IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 1

UNITED STATES,	)	
	)	APPELLEE'S RESPONSE TO THE
Appellant,	)	GOVERNMENT'S MOTION FOR *EN*
	)	*BANC* RECONSIDERATION
v.	)	
	)	Case No. 200800299
Jeffrey R. CHESSANI	)	
Lieutenant Colonel (O-5)	)	
U.S. Marine Corps,	)	
Appellee.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

COMES NOW LtCol Jeffrey R. Chessani, USMC (Appellee), by and through his undersigned counsel, and pursuant to N.M.C.C.A. Rules 4-7 & 6-1 and C.C.A. Rules 17 & 19, hereby files this response in opposition to the government's motion for *en banc* reconsideration.[1]

The government's motion does not set forth a sufficient basis to justify reconsideration of the panel's unanimous opinion. The central holding of the opinion is that the government "failed to meet its burden of demonstrating, *beyond a reasonable doubt*, that [the] proceedings were untainted by the appearance of UCI" and "that an objective, disinterested observer, fully informed of all the facts and circumstances would harbor significant doubt about the fairness of

[1] There is an apparent contradiction in the rules governing this response. N.M.C.C.A. Rule 4-7 states that the "[o]pposition to all motions [other than Motions for Enlargement of Time] must be filed within 7 days after receipt by the opposing party." N.M.C.C.A. Rule 6-1 states that "[a]ny suggestion for en banc reconsideration will be deemed to include a motion for reconsideration by the panel responsible for the opinion or order terminating the case." Pursuant to C.C.A. Rule 19, "A reply to the motion for reconsideration will be received by the Court only if filed within 7 days of receipt of a copy of the motion." However, C.C.A. Rule 17 states, "No response to a suggestion for consideration or reconsideration by the Court as a whole may be filed unless the Court shall so order." Consequently, insofar as this Court may require it, Appellee hereby seeks leave to file this response to the government's motion for *en banc* reconsideration.

[the] proceeding."[2] *United States v. Chessani*, No. 200800299, 2009 CCA Lexis 84, at 6, unpublished op. (17 March 2009) (emphasis added) ("Thus, we are left to conclude that the Government has failed to prove beyond a reasonable doubt there was no apparent UCI."). As the military judge concluded (and the panel affirmed):

> [T]his court finds, ***and actually is convinced of one thing beyond a reasonable doubt, that a disinterested member of the public would harbor significant doubts as to the fairness of the proceedings against this accused and the military justice system as a whole*** if they knew that this accused's main interrogator was, during significant portions of this trial . . . not only prepared as a government witness but was seated at the side of the convening authority as a trusted legal adviser while prosecutors and subordinate legal advisers discussed the details of the accused's case and offered legal advice and strategy which would determine whether this accused would be prosecuted and, if so, how.

Id. at 4 (quoting Record of 17 June 2008 at 26-27 (emphasis added)).

The government asserts that the panel erred by creating "a new species of unlawful command influence," which the government labels as "lateral unlawful command influence." (Gov't Mot. at 3). This assertion is erroneous in that the panel affirmed the military judge's finding of the *appearance* of unlawful command influence. The panel did not make a finding of "lateral unlawful command influence," which, based on the government's argument, is essentially a "species" of *actual* unlawful command influence. In its motion, the government argues that "the alleged defect in these proceedings was limited to a finding that Col Ewers'

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[2] The panel rejected the government's contention that the military judge's essential findings of fact were unsupported by the record. *Chessani*, 2009 CCA Lexis 84, at 5, unpub. op. ("We . . . find that a careful review of the record reveals that the military judge's essential findings of fact are not clearly erroneous, and we adopt them as our own."); *see, e.g., id.* at 6 (finding that the "appearance" of unlawful command influence "was further supported by Col Ewers' stellar reputation, *seniority*, long-term relationship with the CDA, personal knowledge of and well-known opinions regarding this case forged by his role as an investigator on the reporting and follow-on actions regarding the Haditha incidents" and that according to Col Ewers' testimony, "he had anticipated, based on his history with LtGen Mattis and the fact that he was the *senior SJA*, that he might be asked his opinion on MARCENT matters") (emphasis added); (*see also* Gov't Mot. at 1 ("accept[ing] Panel 1's excellent description of this case's factual background)).

