Memorandum For: COL Gunn, Chief Defense Counsel 28 July 2004

Subject: Counsel and the Authority of the Presiding Officer

1. References:

a. The President's Military Order of 13 November 2001
b. DOD Military Commission Order No. 1, 21 March 2002
c. DOD Dir 5105.70, 10 February 2004
d. DOD Military Commission Instruction 1, 30 April 2003
e. DOD Military Commission Instruction 3, 30 April 2003
f. DOD Military Commission Instruction 4, 30 April 2003
g. DOD Military Commission Instruction 5, 30 April 2003
h. DOD Military Commission Instruction 6, 30 April 2003
i. DOD Military Commission Instruction 7, 30 April 2003
j. DOD Military Commission Instruction 8, 30 April 2003
k. DOD Military Commission Instruction 9, 16 December 2003
l. Memorandum, Mr. Hodges to Legal Advisor to the Appointing Authority, Subject: Need for MCO Instructions or Decision, 28 July 2004 (Incl 1)

2. It has come to my attention (e.g., see Incl 2 - Email from LCDR Sandul, 28 Jul 04) that certain counsel may be operating under a misapprehension concerning my authority as the Presiding Officer. Please note that this memorandum does not specifically address any case or any counsel - it covers all four of the cases to which I have been detailed and all of the counsel, whether prosecution or defense, detailed to those cases.

3. So that there is no question of my view in these matters, let me state the following:

a. I have the authority to set, hear, and decide all pretrial matters.
b. I have the authority to order counsel to perform certain acts.
c. I have the authority to set motions dates and trial dates.
d. I have the authority to act for the Commission without the formal assembly of the whole

Commission.

The above listing is not supposed to be all inclusive. Perhaps a better way of looking at the matter is to say that I have authority to order those things which I order done.

4. I base my view upon my reading and interpretation of the references. (I note that my analysis of the references comports with that contained in reference 1l.) I recognize that any one person's interpretation of various documents might be wrong. However, in the cases to which I have been appointed as Presiding Officer, my interpretation is the one that counts:

a) until the cases have been resolved and the cases are reviewed, if necessary, by competent reviewing authority (See reference 1k.). At that time, there will be an opportunity for advocates, for either side, to state that the Presiding Officer was wrong in his interpretation of the references or in his actions based upon those interpretations. If so, competent reviewing authority will determine the remedy, if any. Or,

b) until superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing Authority) issues directives stating that what I am doing is incorrect.

5. No counsel before the Commission is a competent reviewing authority or a superior competent authority. When I issue an order, counsel are encouraged and required, by myself and their oaths, to tell me that they believe I am acting improperly and to provide me the citations and interpretations which support their beliefs. I will consider such reply. I will then make a decision. If my decision is that my prior order will stand, counsel are required to comply with my order.

6. In this regard, I direct your attention to paragraph 4A(5)(b) of reference 1b. As you stated in an email to the Appointing Authority today,

As you are aware, my primary responsibility as Chief Defense Counsel is to provide professional supervision for the personnel assigned to the Office of the Chief Defense Counsel. As we proceed, I believe that it is critical for individuals involved in this process to stay within their areas of responsibility.

The Chief Defense Counsel, the Chief Prosecutor, the Appointing Authority, all counsel, and myself have varying areas of responsibility. I do not wish to have a case delayed, an accused disadvantaged, or a counsel lost due to a misunderstanding by counsel of my authority. There is plenty of time on appeal, if necessary, to correct any mistake I might make. Once a counsel's objection to an order is on the record (by memorandum, email, or witnessed conversation - to name but a few methods), the counsel must accept and comply with my order or face sanctions, which no one wishes to have happen.

2 Incl:
as

Peter E. Brownback III
COL, JA
Presiding Officer

CF:
Appointing Authority
Legal Advisor to the Appointing Authority
Chief Prosecutor
All Counsel

Note to COL Gunn/COL Swann,

RE 11

If I failed to cc any counsel currently detailed to cases, please insure that this email is forwarded to them.

COL Brownback

RE 11

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8/23/2004

Initial Session of Military Commission [version 3]
(Presiding Officer, but no other Commission Members, Present)

A. Convening of the Commission without other Members.

PRESIDING OFFICER (PO): Please be seated. This Military Commission is called to order.

PROSECUTOR (PROS): This Military Commission is convened by Appointing Order No. _____ dated _____ (as amended by Appointing Order No. _____, dated _____) copies of which have been furnished to the Presiding Officer, counsel, and the accused, and which will be marked as Review Exhibit (RE) 1 and attached to the record.

PROS: (The following corrections are noted to the Appointing Order(s): _____.)

PROS: The Presidential determination that the accused may be subject to trial by Military Commission has been marked as RE 2 and has been previously shown to the defense. RE 2 is being handed to the Commission SSO for review.

[Upon completion of SSO review]

PROS: RE 2 is being provided to the Presiding Officer and the government requests that this classified exhibit be annexed to the record of trial under seal in accordance with Military Commission Order No. 1.

PROS: The charges have been properly approved by the Appointing Authority and referred to this Commission for trial. The prosecution caused a copy of the charge(s) in English (and _____, the accused's native language) to be served on the accused on _____. The prosecution is ready to proceed in the Commission trial of *United States v.* _____.

PROS: The accused, the Presiding Officer and all detailed counsel are present (and civilian counsel is also present).

PROS: A court reporter has been detailed reporter for this Commission and [(has been previously sworn) (will be sworn at this time.)]

> ***Note***: The following oath may be used:
>
> Do you [(solemnly swear) (affirm)] to faithfully and properly perform the duties of [(Commission Member) (Presiding Officer) (Prosecutor) (Defense Counsel) (Court Reporter) (Security Person) (Civilian Defense Counsel) (Interpreter) (Foreign Attorney Consultant) (_____)]

in all Military Commissions to which you are appointed or detailed, (so help you God.)

PROS: Security personnel have been detailed for this Commission and [(have been previously sworn) (will be sworn at this time.)].

PROS: (The interpreter(s) that (has)(have) been detailed for the Commission and [(has/have been previously sworn) (will be sworn at this time.)]

Note: The above reference does not apply to the accused's interpreter, if any.

PO: I have been designated as the Presiding Officer of this Military Commission by the Appointing Authority and have previously been sworn.

B. Accused's Need for an Interpreter.

PO: Before continuing with other preliminary matters, it is necessary for me to inquire into the accused's need for an interpreter.

PO: _____, are you able to understand and speak English?

Accused (ACC:) _____.

PO: (*If the accused indicates he speaks English.*) Do you need the services of an interpreter to follow these proceedings?

Accused (ACC:) _____.

PO: *(If the accused states he does not speak or understand English or desires an interpreter, continue as follows).* What language do you speak?

Accused (ACC:) _____.

PO: Is there an interpreter with you now in this courtroom who speaks the language that you do? If so, please also tell me the interpreter's name.

Accused (ACC:) _____.

NOTE: *If the Accused answers in the negative, the Presiding Officer will cause arrangements to be made for the Accused to have a qualified interpreter.*

PO: (To the interpreter): Please identify yourself, tell me if you qualified to interpret into the Accused's language, and whether you have been sworn.

Interpreter: _____

NOTE: If the interpreter has not been sworn, the Prosecutor will issue an oath.

C. Counsel for the Prosecution.

PO: Prosecutor, please state by whom you have been detailed and your qualifications.

PROS: (I) (All members of the prosecution) have been detailed to this Military Commission by the Chief Prosecutor. (I am) (All members of the prosecution are) qualified under Military Commission Order No. 1, Paragraph 4.B and (I) (we) have previously been sworn. (A representative from the Department of Justice, appear(s) as (a) Special Trial Counsel(s)). (I have not) (No member of the prosecution has) acted in any manner, which might tend to disqualify (me) (us) in this proceeding. The detailing document is now being marked as the next Review Exhibit in order.

PROS: [If (an) investigator(s) or similar representative(s) will sit at prosecution table throughout the proceedings] The Prosecution also has sitting at the Prosecution table an (investigator) (assistant) who will assist the Prosecution but will not be representing the Government.

D. Accused's Choice of Counsel.

PO: _____, pursuant to Military Commission Order Number 1, you can be represented by your detailed defense counsel. (He) (She) (They) (is) (are) provided to you at no expense.

You also can request a different military lawyer to represent you. If the person you request is reasonably available, (he)(she) would be appointed to represent you free of charge.

In addition, you may be represented by a qualified civilian lawyer. A civilian lawyer would represent you at no expense to the government. (He) (She) must be a U.S. citizen, admitted to the practice of law in a State, district, territory, or possession of the U.S., or a Federal court, may not have been sanctioned or disciplined for any relevant misconduct, be eligible for a Secret clearance, and agree in writing to comply with the orders, rules, and regulations of Military Commissions.

If a civilian lawyer represents you, your detailed defense counsel will continue to represent you as well and this detailed defense counsel will be permitted to be present during the presentation of all evidence. Do you understand what I have just told you?

ACC: (Response).

PO: Do you have any questions about your right to counsel before this Commission?

ACC: (Response).

PO: Do you desire to be represented by the counsel currently seated at your table and no other counsel?

ACC: (Response).

PO: Military Defense counsel will announce (his) (her) (their) detailing and qualifications.

DETAILED DEFENSE COUNSEL (DDC): (I) (LCDR Charles D. Swift, JAGC, USN) have been detailed to this Military Commission by the Chief Defense Counsel. (I am) qualified under Military Commission Order No. 1, Paragraph 4.C and (I) have previously been sworn. (I have not) acted in any manner that might tend to disqualify (me) in this proceeding. The document detailing counsel is now being marked as the Review Exhibit in order.

CIVILIAN DEFENSE COUNSEL (CDC) [If present]**:** I am a civilian counsel who has been determined to be qualified for membership in the pool of qualified civilian defense counsel in accordance with section 4(c)(3) of Military Commission Order Number 1. I have transmitted my notice of appearance through the Chief Defense Counsel. I have signed the civilian counsel Agreement to Practice before a Military Commission and I have not acted in any manner that may tend to disqualify me to practice in this proceeding.

PO [If civilian defense counsel present]: Please mark the notice of appearance including the qualification determination as RE _____ and attach it to the record.

PO [If civilian defense counsel present]: The civilian defense counsel will now be sworn. Do you swear or affirm that you will faithfully perform your duties in the Commission now in hearing, so help you God?

CDC [If present]**:** I do.

DDC: (If others are at the defense table who are not detailed or civilian counsel as indicated above (such as a FAC), they will now be identified, and if necessary, sworn.)

LN1(SW/AW/SCW) Jason E. Kreinhop, USN – paralegal

Dr. Charles P. Schmitz, Translator

PO: All personnel appear to have the requisite qualifications, and all required to be sworn have been sworn.

E. Presentation of Charges.

PO: Prosecutor, please have the charge sheet marked as RE ___ and attach it to the record.

PROS: (Complies).

PO: Defense counsel, have you and the accused previously been provided a copy of the charge(s)?

DC: (Response).

PO: All parties to the trial have been furnished with a copy of the charge(s). The prosecutor will announce the general nature of the charge(s).

PROS: The general nature of the charge(s) in this case is (are) _____.

PO: Does either party want the charge(s) to be read in open court?

PROS: The prosecutor (does)(does not) want the charge(s) read.

DC: The accused (does)(does not) want the charge(s) read.

PO: (The reading will be omitted.) (Prosecutor will read the charge(s).)

F. Questioning of the Presiding Officer.

PO: I have previously provided counsel for both sides a summarized biography, and a list of matters that one would ordinarily expect counsel to ask during a voir dire process, and they will now be marked as the RE next in order. Those documents are true.

PO: Have counsel for both sides previously seen these documents?

PROS/DC: (Respond.)

(PO: I have also received questionnaires from (the Prosecution) (the Defense), and (that) (those) questionnaires will now be marked as the RE next in order. My answers to those documents are true.)

PO: Does counsel for either side have any questions of me that are not reflected in the documents just marked as Review Exhibit(s)?

NOTE: Further voir dire may be conducted at this point.

PO: Does counsel for either side challenge me to sit on this Commission?

SECTION I.

INITIAL SESSION THROUGH ENTRY OF PLEA(S)

1-1. ASSEMBLY OF COMMISSION

If not part of the script, explanatory notes are in italics. If part of the script, explanatory notes are in brackets.

Prior to the start of proceedings, the Presiding Officer may order one or more conferences with the parties to consider any such matters as will promote a full and fair trial. Counsel may also request a conference with the Presiding Officer. The purpose of a conference is not to decide or litigate contested issues, but rather to inform the Presiding Officer of any appropriate matters, such as anticipated motions, objections, and pleas. Conferences need not be made a part of the record, but any matters agreed upon shall be included in the record, either orally or in writing. The presence of the accused at any conference is neither required nor proscribed. No admissions made by an accused or his counsel at a conference shall be used against the accused at trial unless the admissions are reduced to writing and signed by the accused and his defense counsel.

If the Presiding Officer decides to conduct an Initial Session of the Military Commision (Presiding Officer, but no other Commission Members, Present) then Appendix A of this script will be used.

Prior to calling the Commission to order, the Presiding Officer will ensure that the court reporter, security personnel, courtroom Senior Security Officer (SSO) and any interpreters have been sworn and briefed on the procedures they are to follow. Additionally, the Presiding Officer will brief the Closed Circuit Television (CCTV) operators on courtroom procedures.

The Presiding Officer also should be prepared to brief the Commission spectators and media on courtroom decorum and procedures to be followed. This briefing may occur in the courtroom just prior to calling the Commission to Order.

Commission Members will be provided a copy of the charge(s) on the day before the Commission begins proceedings. There will be no discussion of the charge(s) by any member with outsiders or among themselves.

Once the proceedings have commenced, the Presiding Officer should ensure that classified, classifiable or otherwise protected information is not disclosed in open court (Military Commission Order No. 1, paras. 6.B.(3) and 6.D.(5)). The Presiding Officer also shall ensure that classified, classifiable or otherwise protected information that becomes part of the record of trial is properly safeguarded. For instructions regarding protected information, see Section V.

PRESIDING OFFICER (PO): Please be seated. This Military Commission is called to order.

A folder will be previously placed before each Commission Member location and the folder will contain a copy of the appointing order.

PROSECUTOR (P): This Military Commission is convened by Appointing Order No. _____ dated _____ (as amended by Appointing Order No. _____, dated _____) copies of which have been furnished to the members of the Commission, counsel, and the accused, and which will be marked as a Review Exhibit (RE) 1 and attached to the record.

P: (The following corrections are noted to the Appointing Order(s): _____.)

P: The Presidential determination that the accused may be subject to trial by Military Commission has been marked as RE 2. RE 2 is being handed to the Commission SSO for review.

[Upon completion of SSO review] RE 2 is being provided to the Presiding Officer and the government requests that this classified exhibit be annexed to the record of trial under seal in accordance with Military Commission Order No. 1.

The charges have been properly approved by the Appointing Authority and referred to this Commission for trial. The prosecution caused a copy of the charge(s) in English (and _____, the accused's native language) to be served on the accused on _____. The prosecution is ready to proceed in the Commission trial of *United States v.* _____.

The accused, Commission Members and alternate Commission Member(s) named in the Appointing Order(s) and detailed to this Commission are present. All detailed counsel are present (and civilian counsel is also present).

A court reporter has been detailed reporter for this Commission and [has been previously sworn) (will be sworn at this time.)] Security personnel have been detailed for this Commission and [(have been previously sworn) (will be sworn at this time.)] (The interpreter(s) (has)(have) been detailed for this Commission and [(has)(have) been previously sworn) (will be sworn at this time.)]

