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Not Reported in M.J., 2009 WL 690110 (N.M.Ct.Crim.App.)

U.S. Navy-Marine Corps Court of Criminal Appeals.

UNITED STATES of America

v.

Jeffrey R. **CHESSANI**, Lieutenant Colonel (O-5), U.S. Marine Corps.

NMCCA 200800299.

17 March 2009.

Review Pursuant to Article 62(b), Uniform Code of Military Justice, 10 U.S.C. § 862(b).

Military Judge: Col Steven Folsom, USMC.

Convening Authority: Commander, U.S. Marine Corps Forces Central Command, MacDill Air Force Base, FL.

For Appellant: Robert J. Muise; Capt Kyle Kilian, USMC.

For Appellee: LT Timothy Delgado, JAGC, USN.

Before R.E. VINCENT, E.C. PRICE, J.E. STOLASZ Appellate Military Judges.

OPINION OF THE COURT

STOLASZ, Judge.

***1** This case is before us on a Government interlocutory appeal, pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862, and RULE FOR COURTS-MARTIAL 908, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The Government appeals the ruling of the military judge dismissing all charges and specifications without prejudice, and disqualifying any commander from United States Marine Corps Forces Central Command (MARCENT), I Marine Expeditionary Force, (I MEF), or United States Joint Forces Command from serving as a convening authority (CA) for re-preferral and re-referral of any charges because of actual and apparent unlawful command influence (UCI).

After carefully considering the record of the proceedings, the Government's brief on appeal and assigned error,[FN1] the appellee's reply brief, and the oral arguments of the parties, we deny the Government's interlocutory appeal.

FN1. THE MILITARY JUDGE ERRED WHEN HE FOUND UNLAWFUL COMMAND INFLUENCE BECAUSE SEVERAL OF HIS ESSENTIAL FINDINGS OF FACT ARE UNSUPPORTED BY THE RECORD, THE CONVENING AUTHORITY STATED TWENTY-ONE TIMES THAT HE WAS NOT INFLUENCED BY COLONEL EWERS, THERE IS NO EVIDENCE TO SUPPORT THE MILITARY JUDGE'S FINDING THAT THE MARCENT STAFF JUDGE ADVOCATE WAS INTIMIDATED BY COLONEL EWERS, AND NO DISINTERESTED OBSERVER AWARE OF ALL THE FACTS WOULD HARBOR ANY DOUBTS ABOUT THE FAIRNESS OF THESE PROCEEDINGS.

I. Background

A. Generally

This case arises out of alleged incidents in Haditha, Iraq, on 19 November 2005 (hereinafter Haditha incidents) involving U.S. Marines during which as many as 24 Iraqis died. The appellee was battalion commander of the Marines suspected of involvement in the Haditha incidents.[FN2] The essence of the charges in this case is that the appellee failed to accurately report and thoroughly investigate the Haditha incidents.[FN3] On 6 June 2006, the Commandant of the Marine Corps designated the MAR-

CENT Commander to serve as the Consolidated Disposition Authority (CDA) for all disciplinary and administrative actions relative to investigation of the Haditha incidents. Appellate Exhibit XCI. Then-Lieutenant General (LtGen) James T. Mattis, USMC, was MARCENT Commander and CDA in this case from August 2006-November 2007. FN4

FN2. The appellee was the commanding officer of Kilo Company, Third Battalion, 1st Marines (3/1).

FN3. The appellee is charged with one specification of a law of war violation and two specifications of dereliction of duty.

FN4. In 2007, then LtGen Mattis was promoted to General, reassigned, and assumed duties as Commander, United States Joint Forces Command. LtGen Samuel T. Helland, USMC, assumed command of MARCENT/I MEF and duties as the CDA in November 2007.

