

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

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UNITED STATES

V.

ERIC GILMET  
CHIEF PETTY OFFICER  
USN

DEFENSE MOTION TO DISMISS:  
UNLAWFUL COMMAND INFLUENCE

10 December 2021

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**MOTION**

Pursuant to the *Sixth Amendment*, Article 27, UCMJ, Article 37, UCMJ and Article 38, UCMJ, as well as, R.C.M. 104, R.C.M. 506 and R.C.M. 907, the defense moves to dismiss all charges and specifications with prejudice due to unlawful command influence committed by Colonel Christopher Shaw while acting in his capacity as Judge Advocate Division's Deputy Director.

**BURDEN**

The defense has the initial burden of raising the issue of unlawful command influence. See *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Stombaugh*, 40 M.J. 208,213 (C.M.A. 1994)). To meet that burden, the defense must show "facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *United States v. Lewis*, 63 M.J. 405,413 (C.A.A.F. 2006) (quoting *Biagase*, 50 M.J. at 150). If the defense presents "some evidence" of unlawful command influence, the burden shifts to the government which must then prove beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not constitute

unlawful command influence; or (3) the unlawful command influence will not prejudice the proceedings. *See Biagase*, 50 M.J. at 151.

## SUMMARY OF FACTS

### *Judge Advocate Division (“JAD”)*

- a. Colonel Christopher Shaw is Judge Advocate Division’s current Deputy Director.
- b. Per section 010306 of the MCO 5800.16-V 1 Legal Support Administration Manual (“LSAM”), the Deputy Director, Judge Advocate Division (JAD)(Military Justice and Community Development) is responsible:  
  
“to the SJA to CMC for military justice matters and for the legal community planning and development to ensure the Marine Corps provides high-quality legal support across the entire spectrum to commanders, Marines, Sailors, and their families. The DepDir, MJCD oversees the Military Justice Branch; the Community Development, Strategy, and Plans Branch; and the Legal Assistance Branch.”
- c. In his capacity as Deputy Director, Colonel Shaw oversees the slating and assignment process for all Marine judge advocates. *See* Encl 1-7
- d. Colonel Shaw has served in the USMC on active duty since 1994. *See* Encl 8
- e. In 2004 after graduating from law school Colonel Shaw was assigned as the Senior Trial Counsel for legal Team Echo. *Id.*
- f. Legal Team Echo was located on Camp Pendleton in California. *Id.*

### *Haditha Trials and United States v. SSgt Frank Wuterich*

- g. Prior to serving in a civilian capacity, Colby Vokey retired as a Lieutenant Colonel (LtCol) after serving 20 years in the USMC.
- h. While on active duty, LtCol Vokey was the Regional Defense Counsel (RDC) for the Western Region from 2003-2008.

- i. As the Western Region's RDC, LtCol Vokey supervised and detailed military counsel stationed at Camp Pendleton.
- j. On 19 November 2005 a roadside bomb killed 20-year-old Lance Cpl. Miguel Terrazas in the Haditha neighborhood of Al-Subhani. *See* Encl 9.
- k. Later that day 24 Iraqi civilians, including women and children, were killed and Marines conducting a patrol in the Haditha neighborhood were identified as suspects of the murders. *Id.*
- l. In December 2006, eight Marines on the patrol were administratively and criminally charged. *Id.*
- m. LtCol Vokey was responsible for detailing the military counsel to each of the defendants involved in the Haditha case.
- n. LtCol Vokey was SSgt Frank Wuterich's detailed military defense counsel.
- o. SSgt Wuterich was the senior Marine on patrol and was portrayed in the media as the Marine most responsible for the civilian deaths. *Id.*
- p. In January 2012, SSgt Wuterich, accepted a plea agreement that allowed him to avoid confinement and be discharged from the Marine Corps with a General (under honorable conditions) characterization of service. *Id.*

*United States v. Chief Petty Officer Gilmet & Detailed Defense Counsel*

- q. CPO Gilmet's lead defense counsel is Mr. Colby Vokey (LtCol, USMC ret.).
- r. Mr. Vokey established an attorney client relationship with CPO Gilmet in January of 2019.
- s. On 28 September 2019, Captain Charles D. Strauss was detailed as CPO Gilmet's detailed military defense counsel. *See* Encl 10.

