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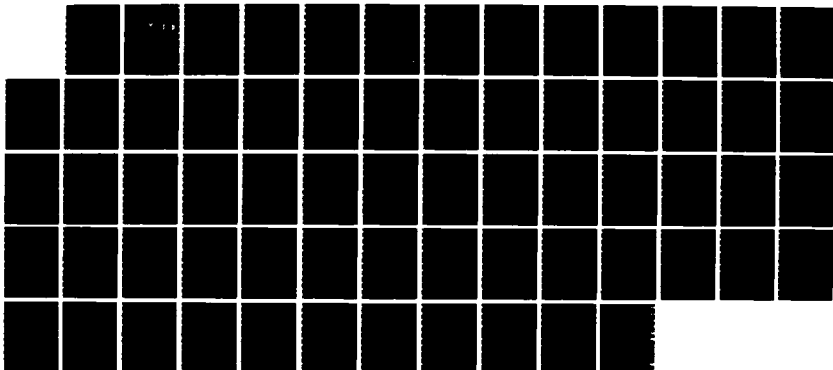
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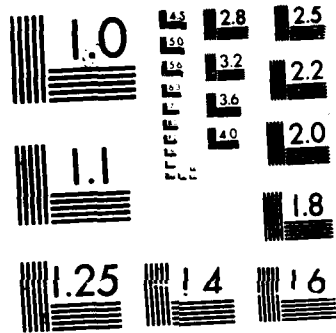
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STUDENT REPORT

UNLAWFUL COMMAND INFLUENCE:
Preserving The Delicate Balance

Major Martha Huntley Bower 87-0295
"insights into tomorrow"

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Preserving The Delicate Balance

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requirements for graduation.

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<p>This paper addresses the issue of unlawful command influence in the military justice system. A delicate balance exists between the commander's need to announce command policies to members of his command and the need for a fair trial. When the commander or his representative takes action to upset this delicate balance, either by improperly influencing the court members during a trial or by intimidating defense witnesses, unlawful command influence results. This has a deleterious impact on the accused and the military justice system. It may also subject the commander to prosecution under the Uniform Code of Military Justice.</p> <p>This paper examines the legislative history of unlawful command influence and then examines relevant case law. It then makes recommendations for the commander and his staff to preclude the problem from arising, and recommends remedial actions, should unlawful command influence occur.</p>				
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PREFACE

1. A copy of this manuscript has been submitted to The Air Force Law Review for consideration.
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4. This paper addresses the issue of unlawful command influence in the military justice system. A delicate balance exists between the commander's legitimate need to announce command policies to members of his command and the need for a fair trial. When the commander or his representative takes action to upset this delicate balance, either by improperly influencing the court members during a trial or by intimidating defense witnesses, unlawful command influence results. This has a deleterious effect on the accused and the military justice system. It may also subject the commander to prosecution under the Uniform Code of Military Justice.
5. This paper examines the legislative history of the issue and then examines relevant case law. It then makes recommendations for the commander and his staff to preclude the issue from arising and recommends remedial actions, should unlawful command influence occur.



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UNLAWFUL COMMAND INFLUENCE:
Preserving the Delicate Balance

Introduction

It is a bedrock principle of military justice that every person tried by court-martial is entitled to have his guilt or innocence, and his sentence, determined solely upon the evidence presented at trial, free from all unlawful influence exerted by military superiors or others.

United States v. Rodriguez'

Perhaps the most elusive problem in the military justice arena today is the issue of unlawful command influence. The commander's need, and indeed mandate, is to enunciate policy to subordinates in order to instill discipline and good order. This interest is fundamental and at the heart of the commander's duties. However, it often clashes with another compelling military interest, that of maintaining a fair, impartial system of military justice. "The process of maintaining discipline yet ensuring fairness in military justice requires what the United States Court of Military Appeals has called a 'delicate balance' in an area filled with perils for the unwary."² When this balance is upset, unlawful command influence results.

The gravamen of unlawful command influence is twofold. In the first place, the accused may be denied a fair and impartial hearing or potentially beneficial witnesses.³ The effect on the accused in such a case may be significant. Not only must the accused cope with a sometimes lengthy and emotional proceeding which will have a direct bearing on his future, but he must also face with anxiety the possibility his trial may be tainted. He cannot be assured his verdict and sentence will be determined strictly within the confines of the courtroom and he may be unable to provide critical evidence. He is bound to lose faith in the judicial system.

In the second place, the courts must strive to "foster public confidence"⁴ in the military justice system.

If respect for the justice system is a key factor in military morale and discipline, the fact that the system

appears vulnerable to command pressures may be as damaging as the occasional exercise of such pressures. Individuals react to phenomena, after all, on the basis of their perceptions of those phenomena.⁵

When unlawful command influence occurs, the military justice system loses credibility, not only within its own ranks, but also in society.

There are scorners from the outside who take every opportunity to sneer at the military justice system. Those of you who have been around for a while could recall several years ago when a leading magazine publication, [sic] popularized the expression "that military justice is to justice, as military music is to music," [sic] and there are witlings out there who take every opportunity to defame our system of military justice, and we must make every effort we can not to provide these people the opportunity for such unfair endeavors. Those others who are a part of the system and whose professional lives center around the military justice system must zealously guard the integrity of that system.⁶

As General Westmoreland, then Chief of Staff of the Army, noted in 1971:

The protection of individual human rights is more than ever a central issue within our society today. An effective system of military justice, therefore, must provide of necessity practical checks and balances to assure protection of the rights of individuals. It must prevent abuses of punitive powers, and it should promote the confidence of military personnel and the general public in its overall fairness.⁷

Three and one half decades after enactment of Article 37^e of the Uniform Code of Military Justice (UCMJ), written to eradicate unlawful command influence, the problem continues to rear its ugly head. While appellate courts struggle with the issue, commanders and their staffs, particularly staff judge advocates (SJA), continue to flounder. It is one thing to state "Command influence is the mortal enemy of military justice," quite another to derive useful lessons. While it may be relatively easy to guard against deliberate sabotage of the military justice system, guarding against the appearance of unlawful command influence is considerably more difficult. This is complicated by the fact unlawful command influence may result when the recipient of the commander's action perceives he is being influenced, even when this is not the commander's

intention. Commanders must provide guidance and maintain discipline, but if they upset the delicate balance the repercussions are intolerable. Not only may the accused suffer an injustice, but the military justice system itself suffers, and, furthermore, the commander may become subject to criminal prosecution.¹⁰ This atmosphere of uncertainty is far from reassuring.

A recent rash of cases, arising out of the Army's 3d Armored Division, illustrates this issue has not been resolved. Over 200 cases, arising from the same set of circumstances, and involving the actions of a commander in the grade of major general, are affected.¹¹ The recent decision by the Court of Military Appeals in *United States v. Thomas*¹² has provided some guidance but more will be forthcoming. In the meantime, commanders and their staffs are in the unenviable position of trying to discover the limits of their command authority.

This paper tackles the issue of unlawful command influence, beginning with a brief legislative background. It then examines relevant case law and addresses the somewhat nebulous character of unlawful command influence. It will then offer some guidelines for commanders and their staffs to avoid unlawful command influence, and discuss curative actions, should it occur.

A. Legislative Background

Unlawful command influence is not a new phenomenon. As early as World War I, the civilian community began to express concern over command interference in courts-martial proceedings.¹³ At that time the principal expressions of military law, the Articles for the Government of the Navy and the Articles of War, did not address unlawful command influence directly.¹⁴ By the end of World War II, however, "the torrent of complaints concerning command control of military justice with which it was inundated"¹⁵ forced Congress to respond.

With over 2,000,000 courts-martial convened during that wartime period, one in eight servicemen was exposed to a criminal code that had been essentially unchanged for 160 years. Most of the stories of unfairness, arbitrariness, misuse of authority and inadequate protection of rights could be boiled down to the criticism that commanders exercised too much control over courts-martial procedures from prosecution through review. It was clear that the central issue in reforming military justice was the commander's role in the court-martial.¹⁶

Congress then began hearing a number of proposals for revising the military justice system.¹⁷ Debate raged about the scope of a commander's authority. The civilian bar was particularly concerned about the degree of command interference in the military justice system.¹⁸ A statement by the Vanderbilt Committee in 1946 struck at the heart of the issue:

Indeed, the general attitude is expressed by the maxim that discipline is a function of command. Undoubtedly, there was in many instances an honest conviction that since the appointing authority was responsible for the welfare and lives of his men, he also had the power to punish them, and consequently the courts appointed by him should carry out his will. We think that this attitude is completely wrong and subversive of morale, and that it is necessary to take steps to guard against the breakdown of the system at this point by making such action contrary to the Articles of War or regulations and by protecting the courts from the influence of the officers who authorize and conduct the prosecution.¹⁹

The Elston Act, enacted in 1948, represented an initial attempt to reform the military justice system.²⁰ That act tried to amend the Articles of War by focusing on the issue of unlawful command influence. Soon thereafter, Congress began developing a uniform code of law for all of the armed services.²¹ The congressional hearings continued to reflect the controversy between those who advocated that military discipline required complete control of the courts-martial proceedings and those who believed command should be entirely removed from the administration of justice.

Over the years that military justice has been under criticism, and particularly during the period the new Uniform Code of Military Justice was being prepared by the Morgan Committee and studied by Congressional Committees, one of the most controversial issues with which all interested parties was concerned dealt with the extent officers in the chain of command should be authorized to influence court-martial activities. Recommendations came not only from those who were directly connected with the armed services, but also from civilians interested in the administration of military justice.²²

In 1950, Congress enacted the Uniform Code of Military Justice.²³ Article 37 of the UCMJ stated neither the convening authority nor the commanding officer would bring pressure to bear on the law officer, counsel, or members of the court in the exercise of any of their functions and no person subject to the code would attempt to influence the action of a court-martial or any post-trial actions.²⁴ Article 98 reinforced the prohibition by providing criminal sanctions for knowing or intentional failure to comply with the provisions of the UCMJ.²⁵ The Manual for Courts-Martial (MCM), 1951, implemented the UCMJ.²⁶ The MCM provided, under paragraph 38, for the convening authority to provide general instruction to members of a court-martial, through his SJA or other representative, preferably before referral for trial.²⁷ Civilian concern with unlawful command influence was also one of the major reasons for establishing the Court of Military Appeals.²⁸

This represented the state of the law in 1951. The Military Justice Act of 1968²⁹ amended Article 37 to allow general instructional or informational military justice lectures, if given solely to instruct members on substantive and procedural aspects of the justice system.³⁰ (The Manual for Courts-Martial, 1969, subsequently eliminated paragraph 38).³¹ The act also added a provision to Article 37 to prohibit commanders from considering counsel or a court member's performance in a court-martial on efficiency reports. The act further amended the

UCMJ, Article 26,³² to establish an independent field judiciary, in an effort to remove any possibility of unlawful command influence over military judges.³³ Since that time, the legislation has not changed significantly.

Despite these legislative efforts, indicating the clear concern of the Congress and the public, cases of unlawful command influence arose regularly. Although the participants in the military justice system attempted to comply with the legislative mandate, appellate courts often found their efforts inadequate.

B. Command Influence on Court Members

The earliest cases of unlawful command influence involved court members. Indeed, this was the gist of the evil Congress tried to resolve in drafting Article 37.³⁴ That article, even today, discusses unlawful command influence in terms of improper influence on court members, counsel or the military judge. One of the primary ways this occurred was when the commander, either personally, or through his staff, provided guidance to court members. A significant case, *United States v. Littrice*,³⁵ decided in 1953, concerned this improper influence and addressed the "delicate balance"³⁶ between justice and discipline:

Thus, confronted with the necessity of maintaining a delicate balance between justice and discipline, Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws. While it struck a compromise, Congress expressed an intent to free courts-martial members from any improper and undue influence by commanders which might affect an honest and conscientious consideration of the guilt or innocence of an accused.³⁷

In *Littrice*, the executive officer, acting in the absence of the commander, called a meeting of the court members, immediately prior to trial. At the meeting the executive officer gave some general instructions to the members. He then told them they should not "usurp the prerogatives of the reviewing authority,"³⁸ and advised them their decision was subject to review. He also read excerpts from a letter from higher headquarter which discussed retention of thieves. He went on to state inadequate sentences tended to impair the image of the services; that the members had been carefully chosen for court duty; and that performance would be reflected on their efficiency reports.

