Command Influence

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Command influence is the mortal enemy of military justice."[1]
– US Ct. of Military Appeals, 1986

"The good news is that there were only a handful of appellate opinions dealing with unlawful command influence this past year. The bad news is that unlawful command influence is still alive."[2]
-- COL Robert A. Burrell, Chair and Professor, Criminal Law Department, U.S. Army JAG School, Charlottesville VA, 2001

Question Considered: How to challenge command influence in U.S. military law.

Brief Answer: Counsel can challenge command influence, in military courts-martial, in two ways:

1. By way of the existing safeguards against *unlawful* command influence already in U.S. military law, where those safeguards were breached, and,

2. By raising new challenges in areas where command-influence law remains uncertain, and where military institutions create a strong possibility, an appearance, of improper command influence even when it's not exerted or currently unlawful.

Military case law on unlawful command influence has evolved considerably in the last 10 years.

Facts:

Unlawful command influence occurs when military authority influences, impedes or otherwise misdirects the administration of justice. This is quite possible in a military where disobedience to command authority is itself punishable by military law, where service members are conditioned from their first day in boot camp to obey that authority, where commanders are the convening authority for courts-martial and will pick the court-martial "jury" panel members.[3]

Unlawful command influence can be directed at members of military courts – judges, panel members, counsel, prospective or actual – or at potential witnesses. The pressure can be direct or indirect, e.g., by general pronunciamentos by the commander as indirect pressure, and it can be actual or apparent. A military appellate court cannot affirm findings and sentence by a court-martial if that influence has affected those findings.[4]

The underlying principle is simple: "A commander who causes charges to be preferred or referred for trial is closely enough related to the prosecution of the case that the use of command influence by him and his staff equates to 'prosecutorial misconduct.'"[5]

Congress and the military have provided several defenses against unlawful command influence: direct (by statute and regulation); indirect (procedural statutes, also by removal of military trial judges, criminal investigators,[6] and defense counsel from the chain of command; creation of civilian-staffed, military appellate courts; also through procedural safeguards, (e.g., Art. 31 and 32), and through military case law.

Direct safeguards against command influence are:

Article 37 (10 U.S.C. § 837). Article 37 and Rule of Court-Martial (RCM)[7] 104 forbid unlawful command influence, which includes any attempt to coerce or retaliate against any member of the court (including judges and counsel), specifically including personnel evaluations (fitness reports).

Article 98 (10 U.S.C. § 898). Violations of Art. 37 can be prosecuted under Art. 98 (noncompliance w/procedural rules; punitive article).[8]

General and special court-martial convening authority cannot also be the accuser.[9] Defense counsel's activity in defense of the accused may not be reflected unfavorably on their fitness reports.[10]

Indirect statutory safeguards that can inhibit command influence include:

Art. 26(c). Trial judges must be independent, i.e., their evaluation reports must not be written by convening authority, must be a member of the Bar (with all the ethics rules that implies) and must be assigned to that service's Judge Advocate General, not the chain of command.

Art. 31 forbids anyone from compelling a defendant to self-incriminate, and, further, Art. 31(d) forbids the use of "coercion, unlawful influence or unlawful inducement" to elicit statements, and bars their use as evidence at trial. Command pressure on suspects or investigators could breach this.[11]

Art. 32 requires, among other due process requirements, a "fair and impartial" pretrial investigation at which defendants have a right to have counsel. Violation of Art. 32 does not constitute judicial error, though command or legal staff breaching Art. 32 (or Art. 31) could face prosecution themselves under Art. 92, failure to follow regulations. The decision to start an Art. 32 investigation does not of itself constitute improper command influence.[12]

Art. 34. Forbids the convening authority to proceed to trial without input from the staff judge advocate that the Art. 32 evidence justifies a trial on that charge. While the SJA is usually on the commander's staff, the SJA is also a military lawyer with obligations under the code of professional ethics. A judge advocate has to make similar post-trial findings under Art. 64, before approving the findings of the court and sending it on for appellate review; The Judge Advocate General[13] will also review under Art. 69.

