UNITED STATES,

Appellee

v.

Keith E. Barry
Senior Chief Special Warfare Operator (E-8)
United States Navy,

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 201500064

USCA Dkt. No. 17-0162/NA

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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Statement of Statutory Jurisdiction

The lower court had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[1] The jurisdiction of this Court is invoked under Article 67(a)(3), UCMJ.[2]

Statement of the Case

A military judge, sitting as a general court-martial, convicted SOCS Barry, contrary to his plea, of one specification of Article 120, UCMJ.[3] The military judge acquitted SOCS Barry of one specification of Article 120, UCMJ, and sentenced him to confinement for three years and a dishonorable discharge. On February 27, 2015, the convening authority (CA), Rear Admiral (RADM) Patrick J. Lorge, approved the sentence as adjudged and ordered the confinement executed.[4] The lower court set aside the CA's action on March 16, 2015, and remanded the record of trial for "a new staff judge advocate's recommendation and new convening authority's action."[5]

On June 3, 2015, the CA signed a new action, approving the sentence as adjudged, but with the following limitation:

> The accused will serve in pay grade E-1 until he is released from confinement. Thereafter, the reduction in pay grade by operation of

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[1] 10 U.S.C. § 866(b)(1) (2012).
[2] 10 U.S.C. § 867 (2012).
[3] JA at 38-40.
[4] JA at 239-40.
[5] JA at 1.

> law, under Art. 58a, UCMJ, and service regulations, is suspended for 12 months from the time of his release and the accused will serve, if still on active duty, in the pay grade of E-7 during the period of suspension. The suspended portion of the reduction by operation of law will be automatically remitted at the end of the probationary period to the rank that he last honorably served, E-7.[6]

The CA ordered the confinement executed and returned the record of trial to the lower court with the following observation:

> In my seven years as a General Court-Martial Convening Authority, I have never reviewed a case that has given me greater pause than the one that is before me now. The evidence presented at trial and the clemency submitted on behalf of the accused was compelling and caused me concern as to whether SOCS Barry received a fair trial or an appropriate sentence.
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> …
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> Additionally, having personally reviewed the record of trial, I am concerned that the judicial temperament of the Military Judge potentially calls into question the legality, fairness, and impartially [sic] of this court-martial. The validity of the military justice system depends on the impartiality of military judges both in fact and in appearance. If prejudicial legal error was committed, I strongly encourage the Appellate Court to consider remanding this case for further proceedings or, in the alternative, disapproving the punitive discharge[.][7]

On October 31, 2016, the lower court affirmed the findings and the sentence as approved by the CA.[8] This Court granted SOCS Barry's petition for review on April 27, 2017, and summarily affirmed the lower court's decision.[9] On May 5, 2017, SOCS Barry petitioned for reconsideration, and this Court granted the

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[6] JA at 236-38.
[7] *Id.*
[8] JA at 2-20.
[9] *United States v. Barry*, 76 M.J. 407 (C.A.A.F. 2017) (sum. disp.).

petition on June 19, 2017.[10] In its order granting reconsideration, this Court ordered further fact-finding pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

A *DuBay* hearing took place on August 18 and September 26-27, 2017. Following the hearing, the military judge returned the record of trial to this Court for review. On November 29, 2017, this Court granted review on two specified issues.

Statement of Facts

While this Court has often referred to military judges as the "last sentinel"[11] to protect a court-martial from unlawful command influence (UCI), here that responsibility fell to three judge-advocate whistleblowers: Lieutenant Commander (LCDR) Justin Henderson, LCDR John Dowling, and LCDR Leah O'Brien.

The military judge presiding at the *DuBay* hearing below substantiated their shared allegation that senior judge advocates engaged in UCI during the post-trial processing of this case.[12] To this day, the government has never asserted these acts were defensible as a matter of law. Indeed, the government called two witnesses, Vice Admiral (VADM) Nanette DeRenzi and VADM James Crawford, the

[10] JA at 21-23.
[11] *United States v. Biagase*, 50 M.J. 143, 152 (C.A.A.F. 1999).
[12] JA at 596-604.

immediate past and current Judge Advocates General (JAG) of the Navy, who testified that the now-substantiated conduct would have been unlawful.[13]

Instead, the government argued the UCI found by the military judge was manufactured by junior officers "warping the facts" and making up "their own fiction."[14] The military judge disagreed, concluding "VADM DeRenzi, RADM Lorge, and LCDR Dowling were all credible witnesses in this case."[15] The military judge concluded LCDR Henderson's conduct evidenced the strength of the military justice system, in that "advocates are concerned with both actual fairness and the perception of fairness."[16] The military judge omitted any reference to VADM Crawford's credibility.[17]

After considering all of the *DuBay* testimony and evidence, the military judge found "[a]ctual or apparent [UCI] tainted the final action in this case."[18] He reached this conclusion after hearing testimony on the organization and structure of the Navy's Judge Advocate General's Corps (JAGC), a brief discussion of which is necessary for this Court's resolution of this case.

A. The Navy JAG has both the responsibility to provide independent legal advice to the Chief of Naval Operations (CNO) and the Secretary of the Navy (SECNAV) and the responsibility to resource and equip the JAGC.

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[13] JA at 800; 804; 852; 876-78;
[14]JA at 1145-54.
[15] JA at 601.
[16] JA at 600.
[17] JA at 601.
[18] JA at 604.

The JAGC is headed by the JAG, a VADM, who serves as the principal legal advisor to the SECNAV and the CNO.[19] The JAG "provides advice to SECNAV on military justice" and "is also assigned to the staff of the Chief of Naval Operations."[20]

The number two lawyer in the Navy JAGC is the Deputy Judge Advocate General (DJAG), a RADM, who "performs the duty of the JAG" when the JAG is absent, and also concurrently serves as Commander, Naval Legal Service Command (CNLSC).[21] The DJAG is assigned "additional duty to the CNO as CNLSC . . . and is responsible for providing and overseeing Navy-wide legal services and related tasks."[22] CNLSC, sitting atop the Naval Legal Service Command, leads all of the Navy's Region Legal Service Offices (RLSOs), Defense Service Offices (DSOs), Victims' Legal Counsel (VLCs), and the Naval Justice School.[23]

Rounding out the Office of the Judge Advocate General's senior leadership are four Assistant Judge Advocates General (AJAGs).[24] These officers have separate functional areas of responsibility, organized as follows: Civil Law (AJAG

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[19] JA at 41; 36-63.
[20] JA at 48.
[21] *Id.*; JA at 42.
[22] JA at 48.
[23] JA at 364-65.
[24] JA at 42; 361.

01), Military Justice (AJAG 02), Chief Judge, Department of the Navy (AJAG 05), and Operations and Management (AJAG 06). The AJAGS report to the JAG via the DJAG.[25] Their "supervisory authority includes preparing and signing fitness reports . . . for the assigned Division Directors and military personnel under their supervision."[26]

B. In light of this structure, VADM DeRenzi testified that it would have been unlawful for either her or VADM Crawford to advise a CA with respect to a specific court-martial.

During her tenure as the JAG she negotiated a Memorandum of Agreement (MoA) with Commander, Navy Installations Command (CNIC), which was merely an update to "an instruction we had previously."[27] In fact, it implements the statutory requirement that judge advocates assigned to military units "give independent legal advice to commanders."[28]

The MoA, among other things, required the Commanding Officer (CO) of each RLSO, the officer responsible for prosecuting cases on behalf of the United States in a given geographic region, to detail officers to serve "additional duty" as Staff Judge Advocates (SJA) who provide independent advice to CAs.[29] The MoA also expressly provided that RLSO CO supervision of the prosecution function is

[25] JA at 362-64.
[26] JA at 49.
[27] JA at 874; 367-73.
[28] JA at 41.
[29] JA at 372.

