NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **ERIC S. GILMET** **HMC, E-7,** **U.S. Navy**	**Ruling on Defense Motion to Dismiss for Unlawful Command Influence** **9 February 2022**

1. <u>Nature of Motion and Procedural Posture</u>

On 10 December 2021, the Defense moved this Court to dismiss all charges and specifications with prejudice.[1] The Defense alleged that Colonel (Col) Christopher Shaw, USMC while acting in his capacity as Judge Advocate Division's Deputy Director, committed unlawful influence on this Court Martial. On 17 December 2021, the Government responded, urging this Court to deny this Defense's motion.[2] The Defense submitted a reply brief on 19 December 2021.[3]

Prior to the initial Article 39(a) session to address this matter, the Court provided notice to the parties that the Court preliminarily found, based on the Defense's submissions, that they had raised "some evidence" that, if true constituted UCI. The Court notified the parties that it had, therefore, shifted the burden to the Government. This was done preemptively so that the parties could properly focus their efforts and argument with trial dates looming.[4]

Also, the Court notified the parties that, based on the Defense's motion and affidavits, the Court planned to have a discussion with each of the military counsel and the Accused - on the record - to address their respective positions regarding the alleged conflict. The Court referenced *United States v. Watkins*, 80 M.J. 253 (C.A.A.F. 2020)

At the hearing on 21 December 2021, the Court asked each military defense counsel if they believed there was a conflict of interest. Both indicated that after consultation with their state bar and with conflict-free supervisory counsel, they believed that there was an irreconcilable conflict of interest. As such, they each moved the Court to withdraw from their representation of HMC Gilmet. The Court then afforded HMC Gilmet a recess to consult with

[1] Appellate Exhibit LXXXV (85)
[2] Appellate Exhibit LXXXVII (87)
[3] Appellate Exhibit LXIX (89)
[4] At the hearing, and at the request of the Government, the Court also entered specific findings into the record regarding this first prong. The Court also takes the opportunity now to supplement its oral findings.

conflict-free counsel and his civilian counsel on whether or not he consented to their withdrawal from the case. After this consultation, HMC Gilmet reluctantly consented to their withdrawal, stating, in essence, "I want the Captain Thomas and Captain Riley of three weeks ago." HMC Gilmet explained this reluctance to the Court and is discussed further in this ruling.

Captains Thomas and Riley were then excused from further participation from the case.

Based on this turn of events, the Court continued the trial and granted the parties additional time to provide any supplemental briefs and evidence in support of their respective positions.

The Court further instructed the parties to focus their efforts on the following areas:

1. Has the withdrawal of counsel materially prejudiced the Accused in this case? Or, once he is provided with conflict-free counsel—and based on his consent to release his counsel—has the issue been resolved and/or mooted?

2. If it has been mooted, is there still a 6th Amendment right to counsel? If so, what is the standard the Court must apply (e.g. structural error, etc . . .)? If that has been interfered with, what are the available remedies?

3. Now that Col Shaw has been removed, does Article 37 still apply? Have the government's remedial measures (along with their submissions) met their burden?

4. Assuming, but not deciding, that UCI has occurred and that it has materially affected these proceedings, what other remedies are available short of dismissal with prejudice? [5]

The Government filed AE 103 and the Defense filed AE 105.

The Court then held an Article 39(a) session on 20 January 2022.[6] At this hearing, the Government provided additional evidence, specifically AE 104, which was the unreleased Command Investigation conducted into the allegations raised by the Defense against Col Shaw.[7] Because the Defense had just been disclosed this investigation, the Court allowed the Defense until 26 January 2022 to address any new issues that were raised as a result of this discovery.

The Defense filed AE 107 on 26 January 2022 with additional enclosures contained in AE 108.

No witnesses were called at any of the Article 39(a) hearings regarding the UCI.

The Court now **GRANTS** the Defense's motion as discussed below. All charges and specifications are **DISMISSED with prejudice**.

---

[5] The Court indicated that this prong was mainly aimed at the Government for their response.

[6] The Court had initially scheduled the Article 39(a) for 21 January 2022, but based on inclement weather in the forecast, the parties asked for an earlier session of Court.

[7] At the time of this hearing, this Command Investigation had not been endorsed or acted upon by the Commander who directed the investigation.

2. <u>Findings of Fact</u>.

In reaching these findings of fact and conclusions of law, the Court has considered all legal and competent evidence presented by the parties, reasonable inferences to be drawn from the evidence, allied papers and documents, and the Court has resolved all issues of credibility.

Chief Gilmet's Defense Counsel

The Accused lead defense counsel is a civilian, Mr. Colby Vokey; Mr. Vokey established an attorney client relationship with HMC Gilmet in January of 2019. HMC Gilmet pays Mr. Vokey an hourly rate.[8] During the usual course of business, on 28 September 2019, Captain Charles D. Strauss, USMC was detailed as the accused's detailed military defense counsel. However, on 25 March 2020, the accused submitted an Individual Military Counsel Request for Captain Matthew Thomas, UMC. This request was approved on 20 April 2020 and Captain Thomas was detailed as the accused's IMC. As a result, Captain Strauss was subsequently excused as detailed military defense counsel. Capt Riley was also detailed as the accused's military counsel.

In March 2020, HMC Gilmet's case was continued indefinitely due to COVID-19 and witness unavailability.[9]

Captain Thomas and Captain Riley had spent time interviewing witnesses who had not spoken with civilian counsel. They were each handling specific portions of the trial or specific witnesses. Trial was scheduled to commence in the beginning of January 2022.

Colonel Christopher Shaw, USMC

Colonel Shaw served as the Deputy Director Community Management and Oversight of Judge Advocate Division and held this position until 19 November 2021.

Until 19 November 2021, in his capacity as Deputy Director, Col Shaw oversaw the slating and assignment process for all Marine judge advocates.

Colonel Shaw has served in the USMC on active duty since 1994 and is a judge advocate.

---

[8] While the actual retainer agreement was not provided to the Court, the Court simply notes this fact as the Accused has mentioned the financial impact his releasing of military counsel will have - and has had - on him.

[9] Much of the lengthy delay in this case is due to the unavailability of a key government witness, Major Wiestra, who is a Canadian national and not subject to the compulsory process. Despite the government's significant efforts to secure his presence at trial, they were unable to do so. Instead, a deposition (which still required significant government coordination and execution) was conducted in the fall of 2021. The parties were set to argue the admissibility of that deposition, as well as any objections to the contents of that deposition, at our scheduled hearing in 21 December 2021.

