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

UNITED STATES **v.** **EDWARD R. GALLAGHER** **SOC (E-7), U.S. NAVY**	**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENSE MOTION TO DISMISS FOR PROSECUTORIAL MISCONDUCT AND UNLAWFUL COMMAND INFLUENCE** **7 June 2019**

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6 1. **<u>Nature of Motion</u>**.

7 On 26 May 2019, the defense filed a Motion to Dismiss for prosecutorial
8 misconduct. Appellate Exhibit CXXVI (126). Specifically, the defense alleged that trial
9 counsel engaged in a pattern of misconduct, including:

10 • Withholding the results of a favorable polygraph examination in violation of
11 *Brady v. Maryland*, 373 U.S. 83 (1963) and RULE FOR COURTS-MARTIAL
12 (R.C.M.) 701(a)(6);

13 • Withholding exculpatory evidence derived from a proffer session with counsel
14 representing several potential fact witnesses in violation of *Brady*;

15 • Failing to recommend to the convening authority that she withdraw
16 Specifications 1 and 2 of the Additional Additional Charge (attempted
17 murder) for lack of probable cause;

18 • Employing the referral of charges, grants of testimonial immunity, and
19 investigation of witnesses in an effort to obstruct equal access to witnesses or
20 influence testimony;

21 • Leaking information to the media that was favorable to the government; and

22 • Targeting members of the defense team through electronic surveillance.

23 The defense asserted that the electronic surveillance of the defense team
24 amounted to violations of the accused's rights under the Fourth, Fifth, and Sixth
25 Amendments to the Constitution.[1]

[1] A matter also addressed in the court's ruling disqualifying trial counsel. Appellate Exhibit CXLI (141).

Finally, the defense averred that the sum total of the government's actions amounted to a violation of the accused's right to an appearance of a fair trial.

On 28 May 2019, the government filed a response opposing the defense's motion and contesting the allegations contained within the motion. Appellate Exhibit CXXVII (127).

On 28 May 2019, the defense filed a Motion to Dismiss for unlawful command influence by the Judge Advocate General of the Navy (JAG) upon the military judge based on a statement made by the JAG public affairs officer quoted in online media. Appellate Exhibit CXXXVII (137).

On 29 May 2019, the government filed a response opposing the defense motion. The government conceded that the statement was made but denied that it amounted to unlawful command influence. Appellate Exhibit CXXXVIII (138).

On 30 and 31 May 2019, the court held an Article 39(a) session to receive evidence and hear argument of counsel. In arriving at its ruling, the court considered enclosures (1) through (86) to Appellate Exhibit IX (9) and enclosures (A) to (TTTTTT) of Appellate Exhibit VII (7).

2. **Findings of Fact**.

On 23 August 2018, the accused submitted to a polygraph exam administered by a government agency unrelated to this case. During that exam, the defense asserted that the accused was asked questions regarding violations of the law of armed conflict. Upon conclusion of the examination, the polygrapher informed the accused that he successfully completed the exam.

On 11 September 2018, the accused was placed into pretrial confinement, and initial charges were preferred against him on 2 October 2018.

On 20 September 2018, Commander, Naval Special Warfare Group ONE (NSWG-1), issued a written order governing the disclosure of investigative materials related to the case. Regardless, items purportedly covered by this order were included in media accounts leading up to the accused's preliminary hearing on 14 and 15 November 2018.

At the preliminary hearing, only Special Agent (SA) Joseph Warpinski, the NCIS lead agent, testified, as several other witnesses were either unavailable due to operational matters or had invoked their right to remain silent. In his report, the preliminary hearing officer highlighted the need for testimonial immunity for many of the witnesses. He also recommended an independent investigation into the potential leaks.

On 20 December 2018, the charges were referred to general court-martial, and on 4 January 2019, the accused was arraigned. That same day, CDR Chris

Czaplak, the lead trial counsel, reached out to counsel for LT Jacob Portier, the accused's platoon commander during deployment and a suspect in a closely related case. CDR Czaplak requested a meeting with LT Portier's counsel and the convening authority's staff judge advocate to discuss possible case dispositions.

On 11 January 2019, LT Portier, through counsel, requested immunity as part of any agreement with the convening authority.

On 23 April 2019 after inquiry from LT Portier's counsel, the convening authority's SJA indicated that they supported an agreement that included testimonial immunity, but only if LT Portier agreed to provide a proffer as to his testimony. As of 31 May 2019, the convening authority had not yet provided LT Portier testimonial immunity.

Earlier – on 8 January 2019 – NCIS opened an investigation into violations of the NSWG-1 protective order, citing to the preliminary hearing officer's recommendation. They first conducted an initial forensic review of Region Legal Service Office (RLSO) shared computer folders hosting documents derived from this case. They also conducted a review of the NMCI email server for correspondence with particular members of the media. Neither effort resulted in any investigative leads.

NCIS next conducted interviews with CDR Czaplak, LT Brian John, an assistant trial counsel, SA Warpinski, the lead case agent, and Supervisory Special Agent (SSA) Suzanne Martsteller, all of whom denied knowledge of any unauthorized disclosures.

Separately, the NCIS Inspector General's Office initiated a review of NCIS databases for potential leak sources but also developed no leads.

During this time, members of the trial team and the Commanding Officer, RLSO SW, were generally aware of the leak investigation but were not directly involved with it.