Art. 66 and 67 provide for review by military appellate courts, outside the chain of command; after that, Art. 67a provides for Supreme Court review on a writ of cert. Congress meant the military appellate system to be a check, a "bulwark" against command influence.[14] The military has two levels of appellate courts, one in each armed service (Army, Navy/Marines, Air Force and Coast Guard Courts of Criminal Appeals), and a U.S. Court of Appeals of the Armed Services (USCAAF).

However, the convening authority – the commander – is rarely a lawyer. From company command level s/he will be trying Art. 15s, will be subject to service on court-martial boards[15], and able, in senior command, to serve as court-martial convening authority. Service regulations typically incorporate UCMJ/RCM mandates in legal training for future commanders, in cadet, basic officers' course, and advanced-course training curricula.[16] This training may or may not impart either a rudimentary legal education or an understanding of the underlying principles of military justice.

Indirect institutional safeguards include the removal of armed services' trial judges, defense counsel[17] and criminal investigators[18] from the direct chain of command. These entities may be in separate organizations, attached to field commands but not under direct command. The Army and Air Force Departments have all three of these agencies, which report to central offices in their department, not to the base commander. *A fortiori,* a military judge *must* be independent of convening command authority per 10 U.S.C. § 826(c) (Art. 26(c) UCMJ) nor may the judge consult *ex parte* with members of the court (Art. 26(e)).

The Navy Department is slightly different: The Navy JAG office has a trial judiciary to serve the Navy and Marine Corps; it also includes the Navy/Marine Corps court of criminal appeals, whose chief judge reports to the Navy's judge-advocate general.[19] However, trial defense counsel will be Navy/Marine JAG personnel "detailed by the judge advocate's commanding officer," i.e., possible convening authority.[20]

Note that the military lawyer has a responsibility, under both the RCM and the military's code of professional ethics,[21] to report any instances of unlawful command influence.[22] A military judge that fails to uphold the independence and integrity of his/her court had committed dereliction of duty, which can include prosecution under Art. 92, failure to comply with regulations.[23]

Finally, each member of the armed services swears an oath of allegiance to the Constitution of the United States, and "true faith and allegiance" to it. By inference that would include the applicable provisions of the Fourth, Fifth, Sixth and Eighth Amendments.

Case law spells out what a defendant must do upon alleging unlawful command influence. One method is a "*DuBay* hearing"[24] which will remand the trial record to a convening authority other than the one that appointed the court-martial, and then on to a board of review.[25] Counsel can raise this during trial or on appeal, e.g., if finding after the fact that the trial panel *voir dire* was subjected to improper command influence, however, any such objection must be timely raised or it will be waived.[26]

Once unlawful command influence is raised, either at trial or on appeal, the burden shifts to the government to show, beyond a reasonable doubt, either that there was no unlawful command influence or that the unlawful command influence will not affect the proceedings, and the government may meet that burden by: (1) disproving the predicate facts upon which the allegation of unlawful command influence is based; (2) persuading the military judge or appellate court that the facts do not constitute unlawful command influence; (3) producing, at trial, evidence proving that the unlawful command influence will not affect the proceedings; or (4) by persuading an appellate court on appeal that the unlawful command influence had no prejudicial impact on the court-martial).[27]

To raise unlawful command influence on appeal, the appellant must show (1) facts that, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness.[28]

The threshold showing is merely "some evidence" of improper command influence (though beyond mere allegation or speculation).[29]

Raising the unlawful command influence issue during trial or on appeal could potentially result in having the charges or the conviction dismissed.[30] The court may also determine that a less drastic remedy is appropriate, such as restricting the ability of the government to present evidence, insuring that witnesses are informed of the protections they are entitled to under the Uniform Code of Military Justice, allowing the defense greater leeway in the *voir dire*, or disqualifying a convening authority from taking further action on the case after the trial.[31]

The commander is arguably a magistrate;[32] command influence can be proper if conferred by, and in conformity to, the UCMJ. Courts have found some command functions to be a matter of command prerogative, e.g., Art. 34 does not disqualify a convening authority, where command functions are at issue, from having its staff judge advocate review a case for trial under Art. 34.[33] Same thing for Art. 60 and 64, post-trial review by convening authority.[34]

Although the Administrative Procedures Act normally forbids civilian courts to review court-martial convictions,[35] some courts have held that collateral review is possible on matters, e.g., as due process,[36] and improper command influence interferes with due process.