Deputy Director for Community Management and Oversight, Judge Advocate Division

Per section 010306 of the MCO 5800.16-V 1 Legal Support Administration Manual ("LSAM"), the Deputy Director, Judge Advocate Division (JAD)(Military Justice and Community Development) is responsible:

> "to the SJA to CMC for military justice matters and for the legal community planning and development to ensure the Marine Corps provides high-quality legal support across the entire spectrum to commanders, Marines, Sailors, and their families. The DepDir, MJCD oversees the Military Justice Branch; the Community Development, Strategy, and Plans Branch; and the Legal Assistance Branch."

On 18 November 2021, Col Shaw served as the Deputy Director, Judge Advocate Division (JAD) for Community Management and Oversight (Dep Dir CMO) at Headquarters Marine Corps. One of his billet responsibilities was to prepare the assignment slate for USMC judge advocates who are scheduled to execute permanent change of station (PCS) orders. Dep Dir CMO supervises the preparation of the proposed assignment slate that is presented to the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC), who makes the final recommendation on the judge advocate assignment slate. JAD forwards the assignment slate recommendation to the monitors at Marine Corps Manpower Management who make the final assignment decisions for USMC judge advocates.

Judge Advocate Division Visit to Camp Lejeune

From 15 through 18 November 2021, members of the Judge Advocate Division, to include Col Shaw, traveled to Parris Island South Carolina, Cherry Point North Carolina, and Camp Lejeune North Carolina to meet with judge advocates and legal services specialists in all three locations. The purpose of these visits was to assist the SJA to CMC with the oversight and supervision of the provision of legal advice and legal services support within the Marine Corps, and to set the conditions for annual Legal Support Inspections in 2022. Col Shaw and Master Gunnery Sergeant Williams met with personnel assigned to the Legal Services Support Teams at Parris Island, Cherry Point, and Camp Lejeune. Col Shaw was at each location in his official capacity as the Deputy Director for Community Management.

Colonel Shaw's Meeting with Defense Counsel

On 18 November 2021, Colonel Shaw held a meeting with Camp Lejeune's Defense Service Office in Building 64B-2. The meeting commenced at 1300 and concluded at 1500.

In attendance were: Major Kurt Sorensen, Captain Matt Thomas, Captain

Michael Blackburn, Captain Jon Bunker, Captain Laura Brewer, Captain Tom Persico, First Lieutenant Steven Trottier, and Captain Cameron McAlister.[10]

Col Shaw introduced himself with a synopsis of his career. He explained his current position at JAD included providing input regarding billet and duty station assignments for judge advocates.

During this meeting, Col Shaw discussed some of the proposals contained in the FY22 NDAA, including an explanation of a new billet where a senior judge advocate, rather than a commander, will be the convening authority for serious criminal allegations. Capt Thomas asked, "What is being done to protect the attorney in that position from outside influences such as political pressures, media pressure and general societal pressures?" or words to that effect. The impetus seemed to be regarding what measures would be put in place to protect that senior judge advocate from improper influences when making referral decisions. Capt Thomas referenced the present protections created for attorneys in the Defense Services Organization (DSO), specifically, having their fitness reports authored by other Defense Counsel within the DSO.

In response, Col Shaw stated that the defense attorneys "may think they are shielded, but they are not protected," and continued to say, "You think you are protected but that is a legal fiction," or words to that effect. Col Shaw then directly squared his shoulders and chair towards Capt Thomas and he did not break eye contact with him as he made further remarks. During that time, Col Shaw specifically stated, "Captain Thomas, I know who you are and what cases you are on, and you are not protected." Col Shaw followed up by stating, "…the FITREP process may shield you, but you are not protected. Our community is small and there are promotion boards and the lawyer on the promotion board will know you," or words to that effect. Col Shaw reiterated comments such as "shielded but not protected," multiple times. Those present at the meeting commented that before responding to questions, Col Shaw took time to reflect on his answers, commenting at one time before answering, "I want to make sure I'm saying what I am allowed to say," or words to that effect.

To further his point, Col Shaw referenced judge advocates who had served as defense counsel for extended periods of time on high profile courts-martial involving allegations of war crimes committed at Haditha and Hamdania in Iraq. He stated there were secondary effects or consequences to spending five or six year in defense, and again referenced promotion boards, the small judge advocate community, and the fact the lawyer on the promotion board will know what "you did." He confirmed the belief that some people who served as defense counsel were not promoted who should have been promoted.

---

[10] There was evidence that Captain Brewer and Captain McAlister were also present, but not for the entire meeting.

During this brief, Col Shaw also mentioned that Congress was not happy with the courts-martial results and resources were going to change to get to the "right result," or words to that effect.

Col Shaw's pointed answers to Capt Thomas concerned Capt Thomas about his continued role as a defense counsel, and more specifically, his role as a defense counsel for HMC Gilmet. Capt Thomas feared that his continued representation of HMC Gilmet and zealous advocacy of clients accused of sexual assaults would be detrimental to his career. Specifically, Capt Thomas became concerned that JAD would positively or negatively affect his career through manipulation of billet assignment and the PCS process based on his role as a defense counsel. Capt Thomas told HMC Gilmet about the meeting and Col Shaw's comments, which created a rift between he and his client, as Col Shaw's comments caused HMC Gilmet to question Capt Thomas' undivided loyalty to him and his defense.

The Aftermath

Word quickly spread through the DSO chain of command and various senior officers within the Camp Lejeune Marine judge advocate community regarding Col Shaw's comments. [11] Most were shocked at what had been relayed to junior defense attorneys. On 19 November 2021, Major General Bligh (MajGen), the Staff Judge Advocate to the Commandant of the Marine Corps, became aware of the comments Colonel Shaw made. After learning of these alleged comments, MajGen Bligh took swift action and temporarily removed Col Shaw from his duties as Deputy Director of the Plans and Innovation Branch at Judge Advocate Division. This was done pending the completion of an investigation into the matter.[12]

A Command Investigation was ordered on 30 November 2021 and Colonel Peter D. Houtz, USMC was appointed as the investigating officer.[13] The investigation was submitted to the Commanding General, Marine Corps Installation Command on 30 December 2021. In this investigation, Col Houtz determined that, while Col Shaw's comments to the young defense attorneys were "ill-advised and lacked proper context and background," they did not warrant, in the Investigating Officer's opinion, any further action.[14]

As this investigation was ongoing, litigation in the *United States v. Draher/Negron*, companion cases to the present case, intensified. In support of its UCI motion, on 13 Dec 2021,

[11] The Court is aware from the submissions from the parties, to include the Command Investigation, that Col Shaw was alleged to have made several unprofessional statements to other Marine judge advocates during other briefs during this trip. As those allegations have no bearing on any of the issues in this case, the Court declines to include them.
[12] MajGen Bligh indicated that even if Col Shaw were to return to JAD in some capacity, he would no longer be involved in the slating or assignment process for Marine judge advocates.
[13] Col Houtz was assigned to JAD in 2016-2017 and is currently an appellate judge at NMCCA.
[14] The Court is reluctant to mention the findings and recommendations of the IO, as they are not binding on any of the issues this Court must address and resolve. The Court highlights this investigation to show that (a) it was ordered (b) it was completed (c) to utilize the investigation's enclosures for facts that may not have been previously provided by the parties in the UCI litigation and (d) to address the curative efforts by the Government.

the Government submitted a signed statement from Col Shaw regarding his interactions with the defense attorneys on 18 November 2021. In this statement, among other things, Col Shaw stated that "[he did] not know Captain Thomas, nor [did he] recall speaking with him." At the end of this statement, Col Shaw indicated that, if called as a witness in any criminal proceeding regarding his comments to the young defense counsel, he would invoke his Article 31(b) rights and remain silent.