Note: *The above reference* <u>*does not*</u> *apply to the accused's interpreter, if any.*

Note: *The following oath may be used:*

Do you [(solemnly swear) (affirm) to faithfully and properly perform the duties of [(Prosecutor) (Defense Counsel) (Civilian Defense Counsel) (Court Reporter) (Security Person) (Interpreter) (Foreign Attorney Consultant) (_____)] in all Military Commissions to which you are appointed or detailed, (so help you God.)

PO: I have been designated as the Presiding Officer of this Military Commission by the Appointing Authority and have previously been sworn. The other members of the Commission and alternate members will now be sworn. All persons in the courtroom please rise.

PO: Commission Members, please raise your right hands. Do you swear or affirm that you will faithfully perform your duties as Military Commission members and alternates, including your duty to proceed impartially and expeditiously and to provide a full and fair trial, and that you will not disclose or discover the vote or opinion of any particular member of the Commission upon findings or sentence unless required to do so in the due course of law, so help you God?

COMMISSION MEMBERS (CM): (Response).

PO: Please be seated. The Commission is assembled.

The Presiding Officer shall conduct an inquiry to determine if the accused needs the assistance of an interpreter. If defense counsel request an interpreter on behalf of the accused, the Presiding Officer shall confirm that request with the accused after an interpreter has been provided. If the accused requests an interpreter, the Presiding Officer shall determine if the prosecutor has any objection to the request and if the prosecutor is prepared to provide an interpreter. If the prosecutor objects to providing an interpreter, the Presiding Officer shall take the necessary steps to determine if an interpreter is required. If Presiding Officer determines that the interpreter provided is deficient in the accused's language, he shall take the necessary steps to obtain a qualified interpreter. The Presiding Officer shall stay the proceedings until an appropriate interpreter is provided. Finally, the interpreter shall be sworn prior to beginning service during the proceedings.

PO: Before continuing with other preliminary matters, it is necessary for me to inquiry into the accused's need for an interpreter.

PO: _____, are you able to understand and speak English?

Accused (ACC:)_____.

PO: (If the accused states he does not speak or understand English or desires an interpreter, continue as follows). What language do you speak?

ACC: _____.

PO: Is there an interpreter with you now in the courtroom who speaks the language that you do? If so, please also tell me the interpreter's name.

ACC: _____.

NOTE: If the Accused answers in the negative, the Presiding Officer will cause arrangements to be made for the Accused to have a qualified interpreter.

PO: In what language will the interpreter be speaking to you?

ACC: _____.

PO: (To the interpreter): Please identify yourself, tell me if you are qualified to interpret the Accused's language, and whether you have been sworn.

Interpreter:_____.

NOTE: If the interpreter has not been sworn, the Prosecutor will issue an oath.

PO: Prosecutor, please state by whom you have been detailed and your qualifications.

P: (I) (All members of the prosecution) have been detailed to this Military Commission by the Chief Prosecutor. (I am) (All members of the prosecution are) qualified under Military Commission Order No. 1, Paragraph 4.B and (I) (we) have previously been sworn. (A representative from the Department of Justice, appear(s) as (a) Special Trial Counsel(s)). (I have not) (No member of the prosecution has) acted in any manner, which might tend to disqualify (me) (us) in this proceeding. The detailing document document is now being marked as the next Review Exhibit in order.

P: [If (an) investigator(s) or similar representative(s) will sit at prosecution table throughout the proceedings] The Prosecution also has sitting at the Prosecution table an (investigator) (assistant) who will assist the Prosecution but will not representing the Government.

NOTE: The Prosecutor should identify the investigator by government agency but not disclose his identity.

1-2. ACCUSED'S CHOICE OF COUNSEL

In accordance with Military Commission Order No. 1, para. 4.C.(4), an accused "must be represented at all relevant times by Detailed Defense Counsel;" pro se representation is not permitted.

PO: _____, pursuant to Military Commission Order Number 1, you can be represented by your detailed defense counsel. (He) (She) (They) (is) (are) provided to you at no expense.

You also can request a different military lawyer to represent you. If the person you request is reasonably available, (he)(she) would be appointed to represent you free of charge.

In addition, you may be represented by a qualified civilian lawyer. A civilian lawyer would represent you at no expense to the government. (He) (She) must be a U.S. citizen, admitted to the practice of law in a State, district, territory, or possession of the U.S., or a Federal court, may not have been sanctioned or disciplined for any relevant misconduct, be eligible for a Secret clearance, and agree in writing to comply with the orders, rules, and regulations of Military Commissions.

If a civilian lawyer represents you, your detailed defense counsel will continue to represent you as well and this detailed defense counsel will be permitted to be present during the presentation of all evidence. Do you understand what I have just told you?

ACC: (Response).

PO: Do you have any questions about counsel representation before this Commission?

ACC: (Response).

PO: Do you desire to be represented by the counsel currently seated at your table and no other counsel?

ACC: (Response).

PO: Defense counsel will announce (his) (her) (their) detailing and qualifications.

DETILED DEFENSE COUNSEL (DDC): (I) (All detailed members of the defense) have been detailed to this Military Commission by the Chief Defense Counsel. (I am) (All detailed members of the defense are) qualified under Military Commission Order No. 1, Paragraph 4.C and (I) (we) have previously been sworn. (I have not) (No member of the defense has) acted in any manner that might tend to disqualify (me) (us) in this proceeding. The document detailing counsel is now being marked as a Review Exhibit in order.

CIVILIAN DEFENSE COUNSEL (CDC) [If present]**:** I am a civilian counsel who has been determined to be qualified for membership in the pool of qualified civilian defense counsel in accordance with section 4(c)(3) of Military Commission Order Number 1. I have transmitted my notice of appearance through the Chief Defense Counsel. I have signed the civilian counsel Agreement to Practice before a Military Commission and I have not acted in any manner that may tend to disqualify me to practice in this proceeding.

PO [If civilian defense counsel present]: Please mark the notice of appearance including the qualification determination as RE _____ and attach it to the record.

PO [If civilian defense counsel present]: The civilian defense counsel will now be sworn. Do you swear or affirm that you will faithfully perform your duties in the Commission now in hearing, so help you God?

CDC [If present]**:** I do.

DDC: (If others are at the defense table who are not detailed or civilian counsel as indicated above (such as a FAC), they will now be identified, and if necessary, sworn.)

PO: All personnel appear to have the requisite qualifications, and all required to be sworn have been sworn.

1-3. PRESENTATION OF CHARGE(S)

PO: Prosecutor, please have the charge sheet marked as RE ___ and attach it to the record. A copy of the charge sheet was distributed to each Commission Member the day prior to start of these proceedings.

P: (Complies).

PO: Defense counsel, have you previously been provided a copy of the charge(s)?

DC: (Response).

PO: All parties to the trial have been furnished with a copy of the charge(s). The prosecutor will announce the general nature of the charge(s).

P: The general nature of the charge(s) in this case is (are) _____.

PO: Members of the Commission and alternate members, at this time it is appropriate for you to review the charge sheet and appointing order(s).

Before continuing, the Presiding Officer should give the Members sufficient time to read the charge sheet and appointing order(s).

PO: Have all Commission members and alternate members had the opportunity to review the charge sheet and appointing order(s)?

CM: (Response).

PO: Is the name and rank of each Commission member and alternate member properly reflected on the appointing order?

CM: (Response).

PO: Does either party want the charge(s) to be read in open court?

P: The prosecutor (does)(does not) want the charge(s) read.

DC: The accused (does)(does not) want the charge(s) read.

PO: (The reading will be omitted.) (Prosecutor will read the charge(s).)

1-4. QUESTIONING OF PANEL MEMBERS AND ALTERNATE MEMBERS

PO: Members of the Commission and alternates, the Appointing Authority who detailed you to this Commission has the ability to remove you from service on this Commission for good cause. Is any member or alternate aware of any matter that you feel might affect your impartiality or ability to sit as a Commission member? Please bear in mind that any statement you make should be in general terms so as not to disqualify other members.

CM: (Response).

The Presiding Officer may conduct follow up questioning as appropriate during this portion of the proceedings.

PO: I have previously filled out a Commission Member Questionnaire. I have previously provided counsel for both sides a summarized biography, and a list of matters that one would ordinarily expect counsel to ask during a voir dire process, and they will now be marked as the RE next in order. Those documents are true. Have all other Commission Members also filled out questionnaires?

CM: (Response).

PO: Have both the prosecutor and the defense been provided copies of the Member Questionnaires and had an adequate opportunity to review them?

P/DC: (Response).

PO: Prosecutor, please have the member questionnaires marked as the next RE and provide them to me.

P: (Complies).

PO: Members, I will now ask you a few preliminary questions. If any member has an affirmative response to any question, please raise your hand. As I ask these questions and make reference to the "members," this refers to both Commission Members and alternates.

> ***In asking the preliminary questions, the Presiding Officer shall ensure that all negative and affirmative responses (including those of the Presiding Officer) are recorded on the record. The Presiding Officer will have held a conference with both counsel prior to the commencement of trial to determine the accused's anticipated plea(s) and the existence of any plea agreement. Questioning of the members shall be tailored accordingly.***

1. Does anyone know the accused? (Negative response) (Affirmative response from _____).

2. [If appropriate] Does anyone know any person named in any of the charges?

3. Having seen the accused and having read the charge(s), do any of you feel that there is any reason you cannot give the accused a fair trial?

4. Do any of you have any prior knowledge of the facts or events in this case that will make you unable to serve impartially?

5. Do any of you feel that you cannot vote fairly and impartially because of a difference in rank or because of a command relationship with any other member?

6. Have any of you had any dealings with any of the parties to the trial, to include counsel for both sides, which might affect your performance of duty as a Commission member in any way?

7. Do any of you feel that you cannot fairly and justly decide this case because of any prior experiences related to previous military assignments or duties?

8. Do any of you feel that you cannot fairly and justly decide this case because of something you have read, heard or seen in the media concerning the events of 9-11, al Qaida, Usama Bin Laden, or terrorism generally?

9. Have any of you been a victim of an alleged terrorist attack or had a close friend or family member who was a victim of an alleged terrorist attack?

10. The following individuals may be called as witnesses before this Military Commission: _____. Do any of you know any of these potential witnesses?

11. [If so] Do any of you feel your relationship with any of the potential witnesses will in any way affect your ability to fairly and justly decide this case?

12. As Commission Members, we must keep open minds regarding the verdict until all the evidence is in. Is there any member who cannot follow this instruction?

13. The accused is presumed innocent and this presumption remains unless his guilt is established beyond a reasonable doubt. The burden to establish the guilt of the accused is on the prosecution. Does each member agree to be guided by this principle in deciding this case?

14. [If applicable] Do any of you have any preconceived notions concerning the death penalty that would preclude you from considering this as a punishment?

15. Do any of you know of anything of either a personal or professional nature that would cause you to be unable to give your full attention to these proceedings throughout the trial?

16. Are any of you aware of any matter that might raise a substantial question concerning your participation in this trial as a Commission member?

Military Commission Instruction No. 8, para. 3.A.(2) states that "the Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal." If the Presiding Officer permits questioning by the Prosecutor or Defense Counsel, it may be done in any manner considered appropriate by the Presiding Officer. For example, the Presiding Officer may permit counsel to directly question the members, either orally or in writing. However, he might instead require that any questions be submitted to him in writing for his presentation, if appropriate, to the members. Any questioning, however, "shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member."

At the close of all questioning, the Presiding Officer should ask counsel if there is "good cause" for the removal of any member(s). If the Presiding Officer concludes that all Commission members are qualified to serve, he should announce:

PO: I find that all Commission Members, alternates and I are qualified to serve on this Military Commission. The members of the Commission and alternate members will be those listed on the appointing order.

> ***If the Presiding Officer determines that good cause for removal of any member(s) exist(s), then the following rules apply. Under Military Commission Instruction No. 8, para. 3.A.(1), the Appointing Authority "may remove members or alternate members for good cause." In the event a member (or alternate member) is removed for good cause, the Appointing Authority may replace the member, direct that an alternate member serve in the place of the original member, direct that the proceedings simply continue without the member (the alternate member or members continuing to serve only in an alternate capacity), or convene a new Commission. In the absence of guidance from the Appointing Authority regarding replacement, the Presiding Officer shall select an alternate member to replace the member in question.***
>
> ***While the Presiding Officer lacks the authority to remove a member or alternate member for good cause, if he concludes that a member (including the Presiding Office) should be removed for good cause, the Presiding Officer may forward information supporting that conclusion, (including any recommendation), to the Appointing Authority for action. While awaiting the Appointing Authority's decision on the matter, the Presiding Officer may elect either to hold the proceedings in abeyance or to continue. The Presiding Officer may issue any appropriate instructions to the member whose continued service is in question. If proceedings continue, that member shall participate in any vote on evidentiary or other administrative or procedural matters. However, a Military Commission shall not engage in deliberations on findings or sentence prior to the Appointing Authority's decision in any case in which the Presiding Officer has recommended a member's removal.***

PO: Members, at this point in time, it is appropriate for me to inform you of some of the procedures the Commission will be using in deciding this case.

During any recess or adjournment, we will not discuss the case with anyone, not even among ourselves. We will hold our discussions of the issues in closed conference when all members are present. When deciding factual issues in this case, we will consider evidence properly admitted before this Commission. In this regard, we will not consider other accounts of the trial or information from other sources as to factual matters involved in this case and we will limit our contact with counsel, the accused and any other potential witnesses.

During the course of the military commission proceedings you may not discuss the proceedings with anyone who is not a member of the commission panel. If anyone who is not a member of the commission panel attempts to discuss the proceedings with you, you shall notify me immediately and appropriate action will be taken. While we are in closed session deliberations, we alone will be present. We will remain together and allow no unauthorized intrusion into our deliberations.

Each of us has an equal voice and vote in discussing and deciding all issues submitted to us. I will, however, act as Presiding Officer during our closed session deliberations and will speak for the Commission in announcing results. The issues submitted to us will be decided based upon the evidence properly presented before this Commission. Outside influence from superiors, other government officials, the media or any other source will not be tolerated. Members, in the event any such attempt is made to influence you in the performance of your official Commission duties, you shall notify me immediately and appropriate action will be taken. Additionally, it is impermissible for the Appointing Authority, a military commander, or any other government official who may have influence over your career to reprimand or admonish you because of the way you perform your duties as a military commission member. If any such action takes place, you shall notify me immediately.

The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If anyone needs a break at any time, please let me know.

Are there any questions?

CM: (Response).

1-5. REVIEW OF RESPONSIBILITIES REGARDING PROTECTED INFORMATION

The Presiding Officer should ensure that classified, classifiable or otherwise protected information is not disclosed in open court. Additionally, the Presiding Officer shall ensure that classified, classifiable or otherwise protected information that becomes part of the record of trial is appropriately safeguarded. If there is such potential, implement the procedures contained in Section V.

PO: Do counsel for both sides understand those provisions of Military Commission Order No. 1 governing Protected Information?

P/DC: (Response).

PO: Do you understand that you must, as soon as practicable, notify me of any intent to offer evidence involving Protected Information so that I may consider the need to close the proceedings?

P/DC: (Response).

PO: Is there any issue relating to the protection of witnesses that should be taken up at this time as may be necessary to discuss and litigate motions or conduct other business before the presentation of evidence on the merits?

P/DC: (Response).

PO: As I am required by Military Commission Order No. 1 to consider the safety of witnesses and others at these proceedings, do both counsel understand that they must notify me of any

issues regarding the safety of potential witnesses so that I may determine the appropriate ways in which testimony will be received and witnesses protected?

P/DC: (Response).

1-6. MOTIONS AND PLEA(S)

PO: Accused and defense counsel, if you have any motions, please state them now.

DC: The defense has (no) (the following) motions (requests to defer motions at this time.)

> ***NOTE:*** *The Presiding Officer should resolve all motions and other issues capable of resolution prior to the entry of plea(s).*

1-7. ENTRY OF PLEA(S)

PO: Accused and counsel please rise. _____, how do you plead?

