

CHAPTER 7

SENIOR OFFICER LEGAL ORIENTATION

UNLAWFUL COMMAND INFLUENCE

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UNLAWFUL COMMAND INFLUENCE

Outline of Instruction

I. INTRODUCTION.

II. REFERENCES:

1. Manual for Courts-Martial, United States, 1984 (2002 ed.) [hereinafter MCM).
2. Uniform Code of Military Justice [hereinafter UCMJ], arts. 1, 25, 37, 98, 134 paragraph 96a.

III. KEYS TO UNDERSTANDING UNLAWFUL COMMAND INFLUENCE.

1. Commander as a quasi-judicial authority.
2. Complete control under one person.
3. Responsibility for unit discipline v. purity of system.
4. Actual **and** apparent unlawful command influence. Looks can kill.
5. Not just a commander's problem (*e.g.*, staff members, NCOs, JAGs).
6. Different way of doing business.

IV. WHAT'S AT STAKE?

1. Dismissal of charges.

2. Right to fair trial.
3. Morale and Discipline.
4. Self-preservation.
5. Our system of military justice as we know it.

V. CURRENT ISSUES.

- A. Congressional Interest.
- B. Deployments – Split ops/rear detachment.
- C. Over-management.
- D. Vision Statements/Transition Briefings.
- E. E-mail trail.
- F. Slang/Lingo.
- G. High-Profile Cases.
 1. The battle versus the war.
 - a) Press wants to hear it from “the commander” or “the Pentagon.”
 - b) Increasing desire within the military to tell the “military’s story.”
 - c) More talk = more potential UCI issues.

- d) Do we keep quiet and win the battle of UCI, but lose the war over the military's public image?
2. UCI and the associated administrative (e.g. safety, collateral) investigation.
- a) Commander often exerts greater control over scope and clarity of these types of investigations. Perhaps greater sense of responsibility and ownership. But ...
 - b) May spill over into court-martial decision.
 - c) More battles and wars.
 - (1) Avoid the battle of UCI by completely cutting off comms between commanders.
 - (2) Is it at the expense of losing the war of ensuring a complete and thorough investigation?
 - d) Does approval of investigator's findings and recommendations constitute pre-judgment of guilt?
3. Preventive Measures.
- a) 32b Investigating Officer: Consider a neutral Judge Advocate or Military Judge in lieu of a line officer to reduce the threat of UCI.
 - b) Consider having a more senior level commander prefer charges.
 - c) Command Communications.
 - (1) Completely prohibit any discussion between superior and subordinate commands?

- (2) Have JAG present for any discussions between commanders.
- d) Article 6, UCMJ. Congress authorized legal tech channel commo. Safest (?) commo channel between different levels of command
- e) Refresher UCI and military justice training.
 - (1) Do it ASAP, before the press comes looking.
 - (2) To all levels of command and to all members of the High Profile Battlestaff.
- f) Deliberately open up our process to the public and the Defense.
 - (1) We have nothing to hide.
 - (2) But everyone must know and understand their roles and responsibilities.

VI. CRITICAL AUDIENCES.

1. Subordinate Commanders.
2. Court members.
3. Potential Witnesses.
4. Media?
5. Congress?

VII. INDEPENDENT DISCRETION VESTED IN EACH COMMANDER.

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.

A. **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); 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). It is permissible for superior commander to prefer charge for a major offense even though accused already received Art. 15 for the offense.

B. Recurring mistakes:

1. Advice before the offense (Policy Letters).

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

Example: Policy of predetermined forfeitures and reductions based on DUI, injuries, blood alcohol level and rank. *United States v. Martinez*, 42 M.J. 327, 331-334 (1995).

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 (A.C.M.R. 1972).
 - b) But it was not improper in another case for the superior who learned of additional misconduct by the accused, to tell a 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.” *United States v. Wallace*, 39 M.J. 284 (C.M.A. 1994). *But see United States v. Gerlich*, 45 M.J. 309 (1996).

VIII. CONVENING AUTHORITY AS ACCUSER.

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.”

- A. 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). *See also United States v. Shelton*, 26 M.J. 787 (A.F.C.M.R. 1988).
- B. Convening authority that 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).
- C. Exceptions:
 1. Violations of general regulations.

