UNITED STATES,

Appellee

v.

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

Appellant

REPLY TO APPELLEE'S ANSWER

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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I

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

II

WHETHER MILITARY OFFICIALS EXERTED ACTUAL UNLAWFUL COMMAND INFLUENCE ON THE CONVENING AUTHORITY OR CREATED THE APPEARANCE OF DOING SO?

Pursuant to Rule 19(a)(7)(B) of this Court's Rules of Practice and Procedure, Senior Chief Special Warfare Operator (SOCS) Keith E. Barry, the Appellant, hereby replies to the government's answer.

With its pleading supported by neither the law nor the facts of this case, the government urges this Court to simultaneously alter both.[1] At the *DuBay*[2] hearing below, the prosecution advanced no legal defense of the conduct of the Judge Advocate General of the Navy, Vice Admiral (VADM) Nanette DeRenzi, JAGC, USN (ret.), or the Deputy Judge Advocate General of the Navy, VADM James Crawford, JAGC, USN, arguing instead the unlawful command influence (UCI) substantiated by the military judge was a fabrication of junior officers.[3]

Confronted with the findings of fact of the *DuBay* military judge, the government now argues that VADM Crawford's discussions with the Convening Authority (CA), Rear Admiral (RADM) Patrick Lorge, were an "inspection in the field" pursuant to Article 6(a), UCMJ, and part of "general

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[1] "These allegations have recalled to the court's mind the adage: if you have the facts, argue the facts. If you don't have the facts argue the law. Lacking both, find a scapegoat." *CPR Assoc., Inc. v. Southeastern Pennsylvania Chapter of American Heart Assn., Pennsylvania Affiliate, Inc.*, 1991 U.S. Dist. LEXIS 4596 (E.D. Pa. 1991) (Weiner, J.).

[2] *United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1967).

[3] JA at 1145-54.

instruction or informational courses" authorized by Article 37, UCMJ.[4] "[T]he *DuBay* military judge found no such 'benign' motive, and it is clear from his findings of fact that it is pure sophistry to pretend that such a motive exists in this case."[5]

The government's case initially rises and falls with its success in convincing this Court that no fewer than five of the *DuBay* military judge's findings of fact are clearly erroneous.[6] Once this Court determines there is more than "some evidence"[7] supporting each of these findings of fact, this Court should dismiss this case for actual and apparent UCI.

Law and Argument

A. Discovery is closed, and this Court should resolve this case on the findings of fact by the *DuBay* military judge.

Without citation to authority, the government appears to suggest that SOCS Barry must do more than cite the findings of fact of the *DuBay* military judge in support of its arguments.[8] This is an odd argument from the

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[4] Gov't Br. at 23.

[5] *United States v. Riesbeck*, No. 17-0208/CG, slip op. at 9 (C.A.A.F. Jan. 23, 2018)

[6] JA at 30-31; 36.

[7] *United States v. Leedy*, 65 M.J. 208, 213 n.4 (C.A.A.F. 2007).

[8] Gov't Br. at 33 ("Appellant merely repeats the Military Judge's conclusion that 'RADM Lorge would have taken action in the case, likely ordering a new trial.'").

government, which routinely relies on the findings of fact in defending rulings by military judges, and especially so in light of this Court's precedent resolving cases of UCI "relying entirely on the findings of fact made by the trial judge."[9]

"At this juncture, discovery is closed, the record is established and counsel must apply the record facts to the applicable law."[10] Once this Court concludes there is more than "some evidence"[11] supporting each of the military judge's findings, the application of the law to this case is relatively straightforward.

B. None of the *DuBay* military judge's findings of fact are clearly erroneous.

"The clearly erroneous standard is a very high one to meet and Appellant does not meet the burden by suggesting that the findings are 'maybe' or 'probably wrong.'"[12] "In the present case, the military judge's findings of fact are well within the range of the evidence permitted under the clearly-erroneous standard."[13]

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[9] *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004).

[10] *Helfrich v. Lehigh Valley Hosp.*, 2005 U.S. Dist. LEXIS 4420 *8 n.2 (E.D. Penn. 2005).

[11] *Leedy*, 65 M.J. at 213 n.4.

[12] *Leedy*, 65 M.J. at 213 n.4.

[13] *United States v. Norris*, 55 M.J. 209, 215 (C.A.A.F. 2001).

