

UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

UNITED STATES)	GENERAL COURT-MARTIAL
)	
v.)	DEFENSE MOTION
)	TO DISMISS
DOUGLAS WACKER)	(Unlawful Command Influence/Improper
CAPTAIN)	Article 32 Hearing)
U.S. MARINE CORPS)	
)	
)	16 October 2009

1. Nature of Motion. The defense hereby moves this court, pursuant to Rule for Court-martial 907, Article 37, UCMJ, and the 5th and 6th Amendments to the U.S. Constitution for dismissal of all charges and specifications with prejudice due to unlawful command influence.

2. Summary of Facts.

A. The charges in this case arose as a result of a trip taken by Capt Wacker and two of his accusers as well as several other people during their spring break from classes at the University of San Diego School of Law (USD) to New Orleans, Louisiana in April of 2007. Capt Wacker and over 20 other travelers were law students at USD. On April 3, 2007, following a night of drinking and partying, Capt Wacker and two of the women in the group, Ms. Jessica Brooder and Ms. Elizabeth Easley decided to engage in sexual activity. They returned to the hotel, rented a room and together went to the room. Shortly after entering the room, but after having undressed herself, Ms. Easley decided that she did not want to engage in a sexual relationship, got dressed, and departed. Ms. Brooder, on her own volition, remained. Several days later the two women alleged that they were forced to engage in the complained of conduct.

NCIS statement of Ms. Easley, NCIS statement of Ms. Brooder

B. USD undertook an investigation and convened an administrative board, consisting of an assistant dean as supervisor and a panel of an administrator, a faculty member, and a student, to look into the matter and provide due process to all parties. After receiving the testimony of the complainants and Capt Wacker, the disciplinary board determined by a preponderance of the evidence that there was no misconduct on the part of Capt Wacker. After having reported that they had already gone to civilian and military authorities without consequence, the two women, dissatisfied with the outcome, filed a police report with the New Orleans Police Department (NOPD). An arrest warrant issued in late 2007. Capt Wacker had no knowledge of the arrest warrant until he was informed by his command that an NCIS agent (not Special Agent (SA) Burge) had found an existing warrant in the State of Louisiana for the accused in January 2008. Capt Wacker reported to the command (then consisting of Capt Nathan Woellhof, HQ Co Cmdr, and Col Helfrich, H&S Bn Cmdr) and timely turned himself into authorities in Louisiana. Capt Wacker was released on bond and returned to San Diego, California. Capt Wacker informed his command of his actions and that he would keep the command apprised of any and all developments in the case. Following up on the complaints, the New Orleans District Attorney investigated the matter, found insufficient evidence and a lack of credibility of the witnesses to support the allegations, refused the charges, and upon joint motion dismissed the case in July 2008. Upon a motion to expunge, the judge expunged. *Court records and order, Parish of New Orleans v. Douglas S. Wacker.*

C. In either late 2007 or early 2008, NCIS Special Agent (SA) John Burge was assigned to investigate the case. He received substantial assistance in his investigation from Col Stephanie Smith the, then, Staff Judge Advocate (SJA) to the Commanding General (CG), BGen

Angela Salinas, of Marine Corps Recruit Depot, San Diego/Western Recruiting Region (MCRD). Col Smith relinquished her billet as the SJA of MCRD in June of 2009. *Col Smith, SA Burge.*

D. Col Smith is currently the Commanding Officer of the Headquarters and Services Battalion (H&S Bn), MCRD, and commander of Capt Wacker. While serving as the SJA she assisted in the investigation and received reports from SA Burge in addition to acting in her primary function as legal advisor to the Commanding General. She also communicated with the SJA to the Commandant of the Marine Corps (SJA to CMC) opinions as to Capt Wacker's guilt and advised that he should be dropped from the excess leave law program. *BGen Walker. Col Smith. Dean Cole. SJA to CMC notice of consideration of disenrollment and disenrollment letter.*

D. On several occasions, while serving as the SJA to the GCMCA, Col Smith participated extensively in the investigation. One example of her participation is when she invited Capt Wacker's close friend and fellow excess leave law program student, Capt Blosser, to lunch under pretenses that Col Smith sought to give him guidance regarding a career as a judge advocate (Capt Wacker, a member of her command at MCRD, was never invited). She then brought Capt Blosser to a conference room where NCIS Agent John Burges waited to interview him about Capt Wacker and attempted to coerce him to cooperate by appealing to his sense of duty and loyalty to the Marine Corps. Capt Blosser had already declined to be interviewed by NCIS regarding Capt Wacker. Capt Blosser did not belong to any of the commands at MCRD (he was attached to the USD ROTC Battalion) and was not under the command of the SJA or any other unit based at MCRD. *Capt Christopher Blosser. NCIS Agent John SA Burge.*

