, the trial counsel conducted voir dire of the military judge and challenged her impartiality:

[S]he presided over two companion cases . . . [she had a] prior professional relationship with the [CDC] while the latter was on active duty . . . [the military judge's] social interaction with the [CDC], and because [the military judge] expressed displeasure to another trial counsel in a court-martial occurring over a year before wherein that trial counsel inquired into whether there had been ex-parte contact with the [CDC] regarding an upcoming case.⁸⁴

The trial counsel moved for the military judge's recusal; the military judge denied the motion.⁸⁵ The trial counsel requested the military judge reconsider her denial of the motion and presented a previously prepared written pleading in support of her request. The military judge, however, denied the trial counsel's motion for reconsideration.⁸⁶ Finally, the trial counsel requested a continuance to file a government appeal. The military judge denied the request.⁸⁷

Based on the trial counsel's actions, the defense filed a motion to dismiss for prosecutorial misconduct and unlawful command influence.⁸⁸ Over the course of a three-day hearing on the defense motion, the trial counsel who moved for the military judge's recusal "conducted all examination and cross-examinations of witnesses for the Government."⁸⁹ The trial counsel even appeared as a government witness and was "examined by a third trial counsel detailed to the case solely for that purpose."⁹⁰ The trial counsel's testimony took up "120 pages of this 1068-page record of trial, over ten percent of the entire trial and a majority of the motion."⁹¹

The defense called the staff judge advocate, a lieutenant colonel, as a witness on the motion.⁹² He testified that he advised the trial counsel regarding trial tactics, voir dire, and the motion to recuse. He further testified that he assisted the trial counsel by conducting caselaw research, providing relevant citations, and calling the Head of Appellate Government Division regarding voir dire and the motion to recuse.⁹³ The staff judge advocate also characterized an incident where the military judge and the CDC were seen together as if on a "date, implying they were engaged in a homosexual relationship."⁹⁴ The staff judge advocate was combative on the witness stand, including addressing comments to the CDC, interrupting the CDC, and arguing with the CDC. The following exchange provides a flavor of the staff judge advocate's testimony on the motion:

Witness (SJA): If you really want to get tacky – and I'll tell you what else I told [the Head of Appellate Government].

TC: Yes, sir, if you would, sir.

Witness: I said that the judge –

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 515.

⁹³ *Id.*

⁹⁴ *Id.*

CDC: Objection. I don't think anybody really wants to get tacky, and I think he's made his point as to how he has –

Witness: I have more to say. I'm not finished. Thanks you.

CDC: I'm making an objection, sir.

Witness: I haven't finished my point.⁹⁵

On the third day of the hearing, the military judge recused herself without ruling on the motion because she could not remain impartial following the government's attack on her character.⁹⁶ A second military judge was detailed to the case. After reading the motion, exhibits, and transcript of the proceedings, the second judge also recused himself because he was so "shocked and appalled" at the trial counsel and staff judge advocate's conduct that he "was not convinced he could remain impartial."⁹⁷ Finally, a third judge heard an expedited defense motion, and a fourth judge presided over additional motions and the accused's trial.⁹⁸ The trial judge granted a motion for a change of venue, disqualified the staff judge advocate and the convening authority from taking post-trial action in the case, and barred the staff judge advocate from attending the remainder of the trial.⁹⁹

On appeal, Lewis alleged that the court should dismiss his case due to the conduct of the trial counsel and the staff judge advocate, and he alleged that the trial counsel and staff judge advocate's actions of forcing the military judge to recuse herself amounted to unlawful command influence. While the NMCCA agreed that the actions of the trial counsel and staff judge advocate amounted to unlawful command influence, the court found no prejudice and declined to grant any relief.¹⁰⁰

