IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201500064
Keith E. BARRY, Senior Chief Special Warfare Operator (E-8) U.S. Navy Appellant	)	USCA Dkt. No. 17-0162/NA

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STATUTES, RULES, BRIEFS, OTHER SOURCES

Issues Presented

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?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellee's approved sentence included a dishonorable discharge and more than one year of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge, sitting as a general court-martial, convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920. The Military Judge sentenced Appellant to three years of confinement and a dishonorable discharge. On February 27, 2015, the

Convening Authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. (J.A. 239-40.)

The Record of Trial was originally docketed at the lower court on March 6, 2015. On March 16, 2015, the Navy-Marine Corps Court of Criminal Appeals set aside the Convening Authority's Action and remanded the case for new post-trial processing. (J.A. 1.) On June 3, 2015, the Convening Authority again approved the adjudged Sentence and, except for the dishonorable discharge, ordered it executed. (J.A. 236-38.)

The Record of Trial was docketed at the lower court on June 15, 2015. On October 31, 2016, the Navy-Marine Corps Court of Criminal Appeals affirmed the Findings and Sentence as approved by the Convening Authority. (J.A. 2-20.)

The Record of Trial was docketed with the Court of Appeals for the Armed Forces on January 4, 2017. On April 27, 2017, this Court granted Appellant's Petition for Review and summarily affirmed the lower court's decision. *United States v. Barry*, 76 M.J. 407 (C.A.A.F. 2017).

On May 5, 2017, Appellant petitioned for reconsideration. This Court granted the Petition on June 19, 2017, ordering a fact-finding hearing pursuant to *United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1967). (J.A. 21-23.)

A *DuBay* hearing was held on August 18 and September 27-28, 2017. The Record of Trial was returned to this Court on October 31, 2017. On November 29, 2017, this Court granted review of two issues. (Order, Nov. 29, 2017.)

Statement of Facts

A. The Judge Advocate General of the Navy and her staff are tasked by Congress with supervising the administration of military justice.

The Judge Advocate General is tasked by Congress to personally, or through senior members of her staff, "make frequent inspection in the field in supervision of the administration of military justice." Article 6(a), UCMJ. The Judge Advocate General and Deputy Judge Advocate General of the Navy dual-signed an order establishing a program for Article 6, UCMJ, inspections in the Navy. (JAG/CNLSCINST 5040.1B.)

The Judge Advocate General is further tasked under 10 U.S.C. § 5148 "to give independent legal advice to the Secretary of the Navy or the Chief of Naval Operations." (J.A. 41.) JAG/CNLSCINST 5400.1C specifies that the Judge Advocate General "provides or supervises the provision of all legal advice and related services throughout the [Department of the Navy], except for the advice and services provided by the General Counsel." (J.A. 47.)

B. The Navy's Deputy Judge Advocate General serves also as the Commander, Navy Legal Services Command and, in that role, is tasked with meeting with region commanders to ensure they have legal resources.

The Deputy Judge Advocate General is a senior member of the Judge Advocate General's Staff and, under 10 U.S.C. § 5148, "shall perform the duties of the Judge Advocate General" when the Judge Advocate General is absent or disabled. (J.A. 42.) The senior leadership of the Office of the Judge Advocate General, according to JAG/CNLSCINST 5400.1C, includes the Judge Advocate General, the Deputy Judge Advocate General, as well as all Assistant Judge Advocates General and their immediate staffs. (J.A. 45.)

The Deputy Judge Advocate General also serves as Commander, Navy Legal Services Command (CNLSC)—the commander of all Region Legal Service Offices, Defense Service Offices, and Naval Justice School and "responsible for providing and overseeing Navy-wide legal services." (J.A. 46, 48, 76, 61-62, 175, 206-209, 764, 780-81, 784.)

CNLSC is further tasked with "support[ing] Commander, Navy Installations Command by providing legal advice for region commanders and installation commanding officers" under OPNAVINST 5450.189C. (J.A. 209.) Each region commander is given a staff judge advocate who is responsible for providing the region commander with independent legal advice. (J.A. 41, 172, 372-73.)

C. Appellant was charged with violating Article 120, UCMJ.

In December 2013, Appellant was charged with two Specifications of sexual assault. (J.A. 233.)

D. After Appellant was charged, the Judge Advocate General of the Navy met with the Region Commander of Navy Region Southwest as part of a scheduled site visit. They discussed heightened pressure and scrutiny in sexual assault cases but did not discuss Appellant's case.

As Judge Advocate General, Vice Admiral (VADM) DeRenzi made it a practice to meet with region commanders to ensure they were "properly resourced." (J.A. 850.) VADM DeRenzi never spoke to region commanders about military-justice cases because she believed the Judge Advocate General must remain neutral. (J.A. 851.)

RADM DeRenzi explained she made many "site visits" throughout the fleet but clarified that her site visits were not for the purpose of "inspect[ing] military justice" under Article 6, UCMJ. (J.A. 849.) Her site visits were to "see as many of [her] own people as [she] could possibly see, see the facilities that they were working in, and meet with [the] customers and clients to ensure that they were resourced properly and satisfactorily." (*Id.*)

On February 19, 2014, as part of a routine site visit in San Diego, California, VADM DeRenzi, the Judge Advocate General of the Navy, conducted an "office call" with Region Commander for Navy Region Southwest, Rear Admiral (RADM) Lorge—the Convening Authority in Appellant's case. (J.A. 375-80, 415,

597, 853-54, 1019, 1054-60.)

Prior to meeting with VADM DeRenzi, RADM Lorge was already aware of external and political pressures on the military-justice system. (J.A. 597, 1014, 1021.) RADM Lorge had "read it in the Early Bird" or heard elsewhere that there was "increasing scrutiny" on sexual assault cases. (J.A. 1015.)

During the office call, VADM DeRenzi explained: (1) the increased pressure she was feeling with regard to sexual assault; (2) the growth of the Sexual Assault Prevention and Response (SAPR) program; (3) the "landscape of what sexual assault had become"; (4) routine meetings and testimony she was having to give before Congress about sexual assault; (5) that there was increased Congressional and media scrutiny on convening authorities; (6) that increased pressure and scrutiny was inbound on the Navy in sexual assault cases; and (7) that every three or four months, commanders were making court-martial decisions that were being "questioned by Congress and other political and military leaders, including the President." (J.A. 415, 597, 858-60, 885, 1019-20.)

VADM DeRenzi did not intend her discussion about the scrutiny of the military-justice system to be a "warning" to RADM Lorge. (J.A. 859.) VADM DeRenzi gave no direction—either personally or on behalf of the CNO or SECNAV—that convening authorities were expected to take any specific actions in sexual assault cases. (J.A. 851, 858-61, 1059.)

VADM DeRenzi and RADM Lorge did not discuss Appellant's case. (J.A. 449, 860, 1056.) And RADM Lorge said that he did not not feel that VADM DeRenzi's comments were intended to persuade him to take any particular action in any case. (J.A. 1058.)

Nothing in the Record suggests that any convening authority action was pending before RADM Lorge at the time of the conversation with VADM DeRenzi.

The *DuBay* Judge made no findings or analysis as to whether the visits between the Judge Advocate General and RADM Lorge were authorized under Article 6 or fell under the "instructional" exceptions in Article 37, UCMJ.

E. Charges were referred and Appellant was convicted of sexually assaulting the bound Victim by penetrating her anus with his penis.

Over a month after this meeting, charges were referred against Appellant by Captain (CAPT) Plummer, the Acting Commander, Navy Region Southwest at the time. (J.A. 234, 597, 1054.)

Appellant was convicted of one specification of sexual assault and sentenced to three years of confinement and a dishonorable discharge. (J.A. 236, 597, 610-11; Staff Judge Advocate Recommendation, encl. 1, Jan. 29, 2015.)