- t. On 25 March 2020, CPO Gilmet submitted an Individual Military Counsel Request (“IMC Request”) for Captain Matthew Thomas be assigned to his case. *Id.*
- u. On 20 April 2020, the IMC Request was approved and Captain Thomas was detailed as CPO Officer Gilmet’s individual military counsel. Captain Strauss was subsequently excused as detailed military defense counsel. *Id.*
- v. On 24 November 2020, CPO Gilmet’s case was continued to 1-19 March 2021.
- w. In March 2020, CPO Gilmet’s case was continued indefinitely due to COVID-19 and witness inavailability.
- x. In May 2021, Captain Thomas was slated to rotate billets and serve as the Special Assistant United States Attorney (SAUSA) for MCI-East. *See* Encl 11.
- y. Due to the continuances, Captain Thomas was unable to rotate to serve as the SAUSA and has remained in the Defense Services Organization since October 2018. *Id.*

*Camp Lejeune Defense Services Organization (DSO) Meeting with Colonel Shaw*

- z. On 18 November 2021, Colonel Shaw held a meeting with Camp Lejuene’s Defense Service Office in Building 64B-2. *See* Encl 1-7.
- aa. The meeting commenced at 1300 and concluded at 1500. *Id.*
- bb. In attendance were: Major Kurt Sorensen, Captain Matt Thomas, Captain Michael Blackburn, Captain Jon Bunker, Captain Laura Brewer, Captain Tom Persico, First Lieutenant Steven Trottier, and Captain Cameron McAlister. *Id.*
- cc. Captain Brewer was present for the majority of the meeting. *Id.*
- dd. Captain McAlister also attended but arrived at the meeting late due to DSO conflicts. *Id.*
- ee. The meeting began with Colonel Shaw introducing himself and his position at Judge Advocate Division. *Id.*

- ff. Colonel Shaw stated that he was Judge Advocate Division's current Deputy Director and responsible for Military Justice and Community Development on behalf of Major General David Bligh. *Id.*
- gg. Major General David Bligh is the current Staff Judge Advocate to the Commandant of the Marine Corps. *Id.*
- hh. Colonel Shaw explained that his billet was responsible for finalizing the slate for PCS/PCA moves. *Id.*
- ii. During the meeting, Colonel Shaw briefed Camp Lejeune's defense counsel on proposed policy/legislation for judge advocates to act as the referral authorities in special victim cases involving sex crimes. *Id.*
- jj. Captain Matthew Thomas asked "What is being done to protect the attorney in that position from outside influences such as political pressures, media pressure and general societal pressures?" or words to that effect. *Id.*
- kk. In connection with the, Captain Thomas referenced the Defense Service Office's chain of command and reporting chain as an example of a protection attorneys in the Defense Services Organization have, as their fitness reports are written by other attorneys within the Defense Services Organization. *Id.*
- ll. In response, Colonel Shaw stated that the defense attorneys "may think they are shielded, but they are not protected," and continued to say, "You think you are protected but that is a legal fiction," or words to that effect. *Id.*
- mm. During that time, Colonel Shaw specifically stated, "Captain Thomas I know who you are and what cases you are on and you are not protected." or words to that effect. *Id.*

- nn. Colonel Shaw followed up by stating, "...the FitRep process may shield you, but you are not protected. Our community is small and there are promotion boards and the lawyer on the promotion board will know you" or words to that effect. *Id.*
- oo. Colonel Shaw reiterated comments such as "shielded but not protected," multiple times. *Id.*
- pp. Colonel Shaw then provided an example of the Defense Service Office's chain of command and reporting chain being fallible. *Id.*
- qq. Colonel Shaw referenced the attorneys that spent 4-5 years in the Defense Services Organization because they were detailed to the defendants involved in the Haditha cases. *Id.*
- rr. Colonel Shaw explained that there were "secondary effects," and "consequences" for those attorneys that spent that much time in the Defense Service Organization because of the Haditha cases. *Id.*
- ss. Colonel Shaw explicitly stated that "some of the attorneys on those cases were good attorneys," and that on the promotion board our community is small enough that the attorneys, "will know what you did." *Id.*
- tt. Colonel Shaw closed out this topic by stating "some of those attorneys were good attorneys and did not get promoted even though they should have been promoted," or words to that effect. *Id.*

*JAD's Actions Regarding Trial Service Office Attorney's Career*

- uu. In August 2020, Major Nathan "Campbell" Thomas, the lead prosecutor for *United States v. CPO Gilmet*, *United States v. GySgt Draher* and *United States v. GySgt Negron* ("Erbil

cases”) rotated billets and began serving as the Deputy Staff Judge Advocate for 2D Marine Division. *See* Encl 1.

