

**52<sup>ND</sup> MILITARY JUDGE COURSE**

**UNLAWFUL COMMAND INFLUENCE**

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March 2009**

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## 52<sup>ND</sup> MILITARY JUDGE COURSE

### UNLAWFUL COMMAND INFLUENCE

#### Outline of Instruction

*Unlawful command influence is most often exerted on members of any of the following populations: (1) subordinate commanders, (2) potential panel members, and (3) potential witnesses. It can be exerted by commanders as well as those acting with the “mantle of command authority,” and can be intentional or inadvertent. Judges need to know the test for command influence at the trial level so that, in drafting findings of fact and conclusions of law, they can seek facts that are relevant to the application of that test. They should also be conversant with the numerous “fixes” available to them in crafting trial-level sanctions and responses to substantiated claims of command influence.*

#### **I. INTRODUCTION.**

References:

1. MANUAL FOR COURTS-MARTIAL, United States (2008) [hereinafter MCM].
2. Uniform Code of Military Justice [hereinafter UCMJ], Art. 37.
3. Dep’t of Army, Reg. 27-10, Legal Services, Military Justice (November 2005) [hereinafter AR 27-10].

#### **II. METHODOLOGY OF PROOF - SHORT FORM.**

*United States v. Biagase*, 50 M.J. 143 (1999); *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994). Details the standards for assessment of unlawful command influence by the military judge during motions at trial.

1. Threshold at trial is low, more than mere allegation or speculation - some evidence.”
2. Facts, which, if true, constitute unlawful command influence, and alleged unlawful command influence has logical connection to court-martial in terms of potential to cause unfairness in the proceedings.

3. Burden does not shift to government unless defense meets the initial burden of producing sufficient evidence to raise unlawful command influence. The government must show either there was no unlawful command influence or that the unlawful command influence will not affect the proceedings, by:
  - a. Disproving predicate facts on which allegation of unlawful command influence is based.
  - b. Persuading the military judge that the facts do not constitute unlawful command influence.
  - c. Producing evidence that unlawful command influence will not affect the proceedings.
4. **BURDEN OF PROOF** - beyond a reasonable doubt that there was no unlawful command influence or that the unlawful command influence will not affect the findings or sentence.

### III. UCMJ ART. 37(A):

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

- A. “This Court has consistently held that any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned. *United States v. Hawthorne*, 22 C.M.R. 83, 87 (C.M.A. 1956).

- B. Defects in the preferral and forwarding of the charges are waived unless raised at trial, unless the defense is deterred from raising those issues at trial due to unlawful command influence. *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). *See also United States v. Brown*, 45 M.J. 389 (1996). *See also United States v. Drayton*, 39 M.J. 871 (A.C.M.R. 1994), *aff'd*, 45 M.J. 180 (1996), relying upon *United States v. Bramel*, 29 M.J. 958 (A.C.M.R.), *aff'd*, 32 M.J. 3 (C.M.A. 1990) (summary disposition).

#### IV. INDEPENDENT DISCRETION VESTED IN EACH COMMANDER.

- A. Independent discretion **by law** which may not be impinged upon.
- B. Recurring mistakes:
1. Anticipatory advice (Policy Letters).
    - a. Wing commander's "We Care About You" policy letter setting out reduction in grade and \$500 fine "as a starting point" for first-time drunk drivers was clearly UCI, notwithstanding letter's preface that "[p]unishment for DWI will be individualized." *United States v. Martinez*, 42 M.J. 327, 331-334 (1995) (found harmless because of disclosure, assessment of damage and proper curative instruction).
    - b. Division Commander's five-page policy letter on physical fitness and physical training addressed other fitness considerations such as weight, smoking, drinking and drugs:
 

"There is no place in our Army for illegal drugs **or for those who use them**. This message should be transmitted clearly to our soldiers, and we must work hard to ensure that we identify drug users through random urinalysis and health and welfare inspections."

CG disqualified from taking action on case despite not referring drug specification to court-martial. *United States v. Griffin*, 41 M.J. 607, 608-09 (Army Ct. Crim. App. 1994) (emphasis added). *See also, United States v. Rivers*, 49 M.J. 434 (1998) (corrective action by government and military judge preserved court from taint of unlawful command influence).

- c. *United States v. Pope*, 63 M.J. 68 (2006). Appellant was an Air Force recruiter involved in unprofessional conduct with prospective applicants. The Military Judge admitted (over defense objection) a letter offered at sentencing which argued Air Force core values and endorsed “harsh adverse action” for those who committed appellant’s offenses. **HELD:** Admitting the letter (especially without a limiting instruction) raised the appearance of improper command influence because it conveyed the commander’s view that harsh action should be taken against an accused. A policy directive may be promulgated to improve discipline but not as leverage to compel a certain result in the trial itself. “Thus we have condemned references to command policies that in effect bring the commander into the deliberation room.” Such a practice raises the specter of command influence, and in this case the CAAF was not convinced beyond a reasonable doubt that the members were not influenced by the letter. The sentence was set aside with a rehearing authorized.
- d. *United States v. Reed*, 65 M.J. 487 (2008). Appellant was a Master Sergeant stationed in Korea. He claimed BAH at the married rate when he was actually single, and was subsequently charged with receiving payments substantially higher than he was entitled to. In support of an unlawful command influence motion, appellant introduced an email from the convening authority to his subordinates addressing a variety of command management issues and containing a thirty-one page slideshow. One slide contained the following statement: “Senior NCO and Officer misconduct – I am absolutely uncompromising about discipline in the leader ranks.” Some noted examples included: “BAH Fraud, Fraternalism, DUI, Curfew violations, Soldier abuse, Sexual misconduct.” The defense also presented evidence that a deputy commander of a subordinate unit addressed a “newcomer’s briefing” with a warning that “BAH fraud is an automatic court-martial here.” **HELD:** The government met its burden of demonstrating beyond a reasonable doubt that the proceedings were not affected by actual unlawful command influence or the appearance of unlawful command influence. The command took prompt remedial action, the issue was thoroughly explored at trial (including voir dire of members) and the military judge made detailed findings of fact and conclusions of law regarding the lack of any UCI or appearance of UCI in the proceedings.

