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November 5, 2013

VIA OVERNIGHT DELIVERY and E-MAIL

Jon T. Rymer
Inspector General
Office of the Inspector General
Department of Defense
4800 Mark Center Drive
Alexandria, VA 22350-1500

Attention: David A. Core, Senior Investigator Investigations of Senior Officials
Michael Rodgers, Defense Hotline Investigator

Re: Amended and Renewed Complaint of Captain James V. Clement, USMC-
Case No. 20130521-014046-03

Dear Mr. Rymer:

Kindly refer to my letter to you of 17 May 2013 containing the original complaint of Captain Clement against the Commandant of the Marine Corps, Robert Hogue, SES Counsel to CMC, MajGen Vaughn Ary and other senior counsel in the Judge Advocate Division of the Marine Corps.

The purpose of this letter is to supplement that complaint about the insidious unlawful command influence, unlawful classification, abuse of the process, false swearing and obstruction of justice. Further, this amended and renewed complaint provide context and the reason for the despicable retaliation and retribution visited upon Major James Weirick, Colonel Jesse Gruter, LtGen Waldhauser and others who have had the courage to be faithful to their oaths and support the letter and spirit of the Uniform Code of Military Justice

This Amended and Renewed Complaint is supported by the Motion and Supplemental Motion to Dismiss the charges filed in the Special Court Martial proceeding with attached exhibits which will be hand delivered to you and your investigators. The essence of the Amended and Renewed Complaint is summarized below.

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SUMMARY OF FACTS

During his deployment to Afghanistan, Captain Clement was the Executive Officer of Kilo Company 3/2. Unlike the normal battalion configuration, snipers were not part of Kilo Company. At the insistence of and on the orders from the Battalion Commander (CO), Executive Officer (XO) and Operations officer (Ops O), the snipers were a separate and special forty man platoon. Their mission from the battalion commander was to kill as many enemy as possible and instill fear and hesitancy into the insurgency. No Marine officer was assigned to lead the snipers on the ground, instead, they were commanded by a Staff Sergeant who had the run of the battle space and reported to the Bn CO, the XO and the Ops O. The snipers were administratively assigned to the Weapons Company. They were hugely successful, owned a significant kill tally and were celebrated for it. Depending on the mission, they would operate alongside and receive support from the rifle companies.

At or about 0100 on 27 July 2011, Sgt Robert Richards, the team leader of Scout Sniper Team (SST) 4, under the command of Kilo Company Commander Captain Rudyard Olmstead, led a 20 man patrol on a five kilometer foot movement from Patrol Base (PB) 7171 to the village of Sandala. This operation was the culmination of months of surveillance and intelligence collection by Scout Sniper Team 4 and members of Kilo Company 3/2, and was supported by close air support, tanks, and engineers. Sandala was deep into enemy territory and the furthest this Battalion had ever pushed in its area of operations. To help protect this large patrol, Sgt Richards asked Captain Clement to serve as the communications officer in the hide site and to call support in to protect this patrol, to which Captain Clement assented and volunteered for the mission. Two tanks from 2d Tanks were ready at PB 7171 to provide needed support. Captain Timothy Thornton was the Forward Air Controller in support of the patrol and had air support on top with a pod, ready to provide further air support. SSgt Eric Summers led the EOD team in clearing the route and site of IEDs and providing other support.

The patrol arrived at the hide site at approximately 0500 and extracted at approximately 1300. No Marines were lost or wounded. Twelve enemy were killed, including one high value target. One wounded enemy was recovered and saved. The local population of Sandala disavowed the insurgents and gave their support to the coalition forces the next day for the first time in the war. Unfortunately, during the patrol, out of his presence and without Captain Clement's knowledge, the snipers engaged in loose, undisciplined behavior, including urinating on and photographing enemy corpses as reflected in the video released in January 2012.

Captain Clement has been charged by the Convening Authority with dereliction of duty and conduct unbecoming an officer while the patrol was in the hide site when he allegedly did not properly supervise, correct or report the actions of Scout Sniper Team 4 on the roof of

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Compound 54 in the village of Sandala, Afghanistan, to wit: permitting the wearing of reduced personal protective equipment (PPE) - no helmets; the discharge of an M203 grenade launcher; permitting the use of excessive and indiscriminate fire during the mission; that he made misrepresentations of material fact relating to the receipt of enemy fire during the patrol and permitted the misconduct of junior Marines - filming of and urinating on enemy bodies. (See Captain Clement Charge Sheet, Exhibit 1.)

