

Confronting the Mortal Enemy of Military Justice: New Developments in Unlawful Command Influence

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Introduction

The past term brought three important cases from the Court of Appeals for the Armed Forces (CAAF) to the area of unlawful command influence.¹ They serve as a reminder that unlawful command influence is still “the mortal enemy of military justice,”² and that all military justice practitioners must be vigilant to prevent even the appearance of impropriety in this area.³ These cases also illustrate once again that the CAAF is willing to address issues of unlawful command influence with severe and even drastic remedies, including setting aside the findings and sentence with prejudice.⁴

Improper Outside Influence on Panel Members—Command Policy in the Deliberation Room

*United States v. Pope*⁵

Staff Sergeant (SSG) Pope was an Air Force recruiter involved in unprofessional conduct with three prospective applicants.⁶ His conduct consisted of inappropriate language and touching both inside and outside the recruiting office.⁷ Contrary to his pleas, SSG Pope was convicted of violating a lawful general regulation, maltreatment and assault.⁸ During the sentencing phase of SSG Pope’s trial, the government moved to introduce a letter signed by Brigadier General Peter U. Sutton, Commander of the Air Force Recruiting Service, admonishing recruiters not to have unprofessional relationships with applicants.⁹ The purpose of introducing the letter at that point was to demonstrate “the aggravating nature of Appellant’s conduct because he had knowledge of what standard of conduct was expected of recruiters, and notwithstanding, chose to conduct himself otherwise.”¹⁰ The defense counsel objected on the grounds of Rule for Courts-Martial (R.C.M.) 403¹¹ and argued that the letter impermissibly introduced command policy into the sentencing process.¹² The military judge disagreed and admitted the letter, noting that the letter did not seem to advocate a policy of punitive separation from the Air Force for

¹ *United States v. Pope*, 63 M.J. 68 (2006); *United States v. Harvey (Harvey II)*, 64 M.J. 13 (2006); *United States v. Lewis*, 63 M.J. 405 (2006).

² *Lewis*, 63 M.J. at 407 (quoting *United States v. Gore*, 60 M.J. 178, 178 (2004) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986))).

³ “The ‘appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.’” *Id.* (quoting *United States v. Simpson*, 58 M.J. 368, 374 (2003) (quoting *United States v. Stoneman*, 57 M.J. 35, 42-43 (2002))).

⁴ *See id.* at 417.

⁵ *Pope*, 63 M.J. 68 (2006).

⁶ *Id.* at 70-71.

⁷ *Id.*

⁸ *Id.* at 69.

⁹ *Id.* at 75. Paragraph four of the letter stated:

Remember, “integrity first” and “service before self” are two of our core values. These two types of misconduct violate those principles. The citizens of this country demand that we treat our applicants respectfully, equitably, and ethically. This command and the U.S. Air Force will accept nothing less. If you choose to ignore these important rules for the sake of your own pleasure or esteem, you should not be surprised when, once you are caught, *harsh adverse action follows*.

Id. at 73 (emphasis added).

¹⁰ *Id.* at 75.

¹¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 403 (2005) [hereinafter MCM].

¹² *Pope*, 63 M.J. at 75 (“Defense counsel’s specific concern was the statement seemingly endorsed ‘harsh adverse action.’”).

these offenses.¹³ Staff Sergeant Pope was ultimately sentenced to fifteen months confinement, total forfeitures, reduction to E-1, and a bad-conduct discharge.¹⁴ The Air Force Court of Criminal Appeals affirmed in an unpublished opinion.¹⁵

Before the CAAF, SSG Pope claimed, in part, that it was error for the military judge to admit (over defense objection) the letter offered at sentencing which argued Air Force core values and endorsed “harsh adverse action” for those who committed his offenses.¹⁶ The court held that admitting the letter raised the appearance of improper influence because it conveyed the command’s view that harsh action should be taken against an accused.¹⁷ Moreover, the letter was introduced without the benefit of a limiting instruction.¹⁸

