Lawful Command Emphasis: Talk Offense, Not Offender; Talk Process, Not Results

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Synopsis

Unlawful command influence (UCI) has rightfully been called the mortal enemy of military justice. This concern stems back to the injustices that occurred during both World War I and II. The reaction to these events was a law—the Uniform Code of Military Justice (UCMJ)—in 1950. A provision within the UCMJ provides that it is improper and unlawful for any person to attempt to influence the action of an appointing or reviewing authority or the action of any court-martial in reaching its verdict or pronouncing sentence. In modern practice, the most common but nebulous type of UCI is the appearance of UCI. Its appearance exists where an objective and disinterested observer who is fully informed of all of the facts and circumstances would harbor a significant doubt about the fairness of the court-martial proceedings. Commanders who rely on a properly functioning military justice system in their quest for good order and discipline, and the Staff Judge Advocates (SJAs) who advise them, must remember three central tenants of military justice: commanders at every level must be free to act with independent discretion; the accused Soldier must be free to build his case without outside influences limiting the full ability to obtain evidence and witnesses with full commitment to the justice process; and members of the court-martial must be free to decide the case on the merits and, as necessary, a proper sentence based only on the evidence presented, law as instructed by the military judge, and arguments of counsel.

"Lawful command emphasis" means ensuring that these three legal tenants stay intact to ensure good order and discipline are preserved within the ranks. The balance then is between the commander's constant participation in his unit's life and the immutable rights and protections of the accused Soldier. The commander's daily input in the unit's direction plays a significant role in the tone and prioritization of the unit's tasks to accomplish the military mission. As leaders, commanders are expected by their chain of command to prepare their units and its members to be ready to go into harm's way. To stay within the law, commanders should always remember to talk about the offense but not the offender, and talk about the process, not the result. There will be times when commanders want to distribute information or a perspective that puts the unit's mission in the best light possible. But judge advocates (JAs) have to give counsel so the commander understands the risk of saying something that would have a near-term positive impact, but could have a long-term detriment to both the accused and the very military justice system that allows commanders to hold Soldiers accountable.

A dialogue between the commander and his SJA helps identify the issues the commander believes need addressing. A commander should identify and address perceived problems related to military justice. Staff Judge Advocates, however, must assist their commanders by drafting policies that are clear, have context, and avoid the appearance of UCI. Commanders want those who have violated the bonds of trust within the ranks to be held accountable. The UCMJ will maintain its relevancy by holding the individual transgressor accountable by ensuring that every accused receives a fair hearing and opportunity to present his case. This was the clear mandate of the reforms outlined by Congress in the UCMJ. The law provides commanders the tools to enforce accountability within the protections afforded an accused Soldier by the UCMJ, but simultaneously allows for commanders to discuss priorities related to good order and discipline within their ranks. When SJAs and commanders work as a team to do that properly, the result is another powerful tool: Lawful Command Emphasis.

Introduction

In the modern age, military justice must always be fair and transparent. In the words of the U.S. Army's 22nd Chief of Staff, General George H. Decker, "it is essential that our excellent court-martial system generate public confidence in the basic fairness of the administration of military justice. No other single factor has greater tendency to destroy public confidence in the system than allegations of [unlawful] 'command influence.'"[1] Unlawful command influence is an existential threat to the military justice system, or according to the Court of Military Appeals—its "mortal enemy."[2]

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[1] SUBCOMM. ON CONST. RTS. OF THE S. COMM. OF THE JUDICIARY, 88TH CONG., REP. ON CONST. RTS. OF MILITARY PERS. 16 (Comm. Print 1963), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/const-rights-mil-pers.pdf [hereinafter CONST. RTS. REPORT] (quoting a 5 February 1962 letter from General George Decker, Army Chief of Staff, on the subject of command influence).

[2] United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986). The U.S. Court of Military Appeals (CMA) was redesignated in 1994 as the U.S. Court of Appeals for the Armed Forces (CAAF).

Unlawful command influence is, in the words of U.S. Air Force Lieutenant Colonel Erik C. Coyne, "any action taken in an attempt to influence either an outcome or another into an inappropriate action."[3] Unlawful command influence litigation frequently arises from unwitting statements by our civilian and military leaders discussing military justice. In the rigidly hierarchical military, the thinking goes: military members are naturally inclined to obey guidance from their superiors. When this guidance is perceived as penetrating the independent sphere of panel members and commanders, UCI concerns are triggered.

A prime example is President Obama's 7 May 2013 press conference. The President, who is also the Commander-in-Chief of the armed forces, answered a question about the concerns over sexual assault in the military with tough but unscripted language:

> The bottom line is: I have no tolerance for this . . . . I expect consequences . . . . I don't just want more speeches or awareness programs or training, but ultimately folks look the other way. If we find out somebody's engaging in this stuff, they've got to be held accountable: prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period.[4]

The actual impact of these comments is not quantifiable. What is more readily apparent is that the comments entered into military motions and trial practice at lightning speed. Defense counsel argued that prosecutorial decisions were tainted by a mandate from the highest military official—the Commander-in-Chief—to prosecute all sexual assault allegations and issue the severest form of punitive discharge.[5] Military trial judges granted many of these motions and fashioned varied remedies such as additional discovery, greater leeway for defense counsel to question members during *voir dire*, liberal grants of challenges for cause, and disallowance of punitive discharges.[6] In response to these developments, several White House and Department of Defense officials emphasized that military officials should effectively disregard the President's remarks and use their independent judgment when deciding cases.[7]

It is beyond the military expertise of the authors of this article to parse presidential political prerogatives.[8] The fallout from the President's comments, however, shows that military and civilian leaders have a strong self-interest in studying and understanding the role of command influence in military justice. The response to the legal fall-out described above led to one of the best, and most recent, examples of lawful command emphasis in the form of a memorandum from the Secretary of Defense clarifying the President's remarks and views of the Administration.[9] In the memorandum entitled, "Integrity of the Military Justice Process," the Secretary of Defense sent a message that was clear and forceful: "[c]entral to military justice is the trust that those involved in the process base their decisions on their independent judgment . . . . Everyone who exercises discretionary authority in the military justice process must apply his independent judgment."[10] The Secretary told the entire Department of Defense, and the world for that matter, that there is no expectation for a certain result, regardless of the allegations. In other words, the Secretary is telling commanders to discuss process, not results, and discuss offenses, not offenders. If the President's message had been delivered in the manner found in the Secretary of Defense memorandum, our trial courts would likely have avoided the necessity to ascend a mountain of litigation, which they continue to climb with no clear summit.

This article will grapple with the intersection of the current environment—especially when sexual assault is alleged—and doing the legally right thing. This article is both historical and tactical. In the end, understanding where a statutory provision comes from is important and helps

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[3] Lieutenant Colonel Erik C. Coyne, *Influence with Confidence: Enabling Lawful Command Influence By Understanding Unlawful Command Influence—A Guide for Commanders, Judge Advocates, and Subordinates*, 68 A.F. L. REV. 1, 7 (2013).

[4] *Obama: 'No Tolerance' for Military Sexual Assault*, NBCNEWS.COM, (May 7, 2013), http://nbcpolitics.nbcnews.com/_news/2013/05/07/18107743-obama-no-tolerance-for-military-sexual-assault?lite. A video of the president's full comments is available at http://www.cbsnews.com/news/hagel-aims-to-blunt-obama-remarks-on-military-sexual-assault/ (last visited July 28, 2014).

[5] Jennifer Steinhauer, *Remark by Obama Complicates Military Sexual Assault Trials*, N.Y. TIMES, July 13, 2013, http://www.nytimes.com/2013/07/14/us/obama-remark-is-complicating-military-trials.html?ref=politics.

[6] The military judge has "broad discretion in crafting a remedy to remove the taint of unlawful command influence." United States v. Douglas, 68 M.J. 349, 354 (C.A.A.F. 2010). For one example of a judge-crafted remedy in response to a UCI challenge concerning the President's comments, see Erik Slavin, *Judge: Obama Sex Assault Comments 'Unlawful Command Influence,'* STARS & STRIPES, June 14, 2013, http://www.stripes.com/judge-obama-sex-assault-comments-unlawful-command-influence-1.225974 (describing a Marine court-martial in Hawaii and including a link to the military judge's written ruling on an unlawful command influence motion).

[7] Jennifer Steinhauer, *Hagel Tries to Blunt Effect of Obama Words on Sexual Assault Cases*, N.Y. TIMES, Aug. 14, 2013, http://www.nytimes.com/2013/08/15/us/politics/hagel-tries-to-blunt-effect-of-obama-words-on-sex-assault-cases.html?_r=1&.

[8] The topic of the president's personal role in military justice matters deserves more attention in military legal scholarship than the limited coverage in this article. For example, contrast President Obama's tough talk on sexual assault with President Bill Clinton's refusal to respond to media questions about a court-martial acquittal of two Marine pilots who were accused of flying recklessly and severing a gondola cable in Italy in 1998, an incident that killed twenty civilians and ignited a diplomatic impasse with Italy. A detailed factual background about that case is found in *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009).

[9] Memorandum from the Sec'y of Def. to the Military Members of the Dep't of Def., Integrity of the Military Justice Process (Aug. 6, 2013).

