

## Attachment 5 – Unlawful Command Influence

Unlawful Command Influence (UCI), often called the “mortal enemy of military justice,” refers to actions made by senior military personnel that appear to pressure members of the military justice system towards certain decisions or outcomes. For instance, due to a commander’s words or actions, a convening authority may feel pressured to convene a court martial, or jurors may feel pressured to come to a certain verdict or sentence. Even the appearance of UCI merits a response from a military judge. Given the recent focus on sexual assault in the military, both claims and findings of UCI have skyrocketed in sexual assault case to the detriment of victims and the military justice system.

The most high-profile finding of UCI were in *U.S. v. Fuentes* and *U.S. v. Johnson* (June 2013), in which Navy Judge Cmdr. Marcus Fulton ruled that statements against sexual assault by President Obama constitute apparent UCI and that, as a result, the defendants could not receive a punitive discharge if found guilty. Such a discharge is a typical sentence for sex crimes in the Navy. After this ruling, Defense Secretary Chuck Hagel issued a memo reemphasizing the independence of the military judicial system, but the potential for findings of UCI remains. Although the federal government appealed this finding, the Navy-Marine Corps Court of Criminal Appeals found only that Judge Fulton could reconsider his decision in lieu of the memo. Such reconsideration has not yet occurred, and if found guilty, these defendants will be able to continue their careers in the Navy knowing the military justice system cannot hold them fully accountable.

Judge Fulton’s decision was not unique. In *U.S. v. Averell*, Judge Cmdr. John Maksym found that comments by President Obama and Chairman of the Joint Chiefs of Staff Gen. Dempsey constituted apparent UCI and granted the defense extra peremptory jury challenges. Protect Our Defenders knows of at least one case where such a ruling led a victim to question the entire court martial process, describing how the defense was able to choose a biased jury more sympathetic to the defendant than to justice. According to the Marine Corps Times, as of August 2013, at least 80 motions have been filed in sexual assault cases alleging UCI after a set of speeches by Marine Commandant James Amos, in which he took a firm stance against sexual assault. At least four of these resulted in findings of apparent UCI. Furthermore, according to the New York Times, one sexual assault case at Shaw Air Force Base in South Carolina has been dismissed, with the judge noting the UCI issue.

Findings of UCI also have the potential to overload the military justice system with appeals, particularly after another high-profile but unrelated UCI case involving Gen. Amos. As one defense attorney with experience in military justice cases stated to the Marine Corps Times, “Suddenly, if people have a case or had a case that was ongoing when [Gen. Amos] made those statements, the issue of UCI is not necessarily waived. You can pursue the issue on appeal.” Such appeals provide another opportunity for assailants to escape conviction, precisely because of the command structure that can influence a Convening Authority’s decision to prosecute.

As long as convening authority rests with the chain of command, rather than independent military prosecutors, the potential for UCI exists. Military officials at all levels have taken firm public stances against sexual assault, amounting to pressure that may lead military commanders

to prosecute weak case—or for judges to find for this possibility. Furthermore, victims may find it difficult to find justice when defendants cannot be discharged or when the defense has an overwhelming say in jury selection. Only by removing court martial-related decisions from the chain of command can Congress ensure an independent, unbiased, and effective military justice system.