The Court of Military Appeals felt the verbal instructions and the letter combined to upset the delicate balance. Taken together, they suggested members need not take their responsibilities too seriously, as their decision would be reviewed; that a lenient sentence would be inappropriate; and that court performance would be reflected on efficiency reports. Specifically addressing command policy, the court stated the commander must not be "too tightly fettered"³⁹ in his

responsibilities. Citing the UCMJ, Article 25(c)(2),⁴⁰ the court indicated the commander shall appoint those best qualified for court duty by training, experience, and judicial temperament. The court also noted the commander may, pursuant to the MCM, paragraph 38, provide general instructions to members, including announcement of a general policy which discourages inadequate sentences for theft offenses. However, the preferable manner of delivering the policy would be to the command, rather than to an actual panel: "It is one thing to announce a general policy and yet another to use that principle to influence the finding and a sentence in a particular case."⁴¹ The court reversed the decision, set aside the findings and sentence, and ordered a rehearing.

A very similar case, *United States v. Hunter*,⁴² decided the same day as *Littrice*, involved a pretrial discussion between the convening authority and at least three court members. During the discussion, the convening authority informed the members a previous court-martial sentence had been inadequate. At least one member understood the commander "was suggesting or recommending or instructing what verdict should be given."⁴³ The Court of Military Appeals, citing *Littrice*, said the commander's conduct violated "both the letter and the spirit of the Uniform Code of Military Justice"⁴⁴ and ordered the charges dismissed.

These cases set the stage and made it clear the court would not hesitate to take serious remedial action where necessary. A distinct message emerged that unlawful command influence could lead to severe repercussions, including, if necessary, dismissal of the charges.

Two years later, in *United States v. Zagar*,⁴⁵ the Court of Military Appeals again addressed the issue of unlawful command influence, focusing on the juror's ability to recognize influence and its impact. In that case, court members attended a lecture the day prior to trial, at which time the SJA briefed them that charges were preferred only after extensive investigation had occurred, and it was reasonably certain the accused had committed the crime. During voir dire, the defense attempted to challenge the members for cause. The law officer rejected the challenge, as the members felt they had not been influenced by the SJA's comments. Nevertheless, the appellate court found impermissible command influence had occurred. "[A]lthough we entertain no doubt of the complete sincerity of the officers concerned—we recognize the present applicability of the comment that jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments can not always be ascertained."⁴⁶

Several factors combined to create unlawful command influence. These included the proximity to trial and the fact that the lecture was addressed solely to the members of that court; the fact that the SJA, a person with the military grade and authority to command respect, gave the lecture; and the content of the remarks themselves. The court did note it would be appropriate to give a general indoctrination to military personnel, discussing the care and preparation given to a case prior to trial, and to suggest personnel use the same care in dealing with military justice matters. However, such indoctrination, given to a designated panel, by a person in authority, shortly before trial, suggests the accused is guilty, otherwise he would not be standing trial. The court disapproved the findings and sentence and ordered a rehearing.

The boundaries of unlawful command influence thus started to assume more definition. The content of the communication obviously assumed crucial importance. While the commander might legitimately provide guidance to subordinates, communication of a desired result, even in a subtle manner, was forbidden. Communication to a specific panel was dangerous, and timing of the communication had an impact. Perhaps most interestingly, this case, and subsequent cases, demonstrated that merely involving the legal community in command pronouncements would not necessarily eliminate the problem of unlawful command influence.

This was emphasized a few years later in *United States v. McCann*,⁴⁷ which also involved a lecture by the SJA. During the trial some of the court members attended a military justice lecture, at which the SJA described certain offenses, including the offense with which the accused was charged, as more "reprehensible"⁴⁸ in the military community than in the civilian environment. The Court of Military Appeals found the lecture constituted unlawful command influence, set aside the findings and sentence and suggested a rehearing. Again, command influence had entered the courtroom through the SJA. However, insertion of command influence into justice proceedings was not limited to the actions of the SJA, as *United States v. Fowle*⁴⁹ demonstrated.

Trial counsel brought command policy directly into the courtroom in *Fowle*. During sentencing, the trial counsel suggested the members implement a Secretary of the Navy Instruction addressing disposition of larceny and other offenses in the Navy. The accused received a bad conduct discharge, partial forfeitures, confinement at hard labor for three months, and reduction. The convening authority attempted to cure any prejudice resulting from trial counsel's remarks, by reducing the confinement and forfeitures. On appeal, the Court of

Military Appeals condemned the practice of bringing the instruction into the courtroom:

A policy directive may be promulgated to improve discipline; however, it must not be used as leverage to compel a certain result in the trial itself ... Although we are here faced with a secretary rather than a command directive, the former, emanating from the Secretary of a service, would be even more persuasive and bring more pressure to bear upon the members of the court than the latter type directive. Nor do we believe that once the trial counsel insists that the policy respecting a punitive discharge be "implemented" with regard to an accused that the prejudice can be removed by the simple expedient of having the president or law officer remind the members of the court that they are not bound by the policy declaration. If everyone is presumed to know that as a general rule thieves should be separated from the service, why parade such information before the members of the court and then turn around and instruct them that they are not bound thereby, if the purpose is not to influence the court to adjudge a punitive discharge? It was against this sort of command influence that the Code was initially directed. Reasonable men must conclude that once the Secretary of a service enters into the restricted arena of the courtroom, whether the members of the court are conscious thereof or not, he is bound to exert some influence over them.⁵⁰

Noting that the prejudicial comments affected the punitive discharge, and that the convening authority's curative actions did not address that prejudice, the court reversed the decision concerning sentence and directed reconsideration.

A year later, in *United States v. Estrada*,⁵¹ trial counsel read a similar policy statement to the members during presentencing. Although the instruction indicated each case should be judged on its own merits, the court, citing *Fowle*, stated:

There is only one reason that the commander's policies are brought to the attention of the court. That reason is to influence the members in their decisions of the case before it, and this is error to the prejudice of the accused. Reading or alluding to the Secretary of the Navy's instructions to the court is tantamount to calling him to the stand and asking what instructions he has with regard to the case before the court. No one familiar with the principles of the Anglo-Saxon jury system would suggest that this is permissible. The fact that the

policy is stated in cautionary terms is of no consequence when applied to a particular case. Although the individual Secretary of the Navy instruction was not read to the court, it is obvious, as in the *Fowle* case, *supra*, that a reading was unnecessary because the members were aware of the policy contained therein, and when the instruction was brought to their attention, perceptive members of the court, in all probability, knew the command's desire that this accused should be separated from the service.⁵²

Finding no cautionary instruction would cure the prejudice, the court ordered a rehearing on sentence.

These cases illustrate administrative policies have no place within the confines of a court-martial proceeding. While it may be true drug offenders are generally administratively separated from the service, this policy has no bearing on the determination of a particular criminal proceeding. They also emphasize the complexity of the issue and the difficulties associated with trying to avoid improper influence. Both cases involved actions by legally trained personnel, acting on behalf of the commander. Despite their legal training, however, trial counsel introduced unlawful command influence into the courtroom. This complexity continued as appellate courts struck down other actions by commanders and staff.

A commander's impermissible comments, made in an informal setting, and possibly in jest, resulted in a finding of unlawful command influence in *United States v. Pierce*.⁵³ In that case, members of a court-martial attended an Officers' Call during the course of the trial. Sometime during that evening the base commander stated, in the presence of three court members, that as long as the court convicted the accused and "hanged him,"⁵⁴ the commander did not care how long the trial took. Although the court members believed the comments were made in jest, the appellate court opined "there may very well exist an unconscious influence"⁵⁵ on the member's mind. Citing *United States v. Navarre*,⁵⁶ the court stated: "the devil himself knoweth not the mind of man--and it may be added with assurance that man himself on occasion knows little more about the matter."⁵⁷ The court ordered a rehearing.

Commanders need to keep this caveat firmly in mind. The commander's comments, even when made in jest, may have an impact on the court member's mind. Perhaps more importantly, a reviewing court may determine such an impact occurred, regardless of a court member's conscious beliefs. Casual remarks occur at numerous times throughout the day, during both official activities and social occasions. The repercussions of

an off-hand remark concerning disposition of a certain case, or a certain type of case, may be serious. This may be so, even when the commander doesn't initiate the remark, if subordinates attribute the sentiment to him.

A somewhat different twist occurred in *United States v. Kitchens*.⁵⁹ A short time prior to referral of charges against the accused, the assistant SJA sent a "personal request"⁶⁰ to all officers stationed where the court-martial was to convene. This letter, on official letterhead, and signed by the chief of military justice, discussed the charges and sentences imposed in six cases tried prior to 1 September 1960 and the charges and sentences imposed in four cases tried after that date. The author indicated the sentences adjudged after 1 September 1960 showed a "considerable difference"⁶⁰ from those adjudged earlier and noted only one punitive discharge had been awarded in the latter group of cases. The requester asked for input concerning this discrepancy, and indicated replies would be treated anonymously. A follow-on letter, apparently in response to a defense contention of unlawful command influence, assured the recipients the first letter had been a personal request for information and had no official sanction.

During voir dire the members were questioned concerning the letters. Several stated they believed the first letter expressed an opinion concerning the "adequacy of sentences adjudged"⁶¹ at recent courts-martial. The law officer refused to dismiss the charges, as the members stated they had not been influenced. The accused pled guilty and the court imposed a punitive discharge.

The Court of Military Appeals found a "disturbing implication"⁶² in the letter. "Without belaboring the obvious, the letter is a manifest criticism of the supposed inadequacy of the sentences imposed in recent cases tried by general courts-martial."⁶³ Noting the second letter "aggravated, rather than alleviated"⁶⁴ the effect of the first letter, the court set aside the sentence and returned the case for either reassessment or rehearing.

Once again, the insertion of command influence originated through the legal office. Today, legal offices often prepare some form of status of discipline briefing for the commander and staff, frequently on a monthly basis. Quite often, these briefings provide an analysis of sentences adjudged by recent courts-martial. The attorneys presenting the lecture need to consider the impact of their comments on potential members and tailor their remarks accordingly. Commanders, likewise, must recognize prospective members may attend such lectures and will note any command comments regarding pending cases. Even where

prospective members are not present, the comments will, in all likelihood, come to their attention informally.

Even military judges are not immune from inserting unlawful command influence into the courtroom. In *United States v. Jones*,⁶⁵ the military judge, during a court-martial held 19 days prior to the accused's case, delivered some comments to the members after sentence pronouncement. The gist of his remarks concerned appropriate sentences in cases involving drug offenses and the fact the panel had returned a lenient sentence. Three of the members of that court subsequently sat on the accused's panel. Finding the accused guilty of various drug charges, the members sentenced him and he appealed. The Army Court of Military Review noted the military judge's comments castigated the members and had the sole purpose of influencing future decisions by that panel. Regardless of the members' indications they were not influenced in the accused's case, the court found the "likelihood of improper influence is strong."⁶⁶ Consequently, the court ordered the findings and sentence set aside, with rehearing before a different judge.

Unlawful command influence may thus arise from almost any source. While the commander must, and should, rely on the legal staff, and the military judge, to guide him, the cases suggest the problem doesn't necessarily arise because the commander fails to receive, or ignores, legal counsel. Even when the legal community involves itself intimately in the military justice system, the problem may surface. In fact, the defense may bring command influence into the courtroom.