[10] *Id.*

place it into context, but most commanders and JAs want the practical: what do I do? This article will discuss the history of the Uniform Code of Military Justice; the development of the concept of UCI; what constitutes UCI and how the courts have dealt with it; and a new term for consideration in our military lexicon: lawful command emphasis. Lawful command emphasis is, in short, the appropriate actions commanders or staff members can take within the military justice process to ensure good order and discipline is maintained within the ranks. The focus will be to explore the pitfalls of talking about offenders instead of offenses and the requirement to talk process and not results. The authors will conclude with some suggestions on how commanders and JAs can craft the command's message so that it stays clear of UCI and focuses on lawful command emphasis. The UCMJ is strong, and it is incumbent that those entrusted to exercise this unique authority—principally commanders with the advice of JAs—do so judiciously and fairly.

Courts-Martial Jurisdiction

Most legal discussions in American jurisprudence will include the U.S. Constitution and the Supreme Court. The Supreme Court has jealously protected the federal judiciary's constitutional power to adjudicate criminal matters, but the Court has carved out a narrow exception: military crimes. Trying military crimes in a non-Article III court—that is, outside the federal judiciary, specifically courts-martial—stems from Congress's legislative powers of Section 8, Clause 14: "To makes Rules for the Government and Regulation of the land and naval Forces."[11]

The Court has interpreted the Constitution as granting Congress the authority to make rules for the government and regulation of the land and naval forces; this is known as the Land and Naval Forces Clause. Congress, in turn, enacted a military criminal code, which grants the Commander-in-Chief the authority to promulgate "[p]retrial, trial, and post-trial procedures, including modes of proof" for courts-martial.[12] In other words, the adjudication of military crimes is outside the purview of Article III. As articulated by the Court, "[t]rial by court-martial is constitutionally permissible only for persons who can, *on a fair appraisal*, be regarded as falling within the authority given to Congress under Article I to regulate the 'land and naval Forces' . . . . The test for jurisdiction, it follows, is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'"[13] Since the inception of the republic, the scope of court-martial jurisdiction has been narrow, "which manifested itself in a very limited grant of authority to try offenses by court-martial."[14] This limited military jurisdiction continues to the present day and has been affirmed by the Court on many occasions.[15]

The Evolution of the Court-Martial Process

Courts-martial practice in America is as old as the United States. The Continental Congress in 1775 enacted the country's first Articles of War, which governed how the military should conduct itself during war.[16] The articles enacted by the Continental Congress were modeled after, and virtually identical to, the British version, which traces its lineage to the Roman Empire. Court-martial authority vests commanders with the ability to try military personnel under their command who have committed a crime. Commanders exercised this authority on numerous occasions during the Revolutionary War. One of the most notorious courts-martial was the trial of Thomas Hickey, General Washington's military aide. Hickey was court-martialed for mutiny, sedition, and trying to poison General Washington; thirteen officers found him guilty and sentenced him to be hanged.[17] The primary goal of his court-martial and others was to deter future acts of mutiny, sedition, and treachery.

Between the Revolutionary War and World War I—over 140 years—the Articles of War saw few changes. It was not until 1857 that the Supreme Court took up the issue of the constitutional validity of courts-martial. In *Dynes v. Hoover*, the Court affirmed a Sailor's court-martial conviction for desertion. The Land and Naval Forces Clause of Article I, among other constitutional provisions, "show that Congress had the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations . . . ." [18] Nearly forty years later, the first procedural manual governing how courts-martial should be conducted for the land forces came into being in 1895.[19] The 1895 Manual, however, was not

[11] U.S. CONST. art. I, § 8, cl. 14. The authority to create military tribunals resides in Section 8, Clause 10 of Article I. "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." *Id.* art. I, § 8, cl. 10; *see also Ex parte* Quirin, 317 U.S. 1, 28 (1942) (holding that the Congress "has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for [such] offenses.").

[12] 10 U.S.C. § 836(a) (2012).

[13] Kinsella v. Singleton, 361 U.S. 234, 240-41 (1960) (italics in original).

[14] Soloria v. United States, 483 U.S. 435, 457 (1987) (Marshall, J., dissenting).

[15] United States v. Averette, 41 C.M.R. 363 (1970) (reviewing original Article 2(10)'s "in the time of war" phrase).

[16] MILITARY LAWS OF THE UNITED STATES 702 n.1 (3d ed. 1898).

[17] LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 14–15 (2010) (citing JAMES C. NEAGLES, SUMMER SOLDIERS: A SURVEY AND INDEX OF REVOLUTIONARY WAR COURTS-MARTIAL (1986)).

[18] 61 U.S. 65, 72 (1857).

[19] MANUAL FOR COURTS-MARTIAL, UNITED STATES 3 (1895). The first manual was written by First Lieutenant Arthur Murray.

nearly as detailed as the modern-day Manual for Courts-Martial. The purpose of the manual, like today's version, was to explain "the legal system that regulates the government of the military establishment."[20]

It was not until after World War I that Congress examined the military justice system in depth. In hearings held before Congress in 1919, the testimony raised concerns regarding "service members' and society's confidence in the justice and fairness of such a system."[21] The lightning rod for these concerns was Brigadier General Samuel T. Ansell, the Acting Army Judge Advocate General.[22] In law review articles and testimony before Congress, General Ansell questioned the efficacy of a system where no independent legal authority could review the process and result of any court-martial, to include where a death sentence was imposed.[23] As historian Colonel William Winthrop noted in his now-famous 1920 treatise on military law, "the court-martial being no part of the Judiciary of the nation, and no statute having placed it in legal relations therewith, its proceedings are not subject to being directly reviewed by any federal court . . . nor are its judgments or sentences subject to be appealed from such tribunal."[24]

Even uniformed lawyers, that is, JAs, had a limited role in the court-martial process. The only substantive role for JAs was to "prosecute in the name of the United States, but when the prisoner has made his plea, he shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner, the answer to which might tend to criminate [sic] himself."[25]

Coupled with the lack of legal oversight, General Ansell's most stinging rebuke of the state of military justice was the commander's seemingly absolute unfettered authority: "[t]here is no legal standard to which court-martial procedure must conform and, therefore, there can be no error adjudged according a legal standard. In other words, military justice is administered not according to a standard of law at all, but under the authority of a commanding officer."[26] In the aftermath of World War I, General Ansell, who is referred to by some jurists as the "father of modern American military law,"[27] was most concerned about command control or, by the current term, unlawful command influence.[28]

In an effort to limit the commander's expansive authority and in response to the voices of concern, Congress enacted the 1920 Articles of War, championed by General Ansell. The 1920 Articles of War made a number of changes to the military justice system,[29] including strengthening the role of the JA in the court-martial process. Congress mandated (1) that the legal member of the court-martial should be a JA or if that was not possible, an officer "specially qualified to perform the duties;"[30] (2) the prosecutor in a court-martial should perform a distinct role from being the command's counsel;[31] and (3) the accused could choose his own defense counsel.[32] Viewed through today's lens, these changes seem conservative, but for the first time, uniformed lawyers were now statutorily part of the court-martial process. The military justice system, however, remained intact: the commander exercised overarching control over the process with limited oversight and governance.

No substantive changes were made to the military justice system between the 1920 Articles of War and World War II. In December 1941, the American Army went to war with the 1920 Articles of War. During the course of World War II, about 1.7 million courts-martial were convened, over 100 capital executions were carried out, and over 45,000 servicemembers were imprisoned.[33]

At the end of the war, numerous veterans groups raised genuine concerns about the fairness of the military justice system. For example, "[n]ot infrequently the [commanding] general reprimanded the members of a court for an acquittal

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[20] *Id.* at 3.

[21] MORRIS, *supra* note 17, at 25.

[22] Brigadier General Ansell was the Acting Army Judge Advocate General because The Judge Advocate General, Major General Enoch H. Crowder, was serving as the Army's Provost Marshal General.

[23] MORRIS, *supra* note 17, at 23.

[24] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 50 (1920).

[25] Articles of War art. 90, 2 Stat. 359 (1806), *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 976 (2d ed. 1920 reprint).

[26] Samuel T. Ansell, *Military Justice*, 5 CORNELL L. Q. 1, 7 (1919).

[27] Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 9 (1987). For an excellent overview of the history of military justice in America, see Kevin J. Barry, *A Face Lift (And Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate The Uniform Code of Military Justice*, 2002 L. REV. M.S.U.-D.C.L. 57 (2002).

[28] DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 32 (1999).

[29] Articles of War (1920).

[30] *Id*. art. 8.

[31] *Id*. art. 14.

[32] *Id*.

