**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| UNITED STATES,<br><br>Appellee<br><br>v.<br><br>Joseph B. Salyer<br>Corporal (E-4)<br>U.S. Marine Corps,<br><br>Appellant | SUPPLEMENT TO PETITION FOR GRANT OF REVIEW<br><br>Crim.App. Dkt. No. 201200145<br><br>USCA Dkt. No. _____ |

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:


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## Issue Presented

**UNDER *UNITED STATES V. LEWIS*, A CASE IS DISMISSED WITH PREJUDICE WHEN UNLAWFUL COMMAND INFLUENCE RESULTS IN THE RECUSAL OF A MILITARY JUDGE. HERE, THE MILITARY JUDGE RECUSED HIMSELF BECAUSE HE FOUND THAT THE GOVERNMENT'S ACTIONS MADE IT IMPOSSIBLE FOR HIM TO REMAIN ON THE CASE. THE GOVERNMENT COMPLAINED TO HIS SUPERVISOR ABOUT A RULING, ACCESSED HIS SERVICE RECORD WITHOUT PERMISSION AND, WITH THIS INFORMATION, MOVED FOR HIS RECUSAL. SHOULD THIS CASE BE DISMISSED WITH PREJUDICE?**

## Introduction

The actions of the Government in this case constitute unlawful command influence. If left undisturbed, service records of a military judge are now fodder from which challenges on bias of military judges can be based. And Staff Judge Advocates (SJAs) and supervising trial counsel will be emboldened to complain about rulings to a military judge's supervisor in the midst of trial. Consistent with the Privacy Act of 1974, 5 U.S.C. § 552a, the lower court should have held that such records are not accessible by the Government, particularly without consent from the military judge *and* in the aftermath of an unfavorable ruling.

Instead, the lower court approved of the Government's actions, and characterized this approach as confirming a good faith basis for *voir dire*. The lower court then distinguished this Court's decision in *United States v. Lewis*, erroneously

confining it to its own facts. It did so despite the facts that (1) the Government's coordinated actions resulted in the recusal of a military judge after an unfavorable ruling, and (2) the new military judge imposed fewer curative measures than those imposed in *Lewis*. Given the strikingly similar--if not worse--facts here, this Court should apply *Lewis*, set aside the findings and sentence, and dismiss the sole charge with prejudice.

**Statement of Statutory Jurisdiction**

Corporal (Cpl) Joseph B. Salyer, U.S. Marine Corps, received an approved court-martial sentence that included a punitive discharge. His case fell within the Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006), jurisdiction of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA). He invokes this Court's jurisdiction under Article 67, UCMJ.

**Statement of the Case**

Cpl Salyer was tried by officer and enlisted members at a general court-martial for possessing and distributing child pornography, in violation of Article 134, UCMJ. The proceedings occurred on various dates between July 29, 2011 and November 21, 2011. Cpl Salyer contested both specifications of that single charge and was found guilty only of possession. He was sentenced to two years confinement, reduction to E-1, and a bad-

conduct discharge. The CA approved the adjudged sentence and, except for the bad-conduct discharge, ordered it executed. On October 23, 2012, the NMCCA affirmed. On November 29, 2012, Appellant requested the Judge Advocate General (JAG) of the Navy certify this case for appeal to this Court. On December 20, 2012, the JAG formally denied that request.

## Statement of the Facts

### *a. Overview*

After losing a motion to define a minor--for purposes of child pornography--as eighteen-years-old, the Government sought recusal of the military judge. (R. at 300-01, 314, 368-70, 403-413.) The Government's basis for recusal was that, ten years prior to the court-martial, the military judge married a woman when she was seventeen.[1] (R. at 370.) It gleaned this information from page 3270 of the military judge's personnel record, which it accessed without his knowledge. (R. at 403, 410-11, 436, Appellate Ex. LIX.) The Government then called the circuit military judge to tell him about his subordinate's ruling, the idea that the military judge was biased, and the imminent challenge for cause. (R. at 376, 404, 407, 417.) After the military judge recused himself, the Government moved the new military judge for reconsideration of two unfavorable

[1] The military judge remains married to this woman. That marriage has borne three children. (Appellate Ex. LIX.)

rulings. (R. at 390; Appellate Ex. LXIV.) A detailed explication follows.

***b. A purely military offense***

The Government initially charged Cpl Salyer with possessing child pornography, "in violation of 18 U.S.C. § 2252A(a)(5)(B), which conduct was to the prejudice of good and order discipline in the armed forces or was of a nature to bring discredit upon the armed forces." (Charge Sheet.) But the Government amended the charge by taking out § 2252A and the clause 1 prejudice language, making it a straight clause 2 specification alleging that Cpl Salyer:

> did . . . knowingly and wrongfully possess a laptop computer containing image files of child pornography, which conduct was of a nature to bring discredit upon the armed forces.

(R. at 92-94; Charge Sheet.) The same was done with the distribution charge of which Cpl Salyer was acquitted. (R. at 92-94.)

LtCol Mori, the military judge, thereafter addressed how "child pornography" should be defined since both specifications were brought solely under clause 2. (R. at 248.) The Government sought the definition from the federal statute--18 U.S.C. § 2256. (R. at 249.) But the military judge highlighted that the Government had removed the federal statute from the specifications and that, unlike in § 2256, the age of consent in

the military is sixteen, not eighteen. (R. at 248-50.) He reasoned that, while it would be lawful under military law to have sex with a seventeen-year-old, it would still be a crime under § 2252A to take a nude photo of that same seventeen-year-old. (R. at 250.) He found that by removing the federal statute, the Government chose to charge a strictly military offense under clause 2 of Article 134. Thus, he ruled that he would define a minor as someone under the age of sixteen-years-old or, in the eyes of the military, someone under the age of consent. (R. at 300-01, 314.)

***c. Maximum Confinement: Thirty years or Eight months?***

Before members were seated, the Government argued that the maximum confinement for the two specifications was thirty years, twenty for distribution and ten for possession. (R. at 126, 131; Appellate Ex. XXV.) Citing *United States v. Leonard*, Defense Counsel argued that it should be eight months, four months for each as disorderly conduct under service-discrediting circumstances. (R. at 131; Appellate Ex. XXV); *see also* MANUAL FOR COURTS-MARTIAL (MCM), United States, (2008 ed.), App. 12, at A12-6. LtCol Mori did not settle the matter. Instead, he ruled that for *voir dire* purposes he would instruct the members that the maximum confinement "could be up to thirty years" and, if necessary, he would decide the issue after findings. (R. at 131, 260.)

By consequence of his recusal, LtCol Mori never ruled on this issue. The new military judge did. Col Richardson found thirty years to be the appropriate term of maximum confinement, not eight months. (R. at 773, 779-81.)

***d. The Government's challenge of Lieutenant Colonel Mori***

After hearing LtCol Mori's ruling on defining a minor, the Military Justice Officer, Captain (Capt) Schweig, approached the Staff Judge Advocate (SJA) for Marine Corps Base Hawaii and Officer-In-Charge of the Legal Services Center, LtCol Mannle, and told him of the ruling. (R. at 402-03.) LtCol Mannle was told that the reason for this ruling was that the military's age of consent is sixteen. (R. at 403.) LtCol Mannle could not understand why the age of eighteen was not being applied, per the federal statute. (*Id.*) Further discussion between Government counsel led someone to mention that LtCol Mori had a "very young wife." (R. at 436-38.) In fact, the Military Justice Officer said that he had heard this from three different people, all of whom had themselves heard of it "second hand." (R. at 437.)