2. Advice after the offense.

- a. *United States v. Gerlich*, 45 M.J. 309 (1996). After Art. 15 adjudicated, IG wrote to CG, who wrote to COL, who wrote to MAJ who administered Art. 15. Charges preferred, accused got BCD. CG’s letter parroted concerns of IG – and expressed dissatisfaction with resolution – while also asking for inquiry into “systemic concerns” regarding the climate at the AFB. CAAF held that subordinates, notwithstanding their protests, were pressured to change their minds. “*We have previously recognized the difficulty of a subordinate ascertaining for himself or herself the actual influence a superior has on that subordinate.*” *Id.* at 313.
- b. Improper for battalion commander to return request for Article 15 to company commander with comment, “Returned for consideration for action under Special Court-Martial with Bad Conduct Discharge.” *United States v. Rivera*, 45 C.M.R. 582, 583 (A.C.M.R. 1972).
- c. *But see United States v. Wallace*, 39 M.J. 284 (C.M.A. 1994). No error where battalion commander learned of additional misconduct by the accused and told subordinate commander, “You may want to reconsider the [company grade] Article 15 and consider setting it aside based on additional charges.” Company commander set aside the Article 15, preferred charges and recommended a BCD-SPCM. On appeal and relying on fully developed record at trial, agreed with trial court judge that subordinate “exercised his own independent discretion when he preferred charges.” *Id.* at 286-287. *And see United States v. Stirewalt*, 60 M.J. 297 (2004). CAAF affirmed Military Judge’s denial of relief despite fact that superior officer “very clearly and forcefully made his opinion known” to subordinate that case was too serious for nonjudicial punishment and that article 32(b) investigation was warranted.
- d. Reconciling *Gerlich* and *Wallace/Stirewalt*?
- (1) Truly new evidence in *Wallace* that prompted (or at least justified) the re-look.
  - (2) Quantitatively less command pressure in *Wallace*, more legitimately permissive language.
  - (3) Strong evidence of prior independence by subordinate in *Wallace*.

- (4) In *Stirewalt*, CAAF noted the extensive fact-finding (including the context of the statements) and thorough legal analysis by the Military Judge and seemed to grant more deference than usually accorded in these cases.

## V. WITNESS INTIMIDATION.

### A. Direct attempts to influence witnesses.

1. *United States v. Gore*, 60 M.J. 178 (2004). The CAAF issues a unanimous, wide-ranging decision affirming the power of the military judge to dismiss charges and specifications with prejudice in the face of unlawful command influence, despite the fact that Appellant negotiated a pretrial agreement prior to the facts which gave rise to the UCI. In so doing, the court clarified the appellate standards of review of the military judge's actions when faced with allegations of UCI, and reaffirmed the role of the military judge as the "last sentinel" to protect a court-martial from unlawful command influence. The case is also a model of the MJ's use of compelling and descriptive findings of fact, particularly in describing the specific demeanor of witnesses that led him to conclude that certain witnesses were and were not truthful.
  - a. Facts: Appellant was charged with desertion (two specifications) and unauthorized absence. He negotiated a pretrial agreement whereby he agreed to plead guilty. Prior to trial, the defense attempted to obtain character witnesses but was prevented from doing so due to unlawful command influence on the part of the convening authority, a naval commander (O-5).

- b. *Procedural History.* Following a hearing into the substance of the defense motion, the military judge found that the defense carried its burden “by a rather exceeding [sic] level,” of producing “some evidence” that unlawful command influence occurred, and that it had the potential to cause unfairness in the proceedings. Finding that the government did not carry its burden of refuting the evidence, or of proving that it would not affect the proceedings beyond a reasonable doubt, and based on the egregious nature of the UCI, the military judge dismissed the charges and specifications with prejudice. The government appealed the military judge’s decision to the NMCCA under the provisions of Article 62, UCMJ. The NMCCA remanded the case with instructions for the military judge to prepare additional findings of fact and conclusions of law concerning the decision to dismiss with prejudice. The military judge complied with the order. On further review, the NMCCA agreed that there was UCI, but “concluded that the military judge abused his discretion in fashioning a remedy,” and ordered the military judge to “select an appropriate remedy short of dismissal.” The Appellant appealed the NMCCA decision to CAAF.
- c. *Nature of the UCI.* Appellant’s defense counsel contacted a Chief Petty Officer who initially agreed to testify on his behalf in the presentencing proceeding and to distribute questionnaires to other personnel in the unit. The convening authority ordered the Chief not to testify, and told the Chief to “toe the line.” As a result, the Chief told the defense that if he did testify, it would be “consistent with the command’s wishes.” The Chief did attend the trial, but claimed that he thought he was there as a command representative, and not as a witness. He was extremely uncomfortable testifying, and “made repeated denials that contradicted the testimony of the defense counsel” and the defense counsel’s supervisor, another defense counsel. These denials included denying initially telling the defense that he would testify; in fact the Chief “denied any knowledge of being a witness.”
- d. The government called the convening authority as a witness. The CA agreed he told the Chief he was not going to go to appellant’s trial. Further, the CA testified that he thought once a pretrial agreement was arranged, it was a “done deal.” The CA denied any UCI. The military judge found the two defense counsel credible, and the Chief and the CA not credible, and dismissed the charges with prejudice.

## e. Held:

- (1) In a 5-0 opinion, the court reversed the NMCCA and reinstated the military judge's ruling dismissing the charges with prejudice.
- (2) The court reviewed the military judge's findings of fact for clear error, and the selection of an appropriate remedy for an abuse of discretion. "Simply stated, our prior cases have addressed only what a military judge can do, not what the military judge must do, to cure (dissipate the taint of the unlawful command influence) or to remedy the unlawful command influence if the military judge determines it cannot be cured." Where the MJ takes corrective action and concludes that the taint of UCI is purged, the court reviews the MJ's actions *de novo*. "Our task on appeal was . . . to determine beyond a reasonable doubt if the military judge was successful in purging any residual taint from the [UCI]." In those cases, the court's *de novo* review "ensured that the [UCI] had no prejudicial impact on the court-martial."
- (3) Here in contrast, the MJ ended the proceedings, so there is no need for the court to review *de novo* whether there remains any prejudice to Appellant. The issue is whether the military judge erred in fashioning the remedy for the UCI that tainted the proceedings – which the court reviewed for an abuse of discretion. The abuse of discretion standard of review "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range."
- (4) While the court has long held that dismissal is a drastic remedy, "dismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings." The MJ "precisely identified the extent and negative impact of the [UCI] in his findings of fact." The MJ further concluded the Government failed to prove that the UCI had no impact on the proceedings. The MJ explained why other remedies were insufficient.