F. The Convening Authority approved the Findings and Sentence after receiving incorrect legal advice from his Staff Judge Advocate. The case was remanded for a corrected Staff Judge Advocate's Recommendation and Convening Authority Action.

Captain (CAPT) Jones, the Staff Judge Advocate, issued his original Recommendation on January 29, 2015, properly advising the Convening Authority as to his powers under Article 60, UCMJ. (J.A. 241, 598.) Appellant submitted an initial Clemency Request on February 23, 2015, requesting disapproval of the Findings and Sentence or, alternatively, suspension of the Sentence. (J.A. 244-336.)

Three days later, the Staff Judge Advocate amended the Recommendation and incorrectly advised that the Convening Authority was restricted from acting on the Findings and Sentence by the new Article 60, UCMJ. (J.A. 337, 598, 1025.) On February 27, 2015, the Convening Authority affirmed both the Findings and Sentence, believing he had no authority to do otherwise. (J.A. 239-40, 598, 1025, 1027.)

On March 16, 2015, the Navy-Marine Corps Court of Criminal Appeals remanded the case for new post-trial processing due to the error. (J.A. 1, 598.)

After learning the case would be returned for a new Convening Authority's Action, CAPT Jones e-mailed RADM Lorge, telling him:

Regarding the findings, you may:

(1) Change a finding of guilty to a charge/specification to a finding of

guilty to a LESSER INCLUDED offense of the same charge/specification;

(2) Set aside the finding of guilty and dismiss the specification and/or charge as appropriate; or

(3) Set aside the finding of guilty and direct a rehearing

Regarding the sentence, you may:

(1) Disapprove the sentence in whole or in part;

(2) Mitigate the sentence; OR

(3) Change the punishment to one of a different nature.

(J.A. 592, 1117-18.)

On April 13, 2015, in an Addendum to the Staff Judge Advocate's Recommendation, CAPT Jones informed RADM Lorge that the amendments to Article 60, UCMJ, did not restrict his authority to act on Appellant's Findings and Sentence . (J.A. 338-39.) In the Addendum, CAPT Jones further advised that there was no legal error and the Convening Authority should approve Appellant's Findings and Sentence. (J.A. 338-39, 358.)

G. The Convening Authority felt pressured by "additional scrutiny" in sexual assault cases, was confused about what action he could take, and asked numerous people for guidance. His Staff Judge Advocate consistently advised him to approve the Findings and Sentence.

1. RADM Lorge felt outside pressure from numerous sources in sexual assault cases.

RADM Lorge testified he felt heightened pressure to "make sure [he was]

doing the right thing" in referring charges, taking action after adjournment, and other actions in sexual assault cases "because of the additional scrutiny paid by folks" on sexual assault cases. (J.A. 1014, 1016-17.)

He believed there was pressure, "repetitive drumbeats," and public scrutiny on military sexual assault cases from numerous sources: unrelated prior meetings with VADM DeRenzi; "all-flag-officer meetings"; meetings where SAPR was a topic and the Judge Advocate General, Chief of Naval Operations, and Vice Chief of Naval Operations, and "sometimes other folks" would brief "the process" in sexual assault cases, which were "a well-known . . . item of interest." (J.A. 1014.)

2. RADM Lorge reviewed the Record after the remand and had concerns and questions. He sought advice from his lawyers and discussed his options under Article 60, UCMJ, but felt he was getting conflicting information.

When the case was "back in [his] hands to decide" after the remand, RADM Lorge started to "become conflicted." (J.A. 1029.) He knew he had the "full gamut of options" available to him at this point but sought guidance from attorneys on his staff to understand how to address his trepidations. (J.A. 598, 1022.) He had concerns about Appellant's (1) "medical condition," (2) whether the Judge had done anything wrong, and (3) whether there was "reasonable doubt" in "some of these statements" in the Record. (J.A. 1022, 1028-29.)

After hearing RADM Lorge's concerns, CAPT Jones told RADM Lorge he would review Appellant's case. (J.A. 1022.) About two weeks later, a "young

lieutenant" came to brief RADM Lorge on the case. (J.A. 1022.) RADM Lorge asked the lieutenant if "the judge [did] anything wrong" and whether there was "reasonable doubt." (J.A. 1022.) The lieutenant was "sheepish" but said "maybe" there was reasonable doubt. (J.A. 1022.) RADM Lorge testified that he thought that the junior officer "kind of agree[d]" with him. (J.A. 1028.)

At a meeting with CAPT Jones, CAPT Jones told RADM Lorge that "[o]h, no, no, they proved [it] beyond a reasonable doubt." (J.A. 1023.) RADM Lorge testified that "[i]nside of [his] lawyers, [he was] getting different advice" and so he was "start[ing] to question." (*Id.*)

RADM Lorge wanted to know if he could send Appellant's case for a retrial, but he believed that he was advised that he could not. (J.A. 1029.) He also wanted to know if he could "call out the judge for something," but he again believed he was told he could not. (*Id.*)

RADM Lorge felt that when he questioned whether "there [was] enough information or there [was] reasonable doubt about [Appellant]'s guilt," CAPT Jones would "poo-poo[]" him and tell him "no, you're reading that wrong." (J.A. 1028.) He felt like "every time [he] c[a]me up with a question" he was told "no, you're wrong . . . no you're wrong." (J.A. 1029.) RADM Lorge further believed that CAPT Jones "shut[] [him] down" and was "pushing [him] in a box." (*Id.*)

RADM Lorge got "the feeling" from CAPT Jones "every time" he talked

with him that while "maybe in other cases" he would have more leeway, "in this case" he had fewer options "because, you know, the scrutiny that might be placed upon [sic] that is higher in these sexual assault cases." (J.A. 1029.)

RADM Lorge expressed concerns to his Deputy Staff Judge Advocate, Lieutenant Commander (LCDR) Dowling, that Appellant suffered from traumatic brain injury—a concern LCDR Dowling also had and previously brought to CAPT Jones's attention. (J.A. 904, 916-18.) LCDR Dowling also advised RADM Lorge of his options under Article 60, UCMJ. (J.A. 917.)

3. Even after his discussions with CAPT Jones and LCDR Dowling, RADM Lorge was confused about what action to take in Appellant's case.

RADM Lorge was "confused by the counsel [he] was receiving on what [he] could and could not do in this case." (J.A. 1076.) He characterized the advice as a "gumbo" that offered him no clear direction. (J.A. 1028-30, 1032, 1059.) RADM Lorge felt like he had no authority to disapprove the Findings and Sentence. (J.A. 1020-21, 1038-39.)

RADM Lorge read the record five or six times but felt a conflict between his lawyer's advice and his feelings. (J.A. 1030.) He "start[ed] Googling . . . articles of . . . the UCMJ and what do they exactly mean." (*Id.*) He felt that his Staff Judge Advocate was "not giving [him] the best . . . advice for [him] to make this difficult decision." (J.A. 1030.) RADM Lorge wanted the case to "go back and

get looked at again," but if not, then he desired to disapprove the findings. (J.A. 1043.)

H. The Convening Authority was confused, so he sought out his old colleague, VADM Crawford, for advice.

RADM Lorge claimed that the conflict between his feelings and the advice he believed he was being given is what led him to speak to RADM Crawford: "[I]t's why the first time I talked to Admiral Crawford. . . . I'm starting to . . . look for something, and I'm not getting it from [CAPT Jones], and the only guy I know is somebody I've served with who is now a flag officer, too, . . . 15 years ago on the Joint Staff." (J.A. 1031.) RADM Lorge trusted VADM Crawford[1] because they had a history. (J.A. 1035.)

VADM Crawford traveled to San Diego for the JAG Training Symposium. (J.A. 770.) While there, he had the opportunity conduct "office calls" with several people in the area, including RADM Lorge. (J.A. 770.) When asked what the purpose of his meetings with regional commanders was, VADM Crawford testified: "So Article 6 . . . as the Commander, Navy Legal Service, Command, I would frequently go out . . . to . . . different regions . . . to see how we were providing services to the commanders . . . and that was to be my purpose of doing that." (J.A. 767.)