Before the hearing in the *Draher/Negron* UCI motion, the Government counsel disclosed to the *Draher/Negron* Defense Teams text messages from Col Shaw that clearly showed internal inconsistencies within Colonel Shaw's initial statement. Namely, text messages were discovered to the Defense team where Colonel Shaw directly texted with his subordinates regarding Captain Thomas hours before his meeting with Captain Thomas and other Marine defense counsel.[15] In his subsequent statements of 14 and 15 December, Col Shaw attempted to explain this inconsistency.[16] In his 15 December 2021 statement, Col Shaw reiterated that if he were called to testify at these criminal proceedings, he would invoke his right to remain silent under Article 31(b).

On 17 December 2021, the Government submitted an affidavit from MajGen Bligh, the SJA to CMC. MajGen Bligh declared that Col Shaw's comments were improper as they do not reflect MajGen Bligh's views or guidance; MajGen Bligh praised defense work as vital to the success of the military justice system, encouraged vigorous advocacy by defense counsel and stated service as a defense counsel will in no way be detrimental to an individual's career. He also discussed the Marine Corps' need to develop litigation expertise.

During the Article 39(a) session on 21 December 2021, the Court asked each military defense counsel if they believed there was a conflict of interest. Both indicated that after consultation with their state bar and with conflict-free supervisory counsel, they believed that there were irreconcilable conflicts of interest. As such, they each moved the Court to withdraw from their representation of HMC Gilmet. The Court afforded HMC Gilmet a recess to consult with his civilian counsel and conflict-free counsel on whether or not he consented to their withdrawal from the case. After this consultation, HMC Gilmet reluctantly consented to their withdrawal. Captains Thomas and Riley were then excused from further participation from the case.

Reflecting on his decision, HMC Gilmet stated

> "Up until November 2021, I had confidence that I had military defense counsel who would fight hard for me and would do everything legal and ethical to defend me. But that

---

[15] There is also evidence that Col Shaw, while meeting with Col Fifer, had spoken with the Senior Defense Counsel, Major Sorensen, the morning of 18 November specifically requesting information regarding Capt Thomas's billet considerations. Again, this directly contradicts Col Shaw's initial statement.

[16] Col Shaw's statement of 14 December was not provided to the Defense until the Command Investigation was disclosed on 21 January 2022.

all changed when this Colonel Shaw made his threatening comments to Captain Thomas. His comments had a significant impact on Captain Thomas and Captain Riley […]. Captain Thomas and Captain Riley were no longer able to provide me legal representation without looking over their shoulder. I wanted Captain Thomas and Captain Riley to represent me at trial but the influence from Colonel Shaw made this impossible.

> Both Captain Thomas and Captain Riley made motions to withdraw from representing me. I was hurt and confused and angry. We were just over two weeks away from trial and I was losing 2/3 of my legal team. Captain Thomas was THE military defense counsel who I wanted to represent me and was the person I requested as my IMC."

When reflecting on the questions from this Court regarding the continued representation of his military counsel, HMC Gilmet added,

> "I did not know what to do. I did not feel like I had much of a choice. It was a Hobson's choice. I could keep military defense counsel who had a conflict and whose representation was being influenced by Colonel Shaw's comments and the possible impact of that representation on their careers. Or I could agree to release the two military attorneys who I had trusted completely and had spent considerable time preparing me and the case for trial. There was no real choice. Based on their fears of reprisal for staying on the case, I ultimately had to release them from the case. These last several years have been the scariest of my life. But, I took comfort in the fact that I had Captain Thomas and Captain Riley there to defend me and ensure I received a fair trial. I don't believe that a fair trial is possible any longer."

> "The loss of Captain Thomas and Captain Riley really hurts me. Based on the evidence of this UCI, I do not believe that any Marine defense counsel can represent me in this trial without the possibility of feeling that career pressure. I realize that, if given new military defense counsel, I will likely be given a judge advocate from another service. I feel like this may put me in a disadvantage in a Marine Corps court-martial."

The Court supplements additional facts where necessary in its analysis below.

3. Principles of Law

Unlawful command influence (UCI) is the "mortal enemy of military justice."[17] Article 37, of the Uniform Code of Military Justice (UCMJ) prohibits commanders and convening authorities from attempting "to coerce, or by unauthorized means, influence the action of a court-martial […] in reaching the findings or sentence in any case."[18] UCI rises from the improper use, or perception of use, of superior authority to interfere with the court-martial process.[19] UCI

[17] *United States v. Thomas*, 22 MJ 388, 393 (C.M.A. 1986)
[18] Article 37(a), UCMJ.
[19] Gilligan and Lederer, COURT-MARTIAL PROCEDURE, Volume 2 §18-28.00, 153 (2d Ed. 1999)

"may consist of interference with the disposition of charges, with judicial independence, with the obtaining or presentation of evidence, or with the independence and neutrality of members."[20]

Traditionally, when assessing whether UCI exists in a particular case, the court must consider the potential impact of actual UCI and apparent UCI. The military judge must take affirmative steps to ensure that both forms of UCI are eradicated from the court-martial in question.[21] The key to the court's UCI analysis is the effect on the proceedings, not the knowledge or intent of the government actors whose actions are in question.[22] In a recent opinion, the C.A.A.F. stated that

> "the plain language of [Article 37, UCMJ] does not require one to operate with the imprimatur of command."[23] In *Barry*, the C.A.A.F. reinforced the fundamental principle that a military court must "protect court-martial processes from improper command influence and to prevent interference from non-command sources as well in order to foster public confidence in the actual and apparent fairness of the military system of justice.[24]

