

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLOR, POND, and COOPER
Appellate Military Judges

UNITED STATES, Appellee
v.
Master Sergeant ROBERT A. MARSHALEK
United States Army, Appellant

ARMY 20240324

Headquarters, Fort Bragg
John H. Cook, Military Judge
Colonel Susan K. McConnell, Staff Judge Advocate

For Appellant: Major Beau O. Watkins, JA (argued); Colonel Philip M. Staten, JA;
Major Beau O. Watkins, JA; Captain Amber L. Bunch, JA (on brief).

For Appellee: Captain Matthew C. Whear, JA (argued); Colonel Richard E. Gorini,
JA; Major Stephen L. Harmel, JA; Captain Matthew C. Whear, JA (on brief).

28 September 2026

OPINION OF THE COURT

POND, Senior Judge:

A panel of officers and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of willfully disobeying a lawful order in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 [UCMJ], and sentenced appellant to be reduced from the grade of E-8 to E-7.¹

This appeal raises two issues. First, whether the military judge abused his discretion in granting defense counsel's request to withdraw over appellant's objection. Second, whether unlawful command influence occurred in violation of Article 37, UCMJ. Addressing the second issue requires this court to determine the scope of its review in light of Congress's amendment to Article 37, UCMJ; namely,

¹ The panel acquitted appellant of eight specifications under six other UCMJ charges, including charges of sexual assault and domestic violence.

whether apparent unlawful command influence continues as a basis for relief under the revised statutory provision. We hold it does not. Because we find no violation of Article 37, UCMJ, and no abuse of discretion by the military judge in granting defense counsel's request to withdraw, we affirm the findings and sentence.²

BACKGROUND

Appellant's two assignments of error stem from the same course of events, about which the military judge made extensive and well-supported findings of fact. Neither party challenges these findings of fact, which we adopt and summarize below.

In pretrial litigation related to a discovery motion, appellant's lead military defense counsel alleged an ethical violation against the prosecution. The prosecution included a special trial counsel and a trial counsel from 1st Special Forces Command (Airborne) (1st SFC(A)).³ The parties litigated the discovery motion during an Article 39(a) session on Friday, 9 February 2024. Afterwards, the prosecution considered raising their own ethical allegations against the lead defense counsel. The substance of the parties' respective ethical claims is not relevant to this appeal.⁴ On the other hand, the subsequent events following this litigation are.

The following Monday, the Staff Judge Advocate (SJA) for 1st SFC(A) learned of the prosecution's potential ethical claim, which, if filed, would result in dueling ethical claims between his trial counsel and the lead defense counsel, who was slated to be assigned to his legal office that summer after appellant's trial. Anticipating that resolving any such claims would take several months and could be "quite emotional," the SJA began to weigh the future placement of personnel within the legal office. Having heard that the lead defense counsel wanted to serve a third year in Trial Defense Services (TDS), the SJA also reviewed her assignment preference sheet, noting that she had listed 1st SFC(A) last on her list of "dream jobs." But having previously served as a defense counsel, the SJA understood and valued the sanctity of TDS independence. He remarked to his Deputy SJA, "well, if [the lead defense counsel] didn't want to come here, she's coming here now." This

² We have considered the matters personally submitted under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and determine they merit neither discussion nor relief.

³ Although the case was not referred by 1st SFC (A), that Office of the Staff Judge Advocate was responsible for detailing trial counsel to any military justice case arising within the Special Operations Force enterprise, including appellant's unit, U.S. Army Special Forces Command.