[1] Throughout these meetings, VADM Crawford and RADM Lorge were both Rear Admirals (upper half). VADM Crawford was promoted only after RADM Lorge took action in Appellant's case. (J.A. 374, 415, 598, 763-64, 930, 1034, 1037.)

So RADM Lorge met with RADM Crawford for about twenty or thirty minutes as part of an office call. (J.A. 1037.)

The *DuBay* Judge made no findings or analysis as to whether conversations between the Deputy Judge Advocate General and RADM Lorge were authorized under Article 6, UCMJ, or fell under the "instructional" exceptions in Article 37, UCMJ.

1. The Deputy Judge Advocate General, operating as the Commander, Navy Legal Services Command, told the Convening Authority to listen to his lawyers.

On April 30, 2015, the then Deputy Judge Advocate General, VADM Crawford, met with RADM Lorge. (J.A. 598, 770.) RADM Lorge knew VADM Crawford was "the number [two] lawyer in the Navy" but did not know what duties that job entailed. (J.A. 1036.)

VADM Crawford was told that RADM Lorge wanted to talk about a case, but he did not know what specific case or what it involved. (J.A. 598-99, 770-71.)

VADM Crawford believed RADM Lorge "to be struggling with how to deal with this case, whether to sustain the finding or whether to exercise his authority not to." (J.A. 599, 772.) RADM Lorge wanted help resolving "the gumbo." (J.A. 1038.) So RADM Lorge asked VADM Crawford if "based on the gumbo . . . was . . . disapproving a sexual assault case . . . going to bring big scrutiny upon the Navy. And [VADM Crawford] told [him] yeah." (J.A. 1038.) RADM Lorge said

the "feeling" he had coming out of the meeting was that "folks are going to be looking over your shoulder" so he had to "scrutinize" his decision carefully and "get to the facts." (*Id.*) VADM Crawford discussed the current pressures on the military-justice system and that it was important that the action in the case be "done correctly." (*Id.*)

RADM Lorge believed he received legal advice from VADM Crawford (J.A. 599, 1037, 1040, 1069), but VADM Crawford did not direct or advise RADM Lorge on what action to take in Appellant's case. (J.A. 764.) VADM Crawford suggested that RADM Lorge work with his lawyers to help him determine the best course of action. (J.A. 599, 772.) VADM Crawford had no interest in manipulating the outcome of any case. (J.A. 773.)

2. VADM Crawford never told RADM Lorge to avoid putting a "target on his back" or words to that effect. And if he had, RADM Lorge would have considered it a joke.

LCDR Dowling believed that after RADM Lorge met with VADM Crawford, RADM Lorge said something to the effect of "Jim said not to put a target on my back—he said I've got smart lawyers, let them figure it out." (J.A. 919.)

Neither VADM Crawford nor RADM Lorge recalled VADM Crawford telling RADM Lorge to not "put a target" on his back. (J.A. 599, 773, 1064.) And if VADM Crawford had said something like this, RADM Lorge "would have taken

that as a joke." (J.A. 599, 1064-65.)

I. Appellant submitted additional clemency matters, and the Deputy Staff Judge Advocate issued another Addendum to the Staff Judge Advocate's Recommendation.

Appellate Defense Counsel submitted Supplemental Clemency Matters on May 11, 2015, requesting the same relief but also petitioned the Convening Authority to order a post-trial Article 39(a), UCMJ, hearing under R.C.M. 1107(e) before a new Military Judge to correct the bias in the proceedings. (J.A. 340-57.)

On May 12, 2015, RADM Lorge's Deputy Staff Judge Advocate, LCDR Dowling, prepared an additional Addendum to the Staff Judge Advocate's Recommendation, enclosing the Supplemental Clemency Matters and advising that corrective action was not warranted on the findings or sentence. (J.A. 358, 599.)

J. The Convening Authority continued to discuss Appellant's case with his Staff Judge Advocate. Unable to make up his mind, the Convening Authority again reached out to his former colleague, the Deputy Judge Advocate General, who told him to rely on his Staff Judge Advocate.

RADM Lorge and CAPT Jones continued to discuss Appellant's case—RADM Lorge expressing his belief that Appellant's guilt was not proven beyond a reasonable doubt, and CAPT Jones advising RADM Lorge to affirm the findings and sentence. (J.A. 599, 1028-29, 1038-39.) CAPT Jones suggested adding language to the action that would communicate RADM Lorge's reservations about Appellant's case. (J.A. 599, 1039.) CAPT Jones reminded RADM Lorge about

the military-justice climate and encouraged him to leave it to appellate courts to resolve Appellant's case. (J.A. 598, 1039.)

RADM Lorge knew that "maybe [he] shouldn't have, but . . . [he] treat[ed VADM Crawford] as somebody helping [him] get to that right decision." (J.A. 1085.) So before taking action, RADM Lorge testified that it was reasonable to believe that he "reached out to" VADM Crawford on the telephone to discuss putting language in the action that would communicate his reservations. (J.A. 1039-40, 1085.)

VADM Crawford told RADM Lorge to trust the advice of his lawyers—he referred him back to his staff judge advocates. (J.A. 1069.) VADM Crawford told RADM Lorge something to the effect of: "[Y]ou have smart lawyers; let them help you on this." (J.A. 1069.)

RADM Lorge never told VADM Crawford that he had "questions about the advice [he was] getting from [CAPT] Jones." (J.A. 774, 1069.) CAPT Jones never spoke to VADM Crawford about Appellant's case. (J.A. 774, 1122.)

K. Not fearing personal or professional repercussions, RADM Lorge approved the Findings and Sentence consistent with the advice of his Staff Judge Advocate.

RADM Lorge determined that approving the findings and sentence was the right action in Appellant's case, but he did not make this decision because of something VADM Crawford or VADM DeRenzi did. (J.A. 599, 1077.)

RADM Lorge had no "fear that if [he] did not take action, [he] would be punished or [he] would not promote." (J.A. 1065, 1076.) RADM Lorge understood the scrutiny against the military-justice system to be separate from any personal scrutiny. (J.A. 1066.)

But RADM Lorge knew that if he disapproved the findings he would need to be prepared to explain why, but he would not be professionally harmed. (J.A. 1066.) He believed that if he disapproved the findings, it would adversely affect the Navy, and his consideration of the Navy's interests contributed to his decision not to disapprove the findings. (J.A. 407.)

On June 3, 2015, RADM Lorge followed the advice of his Staff Judge Advocate and approved the Findings and Sentence, adding that he had "never reviewed a case that ha[d] given [him] greater pause." (J.A. 236-38, 599.) RADM Lorge explained in his Action, that he had "personally reviewed the record of trial" and was "concerned that the judicial temperament of the Military Judge potentially calls into question the legality, fairness, and impartiality of this court-martial." (J.A. 236-38, 599.)

L. RADM Lorge previously served as and made decisions as a convening authority in multiple cases but related no similar confusion as to the scope of his powers in other cases.

RADM Lorge was not without experience as a convening authority. (J.A. 597, 1031, 1040-41.) He previously decided to send a rape case to trial. (J.A.

1032.) And he related that "all of a sudden" in that case, facts emerged that painted the victim in a bad light. (*Id.*) Although he never described what he did after discovering the new facts in that rape case, RADM Lorge analogized the rape case to Appellant's case and his concerns about whether "everybody [is] being truthful here" and whether a "reasonable doubt" existed in Appellant's case. (*Id.*) RADM Lorge did not testify to any confusion as to the scope of his Article 60, UCMJ, powers in that case.

RADM Lorge also testified that at the same time as Appellant's case, he was resolving other high-visibility issues. (J.A. 1040-41.) But he related no similar inability to make a decision in those cases.