[33] *Bills to Improve the Administration of Justice in the Armed Services: Hearing Before Subcomm. on Const. Rts. of the S. Comm. of the Judiciary and a Special Subcomm. of the S. Comm. on Armed Services*, 89th Cong. 713, 714 (1966) [hereinafter *Joint Hearings*], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MJ_hearings-1966.pdf (referencing a statement submitted by Professor Arthur E. Sutherland that consisted of a law-review article that was written by Rear Admiral Robert J. White).

or an insufficient sentence."[34] As one commentator noted, "[t]he emotions suppressed during the long, tense period of global warfare were now released by peace, and erupted into a tornado-like explosion of violent feelings, abusive criticism of the military, and aggressive pressures on Congress for fundamental reforms in the court-martial system."[35] With over 16 million servicemembers in the ranks during the war, the concerns were held by many who fought and then reintegrated into American society. As validation of these concerns about fairness, the Secretary of War, even before the Japanese surrendered in 1945, appointed a Clemency Board to review all general courts-martial in which the servicemember was adjudged confinement. The Board reduced or remitted the confinement in 85% of the cases.[36] The overarching concern voiced by numerous lobbies to Congress was "the denial to the courts of independence of action in many instances by the commanding officers who appointed the courts and reviewed their judgments, and who conceived it the duty of the command to interfere for disciplinary purposes."[37]

The Development of the Concept of Unlawful Command Influence

> Subject: Inadequacy of Court-Martial Sentences
> To: Colonel Cland T. Gunn, President of the general court-martial appointed by paragraph 3, Special Orders No. 104, this headquarters 16 August 1944
>
> . . . I am completely at a loss to understand the reasons for the sentences in the case in reference. The same court but recently imposed three sentences of death in similarly serious cases . . . . As officers of the United States Army I would have expected a far clearer recognition of duty and the dictates of justice from the members of the court . . . . Unfortunately, the provisions of Article of War 19 and 31 prevent me from ascertaining which of the members of the court were responsible for the adoption of life sentences rather than death sentences. However, those members who were guilty of such gross failure to vote for adequate punishments will themselves recognize the application of the foregoing reprimand.
>
> Troy H. Middleton
> Major General, U.S. Army
> Commanding[38]

Shortly after the cession of hostilities in World War II in March 1946, the Secretary of War, Robert P. Patterson, addressed the "command control" concern by appointing the War Department Advisory Committee on Military Justice, known as the Vanderbilt Committee because of its chair, Arthur T. Vanderbilt. The Committee's scope was to "study the administration of military justice within the Army and the Army's courts-martial system, and to make recommendations to the Secretary of War as to changes in existing laws, regulations, and practices . . . ."[39] The principle recommendation of the Vanderbilt Committee was the "checking of command control."[40] The Committee recommended that the law "provide that it is improper and unlawful for any person to attempt to influence the action of an appointing or reviewing authority or the action of any court-martial . . . in reaching its verdict or pronouncing sentence . . . ." It also recommended the elimination of any "reprimand of the court or its members in any form."[41]

In the aftermath of the Vanderbilt Committee's report, Congressman Charles H. Elston of Ohio held hearings in 1947 on the fairness of the military justice system. These hearings held by the U.S. House Sub-Committee on Military Justice, of which Elston was the chairman, resulted in proposed legislation, known as the Elston Act.[42] The Elston Act, supported by the Department of War, prohibited unlawfully influencing the action of a court-martial. The legislation, which passed both chambers of Congress and was signed into law by President Truman, stated in large measure, the modern-day prohibition of unlawful command influence:

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[34] Arthur E. Farmer & Richard H. Wels, *Command Control—Or Military Justice?*, 24 N.Y.U. L. Q. REV. 263, 266 (1949).

[35] *Joint Hearings*, *supra* note 32, at 714 (statement submitted by Professor Sutherland).

[36] REPORT OF THE DEPARTMENT OF WAR ADVISORY CLEMENCY BOARD (1946).

[37] DEP'T OF WAR ADVISORY COMM. ON MILITARY JUSTICE, REPORT OF THE WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 3 (1946) [hereinafter VANDERBILT COMMITTEE], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/report-war-dept-advisory-committee.pdf; *see also* Morris, *supra* note 17, at 125 (noting also that there were concerns about unlawful command influence and the protections afforded to service members during the investigative stage).

[38] Memorandum from Major General Troy H. Middleton, U.S. Army, Headquarters, VIII Corps, APO 308, to Colonel Gland T. Gunn, President of the General Court-Martial Appointed by Paragraph 3, Special Orders No. 104, this Headquarters 16 August 1944, subject: Inadequacy of Court-Martial Sentences (16 Oct. 1944) (excerpt from a World War II commanding general reprimanding members of a court-martial for an insufficient sentence).

[39] VANDERBILT COMMITTEE, *supra* note 37, at 1.

[40] Farmer & Wels, *supra* note 34, at 266 (citing the Vanderbilt Committee Report).

[41] VANDERBILT COMMITTEE, *supra* note 37, at 8.

[42] *See Sundry Legislation Affecting the Naval and Military Establishment: Hearing Before Comm. on the Armed Services Servs.*, 80th Cong. (1947), *available at* http://www.loc.gov/rr/frd/Military_Law/hearings_1947.html.

> No authority appointing a general, special, or summary court-martial nor any other commanding officer, shall censure, reprimand, or admonish such court, or any member thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise, by such court or any member thereof, of its or his judicial responsibility. No person subject to military law shall attempt to coerce or unlawfully influence the action of a court-martial or any military court or commission, or any member thereof, in reaching the findings or sentence in any case, or the action of an appointing or reviewing or confirming authority with respect to his judicial acts. [43]

Although a step in the right direction, some advocates believed this legislation did not go far enough: "the reforms were illusory."[44] In response to this criticism, Secretary James V. Forrestal of the newly created Department of Defense, which replaced the Departments of War and Navy, appointed Harvard Law School Professor Edmund M. Morgan to chair a committee on military justice along with the undersecretaries of each Service. Unlike the Vanderbilt Committee, this body was to prepare a "uniform code of military justice which would be applicable alike to all three Services, and which could be submitted to the 81st Congress as the recommendation of the National Military establishment."[45] The result was the creation of the 1950 Uniform Code of Military Justice. The UCMJ revolutionized the practice and review of courts-martial. In creating the modern-day UCMJ, signed into law by President Truman in 1950, Professor Morgan wrote of his committee's work, "[w]e were convinced that a Code of Military Justice cannot ignore the military circumstances under which it must operate, but we were equally determined that it must be designated to administer justice. We, therefore, aimed at providing functions for command and appropriate procedures for the administration of justice. We have done our best to strike *a fair balance*."[46]

Congress established a comprehensive system of how, when, and why a court-martial could be convened. The UCMJ established roles for JAs and set their qualifications: JAs participating in a court-martial "must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member."[47] Furthermore, a three-member civilian appellate court was established, the Court of Military Appeals,[48] to review courts-martial appeals from the various services.[49]

Congress made the court-martial system a creature of statute, thereby giving itself unprecedented oversight authority. As part of the new statutory framework, Congress gave the President the authority to establish a court-martial's procedures and modes of proof.[50] The President's Executive Orders implementing the UCMJ comprised the Manual for Courts-Martial (MCM); these presidential rules were subject to appellate review by the Court of Military Appeals and, later, the Supreme Court.

What did not change, however, was the Elston Act mandating the prohibition of unlawful command influence. The Morgan Committee adopted this language in full and thereby incorporated the Act's language verbatim into the new UCMJ, Article 37—Unlawfully Influencing Action of Court. With minor changes,[51] this provision has remained intact since its inception in 1948. The only substantive change to the modern-day Article 37 of the UCMJ occurred with the 1968 Military Justice Act. This Act, along with expanding the powers of military judges, added language to Article 37(b) that made it illegal to "consider or evaluate the performance of duty of any . . . member of a court-martial" when preparing the servicemember's fitness or efficiency report for promotion or assignment.[52]

Striking a Fair Balance

As Professor Morgan aptly articulated over sixty years ago, "[T]here are many schools of thought on military justice, ranging all the way from those who sponsor complete military control, to those who support a complete absence of military participation. I do not believe either of

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[43] The Selective Service Act of 1948, Pub. L. No. 80-759, § 233, 62 Stat. 604, 639 (1948).

[44] Farmer & Wels, *supra* note 34, at 273 (citing 34 A.B.A. J. 702–03 (1948).

[45] JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775–1980, at 90 (2001).

[46] *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on H.R. 2498 Before Subcomm. No. 1 of the H. Comm. on the Armed Servs.*, 81st Cong. 606 (1949) [hereinafter *House UMCJ Hearings*], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/hearingss_01.pdf (statement of Prof. Morgan) (emphasis added).

[47] 10 U.S.C. § 827(b) (2012).

[48] UCMJ art. 67 (1950). It is now the modern-day U.S. Court of Appeals for the Armed Forces.

[49] The CMA's appeals flowed from each military department's Board of Review. This board, now the Court of Criminal Appeals, reviewed each conviction for both errors of law, but also sufficiency of the facts. *Id.* art. 66.

[50] *Id.* art. 36(a).

[51] The word "shall" was replaced with "may" in 1956.

[52] The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, 1338 (1968).

these extremes represents the proper solution."[53] The balance then is between the commander's constant participation in his unit's mission and tasks and the immutable rights and protections of the servicemember who is accused of a crime. The preamble to the MCM foreshadows this balance: "The purpose of military law is to *promote justice*, to assist in *maintaining good order and discipline* in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[54]

The commander has daily input in the direction that his unit takes, and obviously plays a significant role in the tone and prioritization of the unit's tasks to accomplish the military mission. The commander, after all, is the leader and is expected to prepare the unit and its members to be ready to go into harm's way.

As for the civilian who becomes a servicemember, the Vanderbilt Committee succinctly observed, "[t]he civilian must realize that in entering the army he becomes a member of a closely knit community whose safety and effectiveness are dependent upon absolute obedience to the high command; and that for his own protection, as well as for the safety of his country, army justice must be swift and sure and stern."[55] The individual servicemember becomes part of something bigger, not only in accomplishing the unit mission, but in possessing the legal obligation to sacrifice his life, if required, in its accomplishment. There is simply no civilian equivalent to this concept.