Few of these safeguards exist in military commission trials, which do not have access to any judicial appellate system, do not follow the MCM but have very loose rules of procedure and evidence, and whose court members are definitely subject to the chain of command.[37] High military commanders often manipulated military-commission trials in the past, notably *Yamashita*[38]*,* in which the Supreme Court upheld it.

Analysis:

The good news is, the military legal community is aware of the problem of improper command influence. Considerable case law, much of it recent, has provided counsel with means of identifying, proving and arguing it. The bad news is, field commanders are not aware of it, particularly the more zealous ones, if *Stoneman* is any indication.[39] In a commander who has unique judicial powers on top of the legal power to command, and the administrative power to end someone's career with a bad report or relief of command, this can easily become improper command influence. It can be implicit: if a commander is at his desk at 0630 then his subordinates are apt to be as well; if a commander proclaims "zero defects" in military discipline, it won't be lost on his/her staff judge advocate – or on the officers that commander appoints to the next court-martial.

This is a possibility to consider by anyone with a military defendant as a client. Improper command influence may be direct, and counsel will want to inquire about any pressures on panel members during *voir dire.* But command influence also may be indirect even if the command says nothing about a particular case, and counsel may want to examine the more general circulars, policy directives announcements and pronouncements of the command. Such pronouncements may not be official, but what a commander says at the O Club bar may still influence your case – even if it wasn't on point. Re-read *Stoneman* to see how much force even the CO's *attitude* can have. Public statements about particular cases or types of cases by the convening authority, even as general comments to officers' meetings, can overturn a case.[40]

The more usual kind of pretrial publicity –statements by military policy makers to news media– is an area of uncertainty in military case law. The *Ayers* case,[41] subsequent to the 1996 sexual-harassment scandal involving female recruits at Aberdeen Proving Ground, involved a drill sergeant tried amid considerable pretrial coverage and statements by the higher chain of command, including the Defense and Army Secretaries, the Chairman of the Joint Chiefs and the commander of TRADOC, among others. *Ayers* was unsuccessful because defense counsel didn't show a nexus between the publicity and any harm wrought by command influence.

Press coverage (or leaks) of itself, is not of itself unlawful command influence, at least so far as military courts have reviewed it.[42] Still, recent public statements on the Abu Ghraib scandal have complicated efforts to prosecute the offenders, notably Defense Secretary Donald Rumsfeld, who by law[43] is in the direct chain of command,[44] who has professed a belief that the case should be prosecuted but that command influence was something he wished to avoid even as he wished to prosecute[45] -- as if he is seeking to cause command influence by protesting it loudly enough. Congress has noticed:

> [Republican Sen. James] Imhofe also suggested that an important reason that officials higher up in the military and civilian chain of command were not given details on the full nature and extent of the prisoner abuse at Abu Ghraib was because of the problem of "undue command influence." Air Force Lieutenant General Lance Smith, deputy commander of the U.S. Central Command, agreed with Imhofe.
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> Smith said that should high-ranking military officers of Central Command say something like "we must take this action against these individuals," that would constitute undue command influence on those who would making judgments on the accused personnel. It "would influence and bias their decisions," Smith said.[46]

Central Command would be the convening authority; the commanders, being possible defendants themselves, would have an interest in the outcome. For that matter, Mr. Rumsfeld oversees not only the chain of command but also the military appellate courts, as they are creations of 10 U.S.C., are Art. I courts, not Art. III, and are a military agency. Defense counsel in Abu Ghraib courts-martial have raised this motion, so far unsuccessfully.[47]

That same month DoD put out a very misleading background briefing on unlawful command influence, suggesting a concerted pattern.[48] In this context, counsel should ponder whether if, by raising a press-publicity challenge in a local court-martial, it might let suspects in abuse cases – high ranking ones among them – get off on an easier command-influence standard? *Ayers*[49] merely suggests that counsel will have to raise this challenge at *voir dire* and show a nexus between the publicity and the harm.