Command policy entered the courtroom through the defense in *United States v. Grady*.⁶⁷ On voir dire, the defense counsel referred to the Strategic Air Command (SAC) drug rehabilitation program. During argument on sentence, both the government and the defense referred to the SAC policy concerning drugs. The military judge cautioned the members they must use their independent judgement to arrive at an appropriate sentence, regardless of SAC policy. The court convicted the accused and adjudged a punitive discharge.

The Court of Military Appeals expressed dissatisfaction. While allowing the commander the authority to determine and promulgate policies and pronouncements as a proper exercise of his command function, the court felt the reference to such policies before members "in effect brings the commander into the deliberation room."⁶⁸ The court reversed the lower court and set aside the sentence.

Recent cases continue to address the problem. In *United States v. Brice*,⁶⁹ the convening authority directed all officers

to attend a speech by the Commandant of the Marine Corps. This speech occurred near the conclusion of the government's case, and the military judge, despite defense objection, allowed the members to attend. During the speech, the Commandant stated drug trafficking was "intolerable"⁷⁰ in the military, and traffickers should not be retained in the Marine Corps. After ascertaining from the members that they could render impartial decisions, the military judge denied a motion for a mistrial. The Court of Military Appeals concluded the "congruence of subject and timing, particularly as they affect the minds- however subtly or imperceptibly- of the triers of fact in this particular case,"⁷¹ dictated reversal of the lower court's decision. The court set aside findings and sentence.

Command interference with members occurred even more blatantly, albeit indirectly, in *United States v. Stephens*.⁷² Approximately six weeks prior to the accused's trial, his battalion command sergeant major, at a noncommissioned officers' call, related that the brigade commander was very concerned about the accused's activities (selling hashish to subordinates). The sergeant major indicated the commander had "put out the word"⁷³ to sentence any NCO convicted of selling hashish to no less than 30 years of confinement. The members subsequently convicted the accused and sentenced him to a dishonorable discharge, total forfeitures, reduction to Private E-1, and confinement for 30 years. The Army Court of Military Review found unlawful command influence and returned the case for a limited hearing to determine whether the unlawful influence affected the accused's sentence.

These cases suggest unlawful command influence may arise in a variety of ways. Command policy may enter the courtroom through various sources: the commander, the commander's representative, the SJA, trial counsel, the military judge or defense counsel. Timing plays a big role. Statements made prior to appointment of a particular panel are less suspect than those made immediately prior to, or during, trial. The content of the communication is crucial. Obviously, the most reprehensible forms of influence occur when the commander intervenes directly by suggesting the result he wishes in a particular case. However, policy statements made by counsel during trial or comments made during military justice lectures may be equally odious.

The appellate courts in these cases discussed unlawful command influence in terms of actual influence on members. Another aspect of the issue, which came before Congress when it first enacted the UCMJ,⁷⁴ concerned the appearance of unlawful command influence.

C. The Appearance of Unlawful Command Influence

During the hearings concerning enactment of the UCMJ, the Chairman, Committee on Military Law, War Veteran's Bar Association, Arthur E. Farmer, asked:

[Are you going to stop with the theory that a fair trial is all that is required or are you going to go further and say that it is necessary to the welfare of the armed services that their personnel believe that they are getting a fair trial as a help to the maintenance of morale.

It seems to me that, first, you must insure a fair trial, and second, you must maintain a belief in a fair trial if you are to have a fighting army, and a fighting army and the ability to win wars is the thing upon which command has based its argument that it must control the courts.⁷⁵

The Court of Military Appeals gradually began addressing the appearance of unlawful command influence. The doctrine initially arose in the dissenting opinion in *United States v. Navarre*⁷⁶ and later surfaced in dicta in *United States v. Fowle*.⁷⁷ However, it was not until the majority opinion in *United States v. Johnson*⁷⁸ that the court addressed the issue squarely. In that case, the convening authority's staff attorney issued a pamphlet to court members entitled "Additional Instructions for Court Members."⁷⁹ The appellate court felt the guidance went beyond providing pretrial orientation under the MCM, paragraph 38. Noting the appearance of command control is "as much to be condemned as its actual existence,"⁸⁰ the court found a rebuttable presumption of prejudice. The court then examined whether the government had rebutted the presumption.

While a member's assurances may be insufficient to rebut the presumption of prejudice, the court noted other circumstances, specifically the adjudged sentence, might. A full acquittal would accomplish this result, as might actions less than a full acquittal. An acquittal of most of the major charges or a significant disparity between the permissible sentence and the sentence imposed might also be considered sufficient. In this case, however, the sentence imposed, although light in relation to the permissible maximum, was three times as severe as that

which the convening authority had approved in a pretrial agreement. This created the appearance the members had been influenced by the pamphlet. Accordingly, the court reversed the decision on sentence and recommended a rehearing.

This illustrates the complexity of the issue. Not only must the commander guard against improperly influencing members in their assigned tasks, but he must also consider the impact of his words and actions on observers of the military justice system. This latter constraint, being of a somewhat nebulous character, is far more difficult to guard against than direct influence.

D. Command Influence on Witnesses

While the earlier cases of unlawful command influence centered around influence on members, the courts gradually focused on improper influence on defense witnesses. As noted, Article 37, UCMJ, addresses improper influence on the participants in the trial, not witnesses.⁸¹ Nevertheless, the courts have treated influence on witnesses under the rubric of unlawful command influence. Until the recent series of cases involving the Army's 3d Armored Division, few cases of unlawful influence on witnesses arose. However, the cases which came before the appellate courts made it clear commanders and their staffs did not always appreciate the Sixth Amendment's guarantee of the accused's right to call witnesses on his behalf. One of the more egregious examples of this occurred in *United States v. Charles*.⁸²

The commander made a direct attempt to influence the testimony of a prospective witness in *Charles*. There, the accused's wing commander, having knowledge the squadron commander might testify on the accused's behalf, met with the squadron commander. The wing commander suggested the squadron commander's view was contrary to his own, that another commander had almost been relieved because of his leniency in dealing with a drug offense, and that the subordinate should "modify his views if it were possible to do so."⁸³ Although the squadron commander did subsequently testify for the accused, he did not testify concerning rehabilitation potential. Despite the fact the wing commander later reduced the sentence in response to possible improper influence, the Air Force Court of Military Review was not satisfied. The court found the commander's conduct in questioning a prospective defense witness "inexcusable and highly improper,"⁸⁴ and ordered a rehearing on sentence.

Another blatant attempt to influence witness testimony occurred in *United States v. Saunders*.⁸⁵ There, the commander called defense witnesses into his office two days prior to trial and discussed Army policy concerning drugs. The commander then spoke with the witnesses in the waiting room on the day of trial, and indicated the accused should receive the maximum sentence. One witness stated he felt threatened and changed his testimony as a result. The Army Court of Military Review found the commander's actions "intolerable and inexcusable"⁸⁶ and ordered a rehearing on sentence.

A less direct attempt to influence witness testimony occurred in *United States v. Tucker*.⁹⁷ In that case, a senior master sergeant testified favorably for an accused in an unrelated case. After that trial, the commander chastised the witness for his testimony. Shortly thereafter, the commander held a meeting with senior NCOs, at which he discussed a senior NCO who had testified on behalf of an accused. The commander indicated such behavior was unprofessional and suggested witnesses should review an accused's record prior to testifying for him. Months later, during a commander's call, the commander, referring to the accused and others, urged the attendees to disassociate from them. Upon learning his actions might amount to unlawful command influence, the commander held a meeting of all officers and NCOs, at which he stated he did not intend to prevent anyone from testifying. Nonetheless, many did not wish to testify, as they were aware of what had transpired in the earlier case and were concerned about their own careers. The Air Force Court of Military Review found these circumstances created the impression the commander had "attempted to inhibit favorable mitigation testimony"⁹⁸ and had been successful. The court ordered a rehearing on sentence.

E. The Appearance Doctrine-Revisited

The appearance of command influence manifested itself with respect to witnesses in *United States v. Rosser*.⁹⁹ There, the accused's company commander, after testifying on a speedy trial motion, communicated with a court member concerning the outcome of the trial. He then remained in the waiting room outside the courtroom and eavesdropped on the sessions, in the presence of both government and defense witnesses. Approached by witnesses who feared bodily harm from the accused if they testified, the commander chose not to inform the military judge. The defense raised the issue of unlawful command influence. While the military judge found no prejudice to the accused, as no witnesses indicated they were influenced by the commander's actions, the Court of Military Appeals was not satisfied: "Military law has traditionally viewed such perfunctory statements from subordinates on the effects of command influence as inherently suspect, not because of the credibility of the witness but because of the difficulty of the subordinates [sic] in ascertaining for himself the effect of any attempted command influence."¹⁰⁰

The total effect of the commander's conduct must be considered in determining the issue of command influence. Finding "no justification as a matter of military necessity"¹⁰¹ for the commander's monitoring of the trial, the court stated:

It is apparent that at the very least he lacked the proper regard for the "delicate balance" that must be maintained between military justice and command discipline. His position as the appellant's accuser and a government witness further exacerbated the effect of his patent meddling in the proceedings of this court-martial. In light of his instructions from the military judge, his willingness to assume responsibility on his own for purported threats to witnesses, rather than immediately reporting them to the trial counsel, cannot be condoned. Finally, his communications to a court member are simply intolerable.¹⁰²

The court, basing its decision, at least in part, on the appearance of unlawful command influence, set aside the findings and sentence and suggested a rehearing would be appropriate.

The issue arose once again in *United States v. Rodriguez*.⁹³ In that case, the squadron commander preferred charges against the accused, alleging drug abuse, and initiated discharge action against another individual, also for drug abuse. The second individual obtained the signatures of various officers, NCOs and associates attesting to his character, which he intended to use to defend against a discharge under other than honorable conditions. The squadron commander, upon learning of the document, held a meeting with the signatories, at which he referred to them as backstabbers and suggested they were condoning drug abuse. At the accused's trial, the commander testified concerning that meeting. He stated he believed once a command decision had been made to initiate discharge action, the squadron should support the decision. He said he had not mentioned reprisal and he had not taken any adverse action against any personnel who chose to testify in the accused's case. The defense asked for a dismissal. The trial judge, rather than dismiss the charges, attempted to neutralize the appearance of unlawful command influence. The judge indicated he would compel the attendance of witnesses, advise them of their duty to testify, grant recesses and continuances for interviews, and admonish the commander not to interfere with witnesses. Notwithstanding this, the accused was convicted.

On review, the Air Force Court of Military Review, after finding unlawful command influence, commended the military judge for his efforts, but found such efforts insufficient to neutralize the appearance of unlawful command influence. (In a footnote, the court suggested a possible solution would have been for the commander to hold a commander's call wherein he addressed the accused's right to witnesses and the duty of those with knowledge to come forward. The judge would then allow the defense time to interview the witnesses. The court cautioned this would not always cure the problem but represented one option).⁹⁴ Addressing the appearance of unlawful command influence, the court stated, citing *Rosser*, "The test for prejudice from unlawful command influence is *not* merely whether such influence *actually* existed but whether there is an appearance of such influence."⁹⁵ The court ordered a rehearing, noting the commander was no longer the squadron commander and the effects of his comments had dissipated.

The appearance of unlawful command influence again surfaced in *United States v. Lowery*.⁹⁶ There, influence did not occur until after the witness had testified. The accused's immediate supervisor, a master sergeant, testified during sentencing that the accused should be retained. The next duty day, the wing first sergeant told the witness, in the presence of the

commander, that his action in testifying made it appear he accepted the use of drugs. The first sergeant then said the witness did not deserve his rank as a senior noncommissioned officer. When the witness left the meeting, he felt he "wouldn't want to testify for anyone again."⁹⁷

While the Air Force Court of Military Review stated that that particular accused had not been harmed, as he had already received the benefit of the testimony, they noted "[t]he policy of 'lecturing' a defense witness or any witness after they have testified cannot help but have a chilling effect on our judicial system."⁹⁸ The court reaffirmed the principle of *Rodriguez*, condemning the appearance of unlawful influence.