Fundamental to obtaining the obedience required to maintain the unit's safety and effectiveness is discipline. It is the commander who is held accountable and whose obligation it is to instill, maintain, and enforce good order and discipline within the ranks. The commander is the fulcrum of discipline and justice. The Vanderbilt Committee also pointed out that "[n]othing can be worse for [Soldiers'] morale than the belief that the game is not being played according to the rules in the book, the written rules contained in . . . the Manual of Courts-Martial."[56] Soldiers must believe the system is fair, and that it is administered accordingly. Discipline, in other words, has it limits; this was the stark lesson learned from the unfairness Soldiers perceived during World Wars I and II. Clearly, "discipline will be better and morale will be higher if service personnel receive fair treatment."[57] Even commentators from the 19th Century "recognized that courts-martial were under the obligation to render justice in accordance with the fundamental principle of law and without partiality, favor, or affection."[58]

Unlawful Command Influence

Since the passage of the UCMJ, UCI has been analyzed by the courts in two ways. One way is to discuss UCI as accusatory or adjudicative.[59] Accusatory UCI springs from command influence that invades the independent discretion of other justice actors in the preferral, forwarding, or referral of charges.[60] Adjudicative UCI, on the other hand, occurs when command influence interferes with witnesses, judges, members, or counsel.[61]

The other narrative is to talk about UCI and the impact it has on the military justice system in terms of actual or apparent UCI. Actual UCI is the "actual manipulation of any given trial."[62] For the most part, this type of UCI is rare and, if found, will normally result in the dismissal of the entire case.[63]

The most nebulous type of UCI is the appearance of unlawful command influence. As defined by the courts, the appearance of UCI exists "where an objective, disinterested observer, fully informed of all of the facts and circumstances, would harbor a significant doubt about the fairness of the [court-martial] proceeding."[64] The commander must strike a balance between "the commander's responsibility for discipline . . . [and the] 'subtle pressures that can be brought to bear by command in military society.'"[65]

The Mechanics of Case Progression Without UCI

Commanders who rely on a properly functioning military justice system in their quest for good order and discipline, and the SJAs who advise them, must jealously guard three central tenants of military justice that come under attack in the presence of UCI.

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[53] *House UCMJ Hearings*, *supra* note 46, at 606.

[54] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. 1, ¶ 3 (2012) [hereinafter MCM] (emphasis added).

[55] VANDERBILT COMMITTEE REPORT, *supra* note 37, at 5.

[56] *Id.* at 6.

[57] CONST. RTS. REPORT, *supra* note 1, at 17.

[58] Farmer & Wels, *supra* note 34, at 277 (citing 1 WINTHROP, MILITARY LAW AND PRECEDENTS 61–62 (1886)).

[59] United States v. Weasler, 43 M.J. 15, 17, 18 (C.A.A.F. 1995).

[60] *Id.*

[61] *Id.*

[62] United States v. Ayers, 54 M.J. 85, 94–95 (C.A.A.F. 2000).

[63] *See* United States v. Gore, 60 M.J. 178 (C.A.A.F. 2004) (the convening authority told a defense witness not to testify at sentencing).

[64] United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006).

[65] United States v. Youngblood, 47 M.J. 338, 341 (C.A.A.F. 1997) (quotation omitted).

(1) Commanders at every level must be free to act with independent discretion.[66]

(2) The accused must be free to build his case without outside influences impacting a full ability to obtain evidence and witnesses with full commitment to the justice process.[67]

(3) Members of the court-martial must be free to decide the case on the merits and, as necessary, a proper sentence based only on the evidence presented, law as instructed by the military judge, and arguments of counsel.[68]

No doubt, Article 37 is the cornerstone of protection against UCI in military justice, but it is only the first in a line of currently existing procedures and protections found in statute, executive order, and case law. The preamble to the MCM not only highlights the necessities of good order and discipline, but also reminds us that the purpose of military law is "to promote efficiency and effectiveness in the military establishment" in an effort to strengthen the security of the Nation.[69] While all commanders value efficiency, few value efficiency above thorough investigation and analysis, which will lead to the best disposition decisions possible.

Commanders and SJAs who emphasize process in combating the day's most notable detractors from good order and discipline, and are not focused on a particular offender or result, increase the probability of good decisions free of UCI exponentially. This begins with those levels of command closest to the Soldiers, who deserve a healthy and orderly command climate. These "immediate commander[s]" as defined by Rule for Courts-Martial (RCM) 306,[70] ordinarily have the ability and responsibility to conduct a preliminary inquiry into suspected offenses within their units.[71] They then have the discretion to dispose of offenses by members of their command at the lowest possible level unless otherwise withheld.[72]

While the initial disposition decision refers to whether to prefer charges, take some other form of action, or do nothing at all, once charges have been preferred against a Soldier, the command must next decide how to dispose of the charges.[73] The military's system of justice was built to give commanders at the lowest possible level discretion to dispose of charges.[74] As described above, the military has long valued the necessity for military justice to be portable, fair, and swift. In making decisions to act on or forward charges with recommendations, commanders and SJAs are again reminded that each commander, regardless of level of command, must exercise independent discretion.[75]

Command Influence and Potential Pitfalls

Commanders may and should discuss military justice process, views, and their unit's most pressing needs in the areas of health, welfare, and good order and discipline with their subordinates.[76] As long as a commander neither directs a particular action regarding an ongoing case or type of case, nor impacts the participation of witnesses, counsel, court-martial members, or judges, discussions that foster good order and discipline or instruct on the fair administration of justice are not UCI.[77] Most commanders know this and would never consider purposefully influencing independent command discretion or the court-martial process. But UCI most frequently occurs in a much less conspicuous manner. The comments of our Commander-in-Chief about sexual assault, as already discussed, provide but one example of how an off-the-cuff response can lead to unintended consequences. Answering unanticipated questions without reflection, addressing unit formations, staff calls, safety and briefings, and discussing views on disposition in forums like a Sexual Assault Review Board provide some of the most fertile ground from which UCI will grow for the commander-SJA team who do not cultivate frequent conversations about delivering a proper command message.

Commanders and SJAs who routinely discuss their shared understanding of the potential for a command message to impact case progression in order to identify and avoid potential UCI pitfalls foster a healthy military justice practice. While the SJA's role focuses on more technical aspects of legal requirements, a SJA improves the commander's awareness and vigilance through discussion of

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[66] MCM, *supra* note 54, R.C.M. 306 (Initial Disposition), 401 (Forwarding and disposition of charges in general).

[67] United States v. Stombaugh, 40 M.J. 208, 212 (C.M.A. 1994).

[68] UCMJ art. 37(a) (2012); *see also* MCM, *supra* note 54, R.C.M. 104 (restating the prohibitions against unlawful command influence).

[69] MCM, *supra* note 54, pmbl.

[70] *Id*. R.C.M. 306 (Initial Disposition).

[71] *Id*. R.C.M. 306(a) (Who may dispose of offenses).

[72] *Id.*

[73] *Id*. R.C.M. 401(a).

[74] *Id.* (discussing each commander's independent discretion in how charges will be disposed of unless withheld by a higher competent authority).

[75] *Id*. The discussion following RCM 401(a) also emphasizes independent commander discretion.

[76] *See* United States v. Wallace, 39 M.J. 284 (C.M.A. 1994). The Court considered the comments of a lieutenant colonel to a subordinate company commander encouraging the subordinate commander to reconsider an initial decision based on new information, leading to the subordinate commander changing his initial disposition decision from non-judicial punishment to court-martial. Because the superior commander did not direct any disposition or even indicate which decision he preferred, the Court found no UCI. *Id.*

[77] *See id.*; *see also* UCMJ art. 37(a) (creating an exception to the prohibition on UCI for "general instructional or informational courses in military justice . . . .").

these aspects. Simultaneously, while a SJA does not bear the burden of command, discussions with commanders about climate, discipline, and a commander's pre-existing beliefs regarding justice assist in identifying potential UCI issues before they become problematic.

Failing to discuss the message, and as a result to identify potential UCI in command remarks, can result in the perception, if not the reality, of the message inextricably invading the court-martial process.[78] The resulting relief granted by a trial or appellate court could be extreme, to include dismissal of charges with prejudice.[79] The system simply works best and avoids unnecessary consequences caused by UCI if the SJA and commander have an open, frank, and ongoing dialogue about cases, the system, and the command message.

This advice holds true for how commanders and JAs should manage UCI concerns during high-profile incidents. In an age of digital media and instant communications, gaffes become instantly known and quickly irretrievable. At the same time, we expect our senior leaders to be able to talk about issues directly, without being vague or requiring lawyers to vet every comment. Beyond considerations already mentioned, such as emphasizing training and education, it may help to think about UCI in a new light. Apparent UCI is not the "mortal enemy" of military justice that actual UCI is,[80] but commanders and all JAs should take every measure to ensure the dictates of the law are adhered to zealously.

Court Analysis of UCI

Given every commander's reliance on their legal advisors to guide them through potential UCI minefields, every JA in such a role should make it a priority to understand the legal framework of UCI analysis. The defense must first raise the issue of UCI at trial, as articulated in the case of *United States v. Biagase*.[81] "The threshold for raising the issue at trial is low, but more than mere allegation or speculation."[82] The facts provided to raise a UCI claim must also demonstrate that, if true, "the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings."[83]

The Court in *Biagase* went on to clarify past inconsistencies in case law, clearly articulating that the government's burden in overcoming a properly raised claim of UCI is beyond a reasonable doubt.[84]

> The government may carry its burden (1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading the military judge or the appellate court that the facts do not constitute unlawful command influence; (3) if at trial, by producing evidence proving that the unlawful command influence will not affect the proceedings; or (4), if on appeal, by persuading the appellate court that the unlawful command influence had no prejudicial impact on the court-martial.[85]

With this case law in mind, it is imperative that commanders and JAs receive education and training on the prevention of UCI. This education and training is in the self-interest of all military justice players, especially leaders who wield the most influence in the military. This so-called "shield" of UCI prevention has the same goal as the ancient English adage, "Justice should not only be done but should be seen to be done."