"integral to the delivery of legal services," and that to ensure the independence of the SJA's military justice advice to convening authorities, the RLSO CO "will not provide SJA advice on military justice matters."[30]

At the time of SOCS Barry's court-martial, as well as his post-trial processing, CAPT Joseph Eldred was the CO of RLSO Southwest.[31] He reported to CNLSC, who was also the DJAG—VADM Crawford.[32] CAPT Eldred was familiar with the MoA between the JAG Corps and CNIC. He interpreted it to mean that "any military justice SJA advice" to RADM Lorge about this case "was not to be given by the RLSO CO."[33]

VADM DeRenzi confirmed CAPT Eldred's interpretation of the MoA and testified that SJAs must provide military justice advice independent of the prosecutors assigned to the RLSOs, as well as the RLSO command leadership.[34] She also confirmed the MoA was "binding guidance" that applied to both the RLSO CO and to her Deputy, VADM Crawford.[35]

The difference or "lanes" between prosecution and SJA advice were to be kept separate, or, as she explained, "if you are not the appropriate lawyer to be

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[30] *Id.*
[31] JA at 828.
[32] JA at 834.
[33] JA at 831.
[34] JA at 876-77.
[35] JA at 877-78.

giving that advice, you need to steer [the convening authority] to the one who is."[36] Vice Admiral DeRenzi explained that she never discussed military-justice cases with local commanders during site visits saying, it "would have been inappropriate" for her to do so.[37] "As the Judge Advocate General, you have to remain neutral."[38] As the JAG, she recognized she "was responsible for organizing, training and equipping the entire JAG Corps, both the defense and the government."[39] She then stated, without equivocation, that she was not authorized to advise CAs on individual cases. "[I]t wouldn't have been appropriate for me to talk about specific cases, nor did I do so."[40]

Had a CA asked her for advice on a case, VADM DeRenzi testified she would have referred them to then-Captain (CAPT) John Hanninck,[41] who was the Chief of Staff of RLSOs at the time.[42] The RLSO Chief of Staff is also the chief prosecutor for the Navy, a fact vigorously advanced by the government below.[43]

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[36] JA at 877.
[37] JA at 851.
[38] JA at 851.
[39] *Id.*
[40] JA at 851.
[41] RADM Hanninck is currently the Deputy JAG.
[42] As the RLSO Chief of Staff, RADM Hanninck was dual-hatted as the Assistant Judge Advocate General for Operations and Management (AJAG 06). JA at 45.
[43] JA at 985-86.

In addition, she testified that VADM Crawford, while serving as DJAG and CNLSC, was not authorized to advise a CA on military justice or a specific case.[44] VADM DeRenzi explained that when she served as CNLSC she never provided legal advice to a CA "about a particular case and the action that [the] convening authority had to take on their case[.]"[45] Both the JAG and CNLSC "are responsible—for the---the full community. You can't favor one side over the other, you can't give advice to one side over the other; you remain neutral."[46]

On this point, VADM Crawford agreed. He asserted he would not substitute himself for "my advisors in the fleet."[47] "It would have been inappropriate, and I did not do that."[48] "I just make sure they are advising them appropriately, and if they have specific questions, I'll take them back and present them to—whether it be our directorate heads for criminal justice or ensure it goes to the O-6 [sic]."[49]

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[44] JA at 877-78. This was immediately apparent to the Appellate Government Division's (Code 46) Director who joked with one of her Navy subordinates "your boss [VADM Crawford] is going to get fired." JA at 1112.
[45] JA at 877.
[46] JA at 878.
[47] JA at 767.
[48] JA at 804.
[49] JA at 767. VADM Crawford was referring to the AJAG 06 who was dual-hatted as the RLSO Chief of Staff, then-CAPT John Hanninck, the same officer VADM DeRenzi referenced.

"That is exactly how it's designed under the MoA."[50] [I]t would have been inappropriate for me to a take a position relative to [the] government."[51]

Nevertheless, VADM DeRenzi testified commanders "frequently want to talk to the most-senior person they can. You—you try to make sure that they understand who they should and should not be talking to."[52] "If there's a discussion about process, I would expect my [RLSO COs] to direct the region commander to their SJAs for the legal advice pertinent to a case."[53] She testified the MoA was intended to help both commanders and judge advocates "stay in their lane."[54] "[I]f you are not the appropriate lawyer to be giving that advice, you need to steer them to the one who is."[55]

C. In February 2014, in accordance with her responsibility as JAG to resource and equip the JAGC, VADM DeRenzi traveled to San Diego, in part, to meet with RADM Lorge.[56]

On February 19, 2014, before the referral of charges in SOCS Barry's case, VADM DeRenzi met with the RADM Lorge in his office in San Diego, California,

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[50] JA at 790.
[51] JA at 804.
[52] JA at 876.
[53] JA at 876.
[54] JA at 876.
[55] JA at 877.
[56] This Court has previously summarized events roiling the Air Force at the time of VADM DeRenzi's visit involving Lieutenant General Franklin, "whose reputation was sullied and career cut short." *United States v. Boyce*, 76 M.J. 242, 255 (C.A.A.F. 2017) (Ryan, J. dissenting).

as part of a routine site visit.[57] She was the JAG at the time,[58] and she testified such visits were not made "to inspect military justice."[59] Instead, in accordance with Navy instructions, she made site visits solely to "meet with our customers and clients to ensure that they were resourced properly and satisfactorily."[60] She had been invited to Thomas Jefferson Law School as the keynote speaker for a Women in the Law conference, and she seized the opportunity to simultaneously hold a "robust site visit[.]"[61] Congressional scrutiny of the military's handling of sexual assault cases limited her ability to travel during her first year as the JAG because her presence was required in Washington, D.C.[62]

And during her site visit with RADM Lorge, VADM DeRenzi testified RADM Lorge did not "seek advice" about "any specific military justice issue[.]"[63] She could not recall if RADM Lorge referenced SOCS Barry's case.[64] Yet she testified—consistent with RADM Lorge's pretrial declarations and sworn testimony[65]—that the two admirals did talk about "the operating environment and

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[57] JA at 856.
[58] JA at 849.
[59] JA at 849.
[60] JA at 849.
[61] JA at 853.
[62] JA at 853.
[63] JA at 860.
[64] JA at 860.
[65] For instance, on redirect, the prosecution invited VADM DeRenzi's attention to RADM Lorge's declaration, where he averred, "She conveyed the importance that convening authorities held and how tenuous the ability of an operational

the scrutiny that—that—that the services were under, not just his as region commander and not just me, but it was—it was broad."[66]

"I remember saying to him that we're under a lot of scrutiny, and it makes a difficult job that much harder, and I sort of empathized with him for that."[67] "And I remember saying, 'I don't think the scrutiny is going to go away any time soon.' In fact, it—you know, it runs in cycles. Every 2 or 3 or 4 months, something happened, and it—it increases the scrutiny again, and I didn't think that would change."[68]

RADM Lorge recalled her mentioning "that she would routinely go over to the White House for a meeting or she would be testifying up at the Hill, and she just, you know, mentioned the meetings she might have had with other senior officers, but if it was—again, it was—it was just this understanding that, you know, there was more pressure upon us and there was going to be more scrutiny paid on sexual-assault cases."[69] "She related to me that there were other services—maybe the Navy, maybe not—that folks had been making decisions, and that rose

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commander to act as a convening authority had become, especially in the findings or sentence of sexual-assault cases due to the intense pressure of the military at the time." JA at 415. She testified that was accurate. JA at 881.

[66] JA at 860.

[67] JA at 859.

[68] JA at 859.

[69] JA at 1020.

up to the congressional level or POTUS' level, and they—and they were asking questions about them."[70]

D. VADM DeRenzi's discussion with RADM Lorge regarding the political pressures facing commanders in their handling of sexual assault cases occurred before SOCS Barry's case was referred to a general court-martial.

Forty days after meeting with VADM DeRenzi, on March 31, 2014, RADM Lorge's Chief of Staff, CAPT Christopher Plummer, referred SOCS Barry's case to a general court-martial.[71] He was the acting commander in RADM Lorge's absence, and, after having his memory refreshed, he recalled saying he would not have made a referral decision without first speaking with RADM Lorge.[72]

E. RADM Lorge's SJA, Commander (CDR) Jones, provided erroneous and conflicting advice in SOCS Barry's case, which prompted RADM Lorge to seek unauthorized legal advice directly from VADM Crawford.

