

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CHAPTER 12

UNLAWFUL COMMAND INFLUENCE

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**LTC Robert A. Burrell
December 2000**

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

UNLAWFUL COMMAND INFLUENCE

Outline of Instruction

I. INTRODUCTION

A. References

1. Manual for Courts-Martial, United States (1995)[hereinafter MCM].
2. Uniform Code of Military Justice [hereinafter UCMJ] arts. 1, 25, 37, 98.
3. Dep't of Army, Reg. 27-10, Legal Services, Military Justice, paras. 5-9, 5-10c (24 June 1996) [hereinafter AR 27-10].

B. Keys to understanding unlawful command influence (UCI).

1. See the commander as a **judicial authority**. Be aware that UCI may be actual or apparent.
2. Public interest; high-profile cases, politics.
3. The exercise of UCI is not limited to commanders.
4. **Independent discretion** of 3 key population groups:
 - a. Court Members
 - b. Subordinate Commanders
 - c. Witnesses

5. Dispute over whether, extent to which Art. 37 applies to accusative stage. *See United States v. Drayton*, 45 M.J. 180 (1996).

II. INDEPENDENT DISCRETION VESTED IN EACH COMMANDER.

- A. Each judicial authority, at every level, is vested with independent discretion, **by law**, which may not be impinged upon. There is no need to dictate dispositions to a lower-level commander.
- B. Lawful Command Actions. The commander MAY:
1. Personally dispose of a case if within commander's authority or any subordinate commander's authority. R.C.M. 306(c).
 2. Send a case back to a lower-level commander for that subordinate's independent action. R.C.M. 403(b)(2), 404(b), 407(a)(2). Superior may not make a recommendation as to disposition. R.C.M. 401(c)((2)(B).
 3. Send a case to a superior commander with a recommendation for disposition. R.C.M. 401(c)(2)(A).
 4. Withdraw subordinate authority on individual cases, types of cases, or generally. R.C.M. 306(a).
 5. Escalate a lower disposition. R.C.M. 601(f) ("Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to that authority for further consideration, including, if appropriate, referral." *Accord United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983). EXCEPTIONS:
 - a. An executed Article 15 for a minor offense. R.C.M. 907(b)(2)(D)(iv), MCM, Part V, para 1e. *See United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993) (permissible for superior commander to prefer charge for a major offense even though accused already received Art. 15 for the offense).

- b. After evidence is presented at trial, extremely limited authority to escalate disposition, *e.g.*, urgent and unforeseen military necessity. UCMJ, art. 47 (former jeopardy); R.C.M. 604(b), 907(b)(2)(C).

C. Recurring mistakes:

1. Advice before the offense (Policy Letters).

Cannot, *e.g.*, suggest reduction and \$500 for NCOs, as a “starting point” for NCOs involved in alcohol-related offenses with no personal or property injury. Base commander published range of appropriate punishments for alcohol offenses, to be “individualized under the guidelines of the UCMJ.” *United States v. Martinez*, 42 M.J. 327 (1995).

See also United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956) (Policy of GCM for soldiers with two prior convictions constitutes unlawful interference with subordinate’s independent discretion).

2. Advice after the offense.

- a. Improper for battalion commander to return request for Article 15 to company commander with comment, “Returned for consideration for action under Special Court-Martial with Bad Conduct Discharge.” *United States v. Rivera*, 45 C.M.R. 582, 583 (A.C.M.R. 1972).

- b. *See United States v. Gerlich*, 45 M.J. 309 (1996). COL bde commander/SPCMCA ordered subordinate (MAJ) to set aside Art. 15 after COL received letter from CG (who had received critical letter from IG) directing reinvestigation. Court set aside findings and sentence, notwithstanding COL’s and MAJ’s claims of continued independence, based on recognized “difficulty of a subordinate ascertaining for himself/herself the actual influence a superior has on that subordinate.”

- c. *But see United States v. Wallace*, 39 M.J. 284 (C.M.A. 1994). Superior learned of additional misconduct by the accused and told subordinate commander, “You may want to reconsider the Article 15 and consider setting it aside based on additional charges.” Court, relying on fully developed record at trial, agreed with trial judge that subordinate “exercised his own independent discretion when he preferred charges.” *Id.* at 286-87.

