

The Defense of “Command Influence”

By Colonel Daniel Smith, USA (Ret.) | May 13, 2004

Throughout the six hours of testimony on Abu Ghraib by Secretary of Defense Donald Rumsfeld *et al.* before the Senate and House Armed Services Committees on May 7, a recurring question was why the various command levels seemed to be in a “business as usual” mode given the explosive nature of the investigation on prisoner abuse.

Even as he noted that he had not grasped the gravity of the situation, Secretary Rumsfeld’s recurring answer was “command influence.” This concern, akin in civilian courts to the pollution of a jury pool from pre-trial publicity, is quite valid, for should an appeal court determine undue command influence existed, all related punitive or legal proceedings can be overturned.¹

May 7 was not the first time this explanation had surfaced. At the start of a May 4 Pentagon press briefing, General Peter Pace, Vice Chairman of the Joint Chiefs of Staff, said the following:

“It’s important to know that as investigations are completed, they come up the chain of command in a very systematic way. So that the individual who reports in writing, it goes up to the next level commander. He or she takes time, a week or two weeks, three weeks, whatever it takes, to read all the documentation, get legal advice from his or her attorneys, make the decisions that are appropriate at his or her level, and then forward that investigation on to the next level.

“The reason it is done sequentially like that is so that each commander, *without any undue influence from above*, has the opportunity at their level to review the entire document, decide what he or she should do at their level, make their decisions, and then forward it up the chain of command. And that way everyone’s rights are protected...” (emphasis added).

By virtue of being appointed as a commander of a military formation, unit, or a number of units, an individual is delegated the authority and responsibility to maintain “good order and discipline” within the

unit. Because the military is hierarchical, each commander from battalion (or equivalent in the Air Force and Navy) up to the President has the authority to review legal proceedings of lower-level commanders within the direct chain-of-command. But the possibility of the exercise of this authority also obliges higher level commanders to allow their subordinates the freedom to enforce military discipline in their units through non-judicial as well as judicial means as an integral power of command.

Command Influence

Examples of undue command influence include: directing or suggesting a particular punishment be imposed or even that a subordinate commander initiate legal proceedings against someone in the command; complaining of “inappropriate” sentences (not severe enough) by courts-martial panels within hearing of future potential panel members; discouraging or impeding in any way the appearance or testimony of witnesses.

Undue command influence must also be excluded in “pre-trial” proceedings such as Article 32 investigations (the Uniform Code of Military Justice’s equivalent of civilian grand jury hearings) and investigations conducted under AR 15-6, the regulation under which MGen Antonio Taguma operated. (This latter regulation “is used as the basis for many investigations requiring the detailed gathering and analyzing of facts, and the making of recommendations based on those facts.” Unless directed by the order that begins an AR 15-6 investigation, sworn statements are not required nor does the investigating officer have subpoena power. However, soldiers suspected of



wrongdoing must be advised of their rights.) The fact that a formal or informal investigation has been started—and any written or oral communication from the officer who orders the investigation—does not and cannot be taken to imply that a regulation has been broken or a crime committed.

Given these constraints, does the Pentagon civilian and military leadership—and the Central Command commander—have an airtight defense in “avoiding undue command influence” as to why they were not more involved sooner? I think not.

Command Responsibility

Two considerations undercut the plea of having to let the system work so as to preclude “undue command influence.” The first is that detailed knowledge of the abuses, which would have revealed (or revealed sooner) the scale and the potential impact of public disclosure of the abuses, might have elicited actions, statements, or communications implying or affirming guilt or wrongdoing by individuals later subject to administrative or legal punishment.

If senior leaders had only what are called “front channel” means of communicating—regular but secure telephones, emails, and general messages—what they said in these messages could become widely known within the military services and create conditions for allegations of undue command influence. But top civilians and generals have what are called “back channels”—special top secret “codeword”—means for sending and receiving messages. These communications are handled by SSOs or Special Security Officers, individuals who are on the personal staffs of commanders. The very tight control over the distribution of messages sent via SSO channels ought to have afforded sufficient guarantee of confidentiality for lower-level commanders to present the explosive nature of the allegations or for the senior leadership to ask for more details.