M. The *DuBay* Judge found VADM DeRenzi, RADM Lorge, and LCDR Dowling credible.

The *DuBay* Judge stated that he found VADM DeRenzi, RADM Lorge, and LCDR Dowling credible. (J.A. 601.) He made no credibility findings about RADM Crawford, CAPT Jones, CAPT Plummer, CAPT Eldred, CAPT King, LCDR O'Brien, LCDR Henderson, LT Corcoran, or CAPT House.

Summary of Argument

An individual can commit unlawful command influence when they are subject to the UCMJ and operate with the "mantle of command authority." That is when an individual (1) is in command or (2) acts on behalf of a commander.

Appellant fails his burden to show some evidence of unlawful command

influence, pointing to no evidence in the Record to support that but for his discussions with VADM DeRenzi and VADM Crawford, the Convening Authority would have disapproved the Findings and Sentence. Even if he met that burden, Appellant's court-martial was not affected by unlawful command influence nor would a disinterested observer fully informed of the facts and circumstances doubt the fairness of the proceedings. And apparent unlawful command influence should finally be discarded as contrary to the plain language of Article 37, UCMJ.

The Convening Authority was not improperly influenced. Instead, the Convening Authority has repeatedly demonstrated deep-seated indecisiveness about how to handle Appellant's case, as well as a lack of understanding as to the scope of his powers as Convening Authority. The proper remedy for any prejudicial error is new post-trial processing.

Argument

I.

THE FIRST ISSUE CALLS FOR AN IMPROPER ADVISORY OPINION. FURTHER, THE DEPUTY JUDGE ADVOCATE GENERAL ONLY COMMITS UNLAWFUL COMMAND INFLUENCE WHEN HE OPERATES WITH THE "MANTLE OF COMMAND AUTHORITY" AND HIS ACTIONS ARE UNAUTHORIZED ATTEMPTS TO INFLUENCE OR COERCE THE ACTION OF A COURT-MARTIAL OR CONVENING AUTHORITY.

A. This Court should refrain from ruling on this issue: the United States concedes that the Deputy Judge Advocates General can commit unlawful influence, but no such situation arises here.

"Courts established under Article I of the Constitution, such as this Court, generally adhere to the prohibition on advisory opinions as a prudential matter." *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003) (citing *United States v. Clay*, 10 M.J. 269 (C.M.A. 1981)). "An advisory opinion is an opinion issued by a court on a matter that does not involve a justiciable case or controversy between adverse parties." *Id.* An issue is moot when "any action which [this Court] might take . . . would not materially alter the situation presented with respect [to the parties]." *United States v. Datavs*, 71 M.J. 420, 426 (C.A.A.F. 2012) (citing *United States v. Gilley*, 14 C.M.A. 226 (C.M.A. 1963)).

The first specified issue is non-justiciable—the United States concedes that the Deputy Judge Advocate General could in some situations, theoretically,

commit unlawful command influence. *See* Article 37, UCMJ. But as demonstrated, *infra*, no such situation arises here.

Ruling on the issue would thus require an advisory opinion. *See United States v. Hale*, No. 201600015, 2017 CAAF LEXIS 1166 (C.A.A.F. Dec. 20, 2017) (issuing no answer to a certified issue because to do so would require the Court to issue an advisory opinion); *United States v. Gould*, No. 20120727, 2017 CAAF LEXIS 1065 (C.A.A.F. Nov. 2, 2017) (same).

B. The standard of review is *de novo*.

Questions of statutory construction are reviewed *de novo*. *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017) (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)).

C. Individuals subject to the Code commit unlawful influence under Article 37, UCMJ, if they attempt to coerce or, by unauthorized means, influence the action of a court-martial or convening authority.

Article 37, UCMJ, states: "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or . . . the action of any convening, approving, or reviewing authority with respect to his judicial acts."

D. The Judge Advocate General and Deputy Judge Advocate General are responsible for the supervision of military justice, and are explicitly permitted to instruct Navy lawyers generally as to military justice.

Article 6(a), UCMJ, instructs the Deputy Judge Advocate General to "make frequent inspection in the field in supervision of the administration of military justice." And Article 6(b), UCMJ, instructs convening authorities to communicate directly with their staff judge advocates in matters relating to the administration of military justice. So too, Article 37, UCMJ, explicitly excludes "general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial."

As demonstrated in more detail, *infra*, no precedent of this Court supports that it would be improper for the Deputy Judge Advocate General to "instruct and inform" a peer not in his chain-of-command that he needed to "communicate directly with [his] staff judge advocate," as required by Article 6(b). Indeed, the Code supports that it is *not* unlawful command influence for, in exercising Article 6, UCMJ, powers, the Deputy Judge Advocate General to tell RADM Lorge exactly that.

Thus while unlawful command influence might be possible in some instances, the plain text of Congress' statute supports that it could not occur under these facts. This Court should refrain from answering the Specified Issue.

E. This Court's past precedent requires a "mantle of command authority" to commit unlawful command influence which only exists when an individual is in command or operates with the imprimatur of the command.

To commit unlawful command influence, this Court's past precedent requires that a person act with the "mantle of command authority." *See United States v. Denier*, 47 M.J. 253 (C.A.A.F. 1997) (unlawful command influence focuses on "the position of the command" and requires that the person who acted improperly had "the mantle of command authority"); *United States v. Stombaugh*, 40 M.J. 208, 212 (C.A.A.F. 1994) ("The attempted interference with witnesses by individuals with no mantle of command authority . . . is not command influence but interference with the access to witnesses."). That is when an individual (1) is in command or (2) acts on behalf of a commander. Although more recent precedent does not cite this requirement, the precedent is still in effect.

1. The Deputy Judge Advocate General can commit unlawful command influence over subordinates when in command.

A superior can commit unlawful command influence over subordinates when in a direct "command" relationship. *United States v. Hamilton*, 41 M.J. 32, 36 (C.A.A.F. 1994) (citing *United States v. Hawthorne*, 22 C.M.R. 83 (C.M.A. 1956)) ("'unlawful command influence' . . . cover[s] a multitude of situations in which superiors have unlawfully controlled the actions of *subordinates* in the exercise of their duties under the UCMJ." (emphasis added)); *see also Edmond v.*

United States, 520 U.S. 651, 662-63 (1997) (Judge Advocate General capable of unlawful command influence over Court of Criminal Appeals judges as judges are subordinate to Judge Advocate General).

Members of the Judge Advocate General's staff may conduct Article 6(a), UCMJ, inspections "in the field in supervision of the administration of military justice." The Deputy Judge Advocate General, under JAG/CNLSCINST 5400.1C and COMNAVLEGSVCCOMINST 5800.1G, also serves as Commander, Navy Legal Service Command, providing and overseeing Navy-wide legal services. (J.A. 46, 48, 76.) The Navy Legal Service Command "is responsible for the administration of legal services, providing direction for all [Navy Legal Service Command] activities and resources assigned, and performing such other tasks and functions as directed by [the Chief of Naval Operations]." (J.A. 76.) Region Legal Service Offices and Defense Service Offices are subordinate to Commander, Navy Legal Service Command. (J.A. 46, 76, 175.) Defense Service Offices provide defense counsel for active duty servicemembers (J.A. 191) while the Region Legal Service Offices include "Trial Departments" responsible for providing qualified trial counsel for the prosecution of courts-martial (J.A. 163). Thus, any influence by Commander, Navy Legal Service Command over those subordinates tasked with prosecuting and defending courts-martial could result in unlawful command influence.

But region commanders are not part of Commander, Navy Legal Service Command's direct chain of command. (J.A. 206-09.) And nothing in the Record supports that VADM Crawford had any similar conversations with RADM Lorge's staff judge advocates. Thus while a Deputy Judge Advocate General *can* commit unlawful command influence in some circumstances, here, as demonstrated in Assignment of Error II, *infra*, no command relationship exists—there was no unlawful command influence over RADM Lorge.

