

# Recent Developments in Unlawful Command Influence: “I really didn’t say everything I said!”<sup>1</sup>

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Like last year,<sup>2</sup> there is good news in the world of unlawful command influence (UCI). All was quiet on the UCI front over the last year. Of course, quiet is relative. Although the Court of Appeals for the Armed Forces (CAAF) did not see much UCI action last year, significant UCI issues are winding their way along the appellate road, having passed through the service courts’ gate posts. Of particular note are two issues: implied bias and pretrial statements. This article addresses these issues in the context of *United States v. Stoneman*,<sup>3</sup> *United States v. Weisen*,<sup>4</sup> and *United States v. Simpson*.<sup>5</sup>

## Implied Bias: *Stoneman* and *Weisen*

The public became the center of discussion this past year in the area of UCI, particularly concerning implied bias of panel members. Although covered in detail in last year’s symposium,<sup>6</sup> the Army Court of Criminal Appeal’s (ACCA’s) decision in *United States v. Stoneman*<sup>7</sup> regained significance as a

UCI case because the CAAF granted review,<sup>8</sup> and more importantly, because the CAAF decided *United States v. Weisen*.<sup>9</sup>

What is implied bias?<sup>10</sup> More specifically, can court members ignore comments of superiors regarding military justice matters? First, a distinction must be made. Actual bias is viewed through the eyes of the court members, while implied bias is viewed through the objective eyes of the public focusing on the appearance of fairness of the military justice system.<sup>11</sup> The trial judge in *Stoneman* noted the CAAF’s holding in *United States v. Youngblood*,<sup>12</sup> which recognized the inherent balancing act between “the commander’s responsibility for discipline and the ‘subtle pressures that can be brought to bear by command in military society.’”<sup>13</sup> These “subtle pressures” are at the heart of the analysis when determining the implied bias of a court member.

The CAAF has long recognized the principle of implied bias.<sup>14</sup> The court has also noted that the principle gains more scrutiny if grounded in a UCI claim.<sup>15</sup> An early case illustrative

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1. YOGI BERRA, THE YOGI BOOK 9 (1998). Pretrial statements made by convening authorities and senior military officials concerning military justice issues are often cloaked with the appearance of command influence. Thus, individuals find themselves in the unenviable position of having to retract or explain their statements, much like Yogi Berra did when asked about famous quotes attributed to him.
  2. See Colonel Robert A. Burrell, *Recent Developments in Unlawful Command Influence*, ARMY LAW., May 2001, at 1.
  3. 54 M.J. 664 (Army Ct. Crim. App. 2000).
  4. 56 M.J. 172 (2001).
  5. 55 M.J. 674 (Army Ct. Crim. App. 2001).
  6. See Burrell, *supra* note 2, at 7-8.
  7. 54 M.J. at 664.
  8. *United States v. Stoneman*, 56 M.J. 147 (2001).
  9. 56 M.J. at 177.
  10. See generally MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912 (2000).
  11. *United States v. Napoleon*, 46 M.J. 279, 283 (1997) (citing *United States v. Daulton*, 45 M.J. 212 (1996); *United States v. Dale*, 42 M.J. 384, 386 (1995)).
  12. 47 M.J. 338 (1997).
  13. *Stoneman*, 54 M.J. at 668 (citing *Youngblood*, 47 M.J. at 341).
  14. *United States v. Harris*, 13 M.J. 288 (C.M.A. 1982).
  15. *Youngblood*, 47 M.J. at 341.

of implied bias based on UCI is *United States v. Zagar*.<sup>16</sup> In *Zagar*, the command's staff judge advocate (SJA) briefed the entire court-martial panel the day before trial. During voir dire, court members described the briefing as an "orientation about the new court-martial manual"<sup>17</sup> and stated that the SJA had explained that the case had been through three levels of review, thus, "the man accused had done this crime."<sup>18</sup> Although the court members unequivocally denied any bias as a result of the SJA's briefing, the Court of Military Appeals disagreed. The court rejected the contention that it was bound by the members' voir dire responses.<sup>19</sup> Relying on federal implied bias case law, the court reasoned that "jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments can not always be ascertained."<sup>20</sup>

Trial practitioners and SJAs should remember the facts of *Stoneman*. The brigade commander declared war on command and leadership failures. In an e-mail message to the entire brigade leadership, he stated:

I'm sick of leaders getting DUIs, abusing their position, being lazy. . . . I am sick of hearing about leaders who are morally and spiritually bankrupt. I am declaring war on leaders like this. . . . If leaders don't lead by example, and practice self-discipline, then the very soul of our Army is at risk. No more PSGs getting DUIs, no more NCOs raping female soldiers, no more E7s coming up "hot" for coke, no more stolen equipment, no more "lost" equipment . . . —all of this is BULLSHIT, and I'm going to CRUSH leaders who fail to lead by example, both on and off duty.<sup>21</sup>

Although aimed at a noteworthy objective, the brigade commander's method and word choice to communicate his frustrations to the entire brigade leadership caused Specialist (SPC) Stoneman to raise several concerns at his subsequent court-martial. The military judge denied the motion to stay the proceedings until all members of the brigade were removed from the panel.<sup>22</sup> In doing so, the military judge disagreed with the defense assertion that the panel members were tainted with implied bias. The military judge cited the responses of the members during voir dire. She specifically addressed implied bias from the public's view: "I think [the public] would see that these members represent the finest traditions of the United States Army as court members . . . and I think everyone heard [the members] say loudly and clearly that they will discharge their responsibilities as court members and vote in accordance with their conscience."<sup>23</sup>

In *United States v. Weisen*,<sup>24</sup> the CAAF found that the military judge had abused his discretion when he denied a defense challenge for cause against the president of a court-martial.<sup>25</sup> The president of the ten-member panel was the brigade commander for six of the members.<sup>26</sup> The defense counsel exercised his peremptory challenge against the panel president while preserving the issue for appeal.<sup>27</sup> During voir dire, the members stated under oath that they would not be influenced by the fact that their commander was the president, and the president swore he would not expect deference in the deliberation room. Accordingly, the defense did not challenge the president or the rest of the panel on grounds of actual bias. The defense, however, did challenge the panel composition based on implied bias. Thus, the CAAF viewed the issue in *Wiesen* as one of "public perception and the appearance of fairness in the military justice system."<sup>28</sup>

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16. 18 C.M.R. 34 (C.M.A. 1955).

17. *Id.* at 37.

18. *Id.* at 36.

19. *Id.* at 38.

20. *Id.* (citing *Stone v. United States*, 113 F.2d 70 (6th Cir. 1940)). Several Supreme Court cases also discuss the doctrine of implied bias. *See, e.g.*, *Smith v. Phillips*, 455 U.S. 209 (1982); *Dennis v. United States*, 339 U.S. 162 (1955); *Crawford v. United States*, 212 U.S. 183 (1909). Other military cases discuss the doctrine as well. *See, e.g.*, *United States v. Armstrong*, 54 M.J. 51 (2000); *United States v. Rome*, 47 M.J. 467 (1998); *United States v. Gerlich*, 45 M.J. 309 (1996); *United States v. Nigro*, 28 M.J. 415 (C.M.A. 1989).

21. *United States v. Stoneman*, 56 M.J. 674, 676 (Army Ct. Crim. App. 2000).

22. *Id.* at 666.

23. *Id.* at 668.

24. 56 M.J. 172 (2001).

25. *Id.* at 177.

26. *Id.* at 173-74.

27. *Id.* at 174.

Judge Baker, writing for the majority, stated that Weisen's court-martial created the "wrong atmosphere" in the eye of the public.<sup>29</sup> The CAAF determined that a member of the public would have "serious doubts" with the military justice system when a brigade commander could be the panel president with sufficient members of his command on the panel to comprise enough votes for a finding of guilty.<sup>30</sup> In fact, the majority further stated that "public perception of the military justice system may nonetheless be affected by more subtle aspects of military life" and "an objective public might ask to what extent, if any, does deference (also known as respect) for senior officers come into play?"<sup>31</sup>

Although not raised in a UCI context, *Weisen* raises implied bias issues that the CAAF may address in its forthcoming review of *Stoneman*. If an objective member of the American public (1) read SPC Stoneman's brigade commander's e-mail message expressing the commander's frustration, (2) knew of the subsequent leader training attended by several panel members on the same subject, (3) understood five members of the brigade were empanelled, and (4) knew this occurred about thirty days before SPC Stoneman's court-martial, would that member of the public have "serious doubts" about the military justice system? The answer, at least in terms of *Weisen*, seems to be yes.