2. Article 15s.
3. Summary Courts-Martial.

IX. CONVENING AUTHORITY MUST NOT EXHIBIT AN INFLEXIBLE ATTITUDE PRE OR POST-TRIAL

- A. Pre-trial. As a judicial authority, the convening must consider each case **individually** on its own merits.
- B. Post-trial. The convening authority **may** approve or disapprove findings, and suspend or reduce sentences. As a judicial appellate authority, the convening authority has a duty to impartially review military justice actions. An inflexible attitude towards clemency necessitates a loss of command/judicial authority.
- C. 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).

X. 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.

- B. Staff Assistance.

Commander must beware 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”).

- 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.

1. *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.).
 2. *United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991) (improper for CG to replace panel because of “results that fell outside the broad range of being rational”).
- D. Deliberate exclusion of unit personnel. Convening authority’s motive is critical.

United States v. Simpson, 55 M.J.674 (Army Ct. Crim. App. 2001). Convening authority systemically excluded members from accused’s unit. Based on his knowledge of scope of investigation into sexual misconduct among trainees and cadre AND the difficulty in finding court members from the unit not tainted by exposure to the investigation. Army court calls this good judgment not error.

XI. NO OUTSIDE PRESSURE ON MEMBERS.

- 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. In the deliberation room.
1. Comments by SJA in staff meeting held shortly before trial, that previous court-members had “under-reacted” and “shirked leadership responsibilities,” and comment from CG that he had sent a letter to that officer’s gaining command offering his opinion that his career had “peaked,” unlawfully tainted the court members in attendance. *United States v. Youngblood*, 47 M.J. 338 (1997).
 2. Commander, during staff meeting, indicated his dissatisfaction with the results of courts-martial. Four officers attending the meeting sat on court-martial panel that day. SJA made full disclosure, resulting in

extensive voir dire of four officers; one of four officers was excused on peremptory challenge. Additional allegation was that president, one of the four officers at the meeting, improperly exerted superiority in rank during the sentence deliberations. *United States v. Reynolds*, 40 M.J. 198, 200 (1994).

3. 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) (allegation that senior officer cut off discussion by junior members, remanded to determine if senior officer used rank to “enhance” an argument).

C. Mentoring.

1. The “black letter” rule is expressed in *United States v. Rogers*, CM 442663 (A.C.M.R. 29 March 1983) (unpub.): “While a commander may not preclude subordinate commanders from exercising their independent judgment, he may express his opinion and provide guidance to them. The fine line between lawful command guidance and unlawful command control is determined by **whether the subordinate commander**, though he may give consideration to the policies and wishes of his superior, **fully understands and believes that he has a realistic choice to accept or reject them.**”
2. *United States v. Stoneman*, 57 M.J. 35 (2002). Bde Cdr sent email to subordinate commanders "declaring war on all leaders not leading by example." Email also stated the following: "No more platoon sergeants getting DUIs, no more NCOs raping female soldiers, no more E7s coming up 'hot' for coke, no more stolen equipment, no more approved personnel actions for leaders with less than 260 on the APFT,, -- all of this is BULLSHIT, and I'm going to CRUSH leaders who fail to lead by example, both on and off duty." At a subsequent leaders' training session, Cdr reiterated his concerns. After consulting with SJA, Cdr issued a second email to clarify the comments in the first. Cdr stated that he was expressing his concerns about misconduct, but emphasized that he was not suggesting courses of action to subordinates, and that each case should be handled individually and appropriately in light of all circumstances. He specifically addressed duties as a court-martial panel member and witness. At trial, defense counsel initially sought to stay proceedings until a new panel could be selected. After denial of this request, defense counsel challenged all panel members from the brigade based on implied bias. After

extensive voir dire, MJ denied the challenge based on the members' statements that they thought the comments were intemperate and that they would not be swayed by anything said by the SPCMCA. **HELD: CAAF sent case back** for rehearing to determine if the facts constituted UCI and whether the proceedings were tainted.

3. How to do it right.
 - a) Discuss generic thought process for deciding how to respond to misconduct (hint: use R.C.M. 306(b) factors).
 - b) Reinforce independent discretion of subordinate commanders.
 - c) JA must be present. Consider team approach.
 - d) Timing is critical.

XII. WITNESS INTIMIDATION.

- A. Direct attempts to influence witnesses.
 1. Example: Battalion commander characterized TDS as “enemy,” TC was “friend,” discouraged testimony for accused. Retraction ineffective. Findings and sentence set aside. *United States v. Gleason*, 43 M.J. 69 (1995).
 2. Example: The 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 unlawful command influence necessitated setting aside findings of guilt and the sentence. *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987).
- 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.