During the initial post-trial processing of SOCS Barry's case in January and February 2015, CDR Dominic Jones erroneously advised RADM Lorge that the 2013, amendments to Article 60, UCMJ, applied to SOCS Barry's case, and that RADM Lorge had no discretion to do anything but affirm the findings and

[70] JA at 1020.
[71] JA at 233-34.
[72] JA at 1095.

sentence.[73] His purported basis for this belief was ALNAV 51-14, which was issued in June 2014.[74]

However, his Deputy Staff Judge Advocate, LCDR John Dowling, believed the ALNAV conflicted with the plain language of the statute regarding the effective date of Article 60, UCMJ, which stated the amendments were to take effect 180 days after it became law, or on 24 June 2014.[75] Lieutenant Commander Dowling contacted the Navy-Marine Corps Appellate Government Division (Code 46), and "they initially told me [the ALNAV] was correct[.]"[76] Code 46 then reversed itself, and the lower court remanded SOCS Barry's case back to RADM Lorge for new post-trial processing on March 16, 2015.[77]

RADM Lorge testified he did not extensively review SOCS Barry's case, or even "look it over for error," before his first CA's action because CDR Jones had advised him, "I basically couldn't do anything."[78] But before SOCS Barry's case was even remanded back to RADM Lorge for action, CDR Jones sent an extensive

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[73] JA at 1022; 1024; 1050-51.
[74] JA at 1022; 1024; 1050-51.; Prosecution Ex. 4.
[75] JA at 908.
[76] JA at 909. Any legitimate debate as to the validity of ALNAV should have ended on December 19, 2014, when the National Defense Authorization Act for fiscal year 2015 clarified that the amendments to Article 60, UCMJ, did not apply to offenses committed before June 24, 2015. *United States v. Roller*, 75 M.J. 659, 660 (N-M. Ct. Crim. App. 2015).
[77] JA at 1; 591.
[78] JA at 1024.

e-mail advising RADM Lorge he could, among other things, set aside the findings and sentence in SOCS Barry's case.[79] When the record of trial finally made its way back to San Diego, RADM Lorge began reviewing the case in earnest.

After reviewing the record of trial, RADM Lorge testified he had concerns. "I looked at it many times, and I agonized over it."[80] "There is no other case which I have spent so much time and effort on, and—and by a factor of 50 or 100."[81] He read the record of trial, which included more than a thousand transcribed pages and allied documents, "five, six times[.]"[82] During his testimony at the *DuBay* hearing, he turned and faced SOCS Barry, and his voice broke as he said, "I mean, again, going back to the record, I—I—I have never seen so many—I mean two inches of good-guy letters. I mean he—he's my altar boy. He's a fabulous guy."[83]

He voiced his concerns to his junior attorneys, and they agreed with him.[84] But CDR Jones would always disagree.[85] Eventually, RADM Lorge began questioning "whether in fact there is enough information or there is reasonable doubt about Senior Chief Barry's guilt."[86] But every time he raised it with CDR

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[79] JA at 592; 1118.
[80] JA at 1030.
[81] JA at 1030.
[82] JA at 1030.
[83] JA at 1032.
[84] JA at 1028-29.
[85] JA at 1028-29.
[86] JA at 1028-29.

Jones, "he kind of poo-poos me, and then he—he'll—he'll start talking about this or that or 'no, you're reading that wrong[.]'"[87] "I have this reasonable doubt, and he—he just shuts me down."[88]

RADM Lorge eventually lost confidence in the advice he was receiving from CDR Jones.[89] "I start to feel this conflict between what I hear some lawyers saying and what I hear him say."[90] RADM Lorge felt as if he were being pushed "in a box," and was told "the scrutiny that might be placed upon that is higher in these sexual assault cases."[91] RADM Lorge became so desperate for accurate legal advice he even began googling the UCMJ.[92]

Feeling "pushed into this box," by CDR Jones, who was telling him "you don't know, you're not a lawyer, you don't know that this is reasonable doubt or this isn't," he decided to discuss the substance of SOCS Barry's case with his old friend VADM Crawford.[93] They had worked together on the Joint Staff in the harrowing days after September 11, 2001.[94] On the Joint Staff, VADM Crawford provided him with legal advice routinely, if not daily.[95] "I'm not getting it from

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[87] JA at 1028.
[88] JA at 1029.
[89] *Id.*
[90] *Id.*
[91] JA at 1031.
[92] JA at 1030.
[93] JA at 1031.
[94] JA at 768; 1031.
[95] JA at 1031.

[CDR Jones], and the only guy I know is somebody I've served with who is now a flag officer, too, you know, 15 years ago on the Joint Staff."[96] RADM Lorge knew then-RADM Crawford was "the number 2 lawyer in the Navy," but only had a "thumbnail sketch of what he did."[97]

F. On April 30, 2015, VADM Crawford met with RADM Lorge in his office. The military judge found he told RADM Lorge "not to put a target on his back," or something similar, and advised him "that approving the findings and sentence was the right answer in the appellant's case."[98]

On April 30, 2015, VADM Crawford was in San Diego to attend the JAG Training Symposium when he went to meet with RADM Lorge, and discussing SOCS Barry's case "was a portion of the purpose for the meeting."[99] Unlike VADM DeRenzi's February 2014, meeting with RADM Lorge, which was reflected on a formal itinerary,[100] the only record of VADM Crawford's meeting with RADM Lorge is a calendar entry.[101]

When they met, CDR Jones escorted VADM Crawford into RADM Lorge's office.[102] VADM Crawford and RADM Lorge met alone.[103] Their meeting lasted

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[96] JA at 1031.
[97] JA at 1036.
[98] JA at 599.
[99] JA at 598-99; 836.
[100] JA 375-80.
[101] JA at 374.
[102] JA at 1031.
[103] JA at 771.

twenty or thirty minutes.[104] The flag officers exchanged pleasantries at the outset of the meeting and then began discussing SOCS Barry's case.[105]

RADM Lorge couldn't recall who brought up SOCS Barry's case, but he testified he believed that he did.[106] "The real question I had is—is based on the gumbo I had going so far, and that was, you know, disapproving a sexual-assault case, you know, is that going to bring big scrutiny upon the Navy."[107] "And he told me yeah."[108] Based on VADM Crawford's advice, RADM Lorge believed he needed "even more than" reasonable doubt to disapprove SOCS Barry's conviction.[109] "[M]y feeling as I come out of this meeting with him is 'yes, the pressure is still there, and it's intense, and it needs to be done correctly[.]"[110] RADM Lorge left the meeting convinced "folks are going to be looking over your shoulder like—everywhere[.]"[111]

The military judge found, "during this meeting, VADM Crawford either told RADM Lorge 'not to put a target on his back' or, by similar comments, left RADM Lorge with the impression that not affirming the findings and sentence in

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[104] JA at 1037.
[105] JA at 771-72.
[106] JA at 1037.
[107] JA at 1038.
[108] JA at 1038.
[109] JA at 1038.
[110] JA at 1038.
[111] JA at 1038.

the appellant's case would put a target on RADM Lorge's back."[112] RADM Lorge told his Deputy SJA, LCDR John Dowling, about VADM Crawford's comment about putting a target on his back, "close in time" to the meeting between the flag officers.[113] In weighing the evidence concerning VADM Crawford's statement to RADM Lorge, the military judge found, "LCDR Dowling was surprised by the content of the discussion which is why the comments were so memorable to him."[114]

VADM Crawford testified that he did not provide RADM Lorge with any advice.[115] And he denied telling RADM Lorge not to put a target on his back.[116] VADM Crawford testified he had no reason to say that.[117] He also denied discussing the political climate surrounding sexual assault cases, testifying "political consequences" are not "part of my decision matrix."[118] Contradicting VADM DeRenzi's testimony, VADM Crawford even went so far as to say the Navy was under no political pressure with respect to military justice.[119]

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[112] JA at 598.
[113] JA at 598.
[114] JA at 598.
[115] JA at 773.
[116] JA at 773.
[117] JA at 802.
[118] JA at 802.
[119] JA at 774.