The MARCENT commander is "dual-hatted," also serving as Commanding General, I MEF. MARCENT headquarters are located in Tampa, Florida, while I MEF headquarters are located at Camp Pendleton, California. MARCENT and I MEF each had an assigned staff judge advocate (SJA): Lieutenant Colonel (LtCol) William Riggs, USMC, was MARCENT SJA and Colonel (Col) John Ewers, USMC, was I MEF SJA, during the relevant timeframe. Col Ewers assumed the position of I MEF SJA in October 2005. He was deployed to Iraq from 15 Oct 2005 until 10 Feb 2007 in various capacities, and upon his return from Iraq resumed duties as I MEF SJA. During this time, Col Ewers, while technically assigned as the I MEF SJA, was actually serving as a governance officer for I MEF forward. FN5

FN5. It is not clear from the testimony of Col Ewers or the record what the duties of a governance officer entail.

Col Ewers and LtGen Mattis shared a significant professional history. In 2003, Col Ewers served as the SJA for the First Marine Division commanded by then-Major General (MajGen) Mattis, including combat operations in Iraq in support of Operation Iraqi Freedom. Col Ewers was tasked by MajGen Mattis with developing a program to investigate and report law of war violations. This program eventually became known as the Reportable Incident Action Team (RIAT). Col Ewers was subsequently awarded a Purple Heart for injuries sustained in an ambush in Iraq while deployed on a RIAT pursuant to MajGen Mattis' direction.

***2** Col Ewers' reputation and experience resulted in his assignment, in March 2006, to assist in investigating the reporting and follow-on command action regarding the Haditha incidents. FN6 Col Ewers served in this capacity from March 2006 -June 2006. In addition to reviewing evidence, Col Ewers interviewed key personnel assigned to Kilo Company, Third Battalion, First Marines (3/1), the battalion commanded by the appellee, including the appellee, his executive officer, operations officer, human intelligence officer, staff judge advocate, civil affairs officer, and watch officer. He also interviewed the appellee's superiors in the reporting chain, including the commanding officer, executive officer and operations officer of Regimental Combat Team Two (RCT-2), and the commanding general and chief of staff of the Second Marine Division.

FN6. MajGen Aldon Bargewell, U.S. Army, was tasked with conducting an Army investigation of the Haditha incidents by the Commander of the Multi-National Corps, Iraq (MNCI). Col Ewers was part of the investigative team assigned to assist with the investigation. The results of the investigation were ultimately compiled in the Bargewell Report.

Notably, the appellee was the most senior officer Col Ewers suspected of criminal misconduct. He advised the appellee of his Article 31(b), UCMJ,

rights prior to commencing his interview, and indicated that he suspected the appellee was derelict in the performance of his duties. During the questioning, Col Ewers directly challenged several of the appellee's explanations, resulting in several inculpatory statements by the appellee.

At the conclusion of the investigation, Col Ewers was intimately involved in drafting findings and conclusions for the final report, commonly referred to as the Bargewell Report, which was produced as a result of the investigation. This report was subsequently incorporated into the Naval Criminal Investigative Service (NCIS) report on the Haditha incidents. LtGen Mattis read and considered the Bargewell Report during the disposition of officer misconduct cases, including the appellee's, arising from the Haditha incidents. AE XXXIX at 36-38.

Prior to Col Ewers' return from Iraq and resumption of I MEF SJA duties, LtCol Riggs advised LtGen Mattis that Col Ewers was "tainted" regarding rendering any legal advice on the Haditha cases, because Col Ewers had been involved in the investigation of occurrences at Haditha and subsequent preparation of the Bargewell Report.[FN7] LtGen Mattis testified he had read the Bargewell Report and knew of Col Ewers' involvement. He further testified that Col Ewers was the I MEF SJA and the Haditha cases were MARCENT matters, thus Col Ewers had no role to play in advising on Haditha. Record of 2 Jun 2008 at 9. However, despite having no advisory role, Col Ewers attended the CDA's weekly legal meetings during which significant MARCENT cases, including the Haditha cases, were discussed and briefed. In addition to LtGen Mattis and Col Ewers, also in attendance were LtCol Riggs, the deputy SJA for MARCENT, and members of the trial team. These meetings were primarily conducted in LtGen Mattis' I-MEF headquarters on board Camp Pendleton. Col Ewers was the senior legal advisor present in the room during the legal meetings.

FN7. *See generally* RULE FOR COURTS-MARTIAL 406(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES S (2008 ed.).

