Of

FAST FACTS

"Command influence" is a term used in military law. It occurs when a judge's boss uses ex parte contacts to influence his or her decisions.

The Uniform Code of Military Justice squarely addresses the problem of command influence, but civilian administrative procedure acts ignore it.

Command influence is rampant in some civilian agencies. It injures countless litigants and gives administrative trials a reputation for unfairness.

The ex parte communications rule in Michigan's Administrative Procedure Act should be amended to prohibit command influence.

Michigan's ex parte law needs reform

off the Record

By Erick Williams

Section 82 of the Michigan Administrative Procedure Act,[1] which forbids ex parte communications in administrative trials, does nothing to combat the scourge of administrative law—pressure from supervisory officials on administrative judges to make politically-correct decisions. Far better tools can be found in the Uniform Code of Military Justice and the Iowa Administrative Procedure Act.

Administrative agencies are characterized by a distinct chain of command, and administrative judges are its captives. Administrative judges have frequent private conversations with their supervisors, they attend staff meetings where their bosses lead discussions about their work, and they receive memoranda in which their bosses give them instructions on how to handle cases. When agency officials put pressure on a judge's boss to affect the decision in a case, or a class of cases, those private conversations, staff meetings, and memoranda become opportunities to put pressure—ex parte—on the judge.

Pressure from supervisory officials on administrative judges to make politically correct decisions, known in military jargon as "command influence," is a hazard to which administrative litigation is uniquely susceptible. Command influence undermines public faith in the fairness of administrative trials and ultimately in the legitimacy of government. Parties facing administrative trials need assurance that their judges will be impartial, and judges, in turn, need protection from command influence.

Section 82 of the Michigan Administrative Procedure Act[2] provides no effective curb on command influence. The loopholes start in the very first sentence, which reads:

> *Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate.*

The first sentence allows non-parties to communicate with administrative judges on issues of law. That exclusion covers a large share of ex parte communications between judges and their bosses. Most supervisors are not "parties" in the cases that judges hear, so the statute permits them to talk with the judge privately about any "legal" issue in a case. The distinction between "fact" and "law" is more academic than real. Lawyers and other clever people can make the same point in either "legal" or "factual" language, as the occasion demands. A supervisor inclined to use command influence on a judge, can find legal cover in the first sentence of Section 82 for any carefully-phrased message.

What the first sentence permits, the third sentence encourages:

> *An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case.*

"Agency members," as long as they do not actually serve as prosecutors or investigators, are altogether exempt from the ex parte prohibition. Under cover of Section 82's third sentence, a judge's boss may speak privately to her, constrained by little more than his sense of ethics.

Supervisory officials who put ex parte pressure on administrative judges to make politically correct decisions are ethically corrupt. The State Bar of Michigan Ethics Committee condemned ex parte communications in a 1993 opinion, RI-166. In that case, a multi-member administrative board was in the business of conducting hearings followed by deliberative meetings. Between the hearing and the deliberative meeting, agency officials routinely inserted new material into the tribunal's files—off-the-record material that the parties had not necessarily seen. Board members were expected to deliberate using the ex parte material. When a member of the board inquired about the ethical propriety of that practice, the Ethics Committee condemned it.

The committee quoted from *Judicial Conduct and Ethics:*

> *Ex parte communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. Ex parte conversations or correspondence can be misleading; the information given to the judge "may be incomplete or inaccurate, the problem can be incorrectly stated." At the very least, participation in ex parte communications will expose the judge to one sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, ex parte communications is an invitation to improper influence if not outright corruption.*[3]

Ex parte contacts are unethical. Ex parte contacts used to influence decisions are downright corrupt. But ethical rules are largely unenforceable, and ethical behavior varies widely from person to person. Any meaningful rule must be statutory.

A statute properly targeting command influence should contain adequate prohibitions and effective means of enforcement (see sidebar). An adequate prohibition must prohibit ex parte attempts to influence decisions in administrative trials and prohibit retaliatory action against a judge based on her decisions. An effective enforcement mechanism would give procedural rights to parties who suspect command influence. Parties need the power to investigate and the right to present evidence outside the hearing record. They need access to a tribunal, separate from the agency, with the power to reverse decisions affected by command influence.

Command influence probably erupts from time to time in all organized judicial systems. Procopius, a sixth-century lawyer, described the phenomenon among Roman magistrates.[4] People with power sometimes use it in devious ways; but when corruption occurs in a judicial system, victims need the tools to smoke it out and correct it. Judicial systems without adequate means to fight command influence develop well-deserved reputations for unfairness.