⁴ The defense later withdrew the ethical violation claim against the prosecution. The prosecution never filed their claim.

statement reflected the SJA's awareness that any change to her scheduled assignment to 1st SFC(A) after recent litigation could be perceived as improper interference in appellant's case. Thus, as the military judge found, the SJA knew he could not and should not do anything to influence or appear to influence the lead defense counsel's assignment.⁵ At the same time, given her preference sheet and word that she might remain in TDS, there was a possibility the lead defense counsel herself desired a different assignment. The SJA felt he needed clarification of the lead defense counsel's desires as well as guidance. He thought it would be beneficial to engage a captains' assignments officer at The Judge Advocate General's Personnel, Plans, and Training Office (PPTO) for advice, both because PPTO manages assignments for JAG Corps personnel and because the SJA was certain that this was not the first time an issue like this had arisen.⁶

On Tuesday, 13 February 2024, the Deputy SJA, acting at the direction of the SJA, contacted the captains' assignments officer and relayed the basic facts to include the potential dueling ethical allegations. Viewing the situation as "an immature fact pattern" that would continue to evolve, the assignments officer focused on confirming the lead defense counsel's assignment preference. He decided to reach out to her supervisor, the regional defense counsel (RDC), with whom he had spoken on several occasions. In fact, just three weeks prior, the RDC had approached the assignments officer inquiring about whether the lead defense counsel could stay for a third year in TDS. Following his call with the Deputy SJA, the assignments officer placed a video call to the RDC on Microsoft Teams with the goal of determining the lead defense counsel's assignment preferences. As the assignments officer tried to explain the purpose of the call, the RDC became visibly upset. The military judge found the RDC "immediately and inaccurately perceived the call as an attempt to interfere with [the lead defense counsel] getting a good job." The RDC stated, "this is inappropriate" and "this is UCI." The call ended with the assignments officer assuring the RDC that the lead defense counsel "still had the job" at 1st SFC(A) and the RDC agreeing to confirm the lead defense counsel's desires. Taken aback by the RDC's reaction, the assignments officer immediately informed the Chief, PPTO, who was The Judge Advocate General's delegated authority to assign company grade officers in the U.S. Army JAG Corps. The Chief, PPTO responded, "if [the lead defense counsel] wants Special Forces Command, she gets Special Forces Command."

The RDC notified the lead defense counsel of the phone call and memorialized PPTO's phone call in a memorandum for record, which he also

⁵ The military judge, who had the benefit of observing the in-court testimony of all witnesses, found the SJA "testified credibly in all respects."

⁶ The captains' assignments officer was responsible, in coordination with SJAs and other supervisors, for making recommendations for the slating of company grade judge advocates in the U.S. Army and managing their assignments.

provided to the lead defense counsel. In the memorandum for record, the RDC wrote the assignments officer “expressed a concern to me that because of the tension created by [the lead defense counsel’s] defense of her client that perhaps she would prefer a different assignment.” In a conversation the following day, the SJA told the RDC, “my express intent was not to have her redirected” and offered to call the lead defense counsel directly to let her know she was “still coming” to 1st SFC(A). The RDC declined the offer but conveyed the SJA’s assurances to the lead defense counsel, stating “they still want you.”⁷ About a week later, on 21 February 2024, the lead defense counsel, after consulting with her technical chain of command and an ethics counselor with her state bar, moved to withdraw as counsel from appellant’s case. At the time of the filing, she had served for over six months as lead military defense counsel and performed 215 hours of work on the case. On 21 February 2024, the defense also filed a motion to dismiss for unlawful command influence in violation of the Fifth Amendment’s right to due process, the Sixth Amendment’s right to counsel, and Article 37, UCMJ.

In an Article 39(a) session on 29 February 2024, the military judge heard the lead defense counsel’s motion to withdraw, which alleged a conflict of interest between appellant’s interest in having a zealous advocate and counsel’s personal interest in her future assignment and career in the Army JAG Corps, a conflict she stated arose from PPTO’s phone call to her RDC. The lead defense counsel attested her continued representation of appellant would be “dampened and affected by the fear of what could happen to her career standing” and to her reputation with mentors and senior leaders whom she greatly respected, to include those who recommended her for assignment to 1st SFC(A). The military judge then asked the defense counsel:

Are you telling the Court that you reasonably believe that your perceived conflict of interest between your own interests, as it relates to your next assignment, and your client’s interest in having you represent and zealously advocate for him at this court-martial, will adversely affect the quality of representation you provide for him, if you remain as one of his detailed counsel?

