NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	GENERAL COURT-MARTIAL
v.	)	GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS
Douglas S. Wacker XXX XX 3913 Captain U.S. Marine Corps	)	(Unlawful Command Influence and Pretrial Publicity) 1 November 2010

1. Nature of Motion

The defense has moved to dismiss all charges and specifications against the accused with prejudice due to alleged unlawful command influence at the accused's former command, Marine Corps Recruit Depot, San Diego. The government opposes the motion.

2. Summary of Facts

The current case

a. The charges in this case were preferred on 7 January 2010 on board Marine Corps Air Station Miramar, CA. The charges were preferred by a military justice clerk on board MCAS Miramar and sworn to before a trial counsel in the military justice section on board MCAS Miramar.

b. The Commanding General of Third Marine Aircraft Wing, Major General T. Conant, directed that the charges be investigated pursuant to Article 32, UCMJ. Lieutenant Colonel M. E. Sayegh, the Staff Judge Advocate for MCAS Yuma, AZ, was appointed as the investigating officer. A hearing pursuant to Article 32, UCMJ was held on 12-14 April, 2010. At that hearing, five witnesses (Jessica Brooder, Elizabeth Easley Cook, Rebecca Barker Abdullah, Nicole Cusack, and Alex Lowder) testified in person and three (Joseph Gorman, Justin Micklish,

and Amber Davis) testified by telephone. These witnesses included every person named on the charge sheet. Several other witnesses requested by the defense (including Special Agent J.R. Burge, Donald Cook, Captain Christopher Blosser, Major Christopher Shaw, Jessie Baxter, Talbot Theunissen, and Tara Aguilar) were on stand by to testify either in person or by telephone. Near the conclusion of the hearing, the defense was asked if they had any other witnesses to call or evidence to present and the defense counsel indicated that they did not. Sworn statements from several witnesses were considered by the Investigating Officer either in lieu of or in addition to the sworn testimony of those witnesses, without objection from either party.

c. Following the Article 32 investigation, the IO recommended that all charges currently before the court be referred to a general court-martial. The Staff Judge Advocate's recommendation was prepared by Colonel K. J. Brubaker, the SJA for 3D MAW, concurring in the IO's recommendation. On 26 May, 2010, the CG, 3D MAW referred the present charges to the general court-martial convened by 3D MAW General Court-Martial Convening Order 1-09.

Prior Proceedings at MCRD, San Diego

a. The NCIS investigation into the present case was opened in June of 2008. Following a lengthy investigation and forensic examination of key evidence by the United States Army Criminal Investigative Laboratory (USACIL) which revealed evidence that directly contradicted the accused's version of events on the night of the charged offenses, charges were preferred on board MCRD, San Diego in April of 2009. The charges were investigated under Article 32, UCMJ on 2 June, 2009. Following the Article 32 investigation, the charges were forwarded pursuant to Article 33, UCMJ by Colonel Stephanie Smith, the former SJA on board MCRD San Diego, who was then the commanding officer of Headquarters and Service Battalion. Due to her

former knowledge of the case as SJA, Col Smith forwarded the charges without recommendation. Major Samuel Jackson, the acting SJA, wrote the SJA recommendation under Article 34, UCMJ prior to referral of charges by Brigadier General Salinas, the convening authority.

b. In June 2009, the accused was recalled to active duty on board MCRD San Diego. The accused's assignment while pending general court-martial charges initially presented a difficult situation for the command because of the inherent difficulty of finding a billet which was suitable for a Captain, yet did not require a security clearance or access to otherwise sensitive information. The AC/S G-3, Col Christopher Conlin, agreed to place the accused in the G-3 Mission Assurance shop. The accused was moved into the G-3 Mission Assurance office with the understanding that he was pending legal action and that the assignment was to be temporary.