Here, the findings of fact were made by the Chief Trial Judge of the Air Force, a "learned and very experienced military judge,"[14] after two days of hearings where he considered the testimony of twelve witnesses, seven prosecution exhibits, thirty-nine defense exhibits, and thirty-two appellate exhibits.

Much of the government's argument that the military judge's findings of fact are clearly erroneous rests on the government's miscasting or ignoring key portions of the record.[15] First, VADM Crawford testified at the *DuBay* hearing he never spoke with RADM Lorge about SOCS Barry's case on the phone, and that his discussions with RADM Lorge about SOCS Barry's case were limited to a brief, in-person[16] meeting in RADM Lorge's office in San Diego, California on April 30, 2015.[17]

Contrary to VADM Crawford's testimony, the government now concedes RADM Lorge "again reached out to his former colleague,"[18] "on the

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[14] *United States v. Edwards*, 45 M.J. 114, 117 (C.A.A.F. 1996) (Cox, C.J., dissenting).

[15] Gov't Br. at 16-17.

[16] JA at 796.

[17] JA 169-170; 190 ("[H]e never had a conversation with me on the phone."); JA 772-73.

[18] Gov't Br. at 16.

telephone,"[19] sometime after their April 30, 2015, meeting, and "VADM Crawford told RADM Lorge to trust the advice of his lawyers—he referred him back to his staff judge advocates."[20] And that is where the government ends its discussion of the phone call.

But it didn't end there. Nevertheless, the government posits the following finding of fact from the *DuBay* military judge is clearly erroneous: "RADM Lorge believed VADM Crawford was essentially telling him to approve the Findings and Sentence."[21] RADM Lorge, however, testified that VADM Crawford confirmed Captain (CAPT) Jones' advice regarding the addition of language in the CA's action that would cause the appellate courts to "take some action on it."[22] And RADM Lorge testified VADM Crawford tried to convince him to approve the findings in this case during the phone call.[23] Not surprisingly, the military judge concluded: "Without these pressures,

[19] Gov't Br. at 17.

[20] Gov't Br. at 17.

[21] Gov't Br. at 30.

[22] JA at 1069.

[23] JA at 1061; *contra* Gov't Br. at 30.

RADM Lorge would have taken different action in the case, likely ordering a new trial."[24] This finding of fact is not clearly erroneous.

Next, the government challenges the *DuBay* military judge's conclusion "that pressure was placed on [RADM Lorge] by senior military leaders."[25] The government ignores the next two sentences identifying the factual basis for this finding of fact, and instead, cherry-picks two references out of eighty-one pages of RADM Lorge's testimony to conclude RADM Lorge "never said he felt pressure from senior military leaders[.]"[26]

However, as identified by the *DuBay* military judge, "[d]uring his testimony, and in his affidavits, RADM Lorge discusses this in some detail."[27] His affidavits describe pressure from the chain of command.[28] "I perceived that if I were to disapprove the findings in the case, it could adversely affect the Navy. Everyone from the President down the chain and Congress might fail to look at its merits, and only view it through the prism of opinion."[29] In the

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[24] JA at 603.

[25] JA at 602; Gov't Br. at 30.

[26] Gov't Br. at 30.

[27] JA at 602.

[28] JA at 414.

[29] JA at 414.

unvarnished, contemporaneous language of RADM Lorge, the Navy wanted "to get tough on sexual assaults, justice be damned[.]"[30] The military judge rightly concluded these pressures were conveyed by VADM DeRenzi and VADM Crawford.[31] This finding of fact is not clearly erroneous.

The government next asserts as clearly erroneous the following finding from the *DuBay* military judge: after RADM Lorge's in-person meeting with VADM Crawford, "RADM Lorge's ultimate impression was that VADM Crawford believed RADM Lorge should approve the findings and sentence in this case."[32] This time, the government plucks a single citation from RADM Lorge's testimony, and declares the *DuBay* military judge's finding of fact to be—not merely clearly erroneous—but "impossible."[33] RADM Lorge testified, however, that when VADM Crawford "left the office"[34] he knew disapproving

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[30] JA at 1197.

[31] JA at 603 ("RADM Lorge was influenced by conversations with senior military leaders; specifically VADM DeRenzi and VADM Crawford when taking action in this case.").

[32] Gov't Br. at 30.

[33] Gov't Br. at 30.

