



THE MILLRIND

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The Millrind, RLSO EURAFCENT's monthly newsletter, provides timely and targeted information for commands and Service members.

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RISK OF UNLAWFUL
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This month's Millrind covers permissible command involvement and unlawful forms of command influence during courts-martial and similar proceedings. The JAG Corps subject matter experts on criminal law (OJAG Code 20) developed this content. It is part of a series of reference tools aimed at highlighting key criminal law related topics for commanders.

Access Past Issues: You can access and review all past issues of The Millrind on the JAG Corps website and indexed within this issue.

If there is a topic you would like us to cover, please contact your local RLSO office!

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COMMAND INFLUENCE¹

ROLE OF THE COMMANDER: Commanders are charged with maintaining good order and discipline, and must do so in a manner that ensures justice. The authority of a commander to convene courts-martial includes the duty of ensuring the constitutional due process rights of an accused. In carrying out this duty, commanders must remain impartial, and be cognizant of the impact their comments and actions (and the actions of their staff) may have on participants in the court-martial process.²

FRAMEWORK: THREE KEY QUESTIONS

- Am I fair and impartial?
- Will others find my actions and statements fair and impartial?
- Could my actions and statements prevent someone else’s ability to be fair and impartial? (e.g. court-martial members, witnesses, subordinates.)

PERMISSIBLE CHAIN OF COMMAND ACTIONS

KEY: Subordinate commanders must make independent disposition decisions.

Permissible actions by Superior Commander	Example
✓ MAY obtain information from a subordinate commander about ongoing cases, investigations, or incidents.	<i>Requesting a briefing on ongoing matters.</i>
✓ MAY generally discuss with a subordinate commander that commander’s role in the military justice process.	<i>“As a convening authority, you have the duty to ensure good order and discipline. You also have the duty to ensure that the rights of the accused and victim are protected. This role requires that you remain fair and impartial.”</i>
✓ MAY generally discuss matters for a subordinate commander to consider when disposing of a case.	<i>“As a convening authority, you have many options at your disposal, to include [X,Y,Z]. I’m available to discuss with you my experiences, generally, with any of those options. However, only you may make the disposition decision in your cases.”</i>
✓ MAY pull the disposition decision up to the superior commander’s level in a particular case or for certain types of offenses.	<i>Retain at the superior commander’s level authority to dispose of a case involving members of different units, or particular types of offenses, e.g. law of armed conflict or officer misconduct cases.</i> <i>Withhold from a subordinate commander the authority to dispose of a specific case, because the superior commander wants to make the decision.</i>

¹ Prepared by: Navy OJAG (Code 20-Criminal Law), Marine Corps Judge Advocate Division, and Coast Guard Office of Military Justice - April 2020

² It is best practice to apply these same principles to administrative proceedings (e.g. NJP, administrative separation, counseling).

PERMISSIBLE CHAIN OF COMMAND COMMENTS

KEY: Talk process, not outcome; talk offense, not offender.

Permissible comments	Example
✓ MAY issue broad policy statements on misconduct <u>before</u> becoming aware of a specific allegation.	<i>“This conduct is contrary to our core values.”</i>
✓ MAY address the command <u>after an allegation</u> by focusing on process, not the alleged offender or an outcome.	<i>“I have directed an investigation into the alleged misconduct. I will take appropriate action based on the results of that investigation. In the meantime, I expect all personnel to continue to uphold our unit’s high standards.”</i>
✓ MAY address the media or public <u>after an allegation</u> by ensuring comments are process-focused.	<i>“The allegation of misconduct will be thoroughly investigated and appropriate action will be taken based on that investigation.”</i>

UNLAWFUL COMMAND INFLUENCE (UCI)

A finding of UCI is a judicial determination that a commander (or the commander’s staff) has failed to ensure a fair and impartial process. UCI is either “actual” or “apparent.”

Actual UCI
<p>A commander manipulates the court-martial process, either intentionally or unintentionally, to drive a certain result. For example, a commander:</p> <ul style="list-style-type: none"> ⊘ MAY NOT direct a subordinate commander to make a particular disposition decision or limit the discretion of the subordinate convening authority. ⊘ MAY NOT censure, discipline, or otherwise express disapproval (either directly or indirectly) with any personnel participating in the court-martial process. ⊘ MAY NOT deter or attempt to deter a potential witness from participating in the investigatory process or testifying at a court-martial. ⊘ MAY NOT coerce or influence the action of a court-martial or member to reach a particular finding or sentence.
Apparent UCI
<ul style="list-style-type: none"> ⊘ A commander’s actions, either intentional or unintentional, cause an objective, fully informed observer to have significant doubt about the fairness of the military justice process. The focus is on public perception of the military justice system.