c. In late August or early September 2009, Col Smith contacted Col Conlin about the accused's responsibilities in G-3. Col Smith expressed apprehension regarding whether the accused had access to any sensitive information due to his participation in preparations for a tactical training exercise (Aztec Fury). Col Smith expressed similar concerns to LtCol Thad Trapp during a PME in mid-August 2009. During that conversation, Col Smith said words to the effect of "let me be clear on this, this is not Col Smith saying don't testify for him, this is Col Smith saying I don't think it's a good idea that he is involved in this exercise."

d. On 24 September 2009, LtCol Gregory Bond sent the email cited in the defense motion. The government expects Col Conlin to testify that when he received the email, he perceived it to be LtCol Bond blowing off steam and did not give it much weight. The government expects LtCol Trapp to testify that when he received the email, he was surprised that it had been sent, but that it did not affect him personally. LtCol Trapp discussed the email with Maj Blalock and told

him not to forward the email. The government expects Maj Blalock to testify that he viewed the email as a "hip pocket PME on what not to do," but that he was not personally swayed by it. Maj Blalock also did not forward the email.

e. Upon learning of LtCol Bond's email, the SJA, Col Michael Richardson, immediately counseled LtCol Bond about sending an email that he viewed as unprofessional. Col Richardson went to the G-3 office and contacted LtCol Trapp and Maj Blalock. Col Richardson told both of them that the email was inappropriate and should be discounted by them, and that the Commanding General would expect them to discount the email and testify freely if they felt it was appropriate. Col Richardson had a similar conversation by phone with Col Conlin. All three officers (Col Conlin, LtCol Trapp, and Maj Blalock) indicated to Col Richardson that they had already viewed the email as inappropriate, that they would have no problem discounting the email, and that they understood their duties as they related to potentially testifying in a court-martial. Based on his interaction with these three officers, Col Richardson left feeling confident that they would not be improperly chilled by the email.

f. Shortly after learning of LtCol Bond's email, Col Smith sent an email on 1 October 2009 to all recipients of LtCol Bond's 24 September 2009 email, advising that she believed LtCol Bond's email to be inappropriate and that she expected everyone who received the email to "participate [in the accused's trial] without any fear of repercussion or reprisal in any manner you deem appropriate."

g. On 16 October 2009, the defense filed a motion to dismiss the charges then pending on board MCRD San Diego. The majority of the motion now pending before the court is either copied verbatim or substantially similar to the motion filed by the defense in 2009.

h. On 18 November 2009, the charges against the accused referred on 14 July 2009 were withdrawn and dismissed without prejudice. Shortly after the dismissal, the accused was transferred to 3D MAW.

3. Authorities

a. United States v. Biagase, 50 M.J. 143 (C.A.A.F. 1999).
b. United States v. Stombaugh, 40 M.J. 208 (CMA 1994).
c. United States v. Johnston, 39 M.J. 242, (C.M.A. 1994).
d. United States v. Allen, 33 M.J. 209 (C.M.A. 1991).
e. United States v. Jameson, 33 M.J. 669 (N.M.C.M.R. 1991).
f. R.C.M. 405, MCM (2008 ed.)
g. United States v. Nieves, 44.M.J. 96 (C.A.A.F. 1996).
h. United States v. Reed, 65 M.J. 487 (C.A.A.F. 2008).
i. United States v. Simpson, 58 M.J. 368 (C.A.A.F. 2003).
j. United States v. Rivers, 49 M.J. 434 (C.A.A.F. 1998).
k. United States v. Johnson, 54 M.J. 32 (CAAF 2000).
l. United States v. Ayala, 43 MJ 296, 299
m. United States v. James, 61 MJ 132 (CAAF 2005)

4. Discussion

Unlawful command influence is defined by Article 37(a) of the Uniform Code of Military Justice in the following terms:

> 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. Art. 37, U.C.M.J. (2008 ed.).