Many brigade commanders and most general officers receive specific training at The Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Virginia, regarding UCI.[86] In the recent past, issues that arise in sexual assault cases—the current UCI lightning rod—are also covered.[87] In this environment, commanders learn about, and freely discuss, critical areas where the pursuit of good order and discipline must patiently and unwaveringly adhere to a military justice process designed to protect against UCI. Judge advocates learn about UCI at their advanced course and ways to eliminate it from our system of justice.

The "sword" of preventing UCI, on the other hand, is wielded by defense counsel in identifying and raising issues

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[78] *See e.g.*, United States v. Stoneman, 57 M.J. 35 (C.A.A.F. 2010) (discussing a case in which the accused's brigade commander sent an e-mail to unit leadership promising to "declare war" on leaders who failed to lead by example).

[79] *See, e.g.*, United States v. Gore, 60 M.J. 178 (C.A.A.F. 2004).

[80] *But see* United States v. Ayers, 54 M.J. 85, 94–95 (2000) (noting that the court "has recognized that the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial") (internal quotation marks omitted).

[81] United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994)).

[82] *Id*. (citing United States v. Johnston, 39 M.J. 242, 244 (C.M.A. 1994)).

[83] *Id*. (citing United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991)).

[84] *Id.* at 150–51.

[85] *Id.* at 151.

[86] *See* Fred L. Borch, *Legal Education for Commanders: The History of the General Officer Legal Orientation and Senior Officer Legal Orientation Courses*, ARMY LAW., Mar. 2014, at 68.

[87] *Id.*

of encroachments on the impartiality of the court-martial process. This focus is increasingly on apparent UCI. The current dormancy of actual UCI is a positive development, but defense counsel must be ever vigilant to ensure this mortal enemy does not rear its head. Finally, defense counsel must never subscribe to the notion that challenging an entire system is too radical or that probing the decisions of high-level commanders is a departure from the traditional customs of the military bar. Instead, defense counsel who are unencumbered in their zealousness represent the most ironclad guarantee of court-martial impartiality and justice.

The *Sinclair* and *Wilkerson* Cases

In light of President Obama's comments, two military cases grabbed the American public's interest: *United States v. Sinclair* and *United States v. Wilkerson*. Both cases occurred in the midst of a public tempest over the debate of sexual assault in the military and the role of commanders in courts-martial. The salacious facts and the senior ranks of the accused helped make both cases among the most publicized courts-martial in modern times, in particular *Sinclair*.

Brigadier General Jeffrey Sinclair pleaded to and was found guilty of maltreatment of subordinates, adultery, and solicitation, among other crimes.[88] In *Sinclair*, UCI issues were heavily litigated over the course of three motions sessions. The defense challenged the information sharing and coordination among military officials in the pre-preferral stage, the tough talk by military and civilian leaders on the problem of sexual assault, the effect of extensive media attention on the case, the potential bias of prospective general officer panel members, the influence of an outside lawyer on the prosecution, and the effect of contemporaneous sexual assault prevention initiatives on the court-martial.[89] Unlawful command influence served as a catch-all for other issues in the case, such as prosecutorial ethics and whether the convening authority displayed an inflexible disposition when he decided to reject a plea agreement based solely on the victim's desire that he reject it. Whether these issues amounted to apparent UCI is open for debate, but given its broad definition, the UCI doctrine proved that it was up to the task in *Sinclair*. After the court-martial, there was consternation over the sentence[90] (as should be expected in such a closely watched criminal trial) but no lingering controversy over whether the military justice system had the right tools at its disposal to shield against improper interference. The scheme of burdens from *Biagase* empowered the court-martial parties to robustly explore all UCI possibilities. *Sinclair* served as an emphatic rebuttal to the most cynical criticism of military justice that it is more concerned with politically influenced show-trials than truth seeking.

Interestingly, much public discourse about the *Sinclair* trial talked about "undue" command influence rather than the correct term "unlawful" command influence.[91] This is telling. "Undue influence" borrows a term of equity from contract law and probate law. "Undue" sounds more benign than the sinister connotations of "unlawful": a harm to be corrected, but short of a mortal enemy. Perhaps the mistaken label of "undue" reflects a broader undercurrent that UCI issues now skew more towards apparent UCI than actual. Unlawful command influence practice, it seems, is increasingly concerned with rooting out issues that can be perceived as harmful influence rather than thwarting affirmatively illegal meddling and obstruction. This is a welcome, positive trend.

The *Wilkerson* case, on the other hand, offers an important lesson about UCI from the perspective of favorable actions toward the accused. *United States v. Wilkerson* drew national attention when the convening authority, Air Force Lieutenant General Craig Franklin, dismissed charges of sexual assault and conduct unbecoming an officer against Lieutenant Colonel James Wilkerson after a panel convicted him and sentenced him to dismissal and one year of confinement.

Lieutenant General Franklin's post-trial decision sparked debate about military justice reform, which this article will not retread. Construed more narrowly, the *Wilkerson* case is a helpful aid in diagnosing when a convening authority has an "other than an official interest" in a case. This tenet of UCI asks whether "a reasonable person would impute to [the convening authority] a personal feeling or interest in the outcome."[92] Anyone with an "other than an official" interest is an accuser,[93] and accusers are ineligible from convening

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[88] Richard A. Oppel Jr., *Sexual Misconduct Case Ends with No Jail Time for General*, N.Y. TIMES, Mar. 20, 2014, http://www.nytimes.com/2014/03/21/us/general-sinclair-is-sentenced.html?_r=0.

[89] Since this sentence fell below requirements for production of a trial transcript and submission for appellate review, study of the UCI aspects in this court-martial (and there were many) is far more difficult than with a published appellate opinion. In researching the case for this article, the authors are grateful to Lieutenant Colonel Robert Stelle for providing helpful information about the three UCI motions submitted by the defense, the three government responses, and the military judge's written ruling on the first motion. Lieutenant Colonel Stelle was a trial counsel on the case.

[90] The accused was convicted of maltreatment and sentenced to a reprimand and to forfeit $5,000 per month for four months. Oppel, *supra* note 88.

[91] *See, e.g.*, Ruth Marcus, *Break the Chain of Command on Military Sex Assault Cases*, WASH. POST, Mar. 18, 2014 (describing developments in the case of "whether there had been 'undue command influence' in pursuing the Sinclair prosecution).

[92] United States v. Gordon, 2 C.M.R. 161, 166 (C.M.A. 1952); *see also* United States v. Dingis, 49 M.J. 232 (C.A.A.F. 1998).

[93] UCMJ art. 1(9); MCM, *supra* note 54, R.C.M. 504(c)(1).

general or special courts-martial.[94] Following from this, an accuser who carries out convening authority duties is engaged in unlawful command influence.

Published military appellate opinions about convening authorities with "other than an official interest" focus on those who display animus towards an accused.[95] *Wilkerson* demonstrates how the opposite response, favoritism, can be just as problematic. The *Wilkerson* case includes a treasure trove of internal documents released in response to public and political attention on the case.[96] These documents helped illuminate the convening authority's manner of deliberation in ways that normally are not available to the public, and caused many to question his impartiality.

Wilkerson will never become UCI case law because the convening authority disapproved the findings of guilty and sentence and dismissed the charges. But the case is a useful lesson in how perceptions matter: if an accused's privilege or personal connections to judicial officials garner him more favorable treatment than he would otherwise enjoy, the integrity of the military justice system suffers, just as it suffers when a convening authority displays a personal hostility towards the accused. In either case, an accuser is improperly serving as a convening authority. The rule is simple: quasi-judicial officials, like Lieutenant General Franklin, must be impartial or recuse themselves.

Focus on Lawful Command Emphasis

A review of relevant cases is replete with examples of UCI, holding true the notion that the law is made from bad cases. Yet, commanders who properly address disciplinary issues enjoy the protection of their command responsibilities from the courts. Following the tragic death of multiple civilians riding a gondola when a Marine Prowler made contact with the cable, as outlined in the case of *United States v. Ashby*, the 2d Marine Aircraft Wing Commander addressed the officers in the Prowler community through a series of speeches.[97] The commander implied that the incident was caused because the crew was not following rules by flying too low.[98] He admonished the Prowler community as a whole for violating rules on low-level flights and discussed the possibility of punishment for violating flight rules.[99] "He never specifically addressed any disciplinary proceedings against the mishap aircrew, what would be an appropriate punishment in the case, or whether fellow aviators should testify in the case."[100]

The *Ashby* court considered that "[b]ecause of the highly publicized international nature of the incident, it is understandable that many senior military officials became publicly involved in the aftermath and investigation of the accident."[101] However, there was "no direct evidence that the actions of any of those officials improperly influenced [the] court-martial."[102] The appellate court evaluated the facts for actual UCI and "the appearance of unlawful command influence where 'an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding,'" and found no UCI that impacted the court-martial process.[103] The court supported the commanders involved in the investigation who spoke about the cause of the incident, eventually failing to find "that the senior military officials' interest in the investigation was anything other than proper, official, and lawfully directed at completing a quality and thorough investigation."[104]

Further support for a commander's ability to lawfully influence the discipline and climate among our ranks, even with regard to sexual assault, can be found in *United States v Wylie*.[105] In *Wylie*, the Navy-Marine Corps Court of

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[94] UCMJ art. 22(b) (general courts-martial), art. 23(b) (special courts-martial).

[95] *See, e.g.*, United States v. Mack, 56 M.J. 786 (A. Ct. Crim. App. 2002).