"Actual UCI occurs when there is an improper manipulation of the criminal justice system which negatively effects the fair handling and/or disposition of a case."[25] In *United States v. Biagase,* C.A.A.F. set forth the analytical framework to be applied to allegations of UCI at trial.[26] The initial burden on the defense to raise the issue by "some evidence."[27] To meet the "some evidence" standard, the Defense must show some facts which, if true, would constitute UCI.[28] The Defense must then show that such evidence has a "logical connection" to the court-martial at issue in terms of potential to cause unfairness in the proceedings.[29] While the initial burden is "low," the Defense is required to present more than an allegation or speculation.[30] Where the Defense has satisfied its initial burden, the burden shifts to the Government to:

---

[20] *Id.* at 154-55.
[21] *United States v. Lewis,* 63 M.J. 405, 413 (C.A.A.F. 2006). *See also Rosser*, 6 M.J. at 271 (stating that once UCI is raised, "it is 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.").
[22] *Boyce,* 76 M.J. at 251.
[23] *U.S. v. Barry,* 78 M.J. 70 at 76 (C.A.A.F. 2017).
[24] *Id*.
[25] *Id.* at 247.
[26] 50 M.J. 143, 150 (C.A.A.F. 1999)
[27] *Id.*
[28] *Id.* at 150
[29] *Id.*
[30] *United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 1998)(noting that "mere speculation that UCI occurred because of a specific set of circumstances is not sufficient"); *see also United States v. Johnston,* 39 M.J. 242, 244 (C.M.A. 1991)("The threshold for triggering further inquiry should be low, but it must be more than a bare allegation or mere speculation.").

(1) disprove "the predicate facts upon which the allegation of UCI is based,"

(2) persuade the court that the facts do not constitute UCI, or

(3) prove that the UCI will not affect these specific proceedings.[31]

"Whichever tactic the government chooses; the required quantum of proof is beyond a reasonable doubt."[32]

To establish apparent UCI, the accused must demonstrate:

(1) facts, if true, that constitute UCI, and

(2) the UCI placed an intolerable strain on the public's perception of the military justice system because "an objective, disinterested observer, fully informed of all of the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding."[33]

In *Lewis*, CAAF explained that the "objective test for the appearance of UCI 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 a conflict of interest."[34]

In *United States v. Boyce*, the Court of the Appeals for the Armed Forces [CAAF], reversed the findings and sentence in a sexual assault case on the basis of apparent UCI, despite finding no prejudice suffered by the appellant.[35] In dissent, Judge Ryan expressed her disagreement with the majority, reasoning, "I posit that Congress had good reason to tether appellate relief to Article 59(a)'s requirement of prejudice to the accused..."[36]

Less than three years after CAAF issued its opinion in *Boyce*, Congress amended Article 37, UCMJ, ("Command influence") to require a showing of material prejudice to the substantial rights of the accused before a finding or sentence of a court-martial may be held incorrect on the ground of a violation of that section. ("No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused."[37] The effective date of this amendment to Article 37, UCMJ, was 20 December 2019.[38] Accordingly, N.M.C.C.A. has held that the revised Article 37, UCMJ, requires a showing of material prejudice to the substantial rights of the accused.[39] Further, trial courts are statutorily barred from holding the findings or sentence of the case to be incorrect on

[31] *Biagase*, 50 M.J. at 151.
[32] *United States v. Stoneman,* 57 M.J. 35, 41 (C.A.A.F. 2002)(citing *Biagase*, 50 M.J. at 151).
[33] *Boyce*, 76 M.J. at 249; s*ee also Stoneman*, 57 M.J. at 42.
[34] 63 M.J. at 415.
[35] *Boyce*, 76 M.J. at 253
[36] *Id*. at 256.
[37] 10 U.S.C. 837(c)
[38] National Defense Authorization Act 2020, Pub. L. No. 116-92, § 532(c), 133 Stat. 1361 (2019).
[39] *United States v. Gattis*, 81 M.J. 748, 757 (N.M.C.C.A 2021).

the grounds of apparent UCI without a showing of material prejudice to the substantial rights of the accused.[40]

If the defense meets that burden, then UCI is raised at the trial level, and consequentially, a presumption of prejudice is created.[41] To affirm in such a situation, a reviewing court must be convinced beyond a reasonable doubt that the UCI had no prejudicial effect on the court-martial.[42] "[P]rejudice is not presumed until the defense produces evidence of proximate causation between the acts constituting [UCI] and the outcome of the court-martial."[43]

If the court finds either actual or apparent UCI, the court "has broad discretion in crafting a remedy to remove the taint of unlawful command influence."[44] The court should attempt to take proactive, curative steps to remove the taint of UCI and, therefore, ensure a fair trial.[45] C.A.A.F has long recognized that, once UCI is raised "…it is incumbent on the military judge to act in the spirit of the UCMJ 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."[46]

Additional principles of law are provided below, where necessary.

4. Analysis and Conclusions of Law

As the Court mentioned several times in these hearings: despite the promptings from both sides, this Court is not here to litigate ghosts of promotions past or future within the USMC judge advocate general corps, nor the career viability of being a defense counsel in the USMC. This ruling only addresses the specific actions of a specific senior officer regarding a specific junior officer. It is not an indictment on the Judge Advocate Division, nor a comment on how the USMC views defense counsel work.

The facts in this case can be boiled down to a simple advert: a senior judge advocate who occupied a position of authority over the futures of young judge advocates made threatening comments to a young judge advocate about his career while this young judge advocate was assigned as IMC to a HIVIS case,[47]creating an intolerable tension and conflict between an accused and his specifically requested military counsel. His actions constitute actual and apparent UCI.

---

[40] *Id.*
[41] *Douglas*, 68 M.J. at 354
[42] *Id*.
[43] *Biagase,* 50 M.J. at 150.
[44] *United States v. Douglas,* 68 MJ 349, 354 (C.A.A.F. 2010)(quoting *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1991))
[45] *Id.*
[46] *United States v. Gore*, 60 MJ 178, 186 (C.A.A.F. 2004).
[47] Even before this UCI litigation made "the news," the case had already received attention in publications such as The Washington Post based solely on the charges and allegations.

Has the Defense Presented Some Evidence in Support of their Motion?

The Court finds that the Defense has presented some facts, which, if true, would constitute both actual and apparent UCI. Specifically, the Defense presented evidence that Col Shaw, acting in his capacity as the SJA to CMC's representative for development of the Marine Corps judge advocate community, made statements to junior defense counsel which left them with the distinct impression that their service as defense counsel was harmful to their career progression. Through the affidavits of those present, and more specifically of Capt Thomas, the Defense has shown some evidence of how Col Shaw's statements directly impacted Capt Thomas' ability to represent HMC Gilmet and thus the fairness of the court-martial proceedings.

Thus, the Court shifts the burden to the Government.

Has the Government introduced evidence that disproves, beyond a reasonable doubt, "the predicate facts upon which the allegation of UCI is based?"