The initial burden of raising the issue of unlawful command influence falls on the defense. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). *citing United States v. Stombaugh*, 40 M.J. 208, 213 (CMA 1994). "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." *Biagase*, 50 M.J. at 150, citing *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994). If the issue is raised 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, citing *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991). "There must be something more than an appearance of evil to justify action . . . "'Proof of [command influence] in the air, so to speak, will not do.'" *Allen*, 33 M.J. at 212.

Following an adequate allegation of unlawful command influence by the defense, "the Government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence." *Id.* at 151. The government may meet its burden by satisfying any element of this disjunctive test.

If the government fails to meet this burden, "the military judge must find that command influence exists and must then 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… 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." *United States v. Jameson*, 33 M.J. 669, 672 (N.M.C.M.R. 1991).

a. <u>The defense must show a concrete and logical connection to *this* court-martial in order to meet its burden of raising the issue of UCI.</u>

The defense motion cites various claimed slights to the accused relating to his law school education, disenrollment from the Excess Leave Program (Law), return to active duty on board MCRD, San Diego, a request mast pertaining to a Military Protective Order (MPO), forensic

testing of evidence in the case, discussion of sexual assaults during safety stand-downs, and the lack of impartiality of a former Staff Judge Advocate to the former Commanding General of MCRD San Diego, the convening authority of the former case. Yet, with a few exceptions discussed below, the vast majority of the claims made by the defense completely fail to state any logical connection to the accused's ability to receive a fair trial in the current case convened by the CG, 3D MAW. The defense cannot overcome a lack of logical connection between the government misconduct alleged and the accused's ability to receive a fair trial simply by turning up the volume and alleging more irrelevant grievances. The doctrine of unlawful command influence is not a vehicle for every grievance that an accused or his counsel may have.

Even assuming the truth of many of the allegations by the defense of wrongs to the accused, the defense fails to even remotely articulate any impact on this case. The defense spends several pages of its motion discussing the accused's removal from the University of San Diego campus, later suspension from the school, and expulsion from the ELP (Law) program and removal of his basic lawyer designation. Yet, the defense does not explain at any point how any incidental impact on the accused's academic and legal career, given the fact that the accused was seeking to become a judge advocate while pending rape charges, amounted to improper government interference with witnesses, prospective members, or the convening authority. Without raising any more than the "mere appearance of evil in the air," these allegations do not raise the issue of UCI.

Many of the allegations raised by the defense, even if true, are completely mooted by the change in convening authority. The members in this court-martial, if the accused should elect trial by members, will be drawn from 3D MAW. Therefore, whatever press releases or training on sexual assault prevention were communicated to the potential members of a panel convened

at MCRD are wholly irrelevant to this case. It is similarly irrelevant whether the former SJA at MCRD, and later Headquarters and Service Battalion Commanding Officer, Col Smith, was an "objective" or "impartial" advisor to the Convening Authority in the previous case, because Col Smith has never provided any advice whatsoever regarding this case to either Col Brubaker or Maj Gen Conant. Even assuming that Col Smith "participated extensively in the investigation" of the accused as alleged by the defense, that participation would merely disqualify her from providing legal advice to the current convening authority, which she has never done.

The defense also fails to provide any explanation why the interview of Captain Blosser amounts to unlawful command influence. In light of the fact that Capt Blosser was refusing to cooperate with law enforcement on the investigation of a felony case, despite then being a student judge advocate himself, Capt Blosser could have been ordered by his command to go to NCIS to provide a statement. Capt Blosser was not in any way chilled from providing testimony on the accused's behalf, as evinced by the fact that he testified at length as a character witness for the accused in the initial Article 32 hearing and was prepared to so testify at the Article 32 hearing in this case but was ultimately not called by the defense.