- vv. Former Staff Judge Advocate to the Commandant of the Marine Corps, Major General Daniel Lecce took affirmative steps to ensure Major Thomas could remain on the Erbil cases after rotating billets to serve as 2d Marine Division’s Deputy SJA. *Id.*
- ww. Specifically, Major General Lecce spoke with the Chief of Staff of 2d Marine Division. *Id.*
- xx. This action was taken to ensure the prosecution could keep Major Thomas, a 4409, on Erbil cases and to prevent the 2D Marine Division’s staff from negatively effecting Major Thomas’s career given his obligations to the Erbil cases. *Id.*

*Prejudice Resulting from Colonel Shaw’s Comments*

- yy. CPO Gilmet has lost trust and confidence in the military justice system. *See* Encl 11.
- zz. CPO Gilmet doubts Captain Thomas’s ability to effectively represent him without fear of reprisal. *Id.*

**LAW**

**a. Right to Counsel**

The 6<sup>th</sup> amendment to the Constitution provides accused the right to effective assistance of counsel. In each general and special court-martial, a statutorily qualified military defense counsel is assigned to represent the accused. Article 27(a)(1), UCMJ). The detailing authority has discretion to assign additional military defense counsel, designated as assistant or associate detailed military defense counsel, to represent the accused. *Article 27(a)(1) UCMJ*; Article 38(b)(6)(A),

By statute, the accused may request representation by individual military counsel of the accused's own selection, subject to the availability of such counsel under applicable statutory and regulatory standards. *Article 38(b)(3)(B), UCMJ*. In addition to military defense counsel furnished at government expense, the accused may be represented by civilian counsel provided by the accused. *Article 38(b)(3)(B), UCMJ*.

**b. Unlawful Command Influence (“UCI”)**

"It has long been a canon of this Court's jurisprudence that '[unlawful] [c]ommand influence is the mortal enemy of military justice.'" *United States v. Boyce*, 76 M.J. 242, 246 (C.A.A.F. 2017) (citing *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)).

In the military justice system, two types of unlawful command influence can arise: (1) actual unlawful command influence and (2) the appearance of unlawful command influence. *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017).<sup>1</sup> Actual UCI occurs when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case. Apparent UCI occurs when, "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id.* at 249. Notably, unlawful influence can be committed by those outside the chain of command. Indeed, the C.A.A.F recently found that the “plain language of Article 37(a), UCMJ, does not require one to operate with the imprimatur of command, and we decline to read a supposedly implied condition into congressional silence.” *United States v. Barry*, 78 M.J. 70, 76 (C.A.A.F. 2018); *United States v. Chamblin*, No 201500388, 2017 CCA

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<sup>1</sup> The defense is mindful of the recent change to Article 37 and cases, including *United States v. Gattis*, 81 M.J. 748 (N.M.C.C.A. 2021), interpreting the changes effect on claims of apparent UCI. However, the Court of Appeals for the Armed Forces has not yet addressed the continued viability of apparent UCI claims and therefore, the defense raises the apparent UCI claim to preserve the issue. Additionally, notwithstanding the change to Article 37, “Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.” *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 1698 (1988)



LEXIS 694 (N-M. Ct. Crim. App. Nov. 8, 2017). Additionally, no intent to influence is required, “even if effectuated unintentionally, [unlawful command influence] will not be countenanced by this Court.” *United States v. Barry*, 78 M.J. 70, 78 (C.A.A.F. 2018).

### **c. Actual Unlawful Command Influence**

Appellant bears the initial burden of raising an issue of unlawful influence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). In order to succeed on appeal, the accused must establish: (1) facts, which if true, constitute unlawful influence; (2) unfairness in the court-martial proceedings (i.e., prejudice to the accused); and (3) that the unlawful influence caused that unfairness. *Boyce*, 76 M.J. at 248 (citing *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006)); *Salyer*, 72 M.J. at 423. While Appellant's initial burden is low, it requires more than mere allegation or speculation. *Salyer*, 72 M.J. at 423; see also *United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 2009) (“Mere speculation ... is not sufficient.”). Instead, an appellant must show “some evidence” in order to sufficiently raise the issue. *Salyer*, 72 M.J. at 423 (quoting *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)).

