They Came In Like a Wrecking Ball[1]: Recent Trends at CAAF In Dealing With Apparent UCI

Lieutenant Colonel John L. Kiel, Jr.[*]

Cowboy legend John Wayne once offered up a bit of advice to fellow actor Michael Cain exhorting him in that famous drawl to remember to "talk low, talk slow, and don't say too much."[2] Given the recent unlawful command influence (UCI) decisions coming out of the Court of Appeals for the Armed Forces (CAAF), judge advocates advising convening authorities would be well served to heed the same advice. As the following cases illustrate, what you say and how you say it could mean the difference between having your case affirmed or having it returned for a rehearing.

The CAAF has recently drawn some very bright lines when it comes to apparent UCI. Gone are the days when you could breathe a sigh of relief knowing that there had been only apparent and not actual UCI found in your case. Appellate courts continue to reaffirm that UCI in whatever form, is still the "mortal enemy of military justice".[3] In fact, Judge Ohlson reminds us in *United States v. Boyce*, the first UCI case we will discuss, that CAAF "unequivocally endorses the Supreme Court's observation that 'federal courts have an independent interest in ensuring … that legal proceedings appear fair to all who observe them."[4]

I: United States v. Boyce

United States v. Boyce is intriguing for a number of reasons. Among them is the fact *Boyce* deals with apparent UCI committed by both command and technical chain channels and that the convening authority was none other than Lieutenant General (Lt. Gen.) Craig A. Franklin from *United States v. Wilkerson* infamy.[5] To recap quickly, Air Force Lieutenant Colonel (Lt. Col.) James Wilkerson had been convicted by a general court-martial panel for sexually assaulting a female house guest after he and his wife invited her back to their home following a USO concert.[6] Lieutenant Colonel Wilkerson went downstairs during the middle of the night, climbed in bed with the victim, fondled her breasts, and digitally penetrated her.[7] Wilkerson's wife ended up finding her husband in bed with the victim when she turned on a light downstairs the next morning.[8] Enraged, Mrs. Wilkerson threw the victim out of the house.[9] The all-male panel found Lt. Col. Wilkerson guilty of committing the assault and sentenced him to be dismissed from the Air Force and to serve a period of one year in confinement.[10] After reviewing the lengthy material submitted by the defense as part of Wilkerson's clemency request, Lt. Gen. Franklin ultimately set aside the findings of the court-martial, against his Staff Judge Advocate's (SJA) advice. This set off a firestorm of controversy in the press and resulted in Congress severely curtailing the convening authority's ability to grant clemency in future cases.[11]

On 3 September 2013, approximately seven months after the *Wilkerson* debacle, Lt. Gen. Franklin declined to refer to court-martial an unrelated sex assault case, this time in accordance with his SJA's advice.[12] Shortly after Lt. Gen. Franklin dismissed the charges and specifications in *United States v. Wright*, Colonel (Col.) Bialke, the SJA for both *Wilkerson* and *Wright*, received a telephone call from Lt. Gen. Richard Harding, The Judge Advocate General of the Air Force.[13] General Harding warned Col. Bialke that his boss's "failure to refer the case to trial would place the Air Force in a difficult position with Congress."[14] Harding further warned that "absent a 'smoking gun' victims are to be believed and their cases referred to trial; and [that] dismissing the charges

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[*] Chair and Professor, Criminal Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1] MILEY CYRUS, *Wrecking Ball*, *on* BANGERZ (RCA Records 2013).

[2] *See* http://www.cowboyway.com/JohnWayneQuotes.htm (last visited Oct. 4, 2017).

[3] United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986). The Court of Appeals for the Armed Forces [hereinafter CAAF] used to be called the Court of Military Appeals (CMA) before it was redesignated in 1994.

[4] United States v. Boyce,76 M.J. 242, *253,(C.A.A.F. 2017),(citing Wheat v. United States, 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

[5] Lieutenant General Franklin became the center of attention in the media and in congressional hearings. As a result of his decision to set aside the panel's verdict, Congress substantially curtailed the ability of convening authorities to grant clemency under Article 60, UCMJ.