The Government has not introduced sufficient evidence to disprove the predicate facts. Instead, there is ample evidence that these comments were made, that they had an impact on those involved, and that the senior leadership within JAD found the comments to be so problematic that Col Shaw was quickly removed from his position, an investigation was ordered, and the Commandant's SJA felt compelled to assure Defense Counsel they would not face retaliation for their zealous advocacy. Further, Col Shaw's statements provided to this Court by the government were internally inconsistent, self-serving and directly contradicted by multiple officers. Compounded by these multiple inconsistent submissions, Col Shaw indicated he would invoke his Article 31(b) rights if he were called during this pending litigation.[48] As such, Col Shaw was never called as a witness.

The Government has failed to carry its burden under this theory.

Has the Government introduced evidence that persuades this court, beyond a reasonable doubt, that the facts don't constitute UCI?

The Government has not provided or introduced sufficient evidence that the facts in this case do not constitute UCI. In support of their position, the Government included multiple affidavits from individuals that indicate that these comments from Col Shaw were isolated, misguided and not based in reality. Because of this, they argue, a defense counsel fully armed

[48] Since he was never called as a witness, Col Shaw's decision to invoke his right to remain silent were he to be called as a witness was not fully litigated during the Article 39(a) hearing. The Defense did urge this Court to not consider any of his statements. While not dispositive or central to the Court's analysis, the Court finds the language in Mil. R. Evid. 301(e)(1) persuasive in how to handle Col Shaw's multiple statements followed by a blanket invocation clause if called as a witness: "If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct . . . , in whole or in part, unless the matters to which the witness refuses to testify are purely collateral." The Court is mindful that this was testimony for an Article 39(a) session. The Court simply uses the above framework as one way – *of many* - to determine how much weight to afford Col Shaw's multiple statements.

with these facts from multiple reliable sources would not and should not harbor any concerns about zealously representing clients as a defense counsel.

However, this fails to address what actually occurred in this case and the dramatic effect that it had.[49]

First, the Court notes that this was a very junior audience being addressed by a very senior officer, who by his billet at the time would have been viewed as an authority on advancement and success within the judge advocate community. This senior officer was directly commenting on evaluations, assignments and promotions within the USMC judge advocate corps generally, but then addressed those topics and how they affect a defense counsel, specifically. Further, these comments appeared to be directed at Capt Thomas.

Article Art 37(b) of the UCMJ addresses the protection of those who zealously represent clients at a court martial in their own evaluation, advancement and assignment:

> In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report […] (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any person in a court-martial proceeding.[50]

The Court finds the prohibition contained in Article 37(b) particularly instructive. Pursuant to this Article, one cannot blatantly and openly negatively affect a career of an officer through the evaluation or fitness report process just because they were a zealous advocate. The concern is that a supervising officer could "kill" a career directly because they did not approve of a defense counsel's zealous advocacy. This would be a brazen flouting of established concepts of fairness in the court martial process. What the Court is facing in the present scenario is equally as dangerous, just more pernicious.

Through the affidavits of the junior defense counsel who were present at Col Shaw's brief, the Defense has presented direct evidence of what Col Shaw said and the effect his words had on them. The evidence clearly establishes that Col Shaw was in a position of power and speaking under a color of authority at JAD. By a result of his position, Col Shaw had a significant and direct impact on the future of a young judge advocate. His opinions, and how he chose to express them to senior officers, could make a significant difference at those micro-intersections of a young judge advocate's career, opening doors for some, closing them for

---

[49] The Court does not need to delve into a long parade of horrible, *reduction ad absurdum* arguments to show how comments from someone speaking under a color of authority, even if misguided and not based in reality, could still result in the harm contemplated under UCI caselaw.

[50] Article 37(b), U.C.M.J.

others.[51] The Court considers Col Shaw's role in the preparation of the assignment slate for USMC judge advocates who are scheduled to execute PCS orders to be similar to a "document used in whole or in part" for determining the assignment or transfer of counsel as contemplated under Article 37(b).[52] In such an important role, when asked a genuine question from a young judge advocate, he stated, "Captain Thomas, I know who you are and what cases you are on, and you are not protected," and the "FITREP process may shield you, but you are not protected," or words to that effect. Col Shaw further commented about the smallness of the USMC judge advocate community and how those senior officers sitting on that promotion board will "know what you did." Each of these comments directly addresses Capt Thomas's zealous representation of Chief Gilmet.

In this brief, Col Shaw commented on Capt Thomas' assignments, his service reputation, and his promotability. These statements were tied directly to Capt Thomas's role as a defense counsel and his then-current status as IMC to HMC Gilmet. This, coupled with Col Shaw's position and authority, created an untenable position for Capt Thomas, a young marine judge advocate, attempting to navigate, and already concerned about, his future within the USMC. Does he take Col Shaw at his word and worry about how his representation of HMC Gilmet may later affect him? Or, does he take the government at its word now that this was all "a tale […] full of sound and fury, signifying nothing." As the Court has reviewed this evidence multiple times, the Court comes back to the same question: whether or not Col Shaw's statements are true or not, how is a young junior officer like Capt Thomas in a position to evaluate the truth of Col Shaw's statements? Col Shaw placed this young Marine in an unworkable situation.

Capt Thomas was faced with the choice to either zealously represent this client and sacrifice the potential for advancement in the USMC or protect his nascent career. This, in turn, created a difficult choice for HMC Gilmet: he must either proceed with a conflicted attorney; or effectively be deprived of his choice of individually chosen military counsel given the conflict the government created.[53]

Has the Government proven beyond a reasonable doubt that the UCI will not affect these proceedings?

The Government argues if the Court finds UCI that they have shown beyond a reasonable doubt that any UCI will not affect these proceedings. They say this because the Government took "immediate corrective actions to cure and remove the taint of any UCI."[54] Further, the Government states that since conflict-free counsel will be appointed and the Court has granted an

---

[51] There is a common gallows humor trope within the military where one junior person did something to displease a senior officer and is shortly found in an undesirable duty location because of that offense.

[52] The Court is mindful that Col Shaw's role was advisory in nature and that he was not the ultimate decider of billet assignments, but the Court cannot ignore the significant impact of "he who prepares the initial spreadsheet and slate."

[53] On brief and during oral argument, the Defense and HMC Gilmet referred to this decision as a "Hobson's Choice," which the Court interpreted as an "illusion of choice" where really only one choice was tenable. HMC Gilmet would never have released his counsel but for Col Shaw's actions.

[54] *See Gattis*, at 754 - 757 (a significant factor in determining the existence of actual and apparent UCI was whether any potential prejudice caused by the UCI was later cured).

indefinite continuance for that new counsel to become prepared, that the effect of the UCI has been removed. The Court finds, however, that the Government has not met its burden to show that the UCI above will not - and has not - affected these proceedings.