Additionally, RADM Lorge testified he and VADM Crawford discussed cases involving co-conspirators of Francis Leonard, commonly known as "Fat Leonard," and Glenn Defense Marine Asia (GDMA).[120] "We had some Leonard Francis folks…they were up in the jail...so we talked about that and were there any specific things we needed to do."[121] VADM Crawford, however, could not recall speaking with RADM Lorge about cases involving GDMA.[122] "I don't talk about GDMA in—in casual conversation."[123]

G. After their in-person meeting, CDR Jones again provided RADM Lorge with erroneous legal advice, and RADM Lorge called VADM Crawford to inquire if CDR Jones' proposal was a valid course of action. VADM Crawford advised him that it was.

After their meeting on April 30, 2015, RADM Lorge continued to believe that SOCS Barry's guilt had not been proven beyond a reasonable doubt.[124] And so RADM Lorge met again with CDR Jones.[125] RADM Lorge reiterated he had reasonable doubt as to SOCS Barry's guilt.[126] CDR Jones responded, "Yeah, but there's higher scrutiny."[127] RADM Lorge described his thought process at the time, "again, I feel like I've now been pushed into this box where my only decision is

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[120] JA at 1040-41.
[121] *Id.*
[122] JA at 777.
[123] *Id*.
[124] JA at 1039.
[125] JA at 1039.
[126] JA at 1039.
[127] JA at 1039.

I—I have to approve it."[128] But CDR Jones asked RADM Lorge to "let me go work it."[129]

A week later, CDR Jones returned to RADM Lorge and was "all smiles" as he proposed the "answer."[130] CDR Jones told RADM Lorge that if he included the language now found in the CA's action, the military appellate courts would realize they should "probably overturn it[.]"[131] LCDR John Dowling, testified the novel language in the CA's action came from "words Admiral Lorge actually had expressed out loud[.]"[132] CDR Jones told RADM Lorge the appellate courts "can make political decisions; you really can't."[133] Skeptical, RADM Lorge said, "I need to talk to Crawford."[134]

Specifically, RADM Lorge wanted to know "if writing, you know, some extra stuff in [the] CA action would do something."[135] And during the phone call, VADM Crawford provided RADM Lorge with advice to the following effect: CDR Jones' proposal was "the best" that RADM Lorge could get in SOCS Barry's

[128] JA at 1039.
[129] JA at 1039.
[130] JA at 1039.
[131] JA at 1039.
[132] JA at 926.
[133] JA at 1039.
[134] JA at 1039.
[135] JA at 1040.

case.[136] VADM Crawford further advised RADM Lorge to trust that eventually the process would "work out for Senior Barry."[137]

RADM Lorge hung up the phone "knowing that 'okay, lawyers are looking at this and, you know, this—this is about as good I can get in this case,' and it—and—you know, and—and I'm still feeling horrible."[138] "[A]gain, it's the box, I'm living in it."[139]

VADM Crawford testified the phone call never took place.[140]

H. On May 21, 2015, less than a month after meeting with RADM Lorge in his office, VADM Crawford was confirmed by the Senate as the JAG of the Navy and promoted from RADM to VADM.[141]

When VADM Crawford met with RADM Lorge at the end of April 2015, RADM Lorge knew that "Nan was leaving soon," and "typically the number 2 guy fleets up to be the JAG[.]"[142]

I. "[A]ll of the factors discussed above ultimately moved [RADM Lorge] to his final action. Without these pressures, RADM Lorge would have taken different action in this case, likely ordering a new trial."[143]

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[136] JA at 599.
[137] JA at 1040.
[138] *Id.*
[139] *Id.*
[140] R. at 776-77; 797.
[141] JA at 387.
[142] JA at 1037.
[143] JA at 603.

After receiving VADM Crawford's advice on the phone, RADM Lorge approved the sentence in SOCS Barry's case, declining to order a new trial as he had wanted to do.[144] He took this action even though he believed—and continues to believe—the government failed to prove SOCS Barry's guilt beyond a reasonable doubt.[145] As RADM Lorge contemporaneously explained to his Public Affairs Officer (PAO), Ms. April Langwell, he believed the Navy "wanted to get tough on sexual assaults, justice be damned[.]"[146]

He described his thought process before taking action:

> It's the SAPR conversations, it's the Nan conversation, it's the Jim conversation, it's the Dominic conversations, it's the—the other JAG conversations that, you know, so it's—it's all being in there. It's me reading the record of trial again, going 'okay, what are we going to do here?' I mean it's me, you know, just praying about it, just—hopefully I'm doing the right thing.[147]

On cross examination, the prosecution asked RADM Lorge if VADM Crawford advised him on his "legal options in this case."[148] He testified, "I believe so."[149] The prosecution then asked if VADM Crawford tried to convince him "to

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[144] JA at 596-600.
[145] JA at 599.
[146] JA at 1197.
[147] JA at 1041.
[148] JA at 1061.
[149] *Id.*

approve the findings and sentence in this case."[150] "[Long pause.] I think he did with how he spoke with me on the phone."[151]

J. Immediately after taking action, RADM Lorge sent a complaint about several issues, including the military judge's inability to fairly administer justice, to VADM DeRenzi.

In addition to the unique language in his action, RADM Lorge's attorneys advised him that writing a letter to VADM DeRenzi would also help SOCS Barry.[152] As a result, a week after taking action, he sent VADM DeRenzi a letter addressing some of his concerns regarding SOCS Barry's case.[153] RADM Lorge's concerns focused on two areas. First, he was concerned about the failure of all the parties, including the military judge, to consider evidence of SOCS Barry's diagnosed traumatic brain injury.[154] Second, RADM Lorge was "concerned whether the Military Judge . . . displayed the appropriate judicial temperament for administering justice[.]"[155]

K. Ms. April Langwell, RADM Lorge's PAO, corroborated RADM Lorge's testimony about the unlawful command influence in SOCS Barry's case.

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[150] *Id.*
[151] *Id.*
[152] JA at 1045.
[153] JA at 359.
[154] JA at 359.
[155] *Id.*

Ms. Langwell laughed when the prosecution asked her if Navy Region Southwest had referred any sexual assault cases to trial.[156] "[T]hey are common now, and we have a sexual-assault rep on the staff that routinely meets with the Admiral to talk about sexual-assault cases."[157]

She testified that CDR Jones came to her during the post-trial processing of SOCS Barry's case with a thick three-ring binder.[158] "He brought the binder with him to show us a number of pages that Admiral Lorge was concerned about and why he felt the way he did, and thought that that was potentially a concern—the Admiral's feelings would be potentially a concern that the media may discover, and then we would have to answer for."[159]

Ms. Langwell testified she immediately brought both her Deputy and her Medial Relations Specialist into that meeting "because it did seem like something we could get a lot of questions about."[160] One of the first things CDR Jones said was "that Admiral Lorge didn't think the kid did it."[161] "Commander Jones told us that Admiral Lorge did not believe that Senior Chief Barry was guilty."[162] CDR

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[156] JA at 1191.
[157] *Id.*
[158] JA at 1173.
[159] *Id.*
[160] JA at 1173.
[161] JA at 1174.
[162] *Id.*

Jones showed them specific passages from SOCS Barry's record of trial "that gave the Admiral the greatest concerns about the findings in this case."[163]

CDR Jones also discussed the potential for Senator Kirsten Gillibrand to inquire about the case.[164] They discussed how sexual assault was Senator Gillibrand's "pet rock."[165] Their meeting lasted approximately an hour.[166]

Sometime thereafter, but "within a few days" of her meeting with CDR Jones[167] in "April 2015," and before RADM Lorge took action in SOCS Barry's case, Ms. Langwell met with RADM Lorge in his office.[168] He told her he spent his "entire weekend reading every single document or piece of that court case, and it upset me greatly. I—I have a hard time—I have a really hard time with this case, and I mean I just don't think the kid did it."[169] "It was obvious he was very upset about it."[170] She told him CDR Jones had shown her his areas of concern.[171] "He didn't believe the accuser—or the alleged victim to be truthful, that it was sour

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[163] *Id.*
[164] JA at 1176.
[165] JA at 1195.
[166] JA at 1184.
[167] JA at 1201.
[168] JA at 1186.
[169] JA at 1186.
[170] JA at 1187.
[171] *Id.*

grapes from a relationship that ended differently than what she want [sic] it to, and that he did not like the judge."[172] He told her, "I don't think the kid is guilty."[173]