[6] Nancy Montgomery, *Former IG Gets 1-Year Sentence, Dismissal for Sexual Assault*, STARS AND STRIPES, Nov. 3, 2012, *available at* https://www.stripes.com/news/former-ig-gets-1-year-sentence-dismissal-for-sexual-assault-1.195865#.Wdt9uf5lJVc. The United Service Organizations (USO) collectively provides services to millions of service members each year. They are perhaps most famous for hosting concerts and bringing celebrities to meet the troops overseas.

[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] *Id*.

[11] Craig Whitlock, *Air Force General to Retire After Criticism for Handling of Sexual Assault Case*, WASH. POST, Jan. 8, 2014, *available at* https://www.washingtonpost.com/world/national-security/air-force-general-criticized-for-handling-of-sexual-assault-cases-to retire/2014/01 /08/ 9942df96-787d-11e3-b1c5-739e63e9c9a7_ story.html?utm_term= . 1be5 a60aa86d.

[12] United States v. Boyce, 76 M.J. 242, *245 (C.A.A.F. 2017)(citing United States v. Wright, 75 M.J. 501, 502 (A.F. Ct. Crim. App. 2015).

[13] *Id.*

[14] *Id*. at *245-46.

without meeting with the named victim violated an Air Force regulation."[15]

Shortly after deciding not to refer charges in *Wright*, Lt. Gen. Franklin received another telephone call on 27 December 2013, this time from the Air Force Chief of Staff, who politely informed him that the newly appointed Air Force Secretary had lost confidence in him.[16] The Chief told Lt. Gen. Franklin that he had two options–he could voluntarily retire from the Air Force at the lower rank of major general or he could wait for the new Secretary to remove him from command.[17] Later that day, while reviewing his options, Lt. Gen. Franklin received the referral packet for *United States v. Boyce*, which he promptly referred to a general court-martial in accordance with the article 32 investigating officer's recommendation and SJA's advice.[18] Two days later, Franklin announced that he would immediately step down as the Third Air Force Commander and officially retire on 31 January 2014.[19]

Airman Boyce's defense counsel immediately sought to depose Franklin after reading that he was stepping down as the commander of Third Air Force. Defense counsel got their wish and interviewed Lt. Gen. Franklin on 28 January 2014.[20] During the interview, Lt. Gen Franklin admitted "there probably is an appearance of UCI but I wasn't affected by it" and that it "would be foolish to say there is no appearance of UCI."[21] Armed with that information, Wilkerson immediately filed a motion to dismiss all charges due to the UCI.[22]

At trial, the government produced an affidavit from Lt. Gen. Franklin wherein he claimed that any comments made by superior government officials had "absolutely no impact" on his ability to render independent and impartial decisions as a GCMCA.[23] Franklin acknowledged however, that his decision to set aside the *Wilkerson* verdict generated a huge amount of controversy and that his decision in *Wright* was second-guessed by the convening authority of the Air Force District of Washington, who referred the case to a general court-martial anyway.[24]

After considering all of the evidence, the trial judge found that while there had been no actual UCI, the defense had successfully demonstrated that there was apparent UCI.[25] The judge concluded however, that because Lt. Gen. Franklin was the most "bombproof of any convening authority" out there, he had been unaffected by UCI when he made his decision to refer Boyce's case.[26] The judge noted that Lt. Gen. Franklin had clearly demonstrated in *Wilkerson* and *Wright* his ability to make independent decisions with regard to sex assault cases in the face of withering criticism from senior military and civilian leaders and lawmakers.[27] The judge also noted that Franklin provided an affidavit whereby he "unequivocally attested to his not being influenced in any way by outside pressure."[28] The Air Force Court of Criminal Appeals (AFCCA) affirmed the trial court's decision stating, "We are convinced that an objective, disinterested, reasonable person, fully informed of all the facts and circumstances, would not believe that the convening authority was affected by UCI and would not 'harbor a significant doubt about the fairness' of Appellant's court-martial proceeding."[29] The AFCCA also agreed that Lt. Gen. Franklin was "the most bombproof of any convening authority" due to the fact that he was able to act independently despite possible career ending phone calls from the TJAG and the Chief of Staff, and members of Congress publically calling for his removal from command.[30]

The CAAF granted Boyce's petition but limited its review to whether there had been apparent UCI committed when Lt. Gen. Franklin referred the case. After reviewing the record, Judge Ohlson concluded that "members of the public would understandably question whether the conduct of the Secretary of the Air Force and/or the Chief of Staff of the Air Force improperly inhibited Lt Gen Franklin from exercising his court-martial convening authority in a truly independent and impartial manner as is required to ensure the integrity of the referral process."[31]

Judge Ohlson also took umbrage with the trial judge's assertion that Lt. Gen. Franklin had been the most bombproof convening authority out there. Ohlson emphatically observed that "if 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

[15] *Id*.