passive presence in the CA's legal meetings may have impermissibly influenced the MARCENT SJA's advice." (Gov't Mot. at 3). However, in its opinion, the panel dismissed this argument, stating, "The Government asserts there was no actual UCI because the record is devoid of evidence to suggest that Col Ewers' presence at the legal meetings improperly influenced either the CDA or subordinate legal advisors. *In light of our decision regarding the presence of apparent UCI*, we need not specifically determine whether, in the context of the present case, actual UCI occurred." *Chessani*, 2009 CCA Lexis 84, at 6, unpub. op. (emphasis added). The panel also noted the following: "Although we have not and need not decide whether Col Ewers' presence actually chilled or otherwise impermissibly influenced the legal advice of the MARCENT SJA, (nor whether any potential chilling was intentional or unintentional), we are convinced the Government failed to meet its burden of demonstrating, beyond a reasonable doubt, that these proceedings were untainted by *the appearance of UCI*." *Id.* (emphasis added). In sum, recasting a losing argument by mislabeling the panel's decision, as the government does here, does *not* create the justification necessary for reconsideration.

In the final analysis, a modest inspection of the record and the panel's opinion demonstrates that the government's claim of error is illusory. The panel's unanimous decision does not conflict with any decision of the United States Supreme Court, the Court of Appeals for the Armed Forces (C.A.A.F.), or this Court, and the government has not cited to any such conflict. No material legal or factual matter was overlooked or misapplied by the panel.[3] And

[3] In its motion, the government states the following: "As the Government has argued, Col Ewers did not discuss *any* aspect of this case with either the Convening Authority or the MARCENT SJA." (Gov't Mot. at 2) (emphasis added). Fundamentally, this assertion misses the point regarding the finding of the *appearance* of unlawful command influence, as noted above. *See also Chessani*, 2009 CCA Lexis 84, at 6, unpub. op. (noting that in light of its decision on apparent UCI, the panel need not address the government's claim of actual UCI). Nonetheless, simply because the government may have *argued* a point does not make it true. As the record

there is no change in the law that occurred after the case was submitted that was overlooked or misapplied by the panel. Consequently, an *en banc* review is not necessary to secure or maintain uniformity of the Court's decisions, contrary to the government's suggestion. (*See* Gov't Mot. at 3). As the panel's opinion demonstrates, the military judge's decision, which was and continues to be subject to limited and deferential review pursuant to Article 62, U.C.M.J., was thoroughly supported by the facts and controlling law. Thus, there is no matter of exceptional importance that requires this Court to grant the government's motion for panel reconsideration or *en banc* review and delay further the proceedings in this case.[4]

CONCLUSION

This Court, as a whole, does not sit as an intermediate appellate court between the panel and C.A.A.F. *En banc* review is not simply a mechanism for a losing party to get a second bite at the apple. The government's argument presented here is the same argument that was properly dismissed by the panel. Because there is no basis for panel reconsideration nor exceptional circumstances warranting review by the entire Court, the government's motion should be denied.

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reveals, Col Ewers, who was less than fully candid on the witness stand, *see id.* at 6, n.12, testified that he *did* discuss the Haditha cases with the MARCENT SJA:

> Q: But you did have a conversation with [LtCol Riggs, the MARCENT SJA] *regarding the Haditha cases*, sir?
> A: Right, he told me when the meetings were going.
> Q: Is that all you talked about, when the meetings were going?
> A: Yeah. *I am sure there were other things*, but I can't remember specifically the conversation that I had with Riggs, you know, *issues that were being discussed.*

(Record of 7 May 2008 at 26) (emphasis added).

[4] Remarkably, the government filed a motion with the panel on 18 February 2009, requesting expedited consideration. In that motion, the government claimed to be concerned about the delay in this case, citing "the continued availability of witnesses and related trial participants, and the impact a prolonged delay might have on Appellee's right to a speedy resolution of the outstanding charges." (Gov't Mot. for Expedited Consideration at 1). Yet, the government took its full 30 days to file a three-page motion with the Court, requesting *en banc* review with little to no basis for doing so.

WHEREFORE, Appellee respectfully requests that this Court deny the government's motion.

Respectfully submitted,

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APPENDIX

United States v. Chessani,
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Chessani* was delivered to the Court and to opposing Appellate Government Counsel, LT Timothy Delgado, JAGC, USN, on 23 April 2009.

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