And:

Are you telling the Court, that your perceived conflict of interest between your personal interests and those of your client, constitute a truly extraordinary circumstance

⁷ Because captains do not normally contact PPTO directly but communicate their assignment preferences through their supervisors, the lead defense counsel’s primary source of information about her assignment was her RDC.

rendering virtually impossible, the continuation of the established attorney-client relationship between the two of you?

The lead defense counsel answered “yes” to both questions.⁸

After confirming appellant’s other detailed counsel was conflict-free, the military judge asked appellant whether he consented to releasing the lead defense counsel voluntarily. Appellant replied, “Sir, I do not wish to do that.”

Over appellant’s objection, the military judge released the lead defense counsel, finding as fact that she “genuinely, and reasonably, believe[d] that her representation of [appellant] [would] be materially affected by a conflict with her own personal interests,” and that she “perceive[d] a conflict between her personal interests and those of [appellant].” The military judge found “the situation constitutes a truly extraordinary circumstance rendering the continuation of the established attorney-client relationship” between the lead defense counsel and appellant “virtually impossible.”

About three weeks later, the military judge heard appellant’s motion to dismiss for unlawful command influence. During the Article 39(a) session, appellant was represented by newly retained civilian defense counsel along with a detailed military defense counsel.⁹ The military judge heard testimony from numerous witnesses, including the former-lead defense counsel, the SJA and Deputy SJA of 1st SFC(A), the assignments officer, and the RDC. Afterwards, the military judge issued his written ruling determining the lead defense counsel’s motion to withdraw was not caused by the Government but rather was based on a faulty, albeit honest, subjective belief of a conflict of interest, which was premised on her RDC’s misperceptions. The military judge found the evidence refuted this subjective belief, in several key regards:

(1) The lead defense counsel mistakenly believed 1st SFC(A) wanted to cancel her assignment when they called PPTO. To the contrary, the military judge found the SJA and DSJA, 1st SFC(A), had no intent to influence the lead defense counsel’s assignment when they contacted PPTO nor did the assignments officer when he contacted the lead defense counsel’s RDC. Rather, “through a tragic game of telephone, [the RDC] misinterpreted the call from [the assignments officer] as something that it was not” and “then exacerbated the tragedy by passing on his

⁸ Given that the motion concerned solely lead defense counsel’s “subjective perceptions and feelings,” the military judge “did not permit the Government to be heard on the withdrawal motion.”

⁹ The civilian defense counsel continued to represent appellant through trial along with a different detailed military defense counsel.

misperceptions to [the lead defense counsel].” The situation was further compounded when the RDC declined offers from the SJA and others to speak to the lead defense counsel directly to convey assurances that her assignment to 1st SFC(A) remained unchanged.

(2) The lead defense counsel mistakenly believed 1st SFC(A) would want to cancel her assignment if she remained on the case. To the contrary, the military judge found her continued representation of appellant would have had no adverse effect on her immediate, future assignment to 1st SFC(A). The SJA and Deputy SJA, both of whom had previously served as defense counsel, credibly testified that they valued zealous advocacy by defense counsel and had no concerns about the lead defense counsel’s advocacy on behalf of appellant. Furthermore, the Chief, PPTO had already guaranteed her assignment when he said, “if [the lead defense counsel] wants 1st Special Forces Command, she gets 1st Special Forces Command.”

(3) The lead defense counsel mistakenly believed the matter would continue to negatively affect her reputation and evaluations at 1st SFC(A). The military judge found this possibility “extremely remote,” “wildly speculative,” and based on an unsupported assumption that future raters would breach their regulatory duty under Army Regulation 623-3, Evaluation Reporting System (14 June 2019), to rate an officer’s performance objectively and fairly.¹⁰

(4) The lead defense counsel mistakenly believed the matter would quietly linger in the form of her broader reputation in the JAG Corps, which could affect her future assignments and career progression. The military judge also found this possibility “extremely remote,” “wildly speculative,” and contrary to evidence before the court. “This event did not affect her reputation in [the assignments officer’s] eyes. Nor is there any evidence in this record that it has affected her reputation in anyone else’s eyes.”