In discussing the letter the court noted that, “A policy directive may be promulgated to improve discipline; however, it must not be used as leverage to compel a certain result in the trial itself.”¹⁹ “Thus, we have condemned references to command policies or views which in effect bring the commander into the deliberation room.”²⁰ Such a practice raises the specter of command influence,²¹ and in this case the court was not convinced beyond a reasonable doubt that the members were not influenced by the letter.²² The CAAF set aside the sentence with a rehearing on sentence authorized.²³

Pope has several lessons for military justice practitioners. First, staff judge advocates and government representatives should carefully screen policy letters for language implicating military justice, especially language insinuating certain results in disposition of offenses or sentence at courts-martial.²⁴ Second, government counsel should contemplate the utility of introducing this type of evidence at trial, especially for aggravation purposes at sentencing. The trial counsel’s role is to do justice, and introducing such policy statements unnecessarily raises the specter of unlawful command influence.²⁵ Third, the Court in *Pope* never specifically held that this language constituted unlawful command influence, or even that the military judge abused her discretion by admitting the letter.²⁶ Rather, the CAAF found the effect of this policy letter “troubling,” and reversed the sentence to avoid the appearance of command influence.²⁷ This is a clear signal that the CAAF will cast a wide net in this area, and any small benefit from this type of aggravation is easily outweighed by the chance of reversal.

Military Judges also have much to think about. First, the CAAF’s approach in this case is unique in recent command influence jurisprudence. They avoided using the *Biagase* framework, under which military judges have clear guidance concerning raising and litigating issues of unlawful command influence.²⁸ Does this mean that in the area of policy letters or command policy guidance that military judge’s need not apply *Biagase*? Recent cases suggest otherwise, and military judges may want to view this case as an anomaly for that purpose.²⁹ This discussion leads to another difficult issue for military

¹³ *Id.*

¹⁴ *Id.* at 69.

¹⁵ *Id.* See United States v. Pope, No. 34921, 2004 CCA LEXIS 204 (A.F. Ct. Crim. App. Aug. 30, 2004).

¹⁶ *Pope*, 63 M.J. at 69.

¹⁷ *Id.* at 76 (quoting United States v. Hawthorne, 22 C.M.R. 83, 87 (C.M.A. 1956) (“This Court has consistently held that any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned.”)).

¹⁸ *Id.*

¹⁹ *Id.* at 75 (quoting United States v. Fowle, 22 C.M.R. 139, 141 (C.M.A. 1956)).

²⁰ *Id.* (quoting United States v. Grady, 15 M.J. 275, 276 (C.M.A. 1983)).

²¹ *Id.* at 76 (citing *Grady*, 15 M.J. at 276). “Such a practice invades the province of the sentencing authority by raising the spectre of command influence.” *Grady*, 15 M.J. at 276.

²² *Id.* (citing United States v. Thomas, 22 M.J. 388, 394 (C.M.A. 1986)).

²³ *Id.*

²⁴ See generally United States v. Rivers, 49 M.J. 434 (1998) (discussing policy letters and remedial actions). Allegations of unlawful command influence raised concerning division commander’s five-page policy letter on physical fitness and physical training which addressed other fitness issues such as weight, smoking, drinking and drugs: “there is no place in our Army for illegal drugs or for those who use them.” *Id.* at 438 (emphasis added).

²⁵ See *supra* note 20.

²⁶ *Pope*, 63 M.J. at 75-76.

²⁷ *Id.* at 76.

²⁸ See generally United States v. Biagase, 50 M.J. 143 (1999) (discussing the *Biagase* framework in detail in this article *infra*, at pages 70-71).

²⁹ See United States v. Dugan, 58 M.J. 253, 258 (2003) (applying the *Biagase* standard to a case involving alleged improper consideration of prior convening authority “commander’s call” statements during sentencing deliberations).

judges: should they (or could they) craft limiting instructions that would cure apparent unlawful command influence like that presented in this case? Precedent notwithstanding, it seems this approach is eclipsed by a broader view and definition of apparent unlawful command influence now embraced by the CAAF.³⁰ Again, it is unclear why the court referred to this possible remedy referenced in *Grady*, when the *Grady* court counseled caution in this area.³¹ Military judges are wise to remember their role as the last sentinel,³² and ensure that courts-martial proceedings are unencumbered by ill-advised policy statements.³³

Finally, this case serves as a reminder to defense counsel to object at trial if the government seeks to introduce this type of evidence, even if the issue is still available on appeal.³⁴ When confronted with this objection, military judges will be more likely to exercise caution to ensure a fair trial, and the accused will increase their chances for a fair and just sentence.