III. CONVENING AUTHORITY AS ACCUSER.

- A. Accuser is “person who signs and swears charges, any person who directs the charges nominally be signed and sworn to by another and any person who has an interest other than an official interest in the prosecution of the accused.” UCMJ art. 1(9).
 1. Test is whether under the circumstances “a reasonable person would impute to [the convening authority] a personal feeling or interest in the outcome. *United States v. Gordon*, 2 C.M.R. 161, 166 (C.M.A. 1952).
 2. Convening authority who possesses **more than an official interest** must forward the charges to a superior competent authority for disposition. UCMJ, art. 22(b), 23(b) (GCM and SPCM respectively); *United States v. Gordon*, 2 C.M.R. 161, 166 (C.M.A. 1952)(GCMCA was victim of burglary); *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992)(accused attempted to blackmail GCMCA); *United States v. Dingis*, 48 M.J. ____ (1998). *Dubay* hearing ordered to determine whether SPCMCA, who forwarded case to GCMCA with recommendation for GCM, had sufficient personal interest in the case to be disqualified as a convening authority.
- B. Exceptions:
 1. Violations of general regulations. *United States v. Doyle*, 26 C.M.R. 82, 85 (C.M.A. 1958).
 2. Article 15s.
 3. Summary Courts-Martial. R.C.M. 1302(b).

- C. Disqualified SPCMCA must disclose disqualification even when forwarding charges to GCMCA with recommendation for GCM. *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994).

IV. INFLEXIBLE ATTITUDE MAY DISQUALIFY CONVENING AUTHORITY.

- A. Pretrial (generally not disqualified).
 - 1. Pretrial referral is a prosecutorial function, not a quasi-judicial function. *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982).
 - 2. *United States v. Treakle*, 18 M.J. 646, 654-55 (A.C.M.R. 1984) (“We do not agree . . . that a convening authority can be deprived of his statutory power to convene courts-martial and refer charges to trial based on lack of judicial temperament”).
 - 3. *United States v. Villareal*, 52 M.J. 27 (1999). Pre-referral transfer of jurisdiction to a neutral GCMCA insulated case from unlawful command influence, after initial GCMCA withdrew from pre-trial agreement (PTA) following phone-call with Chief of Staff of higher command.
- B. Post-trial.
 - 1. Accused is entitled “as a matter of right to a careful and individualized review of his sentence at the convening authority level. It is the accused’s first and perhaps best opportunity to have his punishment ameliorated and to obtain the probationary suspension of his punitive discharge.” *United States v. Howard*, 48 C.M.R. 939, 944 (C.M.A. 1974).
 - 2. The presence of an inelastic attitude suggest that a convening authority will not adhere to the appropriate legal standards in the post-trial review process and that he will be inflexible in reviewing convictions because of his predisposition to approve certain sentences. *United States v. Fernandez*, 24 M.J. 77, 79 (C.M.A. 1987)

V. COURT MEMBER SELECTION.

- A. Article 25 Criteria. The **convening authority** chooses court members based on criteria of Article 25, UCMJ: age, education, training, experience, length of service and judicial temperament.

United States v. White, 48 M.J. 251 (1998). Convening authority's memo directing subordinate commands to nominate "best and brightest staff officers," and that "I regard all my commanders and their deputies as available to serve as members" did not constitute court packing.

- B. Staff Assistance.

1. Staff and subordinate assistance in compiling a list of eligible court members is permissible. *United States v. Gaspard*, 35 M.J. 678 (A.C.M.R. 1992).
2. Commander must beware, however, of subordinate nominations not in accordance with Article 25. *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991)(improper for Division Deputy AG to develop list consisting solely of nominees who were supporters of "harsh discipline").
 - a. *United States v. Benson*, 48 M.J. 734 (A.F. Ct. Crim. App. 1998). Memorandum from SPCMCA directing subordinate commands to nominate only E-7s and above constituted impermissible shortcut for Article 25(b) criteria.
 - b. *United States v. Upshaw*, 49 M.J. 111 (1998) Court concludes that the accused, an Air Force Tech Sergeant (E-6), was not prejudiced by an honest mistake that resulted in the exclusion of E-6s and below from the list of court-martial nominees. At trial, the defense counsel claimed jurisdictional defect, but failed to demand selection of new members, and failed to allege unlawful command influence, after the military judge denied his jurisdiction motion.

- C. Replacement of panel also requires that the convening authority use **only** Article 25 criteria. Even then, the convening authority must avoid using improper motives or creating the appearance of impropriety. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986) (“the history of [art. 25(d)(2)] makes clear that Congress never intended for the statutory criteria for appointing court members to be manipulated [to select members with intent to achieve harsh sentences]”); *United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991) (replacement of panel because of “results that fell outside the broad range of being rational”).