The military judge noted trial was still three months away and there was “no impediment to her returning to the defense team to see this case through to completion” should the lead defense counsel’s subjective feelings change about her perceived conflict of interest.¹¹

¹⁰ If the lead defense counsel had any lingering doubts, the military judge noted that both the SJA and Deputy SJA, 1st SFC(A) were also slated to have a permanent change of station in their duties that summer, minimizing their time in the former lead defense counsel’s rating chain.

¹¹ During the Article 39(a) session to litigate the motion to dismiss, the military judge noted that there was nothing stopping the lead defense counsel from “having a change of heart,” but it was not in his power to order her back to the defense team.

Turning to Article 37, UCMJ, the military judge determined appellant had failed to establish the low threshold of a *prima facie* claim of either apparent or actual unlawful command influence. He based this determination on the finding that no person subject to the UCMJ had attempted to coerce or influence the lead defense counsel's assignment to 1st SFC(A):

(1) The SJA, 1st SFC(A), never had any intention of influencing the lead defense counsel's assignment directly or indirectly. In directing his deputy to call PPTO, he was simply seeking to clarify the lead defense counsel's desires and to obtain guidance on how best to deal with possible dueling ethical complaints within his office.¹²

(2) The Deputy SJA, 1st SFC(A), neither asked the assignments officer for anything nor stated she did not want the lead defense counsel to be assigned to 1st SFC(A). She, like her SJA, was only seeking guidance, not action to influence the counsel's assignment.

(3) The assignments officer, who interpreted the Deputy SJA's call for what it was—a request for guidance and not action to influence anyone's assignment—focused his efforts on the counsel's desires rather than on determining the validity of any of the ethical allegations on either side. His concern and subsequent call to the RDC was squarely within his duties as an assignments officer and was a reasonable course of action given that the RDC had just three weeks prior inquired about the possibility of the lead defense counsel staying in TDS for a third year.

Finding the above, the military judge denied appellant's motion to dismiss for unlawful command influence. On appeal, appellant challenges this ruling along with the military judge's decision to grant the lead defense counsel's motion to withdraw.

LAW AND DISCUSSION

A. Defense Counsel's Request to Withdraw

We review a military judge's decision to grant a counsel's request to withdraw for abuse of discretion. *United States v. Watkins*, 80 M.J. 253, 257 (C.A.A.F. 2020). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008). "An abuse of discretion must be more

¹² Although the SJA, 1st SFC(A), initially held potential concerns about the lead defense counsel's judgment, which were later shown to be based on misinformation, he intended to eventually discuss the matter with the RDC, not PPTO.

than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.” *United States v. Shields*, 83 M.J. 226, 230 (C.A.A.F. 2023) (citation modified).

“The right to counsel of choice under the Sixth Amendment, as well as under the UCMJ, is not absolute.” *United States v. Rhoades*, 65 M.J. 393, 394 (C.A.A.F. 2008); *see also Wheat v. United States*, 486 U.S. 153, 159 (1988) (stating, e.g., a defendant does not have a right to counsel he cannot afford or who is not admitted to the bar); Article 38(b)(3), UCMJ (an accused is entitled to military counsel of his choice “if reasonably available.”). Correlative to the Sixth Amendment’s right to counsel is the “right to representation that is free from conflicts of interest.” *United States v. Lee*, 66 M.J. 387, 388 (C.A.A.F. 2008) (quoting *Wood v. Georgia*, 450 U.S. 261, 271 (1981)). Although an accused “can waive his right to conflict-free counsel,” *United States v. Davis*, 3 M.J. 430, n.16 (C.M.A. 1977), a military judge retains “substantial latitude in deciding whether to accept the waiver.” *Roades*, 65 M.J. at 395; *see also Wheat*, 486 U.S. at 163. This broad discretion allows courts to refuse waivers “not only in those rare cases where an actual conflict” is shown before trial, “but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.” *Wheat*, 486 U.S. at 163.