Based on this rumor, and without LtCol Mori's permission, the Military Justice Officer accessed LtCol Mori's dependent personnel record--which showed that his wife was seventeen when he married her ten years earlier--and presented it to LtCol Mannle. (R. at 403, 410-11, 436; Appellate Ex. LIX.) Besides

showing his wife's date of birth, this record also contained other sensitive personally identifying information (PII)[2] such as LtCol Mori's full social security number and the names and dates of birth for his three young children. (Appellate Ex. LIX.) The record is silent on what measures, if any, were taken to safeguard this sensitive PII as the Government disseminated it.

LtCol Mannle believed that the information contained in this record "suggested bias" on LtCol Mori's part because, since he married a woman when she was seventeen, it appeared that he would not want to use the age of eighteen in defining child pornography (no reasons for why this would be were given). (R. at 403, 413.) As a result, after LtCol Mannle discussed the matter with the Military Justice Officer, Trial Counsel, and the Deputy SJA, he decided that LtCol Mori should be *voir dired* on the age of his wife when he married her and then challenged. (R. at 368-69, 411.) LtCol Mori granted the Government's *voir dire* request and said that his wife was seventeen at the time of marriage. (R. at 369.) Of course, the Government already knew this information because it obtained LtCol Mori's 3270 record, which it then introduced into evidence. (R. at 369; Appellate Ex. LXIV.) Trial Counsel then moved to disqualify LtCol Mori for actual and implied bias because he had defined a minor to

[2] DoD 5400.11-R (May 14, 2007) provides examples of sensitive PII. These examples include military records, spouse and child information, and social security numbers.

the members as someone under the age of sixteen, and he married a woman when she was seventeen. (R. at 370.) Again, no explanation of how this fact amounted to bias was given. LtCol Mori did not immediately rule on the motion. Instead, he put on the record that the day prior, in a phone conversation with his circuit military judge, CAPT Berger, he was told that LtCol Mannle called and complained about his ruling on defining a minor. (R. at 376.) LtCol Mori said:

> So during our lunch recess yesterday . . . I called Captain Berger to speak to him about an evidentiary issue in this case that I had yet to rule on. Captain Berger inquired [*sic*] me what was going on with some age issue in the case that I was hearing, as he had heard [from] Lieutenant Colonel Mannle, the SJA for Marine Corps Base Hawaii and the OIC of the law center who had been sitting in during the proceedings for some of the sessions, that Lieutenant Colonel Mannle was not happy with my ruling that I was defining a minor as a person under the age 16. And he indicated the government was going to seek my recusal based on my wife being 17 when I married her.

(R. at 376.)

LtCol Mori then indicated that he needed to look at the case law to (1) determine if recusal was warranted, (2) whether he should find UCI if the recusal was denied and (3) what remedy should be fashioned if he did find UCI (*i.e.*, whether he should bar the SJA from the court room, disqualify trial counsel, replace the convening authority and SJA, or dismiss the charges with prejudice). (R. at 377.) Defense Counsel objected to recusal, but argued that UCI was raised. (R. at 383.)

The following exchange then occurred between Trial Counsel and the military judge:

> Q. Sir, did the -- the circuit judge express his displeasure in any of your decisions?
>
> A. I would say that I interpreted his questioning of me to raise concern with my performance.
>
> . . . .
>
> Q. Previously have you disqualified any of the trial counsel on any other cases?

(R. at 378.) LtCol Mori said he had disqualified all of the trial counsel in another case. (R. at 379.) The record does not reveal why the previous disqualification of counsel mattered to the Government.

Ultimately, the military judge recused himself because the Government, through the phone call from the OIC/SJA to CAPT Berger, created a situation where all his rulings could be called into question: Government-favorable rulings might be interpreted as intended to halt further complaints, while defense-favorable rulings might be seen as punishing the Government for questioning him on "irrelevant" matters about his marriage. (R. at 386; Appellate Ex. LX.)

***e. The New Judge: Colonel Richardson***

After the Government unseated LtCol Mori, it immediately moved for reconsideration of his previous ruling on the age

issue.[3] (R. at 390.) Defense Counsel moved to have the charges dismissed for UCI. (*Id.*) Col Richardson, the new military judge, addressed the UCI motion first.[4] (R. at 391.) Defense Counsel contended there was actual and apparent UCI because the government created a situation where the military judge had to disqualify himself. (R. at 399-400; Appellate Ex. LX at 4-5.) The Government conceded that UCI was raised, and that it had the burden of proving beyond a reasonable doubt that it did not exist. (R. at 400.) To try to make this showing, it called LtCol Mannle to the stand. (R. at 401.)

***f. Lieutenant Colonel Mannle's testimony and Colonel Richardson's ruling on the UCI motion***

LtCol Mannle testified that he called CAPT Berger as a "professional courtesy". (R. at 404, 407.) According to LtCol Mannle, it was appropriate to tell CAPT Berger that LtCol Mori might need to be replaced. (*Id.*) He also stated that he informed CAPT Berger that, "I would understand if he wanted me to stop talking at any time." (R. at 417.) LtCol Mannle did not explain why he thought CAPT Berger might want him to "stop talking." At the conclusion of this testimony, Col Richardson

[3] The Government also moved for reconsideration on "whether the Government expert witness is able to testify in his opinion as to the depth of problem regarding child pornography on internet and victim impact." (Appellate Ex. LXIV at 7-8.)

[4] At the time, Col Richardson was the Circuit Military judge for the Sierra Judicial Circuit in Southern California.

barred LtCol Mannle from the courtroom for the remainder of the proceedings. (*Id.*) He did not bar him from further participation in the case, however.

For some reason not apparent in the record, the NMCCA posits differently. It posits that the new judge "barred LtCol [Mannle] from the courtroom *and from any further participation in the proceedings*." *United States v. Salyer*, 2012 CCA LEXIS 407, *19 (N-M. Ct. Crim. App. Oct. 23, 2012) (emphasis added). The lower court does not provide a record citation for this assertion. And research fails to uncover any excerpt in the record to substantiate that LtCol Mannle was forbidden from further participation in the proceedings. He merely was banned from the courtroom.

Trial counsel then argued that LtCol Mannle was not acting as the SJA when he called CAPT Berger, but as the law center OIC. (R. at 418.) She further argued that LtCol Mori's marriage to a seventeen-year-old provided a good-faith basis to *voir dire* and challenge him. (*Id.*) Finally, she argued that even if there was UCI, it was not prejudicial. (R. at 419-20.) But on the prejudice aspect, the new military judge pointed out that the first thing the Government did after it unseated LtCol Mori was to ask for reconsideration on his age ruling. (R. at 421.) Col Richardson stated:

> [I]f I were to come in here and say that Lieutenant Colonel Mori screwed this up and should have gone with 18, how can you argue that that would have no detrimental impact on these proceedings? You can't.

(*Id.*) With that, the Government withdrew its motion to reconsider. (R. at 422.)

The military judge then denied the defense motion to dismiss because, in his view, the Government had "carried its burden of proving that the unlawful command influence will not affect the preceding [*sic*]." (R. at 441-43.) As a curative measure, he stated that he would "not reconsider any of Lieutenant Colonel Mori's decisions that were 'defense friendly.'" (R. at 444.)

Yet Col Richardson thought that there were only three remedies available to him to cure UCI: (1) dismiss the charges outright, (2) bar LtCol Mannle from the courtroom (which he did), and (3) ensure that Cpl Salyer is not put in any worse position than if LtCol Mori had remained (which he tried to do with his "defense-friendly" ruling). (R. at 445-46.) He did not address the other remedies identified by LtCol Mori: (1) bar LtCol Mannle from further participation in the case, (2) disqualify trial counsel, and (3) replace the convening authority. (R. at 377.) Nor did he address the possibility that LtCol Mori would have set the maximum confinement at eight months instead of thirty years.