The court determined that the trial counsel and staff judge advocate's actions were "unprofessional" and "a gross abuse of their respective positions of responsibility."¹⁰¹ The court described the trial counsel's voir dire and the staff judge's advocate's behavior as "crass, contemptuous . . . [and] display[ing] nothing but disrespect for the military judge."¹⁰² In particular, the court attacked the actions of the staff judge advocate—"a representative of the convening authority"—in advising the trial counsel on the "voir dire assault of the MJ. . . . his unprofessional behavior as a witness[,] and his inflammatory testimony."¹⁰³ To the extent that these acts "created a bias in the military judge, the facts establish[ed] clearly that there was unlawful command influence on this court-martial."¹⁰⁴ But for the trial counsel and the staff judge advocate's unprofessional actions, the initial military judge would have tried Lewis. However, because diligent, deliberate judges ultimately heard Lewis's case, there was no prejudice.¹⁰⁵

The CAAF granted review of three issues in the *Lewis* case, including the unlawful command influence assertion.¹⁰⁶ The court heard argument on the issues on 2 May 2006, and a decision is expected prior to the end of the court's term on 30 September 2006.¹⁰⁷

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 516.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 520-21.

¹⁰¹ *Id.* at 517.

¹⁰² *Id.*

¹⁰³ *Id.* at 518.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *United States v. Lewis*, 62 M.J. 448 (2006). The three granted issues are:

I. WHETHER THE LOWER COURT ERRED WHEN IT HELD THAT THE IN-COURT ACCUSATIONS BY THE STAFF JUDGE ADVOCATE AND TRIAL COUNSEL THAT THE MILITARY JUDGE WAS INVOLVED IN A HOMOSEXUAL

Lewis soundly demonstrates the presumption that the staff judge advocate is presumed to act with the mantle of command authority. When the staff judge advocate uses the mantle in an improper manner, unlawful command influence can result. *Lewis* also demonstrates that, despite a staff judge advocate's grossly improper actions that cause a military judge to actually recuse herself as a result, there is no relief available where other competent judges hear the case.

Intemperate Remarks by the Command

Finally, a series of three cases this past term from the NMCCA are noteworthy in several respects. First, all of the cases involve intemperate remarks by commanders that are alleged to constitute unlawful command influence or unlawful pretrial punishment. Second, although the cases caused one appellate judge to note the troubling trend of intemperate remarks, the court failed to either grant relief to any appellant or publish any of the opinions so that they would carry precedential weight. Third, one of the cases in particular demonstrates the ameliorative effects of curative remedial actions in the wake of improper remarks by the command. Fourth, the cases stand as a reminder to judge advocates to be proactive with the command in this critical area of military justice.

The first case, *United States v. Baro*,¹⁰⁸ involved an intemperate email. Pursuant to mixed pleas, Baro was convicted by a panel of officer and enlisted members sitting as a general court-martial of violating a general order by drinking under the age of twenty-one, disorderly conduct, and assault consummated by a battery while stationed in Okinawa, Japan.¹⁰⁹ The incidents occurred while Baro was on liberty. Baro's trial took place on 4 February 2001. On 23 January 2001, the commanding general "sent an email to his subordinates regarding his views on liberty incidents."¹¹⁰ The commanding general's position was "[g]et tough on these guys BEFORE they act" and "[s]quash them after they violate the laws and rules."¹¹¹ The Chief of Staff forwarded the email to commanders and executive officers "with his own spin" on the issue, "emphasizing the role of leadership in preventing liberty incidents and urging commanders to be 'tough' when they take offenders to nonjudicial punishment."¹¹²

The two senior members of the panel saw the email and were challenged for cause on unrelated grounds.¹¹³ Two other officer panel members saw the email but "did not take it as policy" and a third officer panel member did not see the email.¹¹⁴ Baro also claimed that members read newspaper articles concerning handling and preventing liberty incidents during the trial.¹¹⁵ In fact, the military judge observed one or more members reading a newspaper, *The Stars and Stripes*, which contained "an article on the strained relationship between Marine leadership and local civilian leaders over their respective

RELATIONSHIP WITH THE CIVILIAN DEFENSE COUNSEL AMOUNTED TO UNLAWFUL COMMAND INFLUENCE BUT WERE HARMLESS BEYOND A REASONABLE DOUBT.

II. WHETHER THE GOVERNMENT DENIED APPELLANT HIS RIGHT TO A SPEEDY TRIAL UNDER THE UNITED STATES CONSTITUTION AND ARTICLE 10, UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. § 810.

III. WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW WHERE HE SERVED HIS ENTIRE SENTENCE OF FORTY-TWO MONTHS CONFINEMENT BEFORE THE LOWER COURT REACHED A DECISION IN HIS CASE.

Id.

¹⁰⁷ See United States Court of Appeals for the Armed Forces, Scheduled Hearings, <http://www.armfor.uscourts.gov/May2006.htm> (last visited July 2, 2006).

¹⁰⁸ No. 200200429, 2005 CCA LEXIS 151 (N-M. Ct. Crim. App. May 9, 2005) (unpublished)

¹⁰⁹ *Id.* at *1; see UCMJ arts. 92, 134, 128 (2005). The members sentenced the Baro to forfeiture of \$1042.80 per month for six months, reduction to E-1, and a bad-conduct discharge. No. 200200429, 2005 CCA LEXIS 151, at *1. The convening authority approved only so much of the adjudged sentence that included forfeiture of \$695.00 pay per month for six months, reduction to E-1, and a bad-conduct discharge. *Id.* at *1-2.

¹¹⁰ *Id.* at *11.

¹¹¹ *Id.* at *12.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at *13.

roles in preventing and handling liberty incidents.”¹¹⁶ The military judge conducted voir dire of the panel members during trial and was satisfied that the members remained impartial and able to perform their duties.¹¹⁷

Surprisingly, the court found “no evidence” of unlawful command influence, and determined that Baro did not meet his burden of presenting “some evidence” of unlawful command influence.¹¹⁸ Further, the court found that the military judge’s actions avoided “even the appearance of evil in the courtroom.”¹¹⁹

The court’s decision in *Baro* is a bit disconcerting. The standard the defense must meet to raise an issue of unlawful command influence is “some evidence,” the same quantum of evidence required to raise any issue of fact.¹²⁰ This burden is not very demanding. Baro faced trial for “liberty incidents” and, less than two weeks before his trial, the commanding general sent an extremely injudicious email directing that commanders “squash” those who commit liberty incidents. The language the commanding general chose is not subtle. His message is not in the “grey area” of impropriety—it is unquestionably a “command expectation” on disposition or adjudication.¹²¹ The timing of the message, less than two weeks prior to Baro’s trial, is also troubling.¹²² The CAAF “previously recognized the difficulty of a subordinate ascertaining for himself or herself the actual influence a superior has on that subordinate.”¹²³ Nonetheless, the court determined that Baro had not even met his threshold burden of presenting some evidence of unlawful command influence.

Finally, the court completely failed to discuss or analyze the issue of apparent unlawful command influence—whether the commanding general’s remarks “placed an intolerable strain on public perception of the military justice system,”¹²⁴ despite the CAAF’s insistence that “military judges and appellate courts must consider apparent as well as actual unlawful command influence.”¹²⁵

[D]isposition of an issue of unlawful command influence falls short if it fails to take into consideration the concern of Congress and this Court in eliminating even the appearance of unlawful command influence at courts-martial. . . . The appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.¹²⁶

The court’s rationale would be much more convincing if it found some evidence of unlawful command influence sufficient to shift the burden to the government and that the government successfully carried its burden beyond a reasonable doubt.

The second case, *United States v. Davis*,¹²⁷ involves a commander’s injudicious comments to a formation of Sailors. Specifically, Davis alleged that the decision to charge him with some of the offenses of which he was convicted resulted from the commander’s comments, which amounted to unlawful command influence.¹²⁸

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at *12-13, 14.

¹¹⁹ *Id.* at *13-14 (quoting *United States v. Stoneman*, 57 M.J. 35, 42 (2002)).

¹²⁰ *United States v. Ayala*, 43 M.J. 296, 300 (1995).

¹²¹ See *United States v. Simpson*, 58 M.J. 368, 375 (2003) (discussing use of the phrase “zero tolerance” in the context of unlawful command influence).

¹²² See *United States v. Baldwin*, 54 M.J. 304, 310 (2001) (discussing the use of command meetings to influence a court-martial sentence); *United States v. Brice*, 19 M.J. 170, 171-72 (C.M.A.1985).