F. The Perception of Unlawful Command Influence

Another aspect of unlawful command influence which began to surface concerned the perception of unlawful command influence. Unlike the appearance of unlawful command influence, which refers to how the public sees the issue, the perception of unlawful command influence pertains to the recipient of the unlawful command influence, and how he reacts. Significantly, the commander's intentions may be pure but the perception of the recipient may result in unlawful command influence. This issue arose most clearly in *United States v. Treakle*,⁹⁹ discussed in more detail below. The commander in that case made a series of statements that subordinates perceived in different ways. Many felt they were being directed not to give favorable testimony for an accused. On appeal, the Army Court of Military Review discussed the perception of unlawful influence:

We have considered all the evidence in this case, including that cited in the dissent. We are convinced that although [the general] acted in good faith and intended his remarks to promote appropriate recommendations, numerous commanders and senior noncommissioned officers perceived his remarks as discouraging favorable character testimony, and some understood his comments to apply to prefindings as well as presentencing testimony. We are also convinced that under the circumstances it was reasonable for members of the general's audience to reach these conclusions. The consequences of these perceptions are therefore the responsibility of the general and his staff and, through them, the Government.¹⁰⁰

The most recent case involving the perception of unlawful command influence is *United States v. Cruz*.¹⁰¹ In that case, investigation revealed an extensive drug problem at Pinder Barracks, Federal Republic of Germany. As a result, the commander, who was also the special court-martial convening authority, held a post-wide formation at which he singled out some 40 soldiers, 35 of whom were from the accused's unit. Labeling these soldiers "criminals"¹⁰² and "bastards,"¹⁰³ he directed the individuals to report to him. As the soldiers reported, their unit crests were removed. The commander did not return their salutes. The military police searched and

handcuffed the soldiers, in full view of the formation, and took them from the area for processing. The soldiers were billeted together until charges were preferred; after that they were free to return to their batteries. A number elected to remain at the battalion headquarters. They were formed into a platoon that became known as the "Peyote Platoon."¹⁰⁴

The accused was tried by general court-martial and convicted. On appeal before the Army Court of Military Review, the accused alleged unlawful influence. As a part of its determination, the appellate court developed a model to analyze unlawful command influence. The court noted command influence concerns two different issues and these two issues must be addressed with different legal doctrines. The first issue concerns whether actual command influence harmed the accused. The court will consider the totality of the circumstances to make this determination.¹⁰⁵ The accused must provide evidence that, considering the totality of the circumstances, would allow a reasonable person to conclude command influence affected the outcome of his case. The perception of command influence, that is, what the participant in the system perceives he was told, is relevant to the question of actual command influence.¹⁰⁶

The second issue involves the appearance of unlawful command influence-whether the public, defined as both the civilian community and the "rank and file"¹⁰⁷ of the armed forces, will believe the accused was prejudiced by command influence. A "substantial majority of the reasonable members of the public"¹⁰⁸ must have confidence in the system. The appearance of influence becomes relevant "only in the absence of actual unlawful command influence."¹⁰⁹ While the appearance of influence has a "deleterious effect on public confidence in the military justice system,"¹¹⁰ it has no effect on the fairness of the trial. Therefore, when the appearance of unlawful command influence occurs, the remedy "should be tailored to the restoration of public confidence under the particular circumstances of the case at hand; should avoid unnecessary expenditure of scarce resources; and should not create an actual injustice in place of an apparent one."¹¹¹ In this regard, the court suggested appellate review often serves the function of satisfying the public. Reversal should only be used when other measures are inadequate.

In the facts of this particular case, the appellate court noted the individuals whom the accused claimed had been influenced had not been not involved in his case, nor did they have any information relevant to his case. Considering the totality of the circumstances, the accused failed to produce evidence that would lead a reasonable person to conclude actual

command influence had occurred. With respect to the appearance of unlawful command influence, the 35 cases from the accused's unit received different dispositions,¹² members of the chain of command testified for most of the accused, and appellate review had occurred. Any appearance of influence had been dispelled.

This framework suggests the commander and his staff have to consider their actions from three viewpoints. The commander must of course ensure he does not intentionally influence, or attempt to influence, the court-martial. He must also avoid actions that might, regardless of his intentions, be misunderstood by subordinates as an attempt to influence the proceeding. This requires accurate assessment of how remarks may be interpreted, which is not an easy task. Finally, the commander and staff must consider how their actions appear to someone observing the operation of the military justice system from outside the system. Again, this involves the difficult task of assessing how remarks may be interpreted. These latter two concerns are in large part responsible for the continuing confusion regarding the limits of the commander's authority.

G. Current Climate: The 3d Armored Division

The most recent cases involving unlawful command influence arise from the Army's 3d Armored Division. Over 200 cases are involved and many are still pending review.¹³ The common fact scenario concerns the activities of the convening authority, a Major General who assumed command of the Third Armored Division in February 1982, and his staff. In April 1982, after consultation with his SJA, the convening authority addressed a meeting of his officers and NCOs, at which time he discussed the subject of testifying for an accused at a court-martial. He stated it was inconsistent for a commander to recommend an accused be tried before a court-martial authorized to adjudge a punitive sentence and then to appear as a character witness on the accused's behalf and recommend retention in the service. Between April 1982 and December 1982, the convening authority spoke at approximately 10 such meetings. The recipients of these remarks had different perceptions and interpretations of the message. Many felt he was telling them a member of the accused's unit should not be providing favorable presentencing, and possibly findings, testimony. Most took the remarks seriously.¹⁴

In December 1982, the Brigade Command Sergeant Major distributed a letter in which he stated:

Once a soldier has been "convicted", he then is a convicted criminal. There is no way he can be called a "good soldier" even though up until the day he's court martialed [sic] he is a superstar.

The NCO Corps does not support "convicted criminals." We are ruthless and unrelenting in our pursuit of law and order and fully accept our role in upholding the moral ethics and principles upon which our nation is founded.

If you personally cannot subscribe to this philosophy my friend, you need to leave the Army and find another occupation in life.¹⁵

Subsequently, in January 1983, the Division Command Sergeant Major distributed a letter in which he stated "Noncommissioned Officers DON'T: ... Stand before a court-martial jury or an

administrative elimination board and state that even though the accused raped a woman or sold drugs, he is still a good soldier on duty."¹⁶ When the convening authority became aware of the import of the letter, he met with subordinate commanders and senior NCOs. During the meeting he stressed the fact personnel had a moral and a legal obligation to testify on behalf of an accused and that there existed no policy which precluded such testimony. The Division Command Sergeant Major held a similar meeting with the senior NCOs. The convening authority also issued a letter which reinforced his oral comments, as did the Division Command Sergeant Major."¹⁷

On appeal, various issues have been raised in the different cases. Of interest here are the allegations of unlawful command influence on court members and witnesses. In *United States v. Treagle*,¹⁸ the Army Court of Military Review stated commanders must be allowed to supervise subordinates and ensure good order and discipline. However, the commander "must exercise restraint when overseeing military justice matters to avoid unlawful interference with the discretionary functions his subordinates must perform."¹⁹ The court went on to say the convening authority may correct procedural deficiencies in the military justice system but added a caveat:

Yet in this area, the band of permissible activity by the commander is narrow, and the risks of overstepping its boundaries are great. Interference with the discretionary functions of subordinates is particularly hazardous. While a commander is not absolutely prohibited from publishing general policies and guidance which may relate to the discretionary military functions of his subordinates, several decades of practical experience under the Uniform Code of Military Justice have demonstrated that the risks often outweigh the benefits.²⁰

The court found the convening authority and his staff judge advocate failed to announce policies and directives clearly. Although the SJA prepared a point paper for the general, the commander disseminated the message in an extemporaneous manner. The court felt the message and its nuances were too complex for verbal transmission, resulting in confusion. This confusion was exacerbated by the general's tone and demeanor. The commander and his staff also failed to follow-up and ensure his words were understood and executed.

Specifically holding that Article 37, UCMJ, prohibiting unauthorized influence on the action of a court-martial, also forbids coercion or unauthorized influence on witnesses or

potential witnesses, the court found unlawful pressure on witnesses in the 3d Armored Division.¹²¹ Additionally, the court found unlawful command influence on a member. Although the convening authority addressed his remarks in terms of witness testimony, a member might draw the "logical inference"¹²² that favorable evidence concerning duty performance "should be discounted and that retention of a convicted accused is inappropriate."¹²³ The finding of unlawful command influence, either in the case of witnesses or court members, triggers a rebuttable presumption the recipient has been influenced by the unlawful influence. The government may rebut the presumption only by clear and convincing evidence¹²⁴ no influence occurred. Furthermore, in the case of members, the government will ordinarily need more than the member's denial he was influenced to rebut the presumption.

In *Treakle*, numerous individuals in the accused's chain of command testified for him during sentencing, which suggested he had not been deprived of favorable character testimony. However, the court did not decide that issue, assuming, *arguendo*, that he had been deprived of such evidence. The court went on to examine whether this deprivation "caused a misapprehension which was a substantial factor in his decision to plead guilty."¹²⁵ The court found the accused would have pled guilty regardless of such character evidence. However, with regard to court members, the court found the evidence insufficient to rebut the presumption of influence. The fact the accused's sentence included a punitive discharge confirmed the presumption of influence. As a remedy, the court, after noting the members had discussed the convening authority's policies during the trial, set aside the sentence.

Treakle represents one of the first cases involving the Army's 3d Armored Division and set the stage for subsequent cases. The finding of unlawful command influence in the 3d Armored Division affected more than 200 cases, many of which are still unresolved. One particular case, *United States v. Stokes*,¹²⁶ decided shortly after *Treakle*, merits consideration because it illustrates the potential magnitude of the problem of unlawful command influence.

In *Stokes*, the convening authority, in light of the aura of unlawful command influence surrounding him, forwarded the charges to his immediate superior for referral. Despite this, the defense moved for dismissal on the grounds of unlawful command influence. The military judge denied the motion. On appeal, the appellate court concluded the issue had been raised:

Unlike situations involving other forms of improper command control, unlawful command influence over witnesses

is not dispelled by simply excising the commander from the judicial process. This is particularly true where, as here, that commander is a general officer. The realities of military life are such that officers of [the general's] rank and position are capable or are perceived to be capable of affecting the military careers of former subordinates as well as those currently under their command ... We believe that the General's guidance was perceived as not only promoting his views on leadership within the division but for the entire Army as well. Such perception would not be dispelled simply because the General was no longer in command.¹²⁷

In *Stokes*, all members in the chain of command testified and the court was satisfied command influence had not deprived the accused of favorable character evidence. However, the case underscores the gravity of the issue. The implication is clear. Once influence is brought to bear, remedial action may be extremely difficult. Merely changing convening authorities may not always suffice to remove the prejudice. A pervasive atmosphere of command influence may have serious repercussions if prospective witnesses or members are influenced to the extent a different convening authority cannot cure the prejudice.

