Unlawful Command Influence—Still with Us; Perspectives of the Chair in the Continuing Struggle Against the "Mortal Enemy" of Military Justice

Lieutenant Colonel Mark L. Johnson
Professor and Chair, Criminal Law Department
The Judge Advocate General's School
Charlottesville, Virginia

Introduction

The past term brought no cases from the Court of Appeals for the Armed Forces (CAAF) to the area of unlawful command influence. However, there were several service court cases that illustrate the continuing struggle with unlawful command influence (UCI) and the need for vigilance from everyone associated with the military criminal justice system. This article will focus on two of those cases,[1] and discuss some recurring problems in the field. These cases and other examples serve as reminders that unlawful command influence is still the mortal enemy of military justice,[2] and that all military justice practitioners must prevent even the appearance of impropriety in this area.[3] They also demonstrate the effects of deliberate planning to guard against inappropriate influence on those participating in the military justice process, effective remedial action when confronted with actual or perceived interference, and the need for training at all levels of command and the legal community.

Commanders and Issues Surrounding "Type Two" and "Type Three" Accusers

United States v. Ashby[4]

Ashby involves the tragic mishap flight of an EA-6B "Prowler" aircraft engaged in a low-level training flight outside of Aviano, Italy in February 1998.[5] On the final leg of the flight, the aircraft flew well below established minimum altitudes, severing two cables carrying a gondola car with twenty passengers.[6] The gondola car plummeted approximately 365 feet, killing everyone on board.[7] Despite serious damage to the aircraft, the crew survived after conducting a successful emergency landing at the NATO air base in Aviano, Italy.[8] A command investigation board (CIB) was convened to investigate the tragedy and senior leaders were intimately involved with the progress and direction of that investigation.[9] Specifically, then Lieutenant General (LTG) Pace, the general court-martial convening authority (GCMCA), had extensive contact with the board president as the investigation unfolded.[10]

Captain (Capt.) Ashby was the pilot of the aircraft on the day of the mishap and ultimately faced two general courts-martial.[11] At his first general court-martial Capt. Ashby was charged with numerous offenses, including: dereliction of duty; negligently suffering military property to be damaged; recklessly damaging non-military property; twenty specifications of involuntary manslaughter; and twenty specifications of negligent homicide in violation of Articles 92, 108, 109, 119, and

---

[1] United States v. Ashby, No. 200000250, 2007 WL 1893626 (N-M. Ct. Crim. App. June 27, 2007); United States v. Bisson, No. 20060097, WL 2005077 (N-M. Ct. Crim. App. July 9, 2007). Although these cases are unpublished and therefore not precedent, they provide a useful medium to discuss recurring issues in complex and high-profile cases as well as witness intimidation.

[2] United States v. Lewis, 63 M.J 405, 407 (2006) (quoting United States v. Gore, 60 M.J. 178, 178 (2004) (quoting United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986))).

[3] "The 'appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.'" *Id.* (quoting United States v. Simpson, 58 M.J. 368, 374 (2003) (quoting United States v. Stoneman, 57 M.J. 35, 42–43 (2002))).

[4] *Ashby*, 2007 WL 1893626. For a similar discussion of these issues, see the companion case of *United v. Schweitzer*, No. 200000755, 2007 WL 1704165 (N-M. Ct. Crim. App. May 10, 2007).

[5] *Ashby*, 2007 WL 1893626, at *1.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at *20–23.

[10] *Id.*

[11] *Id.* at *1.