[16] *Id*. at *245. Deborah Lee James was appointed as Secretary of the Air Force on December 20, 2013.

[17] *Id*. at *246.

[18] United States v. Boyce, 2016 CCA Lexis 198, *20, *21 (A.F. Ct. Crim. App. Mar. 24, 2016).

[19] United States v. Boyce, 76 M.J. 242, *246 (C.A.A.F. 2017).

[20] *Id*.

[21] *Id*. at *245-46.

[22] *Id*.

[23] *Id*. at *246.

[24] *Id*.

[25] United States v. Boyce, 2016 CCA Lexis 198, *22, *23 (A.F. Ct. Crim. App. Mar. 24, 2016).

[26] *Id*.

[27] *Id*. at *23.

[28] *Id*.

[29] *Id*. at *25, *26.

[30] *Id*. at *23.

[31] United States v. Boyce, 76 M.J. 242, *246 (C.A.A.F. 2017).

political pressure' when making those referral decisions."[32] He noted that Franklin could have been subject to immediate removal had the Secretary discovered that he had refused to refer "another" meritorious case to court-martial.[33]

The majority opinion spent a fair amount of time discussing how apparent UCI jurisprudence had developed over the years, and then laid out a two-pronged test to determine whether apparent UCI exists.[34] First, the appellant must show facts, which if true, would constitute UCI.[35] Second, he must show that the UCI placed "an intolerable strain on the public's perception of the military justice system because an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding."[36] Judge Ohlson also emphasized that unlike actual UCI, where prejudice to the accused is required, there is no such requirement to prevail on a claim of apparent UCI.[37]

Relying on precedent established in *United States v. Salyer*[38] and *United States v. Biagese*,[39] Ohlson then laid out an analytical framework for courts to use in applying the two-pronged test.[40] First, the appellant must show some evidence that UCI occurred.[41] That burden is pretty low and all it requires is that the appellant produce evidence that consists of something more than just speculation or a mere allegation.[42] If the appellant satisfies this requirement, the burden shifts to the government to either prove beyond a reasonable doubt that the predicate facts proffered by the appellant do not exist, or that they do not amount to UCI.[43] If the government fails to satisfy this burden, then it must prove beyond a reasonable doubt that the UCI did not place "an intolerable strain" upon how the public perceives 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.[44] If the government can prove that, then the analysis stops and the appellant merits no relief.[45] If not, the court will fashion an appropriate remedy for the UCI.[46]

The CAAF ultimately concluded that Boyce had met his initial burden of demonstrating some evidence of UCI committed by the Chief of Staff and Secretary of the Air Force.[47] It also held that after the burden shifted, the government failed to demonstrate beyond a reasonable doubt that the predicate facts cited to by Boyce did not exist or that they did not amount to UCI.[48] After Boyce had established that apparent UCI was present, the government then also failed to meet its burden of proving beyond a reasonable doubt that the conduct of the Air Force Secretary and/or the Chief of Staff, did not place an intolerable strain upon the public's perception of the military justice system.[49]

Boyce also asserted that actual UCI had permeated Franklin's referral decision but Judge Ohlson quickly dispensed with that claim because of the low standard (reasonable grounds) involved in determining whether to refer charges to a general court-martial.[50] Ohlson aptly noted that there had been two independent witnesses, not just one, who made allegations of abuse against Boyce; that there was physical evidence corroborating both witness's allegations; that Boyce had previously engaged in similar violence; and that the Article 32 investigating officer, every subordinate commander, and the SJA all recommended referral of charges against him.[51]