Improper Outside Influence on Panel Members—The Commander in the Courtroom (literally)

*United States v. Harvey*³⁵

Lance Corporal (LCpl) Harvey was convicted at special court-martial of conspiracy, false official statement, communicating a threat, and several drug offenses involving LSD, methamphetamine, cocaine, and wrongfully inhaling aerosol.³⁶ Harvey was eventually sentenced to sixty days confinement, forfeiture of \$639.00 pay per month for two months, reduction to E-1, and a bad-conduct discharge.³⁷

The convening authority at the time of LCpl Harvey's court-martial was convened and the charges referred was Major (Maj) P.J. Laughlin, Commanding Officer of Headquarters and Headquarters Squadron, Marine Corps Air Station, Yuma, Arizona.³⁸ One officer and three enlisted members eventually heard the case.³⁹ By the time trial commenced, Lieutenant Colonel M.L. Saunders had succeeded Maj Laughlin in command and was therefore the convening authority; Maj Laughlin was now the executive officer.⁴⁰ During the government's closing argument on findings, Maj Laughlin was present in the courtroom wearing a flight suit.⁴¹ The military judge noticed his presence and discussed it on the record at an Article 39(a)⁴² session.⁴³ Defense counsel moved for a mistrial based on the apparent recognition of the original convening authority by several panel members and the fact that the President of the panel was very familiar with Maj Laughlin.⁴⁴ The military judge denied the motion for mistrial, but offered defense counsel the opportunity to voir dire the members or provide a limiting instruction.⁴⁵ Defense counsel declined both of those options and no party took any further action to address unlawful

³⁰ See *supra* note 3.

³¹ *United States v. Grady*, 15 M.J. 275, 276 (1983). "At that point, the matter of command policy was obviously so fixed in the members' minds that only comprehensive limiting instructions could have cured the error." *Id.*

³² See *United States v. Rivers*, 49 M.J. 434, 443 (1998). "The military judge is the last sentinel protecting an accused from unlawful command influence." *Id.* See also Lieutenant Colonel Patricia A. Ham, *Revitalizing the Last Sentinel: The Year in Unlawful Command Influence*, ARMY LAW., May 2005, 1.

³³ "A trial must be kept 'free from substantial doubt with respect to legality, fairness and impartiality.' . . . A judicial system operates effectively only with public confidence--and, naturally, that trust exists only if there also exists a belief that triers of fact act fairly." *United States v. Stringer*, 17 C.M.R. 122, 132-33 (C.M.A. 1954) (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 62f(13) (1951)). "This appearance of impartiality cannot be maintained in trial unless the members of the court are left unencumbered from powerful external influences." *Grady*, 15 M.J. at 276.

³⁴ See *United States v. Baldwin*, 54 M.J. 308, 310 (2001). "We reject the Government's claim of waiver. 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." *Id.* at 310 n.2.

³⁵ *United States v. Harvey (Harvey II)*, 64 M.J. 13 (2006).

³⁶ *Id.* at 16.

³⁷ *Id.*

³⁸ *Id.* at 15.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² UCMJ art. 39(a) (2005).

⁴³ *Harvey II*, 64 M.J. at 15.

⁴⁴ *Id.* at 16.

⁴⁵ *Id.*

command influence.⁴⁶ On appeal, the Navy-Marine Court of Criminal Appeals (NMCCA) affirmed, holding that the defense had failed to raise the issue of unlawful command influence.⁴⁷

Before the CAAF, LCpl Harvey asserted that the military judge at trial failed to conduct a complete inquiry to establish what impact the original convening authority's presence had on the proceedings, and further erred in summarily denying the defense motion for a mistrial.⁴⁸ Lance Corporal Harvey also asserted prejudicial post-trial delay in the processing of his case, and the court specified one issue concerning sentence reassessment.⁴⁹