134, UCMJ.[12] Captain Ashby was ultimately acquitted of these offenses on 4 March 1999.[13] At his second general court-martial Capt. Ashby faced two specifications of conduct unbecoming an officer under Article 133, UCMJ, for conspiring to obstruct justice and ultimately obstructing justice for secreting a videotape and thereafter participating in its destruction.[14] (Capt. Ashby had earlier refused joinder after arraignment for these offenses).[15] Contrary to his pleas, Capt. Ashby was convicted of both offenses on 10 May 1999, and sentenced to six months confinement, total forfeitures, and a dismissal.[16]

The first issue addressed in this article is whether the GCMCA improperly convened Capt. Ashby's court-martial because he had nominally directed that the charges and specifications be signed and sworn by another,[17] making him a "type two" accuser in violation of Article 1(9), Uniform Code of Military Justice (UCMJ).[18] The second and closely related issue is whether the GCMCA was disqualified from serving as the convening authority because he had an "other than official interest" in prosecuting the appellant, making him a "type three" accuser.[19]

The court held that the convening authority was not a "type two" accuser.[20] There was no credible evidence that his actions, words, or official correspondence "directed" that charges nominally be signed and sworn to by another.[21] The fact that the GCMCA (then LTG Pace) was intimately involved with, and ultimately endorsed, the findings and recommendations of a CIB did not make him a type two accuser.[22] "We find nothing improper in Gen Pace consulting with his various legal advisors and commenting in his endorsement to the CIB (a strictly administrative investigation) upon criminal charges that might logically flow from this catastrophic mishap."[23]

Neither did the court find that the convening authority was a "type three" accuser.[24] Nothing in the record indicates that he acted with anything other than an official interest in this case.[25] General Pace was extensively and understandably involved in this high-profile case, but only to review the clarity and not the substance of the findings.[26] The CIB was an administrative investigation, and not a proceeding under the UCMJ.[27] General Pace had no input on selecting the CIB members (other than the President) and never discussed the nature, content or preferral of charges with the President of the CIB.[28] General Pace made it clear on many occasions that the findings and recommendations must be those of the CIB.[29] "He was adamant in his sworn testimony that he never directed any member of the CIB to arrive at specific conclusions, nor did he direct that any finding of fact, opinion, or recommendation be included, changed, or deleted."[30]

---

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at *20. Especially troubling to Capt. Ashby is that the charges preferred against him were those recommended in Gen Pace's first endorsement to the CIB. *Id.*

[18] *Id.* ("As previously mentioned, if Gen Pace had been a 'type two' accuser he would have been obligated under Article 22(b), UCMJ, to forward the case for disposition by a 'superior competent authority.'").

[19] *Id.* at *22.

[20] *Id.* at *21.

[21] *Id.*

[22] *Id.* ("According to the military judge, the fact that the charges ultimately preferred against the appellant mirrored those reflected in Gen Pace's draft and final endorsements was simply a by-product of lawyers . . . working carefully and continuously together throughout the CIB to hone proposed charges to what the evidence actually supported.").

[23] *Id.*

[24] *Id.* at *22. ("The test for determining whether a convening authority is a 'type three' accuser is whether he is 'so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter.'") (citing United States v. Dinges, 55 M.J. 308, 312 (2001)).

[25] *Id.* at *23.

[26] *Id.* ("We can find no fault in Gen Pace's desire to ensure that the CIB report was thorough, clear, concise, and devoid of content unintelligible to the wide and general audience that would no doubt be scrutinizing it.").

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

Finally, the court held that Capt. Ashby did not demonstrate any prejudice from the "accuser" issues in this case.[31] The offenses to which he was convicted were not contemplated at the time that the CIB was conducted, nor were they mentioned in the CIB endorsement.[32] "Even if Gen Pace was disqualified as an 'accuser' on the original charges, we can fathom no reason why he should be similarly disqualified in regard to the additional offenses (the only offenses before this court)."[33]

Actual and Apparent UCI—GCMCA Involvement in the Investigative Process and "Chilling" Statements Made by Senior Leaders