The fact that there had been no actual UCI found caused Chief Judge Stucky and Judge Ryan to author separate dissenting opinions. The Chief Judge wrote that it was impossible for the newly appointed Secretary of the Air Force to have committed actual UCI because there is no evidence that she even knew of the existence of Boyce's case nor did she try to influence or coerce Lt. Gen. Franklin in any way.[52] Instead, she was simply exercising her prerogative as Secretary to remove a commander she had lost confidence in.[53] Stucky argued that because there was no actual UCI present, the test that the Court used to determine whether apparent UCI existed made no sense.[54] If an objective, disinterested observer looking in on this case knew that there was no actual UCI committed by the Air Force Chief of Staff or the Secretary, why then would they ever "harbor a

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[32] *Id*. at *251.

[33] *Id*. at *250

[34] *Id*. at *249.

[35] *Id*.

[36] *Id*.

[37] *Id*. at *248.

[38] 72 M.J. 415 (C.A.A.F. 2013).

[39] 50 M.J. 143 (C.A.A.F. 1999).

[40] United States v. Boyce, 76 M.J. 242, *249-50 (C.A.A.F. 2017).

[41] *Id*. at *249 (citing United States v. Stoneman, 57 M.J. 35, 41 (C.A.A.F. 2002).

[42] *Id*. at *249 (citing United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013).

[43] *Id*.

[44] *Id*.

[45] *Id.* at *250

[46] *Id*.

[47] *Id*. at *252.

[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] *Id*.

[52] *Id*. at *253.

[53] *Id*.

[54] *Id*. at *253-54.

significant doubt about the fairness of the proceeding," Stucky wondered?[55]

Judge Ryan agreed with Judge Stucky that it would be illogical to conclude that an objective observer would harbor doubts about the fairness of the proceedings when there was no actual UCI present.[56] She noted that the only way an appellate court can set aside a finding or sentence on account of legal error is to demonstrate that the error somehow materially prejudiced the substantial rights of the accused.[57] Judge Ryan argued that the there was no evidence that either the Chief of Staff or Secretary attempted to influence the action of Boyce's court-martial, mainly because neither one even knew about it. In fact, Ryan reasoned, the only person actually prejudiced in this case was Lt. Gen. Franklin whose "reputation was sullied and career cut short."[58]

II. United States v. Barry

Shortly after issuing the *Boyce* decision, CAAF reviewed the case of Senior Chief Keith Barry, a Navy SEAL who was convicted at a general court-martial for raping his girlfriend.[59] Barry invited his girlfriend back to his hotel room where they engaged in consensual foreplay that involved Barry tying her up by the ankles and wrists and digitally penetrating her while she laid bound, face down on the bed.[60] When Barry began having anal sex with her, she immediately pleaded with him to stop.[61] The very next day, she disclosed what had happened to her cousin and a month later, she reported being raped to the Naval Criminal Investigative Service (NCIS).[62] At trial, a military judge sitting alone convicted Barry of sexual assault and sentenced him to be confined for a period of three years and to be dishonorably discharged.[63]

In his clemency matters, Barry asserted legal error on the grounds that the trial judge failed to release portions of the victim's mental health records that were constitutionally required and that she abused her discretion by cutting off Barry's testimony during sentencing when he attempted to explain how the victim asked him if he was open to experimenting with bondage and anal sex the day before the assault.[64]

Rear Admiral (RADM) Lorge, the convening authority in the case, responded to the clemency request with highly unusual language directed to the appellate courts.[65] Lorge wrote, in part:

> In my seven years as a General Court-Martial Convening Authority, I have never reviewed a case that has given me greater pause than the one that is before me now. The evidence presented at trial and the clemency submitted on behalf of the accused was compelling and caused me concern as to whether SOCS Barry received a fair trial or an appropriate sentence.[66]

Lorge strongly urged the court to consider remanding the case back to him for a rehearing or in the alternative, to disapprove the dishonorable discharge allowing Barry to retire in the rank that he last honorably served.[67]