E. In a text message to Capt Wacker dated October 15, 2008, Capt Blosser wrote "I'm a little upset that the Colonel and Maj Jackson set me up like that today. They could have been up front w/ me and I would have still given a statement." *Capt Christopher Blosser.*

F. Col Smith, while working for and advising the GCMCA and during a period when she provided advice about this case to the commander as the SJA, contacted the Dean of the USD School of Law and convinced him to bar Capt Wacker from the university 22 months after the incident and 18 months after the school had conducted its own investigation and found no misconduct. *Dean Cole, Col Smith.*

G. On January 9, 2009, Capt Wacker's Executive Officer, LtCol Bond (a person listed as a panel member on the convening order in this case), gave Capt Wacker an MPO that LtCol Bond explained to Capt Wacker prohibits any attorney representing Capt Wacker from contacting law school classmates (witnesses in this present case) without first contacting the command to ask for permission:

SB Capt. Wacker: "Can my lawyer talk with my classmates?"

LtCol Bond: "No, not without your lawyer first contacting the command to ask permission." SB

BC

Despite LtCol Bond's sworn statement, at the time the MPO was issued, Capt Wacker was not represented by any counsel, military or civilian.

H. On January 26, 2009, Col Helfrich, commander of Headquarters and Service Battalion, MCRD, San Diego, issued a modification to the MPO issued by LtCol Bond, which prohibited 'any and all contact' by Capt Wacker with any person listed on the MPO. Col Helfrich further stated that Capt Wacker could not have his attorney contact any of the persons named in the MPO without permission from the command. *Col Helfrich. Maj Budomo.*

I. In February 2009, Capt Wacker requested mast to the Commanding General of MCRD, San Diego, BGen Angela Salinas, requesting a modification of the MPO in regard to four individuals listed, none of whom were among the complainants or percipient witnesses in the case. The request mast was summarily denied by Col Helfrich on the grounds that the UCMJ provided sufficient protections for Capt Wacker. Capt Wacker was never provided the opportunity to speak with the CG or given a written response as to Capt Wacker's request. *Col Helfrich. BGen Salinas.*

J. In March 2008, Capt Wacker received a FedEx package from Capt Jeff Liebenguth, which included a command request from Capt Wacker's command to have Capt Wacker disenrolled from the excess leave law program. In April 2009, Capt Wacker responded to the notice of disenrollment through counsel to the SJA to CMC, BGen Walker. Despite Capt Wacker's response and supporting documents, BGen Walker determined that based on the fact that the MPO was "clear and unambiguous" (the Article 32 Investigating Officer later found discrepancies between the original MPO and follow-on orders given by LtCol Bond and Col Helfrich) that Capt Wacker had violated the MPO and therefore would be disenrolled immediately from the excess leave law program and return to active duty pending further military proceedings. *Col Helfrich. Col Huenefeld. BGen Walker.*

K. In April 2009, the command preferred charges against Capt Wacker. *Preferral of Charges in the case of U.S. v. Wacker. Additional Charges in the case of U.S. v. Wacker.*

L. In April 2009, Capt Wacker was informed by USD Law School Assistant Dean for Student Affairs, Carrie Wilson, that Capt Wacker, based on the university's receipt of the charge sheet, would be "suspended" as soon as he completed his final exams in the spring semester of his third year of law school. The school would not grade Capt Wacker's final exams, and

therefore not confer the degree of Juris Doctor upon Capt Wacker, thus preventing Capt Wacker from timely taking the bar exam after graduation. The school reserved the right to hold its own administrative hearing after all military proceedings were complete. *NCIS Agent Burge, Col Smith. Col Helfrich. Asst. Dean Wilson. Dean Cole.*

M. On June 2, 2009, an Article 32 Hearing was held at MCRD, San Diego. Maj Ted Bonanno was appointed the Investigating Officer (IO). Only three of over twenty witnesses that were requested attended. Those that did attend were active duty Marines assigned to the Depot and NCIS SA Burge. Their testimony resulted in the orders violations charges being dropped. The Article 32 Hearing was recorded in this case. According to trial counsel the recording has been damaged or lost. Although at many points during the proceeding, which lasted over 8 hours, references to the recording of the proceeding had been announced by the IO and trial counsel, no recording now exists of the testimony given at the Article 32 Hearing. There is no record of the Article 32 Hearing except the IO's report. Witnesses were present in the gallery, including a reporter from the Marine Corps Times (although no subsequent media story was released at that time, or at any time before the press release by PAO). During the morning portion of the hearing, NCIS SA Burge testified to the fact that he had advised each of the civilian witnesses that "the Article 32 Hearing was adversarial in nature and that if he didn't have to go, he wouldn't." Not one of the civilian witnesses appeared to testify or agreed to testify via telephone, particularly the accusers. Instead of the opportunity to hear testimony of the witnesses, and to observe the witnesses under cross-examination, the IO was only provided sworn statements by the trial counsel, over objections by the defense. *Maj Ted Bonanno. LtCol Sean Sullivan. Capt Zenon Keske. Capt Brooks Braden. LtCol Patricio Tafoya. Maj Christopher Shaw Wk:(808) 477-8502. LaNita Wacker. Michael Story (619) 942-0203.*