The next and more difficult issues faced by the court in *Ashby* concerned actual and apparent UCI. First, did the GCMCA commit UCI in this case through his extensive involvement in the Command Investigation Board conducted prior to the courts-martial?[34] Second, did the comments and actions of senior leaders constitute "public condemnation," tending to discourage defense witnesses, and creating a "chilling environment" in regard to fundamental fairness and due process for Capt. Ashby?[35] Specifically, the court examined several allegations, including: (1) comments made at "all officers" meetings insinuating that flight crews were breaking the rules;[36] (2) a collateral investigation into whether there was a systemic problem with flight crew violations;[37] (3) a meeting between the Commandant of the Marine Corps and a Marine aviator in which the Commandant pledged his support for the crew but insinuated they would have to be disciplined;[38] (4) comments made by the CIB president that were inaccurate and a statement that the "cause of the mishap was aircrew error";[39] and (5) emails to the mishap crew and their counsel asking them to submit discovery requests through the chain of command rather than submitting them to squadron personnel directly.[40]

Using the factual analysis previously discussed is this case the court noted the lack of any credible evidence to show an intent or motive on the part of the GCMCA to influence the CIB, the Article 32 Investigation, or the ultimate court-martial.[41] In particular, General Pace did not direct that specific charges be brought against Capt. Ashby.[42] Further, the court was satisfied beyond a reasonable doubt that the GCMCA's actions did not constitute either actual or apparent UCI.[43] The court also held there was no improper conduct or UCI stemming from the actions of senior leaders referenced in this case.[44] First, none of the statements or investigations sought to attribute criminal wrongdoing to the mishap crewmembers.[45] Second, there was no attempt to impede access to witnesses or evidence.[46] Third, none of the actions or statements have been shown to

---

[31] *Id*. at *24.

[32] *Id*.

[33] *Id*.

[34] *Id*. at *25.

[35] *Id*.

[36] *Id*. During these meetings General Ryan allegedly read inflammatory articles concerning the tragedy and suggested they were caused by aircrew error, and insinuated that flight crews routinely flew below minimum flight levels. *Id.*

[37] *Id*. at *26. During this investigation every crewmember in the "Prowler" community at Cherry Point was administered Article 31(b), UCMJ, warnings; some perceived retribution against those unwilling to cooperate. *Id*.

[38] *Id*.

[39] *Id*. These remarks were made at a press conference on 12 March 1998. *Id.*

[40] *Id*. at *27.

[41] *Id*. at *30.

[42] *Id*.

[43] *Id*. Throughout their analysis the court applied the framework presented in the seminal case of *United States v. Biagase*, 50 M.J. 143 (1999). The primary focus under *Biagase* is the duty of the military judge to allocate burdens between the prosecution and the defense. *Id.* To discharge this duty, the military judge engages in a two-step process. *Id*. at 150–51. First, the defense must raise the issue of unlawful command influence. *Id.* The test is some evidence of facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings. *Id.* The burden then shifts to the government which has three options: The government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence. *Id.* On appeal, an appellant must show: (1) facts which, if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness. *Id*.

[44] *Ashby*, 2007 WL 1893626, at *30.

[45] *Id*.

[46] *Id*.

have had any direct or negative impact upon Capt. Ashby's court-martial.[47] Fourth, Capt. Ashby has not demonstrated any prejudice from referral of the additional charges to trial after he was acquitted of all original charges.[48] Finally, Capt. Ashby has presented no credible evidence that any substantial segment of the general population suffered any loss of confidence in the military justice system.[49] The court held that Capt. Ashby failed to raise a prima facie case of actual or apparent UCI.[50] In addition, there was no nexus between these acts and any unfairness in his court-martial.[51] Even if the issue was raised, the court found beyond a reasonable doubt that the actions did not constitute UCI and that the findings and sentence were unaffected.[52]

There are several practical lessons for practitioners in this case. First, military cases are more likely to receive intense media scrutiny than ever before. Commanders at all levels must be mindful of their role in our system of justice and be careful not to comment inappropriately on pending cases in their command. Judge Advocates have a central role and responsibility to ensure that commanders discharge those responsibilities correctly; this is done through proper advice and recurring training.

