

# 168<sup>th</sup> OFFICER BASIC COURSE

## UNLAWFUL COMMAND INFLUENCE

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LTC Patricia Ham  
October 2005

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### Outline of Instruction

#### I. INTRODUCTION.

##### A. References.

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005) [hereinafter MCM].
2. Uniform Code of Military Justice [hereinafter UCMJ] arts. 1, 25, 37, 98, 134 (wrongful interference with an adverse administrative proceedings).
3. Dep't of Army Reg. 27-10, Legal Services, Military Justice, paras. 5-9, 5-10c (13 June 2005) [hereinafter AR 27-10].

##### B. **What is unlawful command influence (UCI)?** The improper use, or perception of use, of superior authority to interfere with the court-martial process. *See* Gilligan and Lederer, COURT-MARTIAL PROCEDURE, Volume 2 §18-28.00 (2d Ed. 1999).

##### C. **Concepts of Unlawful Command Influence.**

1. See the commander as a **judicial/prosecutorial authority**.
2. Commanders at each level must exercise **independent discretion**.
3. **Individual consideration** of each case.
4. UCI is **not limited to commanders**.

5. UCI may be **actual** or **apparent**.

6. Three **critical audiences**:

a. Subordinate Commanders

b. Court Members

c. Potential Witnesses

D. *THE 10 COMMANDMENTS OF UNLAWFUL COMMAND INFLUENCE:*

*COMMANDMENT 1: THE COMMANDER MAY NOT ORDER A SUBORDINATE TO DISPOSE OF A CASE IN A CERTAIN WAY.*

*COMMANDMENT 2: THE COMMANDER, IF ACCUSER, MAY NOT REFER THE CASE.*

*COMMANDMENT 3: THE COMMANDER MUST NOT HAVE AN INFLEXIBLE POLICY ON DISPOSITION OR PUNISHMENT.*

*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: AN ACCUSED MAY NOT BE PUNISHED BEFORE TRIAL.*

*COMMANDMENT 8: DO NOT INTERFERE WITH THE INDEPENDENT DISCRETION OF THE MILITARY JUDGE.*

*COMMANDMENT 9: SUBORDINATE COMMANDERS AND STAFF CAN ALSO COMMIT UCI.*

*COMMANDMENT 10: IF A MISTAKE IS MADE, RAISE THE ISSUE IMMEDIATELY.*

## II. INDEPENDENT DISCRETION VESTED IN EACH COMMANDER.

- A. Each commander, at every level, is vested with independent discretion, by law, which may not be impinged upon. There is no need to dictate dispositions to a lower-level commander.
- B. *Lawful Command Actions.* The commander MAY:
1. Personally dispose of a case if within commander's authority or any subordinate commander's authority. R.C.M. 306(c).
  2. Send a case back to a lower-level commander for that subordinate's independent action. R.C.M. 403(b)(2), 404(b), 407(a)(2). Superior may not make a recommendation as to disposition. R.C.M. 401(c)((2)(B).
  3. Forward a case to a superior commander with a recommendation for disposition. R.C.M. 401(c)(2)(A).
  4. Withdraw or withhold subordinate authority on individual cases, types of cases, or generally. R.C.M. 306(a).
  5. Escalate a lower disposition. R.C.M. 601(f) ("Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to that authority for further consideration, including, if appropriate, referral." *Accord United States v. Blaylock*, [15 M.J. 190](#) (C.M.A. 1983). EXCEPTIONS:
    - a. An executed Article 15 for a minor offense. R.C.M. 907(b)(2)(D)(iv), MCM, Part V, para 1e. *See United States v. Hamilton*, [36 M.J. 723](#) (A.C.M.R. 1993) (permissible for superior commander to prefer charge for a major offense even though accused already received Art. 15 for the offense).