[34] JA at 1066.

the findings in this case would cause greater scrutiny "from the chain of command[.]"[35]

The *DuBay* military judge's finding of fact is buttressed by the testimony of RADM Lorge's Deputy Staff Judge Advocate, Lieutenant Commander (LCDR) Jonathan Dowling, JAGC, USN.[36] As LCDR Dowling explained, before the meeting "all options" had been on the table to include disapproving the findings.[37] But after the meeting his "marching orders" changed.[38] "[T]he marching orders as I took them to be were that we were going to approve the conviction[.]"[39] The *DuBay* military judge's finding of fact is neither "impossible" nor clearly erroneous.

The government also takes issue with the *DuBay* military judge's finding of fact regarding the Staff Judge Advocate's (SJA) "intransigence in his advice to RADM Lorge related to this case."[40] The government asserts an SJA who is "reticent to change his advice when a convening authority shows concern does

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[35] JA at 1066.

[36] SOCS Barry's opening brief misspelled LCDR Dowling's first name.

[37] JA at 922.

[38] JA at 921.

[39] JA at 314.

[40] Gov't Br. at 31.

not make him stubborn or his advice incorrect."[41] While that may be true, that is not an accurate description of the SJA's conduct in this case. Here, the SJA repeatedly provided RADM Lorge demonstrably false legal advice. This included misinforming RADM Lorge as to his authority under Article 60, UCMJ, as well as advising him that the language in his CA's action was "the answer," that the appellate courts would "probably overturn [SOCS Barry's conviction]" as a result, and that appellate courts can "make political decisions; you really can't."[42]

Importantly, VADM Crawford reaffirmed this advice during a phone call with RADM Lorge, telling him to "trusting [sic] this and this will—this will work out for Senior Barry."[43] The *DuBay* military judge's finding that RADM Lorge was intentionally misled by his SJA is not clearly erroneous.

Finally, the government asserts "the predicate facts regarding VADM Crawford's use of the phrase 'target on the back' do not exist[.]"[44] But RADM Lorge, while he could not remember the precise words used by VADM

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[41] Gov't Br. at 31.

[42] JA at 1039.

[43] JA at 1040.

[44] Gov't Br. at 35.

Crawford, testified VADM Crawford said something to that effect.[45] LCDR Dowling testified that *he* remembered the precise words. "[W]hat I do remember 100 percent was the 'target on my back' comment[.]"[46] RADM Lorge's decision to approve the findings after the meeting surprised LCDR Dowling, as did "the content of the discussion, which is why the comments were so memorable for him."[47]

C. Neither Article 6, UCMJ, nor Article 37, UCMJ, authorize the Judge Advocate General of the Navy, or her Deputy, to pressure a convening authority to approve the findings in a particular case or warn him that disapproving the findings in a sexual assault case will put a target on his back.

If this Court decides to search for an argument by the government at the *DuBay* hearing that suggests Articles 6 and 37, UCMJ, sanctioned VADM Crawford's conduct, it will do so in vain. Not surprisingly, the *DuBay* military judge's finding of fact are silent as to this argument.[48] Indeed, the government's argument below—tethered to VADM Crawford's sworn testimony[49]—was that

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[45] JA at 1064-65; 1078-79.

[46] JA at 0919.

[47] JA at 599.

[48] JA at 596-604; Gov't Br. at 14. The government appears to attribute significance to the *DuBay* military judge's failure to make findings on an argument the government never advanced below.

[49] JA at 772.

VADM Crawford said nothing more during his single conversation with RADM Lorge than, "You have good lawyers, use them."[50] Trial counsel argued, "He doesn't give advice, he doesn't give details about the case; he moves on."[51]

Forced to make a credibility determination in order to resolve the conflicting testimony at issue, the *DuBay* military judge concluded RADM Lorge's testimony to the contrary, which was corroborated by others, was credible.[52]

The foundation for the government's newly adopted argument is a single passing reference by VADM Crawford to Article 6, UCMJ, which he testified required him to "see how we were providing services to the commanders in the fleet[.]"[53] Interestingly, VADM DeRenzi's testimony contradicted VADM Crawford's.[54] She testified such "site visits" were made pursuant to "Title 10 responsibilities to organize training and equip the JAG Corps, which is

[50] JA at 1148.

[51] JA at 1148.

[52] JA at 601.

[53] Gov't Br. at 13; JA at 767.