Once an appellant meets his initial burden of raising an issue of unlawful influence, the burden shifts to the government to rebut the allegation by persuading the Court beyond a reasonable doubt<sup>4</sup> that: (1) the predicate facts do not exist; (2) the facts do not constitute unlawful influence; or (3) the unlawful influence [will] not affect the findings or sentence. *Salyer*, 72 M.J. at 423 (citing *Biagase*, 50 M.J. at 151).

### **d. Apparent Unlawful Command Influence**

Allegations of unlawful command influence are reviewed for actual unlawful command influence as well as the appearance of unlawful command influence. “Even if there [is] no actual unlawful command influence, there may be a question whether the influence of command placed

an ‘intolerable strain on public perception of the military justice system.’ *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013). Accordingly, “unlike actual unlawful command influence where prejudice to the accused is required, no such showing is required for a meritorious claim of an appearance of unlawful command influence. Rather, the prejudice involved in the latter instance is the damage to the public's perception of the fairness of the military justice system as a whole and not the prejudice to the individual accused. Consequently, consistent with Chief Judge Erdmann's opinion in *Lewis*, it is sufficient for an accused to demonstrate the following factors in support of a claim of an appearance of unlawful command influence: (a) facts, which if true, constitute unlawful command influence; and (b) this unlawful command influence placed an intolerable strain on the public's perception of the military justice system because an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. *Id.* (internal quotation marks omitted) (citation omitted). Once the defense presents “some evidence” of apparent unlawful command influence, the burden then shifts to the government to rebut the allegation. “Specifically, the government bears the burden of proving beyond a reasonable doubt that either the predicate facts proffered by the appellant do not exist, or the facts as presented do not constitute unlawful command influence. If the government does not meet its burden of rebutting the allegation at this initial stage, then the government may next seek to prove beyond a reasonable doubt that the unlawful command influence did not place “an intolerable strain” upon the public's perception of the military justice system and that “an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.” *Salyer*, 72 M.J. at 423 (quoting *Lewis*, 63 M.J. at 415).

## DISCUSSION

The Court should dismiss all charges and specifications with prejudice because the statements made by Colonel Shaw constitute unlawful command influence.

**a. The statements made by Colonel Shaw were actual unlawful command influence and prejudiced the attorney-client relationship between Captain Thomas and CPO Gilmet.**

The behavior exhibited and statements made by Colonel Shaw to Captain Thomas constitute actual unlawful command influence.

The *Sixth Amendment* and decades of U.S. Supreme Court precedent provides CPO Gilmet the constitutional right to counsel. Not only is there a right to counsel, but there is also a "correlative right to representation that is free from conflicts of interest." *Hale*, 76 M.J. at 716 (citing *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981)). Given the inherent nature of the military as an institution, additional orders and policies were deemed necessary in order to protect military defense counsel from conflicts of interest and insulate them from pressure by influences both inside and outside of the military. See JAGMAN § 0131; MCO 5800.16 (LSAM) Vol. 3, § 0112; CDC Policy Memo 3.1D dtd 6 Nov 20. Doing so was necessary because the right to counsel is not just a constitutional right, but one statutorily provided by R.C.M.s and applicable articles of the UCMJ. See Article 27, UCMJ; R.C.M. 506(a)-(b), MCM.

These orders and policies not only ensure that the Defense Services Organization can operate as a functionally independent organization, but also appear to the public as such. This includes a fitness report chain free of outside influence and measures put in place to protect defense attorney's career progression. Notwithstanding these protections, military defense counsel are still military officers subject to billet assignment changes and who compete for promotion with judge advocates and other officers not serving as defense counsel.