N. On August 14, 2009, MCRD PAO released a press release concerning Capt Wacker's case to the Los Angeles Times, the San Diego Union Tribune, the Marine Corps Times, and several other television and print media organizations about Capt Wacker's case. *Maj Logan Affidavit.*

O. On August 18, 2009, MCRD PAO released a media release to all or almost all of MCRD's officers and SNCO's about Capt Wacker's case. *Daily Media Release Email dated August 18, 2009.* Mr. Steve Liewer, a reporter with the San Diego Union Tribune, called the Marine Corps press release unprecedented and said "we've never received a press release for this type of case. Press releases normally come for high profile cases like war crime cases." It was subsequently released via the two major newswires, Associate Press (AP) and United Press International (UPI), and was printed in such newspapers as the San Diego Union Tribune, Los Angeles Times, Seattle Times, Seattle Post-Intelligencer, Tacoma News Tribune, San Jose Mercury-News, New York Times, Washington Post, Washington Times, Baltimore Sun, and Boston Globe, to name a few, as well as reported on several local television networks, one of whom sent a reporter to harass Capt Wacker and his neighbors at his residence. A using the words "Capt Wacker" and "rape" resulted in 7920 hits. *August 18, MCRD daily media release; Mr. Steve Liewer; screen shot of Google search "Capt Wacker and rape."*

P. On August 20, 2009, MCRD PAO released another media release to all or almost all MCRD officers and SNCO's about Capt Wacker's case. *Daily Media Release Email dated August 20, 2009.*

Q. On or near those dates, BGen Salinas conducted two or three town hall meetings for all hands at MCRD where she said she felt that the biggest threat facing the Marine Corps was sexual assault. *BGen Salinas.*

R. Prior to these media releases, most people on MCRD were unaware that Capt Wacker was being accused of criminal misconduct. After those emails, every officer and SNCO stationed at MCRD was aware of Capt Wacker's case. *GySgt Schmidt Affidavit.*

S. On September 24, 2009, panel member LtCol Bond, also the executive officer of H&S Bn (Capt Wacker's command) wrote an email to the Chief of Staff (CoS) (Col Huenefeld) for BGen Bailey, the GCMCA, as well as two named panel members from the convening order (Col Conlin and Maj Blalock) stating as follows:

From: Bond LtCol Gregory F ✓
Sent: Thursday, September 24, 2009 5:36 PM
To: Conlin Col Christopher C ✓
Cc: Trapp LtCol Thad R. Huenefeld Col Carl E. Myers CIV Clifford C III Blalock Major Christopher G ✓
Subject: RE: CAPT WACKER

Sir:
Col Smith can't say if because she is the "impartial" CO. If the XO I don't
Wacker as a psychopath who, if / when he is court martial goes to prison
and returns will be the type of individual who would be a Lone Shooter and
get back at everyone who he thinks "wronged" him. Just like when he raped
the 3 law students who refused to go out on a date with him. You did not
lead the NCIS investigation. I did. You did not interview or speak with the
NCIS investigators who sent lab results to Quantico [FBI] because of the
nature of the drugs he used to "drug" his victims before he raped them. If
Wacker is acquitted, it will be because of a slick lawyer or NCIS procedural
problems.
He is a cadist. I am sure the Colonel would not want him to watch your side.
If we had a "suspected" DI Child Molester, and we gave him to MWS to go
work while his trial was going on would it be right to put him in charge of
the day care center. I think not.
Just wanted to clarify why I think he is a criminal and we should not be
giving him orders to A&S Plans.
I will come to the G-3 and work on the AAR in the time period if that is what
you want to remove Wacker from this position.
The next time we send a "body" to the G-3 we will stipulate and make
recommendations/requirements before he is billeted.