¹²³ *United States v. Gerlich*, 45 M.J. 309, 313 (1996).

¹²⁴ *Simpson*, 58 M.J. at 374 (quotation omitted).

¹²⁵ *Id.*

¹²⁶ *Id.* (quoting *United States v. Stoneman*, 57 M.J. 35, 42-43 (2002)).

¹²⁷ No. 200000604, 2005 CCA LEXIS 161 (N-M. Ct. Crim. App. May 20, 2005) (unpublished).

¹²⁸ *Id.* at *3.

Pursuant to his pleas, Davis was convicted by a special court-martial composed of officer and enlisted members of indecent language, two specifications of indecent assault, and numerous other charges, including wrongful appropriation.¹²⁹ Prior to referring the charges, but after placing Davis into pretrial confinement, the ship's commanding officer held an "all-hands assembly on the ship's flight deck to give a farewell" address.¹³⁰ The commanding officer stated that two crewmen were "caught stealing from a shipmate," that "thievery will not be tolerated,"¹³¹ and that the "guilty individuals would face hard time."¹³² "Finally, the [commanding officer] discussed possible acts of sexual harassment and advised the crew that any person enduring such treatment should come forward."¹³³ Although the commanding officer did not mention the Davis's name, it was common knowledge that he was suspected of committing the misconduct the commanding officer discussed.¹³⁴ "According to the appellant, these remarks led to the referral of two specifications involving indecent assault and the use of indecent language."¹³⁵

A new commanding officer took over prior to the Davis's guilty plea. The new commanding officer took significant corrective actions to ameliorate the prior commanding officer's unwise remarks. While the new commanding officer initially referred the charges and specifications to a special court-martial, he ultimately withdrew the charges without prejudice and forwarded them to the next superior commander.¹³⁶ In addition, the new commanding officer gathered the prospective trial witnesses and, with Davis's defense counsel present, explained that "he did not expect a particular outcome with respect to appellant's court-martial" and instructed all witnesses to "testify truthfully."¹³⁷ All of the witnesses called to testify said the first commanding officer's comments "had no bearing on their ability to tell the truth."¹³⁸ Further, the military judge issued a standing order to produce all defense witnesses and any witness feeling pressure was to report those concerns to the military judge.¹³⁹

The court held that Davis met his burden of producing "some evidence suggesting unlawful command influence."¹⁴⁰ The court, however, found that the "[g]overnment proved beyond a reasonable doubt that no unlawful command influence existed."¹⁴¹ The successor commander took effective action to "stamp out even the appearance of unlawful command influence," and the military judge's "prophylactic" orders ensured that any "potential unlawful command influence that might have existed in [the] case had no possible effect on the court-martial."¹⁴²

The final case, *United States v. Fortune*, also involved a commander's alleged imprudent remarks to a formation of servicemembers.¹⁴³ A special court-martial composed of officer and enlisted members convicted Fortune, contrary to his pleas, of wrongful use of cocaine (two specifications) and sentenced him, inter alia, to confinement for ninety days and a bad-

¹²⁹ *Id.* at *1-2; see UCMJ arts. 134, 121. The members sentenced the appellant to seventy-four days confinement and a bad-conduct discharge. *Davis*, 2005 CCA LEXIS 161, at *1-2. The convening authority approved the adjudged sentence. *Id.* at *2.

¹³⁰ *Id.* at *21.

¹³¹ *Id.*

¹³² *Id.* at *22.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at *22-23.

¹³⁸ *Id.* at *23.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 24 (citing *United States v. Rivers*, 49 M.J. 434, 443 (1998) (designating the military judge as the last guardian of the bridge over which unlawful command influence must not pass)).