## Reasons for Granting Review

**NEITHER THE ACTUAL NOR THE APPARENT UNLAWFUL COMMAND INFLUENCE THAT RESULTED IN THE RECUSAL OF LTCOL MORI WAS CLEANSED FROM THIS COURT-MARTIAL. FINDING DIFFERENTLY, THE LOWER COURT ERRONEOUSLY (1) REJECTED APPLICATION OF *UNITED STATES V. LEWIS*, (2) MADE A FINDING OF FACT NOT SUPPORTED BY THE RECORD, AND (3) COUNTENANCED GOVERNMENT ACTIONS CONTRARY TO PUBLIC POLICY AND DOD REGULATION.**

### A. Cpl Salyer's court-martial was unlawfully influenced by the Government.

Article 37 of the UCMJ prohibits any person subject to the UCMJ from attempting to "coerce or, by any unauthorized means, influence the action of a court-martial . . . ." Art. 37, UCMJ, 10 U.S.C. § 837. In *United States v. Lewis*, this Court stressed that "[u]nlawful command influence is the mortal enemy of military justice[,]" and that the "appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." 63 M.J. 405, 413 (C.A.A.F. 2006).

Here, the trial was inappropriately manipulated by the Government. It sought the recusal of the military judge after receiving an unfavorable ruling on the age-of-consent matter. To accomplish this goal, the Government called CAPT Berger, the circuit military judge, to complain about his ruling defining a minor. Worse, the Government accessed the military judge's service record without his permission and confronted him with it

in court. These actions so infected LtCol Mori's deliberative process that he determined recusal to be necessary. Under these circumstances, a reasonable member of the public would question the fairness of Cpl Salyer's trial and the military justice system.

Defense Counsel recognized the harm of these acts when he moved the new military judge to dismiss the case with prejudice on the basis of UCI. (Appellate Ex. LXII.) As a result, there is now a presumption that Cpl Salyer was prejudiced. *See United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010) ("[O]nce unlawful command influence is raised at the trial level, as it was here, a presumption of prejudice is created." (citing *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999))). This Court can only affirm the lower court's decision, then, if it is "convinced beyond a reasonable doubt that the unlawful command influence had no prejudicial impact on the court-martial." *Id.* (citing *Biagase*, 50 M.J. at 150-51.)

### *1. As in* Lewis*, the Government created the need for the military judge to disqualify himself.*

In conducting its actual UCI analysis in *Lewis*, this Court highlighted that it was the Government that *created* the recusal issue:

> The orchestrated effort to unseat MAJ CW as military judge exceeded any legitimate exercise of the right conferred upon the Government to question or challenge a military judge. But for the Government's attack upon

> MAJ CW, it appears unlikely that there existed grounds for disqualification. Nevertheless, through suggestion, innuendo, and the SJA's personal characterization of the relationship between MAJ CW and Ms. JS, the Government compelled MAJ CW to remove herself from the case. Major CW's own words clearly illustrate how the Government itself created this disqualification:
>
> > [T]estimony of the trial counsel and the SJA demonstrate how little it takes to create an appearance of impropriety in some people's minds. I'm mortally disappointed in the professional community that is willing to draw such slanderous conclusions from so little information. I wish I could do this with less emotion.
> >
> > I now find myself second guessing every decision in this case. Did I favor the government to protect myself from further assault? Did I favor the accused to retaliate against the government[?]

*Lewis*, 64 M.J. at 414. As in *Lewis*, and as highlighted by both Col Richardson and LtCol Mori below, it was the Government that created the need for LtCol Mori to disqualify himself, and it did so by challenging him without a good-faith basis, discussed next.

***2. The Government's challenge was without a good faith-basis and logically implied that LtCol Mori produced and possessed child pornography of his wife.***

Ten years before this court-martial convened, LtCol Mori legally married a woman who was seventeen. He stressed on the record that, even if legally married to a seventeen-year-old, it would still be illegal under § 2252A to take a nude photo of that same seventeen-year-old. He then ruled that because the

Government brought military-specific charges, he would define a minor using sixteen, the military's express age of consent. The Government then argued that this ruling was made because LtCol Mori was biased by the fact that he had married a seventeen-year-old, therefore making recusal necessary. But this basis for challenge only makes sense if LtCol Mori had violated § 2252A by taking nude photographs of his wife when she was seventeen. If he did, then it is plausible that he would want a child defined as a person younger than seventeen to escape criminal liability under § 2252A for producing and possessing child pornography. Sadly, this is the only logical basis of the Government's challenge. Yet there is not the slightest hint in the record that LtCol Mori engaged in such criminal conduct.

Further, Col Richardson's rationale that there was a good-faith basis because it was an "anomaly" for a man over twenty-five to have married a seventeen-year-old, is unsupported in law. The following passage is relevant:

> Well, surely you would concede that Lieutenant Colonel Mori would fall into a very small percentage of our population of adult men who ever married and, one would suspect, then had marital relations with a woman under the age of 18 when they were, let's say, beyond the age of 25. Let's say, getting out of the teenage and college years. You'd surely concede that?
>
> . . . .
>
> Statistically speaking, that is a bit of an anomaly, agreed?

(R. at 423-24.) Col Richardson then rhetorically asked Defense Counsel, "How do you think that's not a good-faith basis[?]" (R. at 423.)

Anomalies peculiar to a sitting judge do not, *ipso facto*, create a good faith basis to *voir dire* and challenge that judge for cause.[5] And even if they did, no facts in evidence support Col Richardson's curious proffer that it is, in fact, an anomaly for a man over twenty-five to marry a seventeen-year-old. Nor did Col Richardson address the fact that, while in his mind, an anomaly, it is legal under the law of most states to marry a seventeen-year-old. *See* Cornell University Law School: Legal Information Institute - Marriage Laws, http://www.law.cornell.edu/wex/table_marriage (providing marriage laws of fifty states plus Puerto Rico and the District of Columbia). The Record is devoid of any suggestion that LtCol Mori married his wife in contravention of law. And even if there were, Col Richardson does not explain how that fact supports challenging the military judge for cause.

Briefly stated, as in *Lewis*, no legitimate grounds existed for the Government to pursue disqualification here. LtCol

[5] If they did, a good faith basis would have existed to *voir dire* Supreme Court Justice David H. Souter in any case related to television. According to author Jeffrey Toobin, Justice Souter "was once given a television but never plugged it in." JEFFREY TOOBIN, THE NINE 5 (2007).

Mori's own words, like Maj CW's in *Lewis*, show how the Government improperly created the need for recusal:

> The action of the supervisory prosecutor at the law center, LtCol Mannle, in complaining to the reporting senior of the military judge presiding over the merits portion of the trial in which his subordinate trial counsel are participating, presents a factual situation where the military judge's impartiality might reasonabl[y] be questioned.
>
> . . . .
>
> "Is the judge ruling in favor of the prosecution [t]o avoid any more complaints to his boss?" or "Is the military judge ruling in favor of the defense to retaliate against the prosecution for their improper complaint to the circuit military judge?"
>
> . . . .
>
> Turning now to the issue regarding the prosecution reason for disqualification due to the military judge's wife['s] age of 17 at marriage: The court finds this is also a basis for disqualification under the objective standard; not due to the fact of the military judge's wife's age, *but due to the fact that the prosecution raised an issue with the military judge's supervisor as part of the complaint*. Even though it is almost ten years and three children later, it is in relation to a personal family matter which might cause a reasonable person to question the military judge's impartial[ity].

(Appellate Ex. LX at 4-5 (emphasis added).) The similarities to *Lewis* do not end there.