1. Example: 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. *See United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), *aff’d*, 23 M.J. 151 (C.M.A. 1986).
2. Command policies versus military justice policies: Example: When two witnesses were relieved of drill sergeant duties immediately after testifying favorably for the accused, the hesitancy of potential witnesses to testify in a similar case was evidence of unlawful command influence. *United States v. Jameson*, 33 M.J. 669 (N.M.C.M.R. 1991); *United States v. Jones*, 33 M.J. 1040 (N.M.C.M.R. 1991).

XIII. PRETRIAL PUNISHMENT MAY RAISE UNLAWFUL COMMAND INFLUENCE.

- A. Mass Apprehension. 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. *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987).
- B. Pretrial Humiliation. 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 Art. 13. *United States v. Stamper*, 39 M.J. 1097 (A.C.M.R. 1994).

XIV. 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. 26c.

- C. Questioning the military judge’s authority.
 - 1. *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. Remedy: 18 months credit ordered against accused’s sentence.
 - 2. *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976). Commander and SJA inquiries that question or seek justification for a judge’s decision are prohibited.

XV. NON-COMMANDER COMMAND INFLUENCE.

- A. **Staff.** *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”). Chief of Staff and G-3 who ignored SJA advice. *United States v. Rivers*, 49 M.J. 434 (1998).
- B. **NCOs.** *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987). 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.
- C. **SJA.** Comments by SJA in staff meeting held shortly before trial, that previous court-members had “underreacted” and “shirked leadership responsibilities unlawfully tainted the court members in attendance. *United States v. Youngblood*, 47 M.J. 338 (1997).
- D. **Trial counsel** who advise company, battalion, and brigade level commanders may be unwitting conduits of UCI.

XVI. RAISE ISSUE IMMEDIATELY; REMEDIAL ACTIONS ARE POSSIBLE.

- A. Before trial.
 - 4. Investigate to determine scope of impact.
 - 5. Brief witnesses of duty to testify. *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 contravenes 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.
 - 6. Rescission or clarification letters and pronouncements. *United States v. Rivers*, 49 M.J. 434 (1998).
 - 7. Transfer offending actors.
 - 8. Reprimand or relieve offending officer/NCO. *United States v. Rivers*, 49 M.J. 434 (1998).
 - 9. Dismiss and re-prefer charges.
 - 10. Consider a pre-trial agreement that waives the issue in return for favorable sentence cap. *United States v. Weasler*, 43 M.J. 15 (1995).
- B. At trial (judge-directed).
 - 11. 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. *United States v. Giarratano*, 22 M.J. 388, 399 (C.M.A. 1986).
 - 12. *United States v. Clemons*, 35 M.J. 770, 773 (A.C.M.R. 1992):

- a) No government aggravation witnesses.
- b) Government not allowed to attack accused's credibility by opinion or reputation testimony.
- c) Defense given wide latitude with witnesses.
- d) Accused allowed to testify about what he *thought* witnesses might have said on merits or E&M.

C. Post-trial.

R.C.M. 1102: Any time before authentication of the record of trial 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.

- 13. New recommendation and action ordered. *United States v. Howard*, 48 C.M.R. 939 (C.M.A. 1974).
- 14. *DuBay* hearing ordered. *United States v. Madril*, 26 M.J. 87 (C.M.A. 1988).
- 15. Findings and sentence overturned.

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

XVII. 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, IF ACCUSER, MAY NOT REFER THE CASE.**
- COMMANDMENT 3: THE COMMANDER MUST NOT HAVE AN INFLEXIBLE POLICY ON DISPOSITION OR PUNISHMENT OR CLEMENCY.**
- 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 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: COMMANDERS MAY NOT QUESTION, CHALLENGE, OR OTHERWISE ATTEMPT TO INFLUENCE THE MILITARY JUDGE.**
- COMMANDMENT 9: STATEMENTS AND ACTIONS OF STAFF AND SUBORDINATE COMMANDERS AND NCOs MAY CONSTITUTE UNLAWFUL COMMAND INFLUENCE.**
- COMMANDMENT 10: IF A MISTAKE IS MADE, RAISE THE ISSUE IMMEDIATELY.**

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