The Navy-Marine Corps Court of Criminal Appeals (NMCCCA) reviewed the assignments of error, to include whether RADM Lorge abused his discretion in denying a request for rehearing, despite harboring significant doubts about the fairness and integrity of the court-martial.[68] The NMCCA found no legal error in the trial judge's decisions to limit discovery of the victim's mental health records and to limit the scope of Barry's sworn testimony during presentencing.[69] The NMCCA also found Lorge's decision not to order a rehearing was not an abuse of discretion because Barry received everything he should have received at clemency which included an "individualized, legally appropriate and careful review of his sentence by the convening authority."[70] Six months later, on 27 April 2017, CAAF summarily affirmed the NMCCA's decision.[71]

But this did not end the case. On the same day that CAAF summarily affirmed Barry's conviction, his military defense counsel received third-hand information from someone in the Navy-Marine Corps Appellate Government Division confirming that RADM Lorge did not want to approve the findings and sentence and that he only did so after meeting with the Deputy Judge Advocate General of the Navy

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[55] *Id*. at *254.

[56] *Id*.

[57] *Id*.

[58] *Id*. at *255.

[59] United States v. Barry, No. 201500064, 2016 WL 6426695 (N. M. Ct. Crim. App. Oct. 31, 2016).

[60] *Id*. at *1.

[61] *Id*.

[62] *Id*.

[63] *Id*.

[64] *Id*. at *6, *10.

[65] Declaration of LCDR Leah A. O'Brien, Appendix 2 at 3, United States v. Barry, No. 17-0162/NA (C.A.A.F. May 4, 2017).

[66] *Id*.

[67] *Id*.

[68] United States v. Barry, No. 201500064, 2016 WL 6426695 at *4 (N. M. Ct. Crim. App. Oct. 31, 2016).

[69] *Id*. at *6-7.

[70] *Id*. at *4-5.

[71] United States Court of Appeals for the Armed Forces Daily Journal, Friday, June 30, 2017, *available at* http://www.armfor.uscourts.gov/newcaaf/journal/2017Jrnl/2017Jun.htm. (last visited Nov. 22, 2017).

(DJAG), RADM James Crawford, III.[72] Barry's trial defense counsel secured an affidavit from RADM Lorge and provided it to his appellate defense counsel.[73] Armed with the affidavit, Barry's counsel petitioned CAAF to order a DuBay hearing to determine whether the convening authority had been subject to UCI during the clemency phase of the proceedings.[74] The CAAF set aside its 27 April order and directed that a military judge from another service conduct a DuBay hearing to determine whether senior Navy leaders had exerted UCI on RADM Lorge.[75]

On September 26th and 27th, the Chief Trial Judge of the Air Force, Colonel Vance H. Spath, conducted the DuBay hearing.[76] After two full days of receiving evidence, Judge Spath concluded that the TJAG, DJAG, and Lorge's SJA all exerted UCI on him.[77] In order to avoid confusion, we will start with the TJAG's role, followed by the SJA's and then the DJAG's roles in exerting UCI on RADM Lorge during the clemency phase of Barry's court-martial.

A. TJAG role in UCI

Barry was convicted on 31 October 2014.[78] Eight months prior to that, in February of 2014, RADM Lorge described meeting Vice Admiral (VADM) Nanette DeRenzi, the NAVY TJAG, in his San Diego office.[79] Admiral DeRenzi had been in town for an unrelated event but popped in to see RADM Lorge as a professional courtesy.[80] Lorge recalled that during the meeting VADM DeRenzi spoke about how tenuous it had become for commanders to act as convening authorities in sex assault cases because of the political pressure Congress kept exerting on the military.[81] She lamented how every three to four months, court-martial decisions convening authorities made seemed to be called into question by members of Congress and even the President.[82] As a result, VADM DeRenzi explained, she spent a great deal of her time defending the role of commanders as convening authorities in the military justice system to members of Congress.[83]

B. SJA role in UCI

Nearly a year after his visit with VADM DeRenzi, RADM Lorge received the record of trial (ROT) and staff judge advocate advice (SJAR) for the Barry case from Commander (CDR) Dominic Jones, his SJA.[84] While CDR Jones's recommendation to approve the findings and recommendations was always consistent, his advice about available clemency options was anything but. In his original SJAR, CDR Jones advised Lorge that under Article 60 of the Uniform Code of Military Justice (UCMJ), his authority to grant clemency was unrestricted.[85] About three weeks later, Jones issued an addendum to the SJAR advising Lorge that due to recent amendments Congress made to Article 60, the only thing he could do was approve the findings and sentence.[86] Having felt his hands were tied at that point, that's exactly what RADM Lorge did.[87] When the NMCCA reviewed the case on 16 March 2015, they quickly discovered that the SJA had misinterpreted the effective date for the Article 60 amendments and remanded it back for corrective post-trial processing.[88]