The recent decision by the Court of Military Appeals in *United States v. Thomas*¹²⁸ represents the latest word on command influence. Also a progeny of the 3d Armored Division sequence of events, the four separate cases addressed in the *Thomas* opinion involve facts similar to those in *Treakle*¹²⁹. In *Thomas*, the court stated unlawful command influence constitutes constitutional error.¹³⁰ The court held once unlawful command influence occurs, findings and sentence may only be affirmed where the government proves, beyond a reasonable doubt, that findings and sentence were not affected by the command influence.¹³¹

The court then developed a framework for analyzing command influence. The court examined findings first, indicating two separate questions must be addressed.¹³² The first question is whether the members were affected by unlawful command influence. The court laid the responsibility on trial and defense counsel, as well as the military judge, to fully examine the issue of unlawful influence during voir dire. The court refused to disqualify members merely because they were assigned to the command in which unlawful influence occurred, stressing the importance of the member's oath to follow the military judge's instructions.¹³³

The second question is whether the commander's influence denied the accused his Sixth Amendment right to call witnesses. Once the accused raises the issue, the government has the burden

to establish command influence did not deny the defense access to witnesses in such a way as to affect the results of trial. Noting command influence is more likely to operate to deny the accused character witnesses than witnesses on the merits, the court indicated the government has several options to establish an accused was not denied favorable character witnesses. The government may demonstrate the accused offered extensive favorable character evidence to negate the inference that influence inhibited witnesses. The government might also show the accused's record contained no favorable evidence or that although such evidence existed, the defense elected not to use it, as it would have opened the door for the government to introduce damaging rebuttal. Finally, the government might show character evidence would have had no effect, because the government's evidence was so strong.¹³³ However, the court cautioned the government to use the latter option sparingly, because character evidence may legitimately create reasonable doubt in the juror's mind, and because the court did not wish "to create even an appearance of condoning command influence on findings."¹³⁴

Turning to sentencing, the court again placed the burden on the government to prove command influence did not deprive the accused of favorable testimony. Here, the government might proceed by demonstrating the accused's military records contained no favorable information. Alternatively, the government might show the accused could not risk using favorable evidence, as the government could then introduce damaging rebuttal.

With regard to the specific facts in the four separate cases addressed in *Thomas*, the court noted the remedial actions adopted either at trial level or by the Court of Military Review eliminated any prejudice. In one case, the military judge found no member had attended any of the general's meetings and no witness indicated any fear of reprisal for testifying. Nevertheless, the military judge took precautionary measures. He agreed to sustain any challenge for cause against a member assigned to the general's command during the period in which the statements were made, and he ruled he would not allow the government to introduce unfavorable character evidence. In the other cases, the record reflected no witnesses testified for the accused during sentencing, and was silent as to the reasons. The Court of Military Review set aside a punitive discharge in one case and ordered rehearing on sentence and action by a new convening authority in the other two cases.

Thomas represents the Court of Military Appeal's latest pronouncement on command influence. The court expressed great concern over the issue and appended an epilogue addressing this

concern. While recognizing the commander's desire to ensure high standards of discipline, and encouraging lawful zeal in the pursuit of this end, the court cautioned that Congress has limited the commander's means to maintain discipline:

One of the most sacred duties of a commander is to administer fairly the military justice system for those under his command. In these cases, the commander, for whatever reason, failed to perform that duty adequately. Likewise, it is also apparent either that his legal advisor failed to perceive that a problem was developing from [the general's] stated policies or that he was unable or unwilling to assure that the commander stayed within the bounds prescribed by the Uniform Code of Military Justice. The delay and expense occasioned by [the general's] intemperate remarks and by his staff's implementation of their understanding of those remarks are incalculable. Several hundred soldiers have been affected directly or indirectly- if only because of the extra time required for completing appellate review of their cases. In addition, the military personnel resources- as well as those of this Court- required to identify and to surgically remove any possible impact of [the general's] overreaching have been immense. Finally, and of vital importance, the adverse public perception of military justice which results from cases like these undercuts the continuing efforts of many- both in and out of the Armed Services- to demonstrate that military justice is fair and compares favorably in that respect to its civilian counterparts.¹³⁵

The court expressed the belief that commanders and their staff judge advocates strive to uphold the law and expressed confidence similar cases would not arise in the future. However, the court cautioned that if unlawful command influence continues to arise, more drastic remedial action will be considered. A clear message is being sent to commanders and their staffs.

Where does this leave commanders and staffs? What leeway does the commander have in instilling discipline in his units? Have the courts so tied his hands he cannot adequately perform his function as commander?

Although no guidance can address every conceivable situation the commander may encounter, certain precautions may help to prevent the issue from arising. Moreover, in cases where unlawful command influence has occurred, remedial actions can be suggested to alleviate the impact and perhaps eliminate more drastic remedies at the appellate level.

H. Preventive Actions

Unlawful command influence does not generally occur because commanders or their staffs attempt to subvert the military justice system. On the contrary, the issue usually arises as an inadvertent side effect when the commander attempts to perform his command responsibilities. This is reinforced by the fact that quite often the legal community bears responsibility for inserting influence into the proceedings. However, that commanders do not deliberately set out to sabotage the proceedings does not go far enough in resolving the problem, and, in fact, may make preventive actions all the more difficult. Were the commander's deliberate intents and actions at issue, it would be relatively easy to publish a list of "do's and don'ts". However, unlawful command influence is a slippery concept. It is often difficult to recognize when the appearance of influence has occurred or when a participant in the justice system perceives he has been influenced. It is perhaps even more difficult to anticipate what actions may lead to these results. No easy list can solve the problem. Nevertheless, lessons may be drawn from the cases, and practical advice given.

The commander must not abdicate his responsibility to enunciate policies necessary to good order and discipline. The commander must announce the standards and indicate his support of those standards. This is a crucial function of command. However, in his zeal to achieve a legitimate goal, the commander must not upset the delicate balance.

Message content is probably the most critical factor leading to unlawful command influence. "Shooting from the hip" has no place either in discipline or in military justice, and may quickly result in unlawful command influence. Although it sounds trite, the commander must determine why he wishes to issue a given statement and then tailor the statement to that purpose. This will minimize the chance of improper interpretation. The commander should seriously consider reducing any comments regarding command policy to writing and seeking SJA approval prior to issuing the statement.¹³⁶ While the appellate courts have not gone so far as to require this, the precaution might make the difference between a fair and a tainted trial. He may wish to have the SJA prepare the statements, or he may merely ask for legal blessing before they

are delivered. While legal sanction does not guarantee unlawful influence will not occur, it represents a safeguard.

As a general rule, the commander may make broad policy statements addressed to members of his command at any time. These statements may relate to status of discipline in the Air Force, within the command or at his installation, or to policy regarding specific activities. There is nothing inherently objectionable about the commander stating individuals who violate the policies may expect either administrative or disciplinary action, even stating offenders will generally be separated from the service. The commander should not, however, make comments which even suggest what result should occur in a particular case or type of case. What makes remarks subject to criticism are commentaries that may skew, or appear to skew, the results of a particular trial.

Here, timing becomes important. Once investigation has identified an individual or group of individuals as a possible defendant in a criminal proceeding, the commander should exercise restraint in any public comments concerning the individual(s) or the offense(s). Thus, for example, the commander must resist the temptation to censure, ridicule, or otherwise display disapproval toward any potential accused, during, and immediately subsequent to, apprehension.¹³⁷ While he may legitimately initiate judicial action, this should be the extent of his participation, other than from an administrative posture.¹³⁸ In this regard, selection of court members is paramount.

The commander has a powerful tool to ensure a fair trial through his ability to personally select members most qualified under the criteria of Article 25, UCMJ.¹³⁹ That article states the commander "shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."¹⁴⁰ The commander should rely on this tool to the utmost. Often commanders reserve key personnel for more critical duties, allowing less qualified personnel to perform the more mundane courtroom duties.¹⁴¹ Not only does this ignore the mandate of Article 25, but it also lends itself to unfortunate results in the administration of justice. Moreover, leaving the selection of members to the discretion of legal officers, even if the commander actually "rubber stamps" the final selection, may result in a less than desirable panel, and abandonment of his statutory duty. The commander knows his people and should take full advantage of the authority Article 25 provides. Once he has appointed members, however, the commander's responsibilities to that panel cease, unless a situation demands he appoint new members.

The commander must refrain from discussing the case in the presence of court members. While this may be a simple matter in the case of an individual with whom the commander has no daily interaction, the commander may experience more difficulty when he is in daily contact with subordinates who may serve as members. Nevertheless, the commander must resist the urge to discuss the pending case, either on an individual basis, or in the context of a meeting. In particular, there is no reason why the facts of any particular case need to be discussed during stand up, staff meetings, status of discipline briefings or any other meetings. Likewise, the commander has no need to discuss pending cases during social gatherings.¹⁴² Regardless of whether prospective members are present during such activities, and it is highly likely that at least some will be, the commander's words will in all probability reach prospective members.

The Manual for Courts-Martial no longer makes provision for the commander to provide instruction to the panel concerning such matters as status of discipline in the command, prevalence of certain offenses or preventive measures which have been adopted. There is, therefore, no justification for pretrial conferences between the convening authority or commander and the panel. Nor does the SJA have a need to engage in discourse with members, or to provide written instructions, other than to specify time, place, and attire.¹⁴³ The commander must also remain away from the courtroom during the trial.¹⁴⁴ His presence cannot help but have an improper effect, even if it is only to create an appearance of impropriety. If necessary, the SJA may convey the progress of the proceeding to the commander. Since the commander may not take any action to alter the result of trial at this stage, further interaction with the panel is not necessary.

Moreover, after a panel has been appointed, the convening authority must excuse members from attending any formations which have potential for creating unlawful command influence.¹⁴⁵ (Should the convening authority fail to excuse the members, the military judge may do so, as he has ultimate authority over members during a court-martial). Despite the commander's laudable attempts to instill good order and discipline, policy statements made during the course of a trial, concerning the subject of that trial, addressed to that panel, are likely, at a minimum, to create the appearance of improper command influence. Regardless of the importance of these remarks, there is no pressing military necessity to address them to this particular panel prior to disposition of the proceeding. While some administrative inconvenience may ensue as a result of having to

repeat the remarks later, preserving the appearance of a fair trial justifies the cost.

The commander also must remain sensitive to the accused's right to call witnesses on his behalf under the 6th Amendment. Any attempt to restrict this right could result in constitutional error. Thus, the commander must ensure anyone with information potentially beneficial to the accused has the unfettered opportunity to testify. The commander should make clear, through military justice lectures, commander's calls and other means, that military members have a positive duty to provide information relevant to an accused's case. More importantly, however, the commander must refrain from taking actions which suggest an accused is tainted or that others should not associate with him.¹⁴⁶ This includes not commenting on the professionalism of those who testify on the accused's behalf,¹⁴⁷ and not suggesting testifying on behalf of an accused could be detrimental to one's career.¹⁴⁸

After the trial has concluded the convening authority is required by statute to take post-trial action. While his action to either approve or disapprove the findings or sentence as adjudged may indirectly convey his desires, further direct action cannot be tolerated. The convening authority, as well as the commander, must refrain from questioning the jurors, from commenting upon the findings or remarking on the adequacy of sentence.¹⁴⁹ Likewise, although the commander should have wide latitude in publishing the results of trial, he must refrain from commenting on the adequacy of sentence adjudged. Post-trial comments may create the appearance of unlawful influence and have a chilling effect on future proceedings. Furthermore, after the conclusion of a given case, no attempt should be made to discuss testimony with witnesses.¹⁵⁰ Such action may again have a chilling effect on future trials. Even where this result does not materialize, the potential for the appearance of unlawful influence is manifest.

The commander must also consider the power his subordinate commanders, first sergeants, senior NCOs, and staff judge advocate wield. These individuals occupy positions of responsibility and generally are regarded with respect. Subordinates may interpret the words and actions of their superiors as representing those of the commander. It is, therefore, imperative key subordinates understand what unlawful command influence is and take actions to avoid creating even the appearance of such influence. In this regard, SJAs play a key role.

On the one hand, the SJA should prove useful in disseminating policies the commander wishes implemented. It is precisely because the SJA occupies a position of responsibility that others will heed his word. On the other hand, the SJA has a responsibility to ensure his actions do not create the evil they are designed to correct. Unfortunately, unlawful command influence has all too frequently emerged through the actions of the SJA or legal office personnel. The SJA must, therefore, be diligent in reviewing not only his own words and actions, but also those of others involved in the processing of the case. He must make certain all such personnel understand the potential for unlawful command influence and avoid actions which may create the issue. In particular, the SJA must ensure counsel demonstrate care in their remarks during trial.¹⁵¹ In this regard, the SJA should require trial counsel to prepare a trial brief to prevent unlawful influence from entering the courtroom through negligent government actions. (The military judge can also help here, by paying close attention to the remarks of counsel and ensuring such remarks do not address command policy).