Military courts have struggled against command influence for a long time, and their efforts to contain the problem deserve attention.

MODEL STATUTORY LANGUAGE

Command influence is ethically corrupt. But in Michigan and other civilian jurisdictions, it is not illegal. An effective prohibition must be statutory. An effective statute must define the problem squarely and provide effective remedies for judges and litigants.

Prohibition of Command Influence

The most articulate statement of the prohibition is Section 37(a) of the Uniform Code of Military Justice:

> Unlawfully influencing action of court—*(a) No authority convening a general, special, or summary court-martial, 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. No person subject to this chapter 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, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.*

Protection of Judges

The best mechanism to protect administrative judges from command influence is in Section 37(b) of the Uniform Code of Military Justice:

> *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.*[1]

Protection of Litigants

The best enforcement mechanism to protect civilian litigants is probably Section 17.7 of the Iowa Administrative Procedure Act:

> *A party to a contested case proceeding may file a timely and sufficient affidavit alleging a violation of any provision of this section. The agency shall determine the matter as part of the record in the case. When an agency in these circumstances makes such a determination with respect to an agency member, that determination shall be subject to de novo judicial review in any subsequent review proceeding of the case.*[2]

Footnotes

1. 10 USC 837 (2001).
2. Iowa Code 17A.17.7 (2001).

In *US v Baldwin*,[5] an Army officer was convicted and sentenced to a year in jail. During her court martial—after the conviction but just before sentencing—the hearing was adjourned while members of the court martial panel went to a staff meeting, convened by the commanding general. At the staff meeting the general announced that recent court martial sentences had been too lenient; officers should always be punished more harshly than enlisted persons; the minimum sentence for a convicted officer should be at least one year in jail. When the panel members returned to court, they sentenced Baldwin to a year in jail.

On appeal, the Armed Forces Court of Appeals found that the commanding general had purposefully designed the staff meeting to influence sentencing decisions by court martial members. The court found a violation of the military's command influence statute[6] and ordered a new hearing on the sentence.

In *US v Youngblood*,[7] a member of the Air Force was convicted on drug charges and discharged. The commanding general held a staff meeting several days before trial in which he made comments on "standards, command responsibility, and discipline." Three members of the court-martial panel were required to attend. The general discussed a recent case where an officer had given a sentence that the general thought was too light. The general quipped that the military career of that officer had "peaked."

One member of the court martial panel (Snyder) said he had been influenced by the general's comments, but figured he could be impartial anyway since he was always under pressure from the general. Mr. Snyder recalled an earlier case in which, after he had rendered a decision that he thought the general would disagree with, he felt it necessary to approach the general and explain his decision. Another member of the panel (Taylor) said she looked to the staff judge advocate (the general's lawyer) for legal guidance and advice, but nonetheless reckoned that responsibility for the final decision was her own. A third member (MacPherson) got the impression that people who made decisions that dissatisfied the general endangered their careers.

During the trial, the defense moved to disqualify Snyder, Taylor, and MacPherson. The trial judge disqualified Snyder but kept Taylor and MacPherson on the panel. On review, the Armed Forces Court of Appeals reversed Youngblood's conviction. The court held that all three members had been subjected to pressure from the general and could not decide the case impartially since they had to consider the potential impact of an acquittal or a light sentence on their own careers.

In *US v McCann*,[8] an Air Force master sergeant was charged with being drunk on duty and with reckless operation of a ground approach facility. During trial, several members of the court-martial panel were required to attend a lecture on military justice sponsored by their commander. The lecturer discussed certain acts of misconduct that he characterized as being more reprehensible in the military than civilian society. One illustration of his point was the very case on trial. The Air Force Court of Military Appeals reversed the conviction. The court found that the lecture was an improper influence.

While military courts sometimes reverse on the issue of command influence, the civilian sector has yet to recognize the problem. In *Latessa v New Jersey Racing Commission*,[9] the executive director of the New Jersey Racing Commission fired the presiding judge at the Meadowlands Race Track. The executive director had a practice of delivering ex parte messages to judges during trials, instructing them to impose stiff penalties in horse doping cases. Latessa complained to the New Jersey Office of Administrative Law about the executive director's interference in his trials, and he found himself on the executive director's blacklist. When his contract came up for renewal, Latessa was not rehired, and he filed a lawsuit.

Latessa's legal case was crippled by the fact that New Jersey has no law prohibiting ex parte communications in administrative trials. Of Latessa's several claims, the only one that survived summary judgment was a First Amendment claim based on the allegation that the executive director had retaliated against him for complaining to the Office of Administrative Law.