Ms. Langwell also discussed with RADM Lorge how "this congresswoman was obviously probably inquiring[.]"[174] When the prosecution asked Ms. Langwell if Senator Gillibrand was RADM Lorge's "biggest concern," she replied, "His biggest concern was he—he was very upset. He did not think Senior Chief Barry was guilty, and he disliked the judge's attitude or bias."[175]

After RADM Lorge took action, Ms. Langwell and her staff, working with CDR Jones and LCDR Dowling, prepared a media strategy to respond to any inquiry as to why RADM Lorge had allowed SOCS Barry to remain a Chief Petty Officer.[176] They knew "the alleged victim had reached out to [Senator Gillibrand's] office and made the senator aware of the case, and we were concerned that the alleged victim would make a stink about his keeping his rank and whether or not she was in further communications with Senator Gillibrand's office about the case."[177] They discussed "the fact that Admiral Lorge did not think that Senior Chief Barry was guilty, that the judge was biased, and that there was concern that

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[172] JA at 1188.
[173] *Id.*
[174] JA at 1197.
[175] JA at 1204.
[176] JA at 1182-83.
[177] JA at 1199.

the media would find it odd that Admiral Lorge was recommending that Senior Chief Barry keep his rank."[178] But Ms. Langwell's media strategy omitted any mention of these issues as the rationale behind RADM Lorge's peculiar CA's action.[179]

Ms. Langwell was directed to, among others, send her media strategy, or Response to Query (RTQ), to Commander Naval Installations Command (CNIC), which was the CA for SOCS Barry's *DuBay* hearing.[180] She and her staff expected media interest because of SOCS Barry's "rank, the community he was in, and then Admiral Lorge's feelings and what we knew his subsequent actions were going to be."[181] At RADM Lorge's direction, Ms. Langwell's RTQ was pushed to CNIC because "senior leaders will want to have awareness of cases that may draw media attention."[182]

But while Ms. Langwell routinely provided RTQs, and forwarded them up, in this case, something unusual happened.[183] "[I]t actually came the other way. CNIC reached out to us. We had not completed the RTQ when CNIC reached down to us and said, 'can you, please, provide?'"[184] She testified she did not know

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[178] JA at 1183.
[179] JA at 1183; 1200.
[180] JA at 1193.
[181] JA at 1192.
[182] JA at 1193.
[183] JA at 1194.
[184] *Id.*

why that happened in this case.[185] However, an email from CDR Jones dated June 9, 2015 reveals that CDR Jones informed CNIC's Deputy SJA of Senator Gillibrand's connection to SOCS Barry's case. "Victim communicated back in February that she had been in contact with Senator Gillibrand's office."[186]

CDR Jones' initial conversation regarding Senator Gillibrand led Ms. Langwell's Media Relations Specialist, Brian O'Rourke, to forward a later news report about Senator Gillibrand's scrutiny of the military's handling of sexual assault cases to LCDR Dowling on June 8, 2015.[187] Such articles commonly appeared in the daily "clips" or news articles about the Navy that are "sent out to all the admirals in the Navy[.]"[188] When the prosecution asked her if articles concerning sexual-assault appear in the "clips," Ms. Langwell replied, "Absolutely," and "very regular[ly]."[189] "I would say once or twice a week."[190]

Sometime after RADM Lorge sent the June 10, 2015 letter to VADM DeRenzi and VADM Crawford, CDR Jones brought a copy to Ms. Langwell.[191] They again discussed how "Admiral Lorge did not think that Senior Chief Barry was guilty, the judge was a man-hater and biased, and we all thought it showed a

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[185] *Id.*
[186] JA at 568-71.
[187] JA at 566-67; 1178.
[188] JA at 1196.
[189] JA at 1196-97.
[190] JA at 1197.
[191] JA at 1184.

great deal of sinew for him to actually draft a letter, send it up to OJAG with those sentiments in it."[192]

L. JAG Corps leadership took no action with respect to RADM Lorge's June 10, 2015 letter.

Despite the "sinew" it took for RADM Lorge to send his June 10, 2015 letter, JAG Corps leadership ignored it. VADM DeRenzi did not remember seeing it. Perhaps understandably, she testified that her "focus was on finishing up [her] duties, going to Medical, and—and getting ready to retire."[193] With respect to VADM Crawford, he inquired of his staff what actions had been taking after being reminded of the letter's existence during a pretrial interview with the defense on July 31, 2017.[194] His staff informed him "the Chief Judge at the time had gotten a complaint from a defense counsel."[195] The Chief Judge viewed the complaint, which was never disclosed to the defense during SOCS Barry's initial appeal, as best "handled through the course of the appellate process."[196] It was not until May 12, 2017, after this Court had summarily affirmed SOCS Barry's case, that the government disclosed the existence of the letter to defense counsel.

M. Once government attorneys were alerted to evidence of unlawful command influence in SOCS Barry's case, they took affirmative steps to conceal it.

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[192] JA at 1185.
[193] JA at 874.
[194] JA at 775-76.
[195] JA at 776. The "Chief Judge" refers to the Assistant Judge Advocate General of the Navy (AJAG 05), Chief Judge, Department of the Navy. JA at 43-62.
[196] JA at 776.

After learning that VADM Crawford told RADM Lorge not to put a target on his back by dismissing this case, LCDR Dowling raised the possibility that VADM Crawford's actions were UCI with CDR Jones in 2015.[197] CDR Jones told him VADM Crawford was not the neutral provider of resources VADM DeRenzi ordered him to be, but instead "like a senior SJA, you know, providing advice to the Commander."[198] LCDR Dowling was "still uncomfortable with it, but Commander Jones had expressed is [sic] viewpoint on it, and I left it at that, sir."[199]

SOCS Barry served his entire three-year sentence without his attorneys ever knowing of the existence of VADM Crawford's conversations with RADM Lorge about his case, or RADM Lorge's June 10, 2015 complaint to VADM DeRenzi about the handling of SOCS Barry's case.

Sometime after this Court summarily affirmed the lower court's decision on April 27, 2017, LCDR Henderson, a senior military attorney at Code 46, learned that the government failed to disclose evidence of unlawful command influence to the defense.[200]

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[197] JA at 939.
[198] JA at 930.
[199] JA at 930.
[200] JA at 1103-06.

When he learned of this Court's April 27, 2017 decision, he began researching his ethical responsibilities.[201] Although he was conflicted from SOCS Barry's case on appeal due to his previous service in the Defense Service Office (DSO) that handled SOCS Barry's trial,[202] another government appellate attorney had informed him of the possibility that evidence of unlawful command influence existed in SOCS Barry's case.[203] The government attorney had inadvertently disclosed the matter to LCDR Henderson through a series of hypothetical questions, including a question about Code 46's obligation to report unlawful command influence.[204]

When the attorney identified the case as SOCS Barry's case, LCDR Henderson told her he could not speak with her and directed her to the Division's Director.[205] LCDR Henderson testified he believed this conversation took place on the same day, or the day after, LCDR Dowling sent Code 46 a series of emails asking about his own ethical obligations to disclose evidence of unlawful command influence to the defense.[206]

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[201] JA at 1107.
[202] JA at 1100.
[203] JA at 1103-06.
[204] *Id.*
[205] JA at 1105.
[206] *Id.*

LCDR Dowling had inquired at Code 46, his chain of command at RLSO Southwest, and the Administrative Law Division of the Office of the Judge Advocate General (Code 13), asking for advice as to his ethical obligations to disclose evidence of unlawful command influence to the defense.[207] In March 2017, a Navy reservist informally suggested to LCDR Dowling that VADM Crawford's advice to RADM Lorge may have constituted unlawful command influence.[208] Desperate for advice and receiving none, LCDR Dowling even drafted a letter to VADM Crawford asking him to address the unlawful command influence.[209]

By then, CAPT Donald King had replaced CDR Jones as the SJA to Commander, Navy Region Southwest. After speaking with a Code 46 attorney,[210] LCDR Dowling informed his command he had spoken with Code 46 about his ethical obligations to disclose unlawful command influence to the defense.[211]

At Code 46, LCDR Dowling's point of contact "bounced" his questions "off with some of [the] super—supervisors and other people within [the] office," and they decided this was an issue best handled by the ethics counselors at Code 13.[212]

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[207] JA at 941.
[208] JA at 934.
[209] JA at 404-05.
[210] JA at 940-41.
[211] JA at 937; 940-41.
[212] JA at 941.