A second and more novel challenge, is a collateral review in Federal court. Though the APA excludes a challenge to a court-martial finding, a question of agency conduct may not be.

A third challenge can come in areas where command influence is technically proper in doubtful areas, not yet challenged by courts, such as policy maker statements cited above, or in institutional areas. Potential new challenges could include:

- Challenge to Art. 32(e). Although the decision to launch an Art. 32 investigation might not be improper command influence, command pressure on an Art. 32 investigator, say, to flout the procedural requirements of Art. 32(c) and (d) would not be judicial error under Art. 32(e). This conflicts with *Gore*[50] and other rulings on command influence, and Art. 32(e) may be worth a constitutional challenge.[51]
- Command-function challenges to convening authorities, on breaches of Arts. 34, 60 and 64, among others, so far have not disqualified convening authority from some judicial functions as an institutional matter, as noted above. This may be worth re-opening but probably won't be successful unless the convening authority breached the UCMJ procedurally, not merely exerted influence.
- In Art. 36, Congress permits the President to make rules for courts-martial, rules which have force of law; the President merely has to conform to the Constitution.[52] Though Art. 36 may be constitutional; a flaw in the MCM or in service regulations permitting command influence in violation of due process, though technically proper otherwise, may be worth challenging under Art. 36.
- Art. 46 requires equal access to witnesses, and since military witnesses are subject to the UCMJ, a court's jurisdiction over active-duty witnesses could be worldwide. Procuring the witnesses – their travel orders and transport – is a command function; Art. 36 and 46 case law mention no instances of failure to procure military witnesses but that would be a matter of command influence, technically a command prerogative but worth raising as a new challenge. The USCAAF did find, in *Rivers*, that overt command pressure, in that case intimidating them, is in breach of the Sixth Amendment; impeding their travel orders is an easy analogy.[53]
- The presence of service appellate courts under the office of the Judge Advocate General. Though not in the direct chain of command, it does put the TJAG and the court under the supervision of the chiefs of staff and the service secretary.
- The fact that the accused must, given fraud on the court or new evidence, petition the JAG for new trial under Art. 73. This raises more questions about the TJAG's presence under the chief of staff, as above. Unlawful command influence often is discovered after trial and it's a short step from the offending convening authority, to the chain of command, to TJAG. This is an inherent conflict of interest even if improper command influence itself, on TJAG, isn't proven.
- The convening authority's judge advocate reviews findings and sentence of the trial under Art. 64. Case history on 10 U.S.C. § 864 suggests that if the convening authority has an interest in the outcome of the trial, it will act on it.
- Where an administrative investigation[54] becomes the basis for preferment of charges, e.g., as in *U.S. v. Johnson*,[55] and the staff and legal (e.g., Art. 31, 32 et seq) procedures commingle. The *Johnson* court didn't find unlawful command influence that time; a future case, where the command didn't keep a "firewall" between, say, a "15-6" and a subsequent "Article 32" may raise this kind of challenge.[56]
- The lack of an independent trial defense service in the Navy Department.[57] Unlike the Army and Air Force, the Navy and Marines have no trial defense counsel agency outside the chain of command; the convening authority may very well be able to hand pick military defense counsel, and may be the one signing off on those officers' fitness reports later. (The fact that the commander may abide by the RCM, even if s/he is not aware of the rule, and not penalize zealous counsel, *doesn't* mean counsel won't wonder if s/he might). Further, there is no mention of unlawful command influence in the JAGMAN index and Navy and Marine commanders, if not their legal staffs, may be unaware of this concept. This is both a danger to justice and an opportunity for a challenge, if not a mandamus.
- The fact that convening authority gets to pick trial panels – it's almost as if a U.S. Attorney got sole choice of jurors (see *U.S. v. Dowty*, 60 M.J. 163 (USCAAF, 2004). The convening authority still has a duty to appoint a "fair and impartial" panel, and attempts to "pack" will not be tolerated by USCAAF, but perhaps this builtin temptation to abuse is enough of a danger that a court may either question the underlying statute, Art. 25(d)(2), or more likely, see a need for a firewall between the commander and his/her staff judge advocate.