Harrison v Coffman[10] involved a worker's compensation judge in Arkansas. Her supervisor, the head of the Worker's Compensation Commission, wanted her to deny claims more frequently. When she failed to comply, she was fired. The head of the commission had himself been under pressure from the governor and the employer's lobby, who branded Judge Harrison as a "liberal," biased toward employees. In a conversation with Harrison's father (also a judge), the head of the commission reportedly delivered a threat, warning that her job was in jeopardy because of employer opposition.

After she was fired, Harrison filed a lawsuit in federal district court. The district judge did a lot of hand-wringing; there were no precedents protecting judges from the sort of threats and retribution to which Harrison was exposed. Arkansas had a law prohibiting ex parte communications, but the law had a loophole exempting communications from "agency members."[11] In an attempt to give Harrison some justice, the district court found a cause of action in the First Amendment.

The real problem in *Harrison* and *Latessa* was wider and more serious than the predicaments of individual judges. In each case, agency managers were using pressure on judges to produce political decisions, a practice that affected every litigant before the agency. First Amendment remedies do not begin to reach the magnitude of that injustice.

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If the Arkansas Worker's Compensation Commission or the New Jersey Racing Commission had been military commands, Judges Harrison and Latessa would have been protected from retaliatory dismissal, and each party with a case before the agency would have had a chance to discover evidence of command influence. Affected parties would have been given rehearings or even reversals. Since the agencies were governed by civilian administrative procedure acts, the law was less than helpful.

Nash v Califano[12] and its companion case, *Nash v Bowen*,[13] were feeble attempts to address the command influence issue with the inadequate tools of the Administrative Procedures Act. During the 1970s, the Social Security Administration monitored the rate at which judges were reversed. Judges reversed in more than 50 percent of their cases were "counseled." An administrative law judge filed suit against the practice. In a 1980 opinion denying the SSA's motion to dismiss, the second circuit made a creative interpretation of the federal Administrative Procedure Act. The court found that the "judicial independence" of administrative judges deserved protection so as to maintain public confidence in the fairness of administrative trials. The court's reasoning was sound, but its argument was improvised, and therefore vulnerable, because the Administrative Procedure Act says nothing about "judicial independence."

The unstable sands of statutory interpretation shifted when the case returned to the second circuit on merits, after eight years of litigation. A 1988 panel of the second circuit found that the SSA had not infringed "judicial independence" because the agency had not put "direct pressure" on its judges to maintain a "fixed percentage" of reversals.[14]

In the *Nash* opinions, the court of appeals tried to reach the real issue—command influence—but found nothing solid on which to ground a decision. The 1980 panel relied on a principle of judicial independence that was not in the APA. The more conservative 1988 panel discovered a narrow definition of judicial independence that was not in the act, either.

In the absence of statutory language, courts can rule any way they want, and agencies can do anything they want. Some agencies have launched whole campaigns of command influence. The Bellmon Review cases arose in the Social Security Administration during the 1980s. The SSA reacted to political pressure from Congress and the White House to reduce the numbers of people who qualified for disability benefits. In its campaign to reduce benefit awards, the SSA sent letters to administrative law judges warning that the practice of liberally granting benefits was politically untenable; in the future, opinions granting benefits would be scrutinized for errors, and judges who granted too many benefits would be disciplined and possibly fired. Subsequently, the SSA targeted the 100 most liberal judges for intense review. They were summoned to a series of individual ex parte meetings and subjected to memos in which their bosses criticized their opinions. The practice provoked a storm of protest from people inside and outside the agency. After the program had been running for some months, the SSA declared victory, announced that the award rate had dropped, and ended the campaign. By the time a lawsuit filed by a group of administrative law judges reached the courts, the issue was moot.[15]

Perry v McGinnis[16] and *Heit v VanOchten*[17] arose in the Michigan Department of Corrections.[18] Everett Perry handled prisoner misconduct cases, the trials of prisoners charged with violating institutional rules. The corrections department expected judges to convict in 90 percent of their cases and took steps to enforce that quota. Statistical reports showing the conviction records of individual judges were circulated to the staff. Judges were told to disbelieve the testimony of prisoners when it conflicted with the testimony of guards.