When the case came back, the SJA advised Lorge that while his original advice had been correct (that clemency powers were unrestricted) Jones still insisted that Lorge approve the findings and sentence.[89] Lorge testified that he spent a great deal of time pouring through the ROT and the clemency submissions trying to figure out what to do.[90] After studying and pondering all of it, Lorge still felt that the government had not met its burden at trial and that the trial judge made rulings that unfairly prejudiced Barry.[91] Commander Jones made the decision to call RADM James Crawford, III, the NAVY DJAG, in hopes that Crawford would convince his boss to approve the findings and

[72] *Id*. at 2. Vice Admiral Crawford currently serves as the 43d Judge Advocate General of the Navy.

[73] Petition for Reconsideration at 5, United States v. Barry, No. 17-0162/NA (C.A.A.F. May 5, 2017).

[74] CAAF Daily Journal, *supra* note 67.

[75] *Id*.

[76] Findings of Fact & Conclusions, United States v. Barry, No. 17-0162/NA (C.A.A.F. Oct. 24, 2017).

[77] *Id*. at 8.

[78] *Id*. at 2.

[79] Declaration of RADM Patrick J. Lorge, USN (RET.), Appendix 1 at 4, United States v. Barry, No. 17-0162/NA (C.A.A.F. May 5, 2017).

[80] *Id*.

[81] *Id*.

[82] *Id*.

[83] Findings of Fact & Conclusions, *supra* note 75, at 2.

[84] *Id*. at 3.

[85] *Id*.

[86] *Id*.

[87] *Id*. at 4.

[88] *Id*. at 3.

[89] *Id*.

[90] *Id*.

[91] United States v. Barry, No. 201500064, 2016 WL 6426695 at *6 (N. M. Ct. Crim. App. Oct. 31, 2016).

sentence.[92] Admirals Lorge and Crawford had been friends since 2001.[93]

C. DJAG role in UCI

On 30 April 2015, the two admirals met to discuss Lorge's clemency options at an office call conducted at Lorge's San Diego headquarters.[94] Testimony at the DuBay hearing indicates that at one point during this meeting, RADM Crawford told his long-time friend "not to put a target on his back."[95] At the hearing, Lorge testified that while he could not recall exactly what Crawford had said to him, he felt like Crawford gave legal advice to approve the findings and sentence.[96] After RADM Crawford returned to Washington, D.C., Lorge and Jones continued to discuss Barry's case. Commander Jones kept insisting that Lorge approve the findings and sentence, but RADM Lorge was still disinclined.[97] Finally, in an effort to give his boss another option, Jones recommended that Lorge put something in the action that would communicate to the appellate court his sincere and strong reservations about the case.[98]

While pondering that option, RADM Lorge called his old friend on the phone and asked him what he thought about Jones's proposal.[99] Barry's appellate counsel stated in his affidavit, that during the phone call, RADM Crawford again advised RADM Lorge to approve the findings and sentence and warned him, "If you disapprove the findings, it will ruin your career."[100] Crawford then told him that the most that he would be able to do was to address the appellate court in the action as CDR Jones had recommended.[101] Lorge testified at the DuBay hearing that while he could not recall exactly what was said during this phone call, he again felt that he had received legal advice from RADM Crawford.[102] Shortly after the phone call, Lorge approved the findings and sentence and expressed his misgivings about the case in the action to the appellate court.[103]

III. DuBay Hearing

After reviewing all of this evidence, the DuBay judge concluded that senior military leaders, including VADM DeRenzi, RADM Crawford, and CDR Jones all exerted UCI on RADM Lorge during the clemency phase of the court-martial proceedings.[104] Even though VADM DeRenzi never spoke about the Barry case, her comments about Congress second-guessing convening authorities and the amount of time she spent defending them reaffirmed in Lorge's mind what he perceived to be the harsh political landscape surrounding sex assault cases.[105] Admiral Crawford's office visit and telephone call to RADM Lorge were clear cut examples of UCI. His comment to Lorge about "not putting a target on his back" coupled with very clear advice to approve the findings and sentence, provide insight into the amount of "pressure" that RADM Lorge believed Crawford had exerted on him.[106] Judge Spath also noted that CDR Jones's incessant demands that Lorge approve the findings and sentence after wrongly telling him that that was his only option, certainly contributed to the UCI in this case.[107]