[54] JA at 849.

different than Article 6 site visits."[55] "Site visits weren't for that purpose. We have an IG who does that with subject-matter experts."[56]

The government's argument that VADM Crawford was acting as a one-man, Article 6, UCMJ, inspection team when he met with RADM Lorge on April 30, 2015, collapses under its own weight. And so does its argument that VADM Crawford was providing RADM Lorge a one-on-one "general instructional or informational course[] in military justice…designed solely for the purpose of instructing members of a command in the substantive and procedural aspect of courts-martial."[57] VADM Crawford testified, "I did not go out to the fleet to generate discussions on military justice."[58]

Both VADM DeRenzi and VADM Crawford testified it would have been inappropriate for them to discuss a specific case with a CA.[59]

D. The parties agree that a Deputy Judge Advocate General can commit UCI.[60]

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[55] JA at 849.

[56] JA at 849.

[57] 10 U.S.C. § 837(a)(1) (2018).

[58] JA at 796.

[59] JA at 767; 768; 804 ("It would have been inappropriate, and I did not do that."); 851 ("Because it would have been inappropriate for me to do that.").

[60] Gov't Br. at 21.

As in *Boyce*,[61] this Court should "deem it appropriate to accept that concession in the course of analyzing the [specified] issue."[62] However, in light of the factual record actually before the Court, SOCS Barry does not share the government's view that the issue specified by the Court is moot.[63]

E. There is no statutory authority for the government's argument that only commanders and their subordinates can violate Article 37, UCMJ.

At certain points in its pleading, the government urges this Court to hew to the plain language of Article 37, UCMJ, and abandon decades of precedent the government casts as "a judicial creation based on 'the spirit of the Code[.]'"[64] Yet at other points of its pleading, it asks this Court to look past the plain language of Article 37, UCMJ, to precedent, which the government acknowledges is dated, that suggests only those acting with the "mantle of command authority"[65] can commit UCI.

To the contrary: "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of…any convening,

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[61] 76 M.J. 242, 246 n.3 (C.A.A.F. 2017).

[62] *Id.*

[63] Gov't Br. at 21.

[64] Gov't Br. at 43.

[65] Gov't Br. at 24.

approving, or reviewing authority with respect to his judicial acts."[66] The government has not yet asked this Court to overrule its precedent holding that RADM Lorge was performing judicial acts[67] when—as found by the *DuBay* military judge below—VADM Crawford successfully, unlawfully influenced his action, and this Court's inquiry should proceed to remedy.

SOCS Barry does not mean to suggest the precedent cited by the government is not valid, so long as it is limited to the species of UCI[68] rooted in the first sentence of Article 37, UCMJ, which prohibits UCI of trial participants, and not coincidentally, references "commanding officer[s.]"[69]

Here, however, neither VADM DeRenzi nor VADM Crawford testified they had the authority to intervene in specific cases like SOCS Barry's, saying they had to "remain neutral."[70] VADM DeRenzi testified, "[I]t wouldn't have

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[66] 10 U.S.C. § 837; *see also*, 10 U.S.C. § 5148 (2018).

[67] *United States v. Fernandez*, 24 M.J. 77, 78 (C.M.A. 1987).

[68] *United States v. Stombaugh*, 47 M.J. 253, 258 (C.A.A.F. 1997) (referencing "unlawful-command-influence species of Article 37 as 'involving some mantle of command authority in the alleged unlawful activity.'") (citation omitted).

[69] 10 U.S.C. § 837 (2018).

[70] JA at 851.

been appropriate for me to talk about specific cases, nor did I do so."[71] VADM Crawford testified, "It would have been inappropriate, and I did not do that."[72]

Despite this record, the government now argues VADM Crawford *did* "do that," and that his meeting with RADM Lorge was either an official inspection pursuant to Article 6, UCMJ, "or fell under the 'instructional' exceptions in Article 37, UCMJ."[73] Assuming for the sake of argument this assertion had any basis in fact, VADM Crawford's official "inspection" cannot be likened to the bathroom-stall gossip regarding the political fallout from Tailhook at issue in *United States v. Denier*[74] or the warnings of the Junior Officer Protection Association (JOPA) at issue in *United States v. Stombaugh*.[75]

When VADM Crawford met with RADM Lorge on April 30, 2015, RADM Lorge knew VADM Crawford was the "number two lawyer in the Navy[.]"[76] And, according to the findings of fact by the *DuBay* military judge,

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[71] JA at 851; 878.