The court began its discussion by emphasizing the statutory prohibition against unlawful command influence⁵⁰ and the court's pivotal role in protecting against it.⁵¹ The CAAF also emphasized its role concerning oversight of the military justice system; a responsibility shared with commanders, staff judge advocates, military judges, and others involved with military justice.⁵² The court highlighted the military judge's role as the "last sentinel" in the trial process to protect a court-martial from unlawful command influence.⁵³

The primary focus under *Biagase* is the duty of the military judge to allocate the burdens between the prosecution and the defense.⁵⁴ To discharge this duty, the military judge engages in a two-step process.⁵⁵ First, the defense must raise the issue of unlawful command influence.⁵⁶ "The test is "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."⁵⁷ The burden then shifts to the government which has three options: "[T]he

⁴⁶ *Id.*

⁴⁷ *United States v. Harvey (Harvey I)*, 60 M.J. 611, 614 (N-M. Ct. Crim. App. 2004). The Court noted the low threshold of "some evidence" for raising unlawful command influence, but noted that it must be more than speculation.

In this case that test was not met. The only undisputed fact in this case, in issue, is that the officer who convened the court-martial was present in the courtroom during closing arguments of counsel on findings. Record at 341. We believe the military judge correctly concluded that this alone was not enough to raise UCI at trial.

Id.

⁴⁸ *Harvey II*, 64 M.J. at 16. Specifically, Harvey claimed that: (1) the facts surrounding the convening authorities presence in the courtroom demonstrated some evidence of unlawful command influence; (2) the military judge failed to conduct further inquiry to establish the impact of that presence; (3) the military judge erred by not shifting the burden to the government to disprove unlawful command influence; and, (4) the Government did not rebut the existence of unlawful command influence beyond a reasonable doubt.. *Id.* at 16-17.

⁴⁹ *Id.* at 16. The court never ultimately addressed the specified issue because of the remedy in this case. *Id.* at 15.

⁵⁰ *Id.*

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. 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 . . .

Id. (quoting UCMJ art. 37(a) (2005)).

⁵¹ *Id.* at 17 ("The importance of this prohibition is reflected in our observation, that 'a prime motivation for establishing a civilian Court of Military Appeals was to erect a further bulwark against impermissible command influence.'") (quoting *United States v. Gore*, 60 M.J. 178, 185 (2004) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986))).

⁵² *Id.*

⁵³ *Id.* at 18.

Illustrative of this shared responsibility to protect against unlawful command influence, in *Biagase*, we explicitly stated that a primary duty of the military judge in a court-martial is to protect against unlawful command influence. Indeed, *Biagase* underscored the role of the military judge as the "last sentinel," an essential guard at the trial level, to protect against unlawful command influence.

Id. (citing *United States v. Biagase*, 50 M.J. 143, 152 (1999) (quoting *United States v. Rivers*, 49 M.J. 434, 443 (1998))); *see also* Ham, *supra* note 32.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* The court noted that this initial showing must be more than speculation, but because of the impact upon the public perception of a fair trial the threshold is low. *Id.* (citing *United States v. Johnson*, 54 M.J. 32, 34 (2000), *Biagase*, 50 M.J. at 150, and *United States v. Johnston*, 39 M.J. 242, 244 (1994)).

⁵⁷ *Id.* (citing *Biagase*, 50 M.J. at 150, and *Johnston*, 39 M.J. at 244)).

government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do constitute unlawful command influence; or (3) that unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence.”⁵⁸ “On appeal, an appellant must ‘(1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the cause of the unfairness.’”⁵⁹

The CAAF held that trial developments in *Harvey* met the low threshold burden of “some evidence” of unlawful command influence, and that the military judge failed to inquire adequately into the issue.⁶⁰ Specifically, the original convening authority was present in the courtroom wearing a flight suit when throughout the case the government consistently characterized Harvey’s conduct as a threat to the aviation community.⁶¹ Second, the record revealed that panel members personally knew the original convening authority; and that defense counsel characterized the relationship between the original convening authority and the senior member of the panel as being “intimately familiar.”⁶² In addition, defense counsel had unsuccessfully challenged that senior member of the panel for cause because she personally knew the original convening authority was also a subordinate member of the present convening authority’s command.⁶³ Finally, defense counsel noted in the record that the “panel was looking over our shoulder” during the entire closing argument, and this assertion was never explored further by the trial court.⁶⁴ The military judge’s error in concluding that unlawful command influence had not been raised was then compounded by his failure to shift the burden to the government to rebut the existence of unlawful command influence or demonstrate a lack of prejudice.⁶⁵ The court specifically noted that the military judge was not required to grant a mistrial; rather, “as the ‘last sentinel’ at trial to protect against unlawful command influence, the military judge had a duty to inquire further into this matter.”⁶⁶