After discussing his professional responsibility obligations with then-CDR Dustin Wallace, the Executive Officer (XO) of RLSO Southwest, and the second highest ranking prosecutor in San Diego, he decided to follow CDR Wallace's advice to contact the Professional Responsibility Officer at Code 13.[213]

Meanwhile, unbeknownst to LCDR Dowling, LCDR Henderson called LCDR Leah O'Brien on April 27, 2017.[214] He took this action after he learned of this Court's decision to deny SOCS Barry's appeal and realized the government had not disclosed the evidence of unlawful command influence.[215] LCDR O'Brien had been SOCS Barry's detailed trial defense counsel.[216] Based upon the unusual language in the CA's action, and what she knew about the case, she didn't think LCDR Henderson's report "was frivolous at all."[217] She immediately "passed on this information to the folks who I thought would be best fit to verify" it, SOCS Barry's appellate defense attorneys at the Navy's Appellate Defense Division (Code 45).[218]

Based on the information LCDR O'Brien provided, SOCS Barry's appellate defense team obtained a declaration from RADM Lorge on May 5, 2017.[219] The

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[213] JA at 940.
[214] JA at 1105.
[215] *Id.*
[216] JA at 1100.
[217] JA at 964.
[218] JA at 964.
[219] JA at 388-90.

team also contacted LCDR Dowling, but he invoked attorney-client privilege.[220] LCDR Dowling emailed his immediate supervisor, CAPT King, to obtain a waiver of privilege from Commander, Navy Region Southwest.[221]

CAPT King questioned whether LCDR Dowling needed to submit an affidavit to the defense.[222] And so did CAPT Meg Larrea, the CO of the RLSO.[223] She had replaced CAPT Eldred and was the senior Navy prosecutor in San Diego when VADM Crawford's meeting with RADM Lorge came to light.[224] And even though the MoA provided that CAPT Larrea should not advise either CAPT King or LCDR Dowling about military justice in a particular case, that is what she did when she learned of LCDR Dowling's intent to submit an affidavit to the defense.[225] Eventually, CAPT King and CAPT Larrea edited LCDR Dowling's declaration, which began as an eight-page draft, down to a single page.[226]

LCDR Dowling detached from Navy Region Southwest on June 9, 2017.[227] In his detaching fitness report, CAPT Larrea elected not to use the more favorable language that CAPT King had submitted to her.[228] When LCDR Dowling inquired

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[220] *Id.*
[221] JA at 953.
[222] JA at 677; 713.
[223] JA at 713.
[224] JA at 937.
[225] JA at 713.
[226] JA at 945; 395; 396-403.
[227] JA at 948.
[228] JA at 948-49.

as to why CAPT Larrea had done so, she told him he had "trouble letting issues go,"[229] "your work has suffered because of Barry[.]"[230]

LCDR Dowling later met with CAPT King, CAPT Larrea, and then-CDR Wallace to discuss specific examples of his shortcomings that resulted in an adverse fitness report, and they "ended up not talking about any examples that the XO had, but we—we talked about whether or not to file an affidavit in this case, and Captain Larrea had indicated that if I filed, I'd be effectively calling Admiral Lorge a liar[.]"[231]

LCDR Dowling signed a declaration on June 5, 2017 and provided it to CAPT King.[232] At some point thereafter, CAPT King caused LCDR Dowling's declaration to be sent to Code 46 who disclosed it to the defense at 1400 on June 14, 2017.[233] Appellate defense counsel received LCDR Dowling's declaration nearly two months after LCDR Dowling first contacted Code 46.

N. At the conclusion of the DuBay hearing, the military judge found that "actual or apparent unlawful command influence tainted the final action in this case."[234]

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[229] JA at 948.
[230] *Id.*
[231] *Id.*
[232] JA at 955.
[233] Appellant's Motion to Supplement (Jun. 14, 2017).
[234] JA at 604.

As this Court directed, the military judge made findings of fact based on the evidence and testimony presented during the *DuBay* hearing. In doing so, the military judge made two significant observations. First, he found that "RADM Lorge did not take the action he wanted to take in this case[.]"[235] And second, the military judge found that "RADM Lorge was influenced by conversations with senior military leaders; specifically VADM DeRenzi and VADM Crawford when taking action in this case[.][236] He then concluded that "the final action taken in this case is unfortunate as it does not engender confidence in the processing of this case or the military justice system as a whole."[237]

RADM Lorge was even more direct: "[Long pause.] I think the system let him down. The system let me down. And we need to make it right."[238]

Argument

I

A DEPUTY JUDGE ADVOCATE GENERAL CAN COMMIT UNLAWFUL COMMAND INFLUENCE UNDER ARTICLE 37, UCMJ, 10 U.S.C. § 837 (2012).

Standard of Review

This Court reviews questions of statutory construction *de novo*.[239]

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[235] JA at 603.
[236] *Id.*
[237] *Id.*
[238] JA at 1047.
[239] *United States v. Wilson*, 76 M.J. 4, 7 (C.A.A.F. 2017).

Discussion

A DJAG can commit unlawful command influence in violation of Article 37, UCMJ, and in SOCS Barry's case, the DJAG of the Navy, in fact, violated Article 37. As this Court has recognized, "Article 37(a) . . . prohibits unlawful command influence *by all persons subject to the UCMJ*."[240] Under Article 2, the DJAG is subject to the UCMJ and, as explained below, can commit unlawful command influence in violation of Article 37.

Additionally, the statute authorizing the Office of the JAG of the Navy further provides that "[n]o officer or employee of the Department of Defense" may interfere with (1) the ability of the JAG to give independent legal advice to SECNAV or CNO; or (2) the ability of SJAs attached to military units "to give independent legal advice to commanders."[241] Thus, the answer to this Court's specified question is an unqualified yes, and the government has never argued to the contrary.

A. The government cannot assert, for the first time on appeal, that a Deputy Judge Advocate General is unable to violate Article 37.

Assuming there exists a heretofore unseen legal argument that the DJAG is unable to commit unlawful command influence in violation of Article 37(a), the

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[240] *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004) (emphasis added).
[241] 10 U.S.C. § 5148 (2012).

government is estopped from making that argument in SOCS Barry's case.[242] In its response to SOCS Barry's petition for reconsideration, its response to his motion for additional fact-finding, and its argument at the *DuBay* hearing, the government had every opportunity to argue that VADM Crawford was unable to commit unlawful command influence in violation of Article 37(a). The government, however, chose not do so. Instead, it chose a different legal position, and is thus estopped from changing its position at this point in the appellate process.

Indeed, in the initial litigation before this Court, the government moved for a new convening authority's action with curative measures. "The subsequent convening authority action may be insulated from the appearance of impropriety by attaching a statement to the Record that clarifies the Judge Advocate General's impartiality and his desire for the newly appointed convening authority to exercise

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[242] "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895); *see also Zedner v. United States*, 547 U.S. 489, 503-04 (2006); *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). This principle, known as judicial estoppel, is meant to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. *See Pegram v. Herdrich*, 530 U.S. 211, 228 n.8 (2000) ("Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."); *see also Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996).

independent judgment in taking action under Article 60."[243] In response, this Court denied the government's motion to remand for new post-trial processing and ordered a *DuBay* hearing.

At the *DuBay* hearing, the government again chose to forgo any argument that VADM Crawford's advice to RADM Lorge in SOCS Barry's case could not violate Article 37. Instead, it argued that VADM Crawford did not advise RADM Lorge and that to assert otherwise was "simply just a fiction, a warping of facts to fit an agenda."[244] "And it's embarrassing today for the Navy JAG Corps that we have an SJA, deputy SJAs, trial-defense counsel, military judge, appellate-defense counsel swirling around, creating unnecessary issues in a post-trial process."[245]

Given the government's acknowledgement of the possibility of unlawful command influence in SOCS Barry's case, its trial strategy to present the whistleblowers in this case as "peripheral people" involved in a "double-triple-hearsay evolution,"[246] and its decision to forgo any argument claiming the DJAG is unable to commit unlawful command influence in violation of Article 37, it is estopped from making that argument at this point in the appellate process.