- (5) The fact that Appellant negotiated a PTA did not undermine the MJ's conclusions, because the existence of a PTA "does not mean that [Appellant] is not entitled to a fair trial . . ." Appellant had not yet entered pleas and was free to plead not guilty. "We view the possible future guilty plea of Appellant as irrelevant."
2. *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994). An officer witness for the accused testified that members of the Junior Officers Protection Association pressured him not to testify. A petty officer also was harassed and advised not to get involved. Finding: UCI with regard to the petty officer. No UCI with regard to the officer, because JOPA lacked "**the mantle of command authority**;" instead unlawful interference with access to witnesses.
3. *United States v. Gleason*, 43 M.J. 69 (1995). SGM on trial for contacting retired soldier to kill captain who reported Gleason for false travel vouchers, other misconduct. After hearing tape of accused's solicitation, battalion commander made clear that he believed accused was guilty, TDS attorney was "enemy," and that soldiers should not testify on SGM's behalf. CAAF found that unlawful command influence (UCI) pervaded entire trial (unlike Ct. Crim. App. conclusion that limited it to sentence), because this 26-year veteran, "considered almost God-like" by his soldiers, would normally have had a string of character witnesses. Accused's conviction and 7 year, TF sentence thrown out (already served time). Limited precedential value:
- a. Vague "command climate" indictment.
  - b. Two-thirds of thin majority no longer a factor on court.
  - c. Infrequently cited since.
4. *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987). Chain of command briefed members of the command before trial on the "bad character" of the accused. During trial, the 1SG "ranted and raved" outside the courtroom about NCOs condoning drug use. After trial, NCOs who testified for the accused were told "that they had embarrassed" the unit. Court found UCI necessitated setting aside findings of guilt and the sentence.

5. *United States v. Newbold*, 45 M.J. 109 (1996). Ship commander (LCDR) held all-hands formation at which he referred to four sailors accused of rape as “rapists,” “scumbags” and “low-lives.” Repeated at additional formation and in meeting with woman crewmembers. Though no retraction, CAAF found no UCI because (a) he not a CA, (b) no panel members drawn from the ship in question [what about witnesses?], and (c) accused waived Art. 32 and pleaded guilty.
- B. Commander’s Language – Broad Taint. *United States v. Bartley*, 47 M.J. 182 (1997) Lawyers drafted and 3-star convening authority (CA) signed poster that addresses “7 Defense Myths” about courts-martial.<sup>1</sup> It was displayed in CA’s office and OSJA waiting room.
- C. Indirect or unintended influence (despite good intentions).
1. *See United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), *aff’d*, 23 M.J. 151 (C.M.A. 1986). CG addressed groups over several months on the inconsistency of recommending discharge-level courts and then having leaders testify that the accused was a “good soldier” who should be retained. The message received by many was “don’t testify for convicted soldiers.”
  2. *See also United States v. Biagase*, 50 M.J. 143 (1999). Accused’s confession circulated within his unit and referred to in unit formation (Company commander and 1SG told unit that that they “will not tolerate this type of behavior”).
  3. *United States v. Francis*, 54 M.J. 636 (Army Ct. Crim. App. 2000). Accused's squad and platoon leaders told other NCOs and soldiers in the unit to stay away from the accused (feared "trouble by association”).
  4. Command policies versus military justice policies - *United States v. Jameson*, 33 M.J. 669 (N.M.C.M.R. 1991); *United States v. Jones*, 33 M.J. 1040 (N.M.C.M.R. 1991). When two witnesses were relieved of drill sergeant duties immediately after testifying favorably for the accused charged with engaging in lesbian activities, the hesitancy of potential witnesses to testify in a companion or similar case was evidence of unlawful command influence.

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<sup>1</sup> *E.g.* “1. DUTY PERFORMANCE REPRESENTS THE PREEMINENT CRITERION IN EVALUATING SUBORDINATES... 5. DRUG ABUSERS CAN BE TRUSTWORTHY, DEPENDABLE AIRMEN . . . 7. ANYONE WHO CAN BE REHABILITATED SHOULD BE.” *Id.* at 188.

<sup>D</sup>  
**VI. INFLEXIBLE ATTITUDE MAY DISQUALIFY CONVENING AUTHORITY.**

A. Pretrial (generally not disqualified).

1. Pretrial referral is a prosecutorial function. *Cooke v. Orser*, 12 M.J. 335, 343-44 (C.M.A. 1982).
2. *United States v. Treagle*, 18 M.J. 646, 654-55 (A.C.M.R. 1984) (“We do not agree . . . that a convening authority can be deprived of his statutory power to convene courts-martial and refer charges to trial based on lack of judicial temperament.”)

B. Post-trial.

1. Accused is entitled “as a matter of right to a careful and individualized review of his sentence at the convening authority level. It is the accused’s first and perhaps best opportunity to have his punishment ameliorated and to obtain the probationary suspension of his punitive discharge.” *United States v. Howard*, 48 C.M.R. 939, 944 (C.M.A. 1974).
2. The presence of an inelastic attitude suggests that a convening authority (CA) will not adhere to the appropriate legal standards in the post-trial review process and that he will be inflexible in reviewing convictions because of his predisposition to approve certain sentences. *United States v. Fernandez*, 24 M.J. 77, 79 (C.M.A. 1987).
3. During recess interview with DC just before he was to be cross-examined on suppression motion, CA told DC that he questioned ethics of anyone who would try to get results of urinalysis suppressed. Court found no effect on trial process – partly because he was skillfully crossed, and because defense never raised the claim until after trial – but it found him disqualified for taking post-trial action because of his “regrettable insensitivity to the adversarial process.” *United States v. Fisher*, 45 M.J. 159 (1996).
  - a. Note weight court gave to CA’s decision not to follow the (admittedly non-binding) recommendation of the MJ to suspend part of the sentence.

- b. Still, how do you calculate the “regrettable insensitivity” standard of post-trial disqualification.
  - c. Judge Crawford: just inartful expression of frustration with the system.
  
- 4. Post-trial disqualification may be wise preemptive move. In *United States v. Crawford*, 47 M.J. 771 (C.G.Ct.Crim.App. 1997) the CA violated Art. 37’s prohibition on censure of counsel when he told the DC, after trial in the presence of her client, that he “used” her and lied to her. That violation obviously had no effect on the trial, but likely would have disqualified the CA – given his evident temperament – from taking post-trial action. He disqualified himself, avoiding an issue.
  
- 5. Examples of problem areas:
  - a. Division commander’s letter stated that “all convicted drug dealers say the same things . . . drug peddling and drug use are the most insidious form of criminal attack on troopers . . . [s]o my answer to . . . appeals is, ‘No, you are going to the Disciplinary Barracks . . . for the full term of your sentence and your punitive discharge will stand.’ Drug peddlers, is that clear?” CA held to be disqualified to perform review function. *United States v. Howard*, 48 C.M.R. 939, 94 (C.M.A. 1974).
  - b. *United States v. Glidewell*, 19 M.J. 797 (A.C.M.R. 1985), *aff’d* 23 M.J. 153 (C.M.A. 1986) (summary disposition). Allegation that GCMCA stated that he could not understand how a battalion commander could allow a soldier to be court-martialed and then testify at trial about the soldier’s good character, led court to conclude GCMCA did not possess the requisite impartiality to perform post-trial review function; action set aside.
  