✓
✓
✓

T. On October 1, 2009, Col Smith sent out an email in response to LtCol Bond's email:

-----Original Message-----

From: Smith Col Stephanie C

Sent: Thursday, October 01, 2009 14:45

To: Trapp LtCol Thad R; Blalock Major Christopher G; Conlin Col Christopher C; Myers CIV Clifford O III

Cc: Richardson Col Michael B

Subject: Important message

Gentlemen:

It just came to my attention that my XO spoke in an e-mail to all of you harshly regarding Captain Wacker and his pending legal action. To be clear, I was unaware of this e-mail until now and do not in any manner condone or ascribe to his comments. I am committed to ensuring that Captain Wacker gets a fair trial. Captain Wacker is innocent until proven guilty by a competent court of law. As some of you may know I made the decision to move Captain Wacker from the G3 and reassign him to duties within the battalion. I did this because I was concerned that the decision to task him as the "lead" G3 representative for the multi-agency exercise Aztec Fury that had considerable media coverage exposed the Depot to unnecessary risk. If Captain Wacker as the lead representative for the Depot were to speak to the media and the media made the connection that he is pending trial for alleged sexual misconduct, this had the potential to reap bad press for the Depot. I also was concerned that based solely on the seriousness of the charges to which he is accused, that Captain Wacker should not be privy to the specifics of the force protection plan for the Depot and/or the local authorities response plan in the event of an emergency aboard the Depot. This decision was mine and was made to ensure good order and discipline within my command and had nothing to do with Captain Wacker personally. I do not want my decision to move Captain Wacker to impact your decision to participate in any manner you deem appropriate regarding Captain Wacker's upcoming trial. In fact, I expect you to participate without any fear of repercussion or reprisal in any manner you deem appropriate. Once again, I do not agree with the XO's comments and want to make it completely clear that those comments were improper. That e-mail should not in any way prevent you from fulfilling your right and obligation to participate in any manner you deem appropriate for Captain Wacker's court proceedings. Lastly, please do not forward LtCol Bond's unprofessional e-mail to anyone else. Doing so will further jeopardize the potential jury pool for Captain Wacker and jeopardize his right and entitlement to a fair trial.

V/R

Col Smith

U. Despite Col Smith's email dated October 1, 2009, Maj Blalock will testify that this contradicts what Col Smith said to him. *Maj Blalock.*

V. From April 2009 to September 2009, Capt Wacker was assigned to work in the AC/S G-3 Mission Assurance Branch section at MCRD. *Maj Blalock. LtCol Trapp*

W. Prior to LtCol Bond's email dated September 24, 2009, LtCol Trapp, Col Conlin, and Maj Blalock could have been requested as good military character witnesses for Capt Wacker.

Some and probably all of these witnesses have either developed reservations about Capt Wacker or have been subtly affected after learning the view of the unit's second in command.

X. As the MCRD SJA and during the time period Capt Wacker's case was investigated by trial counsel, Col Smith became a de facto trial counsel by actively involving herself in the prosecution of this case. She had military justice meetings in the law center with the trial counsel that lasted, in some cases, over three hours. During these meetings, she would discuss tactics and witness testimony and give direction for trial counsel to take or refrain from certain actions. *Col Smith. Capt Keske. Maj Bueno.*

Y. As SJA, Col Smith often spoke with witnesses, as she did in Capt Wacker's case. *Capt Keske. Maj Bueno. Affidavit of Capt Ahn. Capt Torsella.*

Z. On other occasions, as SJA, Col Smith advised her trial counsel to "flip witnesses" when their testimony was not favorable to the Government's cases. *Affidavit of Capt Ahn.*

AA. While serving as the SJA, she would attend courts-martial and instruct trial counsel when to object and what evidence to admit. *Capt Keske. Maj Bueno. Capt Ahn.*

BB. Maj Blalock will testify that Col Smith told him one week after Capt Wacker arrived in G-3 (in his capacity as Capt Wacker's supervising officer) that because Captain Wacker is a "narcissistic criminal" we need to ensure that he is not given anything of responsibility at G-3 because it could help his case. Ms. Desiree Bobie heard half of this conversation (i.e. Wacker is narcissistic). *Maj Blalock. Ms. Bobie.*

CC. While in G-3, Capt Wacker assumed responsibilities as the Assistant Operations Officer for the Mission Assurance Branch. His billet included the lead planning on Mission Assurance exercises. One such exercise, which involved nearly all subordinate commands aboard MCRD as well as several off-base agencies, titled: Exercise AZTEC FURY 2009, took

place on September 24, 2009, and involved nearly 500 participants. LtCol Bond's Email regarding Col Smith's decision to transfer Capt Wacker back to the H&S Bn command post occurred within an hour of the end of the successfully executed exercise. *Col Conlin. LtCol Trapp.*

DD. MCRD's AC/S G-3 Mission Assurance Officer, LtCol Trapp, was told by Col Smith a week before September 24, 2009 (the day of LtCol Bond's Email), words that mirrored those communicated in the September 24, 2009 email from LtCol Bond. Such statements are in direct contradiction to her October 1, 2009, "cleansing" email. *LtCol Trapp. Maj Blalock.*

EE. Maj Blalock will testify that prior to LtCol Bond's email, he had an open mind about the guilt or innocence of Capt Wacker, but following the email and other communications by Capt Wacker's command he is unsure, specifically with regards to the Article 133 conduct alleged.