The various defense allegations regarding the appearance of witnesses at the original Article 32 proceeding are also irrelevant or moot. Even assuming that witnesses were told that they did not have to appear, such advice to potential civilian witnesses at the Article 32 would not constitute unlawful command influence because it is a true statement of the law. See R.C.M. 405(g)(2)(B), discussion ("civilian witnesses may not be compelled to attend a pretrial investigation"). More importantly, the majority of the witnesses requested by the defense did appear or were prepared to appear at the Article 32 on 12-14 April 2010. The defense did not call any additional witnesses at the Article 32 hearing in the present case, nor did the defense

object to the non-production of any witness or the admission of any sworn statements in lieu of testimony. Any claim that the defense may have been prejudiced by the non-production of any other witnesses at the Article 32 was waived by the failure of the defense to object at the Article 32 investigation. See R.C.M. 405(h)(2), 405(k).

The defense fails to show how the allegedly "overly broad" Military Protective Order and No Contact Order have any relationship to this case.[1] The defense does not allege any specific facts showing that any attorney representing the accused was precluded from contacting potential witnesses in a case that had not yet been preferred. See *United States v. Nieves*, 44.M.J. 96, 98 (C.A.A.F. 1996) (order "not to have any discussions with members of Alpha Company, relative to the investigation" was not unlawful where accused presented no evidence that he or his lawyer were ever denied permission to contact potential witnesses or that he even asked to do so, or that the order interfered with his case preparation). The defense claim that the accused was "denied his right to counsel" prior to preferral of charges and absent any pretrial confinement falls apart on its face.

b. Even if the 24 September 2009 email from LtCol Bond and statements from Col Smith and LtCol Bond raise the appearance of unlawful command influence, these actions do not constitute actual unlawful command influence because none of the officers exposed to the email and statements were actually influenced.

The government does not dispute that the 24 September, 2009 email from LtCol Bond to Col Conlin, LtCol Trapp, and Maj Blalock, on its face, *appears* improper. No officer familiar with the contents of that email, to include LtCol Bond, will contend that it was appropriate or an exercise of good judgment. However, the three potential character witnesses who received the

[1] The defense motion at p. 4-6 refer to an MPO and NCO issued to the accused in January of 2009 which prohibited him from contacting a number of classmates who were potential witnesses regarding the case, and required him to seek permission from the command prior to his lawyer contacting potential witnesses.

email will all testify that the email from LtCol Bond did not impact their willingness to testify on behalf of the accused. In fact, even before any corrective action was taken with respect to the email, the recipients of the email mainly viewed it as a surprising lapse in judgment, rather than feeling personally influenced by it.

The government expects all three potential character witnesses identified by the defense to testify that they remain willing to testify for the defense, if the defense chooses to call them, on the basis of their observations of the accused's character and work performance, and that they have no concerns about suffering any retribution if they do so. Their testimony alone will meet the government's burden to establish that no actual unlawful command influence occurred because of the absence of cause and effect, and that if any unlawful command influence did occur, that it was ultimately harmless on these proceedings.

The same analysis applies to any statements allegedly made by Colonel Smith to the same witnesses communicating her impressions of the accused's guilt. Even if these statements were made, they did not affect the willingness of any character witnesses to testify. Therefore, the statements either did not constitute unlawful command influence or, if they did, it was harmless. Much like the cliché about a tree falling in the forest with no one to hear, the defense now asks the court to dismiss all charges against the accused with prejudice because of alleged unlawful command influence where no court, convening authority, member, or witness has actually been influenced.

Moreover, any appearance of unlawful command influence that may have been created by Col Bond's email was remedied by immediate corrective action on multiple levels. After finding out about the email, both Col Smith and Col Richardson unequivocally advised every potential character witness who received the email that they considered it unprofessional, that

they were to discount any opinion as to the accused's guilt expressed in the email, and that they were to testify freely in the trial if they felt it was appropriate. See *United States v. Reed*, 65 M.J. 487, 491 (C.A.A.F. 2008) (where convening authority took corrective action in form of remedial email to all members of command, alleged unlawful command influence was harmless beyond a reasonable doubt). Unlike *Reed*, the statements and emails alleged to constitute unlawful command influence in this case were only directed at a few specific individuals, rather than at an entire command. Because those individuals will testify that they were not impacted in their decision whether to testify on behalf of the accused at trial, and immediate corrective action was taken with respect to those individual officers in order to ensure that they understood the convening authority's desires with respect to testifying in the accused's case, any alleged unlawful command influence was harmless.