- b. After evidence is presented at trial, extremely limited authority to escalate disposition, *e.g.*, urgent and unforeseen military necessity. *UCMJ, art. 47 (former jeopardy); R.C.M. 604(b), 907(b)(2)(C).*

C. Recurring mistakes:

1. Advice before the offense (policy letters and command briefings).
  - a. Improper for commander to suggest reduction and \$500 fine as a “starting point” for NCOs involved in alcohol-related offenses with no personal or property injury. *United States v. Martinez*, [42 M.J. 327](#) (1995).
  - b. Improper for CG’s physical fitness memo to include phrase “There is no place in the Army for illegal drugs or for *those who use them.*” *United States v. Rivers*, [49 M.J. 434](#) (1998). *See also United States v. Hawthorne*, [22 C.M.R. 83](#) (C.M.A. 1956) (Policy that offenses involving soldiers with two prior convictions must be referred to GCM constitutes unlawful interference with subordinate commanders independent discretion).
  - c. Judge advocates must review all command policy letters.
2. Advice after the offense.
  - a. Improper for battalion commander to return request for Article 15 to company commander with comment, “Returned for consideration for action under Special Court-Martial with Bad Conduct Discharge.” *United States v. Rivera*, [45 C.M.R. 582, 583](#) (A.C.M.R. 1972).
  - b. *See United States v. Gerlich*, [45 M.J. 309](#) (1996). COL (BDE commander/SPCMCA) ordered subordinate (MAJ) to set aside Art. 15 after COL received letter from CG (who had received critical letter from IG) directing reinvestigation. Court set aside findings and sentence, notwithstanding COL’s and MAJ’s claims of continued independence, based on recognized “difficulty of a subordinate ascertaining for himself/herself the actual influence a superior has on that subordinate.” *But see United States v. Wallace*, [39 M.J. 284](#) (C.M.A. 1994). Superior learned of

additional misconduct by the accused and told subordinate commander, “You may want to reconsider the Article 15 and consider setting it aside based on additional charges.” Court, relying on fully developed record at trial, agreed with trial judge that subordinate “exercised his own independent discretion when he preferred charges.” [Id. at 286-87.](#)

- c. How reconcile? CANNOT recommend reconsideration of earlier decision unless truly new evidence for subordinate commander to reconsider – not just a “fresh look.”

### III. CONVENING AUTHORITY AS ACCUSER.

- A. Accuser is “person who signs and swears charges, any person who directs the charges nominally be signed and sworn to by another and any person who has an interest other than an official interest in the prosecution of the accused.” UCMJ Art. 1(9).
  1. Test is whether under the circumstances a reasonable person would impute to [the convening authority] a personal feeling or interest, other than official, in the outcome. *See United States v. Shelton*, [26 M.J. 787](#) (1988); *United States v. Dingis*, [49 M.J. 232](#) (1998).
  2. Convening authority that possesses more than an official interest must forward the charges to a superior competent authority for disposition. UCMJ, art. 22(b), 23(b) (GCM and SPCM respectively); *United States v. Gordon*, [2 C.M.R. 161, 166](#) (C.M.A. 1952)(GCMCA was victim of burglary); *United States v. Jeter*, [35 M.J. 442](#) (C.M.A. 1992)(accused attempted to blackmail GCMCA).
- B. Exceptions:
  1. Violations of general regulations. *United States v. Doyle*, [26 C.M.R. 82, 85](#) (C.M.A. 1958).
  2. Article 15s.

- C. Disqualified SPCMCA must disclose disqualification even when forwarding charges to GCMCA with recommendation for GCM. *United States v. Nix*, [40 M.J. 6](#) (C.M.A. 1994).

#### **IV. INFLEXIBLE ATTITUDE TOWARD DISPOSITION OR PUNISHMENT.**

- A. Pretrial (CA usually not disqualified).
1. Pretrial referral is a prosecutorial function, not a quasi-judicial function. *Cooke v. Orser*, [12 M.J. 335](#) (C.M.A. 1982).
  2. “A convening authority can[not] be deprived of his statutory power to convene courts-martial and refer charges to trial based on lack of judicial temperament.” *United States v. Treakle*, [18 M.J. 646, 654-55](#) (A.C.M.R. 1984).
- 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 suggest that a convening authority 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. *U.S. v. Davis*, [58 M.J. 100](#) (2003). Appellant convicted of drug use and AWOL. Defense counsel submitted post-trial affidavit objecting to convening authority taking action on the case. Defense counsel cited several earlier statements made by convening authority. Among them were, “people caught using drugs would be prosecuted to the fullest extent, and if they were convicted, they should not come crying to him [convening authority] about their situations or their families[‘].” Despite objection, convening authority took action, approving sentence as adjudged. Of note, SJA’s addendum was silent as to objection and alleged CA comments. **HELD.** Set aside action. CA comments displayed an inelastic attitude. “Individualized consideration must be made by a neutral convening authority capable of fulfilling his or her statutory responsibilities.”