FF. Shortly after assuming command of H&S Bn, Col Smith had Capt Wacker moved from his billet in the G-3 to a billet as the H&S Bn S-3A, a position that did not exist prior to Capt Wacker's move, and one that is immediately subordinate to her, with LtCol Bond as his Reviewing Officer. *Col Smith.*

GG. Upon assuming command of MCRD, BGen Bailey held a series of sexual assault training sessions on September 22, 2009. In his remarks, BGen Bailey mentioned that there had been six sexual assaults by Marines at MCRD, but that "even one is too many." The sexual assault training was facilitated by a guest speaker who had presented a seminar at a conference hosted by the Commandant of the Marine Corps and attended by all flag officers in July or August 2009. The guest speaker was Jackson Katz (www.jacksonkatz.com; www.endabuse.org). During Mr. Katz's presentation on September 22, 2009, he stated that rape is not a "women's

issue” but rather is a “man’s responsibility” to avoid. During the training sessions, attended by all Marines, SNCOs, and Officers aboard MCRD, the SJA, Col Richardson made a comment to the effect that as leaders we need to focus on preventing men from “scoring” and that sexual activity when any alcohol is involved is to be avoided by all Marines. In regard to the Mr. Katz’s comments, SSgt Vecchia, a female Marine, asked a question to the effect of is it not the responsibility of both sexes to prevent situations of sexual assault? To which, Mr. Katz replied, “It’s not equal responsibility, there is a greater male responsibility.” *BGen Bailey. Mr. Katz. Col Richardson. SSgt Vecchia.*

3. Discussion.

A. WHETHER A CONFLICT RESULTING IN UCI EXISTS WHEN THE SJA WHO PROVIDES ADVICE TO THE CA PARTICIPATES IN THE INVESTIGATION BY TRICKING A WITNESS INTO BEING INTERVIEWED BY NCIS, EFFECTS THE DISENROLLMENT OF CAPT WACKER FROM THE LAW EDUCATION PROGRAM AND COMMUNICATES TO WITNESSES HER BELIEF IN THE GUILT OF CAPT WACKER?

Yes. A conflict resulting in UCI arose when the SJA 1) contacted witnesses before trial, 2) communicated her belief in Capt Wacker’s guilt to potential members and witnesses and actively worked to have Capt Wacker dropped from the law education program, and 3) prohibited defense counsel from contacting witnesses without first coordinating with the command. *See United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986). Article 37, UCMJ, states that no convening authority or commanding officer “may attempt to coerce, or by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case” The prohibition contained in Article 37 is also known as the

prohibition against unlawful command influence. See *United States v. Baldwin*, 54 M.J. 308, 310 (C.A.A.F. 2001); *United States v. Stombaugh*, 40 M.J. 208 (C.O.M.A. 1994); *United States v. Levite*, 25 M.J. 334 (C.O.M.A. 1987).

The defense bears the initial burden to raise the issue by a quantum of evidence “the same as that required to submit a factual issue to the trier of fact.” *Baldwin* at 311; see also *United States v. Jameson*, 33 M.J. 669, 672 (N.M.C.M.R. 1991)(quantum of evidence needed is “some evidence sufficient to render reasonable a conclusion in favor of the allegation asserted.”).

The burden then shifts to the government to prove beyond a reasonable doubt that (1) the predicate facts which the allegation of unlawful command influence is based do not exist; or (2) by persuading the military judge that the facts do not constitute unlawful command influence; or (3) if at trial producing evidence proving that the unlawful command influence will not affect the proceedings *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999). If the Government fails to meet its burden, then:

the military judge must find that command influence exists and must take whatever measures are necessary and appropriate to ensure that the findings and sentence, if any, are so far unaffected by any command influence that a reviewing court would find them to be so beyond a reasonable doubt. If and only if the trial judge finds that command influence exists (because the defense successfully raised it, and the Government failed to disprove it by clear and positive evidence) and finds, further, that there is no way to prevent it from adversely affecting the findings or sentence beyond a reasonable doubt should the case be dismissed.

Jameson, 33 M.J. at 672 (quoting *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R. 1990)); see also *Stombaugh*, 40 M.J. at 214; *United States v. Thomas*, 22 M.J. 388 (C.O.M.A. 1986).