This discretion is reflected in the Rules for Courts-Martial (R.C.M.), which provide that once an attorney-client relationship is formed, it can be severed in only limited circumstances. Rules for Courts-Martial 505(d)(2)(B) and 506(c) authorize four options: (1) excusal of defense counsel with the accused’s express consent; (2) excusal upon appointment of individual military counsel; (3) excusal by the detailing authority for good cause shown on the record; and (4) *excusal by the military judge* upon application for withdrawal for good cause.¹³ Rule for Courts-Martial 505(f) defines “good cause” as “physical disability, military exigency, and”, relevant here, “other extraordinary circumstances which render [the defense counsel] unable to proceed with the court-martial within a reasonable time.” Good cause “does not include temporary inconveniences which are incident to normal conditions of military life.” *Id.*; *see also United States v. Iverson*, 5 M.J. 440, 442-43 (C.M.A. 1978) (“Absent a truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship, only the accused may terminate the existing affiliation with his trial defense counsel prior to the case reaching the appellate level.”).

Courts have generally found good cause to sever an attorney-client relationship under R.C.M. 506(c) when there is a conflict of interest. *See, e.g., United States v. Saenz*, 18 M.J. 327, 329 (C.M.A. 1984) (identifying a conflict of

¹³ All references to the rules for courts-martial are to the *Manual for Courts-Martial, United States* (2024 ed.), unless otherwise noted.

interest as basis for “good cause”); *United States v. Kokuev*, 77 M.J. 531, 539 (N.M.C.C.A. 2017) (“this court has recognized that ‘good cause’ includes instances where there is a conflict of interest or breach of ethical duties”); *United States v. Hardy*, 44 M.J. 507 (A.F.C.C.A. 1996) (holding that when an attorney reasonably believes a perceived conflict will adversely affect the quality of his or her representation, the attorney has good cause to sever the relationship, even against the client’s wishes); see also *Iverson*, 5 M.J. 440, 445-46 (C.M.A. 1978) (Cook, J., concurring) (“‘good cause’ means that the circumstances make termination of an existing attorney-client relationship reasonable and the termination presents no reasonably foreseeable harm to the accused”).

Conflicts of interest fall under the standards delineated by the Army’s rules of professional responsibility. These rules provide that a lawyer shall not represent a client if the representation involves “a concurrent conflict of interest” which exists if “there is significant risk that the representation of one or more clients will be materially limited by,” among other things, “a personal interest of the lawyer.” Army Reg. 27-26, Rules of Professional Conduct for Lawyers, Rule. 1.7 (28 June 2018). A lawyer may represent the client if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation.” Otherwise, the lawyer ordinarily must seek to withdraw from the representation. *Id.*, Comment: General Principles to Rule 1.7.¹⁴

The question before this court is whether the military judge abused his discretion in granting the motion to withdraw based on the lead defense counsel’s perceived conflict of interest. Whether a conflict of interest exists is a mixed question of fact and law. *United States v. Best*, 61 M.J. 376, 381 (C.A.A.F. 2005).

Appellant argues that if this court were to determine that there was no unlawful command influence, then inherently, there was no good cause to grant the defense counsel’s motion to withdraw. We are, however, persuaded by the opinion of our sister service court in *Hardy*. There, the court found “the correct standard to apply” in reviewing whether an attorney’s own interest could sever the attorney-client relationship “is not whether there is proof of actual conflict of interest; rather, it is *what [the attorney] believed.*” *Hardy*, 44 M.J. at 510 (emphasis in original). In that case, appellant’s attorney believed successful representation required alleging that his current supervisor, who previously served as the appellant’s defense counsel, was ineffective. Consequently, the attorney believed his personal interest in not attacking his boss would materially affect the quality of his representation. The court concluded that because the effectiveness of the attorney’s representation “is materially affected *by his perception* . . . regardless of whether that perception

¹⁴ A superseding version of Army Reg 27-26 was issued after appellant’s trial. See Army Reg. 27-26, Rules of Professional Conduct for Lawyers (26 March 2025). The provisions cited above remain unchanged.

proves true,” the attorney had good cause to sever the relationship, even without the client’s consent. *Id.* (emphasis in original). We find this reasoning persuasive.