By April 2019, NCIS believed that a particular member of the media was in possession of thousands of pages of documents related to the investigation into this case, including videos of witness interviews taken by NCIS.

On 1 May 2019, NCIS contacted the U.S. Attorney's Office for the Southern District of California requesting to meet regarding the leak investigation. A meeting was scheduled with Assistant U.S. Attorney (AUSA) Fred Sheppard for 7 May 2019.

On 2 May 2019, Ronald Rader, an Investigative Computer Specialist with NCIS Cyber Operations San Diego, proposed a method of electronically tracking

protected documents using an imbedded HTML GET code. Generally, this method would work by placing a line of HTML – Hypertext Markup Language, a standard form of computer language used for web-based applications – into an electronic document or email. When the document or email was opened, the relevant computer application (e.g. Microsoft Word or Outlook) would "read" the HTML code and then reach out to a specific server to "get" a picture file (a .gif or .png file).

Code like the HTML GET code is used regularly to reduce the size of large email or document files by waiting to download graphics or attachments until the file is opened.

In this case, the HTML GET code would direct to an NCIS server. When the email or document application attempted to retrieve the "get" picture file, the NCIS server would record a set of predetermined information about the request, including the IP address of the requesting computer.

Mr. Rader proposed the idea to his SSA, Melanie Otto, who in turn raised it with Assistant Special Agent in Charge (ASAC) Curtis Evans and LT Eric Norton, JAGC, USN, the staff judge advocate to the NCIS Executive Assistant Director Pacific. One of the participants then proposed that CDR Czaplak send the HTML GET code as he had been cleared of suspicion by NCIS and had contacted the parties via email regularly in his role as trial counsel. After the briefing, LT Norton found the proposed operation legally unobjectionable.

On 6 May 2019, ASAC Evans contacted CDR Czaplak and informed him of the HTML GET code operation. ASAC Evans asked for CDR Czaplak's assistance in conducting the operation, and CDR Czaplak agreed to help. CDR Czaplak was advised to keep the operation secret even from other members of the prosecution team.

On 7 May 2019, ASAC Evans and Investigative Analyst (IA) Jenna Porter met with AUSA Sheppard. CDR Czaplak joined the meeting by phone. The purpose of the meeting was to determine whether the U.S. Attorney's Office had interest in opening up an investigation into the leaks, but they also discussed the proposed use of the HTML GET code. As part of that discussion, the participants informed AUSA Sheppard of their intention to place an "IP tracker" into discovery materials to record the IP address of any computer that opened the materials. AUSA Sheppard advised them to seek authorization from the military judge prior to using the tracker.

At the end of the meeting, AUSA Sheppard stated that he would research the approvals required within DOJ for investigations that implicated attorneys and reporters. AUSA Sheppard also agreed to talk with his supervisors about

whether the U.S. Attorney's Office would open up a separate investigation; however, NCIS never sought out another meeting with AUSA Sheppard.

On 8 May 2019, CDR Czaplak and ASAC Evans met with the court *ex parte* as summarized in Appellate Exhibit CXI (111). After that meeting, ASAC Evans asserted in writing that a taint team made up of an NCIS SSA and an AUSA would review all potential information that had the potential to contain attorney-client information.

On 8 May 2019, ASAC Evans requested the NCIS Cyber Operations Field Office begin the HTML GET operation. Mr. Rader and his supervisor, Mr. Mark Luque, began coordinating with CDR Czaplak to distribute email that contained the HTML GET code.

Although the plan initially only involved using the code in a document, by 7 May 2019, Mr. Luque and Mr. Rader had modified the operation to include a version of the code in CDR Czaplak's email signature block. According to Mr. Rader, this was included on the chance that the imbedded email was forwarded without the document attached.

Mr. Rader communicated with CDR Czaplak frequently on 8 May 2019, including visiting his office, with the purpose of correctly formatting the HTML GET email signature block.

On 8 May 2019, CDR Czaplak first sent a HTML GET-coded email to Capt McMahon and LT John. The email included an attached, 2-page *Brady* notice document (which also included an imbedded HTML GET code) and requested final inputs from the two assistant trial counsel as to the contents of the *Brady* notice. Capt McMahon and LT John were unaware of the HTML GET operation or the inclusion of the code in the email.

CDR Czaplak also uploaded the same 2-page document to the RLSO shared computer drive and a shared web-based workspace.

After successfully testing the HTML GET code, CDR Czaplak sent an email containing the code in both his signature block and in the attached 2-page document to Mr. Tim Palatore, the accused's lead defense counsel. Three other civilian defense counsel, three military counsel, and a defense investigator detailed to assist the accused were also included on this email.

An hour later, CDR Czaplak sent a second email containing the coded signature block to the accused's defense team, this time relaying information regarding a possible threat made against the accused by an anonymous person. Finally, CDR Czaplak also sent an email containing the coded signature block to

Mr. Marc Mukasey, an assistant civilian defense counsel who had only recently made his appearance in the case.

The HTML GET code sent to the accused's defense team directed the applicable computer applications to retrieve a specific image file from the NCIS server.

At about the same time, CDR Czaplak sent two separate emails to members of the defense team in *U.S. v. Portier*. The HTML GET code sent to LT Portier's defense team directed the computer applications (email or word processing) to retrieve an image file from the NCIS server that was different from the one sent to the accused's defense team.