The caselaw is replete with examples of curative Government action. This includes the removal of the leader who made inappropriate comments regarding rehabilitative witnesses from the unit, thus eliminating the offender from the rating chain of any prospective witnesses; liberal continuances; "all hands" calls to correct allegations of UCI; and a "blanket approval" of all defense witnesses.[55] Other such examples are direct correspondence from the commanding officer (after a subordinate forbade witnesses from speaking with defense attorneys), educating all hands on UCI and encouraging them to speak with defense counsel.[56] Other such praised actions have been "admonishment of the offender by his superior in front of those improperly influenced" and an apology.[57]

In the present case, the Government cites to its *sua sponte* efforts. Specifically, they highlight to the Court that Col Shaw was immediately removed from his job as Deputy Director for Community Management and Oversight. Because of this action, the Government argues that JAD has effectively ensured that Col Shaw will have no role in the detailing and slating process for Marine Corps Judge Advocates. Further, the Government offered several statements from officials within JAD to explain how Col Shaw's statements were not an accurate reflection of how promotions and assignments work within the USMC. Any future concerns, the Government argues, are not justified or reasonable.

In response, the Defense, in essence, simply points at its table: Three attorneys once sat, and then there was one. (It is not lost on the Court that the remaining attorney is a civilian.)

The Court applauds the immediate action of MajGen Bligh as it relates to the temporary removal of Col Shaw from JAD and his permanent removal from the assignment and slating process of judge advocates. This was quick and decisive and it reflects the seriousness with which Col Shaw's comments were viewed and further illustrates the pernicious harm that such statements can sow into a process that demands fairness. Further, MajGen Bligh's affidavit regarding his view of the importance of defense counsel work was an important message that had to be sent to this Defense team and the Marine Corps' Defense Bar in general. However, by the time MajGen Bligh issued his affidavit, weeks had passed and the damage had already been done. It did little to restore the confidence and trust needed by this defense team. Nor did it do

---

[55] *See U.S. v. Sullivan*, 26 M.J. 442 (C.M.A. 1988). While the certified issue in *Sullivan* was if the trial judge had abused its discretion in denying a defense continuance to investigate potential UCI, C.M.A. praised the trial judge's efforts to deal with leadership's inappropriate comments regarding witness participation in a courts martial. C.M.A. did not address if these actions were sufficient in a UCI context.

[56] *See* Gattis, 81 M.J. at 754

[57] *See U.S. v. Roser, 21 M.J. 883, 884 (A.C.M.R. 1986)* which involved three officers who had provided favorable character evidence at an Article 32. Afterwards, their company commander threatened them that if they continued to provide such testimony at trial that their careers would be negatively affected. In response, the curative actions in that case involved a strong, stern public rebuke by the immediate superior in command in front of these witnesses that countermanded the improper comments. The ISIC also required the company commander to apologize.

anything to assuage the concerns of the Accused. Further, this affidavit is not qualitatively the same as the actions of the senior officers in *Sullivan* or *Roser.* In both cases, the subsequent remedial measures were able to ensure that the accused had the benefit of witnesses that would have been impacted by the UCI. Here, the Defense Counsel not only had to concern themselves with their own careers based on Col Shaw's statements, but also the ethical concerns of their respective State Bar Associations.

As footnoted above, the Court is reluctant to mention the command investigation conducted into this matter as it is not relevant on the issues this Court must ultimately decide. However, the Government provided this report of investigation in support of its burden and therefore, a few comments are necessary. While, the Court does not adopt the "whitewashing" term used by Defense counsel, it does note that this investigation does little to weed out the harm caused by Col Shaw's comments to junior counsel. Instead of addressing their valid concerns and their perceptions, the IO instead states,

> "The majority of the comments at issue were in response to questions posed by defense counsel who have an obligation to advocate for their clients. Their assessment of the context of the comments are naturally shaped to bring the most benefit to their clients."

In essence, the IO is saying whomever reviews this investigation and provides an endorsement should take the significant concerns and substantial statements from the young defense counsel with a grain of salt, because, well, they're defense counsel who will do anything to benefit their client. In contrast, Col Shaw's inconsistent statements go unmentioned. His declaration to this Court that he would invoke his right to remain silent if called as a witness do not even merit a footnote in the investigation. The Court is mindful that this investigation has a much different purpose and scope than this ruling, along with different standards of proofs and limitations of what cannot be commented upon. However, the tone-deafness of the above lends credence to the Defense's articulated concern: this investigation has made things worse for the defense team, and, if the endorsement concurs with the IO's findings, then no further action will be taken and Col Shaw may be reassigned to JAD.[58]

Apparent UCI

Having found actual UCI, the Court next turns to the issue of whether Col Shaw's comments created apparent UCI and whether they resulted in a material prejudice to the substantial rights of the accused.[59] The Court finds that they have.

Addressing the first prong under apparent UCI, the Court adopts its findings above regarding the particular acts that constitute UCI. As outlined in its actual UCI analysis, the Court

---

[58] The Government cannot have it both ways. From an evidentiary standpoint, this investigation seemingly contradicts the affidavit from MajGen Bligh, who highlighted the inappropriateness of Col Shaw's statements and now, on the other hand, the Government says through this investigation that these statements amount to nothing more than inflated concerns of Defense Counsel.

[59] As cited above, the Court is aware of the controlling precedent from N.M.C.C.A. in *Gattis*. However, the C.A.A.F. has not yet addressed the continued viability of apparent UCI claims without a showing of material prejudice.

finds that the Government has failed to prove beyond a reasonable doubt that the relevant facts do not exist, that these facts do not constitute UCI or that the UCI has not affected these proceedings. The Court further finds that the Government has failed to prove beyond a reasonable doubt that the UCI, left unaddressed, has not placed an intolerable strain on the public's perception of the military justice system.

In assessing this last prong, the court finds that at this point in the proceeding, an "objective, disinterested observer, fully informed of all of the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding," based, in particular, on the facts as outlined above. Namely, Col Shaw is a senior officer in the USMC and occupied, at the time these statements were made, a significant position of authority and influence over the young judge advocates in attendance at this meeting. Capt Thomas, one of these young judge advocates in the meeting, had asked a question which prompted the responses highlighted above. These comments created a cascade of events that ultimately caused HMC Gilmet to face a difficult choice: keep the counsel he wanted, but who had a conflict of interest,[60] or release the counsel who he had specifically chosen to be by his side, representing him at trial. The Court notes that this really was not a choice. HMC Gilmet would not have released his IMC and detailed defense counsel but for Col Shaw's comments. These comments from Col Shaw, weeks before a HIVIS court-martial was set to begin after two years of preparation, would cause an objective person to legitimately question the fairness of these proceedings. Can there be a fair proceeding when the government, through one of its actors, created a conflict of interest which forced a defense counsel to move to withdraw from a client he has represented for close to two years?

