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"SO YOU'RE TELLING ME THERE'S A CHANCE"[1]: WHY CONGRESS SHOULD SEIZE THE OPPORTUNITY TO REFORM ARTICLE 37 (UCI) OF THE UCMJ

Colonel John Loran Kiel, Jr.[*]

In the past year and a half, the Court of Appeals for the Armed Forces (CAAF) has created a lot of tumult with respect to the way it adjudicates unlawful command influence (UCI) claims. In the Spring of 2017, CAAF decided *United States v. Boyce*[2], which abolished the longstanding requirement to find prejudice to the accused in claims involving the appearance of UCI.[3] Sixteen months later, the court held in *United States v. Barry*[4], that intent was no longer required to unlawfully influence, by unauthorized means, the action of a convening authority in claims

[1] DUMB AND DUMBER (New Line Cinema 1994).

[*] Judge Advocate, U.S. Army. Presently assigned as the Kenneth J. Hodson Chair of the Criminal Law Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. LL.M., 2008, The Judge Advocate General's School, Charlottesville, Virginia; J.D., 1999, The Florida State University College of Law, Tallahassee, Florida; B.A., 1996, Brigham Young University, Provo, Utah. Previous assignments include Deputy Staff Judge Advocate, I Corps & Joint Base Lewis-McChord, Washington, 2015-2017; Chief, Policy Branch, Criminal Law Division, Office of The Judge Advocate General, Washington, D.C., 2013-2015; Deputy Staff Judge Advocate, 7th Army Joint Multinational Training Command, Grafenwoehr, Germany, 2011-2013; Brigade Judge Advocate, 1st and 3rd Brigade Combat Teams, 82nd Airborne Division, Fort Bragg, North Carolina, 2008-2010; Assistant Professor of Law, United States Military Academy, West Point, New York, 2005-2007; Trial Defense Counsel, U.S. Army Trial Defense Service, Vilseck, Germany, 2003-2005; Operational Law Attorney, Senior Trial Counsel, Trial Counsel, and Tort Claims Attorney, XVIII Airborne Corps, Fort Bragg, North Carolina, 1999-2003. Member of the Florida Bar.

[2] 76 M.J. 242 (C.A.A.F. 2017).

[3] *Id.*

[4] 78 M.J. 70 (C.A.A.F. 2018).

involving actual UCI.[5] The *Barry* decision also dismantled the mantle of command authority doctrine reinforced by nearly seven decades of precedent, relegating it instead as a factor lower courts may simply choose to consider in future cases.[6]

With all of the upheaval and uncertainty the court has created, is there any wonder why Congress has become increasingly interested in UCI cases? The *Barry* and *Boyce* decisions provide impetus to congressional curiosity, as both were sexual assault cases—one originating out of the Navy, the other out of the Air Force. In both cases, Barry and Boyce's victims testified at the court-martial and subjected themselves to cross-examination, both were found credible by their respective fact-finders, and both had to watch their attacker's convictions vanish due to allegations of UCI. In addition to these two cases, CAAF overturned another rape conviction earlier this year in *United States v. Riesbeck*[7], when it found that the convening authority attempted to stack a court-martial panel in order to obtain more favorable results in sexual assault cases.[8]

Setting *Riesbeck* aside for another day, this article will examine in depth the *Barry* and *Boyce* decisions to illustrate why Congress should amend Article 37 of the Uniform Code of Military Justice (UCMJ)[9]. First, the article will profile the court's decision in *Barry* and the case law contradictions it has created regarding intent in actual UCI claims. Next, the article will discuss the mantle of command authority and how this significant precept had been a major factor in UCI claims prior to the *Barry* decision. The article will then explore how *Boyce* generated even more confusion, this time regarding the requirement to show prejudice to the accused in apparent UCI claims. The article concludes with proposed revisions to Article 37 that specifically address these concerns and it proposes two statutory inclusions that would permit superior convening authorities to mentor subordinate convening authorities and if necessary, withhold the authority to dispose of certain offenses in individual cases without committing UCI. In sum, Congress should seize the opportunity to clarify what constitutes UCI and subdue a lot of the turmoil CAAF has created since it decided *Boyce* nearly a year and a half ago.