2. The Deputy Judge Advocate General can commit unlawful command influence when serves as a staff judge advocate.

Staff judge advocates can commit unlawful command influence—including on more senior officers—when they act with the "mantle of command authority." *See United States v. Lewis*, 63 M.J. 405, 414-16 (C.A.A.F. 2006) (unlawful influence occurred when the staff judge advocate actively worked to, and successfully did, unseat the military judge); *Hamilton*, 41 M.J. at 34-37 (quoting *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986)) (acknowledging that the actions of a staff judge advocate "may constitute unlawful command influence" because "a staff judge advocate generally acts with the mantle of command authority"); *Kitts*, 23 M.J. at 108 (a staff judge advocate was found able to commit unlawful command influence because a staff judge advocates "generally acts with the mantle of command authority").

The Deputy Judge Advocate General acts as a staff judge advocate when he performs the duties of the Judge Advocate General during the Judge Advocate General's "absence or disability." (J.A. 48.) This includes providing or supervising all legal advice and related services throughout the Department of the Navy, except for those services provided by the General Counsel. (J.A. 47, 210.) When assuming the responsibilities of the Judge Advocate General, the Deputy provides independent legal advice to the Secretary of the Navy and the Chief of Naval Operations on military-justice matters (J.A. 41, 47), and is thus acting with the mantle of command authority and capable of committing unlawful command influence.

But nothing in the Record supports that VADM Crawford was serving as the Judge Advocate General at the time of his conversations with RADM Lorge. Thus, while in some instances a Deputy Judge Advocate General *can* commit unlawful command influence, here, the Deputy Judge Advocate General did not commit unlawful command influence, as demonstrated in Assignment of Error II, *infra*.

As Assignment of Error II fully resolves this case, this Court should not reach the first issue.

F. No "estoppel" prevents the United States from answering an issue specified by this Court.

This Court may specify an issue not previously raised below, and neither the United States nor Appellant is estopped from arguing the specified issue. *See, e.g.*, *United States v. Johnson*, 42 M.J. 443, 447 (C.A.A.F. 1995) (Cox, J., concurring) ("We accept an appellant's petition on its merits; we listen to issues raised personally by an appellant; and we specify issues from time-to-time, issues not raised by appellate counsel."); *United States v. Snelling*, 14 M.J. 267 (C.A.A.F. 1982) (court specified issue not raised below); *United States v. Dixson*, 9 M.J. 72 (C.M.A. 1980) (same).

The Court specified this issue because it wants to hear from both parties. The issue is not waived or "estopped" (Appellant Br. 38-39); the Court may hear from the United States.

II.

THIS COURT SHOULD SET ASIDE APPARENT UNLAWFUL COMMAND INFLUENCE PRECEDENT: IT IS CONTRARY TO THE PLAIN LANGUAGE OF 10 U.S.C. § 837. NO ONE EXERTED UNLAWFUL INFLUENCE ON THE CONVENING AUTHORITY, NOR WERE THE CONVERSATIONS BETWEEN THE CONVENING AUTHORITY AND SENIOR JUDGE ADVOCATES THE PROXIMATE CAUSE OF THE CONVENING AUTHORITY ACTION. A FULLY-INFORMED, DISINTERESTED OBSERVER MIGHT FIND THE CONVENING AUTHORITY INDECISIVE, BUT WOULD NOT DOUBT THE FAIRNESS OF APPELLANT'S PROCEEDINGS. IF THIS COURT FINDS UNLAWFUL COMMAND INFLUENCE, THE PROPER REMEDY IS NEW POST-TRIAL PROCESSING.

A. The standard of review is *de novo*.

"Allegations of unlawful command influence are reviewed *de novo*." *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013) (citing *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006); *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999); *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)). A military judge's findings of fact are reviewed under a clearly erroneous standard. *Villareal*, 52 M.J. at 30 (citing *Wallace*, 39 M.J. at 286). Findings of fact are clearly erroneous when they are not supported by the record. *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004).

B. The *DuBay* Judge's Findings were clearly erroneous.

Multiple findings by the *DuBay* Judge are clearly erroneous and should be rejected. While conclusions of law are reviewed *de novo*, the *DuBay* Judge's "Analysis and Conclusions" also included clearly erroneous facts. These factual errors include, *inter alia*:

First, the *DuBay* Judge found that RADM Lorge believed VADM Crawford was essentially telling him to approve the Findings and Sentence. (J.A. 602.) Not so. VADM Crawford merely redirected RADM Lorge to his staff judge advocate for legal advice. (J.A. 825, 1069.)

Second, the Judge found that RADM Lorge believed "that pressure was placed on him by senior military leaders." (J.A. 602.) This is a mischaracterization of RADM Lorge's testimony that he felt pressure to "make sure [he was] doing the right thing" as a convening authority, particularly in sexual assault cases "because of the additional scrutiny" on sexual assault. (J.A. 1014, 1016-17.) He never said he felt pressure from senior military leaders, specifically. It was merely the climate at the time.

Third, the *DuBay* Judge found that after meeting with VADM Crawford, "RADM Lorge's ultimate impression was that VADM Crawford believed RADM Lorge should approve the findings and sentence in the case." (J.A. 602.) This is an impossible conclusion as RADM Lorge expressly rejected the suggestion that

VADM Crawford was telling him what "to do or not to do in [his] Convening Authority action." (J.A. 1066.)

Fourth, the *DuBay* Judge further emphasized the Staff Judge Advocate's "intransigence in his advice to RADM Lorge related to this case." (J.A. 602.) Simply because a staff judge advocate is reticent to change his advice when a convening authority shows concern does not make him stubborn or his advice incorrect. A staff Judge advocate is tasked with providing independent legal advice to the convening authority, nothing says he has to be flexible and alter his advice to appease a commander. There was nothing wrong with the Staff Judge Advocate's advice.

C. Allegations of unlawful command influence are reviewed for both actual and apparent influence.

Statute and regulation prohibit unlawful influence on a court-martial. Article 37, UCMJ, 10 U.S.C. § 837 (2012); R.C.M. 104. The Court of Appeals for the Armed Forces made clear in *Boyce* that actual and apparent unlawful command influence claims are distinct and separate and the initial burden is on Appellant to allege "some evidence" of one or both. 76 M.J. 242, 247 (C.A.A.F. 2017).

D. There was no actual unlawful command influence over Appellant's proceedings.

Actual unlawful command influence involves "attempt[s] to coerce or, by any unauthorized means, influence the action of a court-martial[,] any member

thereof, [or] the convening authority." Article 37(a), UCMJ. It has "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." *Boyce*, 76 M.J. at 247 (citing *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991).

1. Appellant fails his initial burden. He points to no facts that, if true, constitute unlawful command influence.

Appellant must show: "(1) facts, which if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness." *Salyer*, 72 M.J. at 423 (citing *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999) (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999))). An appellant shows that proceedings are unfair by producing evidence "of proximate causation between the acts constituting unlawful command influence and the outcome of the court-martial." *Biagase*, 50 M.J. at 150.

"There must be something more than an appearance of evil to justify action by an appellate court in a particular case. Proof of command influence in the air, so to speak, will not do." *Allen*, 33 M.J. at 212; *see also United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 2009) ("Mere speculation that unlawful command influence occurred . . . is not sufficient."); *Biagase*, 50 M.J. at 150 (the quantum of evidence must be more than mere allegation or speculation). Only if the claim is

"raised by some evidence, the burden shifts to the government to rebut an allegation of unlawful command influence." *Id*.

Appellant makes no effort to address his initial burden to show some evidence of unlawful command influence. (Appellant Br. at 45-51.) Appellant merely repeats the Military Judge's conclusion that "RADM Lorge would have taken different action in the case, likely ordering a new trial." (Appellant Br. at 45). But Appellant cites no authority, offering no "more than mere allegation or speculation" to suggest that improper influence was the proximate cause of RADM Lorge's difficulty choosing what action to take. *Salyer*, 72 M.J. at 423.