## **V. COURT MEMBER SELECTION TO OBTAIN A PARTICULAR RESULT.**

- A. Article 25 Criteria. The convening authority chooses court members based on criteria of Article 25, UCMJ: AGE, EDUCATION, TRAINING, EXPERIENCE, LENGTH OF SERVICE AND JUDICIAL TEMPERAMENT.
- B. Staff Assistance.
  1. Staff and subordinate assistance in compiling a list of eligible court members is permissible. *United States v. Gaspard*, [35 M.J. 678](#) (A.C.M.R. 1992).
  2. Commander must beware, however, of subordinate nominations not in accordance with Article 25. *United States v. Hilow*, [32 M.J. 439](#) (C.M.A. 1991)(improper for Division Deputy AG (1LT) to develop list consisting solely of nominees who were supporters of “harsh discipline”).

- C. Commanders must not use short-cut criteria for selecting court-members. *United States v. Benson*, [48 M.J. 734](#) (A.F. Ct. Crim. App. 1998) (error for CA to exclude all ranks below E-7 from consideration). *United States v. White*, [48 M.J. 251](#) (1998) (majority hints that criteria for command selection is “totally compatible” with Article 25d criteria).
- D. Replacement of panel also requires that the convening authority use only Article 25 criteria. Even then, the convening authority must avoid using improper motives or creating the appearance of impropriety. *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]”); *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”).

## **VI. NO OUTSIDE PRESSURE ON MEMBERS AND MILITARY JUDGE.**

- A. Education: AR 27-10, para. 5-10c. “Court members . . . may never be oriented or instructed on their immediate responsibilities in court-martial proceedings except by . . . [t]he military judge. . . .” See UCMJ, art. 37(a) and R.C.M. 104 concerning permissible education. See also *United States v. Youngblood*, [47 M.J. 338](#) (1997) (error for CA and SJA, to offer opinions that certain commanders “underreacted” to misconduct, when those in attendance at staff call included sitting panel members).
- B. In the deliberation room. 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).
  - 1. *United States v. Dugan*, [58 M.J. 253](#) (2003). Panel member reminded the rest of the panel that the sentence would be reviewed by the GCMCA and needed to make sure the sentence sent a consistent message, especially since their names would be identified as panel members. CAAF remanded the case for a sentence rehearing.

2. *U.S. 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 UCI (1) constrained the discretion of officers disposing of the offenses and (2) infected the impartiality of the panel. 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: Appellant did not meet burden under *Biagase* that "general tenor of the leadership's interaction with the media demonstrated either the intent to improperly influence the court-martial process or the appearance of such an influence." Additionally, appellant failed to "demonstrate the phrase 'zero tolerance'" raised UCI. CAAF noted 6 factors specific to appellant's case the Government demonstrated to show trial not tainted.

C. 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.

D. During court-martial.

*United States v. Baldwin*, [54 M.J. 308](#) (2001). Nine months after her court-martial, appellant filed affidavit alleging that GCMCA conducted OPDs and commented that officer court-martial sentences were too lenient, and stated that the minimum should be at least one year. 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 constitute UCI. **HELD:** Appellant's post-trial affidavit sufficient to raise the issue, but insufficient record on which to decide the issue. Decision of A.C.C.A. set aside and record returned for limited hearing on the UCI issue.

## VII. WITNESS INTIMIDATION.

### A. Direct attempts to influence witnesses.

1. *United States v. Gleason*, [43 M.J. 69](#) (1995). After hearing incriminating tape of SGM, linking him to contract killer, battalion commander (LTC) made clear he believed accused was guilty, characterized TDS as “enemy” and made clear that witnesses should not testify on SGM’s behalf (none did). Court found that command influence infected entire process, overturning sentence AND conviction. *See also United States v. Plumb*, [47 M.J. 776](#) (A.F.Ct. Crim. App. 1997).
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: unlawful command influence with regard to the petty officer. No command influence with regard to the officer, because JOPA lacked “the mantle of command authority;” instead unlawful interference with access to witnesses. Courts cite this case as one of UCI landmarks.
3. *United States v. Francis*, [54 M.J. 636](#) (A.C.C.A. 2000). Appellant asserted that comments from his squad leader and platoon leader to other soldier in his unit that they should not associate with appellant, and that appellant should be separated from the rest of the soldiers constituted UCI. Asserted that the military judge erred by failing to shift the burden of persuasion to the government. The squad leader and platoon leader testified regarding their intent. Other soldiers testified regarding their interpretation of what they heard. These soldiers stated that they were willing to testify on the appellant's behalf; defense counsel stated that he had no evidence of unfairness. Military judge found that the actions of the squad and platoon leaders were UCI, but there was no showing of how or why the proceedings were unfair. Nonetheless, military judge put several *Rivers/Biagase*- type remedial measures into place. **HELD:** Burden of persuasion never shifted because appellant failed to show "proximate cause" or "logical connection" between the actions of the squad and platoon leaders and some unfairness at trial, as required by *Biagase*, [50 M.J. 143](#). The appellate court disagreed with the findings and legal analysis of the military judge, but reached the same conclusion. Based on its conclusion that there was no UCI, the Court sharply criticized the remedial measures put into effect by the military judge.