As part of an email with LT Portier's counsel, CDR Czaplak informed them that the government sent LCDR Breisch a "target letter" informing him that he was a suspect in the allegations surrounding the accused. At the same time, CDR Czaplak renewed the government's offer of a proffer session and non-judicial punishment. LT Portier's counsel interpreted this as an offer conditioned upon "the quality of [his client's] testimony at a proffer."

On 10 May 2019, CDR Czaplak successfully sent an email to a member of the media containing a coded signature block. This was done to assist NCIS with subsequent analysis of the information collected from the HTML GET code operation.

On 8 May 2019, defense counsel discovered the imbedded HTML GET code and alerted CDR Czaplak of their discovery.

The raw information collected by the HTML GET code operation included: the date and time of the request; the image file requested (unique for each defense team); the IP address associated with the computer requesting the file; the user agent (the "make and model" of the software used to open the email or document); the status of the request (whether or not the request was successful); and the time in milliseconds taken to complete the request.

This process of data collection could not and did not retrieve specific communications made by any of the subject counsel, to include the content or subject line of any email. However, analysis of the raw data – using only open source methods without a warrant or court order – may have been able to reveal patterns in defense behavior resembling attorney work product.

On 9 May 2019, NCIS reviewed some of the raw data collected during the operation using an open source method – a "reverse look-up" of some of the IP

addresses collected.[2] This review disclosed which service providers owned some of the IP addresses used to retrieve the images from the NCIS server, and the general location (i.e. San Diego, California) for those service providers. This review was conducted without consultation with the NCIS taint team.

On 10 May 2019, NCIS terminated collection of information received from the HTML GET code. Other than the "reverse look-up" analysis conducted on 9 May 2019, no other analysis has been conducted on the raw data collected from 8 to 10 May 2019.

In early May 2019, trial counsel spoke over the phone with a potential government witness and his counsel. This conversation ended abruptly when trial counsel inquired into a specific incident involving the death of the ISIS prisoner. On 10 May 2019, CDR Czaplak again spoke on the phone with the same civilian defense counsel representing several potential witnesses and a military defense counsel representing one of those witnesses in a joint proffer session. During this call, the civilian defense counsel attempted to offer some insight into the potential testimony of his clients – many of whom had refused to provide interviews with either government or defense since early in the investigation.

On 22 May 2019, trial counsel informed the defense that the proffer sessions had occurred and provided some indication as to the content of the proffers.

On 27 May 2019, trial counsel provided formal notice of the contents of the proffer session. On 31 May 2019, government provided to the defense its notes taken contemporaneously with the session.

On 6 June 2019, the defense requested a short continuance in order to assist them with preparing newly retained expert consultants. The new experts replaced previous defense experts who were no longer available based on the court's previous continuance from 28 May to 10 June 2019. The court granted the request and continued the court-martial from 10 June to 17 June 2019.

On 20 May 2019, Ms. Patty Babb, public affairs officer for the Office of the Judge Advocate General, provided the following comment to the media:

> Following continuing and ongoing violations of the judge's protective order in the Gallagher case, NCIS initiated a separate investigation into violations of the judge's protective order… The initiation and execution of the investigation was conducted at the local level, and not a part of a broader Navy policy and strategy, and not an independent action by the prosecutor. The government is acting as part of a lawful, authorized, and

[2] IP addresses may be "static" or "dynamic." "Static" addresses are permanent addresses typically owned by companies. "Dynamic" addresses are repeatedly reassigned from a bundle owned by specific service providers. Residentially assigned IP addresses are usually "dynamic." As a result, the IP address identifiable to someone in his or her home will change frequently.

legitimate investigation into the unauthorized disclosure of information associated with this case.

This statement was included in an online article covering the proceedings.

Prior to its reference in defense pleadings, the court was unaware of Ms. Babb's statement or the related online article.

Since the HTML GET intrusion was revealed, numerous headlines have characterized the NCIS operation as "spying" by the prosecution on the defense team. This coverage capped off a near constant drumbeat of articles and other media that have appeared since the accused was first placed in pretrial confinement – coverage that at various times has been both favorable and unfavorable to each parties' positions.

3. **Summary of the Law and Conclusions.**

A. Prosecutorial misconduct.

Prosecutorial misconduct occurs when a prosecutor "oversteps the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, as may be articulated in a constitutional provision, a statute, a Manual for Courts-Martial rule, or an applicable professional ethics canon. *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing *Berger*, 295 U.S. at 88) (additional citation omitted).

The military judge shall craft specific remedies, as appropriate, to resolve the harm resulting from prosecutorial misconduct. It is not the number of legal norms violated but the impact of those violations on the trial that determines the appropriate remedy for prosecutorial misconduct. *Id.,* at 6. The Court of Appeals for the Armed Forces (C.A.A.F.) has "long held that dismissal is a drastic remedy and courts must look to see whether alternative remedies are available." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citing *United States v. Cooper*, 35 M.J. 417, 422 (C.M.A. 1992)). When an error can be rendered harmless, dismissal is not an appropriate remedy. *Id.*

B. Brady and R.C.M. 701(a)(6).

The defense asserts that trial counsel withheld the results of the accused's favorable polygraph examination and delayed disclosing information derived from a proffer session involving several fact witnesses in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and RULE FOR COURTS-MARTIAL (R.C.M.) 701(a)(6);

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to

punishment, irrespective of the good faith or bad faith of the prosecution." *United States v. Claxton*, 76 MJ 356 (2016) (quoting *Brady*, 373 U.S. at 87). The Supreme Court has extended *Brady*, holding "that the duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

R.C.M. 701(a)(6) implements *Brady* within the military justice system and requires the government to disclose, as soon as practicable, evidence known to the trial counsel that tends to negate guilt, reduce guilt, or reduce sentence.