The SJA must also periodically review the content of military justice lectures and briefings provided to officers and senior NCOs. Such briefings should not comment upon pending cases, suggest appropriate sentences for certain offenses, or reflect on the results or severity of past courts.¹⁵² Nor should the briefer suggest charges would not have been referred to court-martial unless the accused were guilty. While there is nothing objectionable about the legal officer stating charges are not preferred unless the SJA determines the facts should be decided in a court of law, the attorney must emphasize the ultimate decision rests with the court members.¹⁵³ The SJA should also play a role in educating others on their responsibilities as supervisors. Specifically, the SJA needs to ensure subordinate commanders, senior NCOs and other individuals in supervisory roles appreciate their obligations toward potential witnesses. These individuals must understand the importance of avoiding even the appearance of discouraging witness testimony. The SJA can accomplish this through military justice briefings upon initial assignment of the individuals, or as the individuals assume supervisory positions. Annual training will reinforce the lesson.

Obviously, prevention of unlawful command influence involves not only the commander, but members of the legal community, and subordinate personnel as well. While the commander must bear ultimate responsibility, members of his staff have an important role to play. Although the commander must enunciate policies

and guidance for the maintenance of good order and discipline, his staff must assist him in this responsibility. In particular, the SJA should be intimately involved with any policy statements the commander issues, and should attempt to be present whenever such statements issue. The commander should rely heavily on his SJA for advice in this critical area. In addition, subordinate personnel must continuously bear in mind they represent the commander, and that others may interpret their words and actions as representing those of the commander. Finally, subordinate personnel must recognize the power they wield in their own right, and the potential for their actions or words to intimidate witnesses.

I. Remedial Actions

Despite the commander's good intentions, and all efforts to ensure unlawful command influence does not enter the courtroom, the issue may arise. Once arisen, the specter of unlawful influence casts a shadow over the entire military justice system. Remedial action is difficult and no remedial action can guarantee the taint will be cured or the evil exorcised. But to preserve the integrity of the court, and restore fairness to the trial, the participants must make an effort to dispel the taint at the outset. The primary responsibility for this falls upon the military judge; however, trial and defense counsel, as well as the commander and the convening authority, may be able to help. The military judge has several weapons at his disposal to combat unlawful command influence, starting during voir dire.

Should the military judge determine during voir dire that a court member has been improperly influenced, the judge may remove the member from the panel. While this may create administrative delay and inconvenience if the member must be replaced,¹⁵⁴ the preservation of a fair trial justifies the cost. The Court of Military Appeals has placed responsibility for delving into the issue upon trial and defense counsel and the military judge.¹⁵⁵ Mere exposure to the influence will normally not be sufficient to disqualify the member.¹⁵⁶ The court is apparently prepared to accept the member's assertion during voir dire that he has not been influenced. However, this places a heavy burden on counsel and the judge to examine this issue thoroughly at the trial stage. Moreover, despite the appellate court's willingness to rely on the member's adherence to an oath, reliance on the member's word may be dangerous. As the appellate courts have repeatedly suggested, jurors may not always be able to detect the subtle influence of the commander. Any doubt should, therefore, be resolved in favor of removing the member. Furthermore, while the court members may indicate during voir dire command influence had no impact on them, other indicators during the course of the trial may suggest otherwise. For example, a member's questions may demonstrate the commander has, indeed, improperly influenced the member. Again, the military judge is in the position of being able to remove the member. However, the military judge may have other options.

The military judge may find a simple retraction or explanatory statement sufficient to dispel the taint. In such a case, the military judge should direct the commander to retract a statement or policy, or to expand upon previous statements. The commander may accomplish this either verbally or in writing. After the corrective action has been taken, the military judge should examine the issue again to ensure the influence has been dispelled. However, military judges and commanders must remain sensitive to the fact retractions may actually aggravate the problem.¹⁵⁷ Where the communication is given orally, the commander's manner or other nonverbal indicators might negate the meaning of the words. Whether oral or written, recipients might well regard the statement as a formality, given because "legal" said it must be given. Careful wording and a sincere manner of delivery should overcome these pitfalls. Therefore, it is critical for the commander to consult with the SJA to determine content and method of delivery.

A limiting instruction may suffice where counsel have introduced the commander's policies into the courtroom. Thus, for example, the military judge may instruct the members to disregard certain statements of counsel. However, while jurors may conscientiously strive to fulfill the obligations of their oath, subconscious influences may taint their judgement. Cautionary instructions to disregard the commander's policies may not cure the prejudice;¹⁵⁸ nevertheless, the military judge should make the effort.

The commander's improper influence may be so pervasive no action short of withdrawing the charges and having a different convening authority convene the court will suffice. This might occur, for instance, where the commander's subordinates feel that, despite the commander's efforts to retract his statements, their careers are in jeopardy. While a rather drastic measure, this action would help to dispel any fear of retribution. Although this situation represents an unlikely extreme, military judges, SJAs and commanders must remain sensitive to the possibility of its occurrence.

The convening authority may also take action to dispel the impact of unlawful command influence, through his post-trial actions. One indicator of unlawful influence is a disproportionate sentence, either in relation to the maximum permissible sentence, or to a pretrial agreement.¹⁵⁹ The convening authority may, therefore, wish to reduce the severity of an adjudged sentence to dispel the effect of the unlawful influence. Thus, for instance, where the influence results from the commander's statements to the effect a certain result should occur, and that result in fact does occur, the convening

authority might reduce the sentence. However, despite this attempt, the appearance of impropriety may linger. Furthermore, the reviewing court may not consider the action adequate. Therefore, this remedy should be considered as a last resort, after other remedies have failed.

Where witnesses have been improperly influenced, the military judge also has options. He may compel the attendance of witnesses, advise them of their duty to testify, and grant recesses for interviews.¹⁶⁰ At the same time, he may need to admonish the commander not to interfere.¹⁶¹ In particularly egregious cases, this may not suffice to dispel the taint and the military judge may need to take stronger action. He may need to direct the commander to hold some type of commander's call, at which the commander addresses the accused's right to call witnesses on his behalf and the duty of those with relevant evidence to come forward.¹⁶² Again, however, these actions may be viewed as empty promises. While they may do much to dispel the appearance of influence, they may be inadequate to erase the actual occurrence of unlawful command influence.

In such a case, the military judge may need to take more drastic remedial action. This may be necessary where, for example, the subordinate believes, despite the commander's assurances, testifying will hurt his career. In such a case, the military judge may need to direct transfer of the witness out of that unit. Transfer of the witness might also be necessary where subordinate commanders or NCOs have used threats of poor assignments or performance reports as leverage to discourage testimony and retraction statements have not dispelled the fear of retribution.¹⁶³ (Although an alternative in that case would be to ensure the offending individual has no role in the rating or assignment process of the witness,¹⁶⁴ that option is dangerous. This is so because of the numerous ways in which a superior officer or NCO may exact retribution, other than through assignments or performance reports). Another option would be to transfer the offending individual.¹⁶⁵

Trial counsel may be able cure the taint where witnesses have been influenced not to testify on an accused's behalf; however, this will be difficult. Trial counsel may be able to demonstrate the defense would not have called these witnesses, even had improper influence not operated. Counsel might show the defense would have elected not to call witnesses because such a tactic would have opened the door to damaging rebuttal evidence. Alternatively, counsel might show the government's evidence is so strong character evidence would have had no effect.¹⁶⁶ As the Court of Military Appeals noted in *Thomas*,¹⁶⁷ however, this latter option is a risky alternative, and should

be used with caution. Moreover, trial counsel may experience difficulty demonstrating why the defense would have elected not to call witnesses, or to prove character evidence would have had no effect. Therefore, while trial counsel should certainly attempt to cure the taint in this manner, the likelihood of success is low.

As in the case of court members, the military judge may determine the influence of witnesses is so pervasive only a new convening authority will remedy the problem. This should, in most cases, cure the taint. However, it is possible to imagine a case where the initial convening authority's actions were so serious, and his position so significant, that even a new convening authority can not cure the prejudice.¹⁶⁸

The foregoing discussion clearly demonstrates how terribly difficult remedial action can be. Nevertheless, despite the difficulty and despite the potential futility, the efforts outlined above must be undertaken by the participants in order to preserve and protect the integrity of the military justice system. However, it should now be obvious it is far easier to prevent unlawful command influence than to cure it. In the case of unlawful command influence, "an ounce of prevention is worth a pound of cure."

J. Conclusion

Recent cases decided by and pending before the appellate courts demonstrate that, despite the efforts of the Congress, the courts and the military justice system, unlawful command influence continues to plague commanders and their staffs. The tension between the commander's duty to instill good order and discipline and the need to maintain a fair and impartial trial has not been resolved. Commanders must provide guidance to their subordinates as a crucial function of command, yet they risk upsetting the delicate balance, seemingly whenever they exercise this prerogative.

Appellate decisions over the last few decades illustrate the issue is not an easy one to resolve. While isolated instances have occurred where the commander blatantly took action to influence the results of a trial, all too often the problem has arisen almost as an inadvertent side effect of the commander's attempts to instill good order and discipline. Disturbingly, the legal community has often introduced the unlawful command influence into the trial. Clearly, the issue is not black and white and the answer not simple.

However, commanders and their staffs may draw lessons from the appellate decisions. Perhaps the pivotal lesson to be drawn is that once an individual has been identified as a potential accused, the commander needs to tread softly. When the commander decides to take judicial action and forwards the case to a superior commander for referral action, he has the opportunity to recommend court members. If he himself is the convening authority, he has the opportunity to appoint experienced members to the court. He should use this prerogative wisely. However, once he has taken whatever action he deems appropriate, his participation should, in effect, cease. Intemperate remarks concerning the accused, the facts of a given case, or desired results are bound to create problems. Other than discussions with the legal office over administrative actions, such as appointing or excusing members, no military necessity should require the commander to engage in further dialogue over the case.

The commander must continue to provide guidance and direction to subordinates. He may do this through briefings and lectures which detail command policy. While the SJA may help here, the

commander has the primary responsibility for instilling good order and discipline. What he must not do, and what his subordinates must not do, is discuss the facts or circumstances of specific cases, comment on the adequacy of previous trial results, or even suggest witnesses should refrain from testifying. In this regard, the SJA may prove useful in training subordinate personnel in their roles to ensure they do not inadvertently influence the results of courts-martial.

Despite the efforts of the commander and the legal community, unlawful command influence may arise. Prompt action by the military judge, counsel, or, in some cases, the commander or convening authority, may lessen the impact of, or remove the prejudice resulting from, such influence. However, remedial action cannot guarantee the influence will dissipate. Moreover, the appearance of the evil may linger, regardless of the action taken. For these reasons, commanders should not rely on remedial actions to cure the taint, but should attempt to prevent the issue from arising *ab initio*.

In a report by the Powell Commission to the Secretary of the Army in 1960, the committee recommended the Judge Advocate General of the Army send a letter to newly appointed general court-martial convening authorities.¹⁶⁹ An excerpt of the recommended letter, which addressed undue influence on participants in the military justice system, but which also could apply to undue influence over witnesses, remains valid today:

The results of court-martial trials may not always be pleasing, particularly when it may appear that an acquittal is unjustified or a sentence inadequate. Results like these, however, are to be expected on occasion. Courts-martial, like other human institutions, are not infallible and they make mistakes. In any event, the Uniform Code prohibits censuring or admonishing court members, counsel, or the law officer with respect to the exercise of their judicial functions. My suggestion is that, like the balls and strikes of an umpire, a court's findings or sentence which may not be to your liking be taken as "one of those things." Courts have the legal right and duty to make their findings and sentences unfettered by prior improper instruction or later coercion or censure.¹⁷⁰

Commanders would do well to heed this message, for in it rests the delicate balance.