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[5] *Id*.
[6] *Id*. at 76.
[7] 77 M.J. 154 (C.A.A.F. 2018).
[8] *Id*.
[9] 10 U.S.C. 837 (2018).

I. United States v. Barry

For the sake of brevity, the author will not rehash the entire procedural history of this complex case but will refer the reader to his article titled "They Came in Like a Wrecking Ball: Recent Trends at CAAF in Dealing with Apparent UCI" published in the *Army Lawyer* in January 2018.[10] That article thoroughly analyzes the *Barry* case from the Navy Marine Corps Court of Appeals (NMCCA) opinion through the *DuBay* hearing ordered by CAAF.

To recap quickly, Senior Chief Special Warfare Operator Keith Barry was a Navy Seal who had been convicted at a general court-martial by a military judge sitting alone for forcing his girlfriend to engage in nonconsensual anal sex.[11] The military judge sentenced Barry to a dishonorable discharge and confinement for three years.[12] The general court-martial convening authority (GCMCA), Rear Admiral (RADM) Patrick J. Lorge, after having reviewed the record of trial and clemency matters submitted by Barry's defense counsel, felt that the trial judge had committed a number of erroneous rulings that prejudiced Barry's right to a fair trial.[13] Admiral Lorge was wrongly advised by his staff judge advocate (SJA) that his only option to remedy the judge's error was to approve the findings and the sentence.[14] Acknowledging this faulty advice, the NMCCA ordered a new final action and informed RADM Lorge that he could have disapproved the findings and sentence under Article 60, UCMJ.[15]

Frustrated, Lorge reached out to his good friend, RADM James Crawford III, the Deputy Judge Advocate General (DJAG) of the Navy.[16] The two admirals met at Lorge's headquarters in San Diego to discuss the merits of Barry's case and Lorge's clemency options.[17] The *DuBay* judge, Air Force Colonel Vance Spath, issued in his fact-finding report that during this particular meeting, RADM Crawford committed apparent UCI

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[10] John L. Kiel, Jr., *They Came in Like a Wrecking Ball: Recent Trends at CAAF in Dealing with Apparent UCI*, ARMY LAW., Jan. 2018, at 21-24.
[11] United States v. Barry, No. 201500064, 2016 CCA Lexis 634, at *2-3 (N-M. Ct. Crim. App. 2016).
[12] *Id*. at *1.
[13] 78 M.J. 70, 72 (C.A.A.F. 2018).
[14] *Id*. at 75.
[15] *Id*.
[16] *Id*.
[17] *Id*.

by warning Lorge about "putting a target on his back" and advising him to approve the findings and sentence.[18] Admiral Lorge clearly appreciated what Crawford meant about the target remark after recalling a conversation he had had earlier with Crawford's boss, Vice Admiral (VADM) Nanette DeRenzi, the Judge Advocate General (TJAG) of the Navy.[19] In a conversation unrelated to the Barry case, VADM DeRenzi had been lamenting to RADM Lorge about how much time she spent on Capitol Hill testifying to members of Congress about why commanders should keep their convening authority responsibility.[20] She explained that every few months, commanders were profiled in the newspapers doing something Congress didn't like and as a result, she spent a great deal of time defending their role in the military justice system.[21] Incidentally, the *DuBay* Judge found that VADM DeRenzi also committed apparent UCI on RADM Lorge during the conversation because she injected politics into his decision-making as the convening authority.[22]

After the meeting with RADM Crawford, Lorge consulted his SJA once more to consider his options. The SJA advised him yet again to approve the findings and sentence but added this time that Lorge may want to include a memorandum to the NMCCA articulating his concerns about unfairness in the case.[23] Admiral Lorge then disapproved the reduction in rank, approved the confinement, and took the highly unusual step of pleading with the NMCCA to either remand the case back to him for a rehearing or in the alternative, disapprove the dishonorable discharge to permit Barry to retire in the rank that he last honorably served.[24] Before firing off his missive to the appellate court though, Lorge made one last phone call to Crawford about his proposed course of action. Crawford told Lorge that the memorandum really was his only viable option and that if he disapproved the findings and sentence, his Navy career would be all but over.[25] The *DuBay* judge also found that this conversation was tantamount to legal advice which constituted apparent UCI.[26]

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[18] Findings of Fact & Conclusions, United States v. Barry, No. 17-0162/NA at 4 (C.A.A.F. Oct. 24, 2017).
[19] *Id*. at 2.
[20] *Id*.
[21] *Id*.
[22] *Id*. at 8.
[23] *Id*. at 4.
[24] *Barry*, 78 M.J. at 73.
[25] Findings of Fact & Conclusions, *supra* note 11, at 4.
[26] *Id*. at 8.