- 6. Still alive.

- a. *United States v. Walker*, 56 M.J. 617 (A.F. Ct. Crim. App. 2001). Accused pled guilty to wrongfully using ecstasy. Military judge sentenced him to BCD, 3 months confinement, and reduction to E-1. Convening authority visited the base confinement facility on 12 September with appellant present and said, “I have no sympathy for you guys, you made your own decisions and you put yourselves in this situation. I’m not sympathetic, AND I SHOW NO MERCY FOR YOU. I hope you guys learn from this, but half of you will go on and try to cheat civilian laws and end up in a worse [sic] place than this.” Convening authority approved the sentence on 18 September. Air Force court held convening authority disqualified himself because he “closed his mind to his statutory duties.”
- b. *United States v. Davis*, 58 M.J. 100 (2003). Accused convicted at special court-martial of AWOL and illegal drug use. Appellant’s defense counsel, in clemency petition, objected to convening authority taking action on accused’s court-martial. As basis, defense cited several statements attributed to convening authority such as, “People caught using drugs will be prosecuted to the fullest extent and if they are convicted, they should not come crying to me about their situations or their families[.]” – or words to that effect. CAAF held convening authority’s words reflected an inelastic attitude. Of note, however, CAAF stated a commander need not appear indifferent to crime. Strong anti-crime positions are ok but must be balanced.

## VII. COURT MEMBER SELECTION.

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

- B. *United States v. Upshaw*, 49 M.J. 111 (1998). Accused was not prejudiced by honest administrative mistake that resulted in systematic exclusion of E-6s from court member selection consideration. Effron J., dissenting: government was on notice of defect and must strictly comply with requirements of Article 25, UCMJ.
- C. *United States v. White*, 48 M.J. 251 (1998). Convening authority's memo directing subordinate commands to nominate "best and brightest staff officers," and that "I regard all my commanders and their deputies as available to serve as members" did not constitute court packing. 48 M.J. 251 (1998). Convening authority's memo directing subordinate commands to nominate "best and brightest staff officers," and that "I regard all my commanders and their deputies as available to serve as members" did not constitute court packing.
- D. *United States v. Benson*, 48 M.J. 734 (A.F. Ct. Crim. App. 1998). Memorandum from SPCMCA directing subordinate commands to nominate only E-7s and above for court-martial of E-3 constituted impermissible shortcut for Article 25(b) criteria. SPCMCA testified that his policy was based on experience level of typical E-7, although he admits that he might find an E-5 with proper qualifications. The court also observed that the SPCMCA's apparent bottom line categorical exclusion of E-5s and below violates the line drawn by CAAF at the grade of E-2. *See United States v. Yager*, 7 M.J. 171 (C.M.A. 1979). Appearance of systemic exclusion of qualified persons will be resolved in accused's favor. Government failed to demonstrate by clear and convincing evidence that no impropriety occurred in the member selection process.
- E. Replacement of panel also requires that the CA use **only** Article 25 criteria. Even then, the CA must avoid using improper motive or creating the appearance of impropriety.
1. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986) ("the history of [art. 25(d)(2)] makes clear that Congress never intended for the statutory criteria for appointing court members to be manipulated" to select members with intent to achieve harsh sentences.)
  2. *United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991) (replacement of panel because of "results that fell outside the broad range of being rational").
- F. Staff Assistance

1. *United States v. Brocks*, 55 M.J. 614 (A.F.Ct. Crim App. 2001). Base legal office intentionally excluded all officers from the Medical Group from the list of court member nominees sent to the convening authority. The SJA and chief of justice based this action on fact that all four alleged conspirators to distribute cocaine and many witnesses came from the Medical Group. Decision to exclude came from desire to avoid conflicts and unnecessary challenges for cause. **HELD:** Exclusion of the Group nominees did not constitute UCI. Motive of SJA and staff was to protect the fairness of the court-martial, not to improperly influence it. *See also United States v. Simpson*. Convening authority excluded all members of U.S. Army Ordnance Center and School.
  
2. *United States v. McKinney*, 61 M.J.767, (A.F.Ct. Crim. App. 2005).
  - a. *Facts:* The case involves allegations of unlawful command influence in panel member selection at Hickam AFB. Specifically, the appellants alleged that, based on a flawed SJA pretrial advice under the provisions of Article 34, UCMJ, the convening authority improperly excluded categories of officers from consideration as panel members and thereby engaged in “court-stacking” in violation of Article 37, UCMJ. The pretrial advice at issue read as follows:

If you decide to refer the case to a General Court-martial, you are required to select the members of the panel. [Article 25](#)[,] UCMJ states, "The convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament." By law, you must select at least five officers. Although you may select a minimum of five members to serve on this court-martial panel, I recommend that you select 12 officers - 3 Colonels, 2 or 3 Lt [Lieutenant] Colonels, 3 or 4 Majors, and 3 or 4 company grade officers. Because both the United States and defense counsel have opportunities to challenge the members for cause and can each eliminate one officer peremptorily (i.e., for no reason at all), the above configuration will yield a balanced and diverse court-martial panel that will provide a sufficient number of officers. . . . At Tab 2 is a listing of officers assigned to Hickam AFB [Air

Force Base]. You may select any of these officers as court-members. *Additionally, I have eliminated officers who would most likely be challenged for cause (i.e., JAGs [Judge Advocates], chaplains, IGs [Inspectors General], or officers in the accused's unit).*

- b. *Held:* The court does not recommend the “wholesale elimination of potential court members such as occurred in this case.” However, the convening authority and SJA acted to promote trial efficiency and to protect the fairness of the court-martial, rather to improperly influence it. An element of court-stacking is an improper motive, which did not exist here. Therefore, the appellant failed to satisfy the first *Biagase* criterion, that is, show facts which, if true, constitute UCI. Even if there was UCI, the proceedings were fair, and the defense lodged no objection to the selection process at trial. Accordingly, the second and third *Biagase* criteria were not met.