B. Procedural Posture

***3** On 21 December 2006, the Government preferred the Charge containing one specification alleging a violation of a lawful general order and two specifications alleging dereliction of duty, in violation of Article 92, UCMJ. A pretrial investigation was conducted in accordance with Article 32, UCMJ, from 30 May-9 June 2007.[FN8] On 30 August 2007, LtCol Riggs forwarded his pretrial advice in accordance with Article 34, UCMJ, to LtGen Mattis recommending the original charge, with one specification alleging violation of a lawful order and two specifications alleging dereliction of duty, and an additional charge, alleging two specifications of dereliction of duty, be referred to a general court-martial. On 19 October 2007, the two specifications alleging dereliction of duty, preferred on 21 December 2006, were dismissed, while an additional specification alleging dereliction of duty, in violation of Article 92, UCMJ, was preferred.[FN9] That same day, 19 October 2007, the remaining original specification alleging the appellee violated a lawful general order, preferred on 21 December 2006, and the additional specification alleging dereliction of duty, were referred to a general court-martial by the CDA.

FN8. The Article 32, UCMJ, pretrial investigation was reopened on 8 August 2007 to consider the presentation of an additional Government exhibit.

FN9. The additional charge was initially drafted with two specifications alleging dereliction of duty. The two specifications were combined into one specification alleging dereliction of duty comprising the additional charge.

On 1 April 2008, the appellant filed a motion to dismiss the charge and the additional charge, al-

leging unlawful command influence (UCI). AE XXXIX. The defense UCI motion was litigated during an Article 39(a), UCMJ, session on 7 May 2008. On 20 May 2008, the military judge issued a preliminary ruling that the appellee had presented some factual evidence of actual and apparent UCI, and that the alleged UCI had a logical connection to the court-martial which could potentially cause unfairness. Specifically the military judge concluded:

> [T]he defense has presented **some evidence** that **the Article 34[, UCMJ,] advice, referral, and subsequent convening authority (CA) decisions** in this case **were apparently or actually impermissibly influenced by Col Ewers' presence at, and participation in, military justice meetings** held by the Consolidated Disposition Authority (CDA) from February 2007 to the present during which the accused's case and those of his superiors and subordinates were discussed and legal advice was rendered to the CDA.

AE CXII at ¶ 3 (emphasis added).

During an Article 39(a), UCMJ, session, on 2-3 June 2008, the Government presented the testimony of then-LtGen Mattis, USMC, the CDA, and Col Ewers, the I MEF SJA. Their testimony focused primarily on LtGen Mattis' independence, thoughts and actions as CDA, and the circumstances of Col Ewers' presence at, and participation in the CDA's military justice meetings beginning in February 2007 and continuing thereafter. The Government presented no additional evidence, including any further witness testimony.

C. Military Judge's Conclusions of Law

On 17 June 2008, the military judge granted the defense motion to dismiss all charges and specifications as a result of UCI, finding that the Government:

> ***4** (1) failed to prove beyond a reasonable doubt that the predicate facts were untrue;
>
> (2) failed to prove beyond a reasonable doubt that the predicate facts did not establish either actual or apparent UCI on either the convening authority or the SJA and/or deputy SJA of MARCENT;
>
> (3) failed to prove beyond a reasonable doubt that Col Ewers was not a disqualified legal advisor whose presence did not contribute to a prosecutorial atmosphere or mindset against this accused such that the decisions and actions of the convening authorities or the MARCENT SJA or deputy SJA were not influenced and their independent judgment was not compromised;
>
> (4) failed to prove beyond a reasonable doubt that Col Ewers' history and presence at these legal meetings where MARCENT cases were discussed, particularly this case, did not chill subordinate legal advisers from exercising independence and providing potential contrary legal advice in the presence of Col Ewers;
>
> (5) failed to prove beyond a reasonable doubt that Col Ewers' history, status, and presence at legal meetings has not influenced the decisions of either CA [LtGen Mattis and LtGen Helland] in regulating discovery before, during or after the Article 32, UCMJ, investigation or referral of this case;
>
> (6) failed to prove beyond a reasonable doubt that the legal advice and recommendations of the SJA and deputy SJA of MARCENT were not inappropriately influenced; and.
>
> (7) failed to meet their burden of proof with respect to an appearance of unlawful command influence and further concluded:
>
> And this court finds, and **actually is convinced of one thing beyond a reasonable doubt, that a disinterested member of the public would harbor significant doubts as to the fairness of the proceedings against this accused and the military justice system as a whole** if they knew that this accused's main interrogator was, during sig-