Practitioners must also be aware that any role of the GCMCA will be thoroughly scrutinized, and if necessary Staff Judge Advocates must prepare them for the possibility of testifying concerning their role in high-profile cases. The testimony of General Pace in *Ashby* was obviously compelling and credible.[53] More importantly, his role in the process was well defined from the beginning of the investigation through the completion of the court-martial. He repeatedly informed members of the CIB that they were to come to their own conclusions, and was careful throughout the formal court-martial proceedings not to influence the disposition of the case.[54] As noted by the Navy-Marine Corps Court of Criminal Appeals, the law is clear that we must safeguard not only a fair trial process but the *perception* of a fair trial process as well.[55]

Finally, the continuing role of the military judge as the "last sentinel" against unlawful command influence must never be underestimated.[56] The service court noted the extensive findings of fact and conclusions of law entered by the military judge, and the great care taken to complete the record in these matters.[57] These findings rightly played an essential role in the court's ultimate holding - an important reminder that trial judges must be mindful of the importance of completing thorough findings of fact and conclusions of law for the benefit of all parties.

---

[47] *Id.*

[48] *Id.* at *31.

[49] *Id.* This standard is a bit broader than that usually employed to determine apparent unlawful command influence today.

> We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus, the appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.

United States v. Lewis, 63 M.J. 405, 415 (2006).

[50] *Ashby*, 2007 WL 1893626, at *31.

[51] *Id.*

> Similarly, in this case, there is no evidence that the actions taken by various senior members of the Marine Corps in response to the gondola tragedy—including statements to the media and measures taken to prevent future mishaps—were intended in any way to influence the appellant's court-martial, or that they had such an effect.

Id.; *see also* United States v. Simpson, 58 M.J. 368 (2003); United States v. Ayers, 54 M.J. 85 (2000).

[52] *Ashby*, 2007 WL 1893626 at *32.

[53] *Id.* at *30.

[54] *Id.* at *23.

[55] *Id.* at *27 (citing *Ayers*, 54 M.J. at 94–95); *see also* United States v. Hawthorne, 22 C.M.R. 83, 87 (C.M.A. 1956) ("This Court has consistently held that any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned."). *Id.*

[56] United States v. Rivers, 49 M.J. 434, 443 (1998).

[57] *Ashby*, 2007 WL 1893626, at *29.

Potential Witness Intimidation and Remedial Actions

United States v. Bisson[58]

A military judge sitting as a special court-martial convicted Private (E-1) Bisson, pursuant to mixed pleas, of violating a lawful general order, drunk on duty, assault consummated by a battery, indecent assault, and indecent language, in violation of Articles 92, 112, 128, and 134, UCMJ.[59] Prior to trial, two members of Private (Pvt) Bisson's unit (a Marine Aviation Logistics Squadron) approached the Aviation Supply Officer (ASO) about offering good military character evidence on Pvt Bisson's behalf.[60] After meeting with his commanding officer,[61] the ASO told the potential witnesses not to provide character statements at that time, but did not tell them when they could provide statements.[62] The potential witnesses "understood this conversation as an order not to testify or provide statements at *any* time and not to assist the appellant."[63] Two days after he learned of this information the commanding officer issued a policy letter titled, "Commanders Intent on Military Justice Matters," emphasizing the right to testify as a witness and that no adverse actions would be taken for doing so.[64] Both of the potential witnesses ultimately provided favorable evidence for Pvt Bisson.[65]

On appeal the court considered whether the remedial actions of the commanding officer removed the taint of unlawful command influence in this case.[66] Ultimately the court held that although unlawful command influence was raised in this case, the chain of command's remedial actions effectively remedied any taint.[67] The record demonstrates that following the remedial measures Pvt Bisson received favorable evidence not only from the affected witnesses but others as well.[68] The court was ultimately convinced beyond a reasonable doubt that there was no impact upon the findings and sentence of this court-martial.[69]

This case gives practitioners several important lessons. First, and once again, *Bisson* is illustrative of the need for continual training in the area of unlawful command influence. All servicemembers, especially members of the command, must understand the dangers of unlawful command influence and the strict prohibition against interference with the court-martial process.[70]

---

[58] United States v. Bisson, No. 20060097, WL 2005077 (N-M. Ct. Crim. App. July 9, 2007).