The CAAF acknowledged that a court-martial is open to the public,⁶⁷ and that convening authorities are not barred from attending.⁶⁸ The court cautioned, however, that “the presence of the convening authority at a court-martial may raise issues.”⁶⁹ Before a convening authority attends a court-martial he should consider carefully the impact of his presence on the proceedings.⁷⁰ The court went on to encourage convening authorities to “initiate a dialogue” with the staff judge advocate and trial counsel before entering the courtroom.⁷¹ This would allow the trial counsel an opportunity to alert the military judge and defense counsel and allow any issues to be litigated in advance.⁷²

Ultimately the court set aside the findings and sentence without prejudice.⁷³ Noting the impact of dilatory post-trial processing, the court also held that if the rehearing resulted in a conviction and sentence, the convening authority may approve no portion of the sentence exceeding a punitive discharge.⁷⁴ Judge Crawford and Judge Baker both filed dissenting opinions, arguing that the defense did not meet the low threshold of showing “some evidence” of unlawful command

⁵⁸ *Id.* (quoting *Biagase*, 50 M.J. at 151).

⁵⁹ *Id.* (quoting *United States v. Dugan*, 58 M.J. 253, 258 (2003) (citing *United States v. Stombaugh*, 40 M.J. 208, 213 (1994))).

⁶⁰ *Id.* at 19.

⁶¹ *Id.*

⁶² *Id.* at 19-20. The court afforded this assertion little weight, as *voir dire* had already established there was no “relationship” between the two. *Id.* at 20 n.25.

⁶³ *Id.* at 20.

⁶⁴ *Id.* at 21.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 20. “The sixth amendment right to a public trial belongs to the defendant rather than the public; a separate first amendment right governs the interests of the public and the press in attending a trial.” *Id.* (quoting 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.1(a), at 450 (2d ed. 1999)).

⁶⁸ *Id.* The Court noted, however, that the right to attend a court-martial is not absolute, and is subject to the discretion of the military judge (citing *United States v. Short*, 41 M.J. 42, 43 (1994), and *MCM*, *supra* note 11, R.C.M. 806(b)). *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 25.

⁷⁴ *Id.*

influence.⁷⁵

Harvey is clear guidance to practitioners that convening authorities should be discouraged from attending courts-martial. The CAAF's recommended procedures for addressing this issue speak volumes about the potential problems associated with convening authority's attending courts-martial; it is hard to conceive of a situation in which the government's interest's would be served by encouraging a convening authority to do so. *Harvey* also highlights the role of the military judge in ensuring that unlawful command influence does not affect the proceedings. Military judges must not be remiss in their "affirmative responsibilities to avoid the appearance of evil in his courtroom and to foster public confidence in court-martial proceedings."⁷⁶ The threshold for establishing "some evidence" is very low, and military judges are safe in erring on the side of caution in placing the appropriate burden on the government to rebut the presence of unlawful command influence or the lack of any effect on the proceedings.⁷⁷

Unlawful Command Influence by Staff Members—The Overzealous SJA

*United States v. Lewis*⁷⁸

In *Lewis*, the CAAF began by reminding military justice practitioners that "[u]nlawful command influence is the mortal enemy of military justice."⁷⁹ "Where it is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the proceeding."⁸⁰ The CAAF made this point exceedingly clear by dismissing the findings and sentence with prejudice, a result all the more noteworthy due to its rarity⁸¹ and used only as a drastic measure when alternatives are not available.⁸²

Pursuant to his pleas, a military judge sitting as a general court-martial convicted LCpl Lewis of various drug offenses involving ecstasy, ketamine, LSD, and methamphetamine.⁸³ The military judge sentenced Lewis to five years confinement, total forfeitures, reduction to E-1 and a dishonorable discharge.⁸⁴