> nificant portions of this trial, prepare-not only prepared as a government witness but was seated at the side of the convening authority as a trusted legal adviser while prosecutors and subordinate legal advisers discussed the details of the accused's case and offered legal advice and strategy which would determine whether this accused would be prosecuted and, if so, how.

Record of 17 Jun 2008 at 24-27 (emphasis added).

The Government then filed a timely notice of appeal on 18 Jun 2008, appealing the military judge's decision granting the appellee's Motion to Dismiss for UCI pursuant to Article 62, UCMJ.[FN10]

> FN10. The Government provided notice of the appeal on 8 July 2008, pursuant to R.C.M. 908(b)(3). During oral argument, we directed the Government to submit a written response addressing the appellee's jurisdictional challenge to the Government's appeal. After reviewing the Government's reply and attached documents of 28 October 2008, we are satisfied that this court has jurisdiction to determine the Government's interlocutory appeal.

II. The Law

When reviewing interlocutory appeals filed by the Government pursuant to Article 62, UCMJ, we may only act with respect to matters of law. *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F.2004); *United States v. Lincoln*, 40 M.J. 679, 683 (N.M.C.M.R.1994), *set aside in part on other grounds*, 42 M.J. 315 (C.A.A.F.1995). When the issue of unlawful command influence is litigated on the record, the military judge's findings of fact are reviewed under a clearly-erroneous standard, but the questions of command influence flowing from those facts are a question of law we review *de novo*. *United States v. Reed*, 65 M.J. 487, 488 (C.A.A.F.2008)(quoting *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A.1994)). Further, this court has no authority to find facts in addition to those found by the military judge. *Gore*, 60 M.J. at 185.

***5** At trial, the defense is required to present " 'some evidence' " of unlawful command influence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F.1999)(quoting *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F.1995)); *United States v. Simpson*, 58 M.J. 368, 373 (C.A.A.F.2003). The defense must: (1) "show facts which, if true, constitute unlawful command influence" and (2) show "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.

If the defense meets its burden, the Government must establish one of the following by proof beyond a reasonable doubt: (1) disprove the predicate facts on which the allegation of unlawful command influence is based; (2) persuade the military judge that the facts do not constitute unlawful command influence; or (3) prove at trial that the unlawful command influence will not affect the proceedings. *Id.* at 151.

III. Analysis

A. Apparent UCI

Unlawful command influence is "the mortal enemy of military justice." *Gore*, 60 M.J. at 178 (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A.1986)). "Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with 'eliminating even the appearance of unlawful command influence at courts-martial.' " *United States v.. Lewis*, 63 M.J. 405, 415 (C.A.A.F.2006)(quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A.1979)). "[O]nce 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.' " *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F.2002)(quoting *Rosser*, 6 M.J. at 271). This call to maintain the public's confidence that military justice is free from unlawful command influence follows from the fact that even the " 'appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.' " *Simpson*, 58 M.J. at 374 (quoting *Stoneman*, 57 M.J. at 42-43).

Our review of whether the conduct of the Government in this case created an appearance of unlawful command influence is determined objectively. *Lewis*, 63 M.J. at 415 (citing *Stoneman*, 57 M.J. at 42). The objective test for the appearance of unlawful command influence is similar to the tests we apply in reviewing questions of implied bias on the part of court members or in reviewing challenges to military judges for an appearance of conflict of interest. *Id.* (citations omitted). "We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus, the appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id.*

***6** The Government posits several arguments critical of the military judge's decision. First, the Government asserts that several of the military judge's findings of fact essential to his ruling are unsupported by the record. FN11 We disagree, and find that a careful review of the record reveals that the military judge's essential findings of fact are not clearly erroneous, and we adopt them as our own.

