

CENTRAL JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES)	
v.)	SPECIAL COURT MARTIAL
MATTHEW V. MCCABE)	MOTION TO DISMISS DUE TO
SO2)	UNLAWFUL COMMAND INFLUENCE
U.S. NAVY)	
)	
)	2 MAY 2010
)	

1. Motion

The accused by and through undersigned counsel moves this honorable court to dismiss with prejudice the charges and specifications referred on October 2, 2009 due to unlawful command influence pursuant to R.C.M. 104 and Article 37, Uniform Code of Military Justice, 10 U.S.C. §837. The factual allegation of the motion is based on evidence of influence over the convening authority by a superior commander that has usurped the independent discretion of the CA.

2. Summary of Facts

- a. On September 1, 2009, the accused along with other members of his SEAL team accompanied by Iraqi SWAT, conducted a raid in the vicinity of Fallujah, Iraq, and captured and detained Ahmad Hashim Abd Al-Isawi.
- b. Al-Isawi was physically captured by SO2 McCabe in the course of the raid. Al-Isawi was the 6th or 7th detainee captured during the Team's deployment.
- c. Upon his capture, Al-Isawi was transported to the American camp.
- d. Shortly after arrival, Al Isawi alleged that he had been abused while he was in the custody of U.S. forces on or about September 1, 2009.

- e. An investigation into the allegations commenced. In the course of the investigation MA3 Kevin DeMartino alleged that he observed the accused in the vicinity of the detainee on September 2, 2009, pulling his arm back as if he had just struck the detainee.
- f. The accused along with other defendants immediately denied any misconduct. They have all continued to do so.
- g. On March 17, 2010, the accused took and passed a polygraph examination on the issue of whether he had abused any detainee.
- h. During the week of April 19, 2010, trials began in the companion cases of SO1 Huertas and SO2 Keefe. Both were acquitted of all charges alleging false statements and obstruction of justice. Huertas was tried by members. Keefe was tried by a military judge alone.
- i. During the trials of Keefe and Huertas, testimony was taken from Capt Curtis Schmidt M.D., an Oral surgeon. Capt Schmidt unequivocally testified that the injuries are inconsistent with major trauma as described by the detainee. He found, however, that the injuries are consistent with intentional or unintentional biting.
- j. The detainee alleging the abuse is a suspected terrorist familiar with the Manchester Document (Al-Qaeda Training Manual), which advises captured members to inflict wounds on themselves to win sympathy and media attention.
- k. Throughout the investigation, SO2 McCabe has maintained his innocence and requested that the charges be dropped. He went so far as to take a polygraph exam on March 17, 2010, to prove his innocence.

l. On April 22, 2010, Mr. Geraldo Rivera appeared on The O'Reilly Factor, Fox News Network, LLC. One of the topics discussed on The O'Reilly Factor is this case.

m. Mr. Rivera had interviewed members of the Convening Authority's "close" staff. Based on those interviews Mr. Rivera states "they think that he (MG Cleveland) is really being scapegoated in this case." In reference to questions about charges being dismissed, Mr. Rivera states "[MG Cleveland] would like very much to do the right thing...[a]nd I think that—well, maybe it comes from the Chairman of the Joint Chiefs. It's very difficult for him to do it." The O'Reilly Factor, April 22, 2010, 8:20 PM EST. *Available at* www.6.lexisnexis.com/publisher/enduser?action=UserDi...

n. In the same interview Mr. Rivera discusses the political pressures that resulted in the firing of Gen Ricardo Sanchez in the wake of the Abu Ghraib photos and detainee abuse scandal.

o. Fox News Channel hosts the O'Reilly Factor. The O'Reilly Factor is the number one show in its time slot. Both Fox News and the O'Reilly factor are broadcast by the Armed Forces Network all over the world. Moreover, Fox News Channel is ubiquitous on military bases, in military mess halls and dining facilities, at PXs and NEXs. In short, Fox News is a favorite of the pentagon and the U.S. military. It is widely considered to be reputable and relevant. Military commanders abroad and in the U.S. watch it to get their news because they believe its news and news shows are reputable and truthful.

p. On April 25, 2010, aware of the acquittals in the cases of Huertas and Keefe and armed with the results of the polygraph. The defense sent a letter to the convening authority requesting the charges in this case be withdrawn and dismissed.

q. The defense has not received a response to the letter requesting the charges be dismissed.

3. Discussion

“Command influence is the mortal enemy of military justice.” *U.S. v. Thomas*, 22 M.J. 388, 393 (CMA 1986). Unlawful command influence is defined in Article 37(a) of the UCMJ, (2008 ed.) as follows:

No [convening] authority ... nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge or counsel... [regarding] the findings or sentence adjudged by the court or with respect to any other exercises of its or his functions.... No person subject to this chapter 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.... Art. 37, Uniform Code of Military Justice (UCMJ).

The defense has 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.” *United States v. Jameson*, 33 M.J. 669, 672 (NMCCA 1991). The accused must demonstrate facts that, if true, would constitute unlawful command influence and there must be some nexus between the unlawful command influence and potential unfairness to the proceedings at bar. *U.S. v. Biagase*, 50 MJ 143, 150 (CAAF 1999). There is a rebuttable presumption of prejudice once the issue is raised and the burden then shifts to the government to demonstrate beyond a reasonable doubt that unlawful command influence did not occur. *Id.* at 150-151; *Thomas*, 22 M.J. at 394.