## VIII. NO OUTSIDE PRESSURE.

- A. Command policy in the courtroom.
1. “[H]ere we have a senior noncommissioned officer directly in violation of that open, express, notorious policy of the Army: Through[sic] shalt not [use marijuana].” MJ’s sentencing instruction, which related Army policy regarding use of illegal drugs, implicated UCI concerns and constituted plain error which was not waived by the defense failure to object; sentence set aside. *United States v. Kirkpatrick*, 33 M.J. 132, 133 (C.M.A. 1991).
  2. Disclosure, during members trial, of the terms of co-accused’s pretrial agreement, does not necessarily bring the CA into court and was not, under these circumstances, plain error. *United States v. Schnitzer*, 44 M.J. 380 (1996), *reversing* 41 M.J. 603, 606 (Army Ct. Crim. App. 1994).
  3. *United States v. Yerich*, 47 M.J. 615 (Army Ct. Crim. App. 1997). Testimony from government witness (SFC) that the accused had no rehabilitative potential in the military did not constitute unlawful command influence. Court rejects argument that SFC’s testimony was adopted, and therefore attributable to, the commanding officer. Secondary evil of rehab potential testimony was unlawful command influence. *See United States v. Cherry*, 31 M.J. 1, 5 (C.M.A. 1990).

4. *United States v. Stoneman*, 57 M.J. 35 (2002). SPCMCA sent email to subordinate commanders "declaring war on all leaders not leading by example." Email also stated the following: "No more platoon sergeants getting DUIs, no more NCOs raping female soldiers, no more E7s coming up 'hot' for coke, no more stolen equipment, no more approved personnel actions for leaders with less than 260 on the APFT, . . . , -- all of this is BULLSHIT, and I'm going to CRUSH leaders who fail to lead by example, both on and off duty." At a subsequent leaders' training session, Cdr reiterated his concerns. After consulting with SJA, Cdr issued a second email to clarify the comments in the first. Cdr stated that he was expressing his concerns about misconduct, but emphasized that he was not suggesting courses of action to subordinates, and that each case should be handled individually and appropriately in light of all circumstances. He specifically addressed duties as a court-martial panel member and witness. At trial, defense counsel initially sought to stay proceedings until a new panel could be selected. After denial of this request, defense counsel challenged all panel members from the brigade based on implied bias and potential for unlawful command influence. After extensive voir dire, MJ denied the challenge using R.C.M. 912 as the framework. ACCA reviewed *de novo* and determined no abuse of discretion by military judge in denying challenges and the omission of specific findings of fact and conclusion that email did not constitute UCI were harmless. **HELD:** Remanded for a DuBay hearing. Military judge should have used an unlawful command influence framework to determine the facts, decide whether those facts constituted unlawful command influence, and conclude whether the proceedings were tainted. Additionally, CAAF stressed that the ROT was insufficient to resolve a potential "appearance of unlawful command influence" issue.
5. *United States v. Baldwin*, 54 M.J. 308 (2001). Nine months after her court-martial, appellant filed affidavit alleging that GCMCA conducted OPDs and that he commented that officer court-martial sentences were too lenient and stated that the minimum should be at least one year. Appellant also alleged that her court-martial was interrupted by one of these sessions (mandatory for all officers assigned to the installation). Appellant asserted that these actions constituted UCI. **HELD:** Appellant's post-trial affidavit was sufficient to raise the issue, but insufficient record on which to decide the issue. Decision of the Army court was set aside and the record returned for limited hearing on the UCI issue.

6. *United States v. Simpson*, 58 M.J. 368 (2003). Appellant was convicted of various offenses to include rape, indecent assaults, indecent acts, and maltreatment of trainees at Aberdeen Proving Ground. He contended that he was denied a fair trial because of apparent UCI and unfair pretrial publicity permeated his case. As support, appellant cited the Army's "zero tolerance" policy on sexual harassment; a chilling effect on the command decision-making process stemming from the Secretary of the Army's creation of the Senior Review Panel to examine gender relations; public statements made by senior military officials suggestive of appellant's guilt; and public comments by members of Congress and military officials regarding the "Aberdeen sex scandal." **HELD:** No nexus between the purported unlawful or unfair actions of senior military officials and the convening authority's decision to refer the case. Additionally, no nexus between acts complained of and any unfairness at trial. No evidence that court members were influenced to return guilty verdicts because that is what the Army or superiors wanted. CAAF pointed to the military judge as the sentinel of justice: allowed extensive voir dire of members concerning exposure to the pretrial publicity and any potential taint as a result of senior leader statements. CAAF and ACCA specifically noted the military judge's eight page findings of fact in ruling on defense's UCI motion to dismiss.

B. The Commander in the Courtroom – Figuratively through Argument.

*United States v. Mallett*, 61 M.J.761 (A.F. Ct. Crim. App.2005).

1. *Facts:* Pursuant to his pleas, a panel of officers sitting as a general court-martial convicted appellant of wrongfully using cocaine on divers occasions. The members sentenced appellant to a bad-conduct discharge, confinement for twelve months, and reduction to E-1. Appellant alleged that trial counsel's (TC) sentencing argument injected unlawful command influence into the proceedings because the TC referred to commanders in her argument. Specifically, the TC referred to "commander's calls" where the commander "would warn us to stay away . . . not to use drugs." After stating that the commander could not impose any particular punishment, but could only send the charges to court-martial, the TC then posited, "what would a commander say to get his unit's attention and say, 'I mean business about drugs,' if he had the authority to be the judge and jury in a case where you are, in essence, the jury deciding this?" The TC concluded that, a sentence that would "get people's attention" is "18 months [of] confinement and a bad conduct discharge." Trial defense counsel did not object to the argument.

2. *Held:* The TC's comments were improper under R.C.M. 1001(g), which expressly prohibits making reference to a convening authority or command policy in sentencing arguments and amounted to plain error, despite the lack of defense objection at trial. The TC's argument implied that unnamed commanders favored the sentence he proposed. "Moreover, the trial counsel cloaked himself with the 'mantle of command authority,' thereby creating the appearance of unlawful command influence." The comments were improper because they brought the views of outside commanders into the courtroom. Further, the argument rendered the proceedings unfair and the improper argument was the cause of the unfairness. Accordingly, appellant suffered prejudice and was entitled to relief. Sentence set aside.

C. The Commander in the courtroom - Literally. *United States v. Harvey*, 64 M.J. 13 (2006). *Facts:* Appellant was convicted of conspiracy, false official statement, communicating a threat, and several drug related offenses. During the government's closing argument on findings the convening authority was present in the courtroom wearing a flight suit. Based on the apparent recognition of the convening authority by several panel members, defense counsel moved for a mistrial, which was denied by the military judge.