In this light, institutional flaws creating the potential for, if not the overt use of, improper command influence, it's worth considering a recent foreign case, *Findlay v. United Kingdom*,[58] in which the European Court of Human Rights examined a British court-martial in which the convening officer also preferred the charges, chose the prosecuting and defense counsel as well as the court-martial panel. The convening authority was also the reviewer of the findings, who forwarded it to the Judge Advocate General, whose advice on the appeal was not provided to the accused (at the time of the trial the JAG did not have to provide a judge advocate advisor to the trial), nor did the petitioner know who the reviewing officers were. Thus, the proceedings were not fair and public, not decided by an independent and impartial tribunal, which would be clear breaches of the UCMJ and RCM as written. The Court rejected the trial and findings, which they found invalid simply by the structural *appearance* of improper command influence,[59] even absent any substantive changes to that effect.

The lesson is clear enough. Though the U.S. has significantly greater safeguards for due process than the British army, an impartial court found that *even appearances matter* in a question of improper command influence. The simple pressure of institutional authority and tradition – the military culture – will weigh on military court members even if the command is silent. Till now, U.S. case law focuses on the allegations, rather than the appearances, the *inert weight*, of unlawful command influence, and perhaps the structure and rules of courts-martial, particularly in the U.S. Navy Department, may suggest a challenge to that effect. To use a metaphor, a main battle tank is no less intimidating if it is still.

The commander has enormous power as a commander; as a *magistrate* s/he is practicing law without a license and exuding that power while s/he does so. If Congress doesn't act to create a military court system, then case law should at least put a firewall between the commander and the staff judge advocate. *Dowty* and *Findlay* suggest that there is no such thing as a "fair and impartial" convening authority.

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1 U.S. v. Thomas, 22 M.J. 388, 393 (U.S. Court of Military Appeals, 1986). Note: the *Thomas* court did not find fatal error in the trials of the four *Thomas* appellees, since the lower Court of Military Review had mitigated the damage caused by command interference in their trials, and the modified sentences stood.

2 COL Robert A. Burrell, *Recent Developments in Unlawful Command Influence,* 2001-MAY Army Law. 1 (May 2001).

3 But the panel must be fair and impartial and military courts of appeal will not tolerate attempts to "stack" or otherwise mess with it. U.S. v. Dowty, 60 M.J. 163 (USCAAF, 2004). However, Sixth Amendment right to jury does not apply to courts-martial and the convening authority's authority to pick the panel is valid.

4 U.S. v. Rivers, 49 M.J. 434, 443 (USCAAF, 1998).

5 *Thomas,* 22 M.J. at 393.

6 For instance, the Army's Criminal Investigations Command is a "stovepipe" agency, with detachments (CID) in field units and bases serving commanders but not under their direct command. DoD Background Briefing, May 21, 2004, on the CID's investigation of deaths of prisoners at Abu Ghraib.

7 Rules of Court Martial and Military Rules of Evidence are in the Manual for Courts Martial (2005 ed.)

8 Per fn., MCM (2005 ed.) at II-4.

9 Art. 22(b) and 23(b) UCMJ (10 U.S.C. §§ 822(b), 823(b)).

10 RCM 104(b)(2).

11 Command meddling in an investigation will trigger Art. 31. Cunningham v. Gehlke, 36 M.J. 94, 101-102 (CMA, 1992). Military courts have construed Art. 31 to be broader than *Miranda.* U.S. v. Baird, 851 F.2d 376, 383 (D.C. Circuit, 1988).