CASE STUDIES³

Cases in which actions were found to be ACTUAL UCI.

- A convening authority used gender as a criterion for detailing court-martial members. In a sexual assault case, 7 of the 10 members detailed were women (from a unit with 20% female officers and 13% female enlisted). The convening authority selected these members with the intent of achieving a particular result. The case was *dismissed with prejudice* (i.e. the charges could not be sent to another court-martial or prosecuted in federal court).
- A high-ranking judge advocate said to a high-ranking convening authority, “don’t put a target on your back” in response to a question on whether to grant post-trial clemency in a sexual assault case. The convening authority interpreted the comment to mean that the Navy would be adversely affected if clemency was granted. The case was *dismissed with prejudice*.

Cases in which actions were found to be APPARENT UCI.

- A superior convening authority made public statements reflecting his belief that subordinate commanding officers were “negligent” and “responsible” for an incident. The trial judge determined that the statements placed an intolerable strain on the public’s perception of the military justice system. Examples of the statements:
 - ◆ At a press conference, when asked whether he believed negligence was involved, the superior commander stated, “Yes...I mean we found the [COs] were at fault, the Executive Officers were at fault.”
 - ◆ The superior convening authority told an audience that included potential court-martial members, “I have seen the entire investigation. Trust me; if you had seen what I have seen, it was negligent.” The military judge ruled that, at trial, the defense would have additional leeway to remove potential court-martial members. Later, when the superior convening authority became the convening authority for the case, the charges were *withdrawn and dismissed*.
- After a convening authority dismissed a sexual assault case and granted clemency in another, superior convening authorities “lost confidence” and pressured the subordinate convening authority to submit a retirement request. Subsequently, the convening authority referred another case. Due to the superiors’ actions, the subsequent case was *dismissed without prejudice* (i.e. the charges could be sent to another court-martial).
- Several prospective court-martial panel members attended a briefing where a superior convening authority stated “80 percent” of sexual assault allegations “are legitimate.” That same superior convening authority also said, “If you have a Marine that is not acting right, you’ve got a Marine that deserves to leave the Corps, then get rid of them; it is as simple as that” and “I see this stuff in courts-martial, I see it in the behavior and just for the life of me I can’t figure out why we have become so ecumenical, why we have become so soft? Where are we going [to] keep a sergeant that absolutely does not belong in the United States Marine Corps? Why would we need to do that? And the answer is we don’t.” Because the Government did not prove that the court-martial members who attended the brief were free from the effects of UCI, and therefore the public would question the fairness of the trial, the case was *dismissed without prejudice* and had to be retried.
- A superior convening authority told a subordinate commander that personnel suspected of committing a specific instance of misconduct should be “crushed.” The superior convening authority later presented a brief containing a picture of the accused committing the misconduct that was the subject of the accused’s pending court-martial, and asked “What does America think of her Marines today?” The case was *dismissed with prejudice*.

³ See US v Riesbeck; US v Barry; US v Benson; US v Boyce; US v Howell; US v Chamblin, respectively.