4. *United States v. Gore*, [60 M.J. 178](#) (2004). Military judge did not abuse his discretion when he dismissed charges with prejudice in this guilty plea involving blatant witness intimidation by commander.
- B. Indirect or unintended influence. The most difficult and dangerous areas are those of communications, perceptions, and possible effects on the trial, despite good intentions. *Remember: Courts analyze message received, not message intended.*
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.” Accordingly, these comments unlawfully pressured court-martial members and witnesses.
  2. Policy letters may influence potential witnesses. *United States v. Griffin*, [41 M.J. 607](#) (Army Ct. Crim. App. 1994) (“No place for illegal drugs, or those who use them” buried in five page division commander’s policy letter on physical fitness and training). *See companion case, United States v. Rivers*, [49 M.J. 434](#) (1998).

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

- A. Mass Apprehension. Berating and humiliating suspected soldiers utilizing a mass apprehension in front of a formation found to be unlawful command influence (attempt to induce severe punishment) and unlawful punishment. Violation of UCMJ, art. 13; returned for sentence rehearing. *United States v. Cruz*, [25 M.J. 326](#) (C.M.A. 1987).
- B. Pretrial Humiliation. Comments made by unit commander in front of potential witnesses that accused was a thief did not constitute unlawful command influence; no showing that any witnesses were persuaded or intimidate from testifying. It did, however, violate Article 13. *United States v. Stamper*, [39 M.J. 1097](#) (A.C.M.R. 1994).

## IX. INDEPENDENT DISCRETION OF MILITARY JUDGE.

- A. Prohibition: “No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . . .” UCMJ, art. 37(a).
  
- B. Efficiency Ratings: “[N]either the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge.” UCMJ art. 26(c).
  
- C. Subtle pressures.
  - 1. Improper for DSJA to request that the senior judge telephone the magistrate to explain the seriousness of a certain pretrial confinement issue. *United States v. Rice*, [16 M.J. 770](#) (A.C.M.R. 1983).
  
  - 2. *United States v. Mabe*, [33 M.J. 200](#) (C.M.A. 1991). Senior judge’s letter, written to increase sentence severity, subjected judges to unlawful command influence.
  
  - 3. *United States v. Ledbetter*, [2 M.J. 37](#) (C.M.A. 1976). Commander and SJA inquiries that question or seek justification for a judge’s decision are prohibited.

## X. STAFF AND SUBORDINATE OFFICER UCI.

- A. Trial Counsel must be careful regarding advice they give to subordinate commanders. TC or SJA may be UCI conduits. *See United States v. Hamilton*, [41 M.J. 32](#) (1994). TCs must be careful providing advice to company, battalion, and brigade commanders on the same case.
  
- B. Staff Officers and Senior NCOs.

1. *United States v. Hilow*, [32 M.J. 439](#) (C.M.A. 1991)(improper for Division Deputy AG (1LT) to develop list consisting solely of nominees who were supporters of “harsh discipline”).
  
3. *United States v. Levite*, [25 M.J. 334](#) (C.M.A. 1987). SGM and 1SG 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 and sentence.

C. SJAs.

*United States v. Pinson*, [54 M.J.692](#) (A.F.C.C.A. 2001). After completion of Art. 32(b) investigation, SJA asked the IO to address additional specific issues. IO made no changes to the report. Appellant asserted that this contact constituted UCI. Military judge denied motion for relief. **HELD:** Mere fact of contact between SJA and IO does not prove that it was unlawful. CA could request that the IO address specific issues and include specified matters; SJA, as CA representative, could properly do the same. SJA actions were not improper; under the circumstances, they were unnecessary.