***3. As in* Lewis*, actual UCI was not cleansed here.***

In *Lewis*, this Court stressed that it did not question the new military judge's impartiality, and it was mindful of the remedial measures taken--disqualifying the SJA from further

participation in the case and banning him from the courtroom, as well as requiring a new CA for post-trial action, which this Court highlighted "should" be done when UCI is found. *Lewis*, 63 M.J. at 415. Nonetheless, it found that these measures "fell short of removing doubts about the impact of the actual unlawful command influence" because:

- the SJA "was actively engaged in the effort to unseat MAJ CW as military judge;"
- "the trial counsel, who was provided advice on voir diring MAJ CW by the SJA, became the tool through which this effort was executed;" and
- "the SJA's instrument in the courtroom, the trial counsel, remained an active member of the prosecution despite participating fully in the unlawful command influence."

*Id.* at 414-15. Here, as in *Lewis*, an SJA was (1) actively engaged in the effort to unseat the military judge; (2) the trial counsel became the tool through which this effort was executed; and (3) the trial counsel remained an active member of the prosecution despite participating fully in the unlawful influence.

Finally, the remedial measures here were fewer than the ones that fell short in *Lewis*. Unlike in *Lewis*, the OIC/SJA here was not disqualified from further participation in the case and a new CA was not assigned for post-trial action (the Charge Sheet and the CA's action are both signed by BGen F.M. Padilla, U.S.M.C.).

***4. As in Lewis, the appearance of UCI was not eradicated here.***

The "appearance of unlawful command influence" exists where an "objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Lewis*, 63 M.J. at 415. Here, "a reasonable observer would have significant doubt about this court-martial in light of Government's conduct with respect to [the military judge]." *Id.* This is because, as in *Lewis*:

> [t]he Government wanted to ensure that a given military judge, properly detailed and otherwise qualified, would not sit on [Appellant's] case. In the end, the Government achieved its goal through unlawful command influence. To this point, from an objective standpoint, the Government has accomplished its desired end and suffered no detriment or sanction for its actions.

*Id.* at 416. Further, this Court emphasized the perception problem in *Lewis* by stressing that it was unclear whether "the unlawful command influence [there] was the subject of any ethical or disciplinary investigations or sanctions." *Id.* at 416 n.4. Had such investigations or sanctions occurred, "they could have . . . perhaps restored some confidence in the military justice system." *Id.* Similarly, this Court pointed out that "there appears to be no response from supervisory officials such as the Staff Judge Advocate to the Commandant of the Marine Corps or the Judge Advocate General of the Navy", and

consequently directed that the *Lewis* decision be sent to those officials for review and appropriate action. *Id.*

Like *Lewis*, here the record is silent on whether an official investigation has commenced on these matters. The record is also silent on the issue of sanctions. No action was taken at the command level. And no action was taken at the NMCCA. Nor is it known if an inquiry was launched into whether accessing and disseminating LtCol Mori's dependent data violated The Privacy Act of 1974, 5 U.S.C. § 552a. This issue is discussed in section C, *infra*. Until Appellate Defense Counsel requested the JAG to certify this case,[6] it appears that no senior supervisory officials had visibility on these matters. The last best hope to "restore some confidence" in the military justice system, therefore, rests with this Court.

Finally, because LtCol Mannle was both the SJA and the OIC of the law center at Kaneohe Bay, Defense Counsel was forced to cross-examine the officer who would be her boss if she moved to another billet there. A reasonable person would question whether this impacted her cross-examination of LtCol Mannle, especially because she did not ask him, for example: what regulation, order, etc., allowed the Government to access,

[6] If this Court grants review of this case, Appellant will timely move to attach his certification request.

print, and then disseminate LtCol Mori's record containing sensitive PII?

### *5. Remedy: as in Lewis, this Court should set aside the findings and the sentence and dismiss the charge with prejudice.*

In *Lewis*, this Court ruled that dismissal with prejudice, while "drastic," was necessary because the UCI could not be rendered harmless:

> To fashion an appropriate remedy in this case, we must consider both the specific unlawful influence (unseating of the military judge) and the damage to the public perception of fairness. Since the appearance of unlawful influence was created by the Government achieving its goal of removing MAJ CW without sanction, a rehearing before any military judge other than MAJ CW would simply perpetuate this perception of unfairness. Further, even if we wished to consider ordering a rehearing before MAJ CW, that option is unavailable in light of her acknowledgement that the conduct of the SJA "invaded [her] deliberative process" and influenced her specific decision to disqualify herself from this case.

*Lewis*, 63 M.J. at 416. The same remedy is required here because, as in *Lewis*: (1) the specific unlawful influence was the improper unseating of the military judge; (2) the appearance of unlawful influence was created by the Government achieving its goal of removing the military judge without sanction, and therefore a rehearing before any military judge other than LtCol Mori would simply perpetuate this perception of unfairness; and (3) even if this Court wished to consider ordering a rehearing before LtCol Mori, that option is unavailable in light of his

acknowledgement that the Government's conduct caused his recusal.[7]

Finally, the *Lewis* remedy is even more appropriate here because, based on the Government's charging decisions and LtCol Mori's previous ruling on defining a minor, he seemed inclined to rule that the maximum confinement for child pornography possession was four months as a general disorder under Article 134, not ten years per § 2252A, as Col Richardson eventually ruled. And both approaches are permissible under *United States v. Leonard*, *see generally* 64 M.J. 381 (C.A.A.F. 2007), discussed next.

**6. Leonard *gives a military judge discretion to determine the maximum confinement in a case like this one.***

In *Leonard*, the accused was convicted of receiving child pornography, which conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces in violation of Article 134. 64 M.J. at 386. Despite the fact that it was not in the specification, the military judge used 18 U.S.C. § 2252 to determine the maximum confinement. *Id.* On appeal, the appellant argued that it was improper do so because that statute had an "interstate or foreign commerce element," which was not alleged in the specification. *Id.* at 383. In deciding the case, this Court

[7] LtCol Mori has since retired from the Marine Corps.

highlighted that there are generally three methods of determining the maximum confinement for an Article 134 clause 1 or 2 offense.

First, a court looks to see if the President has published maximum punishments for the Article 134 offense in question. *Leonard*, 64 M.J. at 383. As the President had not done so for the receipt of child pornography, this was inapplicable there. *Id.* The same is true here.

Second, under Rule for Courts-Martial (R.C.M.) 1003(c)(1)(B)(ii), a court looks "in the MCM" for a "closely related" offense. *Leonard*, 64 M.J. at 383. This Court noted that none existed for receipt of child pornography. *Id.* The same is true here.

Third, and again under R.C.M. 1003(c)(1)(B)(ii), a court determines if the subject offense "'is punishable as authorized by the United States Code, or as authorized by the custom of the service[.]'" *Id.* This Court found that there is at least a question whether the United States Code could authorize punishment for receipt of child pornography absent the interstate commerce jurisdictional element. *Leonard*, 64 M.J. at 383 (citations omitted). Similarly, this Court noted that "how Appellant's offense would be punished 'as authorized by the custom of the service,' R.C.M. 1003(c)(1)(B)(ii), is at best an

open question[.]" *Id.* But this Court determined that it did not have to grapple with these questions. *Id.*

Instead, it looked to the plain language of Article 134, which "specifically provides that an accused 'shall be punished *at the discretion of the court*.'" *Leonard*, 64 M.J. at 383. (emphasis added). This language gave the military judge in *Leonard* the *discretion* to reference the federal statute even though the jurisdictional element was omitted. *Id.* at 384. So under *Leonard*, it was within Col Richardson's discretion to rule that the maximum confinement for possession was 10 years. More importantly though, it was *also* within LtCol Mori's discretion to rule that the maximum confinement was 4 months. Of course, we will never know how LtCol Mori would have ruled because the Government unseated him after his unfavorable ruling to its case.