*Held:* The CAAF set aside the findings and sentence without prejudice, but limited the approved sentence at any rehearing to a punitive discharge. The military judge is the "last sentinel" in the trial process to protect a court-martial from unlawful command influence. The trial developments in this case raised "some evidence" of unlawful command influence and the military judge failed to inquire adequately into the issue. Specifically, the convening authority was present in the courtroom wearing a flight suit when the government's argument characterized appellant's conduct as a threat to the aviation community; the senior member of the panel was a subordinate member of the convening authority's command (and the subject of an unsuccessful challenge for cause); and there was some evidence that the panel was watching the convening authority during argument. Further, the military judge failed to place the appropriate burden on the government to rebut the existence of unlawful command influence as required by *Biagase*. (The CAAF noted that that the military judge was not required to grant a mistrial without more evidence before him at the time, and that convening authority's are not barred from attending a court-martial. "But as this case illustrates, the presence of the convening authority at a court-martial may raise issues.") Compare to *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979) (military judge abused his discretion in denying mistrial where accuser's (company commander) presence throughout proceedings was "ubiquitous" and commander engaged in "patent meddling in the proceedings").

C. In the deliberation room.

1. *United States v. Youngblood*, 47 M.J. 342 (1997). Staff meeting at which Wing commander and SJA shared perceptions of how previous subordinate commanders had “underreacted” to misconduct created “implied bias” among three senior court members in attendance. Court focused on impact of remarks on receiver rather than intent of sender (Commander and SJA never testified). Specifically, the court weighed heavily the following factors: Despite the member’s response that they could disregard the comments, the majority concluded it is “asking too much” to expect members to adjudge sentence without regard for potential impact on their careers.

J. Crawford dissenting: “This case is another example of the clash that sometimes arises between the need for good order and discipline and the need to maintain an impartial system of military justice.”

“The primary responsibility for the maintenance of good order and discipline . . . is saddled on commanders. . . . [P]ersonal presentation of that subject by the commander is impressive, but that is as it should be. The question is not his influence but, rather, whether he chartered it through forbidden areas.” Article 37(a)(1) permits instructional and informational military justice lectures. Selecting court members pursuant to Article 25 criteria “differs significantly from random selection of civilian jurors by voter-registration or driver’s license lists. Implied bias should be used only in “extreme situations,” especially with the military’s blue ribbon panel.

2. *United States v. Rome*, 47 M.J. 467 (1998). Court member’s supervisory relationship with enlisted panel member, professional relationship with trial counsel and CID agent, and encounter with defense counsel in prior case involving issue of unlawful command influence was sufficient to create implied bias. J. Crawford, dissent. *See Youngblood, supra*. Implied bias too subjectively applied by majority.
3. Improper for senior ranking court members to use rank to influence vote within the deliberation room, *e.g.*, to coerce a subordinate to vote in a particular manner. Discussion, Mil. R. Evid. 606; *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985) (allegation that senior officer cut off discussion by junior members, remanded to determine if senior officer used rank to “enhance” an argument).

4. *United States v. Dugan*, 58 M.J. 253 (2003). Junior panel member provided defense counsel with a letter after court-martial detailing her concerns regarding statements made during sentencing deliberations. Panel member alleged that another member reminded the panel that the GCMCA would review their sentence and they needed to make sure they sent a “consistent message.” (GCMCA held a “Commander’s Call” several weeks before during which drug use was discussed). Defense counsel requested a post-trial Article 39a session. Military judge denied the request. CAAF disagreed with the military judge and AFCCA. CAAF determined the defense counsel successfully raised unlawful command influence and the Government must rebut the allegation. Remanded for *DuBay* hearing. Of note, CAAF pointed out the limitations in place in questioning the panel members during the *DuBay* hearing. Although M.R.E. 606(b) allows members to be questioned about what was said during deliberations, members may not be questioned about the impact of those statements or the impact of statements made previously by the GCMCA.

- D. Command interference with the power of the judge.

*United States v. Tilghman*, 44 M.J. 493 (1996). Unlawful command interference when commander placed accused into pretrial confinement in violation of trial judge’s ruling. Remedy: 18 months credit ordered against accused’s sentence.

- E. Judges must not be influenced - - even by structure of trial judiciary. *United States v. Campos*, 42 M.J. 253 (1995). Military judge said he was relieved of his position as senior judge for perception of softness. Based on extensive trial record, CAAF found no nexus between assignment of other judge and accused’s trial, that appearance taken care of at Art. 39(a) session and trial, and no abuse of discretion in not recusing himself.

## **IX. PRETRIAL PUNISHMENT MAY RAISE UNLAWFUL COMMAND INFLUENCE.**

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

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

## X. STAFF MAY COMMIT UCI

- A. The Overzealous SJA. *United States v. Lewis*, 63 M.J. 405 (2006).

1. *Facts:*

a. *The government motion.* Pursuant to his pleas, a military judge sitting as a general court-martial convicted appellant of various drug offenses involving ecstasy, ketamine, LSD, and methamphetamine. The military judge sentenced appellant, *inter alia*, to five years confinement and a dishonorable discharge. Civilian Defense Counsel (CDC) represented appellant before a military judge. CDC did not appear at the first session of the court-martial, the arraignment, but neither side had any voir dire or challenge against the military judge at that time or at a second court session where appellant entered pleas. During a third court session held to hear motions, the trial counsel conducted voir dire of the military judge and challenged her impartiality because: (1) she presided over two companion cases; (2) she had a prior professional relationship with CDC while the CDC was on active duty; (3) the MJ's "social interaction" with the CDC; (4) the MJ expressed displeasure to another TC over a year prior when that TC asked whether the MJ had *ex parte* contact with the CDC regarding an upcoming trial. The TC moved the MJ recuse herself; the MJ denied the motion. The TC requested the MJ reconsider her denial of the motion, and presented a previously prepared written pleading. The MJ denied that motion as well. The TC requested a continuance to file a government appeal – the MJ denied the request.

b. *The defense motion to dismiss.* Based on the prosecution's actions, the defense filed a motion to dismiss for prosecutorial misconduct and unlawful command influence. The same TC who moved for the MJ's recusal conducted all government direct and cross-examinations, despite being called as a witness himself. An assistant TC questioned the TC and made argument on the motion. The defense called the SJA as a witness, who testified that he advised the TC regarding trial tactics, as well as voir dire and the motion to recuse, including assisting with research and case citations for the motion, and calling the Head of Appellate Government Division about the motion. The SJA also characterized an incident where

the MJ and CDC were seen together as a “date.” The SJA was combative on the witness stand, including addressing comments to the CDC, interrupting the CDC, and arguing with the CDC.

c. The MJ recused herself because she could not remain impartial following the government’s attack on her character. A second MJ was detailed who also recused himself because he was “shocked and appalled” at the government’s conduct. A third judge heard an expedited defense motion, and a fourth judge presided over additional motions and trial. The trial judge granted a motion for a change of venue, disqualified the SJA and the convening authority from taking post-trial action in the case, and barred the SJA from attending the remainder of the trial.

d. The NMCCA found the SJA’s actions advising the trial counsel on the “voir dire assault of the MJ,” his unprofessional behavior as a witness, and his inflammatory testimony, created a bias in the MJ and constituted unlawful command influence. But for the TC and SJA’s actions, appellant would have been tried by the initial MJ. However, there was no prejudice to the appellant, whose trial was ultimately heard by diligent, deliberate judges.