Appellant further fails to explain how the Deputy Judge Advocate General or Judge Advocate General of the Navy can commit unlawful *command* influence over someone outside their chain of command. As discussed *supra*, an individual must operate with the "mantle of command authority" to commit unlawful command influence. So too, the Deputy Judge Advocate General, exercising his Article 6, UCMJ, authority—and instructionally reminding another Rear Admiral of his duties under Article 6, UCMJ, to talk to his Staff Judge Advocate—is both allowed under Article 6, UCMJ, and an exception to unlawful command influence under Article 37, UCMJ.

In *Stombaugh*, a junior officer was discouraged by fellow junior officers from testifying for the appellant. 40 M.J. 208, 210 (C.M.A. 1994). This Court

explained that a peer's actions could only amount to unlawful command influence if the peer operated with the mantle of command authority. *Id.* at 212. Peer pressure absent the mantle of command amounted to, at worst, unlawful interference. *Id.* ("The attempted interference with witnesses by individuals with no mantle of command authority . . . is not command influence but interference with the access to witnesses.")

But routine meetings and casual conversation between flag officers in separate commands—or between the Deputy Judge Advocate General under Article 6, UCMJ, and another Rear Admiral—do not constitute unlawful command influence. The Convening Authority is a Region Commander who does not fall within Navy Legal Services Command and thus does not fall under the Deputy Judge Advocate General's umbrella of authority.

Appellant fails to show, and this Court should not find, that there was some evidence of unlawful command influence.

2. Assuming Appellant met his burden, the facts do not constitute "actual" unlawful command influence.

Once the appellant sufficiently raises the issue of unlawful command influence by some evidence, the burden shifts to the United States to prove "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." *Salyer*, 72 M.J. at 423-24 (citing

Biagase, 50 M.J. at 151). Actual unlawful command influence requires the intent of the individual to influence court-martial proceedings. *See* Article 37, UCMJ.

a. The predicate facts regarding VADM Crawford's use of the phrase "target on back" do not exist, and if they did, they do not constitute unlawful command influence.

To demonstrate actual unlawful command influence, Appellant relies on the Military Judge's finding that RADM Lorge was left with the impression that not affirming the Findings and Sentence in Appellant's case would "put a target" on his back. (J.A. 599; Appellant Br. 47.) But this comment was unsupported by the two participants to the conversation. VADM Crawford testified that he did not make that statement. (J.A. 773, 802, 825.) And RADM Lorge testified he did not remember VADM Crawford making that statement. (J.A. 1064-65.)

There is no evidence of this statement other than LCDR Dowling's hearsay testimony and LCDR Dowling's Declaration making, again, the hearsay assertion that RADM Lorge told LCDR Dowling that VADM Crawford said not to "put a target" on his back, or something to that effect. (J.A. 395, 919.)

But more importantly, there is no evidence RADM Lorge was left with this impression. RADM Lorge testified clearly about the conversation, after denying that he recalled the "target" comment: "I did not take [the conversation] as him telling me what to do." (J.A. 1066.) RADM Lorge specifically said that even if the statement had been made, he would have taken such statement as a joke (J.A.

599, 1064-65), making it impossible that RADM Lorge was ever left believing that disapproving the findings would in some way place him in personal jeopardy.

This fact is clearly erroneous and should not be considered by this Court. The elimination of this fact cripples Appellant's argument as it reveals the only impression RADM Lorge was left with after his conversations with VADM Crawford were that (1) he "need[ed] to make sure [his actions] are correct" (J.A. 1038), and (2) he should listen to his Staff Judge Advocate—the person responsible for providing him with independent legal advice (J.A. 1069).

b. Assuming the facts to be true, they do not amount to actual unlawful command influence because there was no intent to impact Appellant's proceedings.

In *Lewis*, this Court found actual unlawful command influence when the staff judge advocate was "actively engaged in the effort to unseat" the military judge. *Lewis*, 63 M.J. at 414. The trial counsel was "the tool through which this effort was executed." *Id.* The staff judge advocate was working to unseat this military judge as part of "a continuation of an ongoing effort to remove [the military judge] from any case" with this particular civilian defense. *Id.*

Here, there was no such plan or outright effort to influence Appellant's proceedings. VADM Crawford had a standard in-call with a region commander who happened to bring up a case he was in the process of reviewing. RADM Lorge believed VADM Crawford provided him with advice. But that advice was

general and applicable to any convening authority—listen to your staff judge advocate. (J.A. 1069.) VADM Crawford did not direct RADM Lorge to take certain action. (J.A. 1066-67.) This, unlike *Lewis*, is not coercion or an unauthorized attempt to influence a court-martial.

Further, VADM DeRenzi met with RADM Lorge as part of a routine base visit. (J.A. 375-80, 415, 597, 857-58, 1019, 1054-60.) The two spoke generally about the military-justice climate and the increased scrutiny being placed on sexual assault cases. (J.A. 415, 597, 1019-21, 1057-58, 1060.) But the Convening Authority was already aware of the political pressures on the military-justice system. (J.A. 597, 1014, 1020-21, 1057.) Appellant's case was not discussed. (J.A. 449, 597, 1056.) VADM DeRenzi did not direct RADM Lorge to take any action in a particular case. (J.A. 1057-59.) Nor did RADM Lorge feel like VADM DeRenzi was trying to persuade him to take certain action as a convening authority. (J.A. 1058.) As the Military Judge appropriately found, VADM DeRenzi made no effort to influence any action in Appellant's case. (J.A. 597.)

At most, the Convening Authority was reminded (1) of political pressures on the military-justice system that he already knew existed (J.A. 597, 1014, 1021), and (2) to listen and trust the advice provided by the attorney assigned to give him independent legal advice (J.A. 1069). This is not unlawful command influence.

3. Even if the actions of the Judge Advocate General and Deputy Judge Advocate General constitute unlawful command influence, it had no effect on the Findings or Sentence. The Convening Authority made an independent decision based on the advice of his Staff Judge Advocate.

Despite his great difficulty making a final decision in Appellant's case, the Convening Authority was constantly receiving advice from his Staff Judge Advocate—the independent lawyer assigned to provide him with legal advice—that he should approve the Findings and Sentence. (J.A. 338-39, 358, 236-28, 1028-29, 1038-39.) The Convening Authority cited that his decision to approve the Findings and Sentence was affected by a variety of sources, including from the advice of his Staff Judge Advocate, his conversations with the Judge Advocate General and Deputy Judge Advocate General, the military-justice climate, and the increased scrutiny over sexual assault cases. (J.A. 1028-31, 1038-40, 1075.)

But the Convening Authority testified that he did not make the decision to approve the case because of something VADM Crawford or VADM DeRenzi said or did. (J.A. 1077.) And tellingly, RADM Lorge was *not* a first-time convening authority in Appellant's case—he had made hard decisions in that capacity in the past, including in a rape case where unflattering information emerged about the victim after he had already decided to take the case to trial as well as in other high-visibility cases. (J.A. 597, 1032, 1040-41.) He knew how make a decision. That

Appellant's case caused him discomfort and indecision does not mean that his decision was affected by unlawful command influence.

E. The doctrine of "apparent unlawful command influence" was created by this Court with no basis in the text of the UCMJ. It should be eliminated.

1. When the language of the UCMJ is clear, this Court is bound by the plain meaning of the text.

The first step in statutory construction is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). If the language is clear and unambiguous, this Court is not entitled to "look beyond" the plain meaning of the statute to construct it differently. *United States v. Clark*, 62 M.J. 195, 198 (C.A.A.F. 2005) (citation omitted); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)) ("When the words of a statute are unambiguous, then, this first canon of statutory construction is also the last: 'judicial inquiry is complete.'").