As discussed above, the UCI resulted from Col Shaw's comments interfering with the Accused's right to the counsel of his choice. Not only is this actual UCI, but it is apparent UCI. The fact that Col Shaw caused the Accused's IMC to question his ability to zealously advocate for his client and accordingly caused the Accused to question the abilities of his IMC has placed an intolerable strain on the public's perception of the military justice system. What occurred would confirm the fears of some members of the public that the military justice system is stacked against the Accused and designed to come to the result the military desires.

The Government's Actions Materially Prejudiced the Substantial Rights of the Accused

The Court finds that the actions of the government have materially prejudiced the accused's right to an IMC and his right to detailed counsel.

Under the Sixth Amendment to the Constitution, the accused in a criminal proceeding has the right to establish an attorney-client relationship and obtain committed and zealous representation by that attorney.[61] "Protection of that right is so central to the military justice system that Congress has guaranteed the accused the right to representation by qualified counsel

---

[60] As discussed above, the Court has found Capt Thomas had a significant fear that the small USMC judge advocate community would remember what he did as a defense counsel and hold it against him.
[61] U.S. Const. amend VI; *see*, *e.g.*, *Argersinger v. Hamlin*, 407 U.S. 25, 31, 32 L. Ed. 2d 530, 92 S. Ct. 2006 (1972); [**64] *Gideon v. Wainwright*, 372 U.S. 335, 344, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963).

at Government expense, regardless of financial need, in all general courts-martial." [62] Article 38(b) of the UCMJ states that "an accused has the right to detailed military counsel, military counsel of choice if reasonably available and, at his own expense, civilian counsel of choice. It has been a long-standing tradition that a military accused "has the right to select a particular military counsel in limited circumstances."[63]

A hallmark of this fairness is that the accused "be defended by the counsel he believes to be best." Despite adequate representation by counsel, if it is not the accused's counsel of choice and if he is erroneously prevented from being represented by the lawyer he wants, then the right has been violated.[64] In *Watkins*, the regional trial counsel, who was not counsel of record, had heated discussions with the civilian defense counsel and, according to the civilian defense counsel, made implicit and explicit threats. As a result of these threats, civilian defense counsel made a motion to withdraw from the case because he felt that the regional trial counsel's actions had created a conflict of interest. The accused also informed the judge that, because of this entanglement with the RDC, he wanted to be represented by another civilian attorney. The military judge denied the request and the accused was convicted. In reversing the conviction, the C.A.A.F. ruled that the military judge erred by neither considering nor conducting the proper balance of the accused' right to choice of counsel against other important considerations. The standard the Court used was one of "structural error," and not requiring the harmless error analysis.[65] C.A.A.F. stated,

> Harmless error analysis under such circumstances would be a "speculative inquiry into what might have occurred in an alternate universe." To compare two attorneys, one whose services were denied, would require a court to speculate upon what different choices or different intangibles might have been between the two.[66]

"Defense counsel are not fungible items. Although an accused is not fully and absolutely entitled to counsel of choice, he is absolutely entitled to retain an established relationship with counsel in the absence of demonstrated good cause."[67] In *Baca*, a case involving drunken driving and vehicular manslaughter, the C.M.A. set aside the appellant's conviction because the military judge had inappropriately severed the attorney client relationship. Even though the attorney in question had only been *Baca's* attorney for five months, the C.M.A. declined to engage in "nice calculations as to the existence of prejudice."[68]

In *United States v. Allred,* N.M.C.C.A presumed material prejudice in a case that dealt with the severance of the attorney-client relationship without good cause and an improper denial of the IMC request.[69] In setting aside the conviction, the appellate court cited to its inherent

---

[62] Article 27, UCMJ and *United States v. Rodriguez*, 60 M.J. 239, 259 (C.A.A.F. 2004)
[63] *U.S. v. Spriggs*, 52 M.J. 235, 237-38 (C.A.A.F. 2000)
[64] *U.S. v. Watkins*, 80 M.J. 253, 258 (C.A.A.F. 2020) (internal citations omitted)
[65] *Id.* At 258
[66] *Id.*
[67] *United States v. Baca,* 27 M.J. 110, 119 (C.M.A. 1998).
[68] *Id.*
[69] *United States v. Allred,* 50 M.J.795, 801 (N.M.C.C.A. 1999)

authority under Article 59(a) to set aside errors of law if that "error materially prejudices the substantial rights of the accused."[70] Similarly, in *United States v. Eason* the C.M.A. found "prejudice in the government's frustration of the continuance of a proper attorney-client relationship, and such action constitutes a denial of due process … [because] the accused should be afforded the services of his military defense counsel.[71]

In *United States v. Hutchins*, the C.A.A.F. examined the accused's Sixth Amendment right to counsel after the detailed defense counsel left the case and active duty without being released by the client and without proper inquiry from the military judge.[72] In that case, the C.A.A.F. ultimately denied the accused any relief, stating that the procedural deficiencies in terminating the attorney-client relationship were in error but holding that the errors in the case could be tested for prejudice and the errors did not materially prejudice the substantial rights of the accused.[73] The Court cited a number of factors in deciding to apply the standard of prejudice. Most significantly, the Court noted "the personnel action leading to the severance in the present case resulted from a request initiated by the assistant defense counsel, not by the prosecution or the command. In that context, the case before us does not involve a violation of Appellee's Sixth Amendment right to counsel."[74]

In analyzing the facts of the present case, the Court finds this similar to *Baca* and *Allred* and finds the facts distinguishable from *Hutchins*. In the present case, the nature of the charges are just as serious as in *Baca,* which involved drunk driving and vehicular manslaughter. If found guilty, the Accused faces the chance of significant confinement and a punitive discharge. Just a few weeks before his trial was set to begin, HMC Gilmet lost two thirds of his trial defense team as a result of the comments of a senior officer acting in his official capacity. Capt Thomas had been representing Chief Gilmet for almost two years and was the attorney that HMC Gilmet had specifically requested. Capt Riley was the detailed defense counsel and had been representing HMC Gilmet for about one year. His defense had become a cohesive team, with each counsel responsible for different parts of the trial. No doubt the final preparations for trial had been completed and they were awaiting the assembly of the court-martial so that they could begin the defense of HMC Gilmet.