Under R.C.M. 701(a)(6), trial counsel must review their own case files and must also exercise due diligence and good faith in learning about any evidence favorable to the defense known to others acting on the government's behalf. *United States v. Stellato*, 74 M.J. 473, 486 (C.A.A.F. 2015).

A trial counsel's duty to search beyond his own files is generally limited to: (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity. *Id.*

However, this list is not exhaustive because trial counsel's duty to search beyond his own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request. *Id.*

A military judge may impose sanctions for noncompliance with discovery. R.C.M. 701(g)(3) governs the sanctioning of discovery violations under the RULES FOR COURTS-MARTIAL and provides several options to remedy such violations. These include: order the discovery; grant a continuance; prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and enter such other order as is just under the circumstances.

"Where a remedy must be fashioned for a violation of a discovery mandate, the facts of each case must be individually evaluated." *Stellato*, 74 M.J. at 488 (quoting *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993)).

The court determines that there was no violation of discovery regarding the disclosure of the accused's previous polygraph examination. Upon conclusion of the examination on 23 August 2018, the polygrapher informed the accused that he successfully completed the exam. As a result, the defense was in possession of the results of the exam from the date of its completion. While NCIS agents had access to email from the accused indicating that he had scheduled the polygraph exam, there is

no evidence in the record that the government was aware of its result. Likewise, there is no evidence in the record that the defense specifically requested additional information regarding the polygraph until filing this motion.

As a result, the court concludes that trial counsel did not violate a legal norm or standard as to the discovery of the polygraph.

Likewise, the court determines that there has been no violation of discovery as to the contents of the 10 May 2019 proffer session with defense counsel representing potential government witnesses. On 22 May 2019, trial counsel provided notice of the proffer sessions and verbal notice of some of the content of that session. On 27 May 2019, trial counsel provided formal notice of the contents of the proffer session. On 31 May 2019, notes taken contemporaneously with the session by a paralegal were disclosed to defense.

As government disclosed the matters on defense, the only issue remaining is whether notice provided 12 to 17-days later was made *as soon as practicable* after the proffer session occurred. Assuming without deciding that the notice could have been provided some days sooner, still, the parties have provided no evidence of any direct prejudice resulting from the delay between when notice was made and when notice practicably could have been made. Even if some prejudice resulted from this delay, the appropriate remedy is a continuance, which occurred in this case on 22 May 2019 when the court delayed the start of court-martial by 13 days and on 6 June 2019 when the court delayed the start of court-martial again by 7 days.

As a result, the court concludes that even if the actions of trial counsel did violate a legal norm or standard as to the discovery of the 10 May 2019 proffer session, the harm, if any, has been remedied through the court ordered continuance.

C. The exercise of governmental authority.

The defense asserts that trial counsel failed to recommend to the convening authority that she withdraw the specifications under the Additional Additional Charge after determining that they lacked probable cause to pursue that charge. The defense also asserts a pernicious use of governmental authority by trial counsel in order to obstruct defense access to witnesses or influence testimony.

Only a general court-martial convening authority may refer charges to a general court-martial. R.C.M. 407(a)(6). Charges are referred to court-martial only after being preferred – sworn to by a person with personal knowledge of the matters contained within the charges or by a person who has investigated those matters and believes them to be true to the best of their knowledge – R.C.M. 307(b); investigated at a preliminary hearing, R.C.M. 405(a); and reviewed by a staff judge advocate who then provides advice as to whether the offenses are warranted by the evidence, R.C.M. 406.

Only a general court-martial convening authority may grant immunity, R.C.M. 704(c), and, federal appellate courts will generally not interfere with the government's refusal to grant immunity unless there has been a clear abuse of that power. *United States v. Monroe*, 42 M.J. 398, 402 n.4 (C.A.A.F. 1995)

However, in military courts the defense may request the convening authority immunize a person, and, if this request is denied, may seek relief from the military judge as appropriate.

This relief may include a court order to the convening authority to grant testimonial immunity or an order to abate the proceedings upon finding that the witness intends to invoke the right against self-incrimination if called to testify; the government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the government, through its own overreaching, has forced the witness to invoke his privilege; and the witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses. R.C.M. 704(e).

The Navy Judge Advocate General's Rules of Professional Responsibility, JAGINST 5803.1E of 20 January 2015 (JAG PR), Rule 3.8(a)(1) requires trial counsel to recommend withdrawal to the convening authority of any charge or specification not supported by probable cause. In this context, probable cause has the same definition as that applied to the determination of probable cause by a preliminary hearing officer; that is, evidence sufficient to conclude that an offense was committed and the accused committed it. R.C.M. 405(a). In general, courts do not conduct *de novo* review over another's probable cause determination, and instead, give some degree of deference to that determination. *See United States v. Perkins*, 78 M.J. 550, 555-56 (N-M Ct. Crim. App. 2018).