A civilian defense counsel (CDC) represented LCpl Lewis before the military judge.⁸⁵ The CDC did not appear at the first session of the court-martial, the arraignment, when the detailed military defense counsel appeared for LCpl Lewis. Neither side had any voir dire or challenge against the military judge at that time.⁸⁶ The detailed military defense counsel then indicated that Lewis had retained a CDC.⁸⁷ During a subsequent government requested Article 39(a) session, government counsel conducted voir dire of the military judge and challenged her impartiality because: (1) she presided over two companion cases; (2) she had a prior professional relationship with this particular CDC while the CDC was on active duty; (3) the number of cases presided over by the military judge at which the CDC appeared; (4) the military judge's social relationship with the CDC, including any personal contact since the *Lewis* case began; (5) the fact that in a prior case the military judge had been voir dired about her relationship with this particular CDC; (6) the fact that in yet another prior case

⁷⁵ *Id.* at 27-28. However, Judge Baker argued that although the law does not require military judges to proactively intervene absent some evidence of unlawful command influence, they should as a matter of *legal policy* in cases like *Harvey* (where the UCI door was left ajar), and therefore agreed with the disposition of the case. *Id.* at 28.

⁷⁶ *Id.* at 20-21 (quoting *United States v. Rosser*, 6 M.J. 267, 273 (C.M.A. 1979)).

⁷⁷ *Id.* at 20. "Again, we reaffirm that the law of unlawful command influence establishes a low threshold for the defense to present "some evidence" of unlawful command influence." (citing *United States v. Biagase*, 50 M.J. 143, 150 (1999)).

⁷⁸ *United States v. Lewis (Lewis II)*, 63 M.J. 405 (2006).

⁷⁹ *Id.* at 407 (quoting *United States v. Gore*, 60 M.J. 178, 178 (2004) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986))).

⁸⁰ *Id.* (citing *United States v. Rivers*, 49 M.J. 434, 443 (1998), and *United States v. Sullivan*, 26 M.J. 442, 444 (1998)).

⁸¹ This is only the third case known to the author in which the findings and sentence have been dismissed with prejudice since adoption of the modern Uniform Code of Military Justice. See Ham, *supra* note 32, at 1 (noting *United States v. Hunter*, 13 C.M.R. 53, 53 (C.M.A. 1953) and *United States v. Gore*, 60 M.J. 178 (2004) as two other examples).

⁸² *Lewis*, 63 M.J. at 416 (citing *United States v. Cooper*, 35 M.J. 417, 422 (C.M.A. 1992)).

⁸³ *Id.* at 406, 407.

⁸⁴ *Id.* at 407.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* The CDC was a former Marine judge advocate who had attained the rank of colonel. *Id.*

this military judge had been questioned about electronic mail messages generated by the CDC, was requested to recuse herself, and that she had subsequently expressed displeasure to another government counsel over that incident; and finally, (7) the fact that the military judge had detailed herself to the case after learning that the CDC would represent the accused, the extent of communications with the CDC about the *Lewis* case, and the military judge's receipt of CDC generated email concerning prosecutorial misconduct.⁸⁸ The trial counsel then moved the military judge to recuse herself and the military judge denied the motion.⁸⁹

The trial counsel then requested that the military judge reconsider her denial of the motion, and presented a previously prepared written pleading.⁹⁰ The written pleading contained an allegation by a Marine Colonel that he had observed the CDC and the military judge exiting a play together after the military judge had already presided over the arraignment in the *Lewis* case and been copied on numerous electronic messages by the CDC.⁹¹ This was the first time that the government had notified the military judge of this information, despite the detailed voir dire conducted earlier. On several occasions during the first voir dire, the trial counsel paraphrased for the record that the social interaction between the CDC and the military judge was limited to "at the barn only."⁹² During this second and further voir dire the military judge explained that she had forgotten attending the play, and denied the motion for reconsideration, noting that during occasional social interaction they never discussed pending trials.⁹³ The trial counsel then requested a continuance to file a government appeal and a continuance in order to seek a stay of the proceedings; the military judge denied both requests.⁹⁴