COMMAND INFLUENCE

ACCEPTABLE WAYS TO EXERCISE LAWFUL INFLUENCE ON SUBORDINATES

<u>Before an Allegation</u>	<u>After an Allegation</u>
(Note: Depending on the context, some of these comments <u>might</u> be ruled unlawful if made <u>after</u> an allegation)	(Note: Talk process, not outcome; talk offense, not offender.)
“ <i>[Misconduct] is a blight on the service, and we must not tolerate [type of misconduct] in our ranks. Let’s hold ourselves to the high standards of the [Service].</i> ”	“ <i>The accused has been charged based on the evidence, but is presumed innocent until proven guilty. I expect every one of you to uphold the high standards of the [Service].</i> ”
“ <i>Allegations of misconduct will be thoroughly investigated, and when the evidence supports, offenders will be held appropriately accountable.</i> ”	“ <i>Allegations of misconduct will be thoroughly investigated, and when the evidence supports, offenders will be held appropriately accountable.</i> ”
“ <i>If you commit a [type of misconduct], you will be investigated and may face trial by court-martial. If convicted, you could face punishments such as confinement, punitive discharge, sex offender registration, loss of rank, or administrative separation.</i> ”	“ <i>The allegations are serious. An investigation is underway and should the [convening authority] determine the evidence warrants action, appropriate steps will be initiated.</i> ”
Superior to subordinate commander: “ <i>You should develop a command climate that is intolerant of sexual assault and sexual harassment.</i> ”	Superior to subordinate commander: “ <i>In making your disposition decision, you should consult your SJA, and not be concerned with external or political pressures.</i> ”
Superior to subordinate commander: “ <i>It is the responsibility of commanders, at every level, to maintain an environment free of [misconduct], provide support to those who need it, and to maintain good order and discipline within their units.</i> ”	Superior to subordinate commander: “ <i>I am available to discuss with you my experiences as a convening authority. However, I will not attempt to influence your decision. It is your duty to make an independent decision in all cases.</i> ”

UNACCEPTABLE (Before & After an Allegation)

Establishing an inflexible policy on disposition or punishment of offenses. “ <i>Anyone who commits [type of misconduct] must be stripped of their rank and dishonorably discharged.</i> ” This interferes with a court-martial panel’s independent sentencing determination.
Providing directive advice to a subordinate convening authority on a specific case or type of case. “ <i>If you catch anyone using drugs in this unit, you must send them to court-martial.</i> ” This interferes with a subordinate commander’s ability to make an independent decision on the disposition of the case.
Commenting on the character of the accused or victim. “The accused is a scumbag.”
Considering external factors when making decision on cases. “ <i>Make sure you consider the reaction of [superior, elected officials, or media] when you make your decision.</i> ”
Discouraging witnesses from testifying on behalf of the accused. “ <i>How could anyone support someone accused of X?</i> ” “ <i>Be aware of the message you are sending if you testify for [accused] at his trial.</i> ”
Selecting members with the intent of achieving a particular result as to the findings or sentence. [Stacking the panel]

10 U.S. Code § 837. Art. 37. Command influence

(a) (1) No court-martial convening authority, 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 exercise of its or his functions in the conduct of the proceeding.

(2) No court-martial convening authority, nor any other commanding officer, may deter or attempt to deter a potential witness from participating in the investigatory process or testifying at a court-martial. The denial of a request to travel at government expense or refusal to make a witness available shall not by itself constitute unlawful command influence.

(3) No person subject to this chapter may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority or preliminary hearing officer with respect to such acts taken pursuant to this chapter as prescribed by the President.

(4) Conduct that does not constitute a violation of paragraphs (1) through (3) may include, for example—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing persons on the substantive and procedural aspects of courts-martial;

(B) statements regarding criminal activity or a particular criminal offense that do not advocate a particular disposition, or a particular court-martial finding or sentence, or do not relate to a particular accused; or

(C) statements and instructions given in open court by the military judge or counsel.

(5) (A) Notwithstanding paragraphs (1) through (3), but subject to subparagraph (B)—

(i) a superior convening authority or officer may generally discuss matters to consider regarding the disposition of alleged violations of this chapter with a subordinate convening authority or officer; and

(ii) a subordinate convening authority or officer may seek advice from a superior convening authority or officer regarding the disposition of an alleged offense under this chapter.

(B) No superior convening authority or officer may direct a subordinate convening authority or officer to make a particular disposition in a specific case or otherwise substitute the discretion of such authority or such officer for that of the subordinate convening authority or officer.

(b) In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any person in a court-martial proceeding.

(c) No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused.

(d) (1) A superior convening authority or commanding officer may withhold the authority of a subordinate convening authority or officer to dispose of offenses in individual cases, types of cases, or generally.

(2) Except as provided in paragraph (1) or as otherwise authorized by this chapter, a superior convening authority or commanding officer may not limit the discretion of a subordinate convening authority or officer to act with respect to a case for which the subordinate convening authority or officer has authority to dispose of the offenses.

(Aug. 10, 1956, ch. 1041, 70A Stat. 50; Pub. L. 90–632, § 2(13), Oct. 24, 1968, 82 Stat. 1338; Pub. L. 116–92, div. A, title V, § 532(a), Dec. 20, 2019, 133 Stat. 1359.)

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