Perry, whose conviction rate was closer to 80 percent, became the target of a lobbying campaign. Guards and wardens peppered his supervisors with memos and phone calls, accusing him of being "the prisoners' friend," "believing that guards always lie" and "taking the word of prisoners over guards." To mollify the custodial staff, Perry's bosses subjected him to special scrutiny and flyspecked his opinions looking for defects. They concluded that Perry was biased toward prisoners. To bring Perry's conviction rate above 90 percent and stop the guards from complaining, his boss summoned him to a series of ex parte meetings and handed him several ex parte memoranda criticizing his opinions. When those efforts failed, Perry was fired.

> Laws can not forever put an end to such abuses of power, but we can sharpen Section 82 so that victims have better tools with which to protect themselves.

Perry's lawsuit reached the Sixth Circuit Court of Appeals. In *Perry v McGinnis*,[19] the court denied the government's motion to dismiss and remanded the case for trial. In passing, the court touched the right issue—the unfairness of an adjudicatory scheme that imposed a conviction quota. But the court could not ground its formal holding on command influence or anything like it. The court's formal holding focused on Perry's First Amendment right to express himself. Like the courts in *Nash*, *Latessa*, and *Harrison*, the *Perry* court could not find solid law on the core issue because command influence is—in effect—legal in Michigan.

When a group of prisoners heard about the quota system, they sued the corrections department (*Heit v VanOchten*[20]) alleging deprivation of their rights to fair trials. After several years of litigation, the corrections department settled the *Perry* and *Heit* cases, agreeing to abolish the quota system, abandon the informal practice of automatically taking a guard's word over a prisoner's, and forbid guards from sending messages to judges' supervisors. The department, however, reserved the right to discuss decisions in particular cases at staff meetings and training sessions.[21]

The remedy was not complete. In the years between the discharge of Perry and the litigation's settlement, judges in the corrections department had tried hundreds of thousands of misconduct cases, all affected by the quota system. Nothing was done to reverse or even investigate the effect of command influence on those decisions. As for the future, if supervisory officials take full advantage of their freedom to discuss cases with judges during staff meetings and training sessions, the pressure on judges to convict may continue indefinitely.

The Bellmon Review cases and the *Perry* litigation show that command influence, unrestrained, can affect all litigation in an agency and create countless victims. Such schemes give administrative trials a reputation for unfairness.

Command influence attacks the impartiality of administrative judges and makes administrative trials unfair. Laws can not forever put an end to such abuses of power, but we can sharpen Section 82 so that victims have better tools with which to protect themselves. ✦

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Footnotes

1. MCL 24.282; MSA 3.560(182).
2. MCL 24.282; MSA 3.560(182).
3. Shaman Lubet & Alfini (Charlottesville, Michie, 1990), pp 149–150.
4. Procopius, *Secret History* (Ann Arbor Paperbacks, 1973).
5. *US v Baldwin*, 54 MJ 308 (Armed Forces Ct of App, 2001).
6. 10 USC 837.
7. *US v Youngblood*, 47 MJ 338 (Armed Forces Ct of App, 1997).
8. *US v McCann*, 8 USCMA 675 (Ct Mil App, 1958).
9. *Latessa v New Jersey Racing Commission*, 113 F3d 1313 (CA 3, 1997).
10. *Harrison v Coffman*, 35 F Supp 2d 722 (ED Ark, 1999); 111 F Supp 2d 1130 (ED Ark, 2000).
11. Ark Stat Ann 25-15-209(b)(1).
12. *Nash v Califano*, 613 F2d 10 (CA 2, 1980).
13. *Nash v Bowen*, 869 F2d 675 (CA 2, 1988).
14. *Nash v Bowen*.
15. *AALJ v Heckler*, 594 F Supp 1132 (DC District Ct, 1984). Jerry L. Mashaw, Bureaucratic Justice (New Haven: Yale University Press, 1983).
16. *Perry v McGinnis*, 209 F3d 597 (CA 6, 2000).
17. *Heit v VanOchten*, WD Mich Southern Div, Case No 1:96-CV-800.
18. Also see, "Amicus Curiae Brief of the Michigan Association of Administrative Law Judges in Support of Appellant," filed 2 December 1994, in *Perry v Dept of Corrections*, before the Michigan Department of Civil Service, Case HERM 166-94, Docket No. 15332. "Amicus Curiae Brief in support of Everett Perry," filed 21 December 1998, in *Perry v McGinnis*, before the US Court of Appeals for the Sixth Circuit, Case No. 98-1607.
19. *Perry v McGinnis*, 209 F3d 597 (CA 6, 2000).
20. *Heit v VanOchten*, WD Mich Southern Div, Case No 1:96-CV-800.
21. *Heit v VanOchten*, Judgment, Opinion, and Settlement Agreement, 8 Jan 2001.