On October 17, 2013, the Board of Inquiry concluded that Captain Clement did not commit acts of misconduct, or Moral, or Professional Dereliction and recommended an Honorable discharge. No basis for separation is disclosed in this record except the unlawful demands of the Commandant.¹

UNLAWFUL COMMAND INFLUENCE

This case is the worst case of unlawful command influence (UCI) by the Commandant his subordinates and his counsel in the history of the Marine Corps. In the words of one former General Officer, it is “disgusting and a disgrace.” Captain Clement and Major Weirick are relying upon the strength and honor of your office to call these senior officials to account and to make sure that the subversion of our system of justice never occurs again.

In early January 2012, a video of four SST Kilo 3/2 Marine NCOs urinating on enemy corpses in Afghanistan appeared on the Internet.

Marine Corps Forces Central Command (MARCENT), under the command of LtGen Thomas W. Waldhauser, assumed jurisdiction of the V3/2 desecration cases as the Consolidated Disposition Authority (CDA). LtGen Waldhauser was the most experienced CDA in the Marine Corps. The CDA appointed LtGen Hummer to do the Command investigation and requested the Naval Criminal Investigative Service (NCIS) at Camp Lejeune, North Carolina (CLNC) to do the criminal investigation. The four Marines in the video retained civilian counsel who immediately sought to resolve the charges with the Staff Judge Advocate (SJA), MARCENT. Nevertheless, the Commandant (CMC) was actively and publicly furious and demanding action.

On January 15, 2012, Captain Clement was interviewed under oath by and fully cooperated with NCIS, CLNC. On January 31, 2012, LtGen Waldhauser presented CMC with a

¹ It is worthy of note that the BOI had no questions about the clear UCI at any time during the proceeding. Their silence is telling. It is a fair inference, absent their objection to the UCI, that they were on board and were not about to do the “right thing” and tell the CMC and the CA that this proceeding was unacceptable.

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disposition plan to be discussed overseas in early February 2012. At that meeting CMC expressed his displeasure with the plan, said that instead he wanted to “crush” the Marines, get them out of the Corps, and suggested they be sent to General Court Martial. The CDA, however, resisted these suggestions and indicated he was not going to change his plan even in the face of a threat to relieve him. Shortly thereafter, LtGen Waldhauser was relieved as CDA by CMC and LtGen Mills, CG, Marine Corps Combat Development Command (MCCDC), was appointed the new CDA by CMC. Neither defense counsel, the SJA, MCCDC, the several accused nor the public were made aware of the reasons for the change.²

The Uniform Code of Military Justice (UCMJ) and the due process clause of the Constitution do not permit the removal of a CDA, who is akin to a neutral magistrate, except for conflict of interest or disqualifying misconduct. LtGen Waldhauser was fully qualified, had no conflict and his resistance to the importuning of CMC was consistent with the highest standards of honesty and fidelity of the Marine Corps. The UCMJ prohibits the appointment of a subordinate Commander to be CDA because, as occurred here, he has no unfettered discretion (as demonstrated by the secret 31 May 2012 meeting of Generals in which they received the CMC guidance on the V32 cases, more fully described below).

In mid-February 2012, Captain Clement was interviewed for hours by LtGen Hummer under oath and on the record. He fully cooperated with LtGen Hummer. Shortly thereafter, LtGen Hummer recommended to the new CDA that Captain Clement be charged for dereliction of duty and an alleged false statement concerning his Combat Action Ribbon (CAR) citation.³

At the end of February 2012, civilian Counsel to CMC, Mr. Hogue, classified the videos and investigative materials without proper authority and over the objections of the SJA, MCCDC, Col Jesse Gruter, and Major James Weirick, the Deputy SJA, who advised their superiors of a number of reasons why the information did not qualify for classification. Shortly after making their concerns known, MajGen Vaughn Ary, the Staff Judge Advocate of the Marine Corps., attempted to replace Col Gruter as SJA. Subsequently, Mr. Hogue instructed Col Gruter

² The White House, SECDEF and SASC were never advised of this relief despite the appointment of LtGen Waldhauser, shortly after his firing, as Senior Military Assistant to SECDEF.