Even more significant corrective action was taken by giving the accused a fresh start at a new command. The government's decision to transfer the case to a new convening authority was not a concession that actual unlawful command influence occurred at MCRD San Diego; rather, out of an abundance of caution, the government took a precautionary step in order to ensure that the accused received a fair trial free of even the slightest hint of undue influence. The government may demonstrate that actual, apparent, or merely alleged unlawful command influence will not affect the proceedings in a particular case as a result of ameliorative actions. Ameliorative actions may include transfers of responsibility for disposition of charges to commanders not subject to the alleged influence and changes in venue. See *United States v. Simpson*, 58 M.J. 368, 373-74 (C.A.A.F. 2003), citing *Biagase*, 50 M.J. at 152, *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998).

The defense now seeks to hold an action that was taken in order to protect the rights of the accused against the government. The defense alleges that the accused's trial was poisoned by the toxic actions of the Commanding Officer of Headquarters and Service Battalion, MCRD San Diego, yet goes on to maintain that the accused cannot receive a fair trial anywhere else after being transferred out of Headquarters and Service Battalion, MCRD San Diego. The defense asserts that the change of convening authority and venue is a "pro forma measure that changed nothing," ignoring the change in the pool of members, new Article 32 hearing with a different Investigating Officer, different Staff Judge Advocate, and different convening authority.

d. The factual press release discussing the accused's case, Daily Media Roundups, and Town Hall Forums do not constitute unfair pretrial publicity or unlawful command influence where the defense has failed to allege any prejudice to these proceedings, and ameliorative measures remedy any potential adverse effect on the proceedings.

Though the defense's motion contends that the pretrial publicity in this case constitutes UCI, it offers no supporting legal or factual analysis under *United States v. Simpson*, 58 MJ 368 (CAAF 2003) or *United States v. Johnson*, 54 MJ 32 (CAAF 2000) – both cases the defense cites in support of its contention, but which actually suggest the opposite conclusion.

"The initial burden of raising evidence of command influence is on the defense . . . . however, proof of command influence in the air, so to speak, will not do." *Johnson* at 34 (quoting *United States v. Ayala*, 43 MJ 296, 299, and *United States v. Allen*, 33 MJ 209, 212). "Press coverage does not constitute unlawful command influence." *Id*.

With regard to an allegation of unfair pretrial publicity, "the defense may raise the issue of unfair pretrial publicity by demonstrating either presumed prejudice or actual prejudice. To establish presumed prejudice, the defense must show that the pretrial publicity: (1) is prejudicial; (2) is inflammatory; and (3) has saturated the community." *Simpson*, 58 M.J. at 372. Under

Simpson, for an accused to demonstrate UCI through pretrial publicity, an accused must first, in addition to satisfying the *Biagase* test, demonstrate that, "the general tenor of the leadership's interaction with the media demonstrated either the intent to improperly influence the court martial process or the appearance of such an influence." *Id.* at 375. An accused must also show that the alleged unfair pretrial publicity is deliberately orchestrated by those with the mantle of command authority. *Id.* at 374. "Improper influence" is defined as an "express or implied command position on disposition or adjudication." *Id*. Thus, the defense must show facts, which if true, demonstrate either, (1) an intent, through an orchestrated media campaign, to unlawfully influence the court marital process, coupled with a logical connection to the court-martial, in terms of its potential to cause unfairness; or (2) the appearance of an intent, through an orchestrated media campaign, to unlawfully influence the court martial process, coupled with a logical connection to the court-martial, in terms of its potential to cause unfairness.