12 U.S. v. Stirewalt, 62 M.J. 297 (USCAAF, 2004).

13 "The Judge Advocate General" is senior counsel in each service, working under the service Secretary and Chief of Staff. Thus not in the operational chain of command specified by the Goldwater-Nichols Act (see esp. 10 U.S.C. §§ 161-168) which runs from the President and Secretary of Defense ("National Command Authority") directly to the unified (regional) and specified combatant commands, e.g., CENTCOM in the Middle East. For duties and responsibilities of the TJAG see 10 U.S.C. § 5148 (Navy/Marine Corps), 10 U.S.C. § 3037 (Army), 10 U.S.C. § 8037. However, each TJAG is appointed by the President, who can terminate him/her.

14 So noted in *Thomas,* 22 M.J. at 393.

15 10 U.S.C. § 825 (Art. 25 UCMJ).

16 See, e.g., AR 27-10, Military Justice, ¶ 19-5 on curricula requirements, and Field Manual (FM) 27-1, Legal Guide for Commanders.

17 E.g., the Army Trial Defense Service.

18 Army: Criminal Investigations Detachments (CID); Air Force: Office of Special Investigations; Navy/USMC: Naval Criminal Investigations Service (NCIS, formerly NIS). This keeps commands from impeding an embarrassing investigation; also command intrusion into a criminal investigation, even well meant, can poison a chain of evidence, see *Cunningham* footnote *supra.* It's a reason the military leaves this to professionals, e.g., CID; even on-base MPs might have to defer to them. FYI.

19 Dept. of the Navy JAG INSTR 5400.1A, Office of the Judge Advocate General (OJAG) Operating Manual.

20 JAG INSTR 5800.7D (JAGMAN 2004), §§ 0130b, 0131b(2). The latter section permits convening authorities this role, and the commander can make determinations on attorney-client privilege. § 0131d. Compare with the Air Force's AFI51-201, *Military Justice,* and the Army's AR 27-10, *Military Justice.*

21 AR 27-26, Rule 5.4(b), Rules of Professional Responsibility for Lawyers, App. B.) See also, e.g., Navy JAG INSTR 5803.1C, Professional Conduct of Attorneys.

22 R.C.M. 104, MCM, 1984.

23 U.S. Navy-Marine Court of Military Review v. Carlucci, 26 M.J. 328, 336 (Court of Military Appeals, 1988).

24 U.S. v. DuBay, 37 C.M.R. 411, 17 U.S.C.M.A. 147 (CMA, 1967), undertaken under authority of Art. 67(c).

25 All in accordance with Arts. 61, 64, and 67, UCMJ.

26 United States v. Ayers, 54 M.J. 85, 91 (2000), citing Mil.R.Evid. 103(a)(1).

27 United States v. Biagase, 50 M.J. 143 (USCAAF, 1999).

28 United States v. Richter, 51 M.J. 213 (USCAAF, 1999).

29 United States v. Stoneman, 57 M.J. 35 (2002), *see also* U.S. v. Dugan, 58 M.J. 253-4 (USCAAF, 2003). *but see* U.S. v. Bridges, 57 M.J. 540, 551 (Coast Guard Ct. of Crim. App., 2003).

30 United States v. Gore, 60 M.J. 178 (USCAAF, 2004). The issue: command intimidation of witnesses.

31 53A Am. Jur. 2d Military and Civil Defense § 265

32 "A Senior Military Lawyer," Background Briefing, *Uniform Code of Military Justice and Court Martial Procedures,* May 19, 2004. An interesting characterization of the commander's role, in an otherwise misleading, even silly, discussion of military law and command-influence issues. That DoD put out this Monty Python view of law in the time of the 2004 Abu Ghraib inquiry is disturbing, to say the least.

33 *See generally* case law for 10 U.S.C. § 834.

34 10 U.S.C.A. § 860, see, e.g., U.S. v. Taylor, 60 M.J. 190, 194 (USCAAF, 2004) which disqualified the staff judge advocate but not the convening authority.