DC: The accused, _____, pleads as follows: _____.

PO: You may be seated.

> ***If the accused pleads guilty to one or more charges, go to Section II.***
>
> ***If the accused does not plead guilty to any charge, go to Section III.***

Trial Guide for Military Commissions

(Draft of 22 Aug 2004)

Includes Additional Instructions in the Trial Script highlighted in yellow

This Guide is a draft and subject to revision, modification, and objection by Commission participants.

RE 11

I. INITIAL SESSION THROUGH ENTRY OF PLEA(S)

1-1. ASSEMBLY OF COMMISSION

PRESIDING OFFICER (PO): Please be seated. This Military Commission is called to order.

> ***A folder will be previously placed before each Commission Member location and the folder will contain a copy of the appointing order and the charges.***

PROSECUTOR (P): This Military Commission is convened by Appointing Order No. _____ dated _____ (as amended by Appointing Order No. _____, dated _____) copies of which have been furnished to the members of the Commission, counsel, and the accused, and which will be marked as a Review Exhibit (RE) __ and attached to the record.

P: (The following corrections are noted to the Appointing Order(s): _____.)

P: The Presidential determination that the accused may be subject to trial by Military Commission has been marked as RE __. RE ___ is being handed to the Commission SSO for review.

[Upon completion of SSO review] RE ____ is being provided to the Presiding Officer and the government requests that this classified exhibit be annexed to the record of trial under seal in accordance with Military Commission Order No. 1.

The charges have been properly approved by the Appointing Authority and referred to this Commission for trial. The prosecution caused a copy of the charge(s) in English (and _____, the accused's native language) to be served on the accused on _____. The prosecution is ready to proceed in the Commission trial of *United States v.* _____.

The accused, Commission Members and alternate Commission Member(s) named in the Appointing Order(s) and detailed to this Commission are present.

~~P: (Reads name of each member and receives response from each member to be noted by reporter.)~~

P: All detailed counsel are present (and civilian counsel is also present).

A court reporter has been detailed reporter for this Commission and [has been previously sworn) (will be sworn at this time.)] Security personnel have been detailed for this Commission and [(have been previously sworn) (will be sworn at this time.)] (The interpreter(s) (has)(have) been detailed for this Commission and [(has)(have) been previously sworn) (will be sworn at this time.)]

RE 11

Note: The above reference does not apply to the accused's interpreter, if any.

Note: The following oath may be used:

Do you [(solemnly swear) (affirm) to faithfully and properly perform the duties of [(Prosecutor) (Defense Counsel) (Civilian Defense Counsel) (Court Reporter) (Security Person) (Interpreter) (Foreign Attorney Consultant) (_____)] in all Military Commissions to which you are appointed or detailed, (so help you God.)

PO: I have been designated as the Presiding Officer of this Military Commission by the Appointing Authority and have previously been sworn. The other members of the Commission and alternate members will now be sworn. All persons in the courtroom please rise.

PO: Commission Members, please raise your right hands. Do you swear or affirm that you will faithfully perform your duties as Military Commission members and alternates, including your duty to proceed impartially and expeditiously and to provide a full and fair trial, and that you will not disclose or discover the vote or opinion of any particular member of the Commission upon findings or sentence unless required to do so in the due course of law, so help you God?

COMMISSION MEMBERS (CM): (Response).

PO: Please be seated. The Commission is assembled.

PO: Before continuing with other preliminary matters, it is necessary for me to inquiry into the accused's need for an interpreter.

PO: _____, are you able to understand and speak English?

Accused (ACC:)_____.

PO: (If the accused states he does not speak or understand English or desires an interpreter, continue as follows). What language do you speak?

ACC: _____.

PO: Is there an interpreter with you now in the courtroom who speaks the language that you do? If so, please also tell me the interpreter's name.

ACC: _____.

NOTE: If the Accused answers in the negative, the Presiding Officer will cause arrangements to be made for the Accused to have a qualified interpreter.

PO: In what language will the interpreter be speaking to you?

ACC: _____.

PO: (To the interpreter): Please identify yourself, tell me if you are qualified to interpret the Accused's language, and whether you have been sworn.

NOTE: *If the interpreter does not want her/his identify revealed on the record, her/his full name will be written on a piece of paper, which will be marked as an RE, and shown to the interpreter.*

Interpreter:_____.

NOTE: *If the interpreter has not been sworn, the Prosecutor will issue an oath.*

PO: Prosecutor, please state by whom you have been detailed and your qualifications.

P: (I) (All members of the prosecution) have been detailed to this Military Commission by the Chief Prosecutor. (I am) (All members of the prosecution are) qualified under Military Commission Order No. 1, Paragraph 4.B and (I) (we) have previously been sworn. (A representative from the Department of Justice, appear(s) as (a) Special Trial Counsel(s)). (I have not) (No member of the prosecution has) acted in any manner, which might tend to disqualify (me) (us) in this proceeding. The detailing document is now being marked as the next Review Exhibit in order.

P: *[If (an) investigator(s) or similar representative(s) will sit at prosecution table throughout the proceedings]* The Prosecution also has sitting at the Prosecution table an (investigator) (assistant) who will assist the Prosecution but will not representing the Government.

NOTE: *The Prosecutor should identify the investigator by government agency but not disclose his identity.*

1-2. ACCUSED'S CHOICE OF COUNSEL

PO: _____, pursuant to Military Commission Order Number 1, you are represented by your detailed defense counsel. (He) (She) (They) (is) (are) provided to you at no expense.

You also can request a different military lawyer to represent you. If the person you request is reasonably available, (he)(she) would be appointed to represent you free of charge. If you request a different military lawyer and that lawyer is made available to represent you, then your detailed defense counsel would normally be released from your case. You could, however, request that the Appointing Authority or the General Counsel allow your detailed defense counsel to stay on the case.

In addition, you may be represented by a qualified civilian lawyer. A civilian lawyer would represent you at no expense to the government. (He) (She) must be a U.S. citizen, admitted to the practice of law in a State, district, territory, or possession of the U.S., or a Federal court, may not have been sanctioned or disciplined for any relevant misconduct,

be eligible for a Secret clearance, and agree in writing to comply with the orders, rules, and regulations of Military Commissions.

If a civilian lawyer represents you, your detailed defense counsel will continue to represent you as well and this detailed defense counsel will be permitted to be present during the presentation of all evidence. Do you understand what I have just told you?

ACC: (Response).

PO: Do you have any questions about counsel representation before this Commission?

ACC: (Response).

PO: Do you desire to be represented by the counsel currently seated at your table and no other counsel?

ACC: (Response).

PO: Defense counsel will announce (his) (her) (their) detailing and qualifications.

DETAILED DEFENSE COUNSEL (DDC): (I) (All detailed members of the defense) have been detailed to this Military Commission by the Chief Defense Counsel. (I am) (All detailed members of the defense are) qualified under Military Commission Order No. 1, Paragraph 4.C and (I) (we) have previously been sworn. (I have not) (No member of the defense has) acted in any manner that might tend to disqualify (me) (us) in this proceeding. The document detailing counsel is now being marked as a Review Exhibit in order.

CIVILIAN DEFENSE COUNSEL (CDC) [If present]: I am a civilian counsel who has been determined to be qualified for membership in the pool of qualified civilian defense counsel in accordance with section 4(c)(3) of Military Commission Order Number 1. I have transmitted my notice of appearance through the Chief Defense Counsel. I have signed the civilian counsel Agreement to Practice before a Military Commission and I have not acted in any manner that may tend to disqualify me to practice in this proceeding.

PO [If civilian defense counsel present]: Please mark the notice of appearance including the qualification determination as RE _____ and attach it to the record.

PO [If civilian defense counsel present]: The civilian defense counsel will now be sworn. Do you swear or affirm that you will faithfully perform your duties in the Commission now in hearing, so help you God?

CDC [If present]: I do.

DDC: (If others are at the defense table who are not detailed or civilian counsel as indicated above (such as a FAC), they will now be identified, and if necessary, sworn.)

PO: All personnel appear to have the requisite qualifications, and all required to be sworn have been sworn.

1-3. PRESENTATION OF CHARGE(S)

PO: Prosecutor, please have the charge sheet marked as RE ___ and attach it to the record.

P: (Complies).

PO: Defense counsel, have you previously been provided a copy of the charge(s)?

DC: (Response).

PO: All parties to the trial have been furnished with a copy of the charge(s). The prosecutor will announce the general nature of the charge(s).

P: The general nature of the charge(s) in this case is (are) _____.

PO: Members of the Commission and alternate members, at this time it is appropriate for you to review the charge sheet and appointing order(s).

> ***Before continuing, the Presiding Officer should give the Members sufficient time to read the charge sheet and appointing order(s).***

PO: Have all Commission members and alternate members had the opportunity to review the charge sheet and appointing order(s)?

CM: (Response).

PO: Is the name, rank, and other identifying data of each Commission member and alternate member properly reflected on the appointing order?

CM: (Response).

PO: Does either party want the charge(s) to be read in open court?

P: The prosecutor (does)(does not) want the charge(s) read.

DC: The accused (does)(does not) want the charge(s) read.

PO: (The reading will be omitted.) (Prosecutor will read the charge(s).)

1-4. QUESTIONING OF PANEL MEMBERS AND ALTERNATE MEMBERS

PO: Members of the Commission and alternates, the Appointing Authority who detailed you to this Commission has the ability to remove you from service on this Commission for good cause. Is any member or alternate aware of any matter that you feel might affect

your impartiality or ability to sit as a Commission member? Please bear in mind that any statement you make should be in general terms so as not to disqualify other members.

CM: (Response).

> ***The Presiding Officer may conduct follow up questioning as appropriate during this portion of the proceedings.***

PO: I have previously filled out a Commission Member Questionnaire. I have previously provided counsel for both sides a summarized biography, a list of matters that one would ordinarily expect counsel to ask during a voir dire process, and a document about how I know the Appointing Authority. I also provided all counsel with answers to questions provided by defense counsel in the cases of Al Bahlul, Hamden, and Hicks. These documents will now be marked as the RE next in order. Those documents are true to the best of my knowledge and belief.

PO: Does either party wish to voir dire me outside the presence of the other members?

> **Note:** *If either side requests that the members leave, they will retire.*

PO: Prosecution, any questions for me?

P:

PO: Defense, any questions for me?

DC:

PO: Any challenge against the Presiding Officer?

P:

DC:

> **NOTE:** *If challenged, the Presiding Officer will determine whether the proceedings will continue and present that information to the Appointing Authority to decide whether the challenge shall be granted.*

PO: [There are no challenges by either side against the PO for cause.]

PO: [I have considered the challenge for cause made by the Prosecution/Defense. I will forward (a transcript of the voir dire) (the material provided by me to counsel for voir dire) (the transcript of your challenge and opposing counsel's response) (my recommendation on the matter) to the Appointing Authority for his action. You have until _____ to provide me any further matters which you wish me to forward to him along with those which I have indicated. Under the provisions of MCI #8, paragraph 3A(3), I (will) (will not) hold the proceedings in abeyance.]

[If PO remains on the case because not challenged, or because challenged and the proceedings are not being held in abeyance, proceed as follows:]

NOTE: *The other members are recalled.*

PO: Have all Commission Members completed a member questionnaire?

CM: (Response).

PO: Have both the prosecutor and the defense been provided copies of the Member questionnaires and had an opportunity to review them?

P/DC: (Response).

PO: Prosecutor, please have the member questionnaires marked as the next RE and provide them to me. The RE containing the questionnaires will be sealed.

P: (Complies).

PO: Members, I will now ask you a few preliminary questions. If any member has an affirmative response to any question, please raise your hand. As I ask these questions and make reference to the "members," this refers to both Commission Members and alternates.

1. Does anyone know the accused? (Negative response) (Affirmative response from _____).

2. [If appropriate] Does anyone know any person named in any of the charges?

3. Does any member know any of the counsel involved in this case?

4. Having seen the accused and having read the charge(s), do any of you feel that there is any reason you cannot give the accused a fair trial?

5. Do any of you have any prior knowledge of the facts or events in this case that will make you unable to serve impartially?

6. Do any of you feel that you cannot vote fairly and impartially because of a difference in rank or because of a command relationship with any other member?

7. Have any of you had any dealings with any of the parties to the trial, to include counsel for either sides and other members including myself, which might affect your performance of duty as a Commission member in any way?

8. Do any of you feel that you cannot fairly and justly decide this case because of any prior experiences related to previous military assignments or duties?

9. Do any of you feel that you cannot fairly and justly decide this case because of something you have read, heard or seen in the media concerning the events of 9-11, al Qaida, Usama Bin Laden, or terrorism generally?

10. Have any of you been a victim of an alleged terrorist attack or had a close friend or family member who was a victim of an alleged terrorist attack?

11. The following individuals may be called as witnesses before this Military Commission: _____. Do any of you know any of these potential witnesses?

12. [If so] Do you feel your relationship with or prior knowledge of the potential witness will in any way affect your ability to fairly and justly decide this case?

13. As Commission Members, we must keep open minds regarding the verdict until all the evidence is in. The verdict can only be based on evidence received during these proceedings and you may not rely upon any prior knowledge of the facts or events involved, no matter how you received that information. Is there any member who cannot follow this instruction?

14. The accused is presumed innocent and this presumption remains unless and until his guilt is established beyond a reasonable doubt. The burden to establish the guilt of the accused is on the prosecution. Does each member understand and agree with this principle and further agree to follow this principle in deciding this case?

15. Do any of you know of anything of either a personal or professional nature that would cause you to be unable to give your full attention to these proceedings throughout the trial?

16. Are any of you aware of any matter that might raise a substantial question concerning your participation in this trial as a Commission member?

[If there are questions for an individual member, the PO may decide to hold individual voir dire while the non-voir dired members retire.]

PO: I intend to conduct and allow questioning of individual members outside the presence of other members. Does counsel for either side object?

Note: *All members retire.*

PO: Prosecution, any questions for any of the members other than myself?

P:

PO: Defense, any questions for any of the members other than myself?

DC:

: [After all general and individual voir dire is completed.]

PO: Any challenge by either side against any member?

P/DC:

PO: [*If there are no challenges:*: I find that all Commission Members, alternates and I are qualified to serve on this Military Commission. The members of the Commission and alternate members will be those listed on the appointing order.]

[If a member is challenged, the Presiding Officer will determine whether the proceedings will continue and present that information to the Appointing Authority to decide whether the challenge shall be granted.]

[If a member is challenged, and the PO decides that the proceedings will not be held in abeyance, proceed as follows:]

PO: [Counsel, I have considered your challenge to _____. I will forward (a transcript of the voir dire) (the member questionnaire) (the transcript of your challenge and opposing counsel's response) (my recommendation on the matter) to the Appointing Authority for his action. You have until _____ to provide me any further matters which you wish me to forward to him along with those which I have indicated. Under the provisions of MCI #8, paragraph 3A(3), I (will) (will not) hold the proceedings in abeyance.]

PO: Members, at this point, it is appropriate for me to inform you of some of the procedures the Commission will be using in deciding this case.

Each of you has previously received preliminary administrative-type instructions which are now being marked as the next RE in order. To the extent you believe there is any conflict in the instructions given earlier, and the instructions I am about to give, the following instructions shall control.

I have been appointed as the Presiding Officer. On Monday, you were given the President's Military Order, the Military Commission Orders, DoD Directive 5105.70, and all Military Commission Instructions, except instruction number 8. These references apply to all the cases in which you may be a Commission member.