[72] JA at 804.

[73] Gov't Br. at 7.

[74] 47 M.J. at 253, 258 (C.A.A.F. 1997).

[75] 40 M.J. 208, 212-13 (C.M.A. 1994).

[76] JA at 1036.

"RADM Lorge's ultimate impression was that VADM Crawford believed RADM Lorge should approve the findings and sentence in the case."[77]

In light of these facts, this Court should not disturb its precedent that "a staff officer to and legal representative"[78] of a CA, here the Chief of Naval Operations (CNO),[79] can commit UCI. RADM Lorge testified he attended "all-flag-officer meetings" concerning sexual assault cases, "where the JAG would get up and brief, the VCNO would get up and brief, CNO would get up and brief…it was a well-known…item of interest."[80]

Indeed, VADM Crawford's conduct, whether or not coupled with VADM DeRenzi's commentary that actions by CAs were being questioned by senior military leadership and Congress,[81] is nearly identical to the pretrial advice from the Judge Advocate General of the Air Force in *United States v. Wright*,[82] which this Court referenced in *Boyce*.[83] There, the SJA to the CA was

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[77] JA at 602.

[78] *Lewis*, 63 M.J. at 414.

[79] JA at 173-74; 206.

[80] JA at 1014.

[81] JA at 1058.

[82] 75 M.J. 501, 502 (A.F. Ct. Crim. App. 2015) (*en banc*).

[83] 76 M.J. at 246.

warned, "the failure to refer the case to trial would place the Air Force in a difficult position with Congress."[84]

This Court should not disturb the *DuBay* military judge's conclusion that the Judge Advocates General of the Navy did the same in this case. "In summary, based on comments by VADM DeRenzi (unrelated to the case at hand), comments by VADM Crawford (related to the case at hand), and confusing and difficult advice from his SJA at the time, RADM Lorge felt compelled to take the action taken in appellant's case."[85]

F. The government's request to eliminate apparent unlawful command influence ignores its constitutional underpinnings, the doctrine of *stare decisis*, and the need for an objective test to ensure "both the appearance and reality of impartial justice."[86]

The government urges this Court to "overturn the baseless, judicially-created doctrine of 'apparent unlawful command influence.'"[87] In support of its bold argument,[88] the government advances legal truisms governing statutory

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[84] *Id.*

[85] JA at 601.

[86] *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1910 (2016).

[87] Gov't Br. at 42.

[88] The government's pleading does not indicate whether the Navy-Marine Corps Appellate Government Division has consulted its counterparts within the Department of Defense, the Office of General Counsel, or the Department of Justice before advancing the argument that this Court should invalidate its precedent regarding the appearance of UCI.

construction and the limited jurisdiction of this Court.[89] Then, having erected its strawman, the government proceeds with "demolishing the pitiful scarecrow of its own creation."[90] The government even goes so far as to assert that this Court's 2013 decision in *United States v. Vazquez*[91] "impliedly overturned" its 2015 decision in *Boyce*.[92] It should go without saying: "That's not how precedent works."[93]

However, this Court has acknowledged UCI isn't solely a creature of statute. "While statutory in form, the prohibition can also raise due process concerns, where for example unlawful influence undermines a defendant's right to a fair trial or the opportunity to put on a defense."[94] Here, the government manipulated the post-trial machinery that RADM Lorge relied on while acting as "a judicial officer."[95]

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[89] Gov't Br. at 41.

[90] *United States v. Havens*, 446 U.S. 620, 630 (1980) (Brennen, J., dissenting).

[91] 72 M.J. 13 (C.A.A.F. 2013).

[92] Gov't Br. at 44.

[93] *Iqbal v. Patel*, 780 F. 3d 728, 729 (7th Cir. 2015) (Easterbrook, J.).

[94] *Salyer*, 72 M.J. at 423.

[95] *Fernandez*, 24 M.J. at 78 ("As a matter of right, each accused is entitled to an individualized, legally appropriate, and careful review of his sentence by the convening authority.").