As to the trial counsel's compliance with JAG PR Rule 3.8, the defense has failed to demonstrate by a preponderance of the evidence that prosecutors have violated this legal standard. There is sufficient evidence before the court from which a reasonable trial counsel might conclude that probable exists as to the specifications under the Additional Additional Charge.

Regardless, should changes in testimony – or interpretations of that testimony within the context of the evidence presented at trial – result in a want of probable cause, that concern may yet be remedied through the application of R.C.M. 917, motions for finding of not guilty, or through subsequent action by trial counsel as contemplated under JAG PR Rule 3.8.

In support of its argument that the government attempted to intimidate witnesses and obstruct justice, the defense cites to four occurrences: the prosecution of LT Portier; the investigation of LCDR Breisch as evidenced by a "target" letter to him

stating he was the subject of an investigation; the use of grants of testimonial immunity; and the interview techniques employed by the NCIS lead agent.

In general, appropriate military or law enforcement authorities are tasked with investigating persons who have been accused of or are suspected of having committed offenses triable by court-martial. *See* R.C.M. 301, 303. However, just because a person is the subject of accusations – and thus, may have the right against self-incrimination – does not conclusively mean they are unavailable to testify.

As part of any criminal investigation, it is usual practice to employ grants of testimonial immunity to enable cooperation of witnesses who have or may refuse to cooperate based upon a right against self-incrimination. "Immunity ordinarily should be granted only when testimony or other information from the person is necessary to the public interest, including the needs of good order and discipline…" *Discussion*, R.C.M. 704(a).

To date, the convening authority, or her predecessor, has granted testimonial immunity to several potential witnesses and ordered them to testify. She has not granted immunity to either LT Portier or LCDR Breisch yet.

The court has received only one motion regarding immunity – a defense motion to abate the proceedings pending the grant of *transactional* immunity to two witnesses SO1 C.S. and SO2 I.V. Appellate Exhibit LXXXII (82). The convening authority granted SO1 C.S. and SO2 I.V. testimonial immunity, and the court denied the defense motion requesting an order for transactional immunity as the rule only permitted the court to order testimonial immunity. *See* R.C.M. 704(e). The court also indicated that it had other remedies available to it should SO1 C.S. and SO2 I.V. refuse to comply with the order to testify after the grant of immunity.

The defense has failed to demonstrate by a preponderance of the evidence that the convening authority has used her power to grant immunity in such a way as to limit the defense's access to either LT Portier or LCDR Breisch. There is no evidence that the convening authority has denied such a request from the defense, and the defense has not filed a motion requesting relief as appropriate.

Additionally, while the purpose of a "target" letter to LCDR Breisch is puzzling given is relative rarity in military practice, still its use does not amount to some evidence from which the court might conclude that the government was attempting to prevent LCDR Breisch from testifying.

Finally, the preponderance of the evidence does not support allegations that the written summaries of the initial witness interviews conducted by the lead case agent, as memorialized within the NCIS results of interviews, raise a matter of prosecutorial misconduct.

As a result, the court concludes that trial counsel did not violate a legal norm or standard as to the exercise of governmental authorities.

The defense also asserts that the electronic surveillance of the defense team amounted to violations of the accused's rights under the Fourth, Fifth, and Sixth Amendments to the Constitution.

D. The Fourth Amendment.

The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. The "basic purpose of this Amendment… is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 528, (1967)).

The Fourth Amendment extends to the contents of a person's private computer, but whether a person has a reasonable expectation of privacy in communications from one's private computer depends upon the nature of the communication. *United States v. Maxwell*, 45 M.J. 406, 417 (C.A.A.F. 1996),

Generally, persons have a reasonable expectation of privacy in the content of their email. However, company data identifying the date, time, user, and detailed internet address of sites may be accessed without the use of a warrant. *United States v. Allen*, 53 M.J. 402, 409 (C.A.A.F. 2000) (analyzing the issue in the context of the Electronic Communications Privacy Act). Likewise, pen registers – to include devices and processes used to obtain information about electronic information like the routing and addressing information of a surveillance subject's outgoing email – are not protected by the Fourth Amendment and do not require warrants. *Smith v. Maryland*, 442 U.S. 735 (1979) (superseded by the Electronic Communications Privacy Act).

This case, however, presents a slightly different question: *whether an accused has a Fourth Amendment reasonable expectation of privacy in non-content user data, like IP addresses, when that data might be used to disclose attorney work product*.

In *Carpenter*, the Supreme Court discussed the complex relationship between the Fourth Amendment and rapidly advancing technology, stating "[a]lthough no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings 'of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.'" 138 S. Ct. at 2213-2214 (quoting *Carroll* v. *United States*, 267 U. S. 132, 149 (1925)).

The Court recognized two basic guideposts. First, that the Amendment seeks to secure "the privacies of life" against "arbitrary power," (quoting *Boyd* v. *United States*, 116 U. S. 616, 630 (1886)), and second, that a central aim of the Framers of the

Constitution was "to place obstacles in the way of a too permeating police surveillance," (quoting *United States* v. *Di Re*, 332 U. S. 581, 595, (1948)). *Carpenter,* 138 S. Ct. at 2213-14.

The Court then re-asserted:

> A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, what one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movement... For that reason, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.

Id. at 2217.