In these references establishing the Commission the Presiding Officer is charged with certain duties. Among these is that I will preside over the Commission proceedings during open and closed sessions. As I am the only lawyer appointed to the Commission, I will instruct and advise you on the law. However, the President has directed that the Commission will decide all questions of law and fact, so you are not bound to accept the law as given to you by me. You are free to accept the law as argued to you by counsel either in court or in motions or attachments thereto. In closed conferences, my voice and my vote will count the same as any other member.

RE 11

During any recess or adjournment, we will not discuss the case with anyone, not even among ourselves. We will hold our discussions of the issues in closed conference when all members are present. When deciding issues in this case, we will consider only evidence properly admitted before this Commission. In this regard, we will not consider other accounts of the trial or information from other sources and we will limit our contact with counsel, the accused and any other potential witnesses.

During the course of the military commission proceedings you may not discuss the proceedings with anyone who is not a member of the commission panel. If anyone who is not a member of the commission panel attempts to discuss the proceedings with you, you shall notify me immediately and appropriate action will be taken. While we are in closed session deliberations, we alone will be present. We will remain together and allow no unauthorized intrusion into our deliberations.

Each of us has an equal voice and vote in discussing and deciding all issues submitted to us. I will, however, act as Presiding Officer during our closed conference deliberations and will speak for the Commission in announcing results. The issues submitted to us will be decided based upon the evidence properly presented before this Commission. Outside influence from superiors, other government officials, the media or any other source will not be tolerated. Members, in the event any such attempt is made to influence you in the performance of your official Commission duties, you shall notify me immediately, and appropriate action will be taken. Additionally, it is impermissible for the Appointing Authority, a military commander, or any other government official who may have influence over your career to reprimand or admonish you because of the way you perform your duties as a military commission member. If any such action takes place, you shall notify me immediately.

Members of the Commission and the alternate member, some of you may serve as a Commission member or alternate on more than one case. You are to remember that each case is separate, and you may not consider evidence or motions practice presentations from one case in any other case unless explicitly advised that you may do so. I tell you this now so that upon any notes you might make that you indicate to which case the notes pertain.

Members of the Commission and the alternate member, you have undoubtedly observed the security arrangements around this building, in the building, and in this courtroom. Those arrangements were made by the local commander based on his view of operational considerations. We are required to follow the security arrangements that have been made because this building is located within the commander's area of operation.

You must not, however, infer or conclude from the security arrangements that the accused is guilty of any offense or that he presents a danger. In other words, operational requirements of the local commander have nothing to do with this accused. The only evidence you may consider on the determination of guilt or innocence, or a sentence if sentencing is required, is the evidence presented to you during Commission sessions. Security arrangements are NOT part of that evidence.

COL Cooper, you have been designated an alternate member of this Commission, and will become a member should there become a vacancy on the Commission that needs to be filled. As an alternate member, you will attend all open sessions, however you will not be present for any closed conferences or deliberations, and may not vote on any matter unless your status changes from member to alternate member. Should your status change from alternate member to member, you will be given further instructions.

Members, you are not authorized to reveal your vote, or the factors which led to your vote, or to reveal the vote or comments of another member, when it comes to deliberations on findings and, if necessary, on sentence. This is a lawful order from me to you. You may only reveal such matters if required to do so by superior competent authority in the Military Commission process - namely, the Appointing Authority, the General Counsel of the Department of Defense, the Review Panel for Military Commissions, the Secretary of Defense, or the President of the United States - or by a United States Federal Court. This order is continuing and does not expire.

The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If anyone needs a break at any time, please let me know.

Are there any questions?

CM: (Response).

1-5. REVIEW OF RESPONSIBILITIES REGARDING PROTECTED INFORMATION

PO: Do counsel for both sides understand those provisions of Military Commission Order No. 1 governing Protected Information?

P/DC: (Response).

PO: Do you understand that you must, as soon as practicable, notify me of any intent to offer evidence involving Protected Information so that I may consider the need to close the proceedings?

P/DC: (Response).

PO: Is there any issue relating to the protection of witnesses that should be taken up at this time as may be necessary to discuss and litigate motions or conduct other business before the presentation of evidence on the merits?

P/DC: (Response).

PO: As I am required by Military Commission Order No. 1 to consider the safety of witnesses and others at these proceedings, do both counsel understand that they must notify me of any issues regarding the safety of potential witnesses so that I may

determine the appropriate ways in which testimony will be received and witnesses protected?

P/DC: (Response).

1-6. MOTIONS AND PLEA(S)

PO: Accused and defense counsel, if you have any motions, please state them now.

DC: The defense has (no) (the following) motions (requests to defer motions at this time.)

> ***NOTE:*** *The Presiding Officer should resolve all motions and other issues capable of resolution prior to the entry of plea(s). However, the entry of pleas will take place at the initial session, even if all motions and other issues are not resolved.*

PO: Counsel, I have considered your request to defer pleas in this case. Your request is (granted) (denied).

1-7. ENTRY OF PLEA(S)

PO: Accused and counsel please rise. _____, how do you plead?

DC: The accused, _____, pleads as follows: _____.

PO: You may be seated.

by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) If evidence adduced in an investigation under this article indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of that offense without the accused having first been charged with the offense if the accused—

(1) is present at the investigation;

(2) is informed of the nature of each uncharged offense investigated; and

(3) is afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b).

(e) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

§ 833. Art. 33. Forwarding of charges

When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the Investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

§ 834. Art. 34. Advice of staff judge advocate and reference for trial

(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice. 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 section 832 of this title (article 32) (if there is such a report); and

(3) a court-martial would have jurisdiction over the accused and the offense.

(b) The advice of the staff judge advocate under subsection (a) with respect to a specification under a charge shall include a written and signed statement by the staff judge advocate

(1) expressing his conclusions with respect to each matter set forth in subsection (a); and

(2) recommending action that the convening authority take regarding the specification.

If the specification is referred for trial, the recommendation of the staff judge advocate shall accompany the specification.

(c) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence, may be made.

§ 835. Art. 35. Service of charges

The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person may, against his objection, be brought to trial or be required to participate by himself or counsel in a session called by the military judge under section 839(a) of this title (article 39(a)), in a general court-martial case within a period of five days after the service of charges upon him or in a special court-martial within a period of three days after the service of the charges upon him.

SUBCHAPTER VII. TRIAL PROCEDURE

Sec.	Art.	
836.	36.	President may prescribe rules.
837.	37.	Unlawfully influencing action of court.
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851.	51.	Voting and rulings.
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853.	53.	Court to announce action.
854.	54.	Record of trial.

§ 836. Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

§ 837. Art. 37. Unlawfully influencing action of court

(a) 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, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

§ 838. Art. 38. Duties of trial counsel and defense counsel

(a) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.

(b)(1) The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.

(2) The accused may be represented by civilian counsel if provided by him.

(3) The accused may be represented—

(A) by military counsel detailed under section 827 of this title (article 27); or

(B) by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed under paragraph (7)).

(4) If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused.

(5) Except as provided under paragraph (6), if the accused is represented by military counsel of his own selection under paragraph (3)(B), any military counsel detailed under paragraph (3)(A) shall be excused.

(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 827 of this title (article 27) to detail counsel in his sole discretion—

(A) may detail additional military counsel as assistant defense counsel; and

(B) if the accused is represented by military counsel of his own selection under paragraph (3)(B), may approve a request from the accused that military counsel detailed under paragraph (3)(A) act as associate defense counsel.

(7) The Secretary concerned shall, by regulation, define "reasonably available" for the purpose of paragraph (3)(B) and establish procedures for determining whether the military counsel selected by an accused under that paragraph is reasonably available. Such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member. To the maximum extent practicable, such regulations shall establish uniform policies among the armed forces while recognizing the differences in the circumstances and needs of the various armed forces. The Secretary concerned shall submit copies of regulations prescribed under this paragraph to the Committees on Armed Services of the Senate and House of Representatives.

(c) In any court-martial proceeding resulting in a conviction, the defense counsel—

(1) may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate);

(2) may assist the accused in the submission of any matter under section 860 of this title (article 60); and

(3) may take other action authorized by this chapter.

(d) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.

§ 839. Art. 39. Sessions

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of—

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court. These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be

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Citation: **57 MJ 35**

*57 M.J. 35, *; 2002 CAAF LEXIS 678, ***

UNITED STATES, Appellee v. John S. STONEMAN, Specialist, U.S. Army, Appellant

No. 01-0295

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

57 M.J. 35; 2002 CAAF LEXIS 678

January 22, 2002, Argued
July 5, 2002, Decided

PRIOR HISTORY: [1]** Crim. App. No. 9800137. Military Judges: Stephen V. Saynisch and Debra L. Boudreau. United States v. Stoneman, 56 M.J. 253; 2001 CAAF LEXIS 1527.

DISPOSITION: Decision of the United States Army Court of Criminal Appeals set aside; remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant soldier was convicted by a general court-martial of officer and enlisted members, contrary to his pleas, of raping and sodomizing a child under the age of sixteen, in violation of Unif. Code Mil. Justice arts. 120 and 125, 10 U.S.C.S. §§ 920 and 925. The Court of Criminal Appeals affirmed the findings and sentence, and appellant sought review on the issue of undue command influence.

OVERVIEW: The soldier was court-martialed soon after the brigade commander issued several edicts demanding that his troops must improve their conduct, including no more "raping" of female soldiers, and that those who did not would be "crushed." Before trial, defense counsel raised the issue and presented some evidence of potential bias as a result of unlawful command influence. The defense asserted that members of the brigade should be removed from the court-martial panel for implied bias. After questioning a couple of members, the military judge denied the motion for a stay and the defense challenges for cause based on implied bias, and four members of the brigade remained on the panel. On appeal, the soldier argued that the military judge erred by failing to stay the proceedings, by misapplying the test for implied bias based on unlawful command influence, by failing to hold a hearing on the issue of unlawful command influence, and by failing to shift the burden of proof to the Government. A split appellate court agreed that the trial judge's questioning was insufficient to ensure that the case was not tainted by unlawful command influence, and remanded for a full factfinding hearing.

OUTCOME: The case was remanded to the trial court for a hearing on appellant's claim of unlawful command influence to determine if the court-martial was tainted. The convening authority may set aside the findings and sentence and order a rehearing or dismiss the charges.

CORE TERMS: command influence, e-mail, military, leader, brigade, court-martial, soldier, message, voir dire, commander, training, briefing, duty, bias, sentence, leadership, hip, appearance, responded, trouble, conclusions of law, evidence presented, unfairness, demeanor, sergeant, enlisted, defense counsel, battalion, crush, recollection

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LexisNexis(R) Headnotes ◆ Hide Headnotes

Military & Veterans Law > Military Justice

HN1 The United States Court of Appeals for the Armed Forces reviews de novo the question whether the facts in a court-martial constitute unlawful command influence. Once the issue has been raised, the Government must persuade the court beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. More Like This Headnote

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HN2 The burden is on defense counsel, trial counsel, and a military judge to fully question the court members during voir dire to determine whether a commander's comments had an adverse impact on the member's ability to render an impartial judgment. However, in some cases, voir dire may not be enough, and witnesses may be required to testify on the issue of unlawful command influence. More Like This Headnote

Military & Veterans Law > Military Justice

HN3 The analytical framework for resolving court-martial claims of unlawful command influence is: At trial, the initial burden is on the defense to raise the issue. The burden of proof is low, but more than mere allegation or speculation. The quantum of evidence required to raise unlawful command influence is some evidence. The defense must show facts that, if true, constitute unlawful command influence, and it must show that the unlawful command influence has a logical connection to the court-martial in terms of potential to cause unfairness in the proceedings. If the defense shows such facts by some evidence, the issue is raised. Once the issue of command influence is raised, the burden shifts to the Government. The Government may show either that there was no unlawful command influence or that any unlawful command influence did not taint the proceedings. If the Government elects to show that there was no unlawful command influence, it may do so either by disproving the predicate facts on which the allegation of unlawful command influence is based, or by persuading the military judge that the facts do not constitute unlawful command influence. The Government also may choose to not disprove the existence of unlawful command influence but to prove that it will not affect the proceedings. The quantum of evidence required is proof beyond a reasonable doubt. More Like This Headnote

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HN4 R.C.M. 912(f)(3), Manual for Courts-Martial, United States (2000), places the burden of establishing the grounds for challenge on the challenging party. However, R.C.M. 912(f)(3) does not define the quantum of proof required to establish a ground for challenge. More Like This Headnote

Military & Veterans Law > Military Justice

HN5 The quantum of proof required under R.C.M. 912(f)(3), Manual for Courts-Martial, United States (2000) is higher than the "some evidence" required to raise an issue of unlawful command influence. Thus, a military judge's determination that the defense has not sustained the greater burden of establishing a challenge under R.C.M. 912(f)(3) does not answer the question whether the defense has met the lesser burden of presenting some evidence of unlawful command influence, thereby shifting the burden to the Government. More Like This Headnote

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HN6 Unlawful command influence in a court-martial involves questions of fact as well as questions of law. Once the issue is raised, a military judge must determine the

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facts and then decide whether those facts constitute unlawful command influence. More Like This Headnote

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HN7 In a court-martial, the question whether there is an appearance of unlawful command influence is judged objectively, through the eyes of the community. More Like This Headnote

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HN8 While demeanor is a measure of actual bias, it is also relevant to an objective observer's consideration. On an issue as sensitive as unlawful command influence, evaluation of demeanor of the court members as well as other witnesses, viewed through the presumption of prejudice, is critical to evaluate whether there is an objective appearance of unfairness. Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an intolerable strain on public perception of the military justice system. More Like This Headnote

COUNSEL: For Appellant: Captain Sean S. Park (argued); Colonel Adele H. Odegard, Lieutenant Colonel E. Allen Chandler, Jr., and Major Imogene M. Jamison (on brief); Lieutenant Colonel David A. Mayfield.

For Appellee: Captain Paul T. Cygnarowicz (argued); Colonel Steven T. Salata, Lieutenant Colonel Paul H. Turney, and Major Anthony P. Nicastro (on brief).

JUDGES: GIERKE, J., delivered the opinion of the Court, in which EFFRON and BAKER, JJ., and SULLIVAN, S.J., joined. SULLIVAN, S.J., filed a concurring opinion. CRAWFORD, C.J., filed a dissenting opinion.

OPINIONBY: GIERKE

OPINION: [*36] Judge GIERKE delivered the opinion of the Court.

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of raping and sodomizing a child under the age of sixteen, in violation of Articles 120 and 125, Uniform Code of Military Justice (UCMJ), 10 USC §§ 920 and 925, respectively. The adjudged and approved sentence provides for a bad-conduct discharge, confinement for seventy-eight months, **[**2]** total forfeitures, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence. 54 M.J. 664 (2000).

This Court granted review of the following issues:

> I. WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY DENYING THE DEFENSE'S MOTION TO STAY THE PROCEEDINGS UNTIL THE PANEL WAS PROPERLY SELECTED SO AS NOT TO INCLUDE THE MEMBERS OF THE FIRST BRIGADE WHO RECEIVED AN E-MAIL FROM THE BRIGADE COMMANDER, AND/OR ATTENDED THE RELATED BRIEFING IN WHICH THE COMMANDER STATED HIS INTENT TO "CRUSH" THOSE WHO DID NOT LIVE UP TO A CERTAIN STANDARD.
>
> II. WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY FAILING TO SHIFT THE BURDEN TO THE GOVERNMENT ONCE THE DEFENSE ESTABLISHED A CASE OF UNLAWFUL COMMAND INFLUENCE BY MAKING A WRITTEN MOTION, APPENDING AN INCRIMINATING E-MAIL MESSAGE

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TO THE MOTION, AND PROFERRING TESTIMONY OF A WITNESS TO A BRIEFING AT WHICH THE BRIGADE COMMANDER MADE INAPPROPRIATE COMMENTS ABOUT DISCIPLINE IN THE PRESENCE OF SEVERAL COURT MEMBERS.

III. WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN ATTEMPTING TO "RECREATE" THE UNLAWFUL COMMAND INFLUENCE **[**3]** HEARING THAT THE MILITARY JUDGE SHOULD HAVE CONDUCTED.

IV. WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION BY DENYING THE DEFENSE'S CHALLENGE FOR CAUSE AGAINST PANEL MEMBERS WHO RECEIVED AN E-MAIL MESSAGE FROM THEIR BRIGADE COMMANDER THAT CONTAINED STATEMENTS REGARDING HIS INTENT TO "CRUSH" THOSE WHO DID NOT LIVE UP TO A CERTAIN STANDARD.

For the reasons set out below, we remand for further proceedings.

Background

Appellant was a member of Headquarters and Headquarters Company, 1st Battalion, 17th Infantry, a subordinate unit of the 1st Brigade, 6th Infantry Division (Light). On December 21, 1997, Colonel (COL) Brook, the brigade commander, sent an e-mail to the brigade leadership and supporting unit commanders, notifying them of mandatory leaders' training on December 23, 1997. The e-mail informed all battalion and company commanders that he expected them "to ensure the following happens after [his] leader training":

(1) "Declare war on all leaders not leading by example, both on and off duty," and inform them that failure to lead by example "will result in relief, negative [evaluation reports]; **[**4]** or UCMJ action."

[*37] (2) Develop a unit plan for "ZERO DUIs [driving under the influence] during the holiday period";

(3) "Ensure EVERY single soldier, or geographical batchelor [sic], in the Brigade is invited over to someone's home, or the unit is having a special barracks function" on Christmas Day;

(4) "Ensure all new soldiers . . . are integrated into the unit, and NOT being treated as the 'FNG' [f new guy] prior to Christmas. If you don't' have a good integration plan for the new soldiers, you will have a rash of problems, DUIs, etc. over the holiday period. Be proactive, and ensure this doesn't happen."

COL Brook then articulated his leadership philosophy, including the following comments:

> I am sick of leaders who are leaders by virtue of their rank only. My New Years Resolution is to CRUSH all leaders in this Brigade who don't lead by example, on and off duty. Leaders must focus on developing their REFERENT power, the power given to them by subordinates who respect them because of caring competent leadership, rather than their LEGAL power, which is the power they have by virtue of their rank.
>
> * * *
>
> I'm sick of leaders getting DUIs, abusing **[**5]** their position, being lazy, not

> achieving [Brigade physical training] standards, taking the easy way out regarding safety, and never going the extra mile. I'm sick of encountering leaders who could care less about soldiers, and are SELF CENTERED pukes. I am sick of hearing about leaders who are morally and spiritually bankrupt. I am declaring war on leaders like this, because they don't deserve to be leaders of America's sons and daughters, and they are not doing what the American taxpayer expects them to do.
>
> * * *
>
> . . . If leaders don't lead by example, and practice self-discipline, then the very soul of our Army is at risk. No more [platoon sergeants] getting DUIs, no more NCOs [noncommissioned officers] raping female soldiers, no more E7s coming up "hot" for coke, no more stolen equipment, no more "lost" equipment, no more approved personnel actions for leaders with less than 260 APFT [Army physical fitness test scores], no more leader APFT failures at [Department of the Army] schools, all of this is BULLSHIT, and I'm going to CRUSH leaders who fail to lead by example, both on and off duty.

54 M.J. at 676.

On January 9, 1998, COL Brook **[**6]** sent a second e-mail, stating that nothing in his previous e-mail was intended to suggest specific actions for leadership failures. He informed his commanders that appropriate action for particular cases was defined as "what each individual commander . . . deemed so in the exercise of independent discretion." COL Brook further stated:

> . . . Nothing in what I have said in this or the earlier e-mail, or what I said at the Leader Training, has anything to do with what any soldier does as a member of a court-martial panel or as a witness before a court-martial. The sworn duty of any court-martial panel member is to follow the instructions of the military judge, apply law to admissible facts, and decide a sentence based solely on the evidence presented in court. Nothing said outside a court-martial by anybody, TO INCLUDE ME, may have any bearing on the outcome of any given case or sentence.

Id. at 678.

On January 22, 1998, defense counsel submitted a motion to the military judge asking her to stay the proceedings until all members of the 1st Brigade were removed from the panel. The defense asserted that several NCOs perceived COL Brook's message to be "that **[**7]** leaders who found themselves in trouble needed to be 'crushed.'" The defense proffered the testimony of Staff Sergeant (SSG) Mallerard that no one present at the leaders' training "had any doubt what COL Brook meant to get across -- that is, crush these soldiers that get into trouble." The defense asserted that the members of the **[*38]** brigade should be removed from the court-martial panel for implied bias. The defense conceded that the unlawful command influence only affected court members from the 1st Brigade, and not potential witnesses.

When appellant's court-martial convened on January 25, 1998, the military judge ruled that the request for a stay was premature, because any issues involving unlawful command influence could be addressed during individual voir dire. During group voir dire, five of the

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nine members of the panel acknowledged seeing an e-mail regarding disciplinary problems within the brigade. The members were then questioned individually.

Lieutenant Colonel (LTC) Saul was COL Brook's second in command and had assumed command of the brigade on three occasions in COL Brook's absence. He recalled that COL Brook's first e-mail suggested "the appearance of a lack of **[**8]** law and order among certain elements of the brigade." He thought that the message was directed at all enlisted members of the brigade. He described the leaders' training session on December 23 as follows:

> [A] discussion, a monologue from the brigade commander, in regards that a series of criminal acts or violations of the law, to include a number of driving under the influence or drunk driving cases; there was reference to a rape of a female enlisted soldier by a noncommissioned officer; some details were discussed in that case; and a general perception on the part of the brigade commander was that there was an element within the brigade that violation of the law was common.

The only guidance that LTC Saul recalled was "a tightening up of the chain of command and enforcement of discipline and standards." LTC Saul had no recollection of the second e-mail message.

LTC Saul told the military judge that he did not think that COL Brook's actions had any impact on him as a court member. He did not perceive COL Brook's actions as an "exhortation to . . . be tough in this case."

LTC Withers, the brigade executive officer, perceived the first e-mail as "aimed at the leaders, **[**9]** " addressing "the problems we had had with discipline," and "urging leaders not to accept substandard performance, especially by leaders." He recalled that the e-mail "made a statement that leaders should scrunch or squash, or something, NCOs especially and other officers, who committed crimes, had a DUI, something like that."

LTC Withers recalled that the December 23 leaders' training had "certainly the same tone, the same subject matter." He explained:

> The brigade had had several DUIs, there was a rash of DUIs; it was an attention getter, trying to get people to wake up and realize the seriousness of DUIs and so he was talking that leaders should exhibit a higher standard, and any leader who did something like that it was questionable if they should be around.

LTC Withers perceived the second e-mail as an attempt to clarify the first, and to make it clear that the first e-mail "was not in any way, shape or form, intended to make us -- or to inhibit his subordinates in the proper handling of UCMJ and other legal matters." When asked if COL Brook's actions would affect his performance as a court member, he responded, "Not at all." He explained:

> Colonel Brook is **[**10]** a very impassioned man; he holds his values very high; he shoots from the hip; he knows he shoots from the hip. I had talked to him about that and a wide variety of subjects. I've been in the Army long enough to have seen statements like that before; and quite frankly I've been in the Army so long that I'm not really concerned at this point what my rater thinks; I'm going to

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do what I think is right, because that's what I've done all my career.

LTC Moody commanded an aviation battalion that supported the 1st Brigade but was not part of it. He stated that he probably read the e-mail messages because he receives a courtesy copy of brigade correspondence. He recalled that the message "may have had something to do with accountability, integrity." He stated that he respects COL Brook, "but he's not my brigade commander." LTC Moody was invited to the leadership training but did not attend.

[*39] Command Sergeant Major (CSM) Pagan was the brigade command sergeant major. Although he worked directly for COL Brook, he did not participate in the drafting of the e-mail messages. His perception of the first e-mail was as follows:

> Just trying to convey to everybody how serious these situations **[**11]** are, and that we should do everything in our power as leaders to make sure that we're talking to our soldiers about all the pitfalls that are out there awaiting you, and keep these things in mind and convey that to the soldiers so that they're thinking about that, those situations; the situation that could happen to them, or either -- DUIs, or putting themselves in a compromising situation, so forth and so on. And trying to prevent people from getting into trouble.

Asked whether he thought the e-mail told him what he should do when "confronted with someone who is in trouble," he responded, "No, not at all." CSM Pagan had no recollection of the second e-mail.

CSM Pagan was asked to comment on the first e-mail, and he responded:

> He was thinking about a few leaders out there at different levels, and that he probably overreacted and put it on e-mail. He shot from the hip, versus talking to somebody else and maybe let them, kind of, see what he was writing and maybe say "Hey sir, you need to calm that down a little bit."

CSM Pagan believed that COL Brook sent the same message at the December 23 leaders' training. He believed that the briefing "covered all soldiers from **[**12]** Private to Colonel." However, he thought that the tone of the briefing "was completely different." At the briefing, "it was an upbeat tone by [Col Brook], and it was more on the verge of 'Let me tell you how I can keep you and your soldiers out of trouble.'"

When the military judge asked CSM Pagan whether one of the civilian spectators in the courtroom could be assured that he would be a fair and impartial court member, he responded:

> Well, I've been a fair and impartial member of the United States Army, as well as my nation, serving for close to 25 years; and I'm not one to be swayed, I'm not one to comply with something just because somebody else said it. I'll stick by my guns and come to the conclusion that I feel is appropriate; no matter who's in that group, or in this members [sic] of the jury; I will take all the information that's given to me, make a rational decision, evaluate all that information, and I will make the best decision that I see possible with that information, and listening to others that have an opinion on that subject.

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Master Sergeant (MSG) Peele was the brigade chemical NCO. He stated that he read some of the first e-mail, and "what [he] **[**13]** got out of it was about the incidents about the drunk driving and things like that." He did not think that the e-mail conveyed any message to him that he "didn't already have in [his] mind about drunk driving." He did not think that it gave him any guidance about being a leader. He disagreed with the focus of the leaders' training. Regarding his duties as a court member, he told the military judge, "I don't need a Colonel to tell me now to do my duties, ma'am, I can do them on my own; and I think that he could take a message from me" regarding the treatment of soldiers in the brigade. MSG Peele thought that racism and the standards of treatment of soldiers in the brigade were more appropriate issues than focusing on DUI. Asked by defense counsel what effect the message had on him, MSG Peele responded:

> Well, if you're doing your job, sir, everyday like you should be doing, as I do, I feel it had no affect [sic] on me. It does affect me to the point of you can't tell me to lead by example if you don't do it; and that's just my opinion, sir.

MSG Peele did not see the second e-mail.

Sergeant First Class (SFC) Robbins, a member of appellant's battalion, did not see **[**14]** either e-mail, but he did attend the leaders' training on December 23. He told the military judge that he did not think the December 23 briefing had any bearing on his court-martial duties.

[*40] The military judge denied the motion for a stay and the defense challenges for cause based on implied bias. She explained:

> I've read United States versus Youngblood, [47 M.J. 338 (1997)], and I certainly agree with the court in that case that implied bias is critical and it's reviewed through the eyes of the public; but if it was reviewed through the eyes of the public the responses that the court members gave, if members of the public were sitting in the back of the courtroom and heard their responses given on voir dire by the members of 1st Brigade who have been selected to serve in this court-martial, I think they would see that these members represent the finest traditions of the United States Army as court members, and would certainly not be swayed by anything Colonel Brook might say; they viewed his comments as being intemperate, and I think that everyone heard them say loudly and clearly that they will discharge their responsibilities as court members and vote **[**15]** in accordance with their conscience.

Defense counsel later challenged LTC Saul for cause on several grounds, including his answers on voir dire about COL Brook's message. The military judge granted the challenge, explaining:

> In the interest of granting challenges for cause liberally, based upon my observations as well of Lieutenant Colonel Saul, he was the only one that didn't take great pains to distance himself from Colonel Brook's comments; he was the only one who believed that, I think, the message extended to all soldiers, including those at the Private level.

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A defense challenge for cause against CSM Pagan was granted on multiple grounds, including a recent conflict with defense counsel. After challenges, four members of the 1st Brigade remained on the panel: LTC Withers, LTC Moody, MSG Peele, and SFC Robbins.

The Court of Criminal Appeals held that the military judge did not err by declining to rule on the motion for a stay until after voir dire. 54 M.J. at 671. It held that she did not abuse her discretion by denying the implied bias challenges. Id. at 673. It noted that she "never articulated whether, under command influence **[**16]** law, the appellant had met his initial burden to show facts constituting unlawful command influence that were logically connected to the court-martial, and which had the potential to cause unfairness in the proceedings, thereby shifting the burden of proof to the government." Id.; see United States v. Biagase, 50 M.J. 143, 150 (1999). Instead, the military judge based her ruling "purely on the law of causal challenges." Id. The court below held that any error based on failure to apply the burden-shifting mandated by Biagase was harmless. Id.

The court below also noted that the military judge "did not make any specific findings of fact as to the content of the leaders' training or conclusions of law as to whether COL Brook's comments constituted unlawful command influence." It found this omission harmless. 54 M.J. at 674.

The court below then conducted a de novo review of the record to determine whether the trial was tainted by unlawful command influence. Based on the members' responses during voir dire, the court concluded that COL Brook "did not attempt to coerce or, by any unauthorized means, influence the action" of the court-martial. **[**17]** Id., quoting Art. 37, UCMJ, 10 USC § 837. The court agreed that COL Brook was "shooting from the hip," that his language was intemperate, and that his comments "may have been inappropriate," but it held that his comments were not unlawful. Id. The court below concluded "beyond a reasonable doubt that the findings and sentence in the appellant's case were not affected by COL Brook's e-mails and leaders' training." Id.

Discussion

Appellant asserts that the military judge erred by failing to stay the proceedings, by misapplying the test for implied bias based on unlawful command influence, by failing to hold a hearing on the issue of unlawful command influence, and by failing to shift the burden of proof to the Government as required by Biagase, supra. Appellant also **[*41]** asserts that the court below erred when it "recreated" the hearing that the military judge should have conducted. The Government asserts that the military judge correctly denied the challenges founded on implied bias, and that the court below correctly determined, after a de novo review of the record, that appellant failed to establish unlawful command influence.

Unlawful **[**18]** command influence is "the mortal enemy of military justice." United States v. Thomas, 22 M.J. 388, 393 (CMA 1986). On appeal, HN1 this Court reviews de novo the question whether the facts constitute unlawful command influence. United States v. Johnson, 54 M.J. 32, 34 (2000). Once the issue has been raised, the Government must persuade this Court beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. Biagase, supra; Thomas, supra.

In Thomas, supra at 396, this Court placed HN2 the burden on defense counsel, trial counsel, and the military judge to "fully question the court members during voir dire" to determine whether a commander's comments "had an adverse impact on the member's ability to render an impartial judgment." This Court recognized, however, that in some cases, voir dire may not be enough, and that witnesses may be required to testify on the issue of unlawful command influence.

In Youngblood, supra, relied on by the military judge in this case, this Court held that the military judge erred by denying challenges for cause **[**19]** based on unlawful command influence. Youngblood was decided as an implied bias case, not an unlawful command influence case. Because this Court did not reach the question whether unlawful command influence was raised, it did not apply the burden-shifting analysis set out in its later Biagase decision. 47 M.J. at 339.

In Biagase, this Court set out HN3 the analytical framework for resolving claims of unlawful command influence. At trial, the initial burden is on the defense to "raise" the issue. The burden of proof is low, but more than mere allegation or speculation. The quantum of evidence required to raise unlawful command influence is "some evidence." 50 M.J. at 150.