[59] *Id*. at *1.

[60] *Id*. The witnesses were a second lieutenant and gunnery sergeant from Pvt. Bisson's chain of command. *Id.*

[61] *Id*. During this meeting the commanding officer did not order the two Marines not to testify; his concerns appear to have been based on mission accomplishment and accountability. *Id*.

[62] *Id*. at *2.

[63] *Id*.

[64] *Id*. It stated in part, "At no time was my guidance that a member of this command could or should not testify as a witness at a court-martial, to include testifying favorably on behalf of the accused. **There will be no adverse actions taken against any member of this command for participating in the court-martial process**." *Id*. (emphasis in original).

[65] *Id*.

[66] *Id*. at *3–4.

[67] *Id*. at *5.

[68] *Id*.

[69] *Id*. *But see* United States v. Gore, 60 M.J. 178 (2004) (holding where witness interference without benefit of remedial action ultimately led to dismissal of charges with prejudice).

[70] UCMJ art. 37(a) (2008) reads in pertinent part:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter 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 . . . .

Id.

Second, it underscores the age-old danger of the "message received" rather than the "message intended."[71] Commanders must be careful when discussing military justice matters, especially pending cases, always considering the potential effect on witnesses. The importance of this caution is not merely to avoid charges being dismissed, but to ensure a fair trial for the servicemembers under their command. "The exercise of command influence tends to deprive servicemembers of their constitutional rights. If directed against prospective witnesses, it transgresses the accused's right to have access to favorable evidence."[72]

Third, it highlights the importance of early detection and application of remedial measures. The remedial measures enacted in this case were obviously effective and cured any taint of unlawful command influence.[73] Finally, it is a great reminder for defense counsel to remain aggressive in finding and documenting unlawful command influence, and seeking other remedies as appropriate.[74]

Examples from the Field

There are several recurring issues from the field that I see in my capacity as the Chair of the Criminal Law Department, and in my role as the primary instructor in the area of unlawful command influence.

Split Operations

The first trend concerns increasing problems with "split operations" and the need to train Judge Advocates and commanders on the need for separation of advice and control as one unit leaves another for deployment purposes. This is increasingly common as rear detachments are formed that end up processing most of the pending UCMJ actions.[75] If units are separated by specific designation, then the previously higher headquarters must resist the urge to influence the actions left behind. The following portion of an email is the best example of this to date, however numerous anecdotal conversations with members of the Judge Advocate and paralegal communities leads me to believe they are all too common. This is a colloquy between a battalion and company commander, one subordinate to the other in a garrison environment, but at the time of the email in completely separate chains of command:

> You are the Battalion Rear Detachment Commander and as such, are my equivalent back there, executing my guidance and acting in my capacity—not your own. There is no command influence—only you doing what you are told to do by me, as my designated representative. You are not a subordinate element of the battalion but are my "other half" in Ft. . . . .[76]

Obviously, this email is problematic, whether in a deployed environment or not. Even if they were in the correct jurisdictional alignment, the superior commander is clearly affecting the discretion of the subordinate commander in direct contravention of Article 37(a), UCMJ.[77] Just as importantly, this provision directs that "no person subject to this chapter" should engage in or be a party to this conduct.[78] Practitioners should ask themselves how often they do this inadvertently when their higher headquarters deploys; Judge Advocates and paralegals must not "smuggle" unlawful command influence

---

[71] *See generally* United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984), *aff'd*, 23 M.J. 151 (C.M.A. 1986). The GCMCA made comments concerning "consistency" of forwarding charges to a court-martial capable of a punitive discharge, and then testifying favorably for the Soldier. *Id.* Many subordinate commanders interpreted this to mean they should not testify. *Id.* This is the factual background affecting numerous cases, and ending in part with the bedrock UCI opinion of *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986).