**B. The lower court's attempt to distinguish this case *from Lewis* is defective.**

The lower court describes *Lewis* as "readily distinguishable" from Cpl Salyer's case. *Id.* at *15. It then rejects applying that decision to this case. The NMCCA says:

> LtCol JAM was *not* acting as the SJA for the convening authority in the appellant's case. Therefore, unlike in *Lewis*, there was no influence by or on behalf of the command. There are no facts anywhere in the record suggesting that the convening authority or anyone acting on his behalf knew of, let alone participated in, any of these events. Second, in *Lewis* there was no good faith basis to inquire into

> the military judge's personal life. Here the facts are undisputed that LtCol MDM did marry a 17-year-old woman. *The Government had verified this fact before commencing its voir dire into how that fact might have influenced LtCol MDM's pretrial ruling on the definition of a minor.* Col Richardson found this to be a good faith basis for questioning and we agree. Third, the appellant in *Lewis* ultimately waived his right to a members trial and was found guilty and sentenced by the replacement judge. In this case, trial by members continued, and the members--wholly unaffected by and unaware of these events--convicted the appellant and sentenced him. Finally, the allegations in *Lewis* involved what was potentially illegal and, at that time, career-ending conduct . . . [W]e find no similar explicit or implicit assertion that LtCol MDM did anything wrong; rather, the Government's inquiry suggested that LtCol MDM might be biased against the Federal definition of a minor in light of his life experience.

*Id.* at *15-*17.

There are a number of problems with this analysis.

First, although LtCol Mannle was not the SJA on Cpl Salyer's case, that did not prevent both Col Richardson and the NMCCA from finding apparent UCI in LtCol Mannle's phone call to the circuit military judge. This is because LtCol Mannle was a government actor who, in his displeasure with LtCol Mori's age ruling, called the reporting senior to "tattl[e]". (R. at 386.) In fact, at least three government actors--all under LtCol Mannle's direct authority--actively participated in removing LtCol Mori from the case.[8] Trial Counsel informed the Military

[8] LtCol Mannle "supervises[s] the prosecution function" at the law center. (R. at 405.) His duties in that role include "reviewing the prosecutors' fitness reports[.]" (R. at 407.)

Justice Officer of LtCol Mori's ruling, and at the direction of LtCol Mannle, conducted the *voir dire* of the military judge, and moved for reconsideration of the unfavorable ruling. The Military Justice Officer illegally accessed LtCol Mori's service record without his permission. And LtCol Mannle called the circuit military judge despite understanding that the circuit military judge might have reason to end the conversation. So whether these Government actors expressly served "on behalf" of the CA misses the point: they were cloaked with the authority of the United States and served as integral components in the Convening Authority's military justice apparatus. At minimum, this issue presents another reason for this Court to grant review. Guidance is needed on the agency relationship of government actors as it relates to UCI.

Second, the lower court erred in finding a good faith basis for the Government's challenge of LtCol Mori. The mere fact that, ten years prior, he married a seventeen-year-old woman is not a good faith basis for *voir dire* because there is no intelligible inference that is drawn from that fact. Indeed, neither the trial counsel nor the NMCCA opinion articulates why LtCol Mori's marital circumstances would be a source of bias, and therefore a basis for disqualification. In fact, the only logical source of that bias was rejected by the NMCCA when it found that there is no evidence to suggest that LtCol Mori "did

anything wrong", *i.e.*, possessed nude photos of his wife from when she was seventeen, sufficient to constitute possession of child pornography under the federal statute. *Salyer*, 2012 CCA LEXIS 407, at *17. As a result, the NMCCA's newly crafted good-faith-basis rule is nothing more than *we know it when we see it.* Surely that is wrong.[9]

Lastly, the lower court puts much stock in the fact that the members convicted and sentenced Cpl Salyer while "unaware" of these events. *Salyer*, 2012 CCA LEXIS 407, at *16. True, but irrelevant. The issue, springing from *Lewis*, is whether the Government--through UCI--unseated an otherwise qualified military judge from Cpl Salyer's case. Significantly, the lower court zips by the fact that the members were also "unaware" of whether the sentence of confinement would have been capped to eight months had LtCol Mori remained on the bench.

Contrary to the lower court's findings, *Lewis* and the instant case are remarkably similar. In *Lewis*, spurred by the SJA, the trial counsel moved to have the military judge recuse

[9] The lower court also finds the different "tone" of Trial Counsel to be noteworthy. *Salyer*, 2012 CCA LEXIS 407, at 18. There are three problems with this finding. First, *Lewis* did not turn on the tone of voice used by the Government. Second, to the extent tone is even relevant, the NMCCA whistles past the difficulty of discerning it from a cold record of trial. And third, this finding overlooks the significant question that Trial Counsel asked LtCol Mori during *voir dire*--namely, had he removed trial counsel from a previous case. (R. at 378.) To use the word's of Lewis's mother, this question raises an inference of "personal vendetta". *Lewis*, 63 M.J. at 410 n.2.

herself because it appeared that she was having a homosexual relationship with the defense counsel, and therefore could not be impartial. *Id.* at 408-11. The military judge disqualified herself but, as in this case, not for the reasons advanced by the Government. Instead, she found--as LtCol Mori did (almost quoting *Lewis* verbatim)--that recusal was needed because the Government created a situation making it impossible for her to remain:

> I now find myself second guessing every decision in this case. Did I favor the government to protect myself from further assault? Did I favor the accused to retaliate against the government[?]

*Lewis*, 63 M.J. at 410-11. The new military judge in that case denied the defense's motion to dismiss because, in his view, the UCI would not taint the proceedings. *Id.* at 411. He gave four reasons: (1) he was from a different judicial circuit, (2) he ordered that the SJA be barred from the court room and, unlike here, also (3) barred the SJA from further participation in the case, and (4) ordered that a new CA assume post-trial responsibilities. *Id.* at 411.

In deciding whether the Government proved that there was no UCI taint in *Lewis*, this Court stressed that it had to "consider both whether *actual* command influence was cleansed from the proceedings as well as whether any *perceived* unlawful command influence ha[d] been eradicated." *Id.* at 413. Reviewing *de*

*novo*, it found that the Government failed on both counts. *Id.* at 413-14, 416.

If greater remedial measures were taken in *Lewis* and this Court still found them insufficient to cleanse the proceedings, *see Lewis*, 63 M.J. at 415-16, it follows, *a fortiori*, that the fewer remedial measures taken in this case are also insufficient. Further, the Government's successful attempt to unseat the military judge here occurred after it received an unfavorable ruling to its case. (R. at 402-3.) Once a new military judge was assigned to Appellant's case, the Government immediately moved for reconsideration of the unfavorable age ruling. (R. at 421.) In *Lewis*, by contrast, there is nothing to suggest the Government's attempt to unseat the military judge occurred after any unfavorable rulings. *Lewis*, 63 M.J. at 407-09. This distinction is significant. It shows a naked attempt by the Government to control not just who sits on the bench, but also a ruling that, in part, determines the outcome. This tactic cannot be acceptable.

Additional similarities are telling. Here, as in *Lewis*, the actions by the Government to unseat the military judge were a *coordinated effort*. *Lewis*, 63 M.J. at 414; (R. at 368-69, 411). Here, as in *Lewis*, an SJA and trial counsel were integral actors involved in the unseating. (R. at 402-437); *Lewis*, 63 M.J. at 406-410. And here, as in *Lewis*, the Government's

actions "invaded" the "deliberative process" of the military judge causing "second guessing" of rulings and warranting recusal. (R. at 386; Appellate Ex. LW); *Lewis*, 63 M.J. at 411.

### C. The lower court's decision appears to endorse Government actions that may have violated the Privacy Act of 1974 and are contrary to public policy.