The defense must show facts that, if true, constitute unlawful command influence, and it must show that the unlawful command influence has a logical connection to the court-martial in terms of potential to cause unfairness in the proceedings. If the defense shows such facts by "some evidence," the issue is raised. Id.

Once the issue is raised, the burden shifts to the Government. Id. The Government may show either that there was no unlawful command influence or that any unlawful **[**20]** command influence did not taint the proceedings. If the Government elects to show that there was no unlawful command influence, it may do so either by disproving the predicate facts on which the allegation of unlawful command influence is based, or by persuading the military judge that the facts do not constitute unlawful command influence. The Government also may choose to not disprove the existence of unlawful command influence but to prove that it will not affect the proceedings. Whichever tactic the Government chooses, the quantum of evidence required is proof beyond a reasonable doubt. Id. at 151.

Unlike the law pertaining to unlawful command influence, there is no burden shifting in the law pertaining to challenges. HN4 RCM 912(f)(3), Manual for Courts-Martial, United States (2000 ed.), n1 places the burden of establishing the grounds for challenge on the challenging party. However, RCM 912(f)(3) does not define the quantum of proof required to establish a ground for challenge. This Court has not addressed the quantum of proof required under Rule 912(f)(3), and we need not precisely define it in this case. We are satisfied, however, that HN5 the quantum of proof required **[**21]** under RCM 912(f)(3) is higher than the "some evidence" required to raise an issue of unlawful command influence. Thus, a military judge's determination that the defense has not sustained **[*42]** the greater burden of establishing a challenge under RCM 912(f)(3) does not answer the question whether the defense has met the lesser burden of presenting "some evidence" of unlawful command influence, thereby shifting the burden to the Government.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n1 This Manual provision is identical to the one in effect at the time of appellant's court-martial.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

As noted by the court below, the military judge did not make findings of fact and conclusions of law, nor did she analyze the evidence in accordance with the Biagase framework. n2 54 M.J. at 673-74. Thus, the question before us is whether the lower court's de novo review of the record and its analysis under the Biagase framework are an adequate substitute for a hearing at the trial level and are sufficient to ensure that this case was not tainted by

unlawful **[**22]** command influence. We hold that further proceedings are necessary to determine if the court-martial was tainted.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 The dissent notes that Biagase was decided after appellant's trial. However, the Biagase decision, which then-Judge Crawford joined, did not establish a new requirement for making findings of fact and conclusions of law or otherwise announce new law; it merely synthesized this Court's jurisprudence and established an analytical framework for resolving issues of unlawful command influence. Long before Biagase, this Court recognized that *HN6* unlawful command influence involves questions of fact as well as questions of law. Once the issue is raised, a military judge must determine the facts and then decide whether those facts constitute unlawful command influence. See United States v. Gerlich, 45 M.J. 309, 310-11 (1996); United States v. Ayala, 43 M.J. 296, 299 (1995); United States v. Stombaugh, 40 M.J. 208, 213-14 (CMA 1994). The "some evidence" standard was set out in Ayala, supra at 300. The burden-shifting was set out in Gerlich, supra at 310. The requirement to prove beyond a reasonable doubt that the proceedings were unaffected by unlawful command influence was announced in United States v. Thomas, 22 M.J. 388, 394 (CMA 1986).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**23]**

In United States v. Ginn, 47 M.J. 236, 242 (1997), this Court concluded that Congress intended the Courts of Criminal Appeals "to act as factfinder in an appellate-review capacity and not in the first instance as a trial court." In this case, there was no factfinding hearing, and no analysis under the Biagase framework at the trial level. As a result, there are no trial-level findings of fact regarding the content, tone, and impact of COL Brook's leadership training session on December 23. We cannot determine if additional witnesses would shed light on the issue. In this regard, we note that the defense proffered the testimony of SSG Mallerard, the brigade training NCO, but the military judge did not act on that proffer.

Finally, the record of trial does not provide an appellate court the opportunity to observe the demeanor of the court members. This Court has long recognized that, once unlawful command influence is raised, "we believe it incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings. **[**24]** " United States v. Rosser, 6 M.J. 267, 271 (CMA 1979). Accordingly, disposition 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." Id.; see United States v. Ayers, 54 M.J. 85, 94-95 (2000), quoting United States v. Allen, 33 M.J. 209, 212 (CMA 1991) ("The appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.").

HN7 The question whether there is an appearance of unlawful command influence is similar in one respect to the question whether there is implied bias, because both are judged objectively, through the eyes of the community. In the implied bias area, this Court has recognized that "observation of the member's demeanor may inform judgments" about the public perception of the fairness of a trial. United States v. Downing, 56 M.J. 419, 422 (2002). *HN8* While demeanor is "[a] measure of actual bias," it is "also relevant to an objective observer's consideration." Id. at 423. **[**25]** On an issue as sensitive as unlawful command influence, evaluation of demeanor of the court members as well as other witnesses, viewed through the prism of Biagase and the presumption of prejudice, is critical to evaluate whether there is an objective appearance of unfairness. Even if there was no

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actual unlawful command influence, **[*43]** there may be a question whether the influence of command placed an "intolerable strain on public perception of the military justice system." See United States v. Wiesen, 56 M.J. 172, 175 (2001). For these reasons, we conclude that a hearing before a military judge is necessary to resolve appellant's claim of unlawful command influence.

Decision

The decision of the United States Army Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Army for submission to a convening authority for a hearing on appellant's claim of unlawful command influence under United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). If a hearing is impracticable, the convening authority may set aside the findings and sentence and order a rehearing or dismiss the charges. If a hearing is **[**26]** conducted, the record of trial, including the hearing, will then be transmitted to the Court of Criminal Appeals for review under Article 66, UCMJ, 10 USC § 866. Thereafter, Article 67, UCMJ, 10 USC § 867, shall apply.

CONCURBY: SULLIVAN

CONCUR: SULLIVAN, Senior Judge (concurring):

I agree with the majority. This is consistent with my position in United States v. Youngblood, 47 M.J. 338, 342-43 (1997)(Sullivan, J., concurring in part and dissenting in part) (the real issue is unlawful command influence, not jury bias).

DISSENTBY: CRAWFORD

DISSENT: CRAWFORD, Chief Judge (dissenting):

The majority chastises the military judge because she did not make "findings of fact and conclusions of law, nor did she analyze the evidence in accordance with the Biagase framework." MJ at (15). I do not find this "failure" surprising or erroneous since the court-martial that tried appellant took place fifteen months before this Court rendered its decision in United States v. Biagase, 50 M.J. 143 (1999), setting forth a framework for analyzing questions of unlawful command influence. Although the clairvoyance **[**27]** which the majority apparently demands of trial judges was not present in this case, I believe the trial judge properly applied the law in rejecting appellant's challenge to those members who were subjected to COL Brook's e-mail and December 23, 1997, leadership class.

At the time of trial, the law was clear. As with pretrial publicity, see Sheppard v. Maxwell, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507, 6 Ohio Misc. 231, 35 Ohio Op. 2d 431 (1966), the party raising an unlawful command influence motion had to show the impact on the jurors or panel members. United States v. Thomas, 22 M.J. 388 (CMA 1986). Where there was an allegation of command influence,

> an appellant [had to] (1) 'allege[] sufficient 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 proximate cause of that [alleged] unfairness.

United States v. Stombaugh, 40 M.J. 208, 213 (CMA 1994), citing United States v. Levite, 25 M.J. 334, 341 (CMA 1987)(Cox, J., concurring); see also United States v. Lorenzen, 47 M.J. 8, 15 (1997).

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We made it crystal clear in Thomas, supra at **[**28]** 396, that

> in determining whether an accused's trial in a contested case before court members was adversely affected by command influence, we first consider the impact that such activities and communications may have had on the court members. In this regard, we place the burden upon both defense and trial counsel, as well as the military judge, to fully question the court members during voir dire and to determine thereby whether any of the members had knowledge of the commander's comments and, if so, whether the comments had an adverse impact on the member's ability to render an impartial judgment. When required, witnesses may be called to testify on this issue. United States v. Karlson, 16 M.J. 469 (CMA 1983). However, we are not prepared to disqualify members of a court-martial panel simply because they were assigned or were in close proximity to the command where the comments were made. To do so would ignore the members' oath to adhere to the military judge's instructions and to determine the facts in accordance therewith. Cf. United States v. Garwood, 20 M.J. 148 (CMA 1985).

[*44] VOIR DIRE

The judge permitted an extensive voir dire **[**29]** of all the members. In the preliminary instructions, the judge reminded the members that their decision should be based on the law and instructions given during the case that appellant was presumed to be innocent and the Government had the burden of proof. Lieutenant Colonel (LTC) Withers, LTC Saul, LTC Moody, Master Sergeant (MSG) Peele, and Command Sergeant Major (CSM) Pagan indicated they were aware of e-mail messages from the First Brigade. All of the members also indicated they were not "aware of anything at all that might raise a substantial question concerning [their] participation in this trial as a court member."

On individual voir dire, LTC Saul stated that he remembered the first e-mail message from COL Brook but did not "recall the specifics." He remembered that this e-mail was aimed at "tightening up of the chain of command and enforcement of discipline and standards . . . ." His recollection was that "there was the appearance of a lack of law and order and discipline among certain elements of the brigade." As to the "certain elements," he meant "enlisted personnel and noncommissioned officers." He stated that he "saw the second message . . . but [did not] recall **[**30]** any specific points in the second message." He did not read the e-mail as an "exhortation to . . . be tough in this case." He agreed that any decision must be based on the evidence presented and the judge's instructions, and that such instructions override any information received from the brigade commander. He would not "bump" up the punishment, but would base it only on the evidence presented. As the majority notes, LTC Saul was challenged for cause, and the military judge granted that challenge.

LTC Withers, as did LTC Saul, responded to voir dire questions based on recollection, without that recollection being refreshed by the e-mails. He emphasized that the e-mails were aimed at "urging leaders not to accept substandard performance. . . ." He said the follow-up e-mail was meant to "clarify his statement, I think the real key statement was the one to squash people who did something wrong. It was not in any way, shape or form, intended to make us -- or to inhibit his subordinates in the proper handling of UCMJ and other legal matters." "Sitting as a member," there was nothing in the e-mail messages that would cause him "to hesitate in fulfilling [his] duty as a court member. **[**31]** " He would not be concerned about what COL Brook would think about his performance in this case or any other case. He would not be influenced by the e-mail because

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http://www.lexis.com/research/retrieve?_m=451dca6356332022e60124dbc51fe8b4&csvc... 8/23/2004

> [COL] Brook is a very impassioned man; he holds his values very high; he shoots from the hip; he knows he shoots from the hip. I had talked to him about that and a wide variety of subjects. I've been in the Army long enough to have seen statements like that before; and quite frankly I've been in the Army so long that I'm not really concerned at this point what my rater thinks; I'm going to do what I think is right, because that's what I've done all my career.

After that response, the defense counsel had no more questions.

As the majority notes, LTC Moody indicated that he read the e-mail in a cursory manner and did not attend the follow-up briefing. Major (MAJ) Fields, another court member, did not have any information about the e-mails.

The brigade's top noncommissioned officer, CSM Pagan, stated that he saw a lot of e-mail on a daily basis, and that he did not remember that e-mail conveying anything about his responsibilities as a court member. He saw the second e-mail but did not recall it. He added: **[**32]**

> You know, I've worked for quite a few brigade commanders since being a Command Sergeant Major, and knowing Colonel Brook, as well as those other commanders in the past; I tell you, knowing him, when he sent out that e-mail message and when he talked to soldiers he was looking after the welfare of the leaders, as well as the soldiers, and trying to keep them from getting themselves into trouble; and that was his thoughts on that.
>
> **[*45]** * * *
>
> MJ [MILITARY JUDGE]: Sergeant Major, it looks like we've got some civilians sitting in the back of the courtroom; I know that you received this message and have had the briefing; how can you assure them that you'll be a fair and impartial court member?
>
> MBR [CSM PAGAN]: Well, I've been a fair and impartial member of the United States Army, as well as my nation, serving for close to 25 years; and I'm not one to be swayed, I'm not one to comply with something just because somebody else said it. I'll stick by my guns and come to the conclusion that I feel is appropriate; no matter who's in that group, or in this members [sic] of the jury; I will take all the information that's given to me, make a rational decision, evaluate all that **[**33]** information, and I will make the best decision that I see possible with that information, and listening to others that have an opinion on that subject.

CSM Pagan had a follow-up briefing with the noncommissioned officers of his brigade following COL Brook's briefing. He could not remember the exact words he used during the briefing, "but it was about basically ensuring that they did the right things, talk to their soldiers, mentored their leaders." Compared to the 10th Mountain Division, where he was a Battalion Sergeant Major, the instances of misconduct in his current brigade were "very small." After being read part of the e-mail, CSM Pagan said COL Brook was shooting from the hip and "overreacted." CSM Pagan further stated:

> He was really looking after the - trying to look after the soldiers, by making sure

> that he, kind of, emphasized to the leaders "Hey, I want you to be proactive, I want you to go out there and talk to your soldiers, I want you to make sure that you're communicating with your subordinates, because that will keep soldiers out of trouble." That's what he really wanted to say. He was a little more strong in his method of delivery there, but. . . .

[34]**

The military judge also sustained appellant's causal challenge of CSM Pagan.

MSG Peele did not interpret the December briefing as a need to be tough as a court member. He thought there were more important issues than DUI. He received the first message but did not read it "because [he] knew those things already." He did not receive the second e-mail. Obviously, the messages had no effect on him.

MSG Geyer, another court member, responded that he could set aside any pretrial knowledge about the case he had gained from the media and base his decision solely on the evidence introduced at trial. He did not receive the first e-mail because he was not assigned to COL Brook's brigade. Although MSG Geyer was the only noncommissioned officer not exposed to the brigade commander's written or oral remarks, he was successfully challenged by the defense.

Sergeant First Class (SFC) Robbins, a member of appellant's battalion, said he did not see either e-mail but he did attend a leader's training briefing on December 23, 1997. As noted by the majority, SFC Robbins stated that the session had no bearing on his court-martial duties.

DISCUSSION

The majority errs in two significant ways. **[**35]** First, it indicates that the burden on the defense is merely to present "some evidence," and that alone is sufficient to raise command influence. MJ at (14). While the majority gives no indication whether "some" means colorable evidence or a different evidentiary standard, Stombaugh makes it clear that more than "some evidence" is required to shift the burden to the Government. 40 M.J. at 213. We have previously rejected "[command influence] in the air," United States v. Allen, 33 M.J. 209, 212 (CMA 1991), cert. denied, 503 U.S. 936, 117 L. Ed. 2d 617, 112 S. Ct. 1473(1992), yet the majority's definition of "some evidence" would certainly encompass such ethereal notions. Stombaugh, however, required an appellant to "allege[] sufficient facts which, if true, constitute unlawful command influence" before any burden **[*46]** shifted to the Government to disprove the facts or show that the facts did not constitute command influence. 40 M.J. at 213, quoting Levite, 25 M.J. at 341 (Cox, J., concurring). Appellant has failed to clear the first hurdle.

Even under the Biagase standard, the defense is required to do more than raise an **[**36]** allegation of unlawful command influence. It must "show 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." 50 M.J. at 150.

Second, the majority stretches the holding of Thomas, 22 M.J. at 388, beyond its intended limits by implying that witnesses are required to testify on the issue of command influence. MJ at (13). Thomas established no such requirement. However, in looking at the statements given by the prospective court members under oath during voir dire, I conclude that the trial judge was in the best position to observe the court members' demeanor during their examination under oath; to evaluate their answers; and to determine who was and who

was not improperly and adversely affected by COL Brook. That military judge's ruling denying a challenge for cause ought to be overturned only for a clear abuse of discretion. See United States v. Downing, 56 M.J. 419, 423 (2002)(Crawford, C.J., concurring in part and in the result); United States v. Wiesen, 56 M.J. 172, 177 (2001) **[**37]** (Crawford, C.J., dissenting)(pet. for recon. filed Dec. 21, 2001).