[96] *The Wilkerson FOIA Release*, UNITED STATES AIR FORCE FREEDOM OF INFORMATION ACT READING ROOM, http://www.foia.af.mil/reading/the wilkersonfoiacase.asp (last visited July 25, 2014). The releases show that both the convening authority and the accused were officers in the same tight-knit F-16 pilot community. In his clemency submission, the accused emphasized this common background with the convening authority and noted that they flew a combat mission together in Iraq. While deliberating, Lieutenant General Franklin received e-mails from a close military advisor that the accused's "integrity is airtight" and "character is unshakeable," and another e-mail from a retired group of F-16 pilots decrying the trial as an unfair assault on the fighter pilot community. In a memorandum justifying why he dismissed the charges, Lieutenant General Franklin said that part of his reasonable doubt came from the accused's selection for promotion to full Colonel, service as a wing inspector general, and description as a doting father and husband. The convening authority seemed aware of how his actions would be perceived as favoritism, and addressed this in his written statement by emphasizing that he did not personally remember the accused. However, after dismissing the charges he wrote in an internal e-mail stating, "I intend to get him back to a flying assignment as soon as possible . . . . Certainly after [the accused] and [the accused's wife] have had a chance to discuss, I would like to know what he wants to do next . . . . Please make sure Colonel Wilkerson knows he can contact me . . . about the way ahead for his next assignment."

[97] United States v. Ashby, 68 M.J. 108, 126 (C.A.A.F. 2009).

[98] *Id.*

[99] *Id.*

[100] *Id.* (citing United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006)).

[101] *Id.* at 129.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 128.

[105] United States v. Wylie, No. 201200088, 2012 WL 5995983 (N-M. Ct. Crim. App. Nov. 30, 2012), *review denied*, 72 M.J. 164 (C.A.A.F. 2013). It is important to note that this was an unpublished case from a sister-service court and is in no way binding within the Army. Still, it provides a good example of command commentary that survived appellate scrutiny on what is currently the most sensitive topic.

Criminal Appeals considered a two-page message from the Commander of the Pacific Fleet titled, "Leadership against Sexual Assault."[106] Among other comments, the message stated,

> Despite on-going training and prevention efforts, sexual assault continues to be a persistent problem in the Navy that demands our attention . . . . [T]wo-thirds of all sexual assaults are blue-on-blue, to include seniors sexually assaulting juniors. It would be unwise for [us] to underestimate the impact that sexual assault has within the Navy . . . . [I]t begins with leaders who . . . react forcefully and consistently when sexual misconduct occurs.[107]

The court specifically called the message "an instance of lawful command influence."[108] This message is an excellent example of lawful command emphasis.

Commanders may easily, and legally, influence the progression of a case or investigation without influencing a subordinate commander at all through the use of a withholding policy. Among the most notable examples of a withholding policy is the 20 April 2012 Secretary of Defense mandate that all sexual assault cases are withheld to the first O-6, special court-martial convening authority for initial disposition.[109] Commanders and SJAs should review this memorandum not only for its impact on dispositions in sexual assault cases, but also for its form and construction. The most notable aspect of this memorandum is the lack of reference to how any commander should dispose of a case beyond the process.[110] Instead, the Secretary goes only so far as to support the process,[111] while emphasizing the responsibility for reviewing all matters, conducting independent reviews as necessary, encouraging subordinate commanders to make recommendations, and only then determining an appropriate disposition.[112]

But with these UCI parameters in place, how can commanders set priorities and a tone for their unit on a daily basis without crossing into unlawful command influence? Commanders can talk about offenses, but should not talk about offenders. Commanders can emphasize, for example, that sexual assault is "a criminal offense that has no place in the Army. It is incompatible with Army values and is punishable" under the law.[113] These actions are not an influence on a particular case, but an emphasis on the commander's priorities. Lawful command emphasis allows the commander to prioritize those tasks so that he can accomplish the mission. To stay within the law, commanders should remember to talk about the offense, but not the offender, and talk about the process, not the result.

Talk Offense, Not Offenders

Commanders and their legal advisors should focus on the offense and how that offense harms the military's mission and the bonds of trust within the military that make mission success possible. Therefore, commanders and their staff should not refer to an alleged offender in a derogatory manner.[114] Intemperate comments can impact the alleged offender's right to a fair trial.[115] For example, if commanders or staff members make intemperate comments, alleged offenders might not be able to muster witnesses willing to testify in their defense. If commanders or primary staff members (those who are under the commander's mantle of authority, to include the SJA or even the accused's first-line supervisor)[116] refer to the accused as a "terrorist" or "scumbag," others, including potential panel members, might presume the accused is guilty. At a minimum, those types of comments will have a chilling effect on the fairness of the judicial proceedings and be "a corruption of the truth-seeking function of the trial process."[117]

Instead, talk the offense. The phrase "sexual assault is a criminal offense that has no place in the Army" is a perfectly valid and acceptable statement for any commander to make about sexual assault. Sexual assault is not the only criminal offense that has seized the public's narrative and made the daily news feed—some that might come to mind are hazing, driving under the influence of alcohol, sexual harassment, domestic violence, and discrimination. Each of these is a

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[106] *Id.* at *2.

[107] *Id.*

[108] *Id* at *3.

[109] Memorandum from Sec'y of Defense to Sec'ys of the Military Departments et al., subject: Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (20 Apr. 2012).

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] Memorandum from the Chief of Staff, XVIII Airborne Corps and Fort Bragg, subject: [Policy] (9 Sept. 2008) (on file with the authors).

[114] The concept of "talk offense, not offender; talk process, not results" was outlined in 2006 by then-Lieutenant Colonel Patricia Ham, Chair of the Criminal Law Department at The Judge Advocate General's Legal Center and School. *See* Patricia A. Ham, *Still Waters Run Deep? The Year in Unlawful Command Influence*, ARMY LAW., June 2006, at 53.

[115] *Id*. at 66.

[116] *See* United States v. Douglas, 68 M.J. 349, 353 (C.A.A.F. 2010) (finding UCI stemming from the actions of the accused's first-line supervisor who was a senior non-commissioned officer).

[117] United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

crime under the UCMJ, federal law, or state law. Stating that "sexual harassment in any form will not be condoned within our ranks" is a comment about the offense, not the offender.[118] For example, a commander can always explain that every sexual assault in the Army deteriorates a unit's ability to be prepared for the mission, using words to the effect of, "there is no place for behavior that has this kind of impact at a time with as varied a mission-set as we have, requiring 100% mission focus."

Furthermore, commanders should not single out an alleged offender; that is, a commander should not call a particular Soldier a "druggie" for testing positive on a urinalysis examination. That commander would be veering into waters of assigning guilt before the judicial proceedings commence, which could impact the Soldier's due process rights. Likewise, it is important for a commander to make a distinction between the crime and the person accused of the crime. So while the commander can say, "There is no place for sexual assault within the Army," the commander should not go on to say, "or for those who commit this crime."[119] Even if an accused is found guilty by court-martial, the sentence might not include a discharge, meaning the accused is allowed to stay in the military.

As already discussed, commanders must always advance the narrative that their subordinates use independent judgment. The Commanding General of 1st Infantry Division and Fort Riley articulated this adroitly for the entire Division:

> Independent Judgment: I expect everyone involved in the military justice system to exercise their own independent judgment and make decisions based upon the individual facts and merits of a case. Decisions are not to be made based upon personal interests, a desire for career advancement, or in an effort to please others in the chain of command. Senior officials must never pressure a subordinate to take a particular action or make a certain recommendation in any action.[120]

This language tracks both the sentiment and the verbiage crafted by the Secretary of Defense's memorandum on the integrity of the military justice system several days earlier. It reminds commanders, leaders, and all JAs that each case must be resolved on its own facts. One should not presume a conclusion without knowledge of the facts.

Proactive Measures on Offense

There are numerous proactive ways commanders can talk offense and not focus on the offender: policy memorandums, required unit training, and check-lists. Commanders often put out policy guidance to make those in their commands aware of the commanders' priorities. Several years ago, alcohol abuse was an issue within the ranks. Today, alcohol-related incidents still happen, but with a focus on eliminating alcohol abuse from the ranks, there has been a down-turn in these types of incidents. As the Commander of the 4th Infantry Division and Fort Carson phrased it, "[a]buse of alcohol . . . by both military and civilian personnel is inconsistent with Army values, standards of performance, discipline, and the readiness necessary to accomplish the Army's mission."[121] His policy memorandum goes on to set parameters of when alcohol can be present at unit functions, for example: "[u]nits . . . will not conduct fundraisers using alcohol."[122] The commander also requires that certain training be conducted to prevent an alcohol-related incident: leaders "will ensure that all Soldiers and Civilians are briefed prior to any holiday, training holiday, and . . . extended leave about the dangers of alcohol misuse and abuse."[123]

The goal is to give members of the command awareness and then the tools to help those who are affected: "[l]eaders should make available suitable programs to help reduce or eliminate alcohol-related incidents and to promote responsible social behavior." Programs like the Army Substance Abuse Program and the Family Advocacy Program are available to all Soldiers, which should be made clear in the policy memorandum. Also, if adverse action must be taken against a Soldier because of involvement in alcohol-related misconduct, the memorandum should make clear that "[c]ommanders are expected to continue to exercise discretion in recommending" the appropriate disposition.[124] Although an excellent articulation, this sentiment could be further bolstered and driven further from any possible UCI allegations by inserting the word "independent" before discretion.

With the national narrative focused on sexual assault, commanders should consider putting out a policy memorandum on sexual assault. Such memoranda should make it clear that sexual assault is a crime, and should

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[118] *See* United States v. Rivers, 49 M.J. 434 (C.A.A.F. 1998).

[119] *Id.* at 438.

[120] Memorandum from the Commanding General, 1st Infantry Division and Fort Riley, subject: Danger 6 Sends 13-4, Integrity of the Military Justice System (8 Aug. 2013) (on file with the authors).