"There is no rule of statutory construction that allows for a court to append additional language as it sees fit." *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014). Nor should courts interpret clear language in such a way that

makes accompanying language superfluous. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))) ("It is, however, a cardinal rule of statutory construction that we must 'give effect, if possible, to every clause and word of a statute'"); *United States v. Adcock*, 65 M.J. 18, 24 (C.A.A.F. 2007) ("Indeed, '[o]ne of the basic canons of statutory interpretation is that statutes should be interpreted to give meaning to each word.'").

This Court has a "duty to give effect, if possible, to every clause and word in the statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *Menasche*, 348 U.S. at 538-39 (internal quotations omitted)); *Cf. Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16 , 23 (1983)) ("'Where Congress includes particular language in one section of a statute but omits in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.'").

2. As several judges of this Court have noted, the plain language of Article 37, UCMJ, requires an *intent* to influence the proceedings through coercion or other unauthorized means. A tension exists between the judicially-created concept of "apparent" unlawful influence—looking to a "fully-informed" member of the public—and actual unlawful influence—applying a strict analysis of the statute's plain language.

The jurisdiction of Article I courts—unlike that of Article III courts—is "strictly construed." *Loving v. United States*, 62 M.J. 235, 244 n.60 (C.A.A.F. 2004). While the scope of the UCMJ is as broad as Congress expressly directs, there exists no "broad responsibility with respect to administration of military justice." *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). And of late, this Court has exercised both this broad mandate and hewed to these Constitutional restrictions with great care.

This Court in *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013), righted decades of unmoored precedent, clearly rejected the notion of "military due process," and redirected courts to the three sole sources of rights: the Constitution, the UCMJ, and the Manual for Courts-Martial. This Court has, over the last decade, made encouraging moves in building a more predictable and fair military-justice system by repeatedly righting older precedent that simply ignored the directives and constraints of Congress' Code and the President's Rules.[2] Notably,

[2] *See, e.g., United States v. LaBella*, 75 M.J. 52 (C.A.A.F. 2015) (reading Article 71 literally to mean that a "final judgment" occurs when neither a petition for review is filed at this Court within sixty days, nor a petition for reconsideration is

these plain-text readings cut uniformly in no particular direction—depending on the facts, plain text readings can help either side in adversarial litigation. Today, the Court should adopt a plain text reading of Article 37, UCMJ, and overturn the baseless, judicially-created doctrine of "apparent unlawful command influence."

The United States Congress, in passing Article 37, UCMJ, explicitly forbids only: (1) convening authorities and commanding officers from acting to "censure, reprimand, or admonish" court participants; and (2) persons subject to the UCMJ from "attempt[ing] to coerce, or by any unauthorized means, influence the action of a court-martial . . . or the action of any convening . . . authority." But nothing in the Code forbids the public from being displeased with authorized, non-coercive, but "regrettable" conversations or situations not actually amounting to unlawful influence.

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filed at the lower court); *United States v. Simmermacher*, 74 M.J. 196 (C.A.A.F. 2015) (overturning extra-textual reading of older precedent giving judges discretion to fashion "appropriate" remedies, and reverting to plain text reading of R.C.M. 703(f)(2) that mandates abatement of proceedings); *United States v. Moss*, 73 M.J. 64 (C.A.A.F. 2014) (reading Article 67(a)(3) for the first time literally and requiring that an appellant to personally authorize an appeal); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) (R.CM. 307(c)(3) must be read literally to require the pleading of all elements, including Article 134's terminal element); *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011) (Article 59(a) literally requires prejudice analysis for all non-structural errors—lower court overturned where it refused to test for prejudice under Article 59 for a merely statutory error); *United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009) (overturning older precedent that permitted petitioners to ignore Congress' statutory sixty-day filing deadline).

Apparent unlawful command influence is thus a judicial creation based on "the spirit of the Code" rather than the text of Article 37, UCMJ, as passed by Congress and signed by the President. *See, e.g., United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979) ("[W]e believe it incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom . . . [The judge's] limited approach . . . failed to take into consideration the concern of Congress . . . in eliminating even the appearance of unlawful command influence at courts-martial."); *see also United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002) (quoting *Rosser*, 6 M.J. at 271) ("[D]isposition of an issue of unlawful command influence falls short if it 'fails to take into consideration the concern of Congress and this Court in eliminating even the appearance of unlawful command influence at courts-martial.'"); *United States v. Cruz*, 20 M.J. 873, 879 (A.C.M.R. 1985), *rev'd*, 25 M.J. 326 (C.M.A. 1987) (explaining that *Rosser* was the first and, at that time, only "case in which the Court of Military Appeals ha[d] based its remedy on a finding of appearance of unlawful command influence without finding (sometimes tacitly), that actual command influence had occurred").

Further, internal debate at this Court has highlighted the problems with this judicial creation. As Judge Stucky and Judge Ryan noted in their dissents in *Boyce*: "[I]t is difficult to understand how an objective, disinterested, *fully informed observer*, knowing that there is no actual unlawful influence, 'would

harbor a significant doubt about the fairness of the proceeding.'" *Boyce*, 76 M.J. at 254 (Stucky, J., dissenting); *id.* at 255 (Ryan, J., dissenting) (quoting 76 M.J. at 254 (Stucky, J., dissenting)). "[A] correctible legal error of apparent unlawful command influence must be based upon more than the theoretical presence of influence on a particular convening authority. It must be based upon an objective observation of the 'facts and circumstances' . . . and a finding of substantial prejudice to the rights of the accused." *Boyce*, 76 M.J. at 256 (Ryan, J., dissenting) (citing *Salyer*, 72 M.J. at 423).

Apparent unlawful command influence precedent should be overturned as already impliedly overturned in and violation of *Vazquez*. This case should only be reviewed for actual unlawful command influence.

F. Appellant's apparent unlawful command influence claim fails.

1. Appellant fails his initial burden to show "some evidence" of apparent unlawful command influence.

Appellant again fails to meet his initial burden to show: (1) facts that, if true constitute apparent unlawful command influence," and (2) "that the unlawful command influence has a logical connection to the court-martial in terms of potential to cause unfairness in the proceedings." *Stoneman*, 57 M.J. at 41. As explained *supra*, Part II.D.1, this burden is low, but the evidence must consist of more than mere allegation or speculation. *Salyer*, 72 M.J. at 423.

Appellant cites no authority, offering nothing "more than mere allegation or speculation" suggesting improper influence. *Salyer*, 72 M.J. at 423. Appellant fails to show some evidence of apparent unlawful command influence.

2. Even if Appellant meets his burden, the Record does not support apparent unlawful command influence.

If Appellant meets his burden, then the United States must prove beyond a reasonable doubt that (1) either the predicate facts proffered by the appellant do not exist, or (2) the facts as presented do not constitute unlawful command influence. *Boyce*, 76 M.J. at 249. If the United States meets this burden, Appellant's claims are without merit. *Id*.

The Court found apparent unlawful command influence in *Salyer* where the government searched a military judge's personnel file for information to challenge the military judge for bias, after the judge ruled against the government. 72 M.J. at 426-27. The government retaliated by speaking to the judge's supervisor to express displeasure regarding the judge's rulings while the judge was still presiding over the case. *Id.*

In *Boyce*, after deciding not to refer charges in a separate sex-assault case, the convening authority was contacted by the Chief of Staff of the Air Force who informed him he could either voluntarily retire or be removed by the Secretary of the Air Force. 76 M.J. at 245, 252. Three hours later, the convening authority decided to retire. *Id.* at 245. About ten days later, the convening authority referred

sexual assault charges against Boyce. *Id.* at 245-46. The *Boyce* Court found those facts created the appearance of unlawful command influence. *Id.* at 252.