All the members swore that their decision would be based on the evidence presented and the judge's instructions. Under oath, they indicated they were not aware of anything at all that might raise a substantial question concerning their participation in this trial as court members. We do not need to dismiss their sworn responses so effortlessly, especially when one looks at the extensive voir dire in the context of this case and defense tactics. After appellant's causal challenge of all 1st Brigade members was denied, the member challenged by the defense peremptorily (MSG Geyer) was one who did not know of COL Brook's e-mail.

Finally, the majority is wrong when it criticizes the trial judge for not making "findings of fact and conclusions of law, nor . . . analyzing the evidence in accordance with the Biagase framework." MJ at (15). Biagase does not require a military judge to make findings of fact and conclusions of law. Additionally, that rule is not to be found in any of the cases from this Court that had been decided at the time of appellant's court-martial.

CONCLUSION

The thrust **[**38]** of COL Brook's e-mail, despite its bombastic tone, was to enhance leadership, eliminate noncommissioned officer incidents of drunk driving, encourage leaders to set a good example, and incorporate single and recently arrived soldiers in unit activities. A good digest of the e-mails can be found in the Army Court of Criminal Appeals opinion. 54 M.J. at 671-72.

Notwithstanding appellant's failure to show sufficient facts that constituted improper command influence, the Government "produced" evidence during voir dire by showing that none of the e-mails had any impact on the members. This was reinforced by the members saying that the brigade commander was shooting from the hip. Three of the members testified that COL Brook had no business telling them what their duties were as court members, and that he (COL Brook) did not have the same set of values as they. See, e.g., LTC Withers's voir dire responses, supra at (4). Said differently by MSG Peele when talking about COL Brook's December 23 briefing and email: "I don't need a Colonel to tell me how to do my duties, ma'am, I can do them on my own; and I think he could take a message from me."

Finally, this **[**39]** is a good case to show the importance of remedial action by a staff judge advocate -- the type of action which the majority discourages with their holding. Once the staff judge advocate discovered that COL Brook had sent the first e-mail to members of his command, he ensured that remedial action was taken through the second e-mail. **[*47]** The remedial action of the second e-mail put the first e-mail in perspective. As COL Brook said in his second e-mail:

> Let me make something else perfectly clear. Nothing in what I have said in this or the earlier e-mail, or what I said at the Leader Training, has anything to do with what any soldier does as a member of a court-martial panel or as a witness before a court-martial. The sworn duty of any court-martial panel member is to follow the instructions of the military judge, apply law to admissible facts, and decide a sentence based solely on the evidence presented in court. Nothing said outside a court-martial by anybody, TO INCLUDE ME, may have any bearing on the outcome of any given case or sentence.

54 M.J. at 678.

Whether this case is decided under pre-Biagase law or that set forth in Biagase, appellant has **[**40]** failed to prove or produce the quantum of evidence required to raise the issue of unlawful command influence and, thus, shift the burden to the Government to refute the facts, to show that the facts do not constitute unlawful command influence, or that command influence did not taint the proceedings.

For these reasons, I dissent.

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*58 M.J. 253, *; 2003 CAAF LEXIS 537, **

UNITED STATES, Appellee v. Daniel A. DUGAN, Airman, U.S. Air Force, Appellant

No. 02-0561

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

58 M.J. 253; 2003 CAAF LEXIS 537

December 10, 2002, Argued
June 2, 2003, Decided

PRIOR HISTORY: [1]** Crim. App. No. 34477. Military Judge: Mary M. Boone. United States v. Dugan, 2002 CCA LEXIS 69 (A.F.C.C.A., Mar. 20, 2002)

DISPOSITION: Affirmed in part and set aside in part and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Pursuant to mixed pleas, defendant was convicted on several charges, inter alia, wrongful use of the drug commonly known as ecstasy, violation of Unif. Code Mil. Justice art. 86, 112a, and 134, 10 U.S.C.S. §§ 886, 912a, and 934. The United States Air Force Court of Criminal Appeals affirmed the findings and sentence and defendant appealed.

OVERVIEW: Defendant claimed that improper, extraneous factors influenced the deliberations of the members of the court-martial. One of the members had written a letter expressing her concerns, the first of which was that other court members did not believe that defendant's mental condition was a mitigating factor in sentencing. However, the members were free to assign to defendant's mental condition whatever weight they chose, including no weight at all. A second concern was that other members may have been influenced by one member's statement that defendant would be enrolled in a substance abuse program if he was sentenced to confinement. This was not extraneous, prejudicial information but simply personal knowledge that a member brought into the deliberative process. The final concerns related to whether some members may have based defendant's sentence on a concern that they would have been viewed unfavorably by the convening authority (their commanding officer) if they did not impose a sentence harsh enough to be "consistent" with the convening authority's "message" at a recent Commander's Call that drug use was incompatible with military service. This issue warranted a DuBay hearing.

OUTCOME: The military appellate court affirmed the lower court's decision as to findings but set the decision aside as to sentence. The matter was remanded for a factfinding hearing on defendant's claim of unlawful command influence. If a hearing were impracticable, the convening authority was authorized to set aside the sentence and order a sentence rehearing.

CORE TERMS: sentence, court-martial, command influence, convening, commander, military, deliberation, defense counsel, deliberative process, drug use, confinement, voir dire, attended, military service, extraneous, impeach, post-trial, sentenced, juror's, sentencing

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phase, prejudicial, message, emotions, bad-conduct, admissible, timing, outside influence, substance abuse program, appropriate sentence, mental process

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Military & Veterans Law > Military Justice > Sentencing > Impeachment & Reconsideration

HN1 Long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry. As a result, deliberations of court-martial members ordinarily are not subject to disclosure. R.C.M. 923, Manual Courts-Martial, discussion. The purpose of this rule is to protect freedom of deliberation, protect the stability and finality of verdicts, and protect court members from annoyance and embarrassment. More Like This Headnote

Evidence > Witnesses > Judges & Jurors

Military & Veterans Law > Military Justice > Sentencing > Impeachment & Reconsideration

HN2 See Mil. R. Evid. 606(b).

Evidence > Witnesses > Judges & Jurors

Military & Veterans Law > Military Justice > Sentencing > Impeachment & Reconsideration

HN3 Under Mil. R. Evid. 606(b), there are three circumstances that justify piercing the otherwise inviolate deliberative process to impeach a verdict or sentence: (1) when extraneous information has been improperly brought to the attention of the court members; (2) when outside influence has been brought to bear on a member; and (3) when unlawful command influence has occurred. More Like This Headnote

Evidence > Witnesses > Judges & Jurors

Military & Veterans Law > Military Justice > Sentencing > Impeachment & Reconsideration

HN4 Internal matters regarding the deliberations of the members of the court-martial on sentence cannot be inquired into post-trial. Mil. R. Evid. 606 (b). More Like This Headnote

Evidence > Witnesses > Judges & Jurors

Military & Veterans Law > Military Justice > Sentencing > Impeachment & Reconsideration

HN5 Evidence of information acquired by a court member during deliberations from a third party or from outside reference materials may be extraneous prejudicial information which is admissible under Mil. R. Evid. 606(b) to impeach the findings or sentence. However, the general and common knowledge a court member brings to deliberations is an intrinsic part of the deliberative process, and evidence about that knowledge is not competent evidence to impeach the members' findings or sentence. More Like This Headnote

Military & Veterans Law > Military Justice > Sentencing > Impeachment & Reconsideration

HN6 In military law, at trial and on appeal, the defense has the initial burden of producing sufficient evidence to raise unlawful command influence. The burden of proof is low, but more than mere allegation or speculation. The quantum of evidence required to raise unlawful command influence is "some evidence." At trial, an accused must show 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. 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. More Like This Headnote

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Military & Veterans Law > Military Justice > Sentencing > Impeachment & Reconsideration

HN7 The United States Court of Criminal Appeals for the Armed Forces has long held that the use of command meetings to purposefully influence the members in determining a court-martial sentence constitutes unlawful command influence in violation of Unif. Code Mil. Justice art. 37, 10 U.S.C.S. § 837. Regardless of a commander's intent, the mere "confluence" of the timing of such meetings with members during ongoing courts-martials and their subject matter dealing with court-martial sentences can require a sentence rehearing. More Like This Headnote

Military & Veterans Law > Military Justice > Sentencing > Impeachment & Reconsideration

HN8 See Unif. Code Mil. Justice art. 37, 10 U.S.C.S. § 837.

Military & Veterans Law > Military Justice > Sentencing > Impeachment & Reconsideration
Evidence > Procedural Considerations > Burdens of Proof

HN9 In military law, where an appellant has successfully raised the issue of unlawful command influence, it is the government that must rebut the presumption of unlawful command influence: (1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading a judge at a DuBay hearing that the facts do not constitute unlawful command influence; or (3) by persuading the DuBay judge that the unlawful command influence had no prejudicial impact on the court-martial. Whichever tactic the government chooses, the quantum of evidence required is proof beyond a reasonable doubt. More Like This Headnote

Evidence > Witnesses > Judges & Jurors
Military & Veterans Law > Military Justice > Sentencing > Impeachment & Reconsideration

HN10 In military law, when unlawful command influence has been directed at court members, the government's third option under Biagase is limited by Mil. R. Evid. 606(b). This rule prohibits inquiry into two types of matters: (1) any matter or statement occurring during the course of the deliberations; and (2) the effect of anything upon a member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith. The rule has three exceptions to the first prohibition, one of which permits testimony about any matter or statement occurring during the deliberations when there is a question whether there was unlawful command influence. The exceptions, however, do not permit circumvention of the second prohibition (inquiry into the effect on a member). More Like This Headnote

Evidence > Witnesses > Judges & Jurors
Military & Veterans Law > Military Justice > Sentencing > Impeachment & Reconsideration

HN11 In military law, in a claim of undue command influence, Mil. R. Evid. 606(b) permits voir dire of court-martial members regarding what was said during deliberations about a commander's comments, but the members may not be questioned regarding the impact of any member's statements or the commander's comments on any member's mind, emotions, or mental processes. More Like This Headnote

COUNSEL: For Appellant: Major Kyle R. Jacobson (argued); Colonel Beverly B. Knott and Major Terry L. McElyea (on brief); Major Jeffrey A. Vires.

For Appellee: Lieutenant Colonel Lance B. Sigmon (argued); Lieutenant Colonel LeEllen Coacher (on brief); Colonel Anthony P. Datillo.

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JUDGES: CRAWFORD, C.J., delivered the opinion of the Court, in which GIERKE, EFFRON, BAKER, and ERDMANN, JJ., joined.

OPINIONBY: CRAWFORD

OPINION: [*253] Chief Judge CRAWFORD delivered the opinion of the Court.

Pursuant to mixed pleas, Appellant was convicted by a general court-martial of failure to go to his appointed place of duty, **[*254]** unauthorized absence, wrongful use of the drug commonly known as ecstasy, dishonorable failure to pay a just debt, and wrongful use and possession of a false military identification card, in violation of Articles 86, 112a, and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 886, 912a, and 934, respectively. Appellant was sentenced by a panel of officer members to a bad-conduct discharge, confinement for nine months, total forfeitures, **[**2]** and reduction to E-1. The convening authority reduced the forfeitures but otherwise approved this sentence. The Air Force Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion. United States v. Dugan, 2002 CCA LEXIS 69, No. ACM 34477 (A.F. Ct. Crim. App. March 20, 2002).

This Court specified the following issues for review:

I

WHETHER A COURT MEMBER'S ALLEGATIONS REGARDING STATEMENTS MADE BY OTHER COURT MEMBERS DURING SENTENCE DELIBERATION REASONABLY RAISES A QUESTION AS TO "WHETHER EXTRANEOUS PREJUDICIAL INFORMATION WAS IMPROPERLY BROUGHT TO THE ATTENTION OF THE MEMBERS OF THE COURT-MARTIAL, WHETHER ANY OUTSIDE INFLUENCE WAS IMPROPERLY BROUGHT TO BEAR ON ANY MEMBER, OR WHETHER THERE WAS UNLAWFUL COMMAND INFLUENCE." MILITARY RULE OF EVIDENCE 606(b).

II

IF SO, WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY NOT CONDUCTING A POST-TRIAL SESSION UNDER ARTICLE 39(a), UCMJ, 10 U.S.C. § 839(a) (2000), TO INQUIRE INTO THE VALIDITY OF APPELLANT'S SENTENCE IN LIGHT OF THE ALLEGATIONS.

For the reasons that follow, we remand this case for a factfinding hearing pursuant to United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967). **[**3]**

Factual Background

Several weeks before Appellant's court-martial, the convening authority held a Commander's Call, at which many of the convening authority's subordinate commanders were present. One of the things the convening authority spoke about at that meeting was military justice, and exactly what he said became a topic of voir dire at Appellant's court-martial.

During group voir dire of the nine original court members, the military judge asked: "Does any member, having read these Charges and Specifications, believe that you would be

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compelled to vote for any particular punishment, solely because of the nature of these offenses?" All the members responded in the negative. The military judge then further asked: "Can each of you be fair, impartial, [and] open-minded in your consideration of an appropriate sentence?" All the members responded in the affirmative. Trial defense counsel also asked the members: "Do any of you feel that such an offense, using ecstasy, would require a specific punishment?" Again, they all responded in the negative.

Thereafter, trial defense counsel asked them: "Was anyone - did anyone here attend [the convening authority's] Commander's Call **[**4]** several weeks ago?" In answer, four members stated they attended the meeting and five stated they did not. The four who attended were Colonel (Col) Berry, Lieutenant Colonel (LtCol) Spence, LtCol Freeman, and Major (Maj) Robertson. Following up on these responses, trial defense counsel questioned Col Berry and LtCol Spence individually about the Commander's Call. LtCol Freeman and Maj Robertson were not questioned individually about this subject.

As to Col Berry, trial defense counsel asked: "The Commander's Call that you went to . . . do you remember [the convening authority] mentioning anything about drug use on base?" Col Berry answered: "Yes, **[*255]** he was very emphatic about - and I don't think he used these words - but, essentially, that drug use was inconsistent with military service." As to LtCol Spence, trial defense counsel asked: "[The] Commander's Call that you went to a couple of weeks ago. Do you remember if he said anything about drug use?" LtCol Spence answered: "'It seems like it's prevalent here on the Gulf Coast.' I'm going to assume that he did the normal commander thing and then said, 'It's not compatible with military service.'"

In response to further questioning **[**5]** by trial defense counsel, Col Berry and LtCol Spence each indicated that no specific reference was made at the Commander's Call to Appellant or his impending court-martial.

At the conclusion of individual voir dire, three court members were challenged off the panel, including Col Berry. This left six court members to hear the contested portion of the case and then to adjudge an appropriate sentence. Of those six, three attended the Commander's Call, including LtCol Spence, who served as the president of the court-martial panel. The other three panel members did not attend the meeting, and a post-trial letter written by one of them - Second Lieutenant (2Lt) Greer - lies at the heart of this appeal. n1

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 The letter was neither signed nor sworn to by 2Lt Greer. Nonetheless, during oral argument, the Government agreed it could be treated as such.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

After appellant's court-martial, 2Lt Greer, the junior member of the court-martial panel, provided trial defense counsel a letter for submission to the convening authority **[**6]** as part of Appellant's request for clemency. n2 The letter described four concerns 2Lt Greer had regarding the panel members' sentencing deliberations. First, she worried that "everyone did not agree that [Appellant's mental illness] should be considered as a mitigating factor." n3 Second, she believed that because one member stated Appellant would be enrolled in a substance abuse program if he was further confined, n4 the other members "took it as fact and used it in their decision making process." Third, she noted that "a couple of panel members expressed the notion that a Bad Conduct Discharge was a 'given' for a person with these charges[.]"