The lower court innocuously characterizes the accessing of the military judge's service record as verification of facts in advance of *voir dire*. *See Salyer*, 2012 CCA LEXIS 407, at *16 ("The Government had *verified* this fact before commencing its voir dire into how that fact might have influenced LtCol MDM's pretrial ruling on the definition of a minor.") (emphasis added). Yet glaringly, it never addresses how this verification came about, marching past the accessing of LtCol Mori's personnel record and whether this conduct is in fact illegal as it violates the Privacy Act of 1974, an issue underscored in Appellant's brief to NMCCA (NMCCA Appellant Br. at 19-20). The Privacy Act of 1974 provides in relevant part:

> No agency shall disclose any record which is contained in a system of records by any means . . . to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . .

5 U.S.C. § 552a. An exception to this general rule is that a record may be disclosed without prior consent "to those officers and employees of the agency which maintains the record who *have a need* for the record in the performance of their duties[.]"

*Id.* at § 552a(b)(1). Does this exception apply here? If it does, the NMCCA did not say so because it omits any mention of the Privacy Act, let alone addressing the issue.[10] Surely this gloss-over approach does not instill public confidence in the military justice system.

Similarly, because the NMCCA refused to address the issue, Navy and Marine trial counsel are now left with the impression that this tactic is permissible; that even where the military judge has not granted permission to release such records, and even where such records contain sensitive PII, they are fair fodder for Government inspection. Is this the rule? Can a military judge's personnel record be accessed without his permission because of a rumor that he had a very young wife? More importantly, in the context of this case, does the Government's accessing of LtCol Mori's personnel record impact the UCI issue raised here under *Lewis*? The answers to these questions are tremendously important. And because the NMCCA refused to answer them, this Court should.

**Conclusion**

Appellant respectfully asks this Court to grant review for

[10] Marine Corps Order P1080.40C dictates that this type of data "must be carefully safeguarded under the provisions of the Privacy Act of 1974[]" and that "[*u]nauthorized access and release are punishable under numerous* provisions" of the Act. MCO P1080.40C at 1-3 and 1-16 (June 7, 2001) (emphasis in original).

the same reasons that the Appellant in *Lewis* did: the NMCCA erred in applying this Court's precedents on unlawful command influence. Indeed, in *Lewis*, the NMCCA affirmed only to have this Court grant review and then set aside the findings and sentence and dismiss the charges with prejudice. Because the NMCCA made the same mistake here, review is needed. This is especially true because the NMCCA did not even address the Privacy-Act matter.

To be clear, Appellant does not ask this Court to rule on the merits of a Privacy Act violation. Rather, that issue and the apparent failure of any Government official to investigate it, is merely an application of this Court's UCI and public confidence rationale in *Lewis*. Because that rationale was not applied by the lower court, the attention of this Court is warranted.

This Court should therefore grant review of this case.

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**Appendix:**

1. *United States v. Lewis*, No. 201200145, 2012 CCA LEXIS 407 (N-M. Ct. Crim. App. Oct. 23, 2012)

**Certificate of Filing and Service**

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on December 22, 2012.

**Certificate of Compliance**

This supplement complies with the page limitations of Rule 21(b) because it contains less than 9,000 words. Using Microsoft Word version 2003 with 12-point-Court-New font, this supplement contains 8,456 words.

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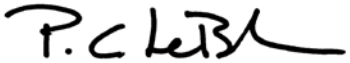

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**UNITED STATES OF AMERICA v. JOSEPH B. SALYER CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201200145**

**UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS**

***2012 CCA LEXIS 407***

**October 23, 2012, Decided**

**NOTICE:** AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

**PRIOR HISTORY:** [*1]

GENERAL COURT-MARTIAL. Sentence Adjudged: 21 November 2011. Military Judge: Col Michael B. Richardson, USMC. Convening Authority: Commanding General, 3d Marine Division (-)(Rein), Kaneohe Bay, HI. Staff Judge Advocate's Recommendation: LtCol K.J. Estes, USMC.

**COUNSEL:** For Appellant: Maj Jeffrey Liebenguth, USMC; LT David Dziengowski, JAGC, USN.

For Appellee: Capt Samuel Moore, USMC.

**JUDGES:** Before J.R. PERLAK, M.D. MODZELEWSKI, D.O. HARRIS, Appellate Military Judges. Chief Judge PERLAK and Senior Judge MODZELEWSKI concur.

**OPINION BY:** HARRIS

**OPINION**

**OPINION OF THE COURT**

HARRIS, Judge:

A general court-martial comprised of officer and enlisted members convicted the appellant, contrary to his pleas, of wrongfully possessing child pornography in violation of Article 134, Uniform Code of Military Justice, *10 U.S.C. § 934*. The appellant was sentenced to confinement for 2 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

In his sole assignment of error, the appellant asserts that the findings and sentence must be set aside due to unlawful command influence, which led to the recusal of the military judge who initially presided [*2] over the case. *See* Appellant's Brief of 29 May 2012 at 1. After carefully considering the record of trial and the briefs of counsel, we hold that the findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

**I. Background**

The appellant was originally charged with a possession of child pornography in violation of clauses 1, 2, and 3 of Article 134. At a pretrial Article 39(a), UCMJ, session, the Government amended the specification, striking through the clause 1 and clause 3 language and leaving only the language alleging a violation under clause 2. Following that amendment, the military judge Lieutenant Colonel (LtCol) MDM raised the following question: for a child pornography specification alleged under clause 2, did the term "minor" mean a child under the age of 16 or a child under the age of 18? The Government argued that, for purposes of a child pornography charge, the correct definition of "minor" was a child under the age of 18, in accordance with the federal statute. The military judge agreed that the other definitions from the federal child pornography statute would [*3] be given, but expressed an opinion that the term "minor" should be defined as under 16 and reserved his decision. Record at 248-51. At a subsequent pretrial session, the trial counsel requested the military judge's decision on

the definition of "minor," but the judge again deferred. *Id*. at 267-69.

Trial commenced on 14 November 2011 in front of officer and enlisted members, with LtCol MDM presiding as military judge. The trial proceeded through *voir dire* of the members, after which the military judge excused the members for the day. LtCol MDM then addressed several issues that remained from pretrial Article 39(a) sessions. At that juncture, LtCol MDM informed the parties that, in his instructions to the members, he would define "minor" as a child under the age of 16 because the "age of consent" in the military is 16 years of age. *Id*. at 300-02. Over the Government's objection, LtCol MDM subsequently instructed the members on this definition prior to opening statements, and the trial proceeded to the Government's case-in-chief.

During the first day of trial testimony, the Government asked to *voir dire* LtCol MDM about the age of his second wife at the time of their marriage. LtCol MDM [*4] disclosed that his wife was 17 years old at the time they married, and was now 27. The Government offered as an appellate exhibit an excerpt from LtCol MDM's service record confirming that fact, and then moved to disqualify the military judge for actual and implied bias. The Government's position was that the military judge's ruling on the definition of a minor was influenced by the fact that his wife was under the age of 18 at the time of their marriage. LtCol MDM took the issue under advisement. After another recess, LtCol MDM excused the members for the rest of the day and recessed until the following morning.

The next morning, LtCol MDM disclosed a telephone conversation he had with the Circuit Military Judge, Captain (CAPT) DB, during the lunch break on the preceding day. LtCol MDM had called CAPT DB about another matter, but CAPT DB then relayed that he had received a call earlier from LtCol JAM, who was "dual hatted" as the Staff Judge Advocate (SJA) for Marine Corps Base Hawaii, and the Officer-in-Charge (OIC) of the Law Center. In the latter role, LtCol JAM served as the trial counsel's supervisor. As Marine Corps Base was not the CA in the appellant's trial, LtCol JAM was [*5] not serving in an SJA role for these proceedings, or acting on behalf of the CA. In that telephone call, LtCol JAM had discussed LtCol MDM's ruling on the definition of a minor, and indicated that the Government would be moving to disqualify LtCol MDM. LtCol MDM stated that he felt that CAPT DB was "rais[ing] concern with [LtCol MDM's] performance"[1] and that LtCol JAM was unhappy with the earlier ruling. LtCol MDM again excused the members for the day, so both sides could research the issue further.