## **XI. IF UCI DISCOVERED, RAISE ISSUE IMMEDIATELY**

- A. UCI can be fixed.
  
- B. Methodology of analysis and proof.
  1. Defense Counsel has initial 3(arguably)4-prong burden to produce:
    - a. Sufficient evidence to raise UCI. *United States v. Ayala*, [43 M.J. 296, 299](#) (1995). The standard is “some evidence”;
  
    - b. that the proceedings were unfair; and

- c. that UCI was proximate cause of unfairness. *United States v. Stombaugh*, [40 M.J. 208, 213](#) (C.M.A. 1994).
  - d. The defense must also show someone acted with “mantle of command authority.” *Id.*
2. Government must then prove beyond a reasonable doubt “that there was no unlawful command influence or show that the unlawful command influence will [did] not affect the proceedings.” *United States v. Biagase*, 50 M.J. 143 (1999).
- C. Remedial actions may be taken if raised early. *Extremely important* to litigate at trial level because:
1. Record built most efficiently here.
  2. Courts will otherwise apply waiver.
- D. Before trial. *See United States v. Rivers*, [49 M.J. 434](#) (1998) and *United States v. Biagase*, [50 M.J. 143](#) (1999).
1. Brief witnesses of duty to testify. *United States v. Sullivan*, [26 M.J. 442](#) (C.M.A. 1988). In response to 1SG’s criticism that those who testify on behalf of drug offenders contravenes Air Force policy, the command instructed all personnel that testifying was their duty if requested as defense witnesses and transferred the 1SG to eliminate his access to the rating process.
  2. Rescind or clarify letters and pronouncements. *United States v. Rivers*, 48 M.J. (1998).
  3. Transfer offending actors.
  4. Reprimand or relieve offending officer/NCO.

5. Consider a pre-trial agreement that waives the issue in return for favorable sentence cap. *See United States v. Weasler*, [43 M.J. 15](#) (1995)(permissible to bargain away accusative stage UCI).
- E. At trial (judge-directed). *See United States v. Rivers*, [49 M.J. 434](#) (1998) and *United States v. Biagase*, [50 M.J. 143](#) (1999).
1. Automatic challenges for cause against those in the unit and no unfavorable character evidence permitted against the accused. GCMCA disqualified from taking action in case. *United States v. Giarratano*, [22 M.J. 388, 399](#) (C.M.A. 1986).
  2. *United States v. Clemons*, [35 M.J. 770, 773](#) (A.C.M.R. 1992):
    - a. No government aggravation witnesses.
    - b. Government not allowed to attack accused's credibility by opinion or reputation testimony.
    - c. Defense given wide latitude with witnesses.
    - d. Accused allowed to testify about what he *thought* witnesses might have said on merits or E&M.
  3. **THE TEST.** *United States v. Biagase*, [50 M.J. 143](#) (1999).
    - 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, and;
    - 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. The government may carry its burden by:
  - (1) Disproving predicate facts on which allegation of unlawful command influence is based; or
  - (2) Persuading the military judge or appellate court that the facts do not constitute unlawful command influence; or
  - (3) At trial, producing evidence that unlawful command influence will not affect the proceedings, or;
  - (4) 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.

- F. Post-trial.

R.C.M. 1102: Any time before authentication of the record of trial or action the military judge or convening authority respectively may direct a post-trial session to resolve any matter which affects the legal sufficiency of any findings of guilty or the sentence.

1. New recommendation and action ordered. *United States v. Howard*, [48 C.M.R. 939](#) (C.M.A. 1974).
2. *DuBay* hearing ordered. *United States v. Madril*, [26 M.J. 87](#) (C.M.A. 1988).
3. Findings and sentence overturned.

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

- H. On appeal. Appellate courts may not affirm findings and sentence unless satisfied beyond a reasonable doubt that the proceedings were not affected by UCI. *United States v. Thomas*, [22 M.J. 388](#) (C.M.A. 1986). *See also Biagase, supra*.

## **XII. YOUR CONCERNS AS A JUDGE ADVOCATE.**

- A. Prevention.
1. OPDs, staff calls, candid conversations.
  2. Teaching, preparing commanders.
- B. Detection.
- C. Litigation.
1. Witness preparation.
  2. Precisely framing issue.
- D. Get bosses involved when you smell smoke.

## **XIII. CONCLUSION - TREND.**

*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.