³ LtGen Hummer’s Command Investigation Report and the supporting materials, including many interviews of Marines that were involved in the 27 July 2011 patrol, demonstrate that the charges against Captain Clement are without merit. LtGen Hummer’s Command Investigation Report itself is flawed, ignores the very materials attached to it, and its conclusions and recommendations are clearly the result of the unlawful command influence present in this case. Attached as Exhibit 2 in which the defense has annotated the Command Investigation Report with facts and observations that demonstrate its failures, errors, and inaccuracies, and, which in conjunction with this submission, establish that the charges against Captain Clement are without merit.

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that everything dealing with the V3/2 cases was in the category of the things he was directed to do by the CMC, and that everything involved with the V3/2 cases went through him. From March through June 2012, CMC conducted his Heritage tour of major Marine installations to poison the well in the V32 cases.

On 31 May 2012, LtGen Paxton, CG II MEF, after an Executive Officer Symposium (EOS) at Quantico, authored a secret e-mail and memorandum, ostensibly approved by the new CDA (but unknown to his SJA, Col Gruter, or Deputy SJA Major Weirick) to the CMC entitled "V32 UPDATE and RECOMMENDATION (Final)" outlining CMC guidance for LtGen Mills to pursue Article 32 proceedings against nine individuals (including Captain Clement). CMC indicated his approval of all recommended actions and his guidance by his signature.

During the summer and fall of 2012, various dispositions were reached against seven of the enlisted Marines. On orders from MajGen Ary, the CMC's Staff Judge Advocate, these dispositions were reached without disclosing the reason for the relief of LtGen Waldhauser or the secret 31 May email and memo to CMC from LtGen Paxton until after the execution of pretrial agreements. This denied the enlisted Marines the benefit of the defense of unlawful command influence by CMC - a gross violation of the UCMJ and the due process clause of the United States Constitution.

After refusing to submit to the pressure and agree to the false accusations, on 29 January 2013 Captain Clement received eight charges, retained *pro bono* counsel, and was assigned detailed Marine counsel. Counsel was advised by Trial Counsel that an NJP was available to dispose of the charges. Counsel sought to meet with the new CDA to refute the charges and discuss why Captain Clement would not agree to the NJP. The new CDA and his SJA declined to meet and issued a press release publicly naming Captain Clement in violation of the Manual of the Judge Advocate General (JAGMAN). After receipt of discovery, including the disclosure of the "unexecuted" 31 May 2012 secret memorandum of the Generals meeting in May 2012, counsel sought but was denied a meeting with the new CDA.

In March and April 2013, Major Weirick filed a complaint with the Department of Defense OIG and Department of the Navy Central Adjudication Facility accusing the CMC and his legal advisors of interfering with the prosecution of the V3/2 cases based on the improper classification of the investigation. Subsequently, in May 2013, Major Weirick filed a separate reprisal complaint with the IG alleging that on 10 May 2013 HQMC had filed a professional misconduct inquiry against Col Gruter because of Col Gruter's refusal to stop Major Weirick from addressing his concerns with members of Congress. In addition to not stopping Major Weirick, immediately prior to the filing of the professional misconduct inquiry, Col Gruter had informed HQMC of his displeasure with the retirement of one of the snipers while he was on

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legal hold, and that if he suspected any more UCI in these cases, he would recuse himself, recommend that LtGen Mills recuse himself, and would recommend that the entire JAD recuse themselves if any evidence of actual UCI was developed. The filing of the professional misconduct inquiry followed within approximately a week.