[72] *Thomas*, 22 M.J. at 393.

[73] For other cases detailing remedial measures, see *United States v. Southers*, 18 M.J. 795 (A.C.M.R. 1984); *United States v. Clemons*, 35 M.J. 770 (A.C.M.R. 1992); *United States v. Rivers*, 49 M.J. 434 (1998); *United States v. Biagase*, 50 M.J. 143 (1999); and *United States v. Francis*, 54 M.J. 636 (Army Ct. Crim. App. 2000).

[74] *See Treakle*, 18 M.J. 646. "The events outlined above were brought to light primarily through the efforts of members of the United States Army Trial Defense Service, an independent agency with the mission of providing defense services to soldiers." *Id.* at 653 n.5.

[75] It is the author's perception that the practice of leaving most UCMJ actions behind when deploying is widely followed.

[76] E-mail from practitioner in the field, to Lieutenant Colonel Mark Johnson, Professor and Chair, Criminal Law Department, The Judge Advocate General's Legal Ctr. & Sch (TJAGLCS), U.S. Army (8 May 2007, 15:28 EST) (on file with the author).

[77] *See supra* note 70.

[78] *Id.*

from one command to another when "guidance" from that office is no longer appropriate.[79]

Vision Statements and E-mails Concerning Military Justice

The second trend concerns the danger of discussing military justice actions or philosophy in emails or vision statements. In one example typical of many others, a commander used "talking points" to address his major concerns.[80] Among them was the following: "Finally, here are the big things—those things that I will absolutely not tolerate."[81] The commander went on to list moral/ethical violations, abuse of drugs or driving while intoxicated, sexual offenses, inappropriate relationships, and child/spouse abuse.[82] The affect of these statements can be deceiving. What does "absolutely will not tolerate" mean, exactly? Does it mean that this commander has an inflexible policy on disposition for certain Soldiers and certain offenses?[83] Does it mean that Soldiers convicted or even suspected of these offenses have no chance of retention?[84] More importantly, what is the effect of statements like these on subordinate commanders, potential witnesses, and panel members?[85] If not directly influenced, what is the perception of these statements among Soldiers or the general public?[86]

Military justice practitioners should keep in mind several important points from the seminal case in this area, *United States v. Simpson*.[87] First, the court discussed the need for context. "The implication of the phrase 'zero tolerance' to personnel in the military justice process depends on the training and experience of the person hearing the phrase, as well as the specific circumstances of a case."[88] After finding no actual improper influence beyond a reasonable doubt as required by *Biagase*,[89] the court noted, "We emphasize that our conclusions are specific to this case, and that the question whether a 'zero tolerance' policy has been presented in a setting that improperly affected the court-martial process must be addressed on a case-by-case basis."[90] After discussing the extensive remedial actions by the government in this case and the "extensive ventilation" of the issue at trial the court ultimately held there was no apparent unlawful command influence either.[91] After noting again that the holding was based on the specific circumstances of this case, the court added:

> In that regard, we note that senior officials and the attorneys who advise them concerning the content of public statements should consider not only the *needs of the moment*, but also the potential impact of specific comments on the fairness of any subsequent proceedings in terms of the prohibition against unlawful command influence.[92]

---

[79] The danger here is obviously not intentional violation of the prohibitions against UCI, but rather the possibility of a higher headquarters influencing separate convening authority decisions through primary legal advisors.

[80] E-mail from practitioner in the field, to Lieutenant Colonel Mark Johnson, Professor and Chair, Criminal Law Department, TJAGLCS (27 Nov. 2007, 10:04 EST) (on file with author).