1 Record at 378.

At this session of court, LtCol MDM first raised the possibility that the Government's actions could constitute unlawful command influence. The court recessed for several hours, after which LtCol MDM recused himself from further participation in the proceedings. *Id*. at 386-88; Appellate Exhibit LX. A substitute military judge, Colonel (Col) Richardson, was flown in from the West Coast, and trial resumed the next morning.

Before continuing with the Government's case-in-chief, the appellant moved to dismiss the charges for actual and apparent unlawful command influence. The appellant claimed that the telephone call by LtCol JAM to CAPT DB, as well as "orchestrated actions" to [*6] disqualify LtCol MDM as the military judge, constituted unlawful command influence. Col Richardson heard testimony from LtCol JAM and Captain JPS, the Military Justice Officer, and argument from both trial and defense counsel. Col Richardson ruled that there was no actual unlawful command influence, but that LtCol JAM's telephone call to CAPT DB created the appearance of unlawful command influence. As a remedy, Col Richardson barred LtCol JAM from all participation in the proceedings, and refused to reconsider any of LtCol MDM's rulings that were favorable to the defense. The trial then resumed, proceeding to verdict and sentencing with Col Richardson as the military judge.

**II. Analysis**

**A. Standard of Review**

This court reviews claims of unlawful command influence *de novo. United States v. Villareal, 52 M.J. 27, 30 (C.A.A.F. 1999)*. We review the military judge's findings of fact in conjunction with the appellant's claim under a clearly erroneous standard. *Id*. We review a military judge's remedy for unlawful command influence for an abuse of discretion. *United States v. Douglas, 68 M.J. 349, 354 (C.A.A.F. 2010)*.

"[O]nce unlawful command influence is raised at the trial level, as it was here, [*7] a presumption of prejudice is created." *Douglas, 68 M.J. at 354* (citing *United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999))*. To affirm in such a situation, we must be convinced beyond a reasonable doubt that the unlawful command influence had no prejudicial impact on the court-martial. *Id*.

**B. Unlawful Command Influence**

Article 37(a), UCMJ, *10 USC § 837(a)* provides:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any

> member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. . . .

*See also United States v. Stombaugh, 40 M.J. 208, 210 (C.M.A. 1994)*. Unlawful command influence is "the mortal enemy of military [*8] justice." *United States v. Rivers, 49 M.J. 434, 443 (C.A.A.F. 1998)* (quoting *United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986))*. "Even the mere appearance of unlawful command influence may be as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Ashby, 68 M.J. 108, 128 (C.A.A.F. 2009)* (quoting *United States v. Ayers, 54 M.J. 85, 94-95 (C.A.A.F. 2000)* (internal citation and quotation marks omitted)).

In addressing the appearance of unlawful command influence, appellate courts consider, objectively, "'the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public.'" *Ashby, 68 M.J. at 129* (quoting *United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006))*. An appearance of unlawful command influence exists 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*. (quoting *Lewis, 63 M.J. at 415*).

Not every violation of Article 37 automatically amounts to unlawful command influence. *Stombaugh, 40 M.J. at 211*. Moreover, "there is a distinction between influence [*9] that is private in nature and influence that carries with it the mantle of official command authority." *Id*. Resolution of the issue necessarily turns on the specific facts of each case.

**C. Unlawful Command Influence Directed at the Military Judge**

Improper attempts to intimidate a military judge may constitute unlawful command influence. For example, the United States Court of Appeals for the Armed Forces (CAAF) has held that the fitness-report system cannot be used "as a conduit for command complaints" against military judges. *See United States v. Mabe, 33 M.J. 200, 206 (C.M.A. 1991)*. Likewise, creating a situation where a military judge feels compelled to recuse can constitute unlawful command influence. *See Lewis, 63 M.J. at 412* (quoting *United States v. Lewis, 61 M.J. 512, 518 (N.M.Ct.Crim.App. 2005))*. However, appellate courts will not presume that a military judge has been influenced simply "by the proximity of events which give the appearance of command influence[.]" *Stombaugh, 40 M.J. at 213*.

In *Lewis, 63 M.J. at 405*, the CAAF addressed unlawful command influence that resulted in recusal of the military judge. In *Lewis*, the trial counsel, apparently aided by the SJA, engaged in [*10] a lengthy *voir dire* regarding the female military judge's relationship with the female civilian defense counsel in the case. *63 M.J. at 407-09*. The SJA later testified in connection with pretrial motions, and referred to the military judge as having been "on a date" with the civilian defense counsel. *Id. at 410*. Eventually, the military judge recused herself, stating that the "slanderous" accusations by the trial counsel and SJA had her "second guessing every decision in [the] case." *Id. at 411*. A second military judge recused himself as well, stating he was so "shocked and appalled" by the conduct of the Government representatives that he did not believe he could remain objective. *Lewis, 61 M.J. at 515*.

On appeal this court held that:

> The unprofessional actions of the trial counsel and the SJA improperly succeeded in getting the military judge to recuse herself from the appellant's court-martial. . . . To the extent that the SJA, *a representative of the convening authority*, advised the trial counsel in the *voir dire* assault on the military judge and to the extent that his unprofessional behavior as a witness and inflammatory testimony created a bias in the military judge, the facts [*11] establish clearly that there was unlawful command influence on this court-martial.

*Lewis, 61 M.J. at 518* (emphasis added). We further noted that "the manner in which the *voir dire* was conducted and the crass, contemptuous behavior of [the SJA] while testifying displayed nothing but disrespect for the military judge." *Id. at 517*.

The last assigned military judge in *Lewis*, who came from outside the circuit, took several remedial actions, including barring the SJA from the courtroom and disqualifying the SJA from any further participation in the case, transferring the case to a new convening authority

for post-trial proceedings, and additional precautions to ensure any court members were untainted by the earlier proceedings. *Lewis, 63 M.J. at 411-12*. Based largely upon those remedial measures, this court found no prejudice resulting from the unlawful command influence. *Lewis, 61 M.J. at 518*.

The CAAF subsequently granted review of our decision and reversed. Although limited by its terms to the "unique facts" of the case, the CAAF held that "the actions taken by [the substituted military judge] fell short of removing doubts about the impact of the actual unlawful command influence in this [*12] case." *63 M.J. at 415* (footnote omitted). The CAAF also found that the appearance of unlawful command influence would cause a member of the public to harbor "significant doubt about the fairness of this court-martial in light of the Government's conduct with respect to [the original military judge]." *Id*. The CAAF set aside the conviction and sentence and dismissed the charges with prejudice, noting that the drastic remedy was the only way to cure the "unlawful" conduct at issue and ensure the public perception of fairness in the military justice system. *Id. at 416-17*.

We now apply this body of law to the facts of this case.

**D. Discussion**

Military courts have set forth a specific procedure at trial to address allegations of actual unlawful command influence. *See United States v. Simpson, 58 M.J. 368, 373 (C.A.A.F. 2003)*. First, the defense must make an initial showing of facts which, if true, constitute unlawful command influence. *Id*. (quoting *v. Biagase, 50 M.J. at 150*). Second, the defense must show that the alleged unlawful command influence has a logical connection to the appellant's court-martial. *Id*. "The threshold for raising the issue at trial is low, but more than mere allegation [*13] or speculation." *Id*. (citations and internal quotation marks omitted).