FOOTNOTES

¹*United States v. Rodriguez*, 16 M.J. 740, 742 (A.F.C.M.R. 1983).

²*United States v. Treakle*, 18 M.J. 646, 653 (A.C.M.R. 1984) (footnote omitted), *cert. granted*, 20 M.J. 131 (C.M.A. 1985).

³In the latter case, this can have an effect on findings, where character witnesses are influenced not to give testimony, or, during sentencing, where witnesses are influenced not to provide extenuation and mitigation testimony. Although the latter is more common, the potential exists for either.

⁴*United States v. Rosser*, 6 M.J. 267, 273 (C.M.A. 1979).

⁵H. MOYER, JUSTICE AND THE MILITARY, § 3-400 (1972), quoted in *United States v. Rosser*, 6 M.J. 267 at 273 n.19.

⁶See transcription of Art. 39(a) session in the special court-martial case of *United States v. Hastay*, held at Homestead AFB, Florida, 8 April 1986, at 91.

⁷Westmoreland, *Military Justice-A Commander's Viewpoint*, 10 Am.Crim.L.Rev. 5, 8 (1971), quoted in *United States v. Treakle*, 18 M.J. 646, 661 (A.C.M.R. 1984), *cert. granted*, 20 M.J. 131 (C.M.A. 1985).

⁸Uniform Code of Military Justice, art. 37, 50 U.S.C. § 612 (1951) [hereinafter cited as UCMJ].

⁹*United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

¹⁰UCMJ art. 98, 10 U.S.C. § 898 (1982). While there have not been any reported prosecutions, administrative sanctions have been employed, including forced resignations. Gaydos and Warren, *What Commanders Need to Know About Unlawful Command Control*, *The Army Lawyer*, October 1986, at 9, 12.

¹¹Government's Answer to Final Brief at 20, *United States v. Yslava*, 18 M.J. 670 (A.C.M.R. 1984) (en banc) (No. 50,410), *cert. granted*, 19 M.J. 281 (C.M.A. 1985).

¹²*Thomas*, 22 M.J. 388 (C.M.A. 1986).

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¹³Johnson, *Unlawful Command Influence: A Question of Balance*, *The Judge Advocate Journal*, Navy, March-April 1965, at 87, 88.

¹⁴*Id.*

¹⁵*United States v. Olson*, 11 C.M.A. 286, 288, 29 C.M.R. 102, 104 (1960).

¹⁶*History of the Judge Advocate General's Corps, United States Army*, *The Judge Advocate Journal*, Bicentennial Issue, 4 July 1976, at 22.

¹⁷Legislative History of the UCMJ, 1950 U.S. Code Cong. Serv., 81st Cong., 2d Sess. 2225 (1950); Johnson, *supra* note 13, at 89.

¹⁸*Id.*

¹⁹Excerpt from the Report of the Committee on Military Justice of the New York County Lawyers Association to the Subcommittee of the House Armed Services Committee on H.R. 2498, 81st Cong., 1st Sess. 634 (1949), quoted in *United States v. Littrice*, 3 C.M.A. 487, 491, 13 C.M.R. 43, 47 (1953).

²⁰*History of the Judge Advocate General's Corps, United States Army*, *supra* note 16, at 22; Johnson, *supra* note 13, at 90.

²¹Legislative History of the UCMJ, *supra* note 17, at 2225-28; *United States v. Littrice*, 3 C.M.A. 487, 491, 13 C.M.R. 43, 47 (1953).

²²*United States v. Littrice* at 490, 13 C.M.R. at 46.

²³UCMJ (1951), enacted as a part of The Act of 5 May 1950.

²⁴UCMJ art. 37, 50 U.S.C. § 612 (1951). Art. 37 provided:

No authority convening a general, special or summary court-martial, nor any other commanding officer, shall censure, reprimand or admonish such court or any member.

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law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this code shall attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

²⁶UCMJ art. 98, 50 U.S.C. § 692 (1951). See Legislative History of the UCMJ, *supra* note 17, at 2227, 2241.

²⁶Manual for Courts-Martial, United States, 1951, Appendix 2. [hereinafter MCM].

²⁷Paragraph 38 provided:

A convening authority may, through his staff judge advocate or legal officer or otherwise, give general instruction to the personnel of a court-martial which he has appointed, preferably before any cases have been referred to the court for trial. When a staff judge advocate or legal officer is present with the command such instruction should be given through that officer. Such instruction may relate to the rules of evidence, burden of proof, and presumption of innocence, and may include information as to the state of discipline in the command, as to the prevalence of offences which have impaired efficiency and discipline, and of command measures which have been taken to prevent offences. Except as provided in this manual, the convening authority may not, however, directly or indirectly give instruction to, or otherwise unlawfully influence, a court as to its future action in a particular case.

²⁸Legislative History of the UCMJ, *supra* note 17, at 2227; *History of the Judge Advocate General's Corps, United States Army*, *supra* note 16, at 22; *United States v. Thomas*, 33 M.J. 388, 393 (C.M.A. 1986).

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²⁹Military Justice Act of 1968, Pub. L.No. 90-632, 82 Stat. 1335 (1968).

³⁰10 U.S.C. § 837 (1968).

³¹Manual for Courts-Martial, United States, 1969 (Rev.ed.).

³²10 U.S.C. § 826 (1968).

³³Legislative History of the Military Justice Act of 1968. 1968 U.S. Code Cong. & Admin. News 4504. The Judge Advocate General, United States Air Force, later created an independent Area Defense Counsel Program, partially in response to possible unlawful command influence. The counsel were assigned directly to HQ USAF "to avoid the specter of command influence." *Report of TJAG-Air Force*, Judge Advocate Journal, Bulletin No. 47, June 1976, at 4, 5. See also TJAG Letter, USAF, 9 May 1974, Atch 1, para. 3. The Chief of Staff of the Air Force approved the program on 19 July 1975. *Report of TJAG-Air Force*, *id.* at 7.

³⁴See Government's Answer to Final Brief at 35-39, *United States v. Yslava*, 18 M.J. 670 (A.C.M.R. 1984) (en banc) (No. 50,410), cert. granted, 19 M.J. 281 (C.M.A. 1985). "The principal concern of the witnesses at the congressional hearings on the proposed Uniform Code of Military Justice was the potential for abuse by convening authorities of their considerable power over the members' careers in order to influence the outcome of a court-martial." *Id.* at 35.

³⁵3 C.M.A. 487, 13 C.M.R. 43 (1953).

³⁶*Id.* at 491, 13 C.M.R. at 47.

³⁷*Id.*

³⁸*Id.* at 490, 13 C.M.R. at 46.

³⁹*Id.* at 491, 13 C.M.R. at 47.

⁴⁰UCMJ art. 25(c)(2), 50 U.S.C. § 589

⁴¹*United States v. Littrice*, 3 C.M.A. at 494, 13 C.M.R. at 50

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⁴³ C.M.A. 497, 13 C.M.R. 53 (1953).

⁴⁴*Id.* at 497, 13 C.M.R. at 53.

⁴⁵*Id.*

⁴⁶ C.M.A. 410, 18 C.M.R. 34 (1955).

⁴⁷*Id.* at 414, 18 C.M.R. at 38.

⁴⁸ C.M.A. 675, 25 C.M.R. 179 (1958).

⁴⁹*Id.* at 676, 25 C.M.R. at 180.

⁵⁰ C.M.A. 349, 22 C.M.R. 139 (1956).

⁵¹*Id.* at 351-52, 22 C.M.R. at 141-42.

⁵² C.M.A. 635, 23 C.M.R. 99 (1957).

⁵³*Id.* at 639, 23 C.M.R. at 103.

⁵⁴29 C.M.R. 849 (A.B.R. 1960).

⁵⁵*Id.* at 850.

⁵⁶*Id.* at 851.

⁵⁷ C.M.A. 32, 17 C.M.R. 32 (1954).

⁵⁸*Id.* at 41, 17 C.M.R. at 41 (Brosman, J., concurring in part and dissenting in part).

⁵⁹12 C.M.A. 589, 31 C.M.R. 175 (1961). In that case, the accused and several companions broke into a furniture store and removed a safe. Caught by civilian authorities, they were tried and given suspended sentences, with probation. The accused's commanding officer decided to initiate separation proceedings. The SJA convinced the commander an Article 32 investigation was appropriate and the commander forwarded a recommendation for trial by general court-martial to the convening authority. The

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convening authority directed an Article 32 investigation. Although the investigating officer recommended the accused not be court-martialed, the convening authority referred the charges to general court-martial. *Id.* at 590-91, 17 C.M.R. at 176-77.

⁵⁸*Id.* at 591, 31 C.M.R. at 177.

⁶⁰*Id.*

⁶¹*Id.* at 592, 31 C.M.R. at 178.

⁶²*United States v. Kitchens*, 12 C.M.A. 589, 593, 31 C.M.R. 175, 179 (1961). The court noted the letter "conveys the idea that there is great official disquietude because some accused convicted of such offenses by general court-martial have not had a punitive discharge imposed upon them."

⁶³*Id.* at 593, 31 C.M.R. at 179.

⁶⁴*Id.* at 594, 31 C.M.R. at 180.

⁶⁵15 M.J. 967 (A.C.M.R. 1983).

⁶⁶*Id.* at 970.

⁶⁷15 M.J. 275 (C.M.A. 1983).

⁶⁸*Id.* at 276.

⁶⁹19 M.J. 170 (C.M.A. 1985).

⁷⁰*Id.* at 171.

⁷¹*Id.* at 172 n.3.

⁷²21 M.J. 784 (A.C.M.R. 1986).

⁷³*Id.* at 785.

⁷⁴*United States v. Cruz*, 20 M.J. 873, 380 (A.C.M.R. 1985), cert granted, 22 M.J. 100 (C.M.A. 1986).

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⁷⁶Hearings on H.R. 4080 and S. 857 Before a Subcomm. of the Comm. on Armed Serv., 81st Cong., 1st Sess. 87 (1949), quoted in *United States v. Cruz* at 880.

⁷⁶*United States v. Navarre*, 5 C.M.A. 32, 17 C.M.P. 32 (C.M.A. 1954). See generally *United States v. Cruz*, at 380-82 for a discussion of the origins of the concept. In *Navarre*, the commanding officer, three months prior to trial, gave a military justice lecture in which he indicated statistics over a one-year period revealed sentence severity decreased with rank. Although the majority opinion found no unlawful command influence, the dissenting judge articulated the appearance doctrine: "We are concerned here with much more, I believe, than the protection of an accused person named Navarre . . . A judicial system operates effectively only with public confidence-and, naturally, this trust exists only if there also exists a belief that triers of fact act fairly and without undue influence." *Navarre* at 43.

⁷⁷C.M.A. 349, 22 C.M.R. 139 (1956).

⁷⁸14 C.M.A. 548, 34 C.M.R. 328 (1964).

⁷⁹*Id.* at 550, 34 C.M.R. at 330.

⁸⁰*Id.* at 551, 34 C.M.R. at 331.

⁸¹*Supra*, note 34.

⁸²15 M.J. 509 (A.F.C.M.R. 1982).

⁸³*Id.*

⁸⁴*Id.* at 510.

⁸⁵19 M.J. 763 (A.C.M.R. 1984).

⁸⁶*Id.* at 764.

⁸⁷20 M.J. 863 (A.F.C.M.R. 1985).

⁸⁸*Id.* at 866.

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⁹⁶M.J. 267 (C.M.A. 1979).

⁹⁹*Id.* at 272.

⁹¹*Id.*

⁹²*Id.* (footnote omitted).

⁹³16 M.J. 740 (A.F.C.M.R. 1983).

⁹⁴*Id.* at 743 n.4.

⁹⁶*Id.* at 742.

⁹⁸18 M.J. 695 (A.F.C.M.R. 1984).

⁹⁷*Id.* at 696.

⁹⁹*Id.*

⁹⁹18 M.J. 646 (A.C.M.R. 1984), *cert. granted*, 20 M.J. 131 (C.M.A. 1985).