“Unlawful command influence is the moral enemy of military justice. If the target of command influence is a court member or the military judge, then it violates the accused’s right to an impartial forum.” *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998). The test for apparent unlawful command influence is “whether a reasonable member of the public, if aware of

all the facts, would have a loss of confidence in the military justice system and believe it to be unfair." *United States v. Allen*, 31 M.J. 572, 590 (N.M.C.M.R. 1990), *affd*, 33 M.J. 209 (C.M.A. 1991).

In this case, the SJA unlawfully influenced the proceeding by participating in the investigation, by assisting the NCIS in investigation and by actively working to persuade at least one witness through deceit and subterfuge to submit to an interview with NCIS. As Col Smith and SA Burge colluded to trick Capt Blosser into an interview for the NCIS investigation, they dissuaded the very people who have raised the allegations that form the central charges in this case from appearing at the Article 32 hearing and testifying.

The depot SJA's communications to the SJA to CMC to have Capt Wacker disenrolled from the Law Education Program along with her communications to the University of San Diego Law School to effectuate his debarment clearly indicate that she formed an opinion as to Capt Wacker's guilt and could no longer act as a neutral legal advisor to the CA. Her actions continued to unlawfully influence this court-martial even after she was relieved of her duties as the SJA when she communicated her belief regarding Capt Wacker's guilt to LtCol Bond and to Maj Blalok, a conversation that was overheard by Ms. Bobie. LtCol Bond then drafted and sent an outrageous email to the Chief of Staff and the G3 as well as other officers. The language in the email clearly suggests that it is a proxy communication from his boss, Col Smith. He states in the email "Col Smith can't say it because she is the impartial C.O." The clear implication is that she has shared her views with him but because of her rank and billet cannot personally publish it to the list. LtCol Bond's email went to some of the most senior officers on the relatively small Marine Corps Recruit Depot, to include the chief of staff to the convening authority. The officers on the list included officers who were good character witnesses for Capt

Wacker. At least one of these witnesses, Maj Blalock, has indicated that he now has reservations. It is unclear how that email has affected the testimony of other witnesses. But even if these witnesses were not influenced by the email. The mere fact that the defense must now offer an explanation to remedy the taint irreparably harms Capt Wacker and denies him a right to a fair trial. Moreover, I, as his defense lawyer, do not feel confident that I can undo the harm resulting from a statement made by the immediate supervisor of Capt Wacker's and the second in command to his commanding officer saying "when he (Wacker)...goes to prison and returns will be the type of individual who would be a lone shooter and get back to everyone who he thinks "wronged" him....If Wacker is acquitted it will be because of a slick lawyer or NCIS procedural problems [sic]. He is a rapist. I am sure the Colonel would not want him to watch your kids." Col Smith undoubtedly agrees with this email. The tone leaves no doubt that she has communicated these views to her X.O. By writing and sending the email, LtCol Bond, communicates his commander's views and intent to the officers in the unit. Particularly troubling is the reference to the slick lawyer. It is offensive, disrespectful, and casts serious doubt on the Marine Corps' ability to give Capt Wacker a fair trial. Neither I nor the detailed counsel in this case had met LtCol Bond nor spoken to him. I did, however, have several communications with Col Smith. I contacted to persuade her reduce the extraordinary number of people listed on the MPO, the majority of whom were of no relevance. I also communicated with her regarding Capt Wacker's disenrollment. Accordingly, any impression LtCol Bond developed of the defense lawyers in this case came from communications between him and Col Smith. If Col Smith harbors the belief that the only way Capt Wacker maybe found innocent is because of the work of a slick lawyer, then how can Capt Wacker have any faith that he will receive a fair trial when this same officer provided advice to the CA who will convene the court-

martial, select members and take post trial action? The conduct of the SJA and the command is an outrageous and abuse of power that is having a chilling effect of the defense' ability to defend Capt Wacker and casts serious doubt on the propriety and fairness of the military justice system.

B. WOULD AN OBJECTIVE MEMBER OF THE PUBLIC WITH KNOWLEDGE OF ALL THE FACTS BELIEVE THAT CAPTAIN WACKER COULD RECEIVE A FAIR TRIAL FREE FROM THE EFFECTS OF UCI EVEN IF THE GOVERNMENT WERE TO SHOW THAT THERE WAS NO ACTUAL UCI OR THAT THE UCI WAS HARMLESS?