> FN11. The findings of fact the Government claims are not supported by the record are: (1) The military judge erred when he found that most of [LtCol Riggs'] participation was by video teleconference; (2) Virtually all of the cases discussed [at the legal meetings] were MARCENT cases; (3) Col Ewers was by rank at all times during these [I MEF/MARCENT] meetings the senior legal advisor in the room; (4) LtGen Mattis was unconcerned with how Col Ewers' presence in these meetings may appear to third parties.

The Government also asserts that no disinterested member of the public aware of all the facts would harbor any doubts about the fairness of these proceedings. In support of this contention, the Government argues that LtGen Mattis was extraordinarily well-informed, exercised complete independence of judgment, routinely took actions which reflected his concern with ensuring the appellee was availed of his rights, only accepted legal advice from permissible sources, and selected an Article 32, UCMJ, investigating officer and court-martial panel familiar with the challenges the appellee faced in Iraq. Govt. Brief at 22-31. In addition, the Government argues that the military judge's finding of apparent UCI is entitled to considerably less deference than his finding of actual UCI, that Col Ewers participation as a witness was not influenced by his attendance at the legal meetings, and that the CDA legal meetings were conducted jointly due to the CDA's scheduling demands. *Id.* at 24-36.

Assuming without deciding the Government's arguments are supported by the record, each argument focuses primarily upon potential improper influence "flowing upwards" to the CDA based upon Col Ewers' presence or participation in the legal meetings. However, it is the **absence of evidence** on potential "improper influence flowing downwards" to the MARCENT SJA that is dispositive in this case.

In his 20 May 2008 ruling, the military judge concluded that the defense presented "**some evidence** that **the Article 34 advice ... w[as] apparently or actually impermissibly influenced by Col Ewers' presence at and participation in, military justice meetings held by the [CDA commencing in February 2007**]." Record of 17 Jun 2008 at 6. This ruling shifted the burden of proof to the Government to prove beyond a reasonable doubt that the MARCENT SJA's legal advice was not apparently or ac-

tually impermissibly influenced by Col Ewers' presence or participation in the CDA legal meetings.

Yet, the Government presented no testimonial or documentary evidence from any member of the MARCENT SJA's office. Instead, the Government called two witnesses: LtGen Mattis and Col Ewers. LtGen Mattis testified that he was aware Col Ewers was "tainted" and could provide no legal advice on the Haditha cases, that he neither solicited nor received advice on the Haditha cases from Col Ewers, and that he only received legal advice on the MARCENT legal cases from the MARCENT SJA and his staff or the prosecutors involved in those cases. Record of 2 Jun 2008 at 59-60, 65.

***7** Col Ewers denied providing any legal advice to the CDA in this case, denied participating in the drafting of the Article 34, UCMJ pretrial advice letter, and acknowledged that he was disqualified from providing pretrial or post-trial legal advice as he had served as an investigating officer regarding the Haditha incidents.[FN12] *Id.* at 68, 70, 72, 75-76, 78, 81, 89-90.

> FN12. In his ruling, the military judge noted that Col Ewers' demeanor while testifying revealed him to be exasperated, frustrated, and mumbling under his breath prior to responding to questions posing a different version of the facts than his own. The military judge's observations regarding Col Ewers' demeanor on the stand are not to be taken lightly. We recognize that we owe less deference to the military judge when, as here, an objective standard is applicable. *Cf. United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F.2007). However, with respect to witness demeanor and credibility, we remain mindful that the military judge saw and heard the witness.

Despite having the burden of proof, the Government presented no evidence to ameliorate the "potential improper influence flowing downwards" specifically the appearance that the MARCENT SJA's legal advice may have been impermissibly influenced by Col Ewers' presence or participation in the CDA legal meetings. Such an appearance was further supported by Col Ewers' stellar reputation, seniority, long-term relationship with the CDA, personal knowledge of and well-known opinions regarding this case forged by his role as an investigator on the reporting and follow-on actions regarding the Haditha incidents. Record of 7 May 2008 at 14, 15. In fact, Col Ewers testified that he had anticipated, based on his history with LtGen Mattis and the fact that he was the senior SJA, that he might be asked his opinion on MARCENT matters. Record of 2 Jun 2008 at 90.