Properly understood, this Court's apparent UCI jurisprudence merely employs a legal test governing important statutory and constitutional rights much like the statutory rights to an impartial judge[96] and panel.[97] Indeed, just last week—and despite being "impliedly overturned" years earlier in *Vazquez*[98]—this Court reaffirmed the right of servicemembers to "the appearance of an impartial panel[.]"[99]

Importantly, if the government is correct that UCI is grounded solely in statute, the doctrine of *stare decisis* is "most compelling" where courts undertake statutory construction.[100] Having unsuccessfully advocated for the

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[96] *Hasan v. Gross*, 71 M.J. 416, 418-19 (C.A.A.F. 2012) ("The standard for identifying the appearance of bias is objective[.]");*United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (acknowledging that the test is objective and "whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions."); *Glass v. Pfeffer*, 849 F.2d 1261, 1267 (10th Cir. 1988) ("Under this section [28 U.S.C. § 455], factual allegations need not be taken as true, and the test is whether 'a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality.'" (quoting *Hinman v. Rogers*, 831 F.2d 937, 938 (10th Cir. 1987))).

[97] *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015) ("The core of the objective test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel."); *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) ("[I]mplied bias is viewed under an objective standard, viewed through the eyes of the public.").

[98] Gov't Br. at 44.

[99] *Riesbeck*, slip op. at 10.

[100] *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003) (citation omitted).

abandonment of decades of precedent in *United States v. Quick*,[101] the government undoubtedly knows the question before the Court is not solely whether its "baseless, judicially-created doctrine"[102] was wrongly decided. Rather, this Court examines: "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law."[103]

An application of these factors to the "patent and intolerable efforts to manipulate"[104] the post-trial process in this case does not warrant abandoning decades of this Court's precedent. Accordingly, this Court should decline the government's invitation to eliminate apparent UCI. Even if this Court were inclined to do so, it should not do so in this case, which involves substantiated allegations of actual and apparent UCI.

G. The government's argument that RADM Lorge did not fear personal repercussions in taking his action is a red herring where he approved the findings despite believing SOCS Barry's guilt had not been proven beyond a reasonable doubt in an effort to shield the Navy from scrutiny.

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[101] *United States v. Quick*, 74 M.J. 332, 335 (C.A.A.F. 2015).

[102] Gov't Br. at 42.

[103] *Quick*, 74 M.J. at 336.

[104] *Riesbeck*, slip op. at 18.

The government argues that RADM Lorge "believed he could not be retaliated against because he was already scheduled to retire."[105] This argument is strikingly similar to the government's argument in *Boyce* that Lieutenant General Franklin was "bombproof."[106] Importantly, this Court rejected that argument saying the general's pending retirement "did not inoculate Lt Gen Franklin from further negative personnel actions."[107]

"[I]f anything, Lt Gen Franklin would have been more acutely aware than other GCMCAs about how closely his referral decisions were being scrutinized by his superiors *and* about the potential personal consequences of 'ignoring political pressure' when making those referral decisions."[108]

Regardless, RADM Lorge testified his concern was bringing "big scrutiny upon the Navy."[109] And VADM Crawford told RADM Lorge that taking the action he believed was necessary would do just that.[110]

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[105] Gov't Br. at 47.

[106] 76 M.J. at 250-51.

[107] *Id.* at 250.

[108] *Id.* at 251.

[109] JA at 1038.

[110] JA at 1038.

H. "The Government, set on arguing that there was no error, hasn't even claimed to meet its burden to show the error was harmless. Yet the error in this case is both so obvious and so egregious" that dismissal with prejudice is appropriate.[111]

The government asserts dismissal with prejudice is inappropriate in this case because the UCI found by the *DuBay* military judge merely affected "the action taken by the Convening Authority."[112] But RADM Lorge wasn't musing about disapproving a reprimand or adjudged forfeitures; he intended to disapprove the findings.[113]

Aside from obvious implications of double jeopardy, the government's "patent and intolerable efforts to manipulate"[114] the post-trial processing of this case, when combined with its failure to "investigate, recognize, or ameliorate the clear" UCI, warrants dismissal with prejudice.[115] "To this point, from an objective standpoint, the Government has accomplished its desired end and suffered no detriment or sanction for its actions."[116]

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[111] *Riesbeck*, slip op. at 18.

[112] Gov't Br. at 51.

[113] JA at 1033; 1043; 1047.

[114] *Riesbeck*, slip op. at 18.

[115] *Id.*

[116] *Lewis*, 63 M.J. 416.