¹⁴³ No. 200300779, 2005 CCA LEXIS 119 (N-M. Ct. Crim. App. 2005) (unpublished).

conduct discharge.¹⁴⁴ Fortune alleged on appeal that remarks by his company commander at a company formation constituted unlawful pretrial punishment.¹⁴⁵ “During the formation, [the company commander] reminded the unit of the Marine Corps policy on drugs and stated that an E-4 in the company had tested positive for drugs and was still wearing his rank but would be held accountable.”¹⁴⁶ Fortune was never “paraded” in front of the unit nor was his name ever mentioned during the commander’s remarks to the formation.¹⁴⁷

The court held that the company commander’s comments “served a legitimate, nonpunitive purpose” and did not constitute unlawful pretrial punishment.¹⁴⁸ The remarks were “cautionary and clearly designed to warn members of the unit of the consequences of illegal drug activity which was an ongoing problem for the command.”¹⁴⁹

In his concurring opinion, Senior Judge Price wrote separately to “address a troubling trend in the hope that judge advocates might be alerted and exercise appropriate preventive action.”¹⁵⁰ The judge noted that several cases the court recently decided include “substantiated allegations of commanders making statements during unit formations and similar gatherings that raised issues of unlawful command influence.”¹⁵¹ All judge advocates should “endeavor to prevent, deter, and eliminate” unlawful command influence.¹⁵²

How do judge advocates comply with Senior Judge Price’s admonition? What can commanders say about military justice without risking running afoul of the prohibition against unlawful command influence? There are some basic guidelines that will assist judge advocates in advising their commanders and some recent high profile occurrences that demonstrate appropriate comments by high-ranking commanders.

Commanders should avoid speaking about specific cases if at all possible. There is a significant risk that comments about particular cases will veer into inappropriate areas or that the comments will trickle down and be interpreted as guidance concerning what the commander thinks is an appropriate disposition or punishment. In fact, the CAAF recognizes that the “confluence” of such comments as they relate to pending courts-martial is an issue.¹⁵³

If the commander feels he must comment about a particular pending case or investigation, he should remember the following shorthand phrase as guidance: “Talk offense, not offender; Talk process, not results.”¹⁵⁴ In the first instance, the commander should avoid comments that characterize an alleged offender, for example, calling an accused a “scumbag,” “druggie,” “thief,” or “troublemaker.” These characterizations, along with stigmatizing an accused, may impinge on the accused’s presumption of innocence and may impact his ability to find witnesses willing to testify in his defense. In the second instance, the commander should avoid comments that potential witnesses, members, and subordinate commanders may interpret as describing “what should happen” to an alleged offender. Those three participants in the military justice system must all make decisions independent of the desires or perceived desires of higher commanders and convening authorities. Subordinate commanders must independently decide how to dispose of alleged misconduct that occurs in their commands;¹⁵⁵ potential witnesses for both the government and the defense must feel free to come forward and provide

¹⁴⁴ *Id.* at *1.

¹⁴⁵ *Id.* at *2-3. At trial, Fortune alleged that these remarks amounted to unlawful command influence. *Id.*

¹⁴⁶ *Id.* at *7.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at *7-8.

¹⁴⁹ *Id.* at *7.

¹⁵⁰ *Id.* at *12.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See *United States v. Baldwin*, 54 M.J. 304, 310 (2001); *United States v. Brice*, 19 M.J. 170, 171-72 (C.M.A.1985).

¹⁵⁴ This is not the author’s original idea. The author inherited this guideline phraseology in materials the author received when she became Chair of the Criminal Law Department at The Judge Advocate General’s School in July 2004. The author does not know the originator of this phrase.

truthful testimony without concern for potential negative repercussions; and court-martial panel members must decide guilt or innocence and, if necessary, an appropriate sentence particularized to the accused based only on legal and competent evidence properly before them and the instructions of the military judge.

The commanding general's comments in *Baro* and the first commanding officer's comments in *Davis* both violate the proscription to "talk offense, not offender; Talk process not results."¹⁵⁶ For example, "[s]quash them when they violate the rules"¹⁵⁷ evinces to lower commanders and panel members what *results* the higher commander thinks should occur in particular cases. These comments are simply wrong. Phrases such as "[t]hevery will not be tolerated" and "guilty individuals will face hard time"¹⁵⁸ also send the wrong message and concentrates on the *results* the commander believes is appropriate in a particular case.