In appellant’s case, the military judge considered the lead defense counsel’s attestations about the conflict of interest. Such statements are “virtually made under oath,” given both the seriousness of their attestations and counsel’s status as an officer of the court. *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978). We also note the lead defense counsel’s subjective belief was not unreasonable given it was based on information provided to her by the RDC, who misinterpreted the impetus of PPTO’s call as the lead defense counsel’s zealous advocacy rather than the potential dueling ethical allegations.¹⁵ While the RDC’s perception of the call was later proven incorrect, the lead defense counsel did not know that at the time nor did the military judge.

Appellant argues that had the military judge allowed the government to call relevant witnesses before granting the motion to withdraw, he would have correctly balanced appellant’s right to counsel and denied the lead defense counsel’s request. We find, however, no abuse of discretion in the military judge’s handling of the motion to withdraw or the order in which he decided the motions. The President has granted military judges the broad authority to “exercise reasonable control over the proceedings,” including control over “when, and in what order, motions will be litigated.” R.C.M. 801(a)(3) and Discussion; *see also United States v. Gilmet*, 83 M.J. 398, 402 (C.A.A.F. 2023) (stating “it was within the military judge’s discretion under R.C.M. 801(a)(3) to explore the conflict issue to ensure that the proceedings did not continue until Appellant obtained conflict-free counsel or consented to being represented by conflicted counsel”). Because a counsel’s request to withdraw based on a personal ethical conflict is guided by that counsel’s subjective beliefs and perceived professional duties, the military judge’s decision to hear solely from the lead defense counsel fell squarely within his discretion under R.C.M. 801(a)(3). Nor was the military judge required to litigate the underlying merits of the separate,

¹⁵ The RDC’s reaction was likely colored by *United States v. Gilmet*, 83 M.J. 398 (C.A.A.F. 2023), which our superior court had recently decided and the RDC referenced during his testimony. In *Gilmet*, our superior court found actual and apparent unlawful command influence where a senior judge advocate made explicit, career-threatening remarks directly to a defense counsel, thereby creating an “intolerable tension and conflict” and resulted in the defense counsel’s withdrawal. *Id.* at 402. The facts in this case, however, are fundamentally different. As discussed further in the next section, the record demonstrates that the phone call was a well-intentioned inquiry into the lead defense counsel’s assignment preferences, rather than an attempt to interfere with her career. Because there was no objective threat to counsel’s career or professional independence, the improper interference with the attorney-client relationship that compelled reversal in *Gilmet* is entirely absent here.

pending unlawful command influence motion before ruling on whether there was good cause for counsel to withdraw. Because the “dimensions of nascent conflicts of interest are notoriously hard to predict” pretrial, *Wheat*, 486 U.S. at 162-63, and “it may be difficult at that stage to assess with precision whether, or to what extent, the grounds for disqualification could affect the trial, the military judge is afforded broad discretion in ruling on disqualification motions.” *Rhoades*, 65 M.J. at 395. Accordingly, the military judge did not abuse his discretion in granting the lead defense counsel’s motion to withdraw before hearing appellant’s motion to dismiss.