In *Simpson*, the Court of Appeals for the Armed Forces considered whether a series of press conferences and public statements, made in conjunction with an investigation into allegations of sexual harassment and trainee abuse involving the Appellant, constituted unfair pretrial publicity resulting in presumed or actual pretrial prejudice to the Appellant. *Id* at 371-372. Concerned about the inevitable media inquiries into its investigation, the Army held a press conference about the investigation and trainee abuse in general that featured remarks from the Army Chief of Staff and Commander of the Training and Doctrine Command (TRADOC). *Id* at 371. Following the press conference, numerous high-ranking officials (including the Secretary of Defense, Chairman of the Joint Chiefs of Staff, Secretary of the Army, and Army Chief of Staff) made public statements over a six month period about the investigation, all of which were heavily covered by the news media. *Id.* In addition, the Army Chief of Staff sent a personal

letter to all general officers communicating the Army's policy on sexual harassment (including the GCMCA in the Appellant's case), and mandated that all active duty personnel receive instruction on the Army's sexual harassment policy. *Id* at 372.

The defense filed a motion to dismiss the charges with prejudice based on unfair pretrial publicity and unlawful command influence. The motion to dismiss was accompanied by an extensive collection of news clippings, transcripts of television programs, videotapes and transcripts of interviews which occupied five volumes of the trial record. *Id.* The military judge denied the defense motion, and both the Army Court of Criminal Appeals (ACCA) and the Court of Appeals for the Armed Forces (CAAF) affirmed the trial judge's ruling, finding no actual or presumed prejudice had occurred as a result of the pretrial publicity. *Id.* at 370. Though the ACCA described the multiple volumes of media items attached to the Appellant's motion as "a nationwide media blitz", "media feeding frenzy", and "extensive – even pervasive – for approximately one month", it observed that the vast majority of the items were published in a two-week period following the Army's initial press conference, and that the publicity was, "in comparison to that found in many civilian criminal investigations, very sparse on details." *Id* at 372-373. Finding no presumed prejudice existed, CAAF noted that "although there was extensive media interest, Appellant has not demonstrated that the community was saturated with inflammatory prejudicial material." *Id* at 373.

As in *Simpson*, the defense fails to establish that the pretrial publicity in this case resulted in presumed prejudice to the accused. Neither the 14 August press release nor the subsequent media coverage saturated the community with inflammatory prejudicial material. Like in *Simpson*, the command's decision to issue a press release was precautionary – it wanted to get out in front of what it believed would be the inevitable media attention the accused's case would

garner once his arraignment was docketed and became public. The press release was succinct, factual sparse on details, did not contain any inflammatory material, and complied with the guidance set forth in Paragraph 1004 of the Marine Corps Manual for Legal Administration (LEGADMINMAN). The media coverage that followed, as reflected in the Daily Media Reports, was generally limited to a one-week period of time. Furthermore, the stories themselves were not inflammatory - on the contrary, they were highly favorable to the accused and contained multiple quotes from the accused's civilian defense counsel, who called the allegations against him "unfounded", the sexual acts in question "consensual", and noted that the accused's law school cleared him of any wrongdoing and the New Orleans District Attorney's Office investigated the allegations and declined to press charges.

The defense also fails to establish actual prejudice to the accused. "To establish actual prejudice, the defense must show that members of the court-martial had such fixed opinions that they could not judge impartially the guilt of the accused." *Simpson*, 58 M.J. at 372. "Without such a showing, evidence that the members had knowledge of highly significant information or other incriminating matters is insufficient." *Id*.

Of course, prior to voir dire, it is impossible to gauge the members' knowledge of the case or any opinions they may have as a result. However, there are multiple ameliorative measures that have already been taken, and can be taken at trial, to eliminate the possibility of prejudice to the accused. As previously noted, the accused's duty station, convening authority and standing members panel have all changed since August of 2009. To the best of anyone's knowledge, none of the current potential members from the 3d Marine Aircraft Wing convening order received the MCRD Daily Media Reports or have otherwise been exposed to media coverage of this case. Whether they have, and if so, whether they have fixed opinions or lack

impartiality as a result, can easily been ascertained and remedied by the court through extensive individual voir dire of the panel prior to trial on the merits and the "liberal grant mandate" contained in *United States v. James*, 61 MJ 132 (CAAF 2005) and safeguarded by appropriate instructions to the members once they have been empanelled.