#### Pretrial Statements: *United States v. Simpson*

In July 2001 the ACCA decided the well-publicized Aberdeen Proving Ground (APG), Maryland, case of *United States v. Simpson*.<sup>32</sup> Among the significant issues raised in the case were unlawful influence claims resulting from "extensive" pretrial statements made by high-ranking individuals.<sup>33</sup>

28. *Id.* at 175.

29. *Id.* at 176.

30. *Id.*

31. *Id.*

32. 55 M.J. 674 (Army Ct. Crim. App. 2001).

33. *Id.* at 678-79. Unlawful command influence issues and evidence comprised four volumes of the record of trial. The evidence included newspaper articles, transcripts of press conferences, letters from members of Congress, videotaped news reports, interviews of senior military officials, and editorial cartoons. *Id.* at 679.

34. *Id.*

35. *Id.* at 680. The commander, a major general, was not the general court-martial convening authority. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 688.

39. *Id.* at 685.

40. *Id.* at 682. The defense produced no evidence that the Senator's demand was communicated through the chain of command to the general court-martial convening authority, accused's chain of command, or court members. *Id.*

Charges involving sexual misconduct with trainees were preferred against Staff Sergeant (SSG) Delmar Simpson, a drill sergeant, on 8 October 1996. The APG command issued a press release outlining an investigation into allegations of sexual activity between cadre (drill sergeants and a commissioned officer) and trainees in an advanced individual training unit.<sup>34</sup> The command issued the release at a press conference in which the Commander, U.S. Army Ordnance Center and School, announced that the misbehavior was "the worst thing I've ever come across in thirty years of service."<sup>35</sup>

The case became a lightning rod for a "nationwide media blitz."<sup>36</sup> The Secretary of Defense, the Secretary of the Army, the Assistant Secretary of the Army for Manpower and Reserve Affairs (ASA (M&RA)), the Army Chief of Staff, and the Chairman of the Joint Chiefs of Staff made public statements regarding the APG cases.<sup>37</sup> Among the statements was one by the ASA (M&RA) in which she stated that there was no such thing as consensual sex between a drill sergeant and a trainee.<sup>38</sup> Additionally, the Secretary of the Army ordered the Department of the Army Inspector General to investigate command responsibility for the "sex scandal," and he created a Senior Review Panel to examine gender relations in the Army, both directives occurring before SSG Simpson's court-martial.<sup>39</sup> Further, during a congressional delegation's visit to APG, several members of Congress issued statements, including a Maryland Senator who demanded that the Secretaries of Defense and the Army "severely" punish wrongdoers.<sup>40</sup>

At a two-day pretrial hearing four and a half months after the press conference, the defense was unable to present any evidence of actual UCI.<sup>41</sup> The military judge then allowed "vigorous and extensive" voir dire of the court members.<sup>42</sup> Both the government and defense explored possible taint stemming from

pretrial statements, media reports, and influence from superiors. Each member stated during individual voir dire that the member had the “ability to decide the case based on the evidence, [and all the members] denied feeling influenced or pressured.”<sup>43</sup> After reaching findings of guilty and pursuant to Simpson’s pleas, the members sentenced Simpson to a dishonorable discharge, confinement for twenty-five years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.<sup>44</sup>

The ACCA decided the issues raised by SSG Simpson on appeal using the *Biagase-Stombaugh* factors.<sup>45</sup> The court first looked at the allegation that the actions of the Secretary of the Army raised the issue of UCI. The court rejected this assertion out of hand. The court found the Secretary of the Army’s directives did not meet the first prong of the *Biagase-Stombaugh* test because neither directive was UCI.<sup>46</sup>

The court next turned its attention to the pretrial statements made by senior ranking military members and reviewed these statements in light of the proximate cause factor.<sup>47</sup> The court granted the defense’s assertion that pretrial publicity, if “engineered” by those with the “mantle of command authority” with the intent to orchestrate a certain result, may be UCI.<sup>48</sup> Publicity by itself, however, is not a “get out of jail free” card.<sup>49</sup> The court noted that SSG Simpson’s claims were general and not

tied to specific results at the court-martial.<sup>50</sup> Accordingly, the defense failed to show the nexus between the pretrial statements and the outcome at trial. The court, in fact, noted that the “vast majority” of the pretrial statements made by senior officials were “balanced and fair.”<sup>51</sup>