Here, the government surreptitiously collected the date and time the defense opened the subject email or document (technically, the date and time the email or document requested the image file); the identity of the image file requested (unique for each defense team); the IP address associated with the computer requesting the file; the user agent (the "make and model" of the software used to open the email or document); the status of the request (whether or not the request was successful); and the time in milliseconds taken to complete the request.

They collected this data from 8 to 10 May 2019, two and a half weeks before the original start of trial.

Because a unique image file was used for each defense team (*U.S. v. Gallagher* and *U.S. v. Portier*), it was possible to determine which IP addresses belonged to which team of counsel and support personnel; the frequency with which a particular team opened the subject email or document; and whether and to what degree the two teams coordinated with each other. Because the HTML GET code was attached to two emails with separate subject matters sent to the accused's counsel one hour apart, it was possible to determine the frequency at which each of those two emails was opened – and thereby the relative interest of the defense team in the subject matter of each email.

Although this information – collected over the course of just three days – may have been of questionable real-world value, it still amounted to protected attorney work product. The court concludes that, under the circumstances of this case, the accused had a reasonable expectation of privacy in the work product of his defense team. The court further concludes that the collection of image file names identifiable by defense team without a warrant violated the accused's Fourth Amendment rights. In this

regard, this case more closely resembles the kind of secret monitoring of movement highlighted by the Court in *Carpenter*, than it does the IP addresses and user data held by third parties in *Allen* and other similar cases.

As a result, the court concludes that the trial counsel's participation in the NCIS operation constituted a violation of a legal standard.

Any remedy for this violation must be narrowly tailored to address the specific harm created. The exclusionary rule is the judicially created remedy designed to safeguard Fourth Amendment rights. *United States v. Hoffmann*, 75 M.J. 120 (C.A.A.F. 2015). However, as there is no evidence in this case to exclude and no direct harm to the accused's court-martial as a result of the Fourth Amendment violation, the court determines that no additional remedy is required to safeguard the accused's Fourth Amendment rights.

E. The Due Process Clause of the Fifth Amendment.

The defense asserts that the government's electronic surveillance of the defense team amounted to a violation of due process in that it interfered with the accused's right to speedy trial; that he lost the benefit of two expert witnesses (Dr. Arden and Ms. Ryan); that the delay required the release of LCDR Robert Miller, one of the accused's detailed assistant defense counsel, the possible release of LT Gregory Gianoni, his detailed defense counsel, and the loss of the assistance of Ms. Catherine Deist, a civilian counsel assisting the defense team with pretrial preparations; and that the defense had delayed reviewing some of the available evidence.

The Due Process Clause of the Fifth Amendment states, "[n]o person shall be . . . deprived of life, liberty or property, without due process of law." The Supreme Court has held that members of the military who may be subjected to loss of liberty or property are entitled to the due process of law guaranteed by the Fifth Amendment. *Middenfdorf v. Henry*, 425 U.S. 25, 43 (1976), *United States v. Jemison*, 65 M.J. 872, 874 (A.F. Ct. Crim. App. 2007). Due process protections in the military include the right to a speedy trial, Article 10, UCMJ; the right to qualified counsel, Article 38, UCMJ; and equal access to witnesses and evidence, Article 46, UCMJ. In some cases, the rights protected by due process may be further protected by other constitutional provisions (e.g. the right to qualified counsel).

As to the assistance of counsel, LCDR Miller was voluntarily released from the case by the accused as of 7 June 2019 after being detailed to the case in April 2019 in a limited capacity, "to assist with writing and filing motions and [to help civilian defense counsel] with military-specific procedural issues" as the defense team prepared for trial. Appellate Exhibit CXXXI (131). Additionally, the court affirms that LT Gianoni remains detailed defense counsel assigned to the case as of this ruling and will remain assigned to the case until he is excused or withdraws in accordance with the

requirements of R.C.M. 506(c). As a result, it is the court's expectation that, absent other excusals or withdrawals, the accused will be represented by Mr. Palatore, Mr. Mukasey, LT Gianoni, and Maj Nelson Candelario, USMC, his individual military counsel, in addition to the assistance of various support counsel and staff.

Otherwise, assuming without deciding that the NCIS intrusion amounted to a violation of due process, the court concludes that the various remedies the court has and will order, including the court's favorable ruling to the defense's Motion to Disqualify Trial Counsel, Appellate Exhibit CXXXV (135), are sufficient to resolve any violation.

Nothing in this ruling is intended to foreclose additional remedies, including reasonable continuances, to account for the loss of potential defense expert witnesses and the inability of defense counsel to complete their review of all discovery.

F. The Sixth Amendment's right to counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

One element within this Sixth Amendment right to counsel is the right of an accused who does not require appointed counsel to choose who will represent him. Second, counsel provided to or retained by the accused must provide reasonably effective assistance. Third, where a constitutional right to counsel exists, there is a correlative right to representation that is free from conflicts of interest. *United States v. Lee*, 66 M.J. 387, 388 (C.A.A.F. 2008).

The right to competent counsel is generally derived from constitutional guarantees to a fair trial through the Due Process Clause. But the right to counsel of one's choice has been regarded as the root meaning of the Sixth Amendment's guarantee. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006).

Not all government interference with the attorney-client relationship violates a defendant's sixth amendment right to counsel. *United States v. Brooks*, 66 M.J. 221, 225 (C.A.A.F. 2008). However, even temporary interferences may implicate the right. *See Geders v. United States,* 425 U.S. 80, 88-91 (1976) (holding that, by sequestering the accused from his attorney for seventeen hours during an overnight recess of the trial, the trial court impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment).