In these scenarios, talking about the *offense*, rather than the *offender*, might mean describing the impact of liberty incidents or larceny by shipmates on the deployability of a unit, or the ability of a unit to accomplish its mission. For example, "Larceny among shipmates destroys the trust and esprit de corps that are essential to mission accomplishment" and "Liberty violations denigrate the good will between our armed forces and the host nation." In the drug use area, it might mean describing the effects of drug use on a Soldier's readiness. For example, "Illegal drug use renders a Soldier mission incapable."

Similarly, comments that discuss *process*, rather than *results* are appropriate. Two recent high profile incidents provide excellent examples of this guidance. The first incident involved an allegation in Iraq in November 2004 that a Marine shot an unarmed man in a mosque. An embedded cameraman recorded the entire event, parts of which were replayed on television and posted on news websites.¹⁵⁹ Army General George V. Casey spoke about the incident by stating that, "It's being investigated, and justice will be done . . . That's the way we operate. This whole operation was about the rule of law, and justice will be done."¹⁶⁰ Marine Lieutenant General John F. Sattler, at the time the Commander of the 1st Marine Expeditionary Force, also focused on process when he stated: "Let me make it perfectly clear: We follow the law of armed conflict. We hold ourselves to a high standard of accountability. The facts of this case will be thoroughly pursued."¹⁶¹

The second example involves the Haditha incident—an investigation into potential wrongdoing by Marines in Haditha, Iraq that resulted in the deaths of twenty-four civilians.¹⁶² As of this writing, the investigation is still ongoing and no Marines have been charged with any criminal offenses. The Chairman of the Joint Chiefs of Staff, General Peter Pace, made the following statements concerning the investigations: "I understand it's going to be a couple of more weeks before those investigations are complete, and we should not prejudice the outcome . . . We will find out what happened, and we'll make it public . . . but to speculate right now wouldn't do anybody any good."¹⁶³

¹⁵⁵ See MCM, *supra* note 12, R.C.M. 306(a) ("A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld."); see also *United States v. Hawthorne*, 22 C.M.R. 83, 89 (C.M.A. 1956) (finding that a command policy directing disposition of offenders violates the UCMJ).

¹⁵⁶ *Supra* note 153.

¹⁵⁷ *United States v. Baro*, No. 200200429, 2005 CCA LEXIS 152, *12 (N-M. Ct. Crim. App. May 9, 2005) (unpublished).

¹⁵⁸ *United States v. Davis*, No. 200000604, 2005 CCA LEXIS 161, *21,-22 (N-M. Ct. Crim. App. May 20, 2005) (unpublished).

¹⁵⁹ See, e.g., Anthony Shadid, *U.S. Commander in Iraq Calls Shooting "Tragic"*, WASH. POST, Nov. 16, 2004, at A15..

¹⁶⁰ *Id.*

¹⁶¹ Thomas E. Ricks, *Marines Probe Apparent Slaying of Wounded Iraqi*, WASH. POST, Nov. 16, 2004, at A14.

¹⁶² See, e.g., John D. Banusiewicz, *Pace: Ongoing Probes Will Yield Facts About Haditha Incident*, May 29, 2006, ARMED FORCE INFO. SERVICE, http://www.defenselink.mil/news/May2006/20060529_5277.html (last visited July 5, 2006) (quoting an interview with General Pace on CNN's "American Morning" news program).

¹⁶³ *Id.*

Generals Pace, Casey, and Sattler's remarks about these high-profile incidents provide outstanding examples of the guidance to "talk process, not results." Judge advocates are wise to follow these templates in advising commanders.

If a commander makes misguided comments, there are a number of corrective actions that the commander or the military judge can take to alleviate the potential damage the comments can cause. *Davis* provides a partial listing of these ameliorative actions: the commander can withdraw the charges and send the case forward to the next higher authority; a non-offending commander can address potential witnesses to assure them he neither expects nor desires any particular outcome and to stress their duty to provide truthful testimony; and a military judge can order the government to produce all witness the defense requests.¹⁶⁴ These and numerous other actions can assuage the effects of intemperate remarks.¹⁶⁵

A commander can also effectively retract or clarify offending remarks as well. To be effective, however, the retraction or clarification must be sincere, complete, and widely disseminated. *United States v. Rivers* contains a sterling example of an effective retraction.¹⁶⁶ In *Rivers*, the commanding general issued a policy letter containing the following comment: "[T]here is no place in the Army for drugs *or for those who use them.*"¹⁶⁷ The italicized portion of the comment violates the guidance to talk offense, not offender and talk process, not results. Subordinate commanders, potential witnesses, or panel members could interpret the comments as the commander's instruction not to retain a drug-using Soldier.