The ACCA then looked at potential UCI in the charging process and the court-martial itself.<sup>52</sup> The defense did not produce, nor did the court find, any evidence of command influence tainting the preferral or referral process as a result of pretrial statements or other superior influence in the case.<sup>53</sup> The court additionally addressed the possibility of apparent UCI on the referral process. After reviewing the testimony of the special and general courts-martial convening authorities, the court found no nexus between the statements of the senior officials and the decision to refer the case to a general court-martial.<sup>54</sup>

As stated earlier, the military judge allowed the defense to extensively voir dire potential panel members. The members “disavowed” any influence as a result of the pretrial publicity and pretrial statements.<sup>55</sup> Not confined to the panel members’ “self-proclaimed impartiality,” the ACCA looked for evidence of UCI and its impact on the members.<sup>56</sup> The court noted several factors, including deliberation time, frequent panel questions of witnesses, verdicts of not guilty to several

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41. *Id.* at 683.

42. *Id.* at 684.

43. *Id.*

44. *Id.* at 678.

45. *Id.* at 684-86 (citing *United States v. Biagase*, 50 M.J. 143 (1999); *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994)). The methodology for review of UCI issues at trial is that “the defense must: (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings [will be] unfair; and (3) that the unlawful command influence [will be] the cause of the unfairness.” *Id.* at 685-86 (quoting *Biagase*, 50 M.J. at 150 (citing *Stombaugh*, 40 M.J. at 213)). The burden then shifts to the government to “prove beyond a reasonable doubt: (1) that the predicate facts do not exist; (2) that the facts [exist but] do not constitute unlawful command influence; or (3) that the unlawful command influence . . . [will not] affect the findings and sentence.” *Id.* at 686 (quoting *Biagase*, 50 M.J. at 151). The appellate review of UCI issues closely relates to the *Biagase* trial methodology in that it uses the same factors while applying a retrospective view of unfairness and cause, as opposed to the prospective *Biagase* view. *See id.* at 684-85.

46. *Id.* 685-86. Judge Vowell, writing for the court, stated that “transmuting [the Secretary of the Army’s] appropriate concern and action into unlawful command influence requires alchemy the appellant does not possess.” *Id.* at 686.

47. *Id.*

48. *Id.* at 687.

49. *Id.* (citing *United States v. Calley*, 46 C.M.R. 1131, 1156-57 (1973)).

50. *Id.* at 686.

51. *Id.* at 687.

52. *Id.* at 689.

53. *Id.* Charges were preferred about a month before the initial press conference announcing the investigation. *Id.*

54. *Id.*

55. *Id.* at 690.

specifications, and a “lenient” sentence, in reaching its determination that UCI did not taint the panel box.<sup>57</sup>

### Conclusion

What do *Stoneman*, *Weisen*, and *Simpson* provide trial practitioners facing UCI issues? Foremost, human emotions and high-profile, high-interest courts-martial will always cultivate pretrial statements. From the defense perspective, *Stoneman* and *Simpson* illustrate the inherent difficulties for defense counsel to meet the burden in *Biagase*. Absent a stroke of luck, the defense will likely be left holding the bag after panel members proclaim complete freedom from bias, intimidation, and influence. This may be true, even if apparently egregious pretrial statements made by superiors are swirling around the court-martial. Defense counsel should reach into the bag and pull out the *Weisen* implied bias argument used successfully in

the “non-unlawful command influence” case. Counsel should argue through the “eyes of the public” and must be prepared to articulate a tangible unfairness in the court-martial.

Concurrently, government counsel must be aware that emotions and interests are imbedded in the military justice system. Given this fact, trial counsel and SJAs should assist commanders and convening authorities with resisting the temptation to speak about a case making its way through the system. Counsel should advise commanders of the uncomfortable position of explaining to troops and subordinate commanders what the commanders really meant. In the same light, government counsel must also understand the need for higher headquarters to gather information about potential high-interest cases. Counsel and SJAs must protect the military justice system when this occurs by ensuring that information only flows upward, with no directives or “suggestions” flowing downhill. This precaution further insulates subordinate commanders and potential panel members, thereby reducing the potential for UCI.

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56. *Id.* (citing *United States v. Calley*, 46 C.M.R. 1131, 1160-61 (A.C.M.R. 1973)).

57. *Id.*