B. Congress has not authorized the Judge Advocates General, or their Deputies, to interfere with the independent legal advice SJAs give to

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[243] Appellee's Opposition to Appellant's Motion to Appoint Special Master, (May 11, 2017).
[244] JA at 761.
[245] JA at 1150.
[246] JA at 1152.

commanders. Importantly, VADM DeRenzi expressly denied she and her DJAG had such authority as they were "responsible for organizing, training and equipping the entire JAGC"[247] and had to "remain neutral."[248]

Article 37(a) provides, in relevant part, that "[n]o person subject to this chapter may attempt to coerce, or by any unauthorized means, influence . . . the action of any convening . . . authority with respect to his judicial acts."[249] And as part of the exercise of RADM Lorge's judicial power in SOCS Barry's case,[250] Congress directed that he "obtain and consider the written recommendation of *his* staff judge advocate or legal advisor."[251] That written recommendation was required to be served on SOCS Barry.[252]

Moreover, the Navy JAG Corps codified this requirement in its MoA with CNIC. In the MoA, RLSO CO's are not authorized to provide a regional commander like RADM Lorge with "SJA advice on military justice matters."[253] Such advice conflicts with the RLSO CO's duty to supervise "prosecution/trial

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[247] JA at 851.
[248] *Id.*
[249] 10 U.S.C. § 837 (2012).
[250] "To the extent that he may disapprove entirely the action of the court-martial, the convening authority possesses a judicial power far in excess of that which resides in any other single judicial office." *United States v. Nix*, 15 U.S.C.M.A. 578, 581 (C.M.A. 1965).
[251] 10 U.S.C. 860(d) (2006) (emphasis added).
[252] *Id.*
[253] JA at 372.

counsel functions" and the MoA ensures regional commanders receive "independent SJA advice."[254]

Absent *any* authority that would permit VADM Crawford to directly communicate with RADM Lorge regarding SOCS Barry's court-martial, the military judge's conclusion that he did so constitutes "an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case."[255]

Importantly, while VADM Crawford was not RADM Lorge's SJA, and was thus not authorized by Congress to provide RADM Lorge with advice regarding SOCS Barry's case, VADM Crawford *was* the deputy legal advisor to both the CNO and the SECNAV. This was not lost on RADM Lorge who, while unaware of what VADM Crawford "did on a daily basis," was aware he was the "number two lawyer in the Navy[.]"[256]

This Court has long held that legal advisors can commit UCI because they "generally act[] with the mantle of command authority."[257] These cases are equally applicable to the Navy's most senior legal advisors. "RADM Lorge was influenced

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[254] *Id.*
[255] *Boyce*, 76 M.J. at 247.
[256] JA at 1036.
[257] *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986); *see also, United States v. Lewis*, 63 M.J. 405, 414 (C.A.A.F. 2006); *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994).

by conversations with senior military leaders; specifically VADM DeRenzi and VADM Crawford when taking action in this case." [258] "Without these pressures, RADM Lorge would have taken different action in this case, likely ordering a new trial."[259] This Court should not abandon long-standing precedent and hold that the CNO's lawyers may move undetected through the ranks of military commanders urging them against exercising their independent judgment on the basis that doing so would harm themselves and the Navy.

Accordingly, VADM Crawford's advice to RADM Lorge—advice that led RADM Lorge to believe he needed to approve SOCS Barry's conviction, "justice be damned"[260]—was unauthorized. As such, it constitutes unlawful command influence in violation of Article 37(a).

II

MILITARY OFFICIALS EXERTED ACTUAL UNLAWFUL COMMAND INFLUENCE ON THE CONVENING AUTHORITY OR, AT A MINIMUM, CREATED THE APPEARANCE OF DOING SO.

Standard of Review

"Allegations of unlawful command influence are reviewed de novo."[261] This Court also reviews de novo whether "the Government has met its burden of

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[258] JA at 603.
[259] *Id*.
[260] JA at 1200.
[261] *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013).

demonstrating, beyond a reasonable doubt, that the[] proceedings were untainted by unlawful command influence."[262] The military judge's findings of fact are reviewed under a clearly erroneous standard.[263]

Discussion

Unlawful command influence is "the mortal enemy of military justice."[264] To ensure the military justice system is fair and engenders public confidence, this Court has recognized that it must act as a bulwark against unlawful command influence.[265] When this Court finds unrebutted evidence of unlawful command influence, or even the appearance of it, it has granted relief, to include dismissing convictions with prejudice.[266]

Unlawful command influence can be both actual and apparent. Both types have "malignant effects" that undermine the military justice system and must be "eradicated" when found.[267] "[A]ctual unlawful command influence has commonly been recognized as occurring when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case."[268] Apparent unlawful command influence is the appearance

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[262] *Lewis*, 63 M.J. at 413.
[263] *Gore*, 60 M.J. at 189.
[264] *Boyce*, 76 M.J. at 246.
[265] *Id.*
[266] *Salyer*, 72 M.J. at 415, *Lewis*, 63 M.J. at 405.
[267] *Gore*, 60 M.J. at 184, 187.
[268] *Boyce*, 76 M.J. at 246.

of actual command influence and "is as devastating to the military justice system as the actual manipulation[.]"[269]

The military judge below concluded "[a]ctual or apparent unlawful command influence tainted the final action in this case."[270] Absent pressure from VADM DeRenzi and VADM Crawford, "RADM Lorge would have taken different action in the case, likely ordering a new trial."[271] In fact, RADM Lorge testified, after reviewing the record of trial, he was inclined to disapprove the findings.[272] Accordingly, actual unlawful command influence tainted the approved conviction in SOCS Barry's case and dismissal with prejudice is required to remedy it.

Once an issue of unlawful command influence is raised by some evidence, the burden shifts to the government to rebut an allegation of unlawful command influence by persuading this Court beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence did not affect the findings or sentence.[273] In SOCS Barry's case, there is evidence of actual unlawful command influence that the government cannot rebut beyond a reasonable doubt.

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[269] *Id.* at 247.
[270] JA at 604.
[271] *Id.* at 8.
[272] JA at 1033; 1043; 1047.
[273] *Salyer*, 72 M.J. at 424.

The test for an appearance of unlawful command influence is objective: would "an objective, disinterested observer, fully informed of all the facts and circumstances . . . harbor a significant doubt about the fairness of the proceeding[?]"[274] And "unlike actual command influence where a prejudice to the accused is required, no such showing is required for a meritorious claim of an appearance of unlawful command influence."[275] As this Court recently held, in instances of apparent unlawful command influence "the damage to the public's perception of the fairness of the military justice system as a whole" is the prejudice as opposed to individualized harm to the appellant.[276]

A. VADM Crawford's unauthorized advice to RADM Lorge is actual unlawful command influence.

Even though VADM Crawford was prohibited by regulation and statute from advising RADM Lorge to approve SOCS Barry's convictions, the military judge concluded VADM Crawford provided that advice anyway. And he did it not only once, but twice.[277]

As the military judge found, "RADM Lorge did believe he received legal advice from VADM Crawford and that approving the findings and sentence was the right answer[,]" even though RADM Lorge had expressed his believe that

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[274] *Id.* (internal citation omitted).
[275] *Boyce*, 76 M.J. at 247.
[276] *Id.* at 249.
[277] JA at 602-04.

SOCS Barry's "guilt was not proven beyond a reasonable doubt at his court-martial."[278] During their in-person meeting on April 30, 2015, VADM Crawford highlighted the political pressures on RADM Lorge as a reason to approve SOCS Barry's conviction. As the military judge found, "VADM Crawford . . . left RADM Lorge with the impression that not affirming the findings and sentence in [SOCS Barry's] case would put a target on RADM Lorge's back."[279]

Later, during the phone call that followed their in-person meeting, RADM Lorge went so far as to discuss with VADM Crawford the specific language he planned to use in his action on SOCS Barry's case.[280] Again, the military judge found that RADM Lorge believed VADM Crawford provided advice.[281] RADM Lorge explained that he asked VADM Crawford whether CDR Jones' proposal to put novel language in the CA's action was "a valid" course of action.[282] After discussing the matter with VADM Crawford, RADM Lorge believed using novel language in his approval action was the "best he could do" for SOCS Barry given his genuine belief that SOCS Barry was not guilty.[283]

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[278] Appellate Ex. XXXIII at 4.
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] JA at 1040.
[283] JA at 599.