At the time of the meeting with the DSO, Colonel Christopher Shaw was the current Deputy Director for JAD. Specifically, Colonel Shaw heads the Marine Corps' Military Justice and Community Development in his role as Deputy Director., Section 010306 of the LSAM provides that the Deputy Director is responsible:

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

During the meeting, Colonel Shaw was acting in his capacity as the Deputy Director for, and as a representative of, JAD during the meeting with Camp Lejeune's DSO attorneys and when he spoke directly to Captain Thomas. Colonel Shaw made it clear to the attorneys present that he was responsible for finalizing PCS/PCA moves. As such, Colonel Shaw has direct control and sway over Captain Thomas's career and flaunted that power during the DSO meeting. Colonel Shaw stated that he was aware of Captain Thomas's cases which includes CPO Gilmet's case. After making that apparent, Colonel Shaw directly told Captain Thomas that “he was not protected.” He further explained that defense counsel detailed to high profile cases are not protected from adverse career implications in the future because the legal community is so small. Colonel Shaw specifically cited the Haditha trials as an example. Notably, Mr. Colby Vokey, CPO Gilmet's civilian defense counsel, was significantly involved in those cases and was not selected for promotion to Colonel either during or following the conclusion of that case. Colonel Shaw repeated comments that the protections afforded to defense attorneys are a “legal fiction,” and that the attorneys “are shielded but not protected,” made his intent clear.

Prior to Colonel Shaw's comments and behavior, Captain Thomas would have been able to zealously represent CPO without any conflict of interest. However, Colonel Shaw's statements

to Captain Thomas regarding his representation of high profiled cases, coupled with Colonel Shaw's rank, current billet, and his representative capacity with Judge Advocate Division generated a conflict of interest. *See* JAGINST 5803.1E Rule 1.7; Rule 1.8 Specifically, Colonel Shaw has created a personal interest for Captain Thomas whereby Captain Thomas now has to choose between potential billet assignments and promotion opportunities – in other words, a successful Marine Corps career– and zealously representing CPO Gilmet. Such a conflict flies in the face of the American Bar Association Ethical Rules and Naval policies that guide the legal community. *See* JAGINST 5803.1E.

In the same vein, Colonel Shaw's comments have placed an undue strain on CPO Gilmet's attorney client relationship and the resulting prejudice cannot be cured. CPO Gilmet's court-martial involves accusations of negligent homicide, involuntary manslaughter, dereliction of duty and violation of a lawful general order. If convicted CPO Gilmet faces federal felony convictions, a dishonorable discharge, and over 20 years of confinement. Additionally, CPO Gilmet's court-martial has attracted significant media attention and put his career on hold for nearly three years. Simply put, CPO Gilmet is in the midst of the fight of his life and he is reliant upon his defense counsel to zealously represent him. Colonel Shaw directly influenced Captain Thomas's ability to zealously represent CPO Gilmet and in doing so, has called into question CPO Gilmet's faith in his military counsel, as well as, the military justice system as a whole. To be clear, Captain Thomas was specifically requested by CPO Gilmet to serve as his military defense counsel per R.C.M. 506. As an accused, CPO Gilmet is afforded the right to a military defense attorney that can zealously represent him without fear of reprisal or negative impacts to their career. The Constitution, U.S. Supreme Court, Headquarters Marine Corps and Defense Services Organization all have gone to great lengths in order to shield attorneys from

conflicts of interest and inappropriate outside influences that can negatively impact their ability to represent their clients. Here, Colonel Shaw, speaking on behalf of JAD, has eviscerated those authorities and Capt Thomas' faith in them. It does not matter whether the comments were intended or designed to interfere with Captain Thomas' attorney-client relationship with CPO Gilmet, the resulting effect is enough. *Boyce*, 76 M.J. at 252. Colonel Shaw's actions and statements improperly interfered with and compromised CPO Gilmet's right to effective and conflict-free counsel. Therefore, actual unlawful command influence that cannot be cured exists in CPO Gilmet's case.

**b. The conduct of and statements made by Colonel Shaw were apparent unlawful command influence and prejudiced the attorney-client relationship between Captain Thomas and CPO Gilmet.**

"The appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002). The "appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Boyce*, 16 M.J. at 249 (citing *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006)). An objective disinterested observer fully informed of all the facts and circumstances, would harbor a significant doubt as to 1) CPO Gimlet's defense counsel's ability to zealously advocate on his behalf after having this conflict of interest arise, and 2) the fairness of CPO Gilmet's trial given JAD's negative view of defense attorneys and disparate treatment of defense counsel and trial counsel within the judge advocate community.