¹⁰⁰*Id.* at 652.

¹⁰¹20 M.J. 873 (A.C.M.R. 1985), *cert. granted*, 22 M.J. 100 (C.M.A. 1986).

¹⁰²*Id.* at 876.

¹⁰³*Id.*

¹⁰⁴*Id.* at 885. The court examines the issue from within the military justice system, to determine whether such influence exists. *Id.* at 882.

¹⁰⁵*United States v. Cruz*, 20 M.J. 873, 877 (A.C.M.R. 1985), *cert. granted*, 22 M.J. 100 (C.M.A. 1986).

¹⁰⁶*Id.* at 883. It may also cause an appearance of unlawful influence.

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¹⁰⁷*Id.* at 882.

¹⁰⁸*Id.* at 883.

¹⁰⁹*United States v. Cruz*, 20 M.J. 873, 883 (A.C.M.R. 1985), cert. granted, 22 M.J. 100 (C.M.A. 1986). The court examines the question from outside the military justice system, as the public sees the issue.

¹¹⁰*Id.* at 884.

¹¹¹*Id.* at 889.

¹¹²Disposition of the cases varied. Of the 35 cases from the accused's unit, 15 were referred to general courts-martial, 4 to special courts-martial, 11 to summary courts-martial, and 5 individuals received nonjudicial punishment. *Id.* at 877.

¹¹³Government's Answer to Final Brief at 20, *United States v. Yslava*, 18 M.J. 670 (A.C.M.R. 1984) (en banc) (No. 50,410), cert. granted, 19 M.J. 281 (C.M.A. 1985).

¹¹⁴*United States v. Treakle*, 18 M.J. 646, 648-52 (A.C.M.R. 1984), cert. granted, 20 M.J. 131 (C.M.A. 1985).

¹¹⁵*Id.* at 651.

¹¹⁶*Id.*

¹¹⁷*Id.* at 651-52.

¹¹⁸*United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), cert. granted, 20 M.J. 131 (C.M.A. 1985).

¹¹⁹*Id.* at 653.

¹²⁰*Id.* (footnote omitted).

¹²¹*Id.* at 657.

¹²²*United States v. Treakle*, 18 M.J. 646, 658 (A.C.M.R.

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1984), *cert. granted*, 20 M.J. 131 (C.M.A. 1985).

¹²³ *Id.*

¹²⁴ *Id.* Chief Judge Everett later raised this standard to "beyond a reasonable doubt" in *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986).

¹²⁵ *Treakle* at 657.

¹²⁶ 19 M.J. 781 (A.C.M.R. 1984).

¹²⁷ *Id.* at 783.

¹²⁸ 22 M.J. 388 (C.M.A. 1986).

¹²⁹ 18 M.J. 646 (A.C.M.R. 1984).

¹³⁰ *Thomas* at 393.

¹³¹ *Id.* at 394.

¹³² *Id.* at 396. Looking to findings based on a guilty plea, the court refused to conclude such pleas were based on unlawful command influence, in the absence of evidence to the contrary. Regarding contested cases before a military judge alone, the court noted the commander is unlikely to influence the military judge, given the independence of the trial judiciary.

¹³³ *Id.* at 396-97.

¹³⁴ *Id.* at 397.

¹³⁵ *United States v. Thomas*, 22 M.J. 388, 400 (C.M.A. 1986).

¹³⁶ See *Treakle*, 18 M.J. 646 (A.C.M.R. 1984), *cert. granted*, 20 M.J. 131 (C.M.A. 1985), and the other 3d Armored Division cases, in which the SJA had prepared a point paper for the general but the general delivered the statements in an extemporaneous manner.

¹³⁷ See *United States v. Cruz*, 20 M.J. 873 (A.C.M.R. 1985).

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cert. granted, 22 M.J. 100 (C.M.A. 1986).

¹³⁸Gaydos and Warren, *What Commanders Need to Know About Unlawful Command Control*, *supra* note 10 at 12.

¹³⁹Thwing, *An Appearance of Evil*, *The Army Lawyer*, December 1985, at 13, 27; Gaydos and Warren, *supra* note 10 at 17.

¹⁴⁰UCMJ art. 25(c)(2), 10 U.S.C. § 825.

¹⁴¹Thwing, *supra* note 139, at 27.

¹⁴²See *United States v. Pierce*, 29 C.M.R. 849 (A.B.R. 1960).

¹⁴³See *United States v. Johnson*, 14 C.M.A. 548, 34 C.M.R. 328 (1964); *United States v. McCann*, 8 C.M.A. 675, 25 C.M.R. 179 (1958); *United States v. Zagar*, 5 C.M.A. 410, 18 C.M.R. 34 (1955).

¹⁴⁴See *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979).

¹⁴⁵See *United States v. Brice*, 19 M.J. 170 (C.M.A. 1985).

¹⁴⁶See *United States v. Tucker*, 20 M.J. 863 (A.F.C.M.R. 1985); *United States v. Cruz*, 20 M.J. 873 (A.C.M.R. 1985), cert. granted, 22 M.J. 100 (C.M.A. 1986).

¹⁴⁷See *United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), cert. granted, 20 M.J. 131 (C.M.A. 1985), and the many cases involving the 3d Armored Division, reported in volumes 18-22, *Military Justice Reporter*; *United States v. Lowery*, 18 M.J. 695 (A.F.C.M.R. 1984).

¹⁴⁸See *United States v. Charles*, 15 M.J. 509 (A.F.C.M.R. 1982).

¹⁴⁹See *United States v. Hunter*, 3 C.M.A. 497, 13 C.M.R. 53 (1953).

¹⁵⁰See *United States v. Tucker*, 20 M.J. 863 (A.F.C.M.R. 1984); *United States v. Lowery*, 18 M.J. 695 (A.F.C.M.R. 1984).

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¹⁵¹ *United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983); *United States v. Estrada*, 7 C.M.A. 635, 639, 23 C.M.R. 99, 103 (1957); *United States v. Fowle*, 7 C.M.A. 349, 351-52, 22 C.M.R. 139, 141-42 (1956).

¹⁵² See *United States v. McCann*, 8 C.M.A. 675, 25 C.M.R. 179 (1958).

¹⁵³ *United States v. Zagar*, 5 C.M.A. 410, 416-417, 18 C.M.R. 34, 40-41 (1955).

¹⁵⁴ This will be the case where the number of members goes below the number required by law.

¹⁵⁵ *United States v. Thomas*, 22 M.J. 388, 396 (C.M.A. 1986).

¹⁵⁶ *Id.*

¹⁵⁷ *United States v. Kitchens*, 12 C.M.A. 589, 594, 31 C.M.R. 175, 180 (1961).

¹⁵⁸ *United States v. Estrada*, 7 C.M.A. 635, 638, 23 C.M.R. 99, 103 (1957); *United States v. Fowle*, 7 C.M.A. 349, 352, 22 C.M.R. 139, 142 (1956).

¹⁵⁹ *United States v. Johnson*, 14 C.M.A. 548, 551-52, 34 C.M.R. 328, 332-33 (1964).

¹⁶⁰ *United States v. Rodriguez*, 16 M.J. 740, 741-42 (A.F.C.M.R. 1983).

¹⁶¹ *Id.*

¹⁶² *Id.* at 743 n.4.

¹⁶³ See Record of Trial, *United States v. Hastay*, a special court-martial held at Homestead AFB on 7-8 April 1986, and Record of Trial, *United States v. Martin*, a general court-martial held at Homestead on 4-6 June 1986 and 23-24 June 1986. While charges were being prepared in several drug cases, including *Hastay* and *Martin*, the first sergeant addressed the NCO's at a commander's call. The gist of his comments was that

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anyone who testified in favor of retaining an individual convicted of drug abuse might not be considered for an elevated indorsement level on their APR. A week later, the hospital administrator addressed a hospital officers' call on the subject of integrity. The hospital commander was present and made no comments. Some understood the remarks to suggest anyone who testified a drug abuser should be retained in the Air Force lacked integrity. In *Hastay*, the military judge directed corrective action. Both the wing commander and the hospital commander gave retraction statements. The accused in that case submitted and was granted a chapter 4, AFR 39-10 discharge in lieu of trial. However, in the companion case, *United States v. Martin*, the military judge found the effect of the senior NCO's improper remarks was not dispelled by the corrective actions. Record of Trial, *United States v. Hastay*, App. Ex. 1, at 87 and App. Ex. VIII; Appellant's Assignment of Error, *United States v. Martin*, ACM 25576, at 6-8; USAF Trial Judiciary Letter, 2nd Circuit, "Improper Influence on Testimony of Prospective Court-Martial Witnesses, USAF Hospital, Homestead," 6 June 1986.

¹⁶⁴In *Martin*, the military judge provided the commander the option of permanently reassigning the senior NCO or providing written assurances that NCO would not have a role in the rating process of any witness who testified for the accused.

¹⁶⁵*Id.*

¹⁶⁶*United States v. Thomas*, 22 M.J. 388, 396-397 (1986).

¹⁶⁷*Id.* at 397.

¹⁶⁸*United States v. Stokes*, 19 M.J. 781, 783 (A.C.M.R. 1984).

¹⁶⁹Committee on the Uniform Code of Military Justice, *Good Order and Discipline in the Army: Report to Honorable Wilbur M. Bruckner, Secretary of the Army*, 18 Jan 1969, at 17, 21, quoted in *United States v. Treakle*, 18 M.J. 646, 660 (A.C.M.R. 1984), cert. granted, 20 M.J. 131 (C.M.A. 1985).

¹⁷⁰*Id.*

GLOSSARY

Ab initio: From the beginning.

Arguendo: Assuming for the purpose of argument.

Challenge for cause: Where either the government or the defense believes a court member is unable to render an impartial decision, counsel may challenge the member for cause, giving specific reasons for the challenge. The military judge may either grant or deny the challenge.

Character evidence: Evidence of the character^f of the accused or of a witness. Character evidence may be introduced during findings or during sentencing.

Convening authority: That officer who has the authority to initiate court-martial proceedings under the Manual for Courts-Martial. The convening authority must be a commander; however, the commander may or may be a court-martial convening authority. For the purposes of this paper, whenever the word commander is used, it includes the convening authority. Whenever the phrase convening authority is used, it only refers to the convening authority, unless otherwise noted.

Court of Military Appeals: The highest military appellate court. The court is composed of three civilian judges and generally hears cases only after the appropriate court of military review has acted on the case.

Court of Military Review: The appellate court within each armed service which initially reviews cases.

Dicta: Refers to statements that are not a part of the court's decision.

Findings: That part of the court-martial where guilt or innocence is determined.

Gravamen: The seriousness or harm of the action or offense.

Law Officer: Used until 1968, referring to the person

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who served as a military judge.

Open the door: A term of art referring to trial tactics. When the defense opens the door, he has made a tactical move which allows the government to do something it would normally not be able to do.

Preferral: Action by a person to initiate the court-martial proceeding. Preferral of charges precedes referral of charges by the convening authority.

Pretrial matters: A term of art referring to certain matters handled prior to trial. (Not hyphenated).

Presentencing: Matters presented to the court during the sentencing portion of the trial. (Not hyphenated).

Rebuttal evidence: Evidence which tends to rebut evidence introduced by the opposing side.

Referral: The order by the convening authority that charges against an accused will be tried by court-martial.

Sentencing: That part of the court-martial where an appropriate sentence is determined.

Trial brief: A group of documents, prepared by the trial counsel prior to trial, that shows how the government expects to prove its case, what evidence and witnesses it intends to call, and what motions and arguments it intends to make.

Trial counsel: The government's advocate, comparable to a civilian prosecutor.

Voir Dire: A preliminary examination during a court-martial in which the military judge and counsel determine any particular prejudices or biases of the panel members. This is accomplished through questions regarding the member's background, the offenses involved in the particular case, or any other questions which might be relevant to the issue.

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