VI. NO OUTSIDE PRESSURE.

- A. Education: AR 27-10, para. 5-10c. “Court members . . . may never be oriented or instructed on their immediate responsibilities in court-martial proceedings except by . . . [t]he military judge. . . .” *See also* UCMJ, art. 37(a) and R.C.M. 104 concerning permissible education.
- B. Command policy in the courtroom.
 - 1. Military judge’s sentencing instruction, which related Army policy regarding use of illegal drugs, implicated unlawful command influence concerns and constituted plain error which was not waived by the accused’s failure to object. *United States v. Kirkpatrick*, 33 M.J. 132 (C.M.A. 1991).
 - 2. *United States v. Youngblood*, 47 M.J. 342 (1997). Staff meeting at which Wing commander and SJA shared perceptions of how previous subordinate commanders had “underreacted” to misconduct created “implied bias” among three senior court members in attendance.
- C. In the deliberation room.

Improper for senior ranking court members to use rank to influence vote within the deliberation room, *e.g.*, to coerce a subordinate to vote in a particular manner. Discussion, Mil. R. Evid. 606; *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985).

D. Command interference with the power of the judge.

United States v. Tilghman 44 M.J. 493 (1996). Unlawful command interference when commander placed accused into pretrial confinement in violation of trial judge's ruling. Trial counsel asked the military judge to place the accused in pretrial confinement overnight. The military judge determined no grounds existed for pretrial confinement and declined to order accused into confinement. Later the same day, the group commander ordered the accused into confinement overnight. Remedy: 18 months credit ordered against accused's sentence.

VII. WITNESS INTIMIDATION.

A. Direct attempts to influence witnesses.

1. *United States v. Gleason*, 43 M.J. 69 (1995). After hearing incriminating tape of SGM, linking him to contract killer, battalion commander (LTC) made clear he believed accused was guilty, characterized TDS as "enemy" and made clear that witnesses should not testify on SGM's behalf (none did). Court found that command influence infected entire process, overturning sentence AND conviction.
2. *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987). Chain of command briefed members of the command before trial on the "bad character" of the accused. During trial, the 1SG "ranted and raved" outside the courtroom about NCOs condoning drug use. After trial, NCOs who testified for the accused were told that they had "embarrassed" the unit. Court found UCI necessitated setting aside findings and sentence.
3. *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994): An officer witness for the accused testified that members of the Junior Officers Protection Association pressured him not to testify. A petty officer also was harassed and advised not to get involved. Finding: unlawful command influence with regard to the petty officer. No command influence with regard to the officer, because JOPA lacked "the **mantle of command authority;**" instead unlawful interference with access to witnesses. Courts increasingly cite this case as one of UCI landmarks.

4. *United States v. Plumb*, 47 M.J. 771 (A.F. Ct. Crim. App. 1997). Investigation of Air Force OSI special agent for fraternization was worst in 90 years of service by appellate court; “fragrant with odor of government misconduct” and “rife with witnesses . . . who were targets of unlawful command influence.” Findings and sentence set aside.

B. Indirect or unintended influence. The most difficult and dangerous areas are those of communications, perceptions, and possible effects on the trial, despite good intentions.

*See *United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), *aff'd*, 23 M.J. 151 (C.M.A. 1986). CG addressed groups over several months on the inconsistency of recommending discharge level courts and then having leaders testify that the accused was a “good soldier” who should be retained. The message received by many was “don’t testify for convicted soldiers.” Accordingly, these comments unlawfully pressured court-martial members and witnesses.

VIII. PRETRIAL PUNISHMENT MAY RAISE UNLAWFUL COMMAND INFLUENCE.

A. Mass Apprehension. *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987). Berating and humiliating suspected soldiers utilizing a mass apprehension in front of a formation found to be unlawful command influence (attempt to induce severe punishment) and unlawful punishment. Violation of UCMJ, art. 13; returned for sentence rehearing.

B. Pretrial Humiliation. *United States v. Stamper*, 39 M.J. 1097 (A.C.M.R. 1994). Comments made by unit commander in front of potential witnesses that accused was a thief did not constitute unlawful command influence; no showing that any witnesses were persuaded or intimidate from testifying. It did, however, violate Article 13.

IX. INDEPENDENT DISCRETION OF MILITARY JUDGE.

A. Prohibition: “No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . .” UCMJ, art. 37(a).

B. Efficiency Ratings: “[N]either the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge.” UCMJ art. 26(c).

C. Questioning sentences.

United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976). Commander and SJA inquiries which question or seek justification for a judge’s decision are prohibited.