The convening authority has unfettered discretion to bring charges against an accused when he believes misconduct has occurred. Likewise, a convening authority has unfettered discretion to not charge or to withdraw charges once it becomes clear that allegations of misconduct are unsupported by evidence or there is evidence to rebut allegations of misconduct. *See R.C.M. 306, Manual for Courts-Martial (2008 ed.)*. When the discretion of the subordinate

court-martial authority is limited by a superior commander in cases where authority to act has not been withheld from the subordinate, the UCMJ is violated. *See* Article 37, UCMJ, R.C.M. 104 and 306, Manual for Courts-Martial (2008 ed.).

Once the discretion of the convening authority is improperly limited by a superior, UCI exists. *United States v. Johnson*, 46 M.J. 253 (C.A.A.F. 1997). The Johnson decision was a reversal of the Navy Marine Corps Court of Criminal Appeals finding that the issue of UCI alleged by the appellant was based on speculation and assertions without supporting in evidence. The *Johnson* court found UCI on essentially an affidavit from the appellant alleging that the decision to not suspend his dismissal following a court-martial conviction was because of “top down command pressure.” *Id.* at 254.

In reversing, CAAF focused on the inference that may be reasonably drawn from the appellant’s un rebutted affidavit: the decision to approve the dismissal was inappropriately influenced. *Id.* In the instant case, the evidence is in the form of a statement made by a nationally renowned reporter on a major American network –Fox News Channel- stating that he spoke to persons “close” to the convening authority who stated that the convening authority is being scapegoated and that “he would like very much to do the right thing” in response to questions as to why the charges should not be dismissed. Moreover, the colloquy between Bill O’Reilly and Geraldo Rivera on the The O’Reilly Factor occurred immediately after a discussion of the Abu Ghraib incident and the firing of Gen Sanchez. The clear implication is that MG Cleveland is under pressure to charge the accused in this case in the wake of the Abu Ghraib scandal regardless of the merits of the case; his discretion has been usurped by that of a senior commander.

When a convening authority exercises his authority to refer charges to a court-martial, he must do so impartially, and must not be actually or apparently influenced by superiors. *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990). In deciding on the existence of UCI, the law asks how would a disinterested member of the public view the process if informed of all the facts. *Allen*, 31 M.J. 590. Members of the general public viewed these prosecutions with suspicion and demonstrated grave doubts about the propriety of these allegations even without the new evidence of influence over MG Cleveland. Over 40 Congressmen and Congresswomen signed letters and engaged the Department of Defense and the CA to convince him to drop the charges. Over one hundred and fifty thousand Americans have signed petitions demanding that these charges be dropped because they are aware of all the facts and believe the prosecution to be politically motivated and therefore unfair. In light of the new evidence indicating that there is influence over the CA to charge when he believes that the charges should be dismissed or handled administratively is sure to cast serious doubt on the propriety of the military justice process.

Given the available evidence and the *Johnson* court's decision endorsing evidence even if it appears to be speculative when the results support the drawing of a reasonable inference of unlawful command influence, it is clear that the defense has presented sufficient evidence to shift the burden. 46 M.J. at 254.

In deciding on the extent of the influence, this court may not rely solely on perfunctory and probably self-serving statements made by government witnesses and prosecutors as to the impact of the influence. The law counsels Judges to develop an objective record of the facts as to the effect of the influence. *See, e.g., United States v. Wallace*, 39 M.J. 284, 287 (C.M.A. 1994) (advising the lower courts to be cautious in relying on "perfunctory statements" from witnesses

claiming that they were not influenced and instead “to fully develop the objective facts on the record”); *see also United States v. Zagar*, 18 C.M.R. 34, 38 (C.M.A. 1955) (rejecting the Government’s argument that the court is bound by the insistence of court members that they were not improperly influenced by the statements of the SJA).

As the Navy-Marine Court of Criminal Appeals has made clear, in order to rebut beyond a reasonable doubt evidence of unlawful command influence “the Government must produce more than mere assertions of impartiality by the person alleged to have been influenced.” *Allen*, 31 M.J. 591. This includes situations concerning the existence of unlawful command influence upon a convening authority. *Id.*

4. Evidence

a. Witnesses

- i. Congressman Dan Burden (telephonically)
- ii. MGen Charles Cleveland
- iii. Mr. Geraldo Rivera

b. Documentary Evidence

- i. Transcript “The O’Reilly Factor” April 22, 2010, 8:20 PM.
- ii. Letter from Defense to CA requesting dismissal of charges
- iii. Results of polygraph of SO2 Mathew McCabe

5. Burden of Proof

The defense bears the initial burden by a quantum of evidence to raise the issue of unlawful command influence. Once raised, the burden shifts to the Government to prove beyond a reasonable doubt that UCI does not exist or that it is harmless beyond a reasonable doubt.

United States v. Biagase, 50 M.J. 143 (C.A.A.F. 1999). *United States v. Harris*, 65 M.J. 594, 598 (N.M. Ct. Crim. App. 2007).

6. **Argument**

Requested.

Respectfully Submitted,

_____/S/
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing of this motion was served upon opposing counsel and the court on May 2, 2010.

Respectfully Submitted,

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