35 The APA exempts courts-martial and military commissions, and military actions in the field in time of war, from civilian court review. 5 U.S.C. § 701(b)(1)(F) & (G).

36 Cothran v. Dalton, 83 F.Supp.2d 58, 63 (D.C. Cir., 1999), finding that while the court-martial is not an "agency," the military – i.e., staff judge advocates – are. *But see* McKinney v. Caldera, 141 F.Supp.2d 25, 31 (D.C. Cir., 2001), agency action should not be "arbitrary and capricious or contrary to the law."

37 Under authority of George W. Bush, *Military Order of November 13, 2001,* Federal Register Nov. 16, 2001 (Vol. 66, No. 222) at 57831-57836 (also listed as 66 F.R. 57833 (Nov. 16, 2001). *See also* DoD Military Commission Order No. 1, March 21, 2002; DoD Military Commission Order No. 3, Feb. 5, 2004, which provides for monitoring of the accused and their counsel; Military Commission Instructions Nos. 1-9, which include rules of proceedings, crimes & elements, qualification of court members and defense counsel, sentencing, review; DoD Directive 5105.70, Appointing Authority for Military Commissions, Feb. 10, 2004 (PDF). Composition, functions and relationships. See also 32 CFR §§ 9.1-18.6 for parallel regulations on military commissions.

38 Application of Yamashita, 327 U.S. 1 (1946).

39 See the brigade commander's various communications starting at *Stoneman,* 57 M.J. at 36 in which he threatens to "CRUSH" leaders who don't lead by referent (sic) rather than legal power. Notice also that even his disclaimers, later, failed to abate the legal damage.

40 U.S. v. Baldwin, 54 M.J. 308 (USCAAF, 2001).

41 U.S. v. Ayers, 54 M.J. 85 (USCAAF, 2000).

42 U.S. v. Johnson, 54 M.J. 32, 35 (USCAAF, 2000).

43 Goldwater-Nichols Act, cited *supra.*

44 And strictly liable, under command-responsibility doctrine, for any atrocities committed by his soldiers even if he didn't order them. Application of Yamashita, 327 U.S. 1 (1946).

45 See Armed Forces Information Service article, "Rumsfeld Arrives In Baghdad to Visit Troops," May 13, 2004; see also his ABC's Today Show interview, May 5, 2004.

46 David A. Denny, "Discipline, Leadership, Training Scored in Prisoner Abuse Case," USIA (11 May 2004).

47 At the trial of SP4 Charles Graner, "Abu Ghraib Soldier Loses His Bid to Dismiss Trial," MSNBC, Dec. 6, 2004.

48 "A Senior Military Lawyer," May 19, 2004, cited *supra.* Again, this link.

49 Along with the recent *Baldwin* and *Johnson* (2000) cases cited above.

50 60 M.J. 178, cited *supra.*

51 Citation of Art. 32(e) normally keeps a defective Art. 32 investigation from invalidating a trial. U.S. v. Clark, 11 M.J. 179, 181-2 (CMA, 1981).

52 U.S. v. Kelson, 3 M.J. 139, 140 (CMA, 1977).

53 *Rivers,* 49 M.J. at 443.

54 Not an Art. 32 but a staff or "collateral" investigation like an AR "15-6", a "JAGMAN investigation, an Inspector-General investigation, etc.

55 *Johnson,* 54 M.J. at 34, where an administrative (medical peer review) investigation morphed into a court-martial on sexual charges.

56 Col. Robert Burrell, *Recent Developments in Unlawful Command Influence*, 2001-MAY Army Law. 1, 3. Col. Burrell worried that this might lead to a "recipe for disaster" in a future case.

57 see JAGMAN 2004 §§ 0130-0131.

58 Findlay v. United Kingdom, 1997-I fasc. 30 (25.2.97), 110/1995/616/706, 24 EHRR 221, 8 HRCD 335, II HRL 18 (European Court of Human Rights, 1997).

59 *Id.*, ¶¶ 73 & 76.