2. *Held:* Improperly seeking recusal of the military judge was actual unlawful command influence. “But for the government’s attack upon MAJ CW, it appears unlikely that there existed grounds for disqualification.” “The record reflects that the SJA – a staff officer to and legal representative for the convening authority - was actively engaged in the effort to unseat MAJ CW as the military judge. The trial counsel, who was provided advice on voir diring MAJ CW by the SJA, became the tool through which this effort was executed.” The trial counsel initially part of the unlawful command influence remained an active member of the prosecution, undermining the government’s later actions and remedial steps. Further, a reasonable observer would have significant doubt about the fairness of this court-martial in light of the government’s conduct. Neither actual nor apparent unlawful command influence have been cured beyond a reasonable doubt in this case; **Charges and specifications dismissed with prejudice.**

## **XI. EXPANDING THE SCOPE OF UCI.**

- A. During sentencing phase of trial, defense may litigate admissibility of NJP based on claim of command influence. *United States v. Lorenzen*, 47 M.J. 8 (1997).

1. Defense argued that NJP, which soldier had accepted, was subject to UCI.
  2. *Unanimous* CAAF reverses Air Force Court and holds that proper subject of litigation at trial.
  3. Court ultimately found that the defense failed to satisfy other two prongs of test (prejudice), so harmless error.
- B. Strong argument that can litigate UCI regarding any collateral sentencing documents.
1. Other sanctions less “optional” than NJP (which soldier can turn down).
  2. “Fundamental fairness” concern sweeps broadly.

## **XII. REMEDIAL ACTIONS.**

- A. Before trial (command directed).

*United States v. Rivers*, 49 M.J. 434 (1998). Corrective action by government and the military judge at trial overcame three allegations of unlawful command influence (UCI). Allegations included the following: CG’s command memo – “no place in our Army for illegal drugs **or for those who use them;**” Co Cdr told soldiers to “stay away from those involved with drugs;” and Btry 1SG issued rights warnings to four defense witnesses prior to interview. Corrective action included: clear and effective retraction” memo from the CG; AR 15-6 investigation against the commander who received Letter of Reprimand, and issued a public retraction and apology.

- B. At trial (**military judge-directed**).

1. *United States v. Rivers*, 49 M.J. 434 (1998). Corrective action by military judge: banned commander from courtroom; ordered production of any witness requested by defense, instructed all witnesses of duty to testify and report any retribution, announced he would “favorably consider” any other remedial measures requested by the defense; directed post-trial 39a session to gather evidence regarding adverse effects 1SG’s rights warnings had on defense witnesses.

2. *United States v. Biagase*, 50 M.J. 143 (1999). Corrective action by military judge: Removed 1SG from rating chain of witnessing testifying for the accused; directed by if the evaluation of any witness were lower than last evaluation that written justification be attached; allowed defense counsel great latitude during voir dire and liberally granted challenges; offered to issue blanket order to produce any defense witnesses otherwise reluctant to testify.
  
3. *United States v. Clemons*, 35 M.J. 770, 772 (A.C.M.R. 1992).
  - a. No aggravation witnesses;
  
  - b. Not allowed to attack accused's credibility by opinion or reputation testimony;
  
  - c. Defense given wide latitude with witnesses;
  
  - d. Accused allowed to testify about what he *thought* witnesses might have said (as substantive evidence on merits or E&M).
  
4. *United States v. Souther*, 18 M.J. 795, 796 (A.C.M.R. 1984).
  - a. Government precluded from presenting any evidence through direct or cross-examination concerning accused's potential for further military service;
  
  - b. Judge offered to sustain any challenge for cause against any member who was present in command during period of UCI.
  
5. Dismissal. *United States v. Gore*, 60 M.J. 178 (2004). CAAF upholds military judge's decision to dismiss case with prejudice due to witness intimidation.

C. Post-trial.

R.C.M. 1102: Any time before authentication or action the MJ or CA may direct a post-trial session to resolve any matter which affects the legal sufficiency of any

findings of guilty or the sentence. See *United States v. Rivers*, 49 M.J. 434 (1998).

### **XIII. METHODOLOGY OF PROOF - LONG FORM.**

#### A. Raising the issue at trial level.

1. **THE BASIC TEST** comes from *Stombaugh*, 40 M.J. at 213, in which the CAAF adopted the test suggested by Judge Cox in his concurrence in *United States v. Levite*, 25 M.J. 334, 341 (C.M.A. 1987) (Cox, J. concurring). The test is:
  - a. **Sufficient evidence.** “Sufficient facts which, if true, constitute” UCI. This language reappears in *Ayala* and elsewhere, reiterating the same or similar language from many other sources. Earlier the court had held, for example, that the defense must produce “sufficient evidence to render a reasonable conclusion in favor” of the allegation of unlawful command influence. *United States v. Cruz*, 20 M.J. 873, 885-886 (A.C.M.R. 1985), *rev’d in part on other grounds*, 25 M.J. 326 (C.M.A. 1987).
  - b. **The proceedings were unfair.**
  - c. **UCI is the proximate cause of the unfairness.**
2. Not formally part of the test, but effectively so: the actor had the “**mantle of command authority.**” *Stombaugh*, 40 M.J. at 211. This is effectively a screening criterion for further analysis: did the person said to have committed the UCI act with the “mantle ...”? *Id.*
3. *United States v. Biagase*, 50 M.J. 143 (1999). Distinguishes standards for assessment of unlawful command influence at the appellate level (*Stombaugh* and *Reynolds*) and the responsibility of the military judge during assessment of motions at trial.
  - a. Threshold at trial is low, “more than mere allegation or speculation - some evidence.”

- b. Facts, which, if true, constitute unlawful command influence, and alleged unlawful command influence has logical connection to court-martial in terms of potential to cause unfairness in the proceedings.
  - c. Once raised, burden shifts to government to show either there was No unlawful command influence or that the unlawful command influence will not affect the proceedings.
4. Burden does not shift to government unless defense meets “the initial burden of producing sufficient evidence to raise unlawful command influence.” *United States v. Ayala*, 43 M.J. 296, 299 (1995). The government may carry its burden of disproving UCI or proving that it did not affect the proceeding by:
- a. Disproving predicate facts on which allegation of unlawful command influence is based.
  - b. Persuading the military judge or appellate court that the facts do not constitute unlawful command influence.
  - c. At trial, producing evidence that unlawful command influence will not affect the proceedings.
  - d. On appeal, persuading the appellate court that the unlawful command influence had no prejudicial impact on the court-martial.