Prior to the lead trial counsel, Major Nathan Thomas rotating billets, JAD actively took steps to ensure continuity was maintained on the Erbil prosecution team and to protect Major

Thomas's career as a judge advocate. Specifically, upon information and belief, the former Staff Judge Advocate to the Commandant of the Marine Corps (and presumably his staff) was personally involved in coordinating Maj Thomas' transition to serve as the deputy staff judge advocate for Second Marine Division while still being permitted by that command to continue to serve as trial counsel on the subject cases without any negative consequences. JAD's steps to aid the prosecution and the judge advocates assigned to trial counsel billets are in stark contrast to the actions Colonel Shaw, as a representative of JAD, took (and will possibly take in the future) regarding the defense counsel when he threatened negative career implications for Capt Thomas' continued participation. Whether intended or not, Colonel Shaw's comments created a conflict of interest for Captain Thomas and put his attorney relationship with CPO Gilmet in jeopardy. Severing CPO Gilmet's attorney client relationship with Captain Thomas would destroy any continuity and work dynamic established by CPO Gilmet's defense team. This prejudice is increasingly severe with CPO Gilmet's trial commencing in 4 weeks. The statements Colonel Shaw made while representing JAD would give any objective bystander significant doubt about the fairness of these proceedings. Therefore, apparent unlawful command influence exists in CPO Gilmet's case.

### **RELIEF REQUESTED**

The Defense requests Court to dismiss all charges and specifications with prejudice due to the unlawful command influence present in CPO Gilmet's case. Although dismissal is a drastic remedy the C.A.A.F. has "not shied away from endorsing this drastic measure in actual unlawful influence cases when warranted." *See Gore, 60 M.J. at 189* (holding that a military judge did not abuse his discretion by dismissing charges with prejudice). The dismissal of charges is warranted "when an accused would be prejudiced or no useful purpose would be

served by continuing the proceedings." *Id.* at 187 (citing *United States v. Green*, 4 M.J. 203, 204 (C.M.A. 1978)). The C.A.A.F. has further held that "[d]ismissal of charges with prejudice ... is an appropriate remedy where the error cannot be rendered harmless." *Lewis*, 63 M.J. at 416 (citing *Gore*, 60 M.J. at 189).

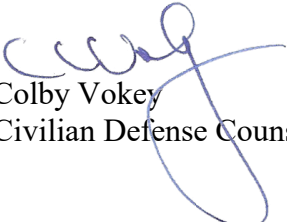
Simply put, CPO Gilmet's right to counsel of his own selection – Captain Thomas – was interfered with by Colonel Shaw creating a conflict of interest. In other words, governmental action on the part of Colonel Shaw has questioned CPO Gilmet's faith in Captain Thomas and has denied CPO Gilmet the right to have Captain Thomas continue to represent him conflict free. As such, this is a case in which the error cannot be rendered harmless and no useful purpose would be served by continuing the proceedings.

#### **ENCLOSURES**

1. Affidavit from Major Kurt Sorensen
2. Affidavit from Captain Matthew Thomas
3. Affidavit from Captain Steven Trottier
4. Affidavit from Captain Michael Blackburn
5. Affidavit from Captain Jon Bunker
6. Affidavit from Captain Thomas Persico
7. Affidavit from Captain Laura Brewer
8. Colonel Christopher Shaw USMC Biography
9. Media Articles from the Haditha & Erbil Trials
10. Defense Service Office Detailing Documents
11. Affidavit from CPO Eric Gilmet
12. Affidavit from Captain J. Keagan Riley

#### **ORAL ARGUMENT**

If opposed, the Defense requests oral argument on this motion.

  
Colby Vokey  
Civilian Defense Counsel





Matthew J Thomas  
Captain, USMC Defense  
Counsel

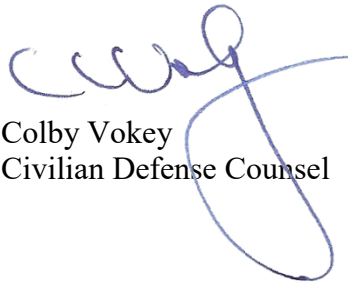


John Keagan Riley  
Captain, USMC  
Defense Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically on Trial Counsel and the Court on 10 December 2021.



Colby Vokey  
Civilian Defense Counsel