In the Clement case, an Article 32 investigating officer (IO) was appointed on 2 February 2013. On 14 March 2013, trial counsel dismissed two of the charges. On 9 April 2013, after Captain Clement filed a motion to dismiss all charges, trial counsel dismissed two more charges. On 10 April 2013, the Article 32 hearing was held. After presenting the Hummer investigation and the testimony of several witnesses, the trial counsel made no recommendation to the Article 32 officer on how Captain Clement's case should be handled. On 19 April 2013, the Article 32 IO recommended no charges for court martial but recommended NJP and BOI on the excessive firing charges, suggesting that Captain Clement should have ceased communicating and supervised the tactical mission. Captain Clement rejected an NJP disposition, objected in writing to the Article 32 IO's findings based on the record and sought to meet with the new CDA, LtGen Mills, to resolve this matter. The request for a meeting was rejected and in May 2013 LtGen Mills referred Captain Clement to a Special Court Martial at Camp Lejeune, North Carolina. On 24 June 2013, trial counsel dismissed one more charge. Trial was initially set for 1 November 2013.

In July 2013, Captain Clement moved to dismiss the remaining charges based upon the unlawful command influence of the Commandant and for the unlawful referral of charges with no factual basis by LtGen Mills. He further sought discovery of documents and testimony which had been withheld by CMC, his civilian counsel and the Judge Advocate Division (JAD). Responses were due on 6 September 2013.⁴ A discovery hearing was set for 11 September 2013. On 5 September 2013 Chief Judge, Colonel Daniel J. Daugherty, USMC, held a hearing and ordered that 10 to 11 key Hummer interviews be produced in unclassified form forthwith and that Col Jesse Gruter, former SJA MCCDC, and Major James Weirick, Deputy SJA MCCDC, appear and give testimony about the failure and refusal of CMC, his counsel and the JAD to produce their documents and e-mails relating to the V32 cases and to give testimony about the same.

On 6 September 2013, LtGen Glueck, the current subordinate Convening Authority appointed by CMC, withdrew all of the charges against Captain Clement, the pre-trial hearing set for 11 September 2013 and the special court martial scheduled for 4 November 2013 were cancelled, and appointed this Board to deal with all of the original charges as a Board of Inquiry.

⁴ Those motions and papers are attached, Exhibit 3.

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There was no charge in that notice that serving as a radio operator was an unacceptable quality of leadership by a Marine Captain.

On 20 September 2013, the Convening Authority appointed Colonel John A. Mannle the legal advisor to the Board, even though in a previous case then LtCol Mannle was found to have engaged in unlawful command influence by obtaining information from the personnel file of the judge, who had ruled against the government, to use as a basis to disqualify that same judge. See *United States v. Salyer*, No. 13-0186, United States Court of Appeals for the Armed Forces, decided 2 August 2013, at pp. 11-12, 29. The court in that case condemned LtCol Mannle's behavior, reversed the conviction, and dismissed the proceedings with prejudice. *United States v. Salyer* at pp. 29, 34-35. Captain Clement's Motion to Replace Col Mannle based upon his misconduct of engaging in unlawful command influence was denied by the Convening Authority on 27 September 2013.

On 23 September 2013, before the BOI hearing, there was additional retaliation against Major Weirick in effort to further undermine his credibility. Major Weirick was removed from his position, a restraining order was entered against him, he was required to surrender his personal firearms, and submit to a risk assessment as a result of an e-mail he sent to Peter Delorier, one of the individuals identified in his OIG complaint, based upon the baseless contention that he had threatened Mr. Delorier when he asked him to disclose fully the events involved in the February 2012 improper classification of the investigation and related materials. Not satisfied with this level of retaliation against Major Weirick, Mr. Hogue furthered the smear campaign against him by telling the press that Major Weirick's e-mail to Mr. Delorier raised suspicions in light of the September 16 mass shooting at the Washington Navy Yard, and that as a result of the e-mail he was concerned for the safety of his clients. As if his original defamatory statements about Major Weirick were not enough, Mr. Hogue, ostensibly to address the mischaracterization of his prior statement regarding Major Weirick and the Navy Yard shooter, subsequently reiterated publicly that his staff faced a threat from Mr. Weirick.

The ordering of the Board of Inquiry was clearly the product of the UCI by the CMC. It was the only unseemly escape from significant adverse exposure of UCI at the highest levels of the Marine Corps when, on 6 September 2013, CMC and his counsel were faced with the prospect of having to produce the evidence of their corrupt and unlawful acts on the order of the Chief Judge of the Navy Marine Corps, who ordered a hearing on the discovery issue.

