



Article 37, Command Influence FY20 NDAA Changes

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Agenda

- What has not changed
- What has changed
 - Additional protections
 - Convening authority and command authorities
 - Burden
- Significance and Impact
- Questions and Discussion





General Overview of Changes

- It is more detailed.
- New title to reflect broader purpose. Leaders know what they can and can not do.
- It is only applicable to allegations of UCI committed on or after 20 December 2019 (FY 2020 NDAA, § 532).





§837. Art. 37. Unlawfully influencing action of court (2016)

(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.

(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 accused before a court-martial.





§837. Art. 37. Command influence (2019)

(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 information 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;

§837. Art. 37. Command influence (2019) (Continued)

(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.

§837. Art. 37. Command influence (2019) (Continued)

(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 the authority to dispose of the offenses.





Actual Unlawful Command Influence Unchanged

- Convening authorities and commanders cannot censure, reprimand, or admonish the court, members, military judge, or counsel for findings, sentence, or other exercises of judicial functions
- No person subject to the UCMJ may attempt to coerce or by unauthorized means influence the action of a court-martial or any member in reaching findings or sentence (“attempt” applies to both coercion and influencing by unauthorized means)
- No person subject to the UCMJ may consider performance of duty as a court-martial member or as counsel *of any person in a court-martial proceeding in* preparing an evaluation for consideration for promotion, assignment, or continued service
- “Accusatory UCI”: Art. 22(b) still prohibits a convening authority from being the accuser





... **AND** strengthened

- Codification of case precedent prohibiting convening authorities and commanding officers from impeding defense access to witnesses
- Inclusion of Art. 32 preliminary hearing officer as being protected from coercion
- SVCs receive same protections as defense counsel: Protected from adverse evaluations, promotions, assignments, etc., based on zealous representation of a victim





§837. Art. 37. Command influence (2019)

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(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 information 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;

§837. Art. 37. Command influence (2019) (Continued)

(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.

§837. Art. 37. Command influence (2019) (Continued)

(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 the authority to dispose of the offenses.





What has changed: convening authority and command authorities

- Expands the types of communications excluded from definition of unlawful command influence:
 - Art. 37(a)(5)(A)(i): A superior may generally discuss matters to consider with a subordinate regarding a disposition decision
 - Art. 37(a)(5)(A)(i): A subordinate can seek a superior's advice regarding a disposition decision
- KEY: The changes encourage discussion, but a superior cannot direct a particular disposition or substitute the subordinate's discretion (accusatory UCI)
- Art. 37(d): Codifies R.C.M. 306(a); superiors can withhold disposition authority, but cannot limit or direct a subordinate's exercise of authority in cases not withheld





Convening and Command Authorities

Conduct that does not constitute UCI includes 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[.]

Conduct that does not constitute UCI includes a superior convening authority or officer generally discuss[ing] matters to consider regarding the disposition of alleged violations of this chapter with a subordinate convening authority or officer;

Conduct that does not constitute UCI includes a subordinate convening authority or officer seeking advice from a superior convening authority or officer regarding the disposition of an alleged offense under this chapter.

***Superiors may withhold disposition authority, but cannot limit or direct a subordinate's exercise of authority in cases not withheld. (codified in (d)(1))**

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.

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MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHIEFS OF THE MILITARY SERVICES
COMMANDERS OF THE COMBATANT COMMANDS

The military justice system is a powerful tool that preserves good order and discipline while protecting the civil rights of Service members. It is a commander's duty to use it. Military leaders must not interfere with individual cases, but fairness to the accused does not prevent military officers from appropriately condemning and eradicating malignant *behavior* from our ranks. Leaders must be willing to choose the harder right over the easier wrong. Administrative actions should not be the default method to address illicit conduct simply because it is less burdensome than the military justice system. Leaders cannot be so risk-averse that they lose their focus on forging disciplined troops ready to ferociously and ethically defeat our enemies on the battlefield. – Secretary of Defense James Mattis

We have no God-given right to victory. Discipline is a competitive edge we must seek and maintain each day if we are to keep America safe from its enemies. As General Washington learned first-hand, discipline will make us stronger and more lethal. Therefore, let *nothing* prevent us from becoming the most disciplined force this world has ever known.

cc:
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Apparent unlawful command influence

United States v. Boyce, 76 M.J. 242 (C.A.A.F. 2017)

- Lt. Gen. Franklin: AF Convening Authority who set aside conviction of Lt. Col. Wilkerson, leading to Congress curtailing CA action over findings in most cases, as well as numerous public comments condemning Lt. Gen. Franklin.
- As he's preparing to refer Boyce's cases, he is given an unrelated ultimatum from SECAF: retire or be fired. Two weeks later, he referred the charges. Three weeks later, he announced his retirement.
- Both trial court and AFCCA find no UCI, because the Gov't demonstrated that Lt. Gen. Franklin made his referral decision independent of any action by AF leadership and AF leadership had no knowledge of Boyce's case.





Apparent Unlawful Command Influence

- CAAF Majority Opinion:
 - No actual UCI. “there is no reasonable likelihood that a different convening authority standing in the shoes of Lt. Gen. Franklin would have made a different referral decision.”
 - But . . . there was an appearance of UCI, because “an objective, disinterested observer with knowledge of all the facts would harbor a significant doubt about the fairness of the court-martial proceedings.”
- CAAF Dissent:
 - Judge Stucky: “It is difficult to understand how an objective, disinterested, fully informed observer, knowing that there is no actual unlawful influence, ‘would harbor a significant doubt about the fairness of the proceeding.’”
 - Judge Ryan: Art. 59(a) requires prejudice to the accused to grant relief. No prejudice = no relief. “I posit that Congress had good reason to tether appellate relief to Article 59(a)'s requirement of prejudice to the accused[.]”





Burden Change: *Apparent* Influence

- The most significant change to Art. 37
- Previous requirement: “an intolerable strain upon the public’s perception of the military justice system and that an objective observer, fully informed . . . would harbor significant doubt about fairness”
 - No requirement to show prejudice to the Accused prior to 20 Dec 19





Burden Change: *Apparent* Influence

NEW ARTICLE 37 LANGUAGE

- “(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.”





- Follows Art. 59(a) language that places burden on accused to demonstrate prejudice, consistent with current actual UCI doctrine. See *Boyce*, 76 M.J. at 248
 - (a) facts, which if true, constitute unlawful command influence;
 - (b) the court-martial proceedings were unfair to the accused (i.e., the accused was prejudiced); and
 - (c) the unlawful command influence was the cause of that unfairness.”
- Relief *no longer available* based on “the damage to the public's perception of the fairness of the military justice system as a whole and not the prejudice to the individual accused.” Boyce, 76 M.J. at 248





Significance and Impact (Summary)

- Accused's protections from *actual unlawful* command influence maintained and strengthened (e.g., defense access to witnesses, protection of the PHO from coercion, encompass SVC)
- Commanders are an integral part of the military justice system; they are permitted to mentor subordinates and place command emphasis on malignant behavior that is incompatible with military service, but must maintain independent decision making boundaries
- Military justice advisors must be able to articulate to commanders at all levels the difference between appropriate command involvement in the military justice system and unlawful influence
- How will the courts handle the new statutory language?





QUESTIONS AND DISCUSSION

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