Moreover, this Court does not need to speculate on what action may be appropriate, short of dismissal with prejudice, if further remedial action had been taken to cure the UCI.[117] In *Lewis*, this Court noted the record before it did not indicate whether the UCI "in this case was the subject of any ethical or disciplinary investigations or sanctions," and expressed its concern "that there appears to be no response from supervisory officials such as the Staff Judge Advocate to the Commandant of the Marine Corps or the Judge Advocate General of the Navy."[118]

Here, unlike *Lewis*, there is no need to forward this Court's opinion to the Judge Advocate General of the Navy. To do so "is to dig a den for the fox inside the chicken coop."[119]

The Navy has made it abundantly clear it will take no action in this case. It was whistleblowers who brought the government's misconduct to light after their superiors in the Appellate Government Division determined they would not comply with the government's discovery obligations and disclose the existence of UCI.

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[117] *Id.* at 415 n.3.

[118] *Lewis*, 63 M.J. at 416 n.4.

[119] *Ginsburg, Feldman & Bress v. Federal Energy Admin.*, 591 F. 2d 717, 731 (D.C. Cir. 1978).

And after the allegations came to light, the government took steps to cloak its misconduct in attorney-client privilege[120] and limit the testimony of witnesses like LCDR Dowling.[121] CAPT Donald King, JAGC, USN, who replaced CAPT Jones as the SJA to the CA in 2017, along with CAPT Margaret Larrea, JAGC, USN, the Commanding Officer of Region Legal Service Office Southwest, and therefore the region's top prosecutor, both questioned the need for LCDR Dowling to submit the one-page declaration that was ultimately submitted to this Court by SOCS Barry on June 14, 2017. Eventually, CAPT King and CAPT Larrea edited LCDR Dowling's declaration, which began as an eight-page draft, down to the single page submitted to this Court.[122]

When LCDR Dowling detached from Navy Region Southwest on June 9, 2017, CAPT Larrea did not use favorable language from the fitness report proposed by CAPT King.[123] When LCDR Dowling inquired as to why CAPT Larrea had done so, she told him he had "trouble letting issues go,"[124] and

[120] JA at 675-76.

[121] JA at 945; 395; 396-403.

[122] JA at 945; Defense Exs. EE; DD.

[123] JA at 947-48.

[124] JA at 948.

"your work has suffered because of Barry[.]"[125] Thus, having failed to dissuade LCDR Dowling from reporting UCI, the government has confirmed it retaliated against him for doing so.

Later, when the Director, Appellate Defense Division, CAPT Andrew House, detailed a robust team of experienced attorneys to represent SOCS Barry at the *DuBay* hearing, and after a July 31, 2017 pretrial interview with VADM Crawford revealed the government had failed to disclose communications between VADM Crawford and the CNO regarding this case, the government unsuccessfully sought to remove SOCS Barry's detailed legal team from this case and force them to "sit behind the bar."[126]

CAPT House testified, "in a case involving alleged unlawful command influence at the highest levels, for the government to take an interest in who was representing Senior Chief Barry does cause me some concerns."[127] Assigned to his "fourth defense-services tour," CAPT House testified, "I've just never seen the government concern with the detailing of defense counsel

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[125] *Id.*

[126] JA at 660.

[127] JA at 984.

other than making sure that defense counsel were properly trained and certified according to the UCMJ[.]"[128]

The government's conduct in this case strikes at the heart of the "essential fairness and integrity of the military justice system."[129] And in this case perhaps more than any other, this Court must fulfill its congressional mandate to serve as a bulwark against UCI "by taking all appropriate steps within [its] power to counteract its malignant effects."[130]

WHEREFORE, this Honorable Court should dismiss this case with prejudice.

Respectfully submitted,

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[128] JA at 983.

[129] *Riesbeck*, slip op. at 18.

[130] *Boyce*, 76 M.J. at 253.

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CERTIFICATE OF FILING AND SERVICE

I certify I electronically filed a copy of the foregoing with the Clerk of Court on January 31, 2018, pursuant to this Court's order dated July 22, 2010, and that a copy was served via electronic mail on the Air Force Appellate Government Division on January 31, 2018.

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Certificate of Compliance

This supplement complies with the type-volume limitations of Rule 24(c) because it contains 4,154 words, and it complies with the typeface and style requirements of Rule 37. Undersigned counsel used Garamond, 14-point type with one inch margins on all four sides.

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