The acts of the Convening Authority were no accident of a neutral decision by the CDA as public affairs tried to peddle to the press. It was an unlawful desperate act to save the guidance and face of CMC.

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But, they could not keep the corruption under wraps. After the Board's Findings were published and signed, we learned that the Convening Authority sat on the Board which decided whether Colonel Donovan would be promoted to flag rank. That fact was never disclosed by the Convening Authority, his counsel or Colonel Donovan to the parties to pursue on *voir dire* provided by the BOI rules. Then we learned that Colonel VanOpdorp, the Commanding Officer of OCS, took the liberty of sharing the Board's confidential deliberations with his subordinate officers and told them that the Board ignored the "lawyer tricks," found that Captain Clement serving as a radio operator on the patrol was an unacceptable quality of leadership, distorted his answer about command and "should have," despite the uncontradicted evidence to the contrary, been aware of alleged lax behavior of the snipers.⁵ Those findings were clearly outside the notice of charges from the Convening Authority and never advanced as a leadership deficiency by the recorder or the Board in its questioning. Thus the findings and the recommendation to separate by the Board are null and void as another gross denial of due process to Captain Clement.

However, that was not enough for the Commandant. In late October 2013, following the Findings of the BOI, he took umbrage with the senior expert testimony on behalf of Captain Clement, which no doubt lead to the acquittal of the charges of misconduct. In an unlawful act of reprisal, the Commandant urged his subordinate Colonels and Generals to push back against one of the expert witnesses. Fortunately, these fine Marines declined.

They understood that our system of justice is not the underworld where witnesses are regularly intimidated, harassed, depicted as killers and punished for their lawful testimony. But this is exactly what the unlawful command influence by the Commandant and his counsel has produced and this is why the Colonels on that Board did exactly what CMC ordered: throw James Clement out of the Marine Corps despite the overwhelming evidence to the contrary.

The evidence is clear that, from the beginning, Captain James Clement was innocent of all charges and suggestions of misconduct-moral or professional dereliction. He was falsely accused in public and subjected to the grossest abuses of our investigative and judicial processes, including the firing of the only neutral magistrate and retaliation and retribution against witnesses obligated to protect the integrity of our process. Then he was denied the right to expose through the lawful discovery process the unlawful command influence of the

⁵ In a 21 October 2013 e-mail, we requested that Col VanOpdorp share with us the same information regarding the deliberations that he shared with his subordinates. In a follow-up e-mail to Col VanOpdorp, we informed him that, contrary to that assertion by Col Riley, SJA, MCCDC, that the BOI proceeding was closed, the proceeding remained open and asked him to respond to our initial inquiry. See attached e-mails, Exhibit 4. To date we have not received any reply from Col VanOpdorp.

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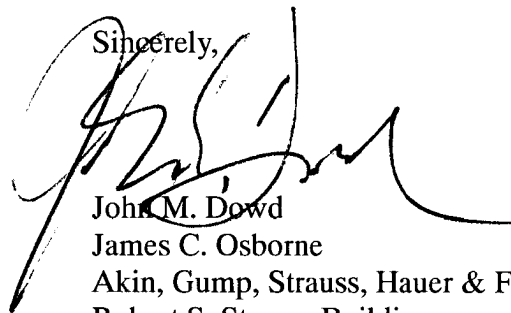
Commandant. Then the demonstrably false charges were sent to a Board of Inquiry by a Convening Authority who knew that Captain Clement had not violated the law. Again, the process was rigged against him – all because he insisted he was innocent, insisted as his record reflected that he had been an outstanding, selfless Marine officer, particularly on 27 July 2011, and he had the courage to demand a full and fair hearing in accordance with our Constitution and the Uniform Code of Military Justice he fought faithfully to protect and preserve.

The evidence of the violations of the UCMJ and our Constitution by the Commandant and his counsel is overwhelming. Every Marine, no matter their rank, is now in jeopardy. Their rights have been diminished by this despicable and dishonorable behavior. Only you have the power to call them to account and protect our system of justice from abuse and subversion by senior authorities - for all of our Marines and Sailors.

Thank you for your time and consideration. If you have any questions or need any assistance, please do not hesitate to call us.

Semper fidelis.

Sincerely,



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