The commander retracted the offending comment by recalling the initial policy letter and reissuing a replacement that did not contain the offending language.¹⁶⁸ He also issued the following statement:

Due to an administrative oversight, a policy memorandum, subject: Physical Fitness and Physical Training, dated 30 July 1993, inaccurately presented my view toward drug offenders.

a. Any suggestion that I believe all drug offenders must be discharged from the service is simply an inaccurate reading of both my personal and professional philosophy. My intent in issuing the policy was to convey my thoughts on physical training, health, and life-style issues. The memorandum was not intended and should not be read to express a command philosophy on drug offenders. The memorandum was replaced with a corrected copy, dated 27 August 1993.

b. My policy on the disposition of military justice cases is expressed above. I strongly believe all soldiers deserve an individual assessment of their cases.¹⁶⁹

The commander's statement, along with other remedial actions by the military judge, ensured that Rivers' trial was free from the taint of unlawful command influence.¹⁷⁰

¹⁶⁴ *United States v. Davis*, No. 200000604, 2005 CCA LEXIS 161, *22-23 (N-M. Ct. Crim. App. May 20, 2005) (unpublished)..

¹⁶⁵ Helpful cases discussing remedies for unlawful command influence include the following: *United States v. Biagase*, 50 M.J. 143 (1999); *United States v. Rivers*, 49 M.J. 434 (1998); *United States v. Francis*, 54 M.J. 636 (Army Ct. Crim. App. 2000); *United States v. Clemons*, 35 M.J. 770 (A.C.M.R. 1992).

¹⁶⁶ *Rivers*, 49 M.J. at 439.

¹⁶⁷ *Id.* at 438 (emphasis added).

¹⁶⁸ *Id.* at 439.

¹⁶⁹ *Id.* (quoting the Commanding General's memorandum).

¹⁷⁰ *Id.* at 443. There were allegations of unlawful command influence in addition to the issue involving the commander's memorandum. The court found:

[A]s a result of the prompt corrective actions taken by the Government, as well as the exhaustive factfinding hearings and comprehensive judicial orders initiated by the military judge in this case, we are satisfied that appellant was not deprived of any witnesses on the merits or on sentencing. The military judge is the last sentinel protecting an accused from unlawful command influence. In this case, the military judge performed his duty admirably. His aggressive and comprehensive actions ensured that any effects of unlawful command influence were purged and that appellant's court-martial was untainted.

Id.

Conclusion—Looking Ahead to Next Term

The 2005-2006 term of court will feature at least two unlawful command influence decisions. The first expected decision is *United States v. Lewis*, which involves the crass acts of the trial counsel and staff judge advocate that caused the military judge to recuse herself. In addition, the 2005-2006 term of court should also feature an opinion that addresses the propriety of the convening authority's physical presence in the courtroom during proceedings with members and the military judge's role in handling the issue. *United States v. Harvey* granted review of the following issue, as well as one other unrelated issue: Whether the lower court erred in affirming the military judge's denial of a mistrial, when the military judge failed to inquire into the circumstances of the convening authority's presence at trial or to require the government to disprove the existence of unlawful command influence once that issue was raised.¹⁷¹ The court heard arguments on 11 October 2005 and a decision is pending.¹⁷² All those who study and practice military justice should look forward to the CAAF's continuing jurisprudence in this vital area.

¹⁷¹ *United States v. Harvey*, 61 M.J. 50 (2005).

¹⁷² The lower court opinion is found at *United States v. Harvey*, 60 M.J. 611 (N-M. Ct. Crim. App. 2004).