Based on the prosecution's actions, the defense filed a motion concerning prosecutorial misconduct.⁹⁵ The defense called the Staff Judge Advocate (SJA) as a witness, who testified that he advised the trial counsel regarding voir dire, and informed that counsel of things that he had learned in regards to the military judge and this particular CDC.⁹⁶ In explaining some of his advice the SJA stated that, "there was some evidence out there that, in fact, the defense lawyer had been on a date with the judge while this case was pending."⁹⁷ The SJA testified that he contacted the Head of Appellate Government Division about a government appeal or extraordinary writ, at which time he discussed apparent discrepancies in the military judge's responses on the record, as well as his "own personal bias" observations.⁹⁸ The SJA's testimony included direct exchanges with the CDC.⁹⁹

The next day the military judge reconsidered her ruling and decided to recuse herself.¹⁰⁰ During her detailed remarks on the record, she conceded her emotional state over the incident, and reiterated her belief that the relationship she shared with the CDC was not improper.¹⁰¹ However, the military judge had consulted with the circuit military judge and now decided to grant the motion.¹⁰² "I'm granting the motion for recusal for two reasons: One, in an abundance of caution, interpreting appearance of impropriety at its broadest possible meaning; and two, because my emotional reaction to the slanderous conduct of the SJA has invaded my deliberative process on the motions."¹⁰³

⁸⁸ *Id.* at 407-08.

⁸⁹ *Id.* at 409.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* The military judge indicated in earlier questioning that she and the CDC boarded horses at the same barn and saw each other there occasionally. *Id.* at 408.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 409-10.

⁹⁷ *Id.* at 410.

⁹⁸ *Id.*

⁹⁹ *Id.* The personal nature of this confrontation is reflected in the CDC's consideration of withdrawal from the case. *Id.* Lewis's mother later testified that the SJA's testimony appeared to be a "personal vendetta." *Id.* at 410 n.2.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 411. "I now find myself second guessing every decision in this case. Did I favor the government to protect myself from further assault? Did I favor the accused to retaliate against the government[?]" *Id.*

A second military judge was detailed and also recused himself because of personal bias, and because he could not set aside the SJA's treatment of the previous military judge.¹⁰⁴ A third military judge heard an expedited defense motion,¹⁰⁵ and a fourth military judge presided over additional motions and trial.¹⁰⁶ Although the fourth final trial judge denied a motion to dismiss for unlawful command influence, he did grant a motion for a change of venue, disqualified the SJA and the convening authority from taking post-trial action in the case, and barred the SJA from attending the remainder of the trial.¹⁰⁷

On appeal, the NMCCA found the SJA's actions advising the trial counsel on the "voir dire assault of the [military judge]," his unprofessional behavior as a witness, and his inflammatory testimony, created a bias in the military judge and constituted unlawful command influence.¹⁰⁸ However, the court below held there was no prejudice to Lewis, whose trial was ultimately heard by diligent, deliberate judges.¹⁰⁹

Before the CAAF, Lewis claimed that it was error for the NMCCA to hold that the actions of the SJA and the trial counsel were harmless beyond a reasonable doubt.¹¹⁰ The CAAF held that improperly seeking recusal of the military judge was actual unlawful command influence.¹¹¹ The Court was now only concerned with whether the government had demonstrated beyond a reasonable doubt that the proceedings were untainted by unlawful command influence.¹¹²

The court held that the "orchestrated effort" to unseat the military judge exceeded any right conferred upon the government to challenge a military judge.¹¹³ "But for the government's attack upon MAJ CW [the military judge], it appears unlikely that there existed grounds for disqualification."¹¹⁴

The record reflects that the SJA—a staff officer to and legal representative for the convening authority—was actively engaged in the effort to unseat MAJ CW as military judge. The trial counsel, who was provided advice on voir diring MAJ CW by the SJA, became the tool through which this effort was executed."¹¹⁵

The court noted that the trial counsel initially part of the unlawful command influence, remained an active member of the prosecution, undermining the government's later actions and remedial steps.¹¹⁶

The CAAF then addressed the impact of apparent unlawful command influence, emphasizing the need to maintain the "confidence of the general public in the fairness of the court-martial proceedings."¹¹⁷ The "appearance of unlawful command

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* The third military judge heard a motion to release Lewis from pretrial confinement and released him the same day. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 412.