Burden at both levels is the same – proof beyond a reasonable doubt that there was no unlawful command influence or that the unlawful command influence did not affect the findings or sentence. *United States v. Biagase*, 50 M.J. 143 (1999).

5. If government fails to produce rebuttal evidence, “military judge must find unlawful command influence exists and then take whatever measures are necessary . . . to ensure [beyond a reasonable doubt] that the findings and sentence” are not affected. *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R. 1990).
6. Dismissal is last resort:

“If and only if the trial judge finds that command influence exists (because the defense successfully raised it, and the Government failed to disprove it by clear and positive evidence) and finds, further, that there is no way to prevent it from adversely affecting the findings or sentence beyond a reasonable doubt should the case be dismissed.” *Jones*, 30 M.J. at 854. *Accord United States v. Thomas*, 22 M.J. 388 (1986), *United States v. Martinez*, 42 M.J. 333 (1995).

B. Appellate Standard - Beyond a Reasonable Doubt.

1. Once the issue of command influence is properly placed at issue, “no reviewing court may properly affirm findings and sentence unless [the court] is persuaded **beyond a reasonable doubt** that the findings and sentence have not been affected by the command influence.” *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986).
2. “Where the issue of unlawful command influence is litigated on the record, the military judge’s findings of fact are reviewed under a clearly-erroneous standard, but the question of command influence flowing from those facts is a question of law that this Court reviews *de novo*.” *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994).
3. There must be more than “[command influence] in the air” to justify action by an appellate court. *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991), *cert. denied*, 112 S. Ct. 1473 (1992).

*Accord Ayala*, 43 M.J. 296 (1995). Accused’s friend submitted affidavit saying that after initial enthusiasm, most (6 of 7) of those he solicited for clemency recommendations demurred. Three judge majority (Cox, Gierke, Crawford) found it insufficient to shift burden. Key is that his affidavit lacked evidence that “anyone acting with the mantle of authority unlawfully coerced or influenced” any of the individuals approached.

- a. A post-trial evidentiary hearing is not required if no reasonable person could view the opposing affidavits . . . and find the facts averred by appellant. *United States v. Dykes*, 38 M.J. 270, 172-73 (C.M.A. 1993).
- b. “[T]he threshold triggering [a *DuBay*] inquiry is low, but it must be more than a bare allegation or mere speculation.” *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994).

- c. *But see United States v. Bradley*, 48 M.J. 777 (A.F. Ct. Crim. App. 1998) (After *Dubay* hearing, Air Force Court very apologetic for its initial criticism of SJA alleged to have committed unlawful command influence. Court strongly hints outcome may have been different had the government submitted an affidavit from the SJA).
- 4. *United States v. Francis*, 54 M.J. 636 (Army Ct. Crim App. 2000). Provides good explanation of methodology at trial and appellate levels.

#### **XIV. WAIVER.**

- A. *United States v. Drayton*, 45 M.J. 180 (1996); *United States v. Brown*, 45 M.J. 389 (1996). *Accord United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). (Court unanimously affirms conviction, but two judges dissent from analysis.). Majority approach for future cases.
  - 1. Forfeited if not raised at trial:
    - a. Accuser disqualification;
    - b. Commander coerced into signing charges, (charges are treated as unsworn); and
    - c. Pressure to make a certain recommendation in the transmittal process.
    - d. Claim that commander's recommendation coerced by superior commander waived unless can show deterred from raising it at trial by UCI. (*Drayton*).
  - 2. Not waived by failure to raise at trial. Improper influence at:
    - a. Referral;
    - b. Trial; or
    - c. Post-trial review.

3. Items in 1.(a) - (c) above are not waived if there is an allegation that the party was deterred by unlawful command influence from challenging the defects at trial.
- B. Old Rule: UCI motion “is not waived by failure to raise it at trial.” *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994), *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983) (note, however, that it carefully sidesteps the applicability of Art. 37 to the adjudicative phase).
  - C. Not jurisdictional: “[E]ven in egregious case[s] of unlawful] command influence,” the court has refused to find the error is jurisdictional. *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994) (citing *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983)).
  - D. Problem case for Military Judge: *United States v. Reynolds*, 40 M.J. 198 (C.M.A. 1994) (2-1-1-1). Fractured court affirms conviction, but three judges struggle over whether accused can affirmatively halt post-trial Article 39(a) inquiry into allegations of unlawful command influence.
  - E. Waiver as Part of Pretrial Agreement.

*United States v. Weasler*, 43 M.J. 15 (1995). Accused had made (accurate) motion that acting commander improperly signed charges, at direction of commander who was going on leave, and therefore did not exercise independence. While government preparing to respond to motion, defense offered to plead guilty. Held: issue is waiveable by defense, so long as knowing, freely initiated. Strong disagreement in scathing concurrences from Judges Sullivan and Wiss, who suggest that majority is setting a standard of “tolerable” command influence.

## **XV. CONCLUSION.**

## **XVI. FURTHER READING**

- A. Robert A. Burrell, *Recent Developments in Appellate Review of Unlawful Command Influence*, ARMY LAW., May 2000.

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- B. Robert A. Burrell, *Recent Developments in Unlawful Command Influence*, ARMY LAW., May 2001.
- C. James F. Garrett, *Recent Developments in Unlawful Command Influence*, “*I Really Didn’t Say Everything I Said*,” ARMY LAW., May 2002.
- D. James F. Garrett, *Recent Developments in Unlawful Command Influence*, ARMY LAW., May 2004.
- E. Patricia A. Ham, *Revitalizing the Last Sentinel: The Year in Unlawful Command Influence*, ARMY LAW., May 2005.
- F. Patricia A. Ham, *Still Waters Run Deep? The Year in Unlawful Command Influence*, ARMY LAW., June 2006.
- G. Mark L. Johnson, *Confronting the Mortal Enemy of Military Justice: New Developments in Unlawful Command Influence*, ARMY LAW., June 2007.
- H. Mark L. Johnson, *Unlawful Command Influence--Still with Us; Perspectives of the Chair in the Continuing Struggle Against the "Mortal Enemy" of Military Justice*, ARMY LAW., June 2008.

**APPENDIX A**

**THE 10 COMMANDMENTS**

**OF**

**UNLAWFUL COMMAND INFLUENCE**

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