Judge Spath ultimately concluded that RADM Lorge decided on a course of action that he did not wish to take because of the UCI and bad legal advice.[108] Spath stated that "it appears the final action taken in this case is unfortunate and does not engender confidence in the processing of this case or the military justice system as a whole. Actual or apparent unlawful command influence tainted the final action in this case."[109] Judge Spath acknowledged that even though CAAF's order allowed for him to make conclusions of law and analysis, he conceded that CAAF would ultimately conduct a de novo review of its own.[110] That did not keep him from recommending however, that CAAF order a new action at a minimum, or in the alternative, that it honor the GCMCA's original stated desire and order a new trial.[111]

The CAAF has not issued a decision yet in *Barry*, but given its holding in *United States v. Boyce*, the Court is likely to find at least apparent UCI permeated the clemency phase of Barry's court-martial proceedings. Barry was able to set forth "some evidence" at the DuBay hearing that UCI had been exerted on him. The government was unable to prove beyond a reasonable doubt that the predicate facts did not exist or that the UCI did not actually occur. The government

[92] Declaration of LCDR O'Brien, *supra* note 68, at 2.

[93] Declaration of RADM Lorge, *supra* note 78, at 3.

[94] Findings of Fact & Conclusions, *supra* note 75, at 3.

[95] *Id*. at 4.

[96] *Id*.

[97] *Id*.

[98] *Id*.

[99] *Id*.

[100] Petition for Reconsideration at 5, United States v. Barry, No. 17-0162/NA (C.A.A.F. May 5, 2017).

[101] Findings of Fact & Conclusions, *supra* note 75, at 4.

[102] *Id*.

[103] *Id*.

[104] *Id*. at 7.

[105] *Id*.

[106] *Id*.

[107] *Id*. at 8.

[108] *Id*.

[109] *Id*. at 9.

[110] *Id*. at 6.

[111] *Id*. at 9.

also failed to convince the DuBay judge and will likely fail to convince CAAF beyond a reasonable doubt that VADM DeRenzi's, CDR Jones's, and RADM Crawford's actions did not place an intolerable strain on the public's perception of military justice. And remember, CAAF is no longer concerned about whether Barry was actually prejudiced by the UCI, it will only look to see what effect it had on the public's perception of the court-martial proceedings.[112]

In *United States v. Boyce*, it is important to recall that there was proof that neither the Chief of Staff nor the Secretary of the Air Force had ever spoken to Lt. Gen Franklin about *Boyce*, mostly because both were completely unaware the case existed.[113] In *Barry* however, RADM Crawford specifically met with RADM Lorge in person to discuss his clemency options and then spoke to him again over the phone to specifically discuss them once more. Crawford's warnings to "not put a target on your back" and "if you disapprove the findings it will ruin your career" are nearly identical to the ultimatum the Air Force Chief of Staff gave to Lt. Gen. Franklin telling him that he could either wait to be fired or retire immediately. Given the direct discussions Admirals Crawford and Lorge had about the Barry case, CAAF is almost guaranteed to find apparent UCI had taken place and that Crawford's advice in particular placed an intolerable strain on the public's perception of at least the clemency phase of the court-martial proceedings. Because the SJA repeatedly failed to advise Lorge properly about his clemency options and then later about whether he could order a new hearing, the CAAF is likely to set aside Barry's findings and sentence without prejudice and authorize the convening authority to order a new hearing as the original convening authority had originally requested.