Second, senior commanders can remove or withhold from a subordinate commander the authority to take action in a particular case (or class of cases). Thus, with sufficient information such as a 15-6 investigation might yield, the Central Command (CENTCOM) commander (four star general) might

decide to initiate an Article 32 investigation (and if warranted to convene a court-martial) at his level rather than leave it to the commander (three star general) of Combined Joint Task Force-7 (CJTF-7).

With regard to SSO channels, it is always possible that even these will become public (as occurred during the 1974 Senate hearings on Watergate and the Secret War in Cambodia), so even here caution has to be exercised. And a case could be made that a senior commander would be signaling a lack of confidence in the impartiality of a subordinate should the senior pull authority to his level.

These would not appear to be insurmountable obstacles to transmitting a sense of urgency, particularly when a third point is considered. The ongoing reports by the International Committee of the Red Cross (ICRC), especially the February 2004 report, ought to have caught the attention of commanders right through to Secretary Rumsfeld and from him to the President. This war was proclaimed to be and justified as an exercise in establishing democracy, human rights, and respect for law in a liberated Iraq. To then have abuses the ICRC labeled “tantamount to torture” occurring in a U.S.-controlled prison “confirms” the image many in the world have of the United States as the real threat to peace, security, and human dignity.

Although not called “command influence,” there is a proper—and very necessary—place for the exercise of command influence as “command responsibility.”

In a formal sense, a commander is responsible for everything members of his command do or fail to do in connection with official duties and orders, explicit and inferred. Realistically, as one moves up the chain-of-command to larger and larger formations, aside from issuing standard operating procedures, specific directives, and orders, command responsibility consists less in direct specific knowledge of what individuals at the lowest level might do or not do and more in (1) the “climate” or “tone” the commander sets for his subordinates and (2) the things the commander reasonably ought to be expected to know were happening. At CJTF-7 and CENTCOM levels, the commanders set the tone and select specific areas to monitor and require their staffs and immediate lower

commanders monitor. These areas will vary with the particular circumstances—combat, reserve, peacetime, etc. Sometimes, however, as in Iraq, the monitoring process doesn't include all areas it should cover or fails to react to reports that, like those of the ICRC, come from non-Pentagon sources.

Secretary Rumsfeld has hinted that some form of compensation may be paid to those who suffered the abuses. But money will not redeem either the ethical lapses or the systemic failures that precluded appreciation of the seriousness of what had occurred among the most senior elected and appointed officials and uniformed officers.

In his 1963 encyclical *"Pacem in Terris"* (Peace on Earth), Pope John XIII wrote that "every fundamental human right draws its indestructible moral force from the natural law, which in granting it imposes a corresponding obligation. Those, therefore, who claim their own rights, yet altogether forget or neglect to carry out their respective duties, are people who build with one hand and destroy with the other."

That this is how countries in the Muslim world and beyond regard the U.S. is not surprising. One can only hope that the White House and the Pentagon have taken the message to heart.

Dan Smith <dan@fcn.org> is a military affairs analyst for Foreign Policy in Focus (online at www.fpif.org), a retired U.S. army colonel and a senior fellow on Military Affairs at the Friends Committee on National Legislation.

ENDNOTES

- ¹ United States v. Thomas, 22 MJ 388, 394 (CMA 1986) held that unlawful command influence was an error of constitutional dimension. Specifically, Thomas applied the test for constitutional error and held that an appellate court may not affirm the findings or sentence "unless it is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command

Published by Foreign Policy In Focus (FPIF), a joint project of the Interhemispheric Resource Center (IRC, online at www.irc-online.org) and the Institute for Policy Studies (IPS, online at www.ips-dc.org). ©2004. All rights reserved.

Foreign Policy In Focus

"A Think Tank Without Walls"

Established in 1996, Foreign Policy In Focus is a network of policy analysts, advocates, and activists committed to "making the United States a more responsible global leader and global partner." For more information, visit www.fpif.org.

Recommended citation:

Colonel Daniel Smith, USA (Ret.), "The Defense of "Command Influence"," (Silver City, NM & Washington, DC: Foreign Policy In Focus, May 18, 2004).

Web location:

<http://www.fpif.org/commentary/2004/0405comminf.html>

Production Information:

Writer: Colonel Daniel Smith, USA (Ret.)

Editor: John Gershman, IRC

Layout: Chellee Chase-Saiz, IRC

p. 3

www.fpif.org

A Think Tank Without Walls