[81] *Id.*

[82] *Id.*

[83] For issues surrounding policy letters and remedial actions, see generally *United States v. Rivers*, 49 M.J. 434 (1998). Allegations of unlawful command influence raised concerning division commander's five-page policy letter on physical fitness and physical training which addressed other issues such as weight, smoking, drinking and drugs: "there is no place in our Army for illegal drugs *or for those who use them*." *Id*. at 438 (emphasis added).

[84] *See* United States v. Fowle, 22 C.M.R. 139, 141 (C.M.A. 1956) ("A policy directive may be promulgated to improve discipline; however, it must not be used as leverage to compel a certain result in the trial itself.").

[85] *See generally* United States v. Thomas, 22 M.J. 388 (C.M.A. 1986); *see also* United States v. Grady, 15 M.J. 275, 276 (C.M.A. 1983) ("'A judicial system operates effectively only with public confidence—and, naturally that trust exists only if there also exists a belief that triers of fact act fairly.'" United States v. Stringer, 17 C.M.R. 122 (C.M.A. 1954). This appearance of impartiality cannot be maintained in trial unless the members of the court are left unencumbered from powerful external influences." (citing *Fowle*, 22 C.M.R. at 142)).

[86] "Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with 'eliminating even the appearance of unlawful command influence at courts-martial.'" United States v. Lewis, 63 M.J. 405, 415 (quoting United States v. Rosser, 6 M.J. 267, 271 (C.M.A. 1979)).

[87] 58 M.J. 368 (2003). Unlawful command influence alleged, in part, based upon improper emphasis on zero tolerance policies regarding sexual harassment in the context of a publicized investigation and possible trial of servicemembers for trainee sexual abuse. *Id*. at 375.

[88] *Id.*

[89] *See* United States v. Biagase, 50 M.J. 143 (1999).

[90] *Simpson*, 58 M.J. at 376.

[91] *Id*. at 376–77.

[92] *Id*. at 377 (emphasis added).

Practitioners are thus reminded to consider whether a commander's intent can be met another way, or whether the danger of confusion and apparent influence outweighs the benefit of any discussion at all.[93] If commanders must address these problems they are reminded to talk about the offense, rather than the offender, and the process, rather than the result.[94] The CAAF has never held that a convening authority need be "indifferent to crime."[95] However, when addressing these issues they must be balanced, and not portray an inflexible disposition.[96] If commanders issue troubling policy statements or comment on cases inappropriately, remedial action through the form of explanatory memoranda or retractions will often save the case and maintain the perception of a fair and impartial justice system.[97]

The Military Judge

The third and final example is not a trend (hopefully), but serious and worth comment nonetheless. Recently at a large installation a commander approached a military judge in chambers following a court-martial to discuss the sentence.[98] During this conversation the commander made it clear that he was not happy with the sentence and the problems that the military judge had apparently left him with by not adjudging a discharge.[99] The commander insisted in talking about the sentence despite repeated warnings from the military judge that it was improper to do so.[100] At the Army Chief Trial Judge's direction, a subsequent military judge presided at a post-trial 39(a) session and found that unlawful command influence had been committed.[101] The military judge also found that a judge advocate legal advisor knew of the commander's intent to approach the military judge, and did nothing to stop him.[102] This incident is a stark reminder that continual training of commanders and judge advocates concerning unlawful command influence is absolutely essential.[103] No matter your role as Judge Advocate or paralegal, primary advisor or courtroom observer, in the area of unlawful command influence "everyone is a safety,"[104] and should immediately seek guidance or clarification from supervisors if necessary. Commanders should never contact the military judge concerning the sentence at a court martial; even if no actual influence occurs and the commander's intent is benign, the danger of improper public perception is too great.[105]

---

[93] *See* United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984), *aff'd*, 23 M.J. 151 (C.M.A. 1986).

> Correction of procedural deficiencies in the military justice system is within the scope of a convening authority's supervisory responsibility. Yet in this area, the band of permissible activity by the commander is narrow, and the risks of overstepping its boundaries are great. Interference with the discretionary functions of subordinates is particularly hazardous. While a commander is not absolutely prohibited from publishing general policies and guidance which may relate to the discretionary military justice functions of his subordinates, ***several decades of practical experience under the Uniform Code of Military Justice have demonstrated that the risks often outweigh the benefits.***

Id. at 653 (emphasis added) (citations omitted).