IV. Lessons Learned

So what are the takeaways from Boyce and Barry? First and foremost, SJAs must remember that they can commit UCI.[114] In both cases, the appellate courts found that telephone calls from the Air Force and Navy TJAGs to subordinate SJAs and in Barry's case, to the convening authority directly, placed an intolerable strain on the public's perception of military justice. Telling your boss not to put a target on his back and warning him that political atmospherics require him to take certain action is always going to be "some evidence" of apparent UCI under *United States v. Boyce*. Perhaps the biggest takeaway from *Boyce* is that the Court doesn't' even have to look for actual prejudice to the accused. If they find that UCI placed an intolerable strain on the public's perception of any aspect of the court-martial proceedings, they are going to fashion a remedy to cure it even if the accused has suffered no prejudice because of it.

What can SJA's do then to guard against apparent UCI? For starters, when TJAG calls, don't answer the phone! Kidding aside, you should never, ever put TJAG (or DJAG) in a potentially compromising position by discussing cases that are still pending in your jurisdiction. Providing an update for the high profile tracker is one thing, getting his advice and passing it along to your convening authority is quite another. As we saw in both cases, you, your boss, and TJAG may all end up testifying at a DuBay hearing concerning the intimate details of your private conversations. If your boss feels comfortable enough to pick up the phone and call TJAG to discuss specific cases, you need to know exactly what was said and then try like hell to prevent him from doing it again. Lastly, keep your legal advice free from politics. That can only lead to trouble down the road. The only thing your legal advice should be steeped in is the law and the facts.

At the end of the day, SJAs must figure out how to convey legal advice that comports with the evidence, is grounded in the rules, and is consistent with powers the convening authority can exercise under the UCMJ wihtout cajoling them into taking action that the President or members of Congress might like them to take. Congress has codified a number of procedures to help prevent legal advisors and convening authorities from exerting UCI on their subordinates. In the Fiscal Year 2014 National Defense Authorization Act, Congress amended Article 60, UCMJ to ensure that convening authorities can no longer set aside findings of guilt for sex assault offenses.[115] They also severely curtailed what the convening authority can do to alter the sentence.[116] Both adult and child sex assault offenses under Article 120, UCMJ now carry with them a mandatory dishonorable discharge or dismissal and must be referred to a general court-martial.[117] Additionally, Congress imposed mandatory review of sex assault cases whenever the SJA and the convening authority both agree not to refer a case to trial or when the SJA recommends it but the convening authority then refuses to refer the case.[118] In the first scenario, the next higher GCMCA will conduct a review and make an independent decision and in the second, the GCMCA must forward the case to the Service Secretary for review.[119]

The amendments to Article 60 will help prevent the UCI issues litigated in *Barry*. Had they been in effect, RADM

[112] United States v. Boyce, 76 M.J. 242, *248 (C.A.A.F. 2017).

[113] *Id.* at *253.

[114] *See, e.g.*, United States v. Youngblood, 47 M.J. 338 (C.A.A.F. 1997); United States v. Lewis, 63 M.J. 405 (C.A.A.F. 2006); United States v. Hamilton, 41 M.J. 32 (C.M.A. 1994); United States v. Kitts, 23 M.J. 105 (C.M.A. 1986); United States v. Bradley, 47 M.J. 715 (A.F. Ct. Crim. App. 1997); Lieutenant Colonel Daniel G. Brookhart, *Physician Heal Thyself: How Judge Advocates Can Commit Unlawful Command Influence*, ARMY LAW., Mar. 2010.

[115] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954-55 (2013) [hereinafter FY14 NDAA]. Now at Article 60, UCMJ.

[116] *Id*.

[117] *See* FY14 NDAA § 1705. Now at Articles 18 and 56, UCMJ.

[118] *See* FY14 NDAA § 1744. This section has been incorporated into AR 27-10 para. 5-19c, dated May 11, 2016.

[119] *Id*.

Lorge's hands would have been truly tied and he couldn't have set aside the findings and sentence even though he wanted to. In cases where the convening authority has doubts about whether to refer the case despite his SJA's advice, the safest option is to let the convening authority independently work out if they truly want the Service Secretary reviewing their homework. If they insist, send the case file up and let the superior convening authority and their legal advisor conduct an independent review. You get to avoid UCI and your boss gets to avoid retrying the case. The absolute worst thing you can do is to inject politics into the discussion. While John Wayne's counsel to avoid saying "too much" is generally great advice, when it comes to pondering political considerations with the convening authority, the best advice is to say nothing at all!