No. An objective member of the public with knowledge of all the facts in this case could not be convinced that Capt Wacker could receive a fair trial, regardless of any remedy fashioned by the court except a dismissal with prejudice. Col Smith is a senior officer and served as the SJA to the Commanding General. MCRD is a small base. It is reasonable to assume that officers assigned to the base communicate among one another. And, in fact, there is evidence that they have about this case. The communication clearly indicates that a determination of Capt Wacker's guilt is a foregone conclusion. Accordingly, even if the Government were to make a colorable argument that there was no actual UCI or that it was harmless, it is doubtless that a reasonable member of the public with knowledge of the all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding. To ameliorate the harm beyond a reasonable doubt the government must take actions to show, convincingly, that the disinterested public would believe Capt Wacker would receive a trial free from the effects of unlawful command influence. *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). The *Lewis* court decided that whatever remedies are available would be insufficient because the government's objective of unseating the military judge had been achieved. *Id.* at 416. In this case, the government's objective was to ensure a conviction of Capt Wacker. To that end, the SJA

participated in the investigation, tricked witnesses, attempted to bar defense counsel from contacting witnesses, denied Capt Wacker the right to a fair Article 32 hearing and most outrageously, unfairly communicated with potential witnesses her belief that Capt Wacker is a rapist, psychopath, and potential killer of those who cross him. Accordingly, even if this court were to order a change of venue and a new referral under a different CA, the influence over witnesses cannot be reversed. And even if, *arguendo*, the influence were reversed, the question remains: would a member of the public regain confidence that Capt Wacker would receive a fair trial?

This court may avail itself of several remedies to ameliorate the harm. But where the harm cannot be rendered harmless, dismissal with prejudice, as drastic as it may appear, is the only appropriate remedy. *Id.*

The SJA is a staff officer to, and legal representative for, the convening authority. Col Smith actively participated in the investigation. When she became an assistant to the NCIS agent, an agency relationship formed. Accordingly, when NCIS Agent John Burge told witnesses that "if I were being called to testify at the Article 32 I wouldn't go," he and Col Smith directly or indirectly hindered the Article 32 investigation. Her conduct turned her into an investigator and a prosecutorial arm in the case. She did this while she continued to give advise the convening authority. To add fuel to the unlawful command influence fire, she communicated her biased views to her Executive officer after assuming command of Headquarters and Services Battalion who then communicated those views to some of the most senior officers on the base, including the chief of staff and the G-3. At least two of those officers were good character witnesses in the case.

When Congress acted to eliminate unlawful command influence, it was “not only concerned with eliminating actual unlawful command influence, but also with ‘eliminating even the *appearance* of unlawful command at court-martial’” *United States v. Lewis*, 65 M.J. 405, 415 (2006) (Emphasis added) (Internal quotations omitted). One of the central issues the *Lewis* Court grappled with after unlawful command influence was established is whether the military judge’s actions were sufficient to remedy the harm. The Court considered the Government’s actions in the case in effecting the removal of the military judge and determined that no remedy short, perhaps, of a disciplinary investigation or sanctions against the government could restore the public’s confidence in the military justice system. *See id.*

In this case the government has achieved its objective of influencing the testimony of senior good character witnesses. That taint cannot be undone through a change of venue nor a new convening order. A disinterested member of the public presented with the facts of Col Smith’s participation in the investigation would not believe that Capt Wacker could receive a fair trial. Col Smith is one of the most senior Judge Advocates in the Marine Corps. She communicated her views not only down the chain but up the chain as well. The SJA to CMC believes Capt Wacker is guilty of serious misconduct. At least two other General officers have also been exposed to the taint perpetrated by Col Smith. Assuming that news of Capt Wacker’s charges has been communicated to other General officers is not unreasonable, especially in light of the extraordinary effort made by the PAO office to get the story onto the AP and UPI wires and the Early Bird. To compound the harm, the former SJA, now in the position of Capt Wacker’s commanding officer, continued to exert a devastating and unlawful influence over the proceedings by communicating, through her XO, to witnesses and potential panel members her belief in Capt Wacker’s guilt and that he is a psychopath and rapist. Additionally, the Convening

Authority's town hall meetings wherein she communicated her belief that the greatest challenge to the Marine Corps is sexual assaults and briefs by an expert on sexual assaults that it is the man's responsibility to prevent sexual assaults, further exacerbated the harm done by the SJA. Perhaps the town hall meetings were merely coincidental to the charges in this case; nonetheless, they appear to be a consequence of the charges and have clearly had an impact. The impact from the town hall meetings and the press releases about the case resulted in many if not most of the officers and Staff NCOs on the base learning of the charges in this case and hearing that one of the greatest challenges to the Marine Corps are sexual assaults. It is not the war in Afghanistan or Iraq but sexual assaults. Capt Wacker is facing not one but three sexual assault charges. The implications of the General's message are clear and have the very real consequence of denying Capt Wacker an opportunity to have a fair trial.

C. WHETHER A MEDIA RELEASE BY THE BASE PAO REGARDING THE CASE ALONG WITH AN EMAIL NEWS ROUNDUP TO A BASE LISTSERV WHICH INCLUDED A STORY CARRIED BY A LOCAL PAPER CONSTITUTES UCI?