D. Subtle pressures.

1. Improper for DSJA to request that the senior judge telephone the magistrate to explain the seriousness of a certain pretrial confinement issue. *United States v. Rice*, 16 M.J. 770 (A.C.M.R. 1983).

2. *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991). Senior judge’s letter, written to increase sentence severity, subjected judges to unlawful command influence.

X. RAISE ISSUE IMMEDIATELY.

A. Remedial actions may be taken:

1. Before trial.

a. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1988). In response to 1SG’s criticism that those who testify on behalf of drug offenders contravene Air Force policy, the command instructed all personnel that testifying was their duty if requested as defense witnesses and transferred the 1SG to eliminate his access to the rating process.

- b. *United States v. Rivers*, 49 M.J. 434 (1998) Corrective action by military judge at trial overcame three allegations of unlawful command influence (UCI); CG's command memo – “no place in our Army for illegal drugs **or for those who use them;**” Company Commander twice told soldiers to “stay away from those involved with drugs;” 1SG issued rights warnings to four defense witnesses prior to interview.
- c. *United States v. Biagase*, 50 M.J. 143 (1999) provide excellent examples of corrective action taken by the government to overcome acts of unlawful command influence.

2. At trial. *United States v. Giarratano*, 22 M.J. 388, 399 (C.M.A. 1986). Automatic challenges for cause against those in the unit and no unfavorable character evidence permitted against the accused. GCMCA disqualified from taking action in case.

3. Post-trial.

R.C.M. 1102: Anytime before authentication or action the military judge or convening authority respectively may direct a post-trial session to resolve any matter which affects the legal sufficiency of any findings of guilty or the sentence.

United States v. Bradley, 51 M.J. 437 (1999) After *Dubay* hearing, the court was satisfied that the SJA did not commit UCI:

4. On appeal.

a. New recommendation and action ordered. *United States v. Howard*, 48 C.M.R. 939 (C.M.A. 1974).

b. *DuBay* hearing ordered. *United States v. Madril*, 26 M.J. 87 (C.M.A. 1988).

c. Findings and sentence overturned.

- B. Remedial action may not work. Extremely important to litigate (at the trial court level) the adequacy of remedial actions.

XI. YOUR CONCERNS AS A NEW JUDGE ADVOCATE.

- A. Prevention.
 - 1. OPDs, staff calls, candid conversations.
 - 2. Coaching, preparing commanders.
- B. Detection.
- C. Litigation.
- D. Get bosses involved when you smell smoke.
- E. Remember:
 - 1. Mantle of command authority.
 - 2. Dispute over whether Art. 37 applies to *accusative* stage.
 - 3. UCI frequently correctable when (a) detected early, and (b) appropriate corrective measures are applied.

XII. CONCLUSION.

**THE 10 COMMANDMENTS
OF
UNLAWFUL COMMAND INFLUENCE**

- COMMANDMENT 1: THE COMMANDER MAY NOT ORDER A SUBORDINATE TO DISPOSE OF A CASE IN A CERTAIN WAY.**
- COMMANDMENT 2: THE COMMANDER MUST NOT HAVE AN INFLEXIBLE POLICY ON DISPOSITION OR PUNISHMENT.**
- COMMANDMENT 3: THE COMMANDER, IF ACCUSER, MAY NOT REFER THE CASE.**
- COMMANDMENT 4: THE COMMANDER MAY NEITHER SELECT NOR REMOVE COURT MEMBERS IN ORDER TO OBTAIN A PARTICULAR RESULT IN A PARTICULAR TRIAL.**
- COMMANDMENT 5: NO OUTSIDE PRESSURES MAY BE PLACED ON THE JUDGE OR COURT MEMBERS TO ARRIVE AT A PARTICULAR DECISION.**
- COMMANDMENT 6: WITNESSES MAY NOT BE INTIMIDATED OR DISCOURAGED FROM TESTIFYING.**
- COMMANDMENT 7: THE COURT DECIDES PUNISHMENT. AN ACCUSED MAY NOT BE PUNISHED BEFORE TRIAL.**
- COMMANDMENT 8: RECOGNIZE THAT SUBORDINATES AND STAFF MAY “COMMIT” COMMAND INFLUENCE THAT WILL BE ATTRIBUTED TO THE COMMANDER, REGARDLESS OF HIS KNOWLEDGE OR INTENTIONS.**
- COMMANDMENT 9: THE COMMANDER MAY NOT HAVE AN INFLEXIBLE ATTITUDE TOWARDS CLEMENCY.**
- COMMANDMENT 10: IF A MISTAKE IS MADE, RAISE THE ISSUE IMMEDIATELY.**