Here, the military judge was presented with attestations from a defense counsel who, after consulting with her state bar and her technical chain of command, sincerely believed she could not zealously advocate on behalf of her client because of a personal conflict. Under these circumstances, the military judge acted within his discretion under R.C.M. 506(c) in finding good cause to grant the lead defense counsel’s motion to withdraw, over appellant’s objection.¹⁶

B. Unlawful Command Influence

The prohibition against the unlawful influence of courts-martial proceedings has been a feature of the Uniform Code of Military Justice since its statutory inception.¹⁷ Our superior court has dubbed unlawful command influence “the mortal enemy of military justice” because of its tendency “to deprive servicemembers of their constitutional rights.” *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

¹⁶ Appellant also contends the military judge erred by granting the withdrawal without properly balancing appellant’s right to counsel of choice against other important considerations, citing *United States v. Watkins*, 80 M.J. 253, 260 (C.A.A.F. 2020). We do not find that case controlling. In *Watkins*, our superior court determined appellant’s request to excuse his civilian defense counsel included an implicit request for a continuance to seek replacement counsel, and because such a request for a continuance requires consideration of factors outlined in *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997), the military judge erred in failing to weigh the *Miller* factors in denying the request. In contrast to *Watkins*, the present case involves neither a request to release civilian defense counsel nor an implicit request for continuance. Even so, the military judge acknowledged that defense might be “scrambling” and promised to give the defense team “grace” if new counsel were detailed or retained. And there was no indication that a continuance would have resolved the conflict of interest.

¹⁷ The prohibition arose following numerous studies, investigations, and hearings after the end of hostilities in World War II. See H.R. Rep. No. 80-1034, at 4-5 (1947); see also Report of War Department Advisory Committee on Military Justice To The Secretary of War (Vanderbilt Report) 6-8 (13 Dec. 1946).

If directed against prospective defense witnesses, it transgresses the accused's right to have access to favorable evidence. If directed against defense counsel, it affects adversely an accused's right to effective assistance of counsel. If the target is a court member or the military judge, then the tendency is to deprive the accused of his right to a forum where impartiality is not impaired because the court personnel have a personal interest in not incurring reprisals by the convening authority due to a failure to reach his intended result.

Id. (citations omitted).

Although the judicially created term “unlawful command influence” and the new title of Article 37, UCMJ, “command influence,” both include the word “command,” the scope of the statute is actually broader. Paragraph (a)(3) of Article 37, UCMJ, applies to any person subject to the UCMJ, not just commanders or convening authorities. And it is this particular provision—which prohibits any person subject to the UCMJ from attempting to coerce, or by any unauthorized means, attempting to influence a court-martial's actions—that is at issue in appellant's case. 10 U.S.C. § 837(a)(3) (2024).

Congress made significant amendments to Article 37, UCMJ, in the National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA), which are relevant to appellant's appeal. First, Congress amended Article 37, UCMJ, to add an additional intent element. Before the FY20 NDAA, Article 37(a)(3), UCMJ provided:

No person subject to this chapter may *attempt to coerce* or, by any unauthorized means, influence the action of a court-martial

(emphasis added).

Our superior court interpreted the syntax of this statutory language to conclude that the words “attempt to” only modified the word “coerce” and not the word “influence” which was separated by the words “by any unauthorized means.” *United States v. Barry*, 78 M.J. 70, 78 (C.A.A.F. 2018). Because the word “attempt” infers an intent, the court found that an “attempt to coerce” required an intent to coerce to violate the statute whereas “influence” did not. That is, an individual who influenced the proceedings by unauthorized means, even if unintentional, could nevertheless violate the statute by committing actual unlawful command influence. *Id.* at 78.

Congress subsequently amended Article 37(a)(3) to now read:

No person subject to this chapter may *attempt to coerce* or, by any unauthorized means, *attempt to influence* the action of a court-martial

FY20 NDAA (emphasis added). In light of this amendment, we now read a requirement to show an intent to influence the action of the court-martial in order to constitute a violation of Article 37, UCMJ.