[121] Policy Letter, Headquarters, 4th Infantry Division (Mechanized) and Fort Carson, subject: Command Alcohol Policy 1 (13 Feb. 2012) [hereinafter Carson Alcohol Policy] (on file with the authors).

[122] *Id.*; *see also* Policy Letter, Headquarters, XVIII Airborne Corps and Fort Bragg, subject: Mandatory Initiation of Administrative Separation for Drugs and Alcohol Related Offenses 2 (26 Mar. 2012) (on file with the authors).

[123] Carson Alcohol Policy, *supra* note 121.

[124] *Id*.

outline the unit's training responsibilities for the prevention of sexual assault. The memorandum should also include information as to how a victim should report a sexual assault and what resources are available to the victim. As one command succinctly stated, "[l]eaders at all levels must take swift and decisive action in preventing, identifying, reporting, and—after consulting with legal authorities—disposing of all incidents of sexual assault."[125] The XVIII Airborne Corps' policy on the response to incidents of sexual assault gives subordinate commanders a sexual assault victim assistance checklist and the telephone numbers of care providers and local authorities. This same policy outlines the unit's annual training requirements. The commander is trying to be proactive and set a tone that sexual assault or harassment is not acceptable behavior. With specific regard to sexual assault policies, programs that begin with Soldiers at the lowest rank and grow upward tend to be most effective and least likely to create UCI concerns. Plus, it allows commanders to teach and empower Soldiers to take care of each other when the chain of command is not present and inculcate a culture where sexual assault is not acceptable behavior.

Regardless of the subject matter, commanders are trying to "develop a command climate in which service members feel confident that they can openly address incidents of sexual assault [and harassment, hazing, or domestic violence] with their chain of command."[126] In the policy memorandum, as in the oral and written comments of a commander, the focus should be on the conduct that should not be condoned[127]—these crimes interfere with the unit's mission and degrade the unit's combat effectiveness and readiness. The memorandum should simply avoid discussion of any alleged perpetrator of sexual assault, hazing, or domestic violence and refrain from commenting on what should happen to any Soldiers who are accused of such conduct presently or in the future.

Talk Process, Not Results

We live in an age of instantaneous information and social media commentary. There is a great drive to comment on what is happening instantaneously—the current pending case, the de jure outrage—and the perception is that there is a demand to know the facts as we know them this very second. This feeding of the news cycle is a reality of our current environment, and with instantaneous communication platforms, the demand for comment or information grows more intense. In the context of the UCMJ, Colonel Erik Coyne correctly couches high-interest cases as "[b]alancing the need for information with the demands of justice."[128] Commentary that calls into question the fairness of the military justice system by discussing results is corrosive. All military courts should impartially and judiciously decide the merits of a case; this is foundational and paramount. To do otherwise is to cast into doubt the instant case that is, or potentially will be, before a court-martial. More seriously, it undermines the system. It gradually leads to doubt about the fairness of the UCMJ.

Colonel Patricia Ham,[129] former Chair of the Criminal Law Department at The Judge Advocate General's Legal Center and School, gave two excellent examples of talking process, not results. The first related to the allegation that in November 2004 in Iraq, a Marine corporal shot an unarmed man in a Fallujah mosque. The situation captured the public's attention, in part, because the episode was captured by a journalist, Kevin Sites, on camera. Instead of making conclusions or telegraphing a certain disciplinary result, General George V. Casey, the commander in Iraq at the time, stated, "[The shooting] is being investigated, and justice will be done . . . . This whole operation was about the rule of law, and justice will be done."[130] General Casey, when asked about the details of what the military knew and potential culpability, was not making conclusions but discussing the process. Since there was film of the actions, there was an appetite in certain corridors of the press to bring this Marine to justice for killing a civilian,[131] but General Casey and the Marine Corps leadership investigated the facts and concluded that the Marine's actions were consistent with the rules of engagement and the law of armed conflict.[132]

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[125] Policy Letter, Headquarters, Fort Campbell, subject: Fort Campbell Policy on Sexual Assault (30 Nov. 2011) (on file with the authors).

[126] Policy Letter, CG-01, Headquarters, 4th Infantry Division (Mechanized) and Fort Carson, subject: Sexual Harassment/Assault Response and Prevention (SHARP) Program (n.d.) (on file with the authors) (policy is undated).

[127] The authors recommend staying away from the terminology "will not be tolerated" given developed case law that takes a dim view of the "zero tolerance" policy. *See* United States v. Simpson, 58 M.J. 368, 376 (C.A.A.F. 2003) (finding no unlawful command influence in the use of "zero tolerance" regarding Army policy about drug use, but emphasized the court's conclusion was case-specific and warned that "zero tolerance" has improperly affected past courts-martial).

[128] Coyne, *supra* note 3, at 16.

[129] *See also* Ham, *supra* note 114.

[130] *Id.* at 67.

[131] *New York Times Rewrites Fallujah History*, GLOBAL POL'Y FORUM (Nov. 16, 2004), https://www.globalpolicy.org/component/content/article/168/36645.html ("If part of that 'information war' means convincing Americans that civilians are not victims of the Fallujah invasion, the Times has signed up on the side of the Pentagon.").

[132] Alex Chadwick, *No Court-Martial for Marine Taped Killing Unarmed Iraqi*, NAT'L PUB. RADIO (May 10, 2005), http://www.npr.org/templates/story/story.php?storyId=4646406.

The other example given by Colonel Ham relates to the November 2005 Haditha Dam massacre where twenty-four Iraqi civilians were killed allegedly by U.S. Marines. General Peter Pace, the Chairman of the Joint Chiefs of Staff at the time, when asked about what the military would do with the implicated Marines, said, "We will find out what happened, and we'll make it public . . . . [T]o speculate right now wouldn't do anybody any good." Even more than the Fallujah mosque incident, the Haditha Dam massacre seeped into the public's narrative.[133] But the criminal process had not occurred at that point, and the rights of the accused would not allow the military's leadership to talk about conclusions of culpability.

Both examples are related to requests for information about an ongoing investigation regarding potential war crimes. It is certain that both of these senior officers had information that would have put the military in a better light at the time. But both officers took a strategic pause and did not offer commentary that could have had a near-term positive impact, but could have caused long-term detriment to both the individuals involved and our military justice system.

Comments by the Commandant of the Marine Corps and the Secretary of the Army

The above comments can be juxtaposed with what two senior leaders in the military establishment recently said about matters related to sexual assault in the military. One example shows the unintended consequences of talking results and the other shows the intended benefits of talking process. The first are the comments by the Commandant of the Marine Corps, General James F. Amos, during his Heritage Brief, and the second are the comments by the Secretary of the Army, the Honorable John McHugh, about the court-martial of Brigadier General Jeffrey Sinclair.

In the spring of 2012, the Marine Corps' Commandant, General James F. Amos, toured Marine Corps installations worldwide. During his talks with Marines, known as the Heritage Brief, he discussed his priorities as the Commandant, his responsibility for the Corps' "spiritual health," and those issues that impacted this health.[134] During this address, he discussed the problem of sexual assault within the Marine Corps as follows:

> [W]e had 348 sexual assaults in 2011 and you go—males in here, I know exactly what you are thinking, well . . . it's not true; it is buyer's remorse; they got a little liquored up and got in the rack with a corporal, woke up the next morning, pants were down, what the hell happened; buyer's remorse. *Bull shit*. I know fact. I know fact from fiction. *The fact of the matter is, 80 percent of those are legitimate sexual assaults.*[135]

The Commandant also made clear his views on accountability regarding those found guilty or responsible of sexual assault:

> [W]e have got a problem with accountability. I see it across the Marine Corps. I see it in the Boards of Inquiry, in their results and we have got an officer that has done something that is absolutely disgraceful and heinous and the board . . . he goes to a court-martial and he goes before a board of colonels and we elect to retain him. Why? Do I need this captain? Do I need this major? *I don't*. Why would I want to retain someone like that? I see the same thing with staff NCOs.[136]

The Commandant was talking squarely about results and not about the process. As the senior Marine, he was informing Marines that a vast majority of sexual assault allegations are "legitimate," and once found guilty of this disgraceful and heinous act, the Marine needs to be removed from the ranks. In other words, believe the victim of sexual assault and eliminate the perpetrator.

The Commandant's remarks landed squarely in the middle of the court-martial of Staff Sergeant Howell. Howell was accused of rape, among other violations of the UCMJ, and was found guilty by a panel of Marines and given eighteen years of confinement and a dishonorable discharge.[137] Howell raised the appearance of UCI, in part, on the Commandant's remarks given at Parris Island where Howell was pending trial by general court-martial for sexual assault. The Navy-Marine Corps Court of Criminal Appeals agreed and set aside the findings of guilt and the sentence. The *Howell* court held that "a disinterested observer, knowing that potential court-martial members heard this very personal appeal in April from the [Commandant] to 'fix' the sexual assault problem, would harbor significant doubts about the fairness of a sexual assault trial held shortly thereafter in June."[138]

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[133] Ellen Knickmeyer, *In Haditha, Memories of a Massacre*, WASH. POST, May 27, 2006, at 3.

[134] United States v. Howell, No. 201200264, at *3 (N-M. Ct. Crim. App. May 22, 2014).

[135] *Id*. at *4 (emphasis added).

[136] *Id*. at *5 (emphasis added).

[137] *Id*. at *1–2.