¹⁰⁸ *United States v. Lewis (Lewis I)*, 61 M.J. 512, 518 (N-M. Ct. Crim. App. 2005). There can be no doubt that but for the unprofessional actions of the trial counsel and the SJA, Lewis would have been tried by the initial military judge. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Lewis II*, 63 M.J. at 407. The first issue granted was the following: "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 RELATIONSHIP WITH THE CIVILIAN DEFENSE COUNSEL AMOUNTED TO UNLAWFUL COMMAND INFLUENCE BUT WERE HARMLESS BEYOND A REASONABLE DOUBT." *Id.* at n.1.

¹¹¹ *Id.* at 412, 413. "Because the conclusion of the Navy-Marine Court of Criminal Appeals is the law of the case, we need not determine whether Lewis has met the burden of raising the issue nor need we review whether the Government has demonstrated beyond a reasonable doubt that there was no command influence." *Id.* at 413.

¹¹² *Id.*

¹¹³ *Id.* at 414. Rule for Courts-Martial 902(d)(2) allows either party to question the military judge concerning possible grounds for disqualification. MCM, *supra*, note 11. However, the court noted earlier that, "Neither the government nor the defense at a court-martial is vested with the power to designate, detail, or select the military judge. Conversely, neither party can usurp the authority of the service secretaries or Judge Advocates General by removing or unseating properly certified and detailed military judges." *Lewis II*, 63 M.J. at 414.

¹¹⁴ *Lewis II*, 63 M.J. at 414.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 415 (quoting *United States v. Stoneman*, 57 M.J. 35, 42 (2002) (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979))).

influence is as ‘devastating to the military justice system as the actual manipulation of any given trial.’”¹¹⁸ The CAAF views the perception of fairness in the military justice system through the “eyes of a reasonable member of the public.”¹¹⁹ The appearance of unlawful command influence exists where an objective, disinterested observer would harbor a significant doubt about the fairness of the proceeding.¹²⁰

Applying the test to this case, “a reasonable observer would have significant doubt about the fairness of this court-martial in light of the government’s conduct with respect to MAJ CW.”¹²¹ The court held that neither actual nor apparent unlawful command influence had been cured beyond a reasonable doubt in this case, and dismissed the charges and specifications with prejudice.¹²² “We do not do so lightly, but the nature of the unlawful conduct in this case, combined with the unavailability of any other remedy that will eradicate the unlawful command influence and ensure the public perception of fairness in the military justice system, compel this result.”¹²³

Lewis is a glaring example of the fact that staff officers can also be implicated and scrutinized for unlawful command influence. Although recusal motions concerning the military judge are sometimes appropriate, the government should balance the impact on the case with the perception created by those viewing the proceedings. *Lewis* also reminds us that the CAAF continues to view unlawful command influence as the “mortal enemy” of military justice, and will take drastic steps to ensure that it does not interfere with the court-martial process.¹²⁴ Finally, Judge Efron’s concurrence serves as guidance to military judges and to the respective service courts of criminal appeals to consider dismissal without prejudice as a remedy in cases like *Lewis*.¹²⁵ This would allow the charges and specifications to proceed through channels untainted by the previous conduct.¹²⁶

Conclusion

The past year was an active one for the CAAF in the area of unlawful command influence. Taken together these cases should remind practitioners that vigilance is necessary to protect our military justice system from unlawful interference. Practitioners are also on notice that the CAAF will not be afraid to address the “mortal enemy” with draconian measures to ensure not only the actual fairness of the military justice system but the appearance of fairness by all those that practice within it.

¹¹⁸ *Id.* (quoting *United States v. Simpson*, 58 M.J. 368, 374 (2003) (quoting *Stoneman*, 57 M.J. at 42-43)).

¹¹⁹ *Id.* at 415.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 416.

¹²³ *Id.*

¹²⁴ *Id.* The gravity of the courts opinion in this respect is seen in its suggestion that investigations or sanctions may have restored public confidence in the military justice system. The court also expressed concern that there appeared to be no response from Marine Corps supervisory authorities. *Id.*

¹²⁵ *Id.* at 417.

¹²⁶ *Id.*