Even as to prosecutorial misconduct that invades the accused's right to counsel, an appropriate remedy should be crafted to resolve the prejudice caused by the invasion. *Meek, 44 M.J.* at 8.

As previously articulated on the record, the court concludes that the government HTML GET operation temporarily interfered with the attorney-client relationship

beginning on 8 May 2019. It hampered the defense's opportunity to prepare for trial as they became necessarily enmeshed in discovery and litigation related to the operation, thereby harming the accused's right to competent counsel. It created short-term concerns regarding conflicts of interest between his counsel and the accused, temporarily robbing the accused of the counsel of his choice. These delays are wholly attributable to the government's actions.

As a result, the court finds that trial counsel's participation in the NCIS operation resulted in the violation of a legal standard.

Under these circumstances, the appropriate remedy for the temporary interference with the right to counsel would be to continue the case, which the court approved for 28 May to 17 June 2019. Further, the court concluded that release of the accused from all pretrial restraint would serve the dual effect of: (1) removing one potential source of prejudice to the accused resulting from the delay in the start of court-martial in light of his speedy trial demands; and (2) providing him significantly greater opportunity to prepare for trial in coordination with his counsel of choice.

The court now reaffirms these remedies and finds them narrowly tailored to resolve the specific harm incurred.

G. Unlawful Command Influence and the appearance of a fair trial.

In Appellate Exhibit CXXXVII (137), defense alleged unlawful command influence (UCI) by the JAG upon the military judge based on a statement made by the JAG public affairs officer quoted in online media.

In Appellate Exhibit CXXVI (126), they alleged that the prosecution leaked information to the media favorable to the government in an attempt to influence the proceedings. They also asserted that the government's conduct taken together has resulted in the appearance of an unfair trial.

Article 37(a), UCMJ, prohibits commanders and convening authorities from attempting "to coerce, or by unauthorized means, influence the action of a court-martial… or any member thereof, in reaching the findings or sentence in any case." UCI arises from the improper use, or perception of use, of superior authority to interfere with the court-martial process. Gilligan and Lederer, COURT-MARTIAL PROCEDURE, Volume 2 §18-28.00, 153 (2d Ed. 1999). UCI "may consist of interference with the disposition of charges, with judicial independence, with the obtaining or presentation of evidence, or with the independence and neutrality of members." *Id.* at 154-55.

When assessing whether UCI exists in a particular case, the court must consider the potential impact of actual UCI and apparent UCI, *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017), and military judges must take affirmative steps to ensure

that both forms of UCI are eradicated from courts-martial. *United States v. Lewis,* 63 M.J. 405, 413 (C.A.A.F. 2006).[3] The key to the court's UCI analysis is the effect on the proceedings, not the knowledge or intent of the government actors whose actions are in question. *Boyce,* 76 M.J. at 251.

Actual UCI occurs when there is an improper manipulation of the criminal justice system that negatively effects the fair handling or the disposition of a case. *Id.* at 247. In *United States v. Biagase,* the C.A.A.F. set forth the analytical framework to be applied to allegations of UCI at trial. 50 M.J. 143, 150 (C.A.A.F. 1999).

The initial burden is on the defense to raise the issue by "some evidence." *Id.* To meet this "some evidence" standard, the defense must show some facts which, if true, would constitute UCI. *Id.* at 150. The defense must then show that such evidence has a "logical connection" to the court-martial at issue in terms of potential to cause unfairness in the proceedings. *Id.* While the initial defense burden is "low," the defense is required to present more than an allegation or speculation. *United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 1998) (noting that "mere speculation that UCI occurred because of a specific set of circumstances is not sufficient"); *see also United States v. Johnston,* 39 M.J. 242, 244 (C.M.A. 1991) ("The threshold for triggering further inquiry should be low, but it must be more than a bare allegation or mere speculation.").

If satisfied by the defense, the burden shifts to the government to: (1) disprove "the predicate facts upon which the allegation of UCI is based," (2) persuade the court that the facts do not constitute UCI, or (3) prove that the UCI will not affect these specific proceedings. *Biagase*, 50 M.J. at 151. "Whichever tactic the government chooses; the required quantum of proof is beyond a reasonable doubt." *United States v. Stoneman,* 57 M.J. 35, 41 (C.A.A.F. 2002) (citing *Biagase*, 50 M.J. at 151).

To establish apparent UCI, the accused must demonstrate: (1) facts, if true, that constitute UCI, and (2) the UCI placed an intolerable strain on the public's perception of the military justice system because "an objective, disinterested observer, fully informed of all of the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Boyce*, 76 M.J. at 249; s*ee also Stoneman*, 57 M.J. at 42. In *Lewis*, CAAF explained that the "objective test for the appearance of UCI is similar to the tests we apply in reviewing questions of implied bias on the part of court members or in reviewing challenges to military judges for an appearance of a conflict of interest." 63 M.J. at 415.

[3] *See also Rosser*, 6 M.J. at 271 (stating that once UCI is raised, "it is incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings.").