The Court finds that the Accused was not really presented with a choice when his counsel sought to withdraw from the case. Granted, unlike *Allred,* the Accused ultimately consented to the withdrawal of Capt Thomas and Capt Riley. However, as discussed at length above, it is clear to this Court that HMC Gilmet would *never* have sought, or consented to, the release of his

---

[70] *Id.* The *Allred* Court presumed prejudice "because the appellant was made to forgo the services of [his IMC] without good cause and without his consent."
See also U.S. v. Cooper, 2018 CCA LEXIS 114, aff'd on other grounds, 2021 CAAF LEXIS (Dec. 13, 2021) where the appellate court found that the accused suffered material prejudice because of the detailed defense counsel's mere failure to simply submit and forward a request for the accused's IMC to the appropriate chain of command for action.
[71] *United States v. Eason*, 45 C.M.R. 109, 112 (U.S. C.M.A. 1972)
[72] *Hutchins*, 69 M.J. 282 (2011).
[73] *Id.*
[74] *Id.* at 291 (*emphasis added*).

two military counsel but for Col Shaw's comments and the effect they had on Capt Thomas. Further, the Court finds that Capt Thomas and Riley would *never* have sought to withdraw from the case but for the actions of Col Shaw. Like *Allred*, this Court finds that the Accused was required to forego the services of Capt Thomas and Capt Riley because of government action; in this case, the actions of Col Shaw.

The deprivation of his right to Capt Thomas to serve as his IMC and Capt Riley to serve as his detailed defense counsel has materially prejudiced HMC Gilmet's substantial right to counsel. Losing two attorneys who had been engaged in defense of a client for such a significant period of time, and so close to trial, substantially prejudiced the Accused's rights in this case. The Court will not engage in fanciful speculation and attempt to assess what future IMC or future detailed counsel might bring to HMC Gilmet's defense team. Even if the Court were so inclined, it would be impossible to address the intangible benefits of one group of military defense counsel over others. Nor would such an assessment accurately value the impact of a further continuance of this court-martial. More importantly, HMC Gilmet does not want other military counsel. He wants the Captain Thomas and Captain Riley that existed before Col Shaw traveled to Camp Lejeune, NC and addressed a group of young Marine defense counsel. However, because of Col Shaw's actions, such a request is impossible to grant. Col Shaw's actions cannot be unwound and their taint cannot be removed from Capt Thomas and Capt Riley, and ultimately, this court-martial.

Dismissal is the Appropriate Remedy

The Court is mindful that even with a finding of UCI, dismissal is a drastic remedy and courts must look to see whether alternative remedies are available.[75] The Court is acutely aware that any action taken has to be "tailored to the injury suffered" and "when an error can be rendered harmless, dismissal is not an appropriate remedy." [76] Dismissal is a last resort, and "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."[77] Further, dismissal with prejudice is appropriate where a rehearing would effectively validate Government impropriety. [78]

This is the grave position the Court finds itself in. In taking this action, the Court has carefully considered and weighed all of the various options available to it and suggested by the Government. In each instance, the Court finds the other remedies wanting.

Government funding of civilian counsel.

The Court finds that this particular remedy is insufficient. While it is creative in countering the financial strain that yet another lengthy continuance will inevitably cause, coupled

---

[75] *See United States. v. Gore*, 60 M.J. at 187 and *United States v. Cooper*, 35 M.J. 417, 422 (C.M.A. 1992); *see also United States v. Pinson*, 56 M.J. 489, 493 (C.A.A.F. 2002)

[76] *See Gore*, 60 M.J. at 187 (citing *United States v. Mechanik*, 475 U.S. 66 (1986)).

[77] *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R. 1990).

[78] *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013)(authorizing a rehearing would have indirectly provided the Government with the result it had improperly sought – replacement of the detailed military judge.)

with the unknown man-hours that will have be invested by this specific civilian defense counsel to properly educate a new team of military defense lawyers, it still does not address the harm of losing Capt Thomas, the IMC, due to government action. Further, there has been evidence presented about the long-reaching effects of Col Shaw's comments that extend well beyond *United States v. Gilmet* and, the argument that is unlikely that local Marine defense counsel will be willing to sit on this case. This remedy would not address the loss of two military defense counsel.

Dismissal with prejudice of the two specifications charged under Article 92.

This remedy, likewise, is insufficient. In crafting this remedy, the Government concedes that Col Shaw's comments were prejudicial to good order and discipline and since these Article 92 offenses are military specific,[79]their dismissal, they argue, would remove the taint of UCI in this case. However, the Court does not know, nor can it divine, which parts of the trial Capt Thomas and Capt Riley would have defended and assisted. Further, these are the more minor charges on the charge sheet that will take up the least amount of court time, compared to the gravamen of this general court martial. Like above, the time and energy that will be necessary for a new set of defense counsel to be brought up to speed on the remaining charges is significant. This also fails to address the harm created by this UCI.

Disqualify one or more of the currently detailed trial counsel.

This remedy is akin to forcing right-handed fencers to sword fight with their non-dominant hand, as to handicap the stronger and level the playing field for those who have been harmed. This "eye for an eye" proposal also fails to address the harm in this case. While it may make opposing counsel somewhat relieved for a brief period of time, it does little to assuage HMC Gilmet's loss of his military counsel of choice.[80]

Voir Dire of the members to ensure they are untainted by Col Shaw's comments.

This remedy is insufficient and does not address the reason for the prejudice in this case. Col Shaw is a lawyer. While the junior members of the judge advocate community in attendance at his briefs were reasonable in their apprehension and concern with his remarks, it is very unlikely that a venire of members, composed of line officers and non-JAG staff officers, would be affected by something a senior lawyer of JAD said about junior Marine judge advocates. Additionally, it would introduce an otherwise irrelevant line of questions into what is likely an already complex voir dire process. The members are presumably unaware of anything Col Shaw said to defense counsel and therefore could not be tainted by Col Shaw's comments. The prejudice here is not that the members are tainted but that the defense counsel are now conflicted.

---

[79] The accused is charged with violation of a general order for consumption of alcohol and dereliction of duty for breaking curfew

[80] Moreover, trial counsel are commonly referred to as "fungible." Disqualifying trial counsel does not remedy the specific harm in this case.

Require the Accused to be represented by two IMCs of his own selection.

This remedy highlights the harm in this case and how anything short of a dismissal is insufficient. Further, it does not address the prejudice of the further continuance of this case, as discussed above. In making this ruling, the Court simply cannot assess whether or not HMC Gilmet will be getting "better" attorneys when compared to the attorney that HMC Gilmet specifically requested and was granted. Neither potential replacement attorneys will be Capt Thomas or Capt Riley. Being unable to make that assessment, there is no way for this Court to prevent this UCI from adversely affecting the findings or sentence beyond a reasonable doubt. As such, the only appropriate remedy is dismissal with prejudice.

5. Ruling

The Court now **GRANTS** the Defense's motion as discussed above.

All charges and specifications are **DISMISSED with prejudice**.

So ordered, this 9th day of February 2022.

Hayes C. Larsen
Military Judge
CDR, JAGC, USN