Notably, five of the seven legal conclusions reached by the military judge address the Government's failure to prove beyond a reasonable doubt that the MARCENT SJA, or his legal advice, was not impermissibly influenced by Col Ewers' presence at, or participation in, the legal meetings with the CDA. Although we have not and need not decide whether Col Ewers' presence actually chilled or otherwise impermissibly influenced the legal advice of the MARCENT SJA, (nor whether any potential chilling was intentional or unintentional), we are convinced the Government failed to meet its burden of demonstrating, beyond a reasonable doubt, that these proceedings were untainted by the appearance of UCI. We are similarly convinced that an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor significant doubt about the fairness of this proceeding.

Thus, we are left to conclude that the Government has failed to prove beyond a reasonable doubt there was no apparent UCI.

B. Actual UCI

The Government asserts there was no actual UCI because the record is devoid of evidence to suggest that Col Ewers' presence at the legal meetings improperly influenced either the CDA or subordinate

legal advisors. In light of our decision regarding the presence of apparent UCI, we need not specifically determine whether, in the context of the present case, actual UCI occurred.

IV. Remedy

Having concluded that the Government failed to meet its burden of demonstrating beyond a reasonable doubt that the proceedings were untainted by UCI, we must next decide whether the remedy ordered by the military judge was an abuse of discretion. *Gore*, 60 M.J. at 187. The abuse of discretion standard of review recognizes that a military judge has a range of choices and will not be reversed so long as the remedial action remains within that range. *Id.* An abuse of discretion means that "when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id.* (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.M.A.1993)).

***8** A military judge has the inherent authority to intervene and protect the court-martial from the effects of apparent UCI. *Biagase*, 50 M.J. at 152. In any case involving UCI, it is the duty of the military judge to act as the "last sentinel" and protect the court-martial from the pernicious effects of UCI. Here, the military judge dismissed all charges and specifications without prejudice, and further disqualified any commander from MARCENT, I MEF, or Joint Forces Command from serving as the convening authority in any future disposition. *Id.*

The military judge's remedy was an attempt to eradicate taint on the proceedings, and to provide that future proceedings would not be infected by that taint. The military judge reasoned that purging the taint and restoring public confidence in the military justice system required the removal of any potential influence from Col Ewers, and concluded this required turning back the clock prior to Col Ewers' first appearance at the legal meetings in February 2007. He further concluded that dismissing the charges without prejudice was necessary to remove the taint of UCI.

The record established that Col Ewers was a well-known and influential staff judge advocate within MARCENT and I MEF. Although the military judge did not make specific findings as to the extent of Col Ewers' influence within these organizations, it is, nevertheless, reasonable to conclude that an experienced judge advocate has many professional relationships throughout the commands he services. Thus, to eliminate the possibility of future taint, the military judge disqualified the MARCENT and I MEF commands and required any future prosecution occur under the cognizance of a different convening authority.

We also surmise that his remedy was intended to insulate future proceedings from taint, and to ensure public confidence and integrity of any subsequent prosecution is protected. Thus, to the extent not explicitly stated by the military judge, we conclude that his ruling disqualified the commanders and their SJA's, including LtGen Mattis, LtGen Helland, Col Ewers, and LtCol Riggs, from any future involvement in this case in their individual capacities.

We conclude the military judge did not abuse his discretion by dismissing the charges without prejudice, by disqualifying the MARCENT and I MEF commanders, and by disqualifying LtGen Mattis, LtGen Helland, Col Ewers and LtCol Riggs in their individual capacities.

We further conclude that the military judge's disqualification of Joint Forces Command organization, except to the extent that it involves Gen Mattis in his individual capacity, is not supported by factual findings in the record, and therefore is an abuse of discretion.

V. Conclusion

For the foregoing reasons, the Government's interlocutory appeal is denied. The record is returned to the Judge Advocate General.

Senior Judge VINCENT and Judge PRICE concur.

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