As RADM Lorge explained, VADM Crawford's advice was a significant factor that caused him to approve SOCS Barry's conviction when he was otherwise inclined to disapprove it. RADM Lorge described the influences on him as operating like a "gumbo," and made it clear that his conversations with VADM Crawford were part of the stew that caused him to forgo disapproval of SOCS Barry's conviction.[284] As RADM Lorge squarely acknowledged in both of his affidavits, "absent the pressures[,]" which included VADM Crawford's intervention, he "would have disapproved the findings in this case."[285]

LCDR Dowling corroborated the impact that VADM Crawford had on RADM Lorge when he described how RADM Lorge's position changed following the April 30, 2015 meeting. Prior to this meeting, RADM Lorge was convinced he should disapprove the findings. Afterwards, RADM Lorge was still convinced that he should disapprove the findings, but instead approved the conviction in order to avoid the appearance that the military was "sweeping sexual assaults under the rug."[286]

Given these facts, sworn to by the CA himself, the government cannot rebut the evidence of unlawful command influence beyond a reasonable doubt. Accordingly, VADM Crawford unlawfully influenced RADM Lorge to forgo

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[284] JA at 1041; 416.
[285] *Id.*
[286] JA at 414-15.

disapproval of SOCS Barry's conviction. And as a result, rather than allowing RADM Lorge to provide SOCS Barry with a new trial, VADM Crawford ensured that SOCS Barry would serve the entirety of his adjudged confinement.

B. If not actual unlawful command influence, VADM Crawford's meeting with RADM Lorge is apparent unlawful command influence.

Although he could not recall SOCS Barry's name, VADM Crawford agreed that he talked with RADM Lorge's about his pending action in a specific sexual assault case.[287] Moreover, there is no evidence that the government can provide to change the fact that RADM Lorge planned to disapprove the findings before his meeting with VADM Crawford, and then decided to approve SOCS Barry's conviction only after the April 30, 2015 meeting.

Accordingly, even if this Court were to conclude that VADM Crawford genuinely believed he provided no advice to RADM Lorge, the fact remains that they discussed SOCS Barry's case and RADM Lorge decided to approve SOCS Barry's conviction as a result. Regardless of VADM Crawford's actual advice, an objective, disinterested observer fully informed of all the facts and circumstances of SOCS Barry's case, including the facts outlined in RADM Lorge's affidavits and testimony and corroborated by several witnesses, would harbor a significant doubt about the fairness of RADM Lorge's decision to approve the findings.

[287] JA at 798-800; 806-07; 823.

C. VADM DeRenzi's meeting with RADM Lorge constitutes both actual and apparent unlawful command influence.

As VADM DeRenzi admitted during the *DuBay* hearing, she advised RADM Lorge that "we're under a lot of scrutiny" with regard to how he handled sexual assault cases.[288] She explained that "[e]very 2 or 3 or 4 months, something happened, and it increase[d] the scrutiny again,"[289] and "conveyed . . . how tenuous the ability of an operational commander to act as a convening authority had become, especially in the findings or sentence of sexual assault cases due to the intense pressure of the military at that time."[290]

In addition, the military judge summarized the conversation between VADM DeRenzi and RADM Lorge as follows:

> VADM DeRenzi discussed with RADM Lorge the fact that RADM Lorge and other commanders were facing difficult tenures as convening authorities due to the political climate surrounding sexual assault. She told RADM Lorge that every three or four months decisions were made regarding sexual assault cases that caused further scrutiny by Congress and other political and military leaders. She also told RADM Lorge that a good deal of her time was being taken up with testimony and visits to both Capitol Hill and the White House.

At the time of their conversation, VADM DeRernzi was the principal legal advisor to the SECNAV and CNO, superiors in command to RADM Lorge. And while VADM DeRenzi did not reference a specific case during their meeting, her

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[288] JA at 859.
[289] *Id.*
[290] JA at 881.

guidance brought to bear on RADM Lorge the political pressure emanating from Congress and the President, which in turn caused RADM Lorge to believe that if he "were to disapprove the findings in [SOCS Barry's] case, it could adversely affect the Navy."[291] Given VADM DeRenzi's guidance, RADM Lorge believed that "[e]veryone from the President down the chain and Congress" would fail to look at decision to disapprove a sexual assault conviction on "its merits," which, as a result, "could bring hate and discontent on the Navy from the President, as well as senators including Senator Kirsten Gillibrand."[292]

VADM DeRenzi's guidance to RADM Lorge about his ability to take action in a category of cases—sexual assault offenses—was a significant factor in RADM Lorge's decision to forgo disapproval of SOCS Barry's conviction. He described it as part of the "gumbo" that caused him to act contrary to his genuine desire to disapprove SOCS Barry's conviction.[293] Accordingly, it constitutes actual unlawful command influence. At a minimum, VADM DeRenzi's guidance would cause an objective, disinterested observer fully informed of all the facts and circumstances of SOCS Barry's case to harbor a significant doubt about the fairness of RADM Lorge's decision to approve the findings.

D. Dismissal is required to remedy the unlawful command influence.

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[291] JA at 410-16.
[292] *Id.*
[293] JA at 1041.

Given the existential nature of the threat that unlawful command influence poses to military justice, Congress established "a civilian Court of Military Appeals . . . [as] a . . . bulwark against impermissible command influence."[294] Since then, this Court has recognized that "undue and unlawful command influence is the carcinoma of the military justice system, and when found, must be surgically eradicated."[295] Therefore, in light of the actions of VADM Crawford and VADM DeRenzi that caused RADM Lorge to forgo he belief that disapproval of the findings in SOCS Barry's case was required under Article 60, SOCS Barry respectfully asks this Court to now stand as the bulwark Congress intended it to be; dismiss Specification 2 of the Charge with prejudice and eradicate the unlawful command influence in SOCS Barry's case.

No remedy will give SOCS Barry the nearly two years of liberty he would have enjoyed had VADM DeRenzi and VADM Crawford not violated Article 37, UCMJ, and unlawfully influenced RADM Lorge's action in the case. They brought the political hysteria in Washington D.C., which at the time was felling even their fellow flag officers, to bear on RADM Lorge, and, at least with respect to VADM Crawford, did so intending to stop him from disapproving the findings. Dismissing Specification 2 of the Charge with prejudice, however, can give SOCS Barry the

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[294] *Id.* (citing Hearings on H.R. 2498 Before a Subcomm. of the House Committee on Armed Service, 81st Cong., 1st Sess. 608 (1949)).
[295] *Gore*, 60 M.J. at 184, 187.

outcome he would have received absent the unlawful influence of VADM Crawford and VADM DeRenzi.

Conclusion

SOCS Barry now respectfully asks this Court to take action that will restore confidence in the military justice system.[296] He asks this Court to eradicate the unlawful command influence and take action that demonstrates the military justice system is an independent, fair, and impartial system that will neither tolerate Convening Authorities who confine men and women in uniform for the sake of political convenience nor condone the actions of the judge advocates who counsel them to that effect; respectfully, dismiss Specification 2 of the Charge with prejudice.[297]

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[296] "Even the appearance of 'backroom justice' should be avoided." *United States v. Czekala*, 38 M.J. 566, 573 n. 3 (A.C.M.R. 1993).

[297] Any remedy short of dismissal with prejudice at this point would effectively validate the unlawful command influence of VADM Crawford and VADM DeRenzi. *Cf., Salyer*, 72 M.J. at 428.

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I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on December 21, 2017.

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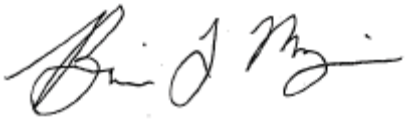

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