[94] *See* Lieutenant Colonel Patricia A. Ham, *Still Waters Run Deep? The Year in Unlawful Command Influence*, ARMY LAW., June 2006, at 53, 66.

[95] *See* United States v. Davis, 58 M.J. 100, 103 (2003) ("A commanding officer or convening authority fulfilling his or her responsibility to maintain good order and discipline in a military organization need not appear indifferent to crime.").

[96] *Id*.

[97] These facts foreshadow a recent CAAF case from the present term, thus beyond the scope of this article. *United States v. Reed*, 65 M.J. 487 (2008), addresses issues of UCI including an e-mail and attached slide show containing the phrase, "Senior NCO and Officer Misconduct—I am absolutely uncompromising about discipline in the leader ranks." *Id*. at 489. One of the listed examples concerned the offense for which the appellant had been tried at court-martial. *Id.* The CAAF found no UCI based in part on government remedial actions and corrective actions taken by the military judge to ensure a fair trial, including the perception of a fair trial. *Id*. at 491–92.

[98] United States Army Trial Judiciary, Fourth Judicial Circuit, Fort Carson, Colorado, Ruling of the Court, Allegation of Possible Unlawful Command Influence (5 Mar. 2008) (on file with author). This incident did not take place at Fort Carson.

[99] *Id*.

[100] *Id*.

[101] *Id.* The military judge also found beyond a reasonable doubt that the proceedings had not been tainted and granted no relief. *Id*.

[102] *Id*.

[103] This is a responsibility shared by TJAGLCS and all supervisors in the field. In this case, SJA's were sent a cautionary e-mail with a policy letter on UCI and an attachment of the "10 Commandments" of UCI. E-mail from Practitioner to LTC Mark Johnson, Professor and Chair, Criminal Law Department, TJAGLCS (18 Apr. 2008, 14:18 EST) (on file with author).

[104] Referring to standard practice on firing ranges of allowing any participant to stop operations if they observe a safety violation.

[105] The role of the Judge Advocate here is crystal clear. *See* United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).

> Article 26(c)'s provision for an independent trial judiciary responsible only to the Judge Advocate General certainly was not designed merely to structure a more complicated conduit for command influence. That is to say, The Judge Advocate and his representatives

Conclusion

The prevention of unlawful command influence is a primary reason we exist as a JAG Corps today, and is certainly the main reason Congress created the Court of Appeals for the Armed Forces (CAAF).[106] As illustrated by the cited cases and examples from the field, it is still with us, requiring vigilance by everyone practicing within the military justice system. They also remind us of the need for aggressive action by all parties, and the ameliorative effects of prompt and thorough remedial measures. The need for fairness in our military justice system was recognized long ago by General George Washington in one of his first general orders: "No Connections, Interests, or Intercessions . . . will avail to prevent strict execution of justice."[107] This quotation is contained within a memorandum written by then Chief of Staff General John A. Wickham, Jr., emphasizing the importance of prohibiting unlawful command influence with senior commanders throughout the Army.[108] His memorandum and this article end with the following sentences. "It is incumbent upon you, together with your legal advisor, to assure that your subordinate commanders understand and adhere to the provisions of Article 37. *Our system of justice demands no less*."[109]

---

should not function as a commander's alter ego but instead are obliged to assure that *all* judicial officers remain insulated from command influence before, during, and after trial.

Id. at 42 (emphasis in original).

[106] *See generally Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Service*, 81st Cong. (1949).

[107] Memorandum, General John A. Wickham, Jr., Chief of Staff, U.S. Army Chief of Staff, subject: Unlawful Command Influence (n.d.).

[108] *Id*.

[109] *Id*. (emphasis added).