[138] *Id.* at *17. The Court notes in a footnote that "on the date of the Heritage Brief at Parris Island, the appellant was pending trial by general court-martial for sexual assault offenses. The panel for his specific court-martial had been identified, and eight panel members were sitting in the

The lack of curative instructions to the panel members who heard the Commandant speak and the military judge's flawed rulings, along with his intemperate comments during the trial, made this case unanimous in its result. But Senior Judge Ward, in his concurring opinion, noted that "[m]uch of the Heritage Brief in my mind reflects lawful command influence. Reasonable minds can disagree as to attendant meanings from certain remarks. In many ways, the [Commandant's] remarks in regard to sexual assault reflect a broader, ongoing debate that extends well beyond our military."[139]

As outlined in these pages, there are numerous steps a commander can take to ensure lawful command emphasis. What is perplexing about Senior Judge Ward's comment about sexual assault reflecting a broad, ongoing debate is that those other commentators to this debate are not the *Commandant of the U.S. Marine Corps*—the senior military officer in the Marine Corps. Like a commander, when he speaks, his subordinates listen. In the end, with position comes responsibility, and one of those responsibilities is adherence to Article 37, UCMJ. In sum, the tactical imperative of eradicating sexual assaults from our ranks cannot trump the strategic necessity of preserving our time-tested code of military justice. One of its pillars for more than sixty-five years is Article 37, UCMJ.

On the other side of the spectrum concerning comments by senior leadership is the *Sinclair* case. As already discussed, the Army court-martialed Brigadier General Jeffrey Sinclair for maltreatment of subordinates, among other crimes. After the trial but before the General Court-Martial Convening Authority (GCMCA) took action on General Sinclair's case—in which the GCMCA would review the record of trial and consider General Sinclair's clemency matters—the Secretary of the Army was asked about General Sinclair's sentence while testifying before the U.S. House of Representatives. He was asked in the context of a less than cordial audience; one Member asserted that Sinclair was "given a slap on the wrist," thereby suggesting that military justice "does not work."[140] Instead of defending the result or casting it into doubt, the Secretary adroitly talked about the process.

> As the final decision-maker in matters of this kind, I'm really constrained in what I can say. Unlike in the civilian sector, when a jury comes in, and the case is closed, this case is not closed. They're under the uniform code of military justice: a continuing process of certification of the record providing both the victim as well as [Sinclair] an opportunity to respond to the content of that record . . . . What I can say is that as in the civilian sector, we do not have control over, nor do we try to influence the sentencing of the judge. The Army was faced with the prospect of prosecuting this particular individual, and it did that, and it also prosecuted in a way that obtained a conviction. Those are the things we—we do control . . . . So, we do take the steps necessary to hold soldiers accountable, but we cannot, and nor would the civilian sector, be able to make the determinations of a sentencing judge.[141]

Then a Member of Congress asked whether Sinclair would be able to retire at his current grade. The Secretary, again, talked about the process and did not telegraph what would occur.

> Under the processes for the military, when a soldier goes for retirement, the secretary of the department has the authority to order a grade determination board, and that grade determination board makes recommendations as to the grade at retirement for that officer . . . . [U]nder the military procedures, at retirement, the service secretary of any of the military departments can order a grade determination board to make recommendations on grade at retirement.[142]

When asked if he was going to conduct a grade determination board, the Secretary answered: "I'm not at liberty to make comment on what I may or may not do, particularly given that the case is still technically open under the UCMJ."[143] The Secretary did not make a comment that would impact General Sinclair's opportunity to have his clemency be fully and fairly considered by the GCMCA—a right afforded every accused. Secretary McHugh's responses provide a good example of a right way for leaders to talk about military justice.

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audience. Those panel members heard the [Commandant's] comments from a unique perspective— that of prospective members of a pending court-martial." *Id.* n.59.

[139] *Id*. at *23 (Ward, J., concurring).

[140] *House Armed Services Committee Holds Hearing on Department of the Army Defense Authorization Request for Fiscal 2015*, CONG. Q., Mar. 25, 2014, at 62.

[141] *Id.*

[142] *Id*. at 63.

[143] *Id*.

Crafting Your Message

While this article cannot identify every potential UCI pitfall or look into a crystal ball to predict lawful command emphasis that will always survive scrutiny, it can offer a method that helps accomplish both tasks based on lessons learned from senior leaders. The best first step is simply a conversation between the commander and the SJA identifying the issue the commander wants to address. A commander may and should identify and address perceived problems related to military justice.[144] Staff Judge Advocates must assist in drafting policies and statements that are clear, have context, and avoid UCI.[145]

Both the commander and SJA should consider the content and complexity. Ask, "Can this commander address this issue and have the intended impact on the intended audience?" Most of the time, critical analysis and carefully crafted language will result in a positive answer to those questions. On other occasions, the commander-SJA team will determine the commander must exercise restraint on the issue to ensure independent discretion and fairness.[146]

If the commander decides to address the issue, consideration of the intended audience is critical, as is the commander's intent regarding further promulgation. Some messages are simply too complex and nuanced for transmission to a large audience.[147] A commander must be able to clearly and directly communicate command emphasis to an audience, orally or in writing, with some predictability regarding the manner in which listeners or readers at varying ranks will receive the message. To the extent the commander-SJA team senses the message may become murky for some, they should reevaluate the intended audience and message.

An often cited example, and the one used during General Officer Legal Orientations at TJAGLCS, comes from *United States v. Treakle*.[148] In *Treakle*, a commanding general was frustrated with subordinate commanders who recommended referral of cases to levels of courts-martial empowered to adjudge a punitive discharge, but then testified in favor of retaining the Soldier.[149] Potential for UCI existed within both aspects of this general's frustration. If he directed a lesser course of action, he would unlawfully influence the independent discretion of his subordinate commanders. If he directed subordinates not to testify to retain Soldiers for whom they recommended a discharge, he would unlawfully influence their testimony. Was there room for a nuanced message to the right audience that only addressed a method of doing military justice business using a systematic, consistent approach?

The commanding general in *Treakle* discussed the issue with his SJA. The SJA prepared talking points that, in part, warned against conveying a message that might discourage testimony.[150] While the general used the talking points, he spoke somewhat extemporaneously to several different large audiences, often leaving out the cautionary note supplied by his SJA.[151] Subordinates at various levels of command who attended different meetings later conveyed very different understandings of the comments.[152]

The general could have discussed the necessity for thorough investigations and critical analysis using all the factors listed in RCM 306,[153] and the importance of making independent recommendations and having the courage to stand behind them. Instead, he conveyed a complex message orally on several occasions to various audiences where he often strayed from the points prepared by the SJA and with a tone and tenor that confused his subordinates.[154] While his SJA was there for some of these meetings, he was more frequently absent and never took steps to provide course correction until it was too late.[155] The message, audience, forum, and legal presence were all wrong, resulting in unintended UCI instead of lawful command emphasis.

Even after a commander-SJA team determines proper lawful command emphasis to the right audience, in the correct context, should it be delivered orally or in writing? Commanders tend to appreciate the closer interpersonal aspects of in-person communications. Written policies offer

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[144] United States v. Treakle, 18 M.J. 646, 653 (C.M.A. 1984) (discussing comments by a commanding general seeking to correct a perceived military justice problem that were interpreted very differently by members of the unit who heard the comments at different meetings and in different contexts).

[145] *Id.* at 649 (discussing a SJA who provided a point paper with cautionary warnings meant to safeguard against UCI).

[146] *Id.* at 653.

[147] *Id*. at 654.

[148] *See* CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, GENERAL OFFICER LEGAL ORIENTATION—UNLAWFUL COMMAND INFLUENCE (quoting *Treakle*, 18 M.J. at 646).

[149] *Treakle*, 18 M.J. at 650.

[150] *Id.* at 654.

[151] *Id.*

[152] *Id.* at 650–52.

[153] MCM, *supra* note 54, R.C.M. 306(b) discussion. Some of the factors include "the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline; . . . the views of the victim as to disposition; . . . and the character and military service of the accused." *Id.*

[154] *Treakle*, 18 M.J. at 654.

[155] *Id.* at 649–50.

the opportunity for precise language and consistency in the way the message is received. In deciding which is best, commanders should consider their ability to predict the manner in which subordinates will receive the message and the resulting impact. Part of the impact may be responding to a UCI motion. Accordingly, when SJAs discuss delivery of the message, they must provide counsel on how both delivery and reception of the message should be preserved.

After the lawful command emphasis is delivered, commanders and JAs must follow up to ensure the message received was consistent with the commander's intent.[156] As an organization, the military frequently requires subordinates to provide "back-briefs" or use other methods to ensure proper understanding of an intent or operation. It is a method that every level of Soldier has experienced and understands. When exercising lawful command emphasis, both legal and command personnel should ask what subordinates gleaned from the command policy or message. Only then can the team truly assess the success of the message or the potential need for clarifying guidance.

Conclusion

The UCMJ is unique and must comport with the fundamental concepts of American justice. The balance between justice and discipline is not antithetical, however. It is complementary. All commanders and those under the mantle of command authority must make the fair and impartial functioning of the military justice system their mission. It truly is where tactics and strategy meet. Commanders want transgressors in their units to be held accountable, which is understandable and necessary. The commander-SJA approach must ensure the strategic vibrancy of the UCMJ. The joint focus must be discipline—holding offenders accountable—and ensuring that every accused receives a fair hearing with the full opportunity to present his case. That is the goal of Article 37. Lawful command emphasis provides the commander-SJA team with the means to protect the integrity of Article 37 and the UCMJ while simultaneously addressing indiscipline within the formation. Properly applied, lawful command emphasis allows a commander to lead a stronger, mission-ready unit built on Soldier trust and trust in our military justice system.

[156] *Id.* at 654.