In another significant amendment, Congress added a provision requiring a showing of prejudice: “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 right of the accused*.” 10 U.S.C. § 837(c) (2024) (emphasis added).¹⁸ Prior to this change, the jurisprudence governing unlawful command influence outlined two types: actual and apparent. *See, e.g., United States v. Boyce*, 76 M.J. 230 (C.A.A.F. 2017). “Unlike actual unlawful command influence, a meritorious claim of the appearance of unlawful command influence does not require prejudice to an accused.” *United States v. Proctor*, 81 M.J. 250, 255 (C.A.A.F. 2021). Rather, the prejudice was to the “public’s perception of the fairness of the military justice system as a whole.” *Boyce*, 76 M.J. at 248. This recent amendment requiring prejudice to the accused can leave no doubt of Congress’s intent to remove the appearance of unlawful command influence as a basis for relief under Article 37, UCMJ. We now hold that the current version of Article 37, UCMJ, only provides actual command influence as a basis for dismissing a finding or sentence, which is the relief appellant requests here.

We review claims of unlawful command influence de novo and apply a clearly erroneous standard to the military judge’s findings of fact. *Gilmet*, 83 M.J. at 403 (citations omitted). To establish a prima facie claim of actual unlawful command influence, the accused bears the burden of presenting “some evidence” of “facts, which if true, constitute unlawful command influence.” *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citation omitted). Although this initial burden is low, the accused must present more than mere allegations or speculation. *Id.* “Once the accused satisfies his burden, the burden shifts to the Government to prove beyond a reasonable doubt that the [unlawful command influence] will not affect the proceedings.” *Gilmet*, 83 M.J. at 403 (citing *Biagase*, 50 M.J. at 150-51).

¹⁸ Similar language already existed in Article 59, UCMJ, which provides, “A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.” *See also Boyce*, 76 M.J. 254-55 (Ryan, J. dissenting).

In this case, appellant established a *prima facie* case of unlawful command influence in presenting some evidence of facts, which if true, would constitute unlawful command influence. That is, appellant presented evidence that the RDC received a phone call from the assignments officer and perceived the call to be interfering with the lead defense counsel's future assignment as a direct result of her representation of appellant at his court-martial. The lead defense counsel then requested to withdraw as appellant's counsel because of a perceived conflict between her personal interest in her future assignment and appellant's right to a zealous advocate. If the RDC's perception of the phone call was correct, that would constitute some evidence of unlawful command influence.¹⁹ We find, however, that the government disproved the predicate facts beyond a reasonable doubt. The government demonstrated that no one involved in the phone call—not the SJA, the Deputy SJA, nor the assignments officer—acted with the intent to affect the lead defense counsel's representation of her client. Rather, these individuals merely sought to clarify the lead defense counsel's assignment preference given she had previously ranked other assignments higher on her preference sheet and she would be transitioning that summer into the same legal office as counsel against whom she had lodged an ethical complaint that would likely still be ongoing. This lack of intent to interfere was further reflected in the assignments officer's assurances to the RDC during the same phone call that the lead defense counsel "still had the job."

The record is clear that all those involved were acting with good intentions: the leadership at 1st SFC(A) sought only to confirm that the lead defense counsel still desired the assignment, while the lead defense counsel and the RDC sought to safeguard appellant's right to a fair trial. Ultimately, however, misunderstandings distorted well-intentioned efforts, resulting in the lead defense counsel's request to withdraw.

Because we find the government proved beyond a reasonable doubt that no person subject to the UCMJ attempted to coerce, or through unauthorized means, attempted to influence appellant's court-martial proceedings, we find no violation of Article 37, UCMJ.²⁰

¹⁹ While we concur with the military judge that the lead defense counsel's feelings alone were not reliable facts upon which to make a *prima facie* case of unlawful command influence, we find that in conjunction with other evidence, including statements from the RDC, appellant met the initial low threshold of "some evidence."

²⁰ Because we agree with the military judge that the motion to withdraw was later determined to be based on the lead defense counsel's subjective misapprehension rather than the objective facts, we do not reach appellant's Fifth and Sixth Amendment constitutional claims. *See* Article 59(a) and Article 66(d)(1), UCMJ.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Chief Judge FLOR and Senior Judge COOPER concur.

FOR THE COURT:


JAMES W. E
Clerk of Court