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

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n2 See Rules for Courts-Martial 1105, 1107 (convening authority must consider clemency matters submitted by accused before taking final action on sentence).

n3 A defense expert testified that Appellant suffered from post-traumatic stress disorder as a result of a brutal assault he experienced, and that he could not be effectively treated while in confinement.

n4 Appellant served 150 days of pretrial confinement before his court-martial commenced.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**7]**

Finally, 2Lt Greer found "most disconcerting . . . the mention of a recent Commander's Call in which [the convening authority] was said to have discussed the increasing problem of Ecstacy use[.]" In that regard, she wrote:

> [A] panel member reminded us that our sentence would be reviewed by the convening authority and we needed to make sure our sentence was sending a consistent message. Another member pointed out that we needed to make sure it didn't look like we took the charges too lightly because those reviewing our sentence wouldn't necessarily be aware of the mitigating factors. He or she said it was especially important because our names would be identified as panel members.

Procedural Background

Having received this letter, trial defense counsel requested that the military judge convene a post-trial session pursuant to Article 39(a) so the defense could question the members about these matters. The military judge denied the request, however, and ruled as follows:

> That some members may have concluded [the accused's mental illness] deserved less weight than 2Lt Greer does not warrant such an invasion into their deliberative process. Also, that **[**8]** some member(s) might think that lengthier confinement might provide the accused with more treatment options is again a deliberative process this court does not feel appropriate to invade. Similarly, after having heard all of the **[*256]** facts in this case, if some members felt a bad conduct discharge was a "given" in this case, that does not impeach their responses during voir dire that they were not predisposed to giving such a sentence. . . .
>
> . . . There is no evidence that anyone within the panel exerted any command influence over any other panel member[,] and any references to [the convening authority's Commander's Call] during the deliberative process did not appear to chill the deliberative process. . . . This court does not find it appropriate to violate the sanctity of the deliberative process based upon the statement provided by 2Lt Greer.

At the Court of Criminal Appeals, Appellant "conceded that most of the 'areas of concern' in the [letter] do not call into question the validity of his sentence." Dugan, 2002 CCA LEXIS 69, *7, No. ACM 34477. However, he asserted that the letter "raises the issue of unlawful command influence and that the [military] judge erred by failing **[**9]** to convene a post-trial hearing." 2002 CCA LEXIS 69 at *5. He therefore requested a DuBay hearing on the matter to determine the validity of the sentence. The Court of Criminal Appeals denied that request, concluding there was "no evidence of command influence." 2002 CCA LEXIS 69 at *12. In doing so, that court stated:

> The convening authority repeated what everyone in the Air Force has heard many times before, that drug use is incompatible with military service. The issue before us is whether there is any evidence that the convening authority's purpose in repeating this often used phrase at a command meeting was to influence the court members.
>
> . . . The convening authority informed the attendees that drug use was prevalent on the gulf coast of Florida, and that it was incompatible with military service. Neither of these assertions is novel or shocking, and common sense tells us that they were not intended to influence the outcome of any court-martial.
>
> We also find that the alleged comments that the convening authority would know their names and review the sentence, and that the sentence should not appear to be too lenient, do not support the Appellant's claim of unlawful command influence. **[**10]** Rather, they reflect the reality of the military justice system . . . . Court members know the convening authority selects them to serve on the court-martial and reviews the sentence.
>
> . . . The convening authority's exercise of his statutory responsibility and the members' awareness of that role, without more, does not amount to unlawful command influence because no policy or preference can be imputed to the commander for doing what he is required to do.

2002 CCA LEXIS 69 at *11-12 (citations omitted).

Discussion

1. Introduction

HN1"Long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." Tanner v. United States, 483 U.S. 107, 127, 97 L. Ed. 2d 90, 107 S. Ct. 2739 (1987). As a result, "deliberations of [court-martial] members ordinarily are not subject to disclosure." Rule for Courts-Martial [hereinafter R.C.M.] 923 discussion. "The purpose of this rule is to protect freedom of deliberation, protect the stability and finality of verdicts, and protect court members from annoyance and embarrassment." United States v. Loving, 41 M.J. 213, 236 (C.A.A.F. 1994) (internal quotations omitted).

Like its counterpart in **[**11]** the federal civilian system, Military Rule of Evidence 606(b) [hereinafter M.R.E.] implements this rule by stating:

> *HN2*
>
> Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the

> deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question [1] whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, [2] **[*257]** whether any outside influence was improperly brought to bear upon any member, or [3] whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.

See also Fed. R. Evid. 606(b)(identical to M.R.E. 606(b) other than reference to military issue of unlawful command influence); **[**12]** R.C.M. 923, 1008 (standard for impeachment of findings and sentence).

Thus, HN3 under M.R.E. 606(b), there are three circumstances that justify piercing the otherwise inviolate deliberative process to impeach a verdict or sentence: "(1) when extraneous information has been improperly brought to the attention of the court members; (2) when outside influence has been brought to bear on a member; and (3) when unlawful command influence has occurred." United States v. Accordino, 20 M.J. 102, 104 (C.M.A. 1985). Appellant's case involves the first and third of these categories.

2. Extraneous Information

The first two concerns 2Lt Greer expressed in her letter were: (1) other court members did not believe, as she did, that Appellant's mental condition was a mitigating factor to consider when determining an appropriate sentence, and (2) other court members may have been influenced by one member's statement that Appellant would be enrolled in a substance abuse program if he was sentenced to confinement. As to the first of these concerns, we agree with the military judge that the members were free to assign to Appellant's mental condition whatever weight they chose, including **[**13]** no weight at all. Such a decision "raises [nothing] other than HN4 internal matters regarding the deliberations of the members of the court-martial on sentence" and, therefore, cannot be inquired into post-trial. United States v. Straight, 42 M.J. 244, 250 (C.A.A.F. 1995); see M.R.E. 606(b).

Regarding the possibility that one of the members informed the others that Appellant would be enrolled in a substance abuse program if sentenced to confinement, appellate defense counsel argues this was "extraneous prejudicial information" within the meaning of M.R.E. 606(b) because "if relied upon," the members "would increase the term of confinement they would otherwise impose in order to 'help' Appellant[.]" This, counsel argues, calls into question the validity of Appellant's sentence and justifies a rehearing. We disagree.

In Straight, we stated:

> HN5 Evidence of information acquired by a court member during deliberations from a third party or from outside reference materials may be extraneous prejudicial information which is admissible under [M.R.E.] 606(b) to impeach the findings or sentence. [However], the general and common knowledge a court member brings **[**14]** to deliberations is an intrinsic part of the deliberative process, and evidence about that knowledge is not competent evidence to impeach the members' findings or sentence.

42 M.J. at 250.

Here, even if one member did tell the others that Appellant would receive substance abuse counseling if sentenced to confinement, and even if the others did factor that into their sentence determination, it would not involve extraneous prejudicial information. To the contrary, it "would fall squarely within the deliberative process which is protected by [M.R.E.] 606(b)." United States v. Combs, 41 M.J. 400, 401 (C.A.A.F. 1995)(court member's statement that sentence would have been less if appellant had cooperated with police was not competent evidence to impeach sentence). Thus, it cannot be considered by this or any other court as impeaching the validity of Appellant's sentence. See McDowell v. Calderon, 107 F.3d 1351, 1366-67 (9th Cir. 1997)(juror's statement to other jurors about parole consequences of sentence not admissible under Fed. R. Evid. 606(b)); Silagy v. Peters, 905 F.2d 986, 1008-09 (7th Cir. 1990)(juror's statements **[**15]** to other jurors about impact of death versus life sentence on actual time served not admissible under Fed. R. Evid. 606 (b)); United States v. Motsinger, 34 M.J. 255, 257 (C.M.A. 1992)(letter from court-martial **[*258]** president concerning reasons for imposing bad-conduct discharge "may not be considered").

3. Unlawful Command Influence

The third and fourth concerns expressed by 2Lt Greer in her letter were: (1) some members stated a bad-conduct discharge was a "given" in this case, and (2) some members made statements suggesting they were influenced by the message put out by the convening authority at his Commander's Call. As to these concerns, we conclude they make a DuBay hearing necessary to determine whether unlawful command influence existed during the sentencing phase of Appellant's court-martial. Under the circumstances of this case, such statements fall squarely within the "unlawful command influence" exception of M.R.E. 606(b) and are not protected from disclosure.

We begin by noting that to the extent the military judge and the Court of Criminal Appeals concluded Appellant did not meet his initial burden of raising the issue of unlawful command influence, **[**16]** they erred. HN6 At trial and on appeal, "the defense has the initial burden of producing sufficient evidence to raise unlawful command influence." United States v. Ayala, 43 M.J. 296, 299 (C.A.A.F. 1995). "The burden of proof is low, but more than mere allegation or speculation. The quantum of evidence required to raise unlawful command influence is 'some evidence.'" United States v. Stoneman, 57 M.J. 35, 41 (C.A.A.F. 2002) (quoting United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999)).

"At trial, the accused must show 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." Biagase, 50 M.J. at 150. 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." Id. (citing United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994)). The defense has met its burden in this **[**17]** appeal.

HN7 "We have long held that the use of command meetings to purposefully influence the members in determining a court-martial sentence" constitutes unlawful command influence in violation of Article 37, UCMJ, 10 U.S.C. § 837 (2000). n5 United States v. Baldwin, 54 M.J. 308, 310 (C.A.A.F. 2001). We also have held that regardless of a commander's intent, "the mere 'confluence' of the timing of such meetings with members during ongoing courts-martials and their subject matter dealing with court-martial sentences can require a sentence rehearing." Id. Thus, in United States v. Brice, 19 M.J. 170 (C.M.A. 1985), we reversed and

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remanded for a new trial because the members of an ongoing court-martial attended a Commandant's meeting where drug problems in the military were discussed. In doing so, however, we also stated:

> We do not in any way wish to be viewed as condemning the contents of the Commandant's remarks since the drug problem in the military demands command attention; nor do we feel that such remarks necessarily constitute illegal command influence. Instead, we base our decision on the confluence of subject and **[**18]** timing, particularly as they affect the minds - however subtly or imperceptibly - of the triers of fact[.]

Id. at 172 n.3 (citing United States v. Grady, 15 M.J. 275, 276 (C.M.A. 1983)).

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n5 HN8 Article 37, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 837 (2000), states: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof, in reaching the findings or sentence in any case[.]"

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With these principles in mind, we turn now to Appellant's case. At the outset, we note there is nothing in 2Lt Greer's letter to indicate the convening authority had any improper intent when he conducted the Commander's Call, or that he purposefully used that meeting to influence Appellant's or any other court-martial. Nor does the record in its current form contain any other evidence **[*259]** suggesting such an intent or design on the part of the convening authority. **[**19]** As a result, we have no reason presently to question either the lawfulness of the Commander's Call or the correctness of the Court of Criminal Appeals's finding that the content of the Commander's Call was "neither . . . novel or shocking."

We also recognize that Appellant's court-martial took place several weeks after the Commander's Call, in stark contrast to the Baldwin and Brice cases, where court members attended command meetings while they were actually sitting as court-martial panels. We are therefore mindful that to the extent the timing of such meetings -- coupled with their content -- alone gives rise to an inference of unlawful command influence, such an inference is not warranted in appellant's case, given the record as it now stands. n6

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n6 We also recognize that Appellant's case, as in United States v. Brice, 19 M.J. 170 (C.M.A. 1985), involves both a court-martial for drug use and a command meeting dealing with drug use in the military.

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We hold, however, that 2Lt Greer's **[**20]** letter does constitute some evidence that

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unlawful command influence may have taken place during the sentencing phase of Appellant's court-martial. 2Lt Greer's letter is more than mere speculation because it is "detailed" and "based on her own observations." Baldwin, 54 M.J. at 311. Moreover, it contains assertions which, if true, suggest that members of Appellant's court-martial who attended the Commander's Call unfairly based his sentence, at least in part, on a concern they would be viewed unfavorably by the convening authority (their commanding officer) if they did not impose a sentence harsh enough to be "consistent" with the convening authority's "message" at the Commander's Call that drug use is incompatible with military service.

Such a possibility we cannot ignore, for it is exactly this type of command presence in the deliberation room -- whether intended by the command or not -- that chills the members' independent judgment and deprives an accused of his or her constitutional right to a fair and impartial trial. For these reasons, we conclude that a DuBay hearing is necessary to determine whether unlawful command influence existed during the sentencing **[**21]** phase of Appellant's court-martial. Furthermore, HN9 because Appellant has successfully raised the issue of unlawful command influence, it is the Government that must now rebut the presumption of unlawful command influence

> (1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading the [DuBay] judge . . . that the facts do not constitute unlawful command influence; . . . or [3] . . . by persuading the . . . [DuBay judge] that the unlawful command influence had no prejudicial impact on the court-martial.

Biagase, 50 M.J. at 151. "Whichever tactic the Government chooses, the quantum of evidence required is proof beyond a reasonable doubt." Stoneman, 57 M.J. at 41.

Having said that, we note that HN10 when unlawful command influence has been directed at court members, the Government's third option under Biagase is limited by M.R.E. 606(b). This rule prohibits inquiry into two types of matters: (1) "any matter or statement occurring during the course of the deliberations," and (2) "the effect of anything upon [a] member's or any other member's mind or emotions as **[**22]** influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith[.]"

The rule has three exceptions to the first prohibition, one of which permits testimony about "any matter or statement" occurring during the deliberations when there is a "question whether . . . there was unlawful command influence." The exceptions, however, do not permit circumvention of the second prohibition (inquiry into the effect on a member). See Stephen A. Saltzburg, et al., Military Rules of Evidence Manual 722 (4th ed. 1997)("Members may testify "with respect to objective manifestations of impropriety" but may not testify "if the alleged transgression is subjective in nature."); see also 3 Jack B. Weinstein & Margaret A. Berger, **[*260]** Weinstein's Federal Evidence § 606.04[2][c] (2d ed. 1997)(citing examples of subjective and objective evidence of impropriety).

Thus, in this case, HN11 M.R.E. 606(b) permits voir dire of the members regarding what was said during deliberations about the commander's comments, but the members may not be questioned regarding the impact of any member's statements or the commander's **[**23]** comments on any member's mind, emotions, or mental processes.

If the military judge who presides at the DuBay hearing is not satisfied beyond a reasonable

doubt that unlawful command influence did not exist during the sentencing phase of Appellant's court-martial, or that one or more members did not exert the influence of superior rank on a junior member or purport to wear the mantle of the convening authority by conveying to the other members his or her interpretation of the convening authority's message, that judge shall set aside Appellant's sentence and order a sentence rehearing. If, however, the military judge finds there were no infirmities in the sentencing process, he or she shall return the record, along with the military judge's findings of fact and conclusions of law, to the Court of Criminal Appeals for further review under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2000).

Finally, in conducting the DuBay proceeding, the military judge shall not voir dire any member as to "the effect of anything upon [a] member's . . . mind or emotions as influencing [a] member to assent to or dissent from the findings or sentence or . . . [a] member's **[**24]** mental process in connection therewith." M.R.E. 606(b).

Decision

The decision of the United States Air Force Court of Criminal Appeals is affirmed as to findings but set aside as to sentence. The record of trial is returned to the Judge Advocate General of the Air Force for submission to a convening authority for a hearing on Appellant's claim of unlawful command influence. If a hearing is impracticable, the convening authority may set aside the sentence and order a sentence rehearing. If a hearing is conducted, the military judge shall make findings of fact and conclusions of law and then shall either order a sentence rehearing or return the record of trial to the Court of Criminal Appeals for further review consistent with this opinion.

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