"The prohibition against unlawful command influence does not require senior military and civilian officials to refrain from addressing . . . . concerns . . . . through press releases, responses to press inquiries, and similar communications." *Simpson* at 374. The fact that the Commanding General held a series of town hall forums at MCRD discussing, among numerous other policy issues, her concerns about the threat that sexual assault poses to the Marine Corps – without mentioning the accused's case – is well within her purview and the law. To argue that her statement somehow shows evidence of a deliberate plan to send a message to potential members "that supporting Capt Wacker at his court-martial is tantamount to harming the Marine Corps" or goes "against the intent of the Commander" is not only wildly speculative, it is entirely mooted by the fact that she is no longer the convening authority, and none of the current members were present for these town halls.

4. <u>Relief Requested</u>

The government asks that the court deny the motion.

5. <u>Evidence and Burden of Proof</u>

The defense bears the initial burden to present some evidence, beyond speculation or allegation, of facts showing actual or apparent unlawful command influence. Once the defense has raised the issue, the government bears the burden of proving, beyond a reasonable doubt, either that the facts alleged by the defense are untrue, that the facts do not constitute unlawful

command influence, or that the alleged unlawful command influence will not prejudice the proceedings.

If the court finds that the burden has been shifted, the government intends to call the following witnesses to offer testimony on this motion, either live or via remote means:

a. Col Christopher Conlin

b. LtCol Thad Trapp

c. Maj Michael Blalock

d. Col Stephanie Smith

e. LtCol Gregory Bond

If the court finds that the burden has been shifted, the government intends to offer the following evidence on this motion:

a. Affidavit of Col Richardson (Encl 1)

b. Charge Sheet, Article 32 Report of Investigation, and Article 34 advice relating to charges preferred on 7 January 2010 (allied papers to charge sheet).

c. Memorandum of Maj Keske (withdrawal and dismissal of charges without prejudice) dated 18 Nov 2009 (Encl 2).

d. Article 32 Report of Investigation,[2] Article 33 letter, and Article 34 advice pertaining to charges on board MCRD, San Diego (Encl 3).

e. Web orders transferring accused to 3D MAW (Encl 4)

f. Defense 2009 (MCRD) UCI motion and Microsoft Word comparison of 2009 and 2010 motions (Encl 5).

The defense requests for production of the following witnesses are denied due to insufficient proffer, lack of relevance, or cumulativeness: Capt David Ahn, BGen R.L. Bailey, Maj R.M. Bueno, Capt Christopher Blosser, Jessica Brooder, Maj Brooks Braden, Maj Armando

[2] Previously provided as Enclosure (4) to the government's motion to exclude evidence of prior findings.

Budomo, Dean Kevin Cole, Capt David Cote, Nicole Cusack, Elizabeth Easley, Capt Tyler Hart, Col K.S. Helfrich, Col C.F. Huenefeld, Steve Liewer, Maj S.E. Jackson, Jackson Katz, Maj Z.W. Keske, Capt J.R. Liebenguth, Capt Christian Pappas, Rick Rogers, BGen A. Salinas, Maj Christopher Shaw, Michael Story, LtCol Sean Sullivan, Capt John Torressala, SSgt Heather Vecchia, LaNita Wacker, BGen J.C. Walker, Bruce White, Carrie Wilson, Capt Woellhoff, Col Michael Richardson, Maj Christopher Logan, Desiree Bobie, Maj Ted Bonanno.

6. <u>Oral Argument</u>

The government respectfully requests oral argument on this motion.

E. S. DAY
Captain, U.S. Marine Corps
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this motion was served on the court and defense counsel by electronic mail on 1 November 2010.

E. S. DAY