In *Reed*, the Court found apparent unlawful command influence where the convening authority sent an email to members indicating he was uncompromising about discipline with respect to fraud like that of Appellant's misconduct. 65 M.J. 487 (C.A.A.F. 2008).

But both *Boyce* and *Salyer* deal with retaliation against an individual involved in a judicial process that impacted the appellant's proceedings. And *Reed* involved a convening authority's direct impact on members hearing a court-martial.

Here, the predicate facts involve: (1) a Convening Authority confused about the scope of his powers and having great difficulty finalizing his decision; (2) a Staff Judge Advocate providing consistent advice to the Convening Authority to approve the Findings and Sentence; (3) an exceedingly complex Record of Trial; (4) a military-justice system and sexual-assault prosecutions that are under great scrutiny from Congress, the President, leadership, the media, and the public; and (5) a case that directly implicates all those sources of scrutiny.

Appellant, and the *DuBay* Judge, argue that the information given to RADM Lorge was improper. But the communications to "rely on your Staff Judge Advocate" were not only proper, they were part of the Deputy Judge Advocate

General's duties to ensure military justice was being correctly conducted. RADM Lorge knew that he needed to rely on his Staff Judge Advocate for advice about individual military justice cases, though he admitted "maybe[he] shouldn't have" in Appellant's case. (J.A. 1085.) And discussions about the current scrutiny weighing heavily on the entire military-justice system, and particularly on sexual assault cases, were appropriate, frequent, and routine—in meetings and briefings with senior judge advocates as well as the Chief of Naval Operations. (J.A. 1014.)

While *Boyce* involved blatant retaliatory action against a convening authority who refused to fall in line, here, the Convening Authority received no personal threats and knew he would not be personally retaliated against. (J.A. 1066.) The Convening Authority believed he could not be retaliated against because he was already scheduled to retire. (J.A. 1065.) He, not improperly, was exceedingly concerned about the impact his decision would have on the Navy generally. (J.A. 407.) But an experienced, albeit indecisive, Convening Authority—apparently for the first time confused about the scope of his powers—does mean apparent unlawful command influence has occurred at the highest levels of Navy leadership.

G. Regardless, no disinterested observer fully informed of the facts would doubt the fairness of Appellant's case.

If the United States fails to rebut the allegation of unlawful command influence, then the United State may prove beyond a reasonable doubt that any

unlawful command influence did not place "an intolerable strain" on public perception of the military justice system and that "an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding." *Boyce*, 76 M.J. at 249-50 (quoting *Salyer*, 72 M.J. at 423 (quoting *Lewis*, 63 M.J. at 415)).

In *Boyce*, after being threatened and forced to retire by senior Air Force officials because of a prior referral decision, the convening authority referred charges in the appellant's case but assured that his decision to do so was done independently. *Id.* at 245-46. This assurance was not sufficient to overcome the appearance of unlawful command influence. *Id.* at 253.

Here, there is no blatant threat to blind the Court or the disinterested observer. The Convening Authority was simply confused and overwhelmed by the possibility of making a decision that could impact the Navy. His confusion does not amount to unlawful command influence. If anything, it amounts to insufficient post-trial processing that must be remedied by a convening authority who understands his powers.

Further, no reasonable member of the public would harbor any doubt as to the fairness of Appellant's trial when fully informed of the following facts: (1) RADM Lorge was confused as to his powers as the Convening Authority in Appellant's case. (J.A. 239-41, 592, 598, 1025, 1027, 1028-30, 1032, 1074.) (2)

RADM Lorge sought guidance from a prior colleague who he trusted, VADM Crawford, but the only advice he received was to listen to his staff judge advocates. (J.A. 599, 772, 1031-36.) (3) Neither RADM Lorge nor VADM Crawford recall VADM Crawford saying anything about putting a target on his back, and if he had, RADM Lorge would have considered it a joke. (J.A. 599, 773, 1064-65.) (4) RADM Lorge never received direction from any senior Department of Defense personnel to take certain action in Appellant's case. (J.A. 1059.) (5) VADM DeRenzi met with RADM Lorge before RADM Lorge had heard of Appellant's case. (J.A. 1056.) (6) VADM DeRenzi discussed the general military-justice climate with RADM Lorge, including the scrutiny placed on sexual assault cases, which RADM Lorge already knew. (J.A. 597, 1014, 1021.) (7) Discussions about the high level of scrutiny on sexual assault cases in the military-justice system were a "repeated drumbeat" and a topic brought up in multiple meetings RADM Lorge attended, not just the discussions with VADM DeRenzi and VADM Crawford. (J.A. 1013-14.) (8) RADM Lorge did not decide to approve the conviction because of the actions of either VADM Crawford or RADM DeRenzi. (J.A. 1077.) (9) The Convening Authority followed the consistent advice of his Staff Judge Advocate to approve the Findings and Sentence. (J.A. 236-38, 338-339, 358.)

There is no apparent unlawful command influence.

H. Even if Appellant's allegations of unlawful command influence are true, he is not entitled to dismissal.

If this Court believes the United States fails to meet its evidentiary burden, this Court fashions an appropriate remedy by considering "both the specific unlawful influence" and "the damage to the public perception of fairness." *Lewis*, 63 M.J. at 416. Dismissal is a drastic remedy and courts must consider alternative remedies. *Id.* (citing *United States v. Cooper*, 35 M.J. 417, 422 (C.M.A. 1992)). Dismissal of charges with prejudice is only appropriate where the error cannot be rendered harmless. *Lewis*, 63 M.J. at 416 (citing *Gore*, 60 M.J. at 189).

In *Lewis*, this Court found that the unlawful command influence created by the staff judge advocate's attempts to and success in unseating the military judge had not been cured, so the findings and sentence could not stand. *Lewis*, 63 M.J. at 416. In *Salyer*, this Court found the appearance of unlawful command influence after the government sought to disqualify the military judge through inappropriate means because the judge ruled against the government. 74 M.J. at 412. The influence penetrated the entire trial in both *Lewis* and *Salyer*, so the only available remedy was to reverse the decision of the lower court, set aside the findings and sentence, and dismiss the charges with prejudice. *Id.*

Meanwhile, in *Boyce*, after being threatened and forced to retire by senior Air Force officials because of a prior referral decision, the convening authority referred charges in the appellant's case but assured that his decision to do so was

done independently. *Id*. at 245-46. The Court found the convening authority's assurance insufficient to overcome the appearance of unlawful command influence. *Id*. at 253. But the Court reversed the findings and sentence without prejudice, authorizing a rehearing. *Id.*

Here, unlike *Lewis* and *Salyer*, if there was influence over the proceedings it was limited to Appellant's post-trial processing and, specifically, the action taken by the Convening Authority. Unlawful command influence that occurs in post-trial processing requires less relief than that which impacts the actual trial proceedings. *See United States v. Jameson*, 33 M.J. 669, 673 (N-M. Ct. Crim. App. 1991) ("Of course, the later the stage of a case at which unlawful command influence first occurs, the less drastic the relief which may be required, because the earlier stages may be entirely unaffected, but that is the only material distinction we perceive.")

Like the *Boyce* Court authorized a rehearing to eliminate the taint of apparent unlawful command influence, so too can this Court. Should this court find unlawful command influence impacted the Convening Authority's Action, this Court should remand the case to an appropriate, independent convening authority for new action to eradicate any impact the unlawful influence had over the proceedings.

At most, this Court may choose to set aside the Findings and Sentence and authorize a rehearing, honoring the original desires of the Convening Authority to send the case back to "get looked at again." (J.A. 1043.)

Conclusion

Wherefore, the United States respectfully requests that this Court find no actual or apparent unlawful command influence and affirm the decision of the lower court.

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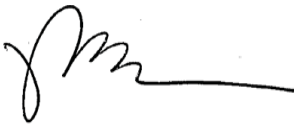

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I certify that a copy of the foregoing was delivered to the Court and delivered to opposing counsel on January 22, 2018.

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