If the defense makes this requisite showing, the burden then shifts to the Government either to: (1) disprove the predicate facts on which the allegation of unlawful command influence is based; or (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.* (internal citations and quotation marks omitted). Here, the trial court found, and the Government conceded, that the defense met its initial burden. AE LXXXIV at 8-9.

There are two separate bases for the unlawful command influence motion: 1) the phone call placed by LtCol JAM to the Circuit Military Judge; and 2) the *voir dire* of LtCol MDM about his wife's age at the time of their marriage. We have reviewed the military judge's findings of fact on the motion, find them not clearly erroneous and adopt them here. We hold that there was no actual unlawful command influence, and any appearance of unlawful command influence was adequately remedied by the military judge.

1. Phone Call to the Circuit Military Judge

Col Richardson made a specific [*14] finding of fact that LtCol JAM's purpose for calling the Circuit Military Judge was merely to provide a "heads up" that the Government planned to make a recusal motion, and that there could be a short fuse need to find a replacement judge in a remote location. AE LXXXIV at 9. Col Richardson further found that the Circuit Military Judge did nothing improper, and did not attempt to influence LtCol MDM in their subsequent telephone conversation. Although we share Col Richardson's view that a phone call to a sitting military judge's reporting senior in the middle of trial is ill advised, and we have no reason to doubt LtCol MDM's statement that he *felt* LtCol JAM's phone call was an attempt to "tattle" on him,[2] these facts alone do not establish actual unlawful command influence.

2 Record at 386.

Col Richardson found as fact that LtCol JAM did not complain about any of LtCol MDM's rulings and did not seek any relief or assistance from the Circuit Military Judge. AE LXXXIV at 9. He further found that neither LtCol JAM nor the Circuit Military Judge intended to influence LtCol MDM's rulings. LtCol MDM made no assertion that the Circuit Military Judge pressured him in any way, only that LtCol [*15] MDM "interpreted his questioning of me to raise concern with my performance." Record at 378. However, "[t]he fact that military judges may issue rulings adverse to the interests of superior officers . . . does not in itself preclude those judges from exercising independence in their judicial rulings." *United States v. Norfleet, 53 M.J. 262, 268 (C.A.A.F. 2000)*. On these facts we find no actual unlawful command influence.

We agree with Col Richardson that this situation does amount to apparent unlawful command influence. Notwithstanding the innocent purpose behind the call, the Government's actions created the appearance that the phone call was the sort of "conduit for complaints" against a military judge prohibited by the UCMJ. *See Mabe, 33 M.J. at 206*. We address the remedy for the apparent unlawful command influence in Part E, below.

2. *Voir Dire* of LtCol MDM

Regarding the inquiry into LtCol MDM's marriage and potential bias, we find no actual or apparent unlawful command influence. Although the facts bear some similarity to those in *Lewis*, we find the two situations to be readily distinguishable.

First and foremost, as noted by Col Richardson in the findings of fact, LtCol JAM was *not* [*16] acting as the SJA for the convening authority in the appellant's case. Therefore, unlike in *Lewis*, there was no influence by or on behalf of the command. There are no facts anywhere in the record suggesting that the convening authority or anyone acting on his behalf knew of, let alone participated in, any of these events. Second, in *Lewis* there was no good faith basis to inquire into the military judge's personal life. Here the facts are undisputed that LtCol MDM did marry a 17-year-old woman. The Government had verified this fact before commencing its *voir dire* into how that fact might have influenced LtCol MDM's pretrial ruling on the definition of a minor. Col Richardson found this to be a good faith basis for questioning and we agree. Third, the appellant in *Lewis* ultimately waived his right to a members trial and was found guilty and sentenced by the replacement military judge. In this case, trial by members continued, and the members--wholly unaffected by and unaware of these events--convicted the appellant and sentenced him. Finally, the allegations in *Lewis* involved what was potentially illegal and, at that time, career-ending conduct. Notwithstanding the appellant's attempt [*17] to characterize this case as identical, we find no similar explicit or implicit assertion that LtCol MDM did anything wrong; rather, the Government's inquiry suggested that LtCol MDM might be biased against the Federal definition of a minor in light of his life experience.

At one point during the discussion regarding the appropriate definition of a minor for purposes of the child pornography charge, LtCol MDM remarked "(Y)ou couldn't have a naked picture of someone who you could lawfully have sexual intercourse with; a 17 year old?" Record at 250. LtCol MDM is not the first person to point out this somewhat counterintuitive wrinkle in the law. *See United States v. Nerad, 69 M.J. 138, 141 (C.A.A.F. 2010)* (reversing the Air Force Court of Criminal Appeals for dismissing a conviction for possessing child pornography on similar facts). Because LtCol MDM had married a 17-year-old woman, it is a reasonable inference that his view on the legal definition of a "minor" might be colored by his personal history.

"A military judge 'shall perform the duties of judicial office impartially and fairly.'" *Lewis, 63 M.J. at 414* (quoting *United States v. Quintanilla, 56 M.J. 37, 42 (C.A.A.F. 2001))*. To [*18] ensure compliance with this requirement, the Government has every right to "question the military judge and to present evidence regarding a possible ground for disqualification . . . ." RULE FOR COURTS MARTIAL 902(d)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). *Lewis* was limited by its own terms to the "unique circumstances" of that case. *63 M.J. at 407*. Were we to eliminate or severely restrict the questioning of a military judge about a personal matter as creating an appearance of unlawful command influence, it would essentially nullify R.C.M. 902. We find nothing in *Lewis* requiring such a result. Nor do we find any evidence in this case of the extraordinarily disrespectful and unprofessional tone of the questioning present in *Lewis. Cf. Lewis, 61 M.J. at 517*. Accordingly, we find no actual or apparent unlawful command influence resulting from the *voir dire* of LtCol MDM.

**E. Remedy**

The military judge is the "last sentinel" in the trial process to protect a court-martial from unlawful command influence. *United States v. Harvey, 64 M.J. 13, 14 (C.A.A.F. 2006)*. Appellate decisions encourage military judges to take "proactive, curative steps to remove the taint of unlawful command [*19] influence and ensure a fair trial." *Douglas, 68 M.J. at 354*. As a last resort, a military judge may consider dismissal of the charges when no other remedy will avoid prejudice against the appellant. *Id*. (quoting *United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004))*. When an error can be rendered harmless, dismissal is not an appropriate remedy. *Gore, 60 M.J. at 187* (citing *United States v. Mechanik, 475 U.S. 66, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986))*.

A military judge has a range of options in addressing unlawful command influence. *Id*. As the CAAF stated, "our prior cases have addressed only what a military judge can do, not what the military judge must do, to cure (dissipate the taint of the unlawful command influence) or to remedy the unlawful command influence if the military judge determines it cannot be cured." *Id. at 186*. We review a military judge's remedial actions for an abuse of discretion. *Id. at 187*.

In this case, the military judge took steps to cure any appearance of unlawful command influence. First, he barred LtCol JAM from the courtroom and from any further participation in the proceedings. Second and significantly, he refused to reconsider any of LtCol MDM's rulings favorable to the defense, eliminating [*20] any possible tactical advantage to the Government resulting from LtCol MDM's recusal. Unlike the situation in *Lewis*, there is no suggestion that the CA or someone acting on his behalf was involved. For that reason, we conclude that dismissal would be too harsh of a remedy. We are convinced beyond a reasonable doubt that a reasonable member of the public would not harbor significant doubts as to the fairness of these proceedings.

**III. Conclusion**

Accordingly, the findings and the sentence as approved by the CA are affirmed.

Chief Judge PERLAK and Senior Judge MODZELEWSKI concur.