The pretrial publicity in this case also constitutes UCI. "When those with the mantle of command authority deliberately orchestrate pretrial publicity with the intent to influence the results in a particular case or series of cases, the pretrial publicity itself may constitute unlawful command influence. Even the perception that pretrial publicity has been engineered to achieve a prohibited end - regardless of the intent of those generating the media attention - may lead to the appearance of unlawful command influence." *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003). Capt Wacker's command released details of Capt Wacker's case to all significant local media organizations before his arraignment. Following that, the command engaged in a series of town hall meetings and base wide press releases practically guaranteeing

that every potential member or good military character witness in the case would get the message that supporting Capt Wacker at his court-martial is tantamount to harming the Marine Corps and goes against the intent of the Commander.

The media release alone may arguably be dismissed as not rising to the level of creating UCI. This media release, however, was different. It is not standard practice for the PAO on this base to comment on cases of this sort. Mr. Steve Liewer of the San Diego Union Tribune called it unprecedented. Mr. Rick Rogers, formerly of the San Diego Union Tribune and now a syndicated columnist, said he has never seen a press release on a case of this sort. The press release was followed up with a base wide distribution of the news stories published by the local papers. Neither the defense team nor this court can determine specifically if and how the media releases influenced the court-martial. This court, however, is not required to delve into the specifics of the UCI on the court-martial. The mere appearance of UCI triggers a requirement for the government to prove beyond a reasonable doubt that the UCI will not influence the court-martial. Command influence may assume many forms, may be difficult to uncover, and affects court members in unsuspecting ways. *United States v. Johnson*, 54 M.J. 32, 36 (C.A.A.F. 2000). Accordingly, the government must prove to this court beyond a reasonable doubt that the effects of the UCI will not affect court members. *Biagase* 50 M.J. at 151. Specifically, once the issue of unlawful command influence is raised by the defense, “the Government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings . . .” *Id.*

It is difficult to evince how the press releases and the subsequent distribution of the media release to base email distribution list has affected or will affect this court-martial. At its

least serious it exposed potential members and witnesses to the facts of the case who were then told by their Commander that sexual assaults are a serious challenge in the Marine Corps. At worst, the Command's press releases have influenced or appear intended to influence the proceeding and interfere with Capt Wacker's right to obtain a fair trial. As Justice Ferguson observed in *United States v. Olson*, "the scales always become loaded against justice when lectures attended by court members involve extended discussion of offenses identical or closely related to those for which as accused is shortly to be tried. 11 U.S.C.M.A. 286, 289, 29 C.M.R. 102, 105 (1960). Potential members and witnesses in this court-martial heard that sexual assaults are a serious threat to the Marines Corps from the convening authority. They also heard that it is the man's responsibility to ensure sexual assaults do not happen. The briefs occurred while the base PAO made several press releases naming Capt Wacker as being accused of the rape of three different women. The scales have been decisively loaded against justice.

4. Relief Requested. The defense respectfully requests that all charges in this case be dismissed with prejudice.

5. Evidence and Burden of Proof.

a. The defense requests production of the following witnesses by the Government in support of its motion:

- BGen R.L. Bailey
- BGen Salinas
- BGen Walker by telephone
- Col Stephanie Smith
- Col C.C. Conlin
- Col K.S. Helfrich

- Col C.F. Huenefeld, MCRD
- LtCol Trapp
- LtCol G.F. Bond
- Maj R. Bueno.
- Maj C. Blalock
- Maj Ted Bonanno
- Maj Budomo
- Maj S.E. Jackson
- Maj Christopher B. Logan (MCRD, PAO)
- Maj Christopher Shaw
- Capt Christopher Blosser
- Capt Z. Keske
- Ms. Desiree Bobie (MCRD, G3)
- SA John Burge, NCIS
- Dean Kevin Cole, USD
- Mr. Steve Liewer, San Diego Union Tribune, 619-542-4572
- Mr. Jackson Katz (Defense will agree to stipulate to his testimony)
- Mr. Rick Rogers
- Mr. Michael Story
- SSgt Heather D. Vecchia
- Ms. LaNita Wacker, Seattle, WA
- Assistant Dean Carrie Wilson, USD

b. The following defense exhibits are provided:

- Exhibit 1: Email dated 24 September 2009 by LtCol Bond
- Exhibit 2: Email dated 1 October 2009 by Col Smith
- Exhibit 3: Affidavit of Maj Logan
- Exhibit 4: Affidavit of Maj Blalock
- Exhibit 5: Affidavit of GySgt Schmidtd
- Exhibit 6: Sample of base wide media releases in this case

6. Argument. The defense desires oral argument.

_____/S/_____
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I certify that a copy of this motion was served upon the trial counsel on October 16, 2009.

_____/S/_____
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