Pretrial publicity is an issue closely related to UCI.[4] An accused has the right to a fair and impartial jury. *Chandler v. Florida*, 449 U.S. 560, 574 (1981) (noting, "[a]ny criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial."). Pretrial publicity is unfair if it denies an accused a fair trial in violation of his Fifth and Sixth Amendment rights. *United States v. Simpson*, 58 M.J. 368, 371 (C.A.A.F. 2003); *United States v. Curtis*, 44 M.J. 106, 133 (C.A.A.F. 1996). However, adverse pretrial publicity does not in and of itself "lead to an unfair trial." *Curtis*, 44 M.J. at 138.

The prohibition against UCI does not require senior military and civilian officials to refrain from addressing issues in the media. *Simpson*, 58 M.J. at 373. However, "[w]hen those with the mantle of command authority deliberately orchestrate pretrial publicity with the intent to influence the results in a particular case or a series of cases, the pretrial publicity itself may constitute unlawful command influence." *Id.* (citing *United States v. Simpson*, 55 M.J. 674, 687 (A.C.C.A. 2001)).

As to the allegation of UCI upon the court by the JAG, the court finds that the defense has failed to raise some facts which, if true, would constitute UCI.

First, there is no evidence before the court as to whether this statement was made at the behest of the JAG or on sole initiative of the public affairs officer. The statement generally consists of a type of "media-speak" which characterizes most public affairs statements, insomuch that, the meaning of the phrase "the government is acting as part of a lawful, authorized, and legitimate investigation" is unclear and nonspecific – and may have been intended to refer to all or none of the general NCIS investigation, the leak investigation, or the HTML GET operation. Nevertheless, as a tool hoping to influence a military judge, it is an ineffectual one.

Regardless of this determination, the court notes that the first remedy for UCI intending to influence a military judge is *voir dire*. As a result, the court invites the parties to question the military judge on this matter, as they deem appropriate.

As to the assertion that members of the prosecution leaked materials to the media, the court finds no evidence to support this allegation. To date the source or sources utilized by the media to inform the reporting are unknown to all but the specific reporters involved – hence the ill-conceived efforts of NCIS which are part of this litigation.

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[4] *See United States v. Simpson*, 58 M.J. 368, 373 (C.A.A.F. 2003). At the appellate level, an analysis with respect to pretrial publicity involves a different burden and quantum of proof than UCI. *Id.* The C.A.A.F. has considered claims of improper pretrial publicity as related, yet separate, from UCI claims, developing standards for presumed or actual prejudice caused by the pretrial publicity. *Curtis*, 44 M.J. at 138; *Simpson*, 58 M.J. at 373. The court determines that, as presented in the defense's motion, the UCI analysis subsumes the related pretrial publicity framework.

Still, "[e]ven the perception that pretrial publicity has been engineered to achieve a prohibited end – regardless of the intent of those generating the media attention – may lead to the appearance of unlawful command influence." *Simpson*, 58 M.J. at 373. As such, the court determines that the ubiquity of media coverage regarding the accused and his case, with special attention to those articles which reproduced excerpts of the court's rulings incorrectly or out of context, constituted apparent UCI.

When the court finds either actual or apparent UCI, the court "has broad discretion in crafting a remedy to remove the taint of unlawful command influence." *United States v. Douglas,* 68 MJ 349, 354 (C.A.A.F. 2010) (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1991)). The court should attempt to take proactive, curative steps to remove the taint of UCI and, therefore, ensure a fair trial. *Id.* The C.A.A.F has long recognized that, once UCI is raised "…it is incumbent on the military judge to act in the spirit of the UCMJ by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings." *United States v. Gore*, 60 MJ 178, 186 (C.A.A.F. 2004). However, the C.A.A.F. has also repeatedly emphasized that dismissal "is a drastic remedy and courts must look to see whether alternative remedies are available." *United States v. Salyer*, 72 M.J. 415, 429 (C.A.A.F. 2013) (quoting *Gore*, 60 M.J. at 187).

In order to remedy the strain of pretrial publicity upon the court-martial, the court grants the defense an additional two peremptory challenges for use during the excusal of members under R.C.M. 912(g).

Finally, the court finds it likely that the NCIS HTML GET intrusion created a crisis in the public's perception of the fairness of the accused's court-martial. While events of this kind do not fall neatly into legal classification, this situation most closely resembles the kind of unlawful influence encompassed by the C.A.A.F.'s UCI precedent. As a result, the court applies the apparent UCI framework to its analysis.

Based on this framework, the court determines that the NCIS intrusion placed an intolerable strain on the public's perception of the military justice system because "an objective, disinterested observer, fully informed of all of the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Boyce*, 76 M.J. at 249.

In fashioning a remedy, the court distinguishes its other remedies, which seek to resolve specific harms to the accused, from this effort, which addresses the public's potential negative perception of the military justice system generally and this court-martial specifically. Applying its broad discretion in crafting a remedy to remove the taint of unlawful command influence, the court directs that the court-martial is

prohibited from adjudging a sentence that includes confinement to life without eligibility for parole.

4. **Ruling**.

The defense Motion to Dismiss is **DENIED**. As alternate remedies, the court orders (or has previously ordered):

- The court-martial is continued from 28 May 2019 to 17 June 2019;
- The accused shall be released from pre-trial restraint;
- CDR Czaplak is disqualified as trial counsel;
- The defense is granted two additional peremptory challenges (for a total of three peremptory challenges); and
- The court-martial is prohibited from adjudging a sentence that includes confinement to life without eligibility for parole.

A. C. RUGH
Military Judge