After receiving Judge Spath's *DuBay* report, CAAF granted review of two issues to determine whether UCI had tainted the convening authority's approval of Barry's findings and sentence.[27] The first issue specifically examined whether the DJAG is capable of committing UCI on a convening authority.[28] The second investigated whether the most senior leaders of the Navy Judge Advocate General (JAG) Corps exerted actual UCI on the convening authority or created the appearance of exerting unlawful command influence on him.[29]

A. Can the DJAG commit UCI?

With break-neck speed, CAAF answered the first issue in less than four full paragraphs. A DJAG can commit UCI on a convening authority, the majority wrote, even though he is not a commander, a convening authority, or an SJA.[30] In reaching this conclusion, the court set aside nearly seven decades of its own precedent, which previously required that an individual accused of committing UCI must have acted with the "mantle of command authority."[31] Since the 1990s, legal advisors, commanders, and convening authorities had been taught that former leaders, subordinates, and peers generally could not commit UCI when discouraging someone from supporting an accused.[32] Friendship, peer pressure, and mentorship are not enough to commit UCI; rather, the offender must use their rank or status to improperly influence.[33]

In 1994, CAAF issued a decision in *United States v. Stombaugh*[34] that formally reaffirmed this concept of "mantle of command authority" in actual UCI cases.[35] Airman Apprentice Stombaugh was convicted of raping a female junior grade officer and was sentenced to ninety-three months confinement, a dishonorable discharge, and reduction to the lowest enlisted grade.[36] At trial, Stombaugh called more than 10 character

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[27] *Barry*, 78 M.J. at 73.
[28] *Id*.
[29] *Id*.
[30] *Id*. at 76.
[31] *See* United States v. Stombaugh, 40 M.J. 208, 211 (C.M.A. 1994).
[32] CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK, at 1-1 (1 Jan. 2019).
[33] *Id*. at 2-2.
[34] *Stombaugh*, 40 M.J. 208.
[35] *Id*. at 211.
[36] *Id*. at 209.

witnesses to testify on his behalf.[37] One of the character witnesses, a lieutenant, testified that he was told by fellow junior officers in the squadron not to testify on Stombaugh's behalf and against the victim.[38] A petty officer also testified that his division officer told him not to get involved in the case and complained that he had been verbally harassed by two other officers after they learned that he was going to testify on Stombaugh's behalf.[39]

CAAF examined the plain language of Article 37 and determined that:

> It goes without saying that a violation of Article 37 does not automatically amount to unlawful command influence. Likewise, discrepancy in rank between the party seeking to influence and the person whom he or she seeks to influence is not, in and of itself, the determinative factor in assessing whether the unlawful command influence was indeed unlawful command influence. While the influence may well be unlawful and its effect just as harmful, there is a distinction between influence that is private in nature and influence that carries with it the mantle of official command authority.[40]

Interestingly enough, CAAF then admitted that since the 1950s, every one of the UCI cases it had considered involved some degree of mantle of command authority in the alleged unlawful activity.[41] The court also noted that every one of the actors in those cases had been a commander, a convening authority, or an SJA.[42] With regard to the lieutenant witness in the Stombaugh case, CAAF held that even though other lieutenants discouraged him from testifying, none of them held the mantle of command authority and as such, they couldn't commit UCI.[43]

With regard to the petty officer witness, the court found that technically UCI had been exerted over him by officers who outranked him.[44] But because none of these officers were commanders or convening

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[37] *Id*. at 210.
[38] *Id*. at 212-13.
[39] *Id*. at 213.
[40] *Id*. at 211.
[41] *Id*.
[42] *Id*.
[43] *Id*. at 213.
[44] *Id*.

authorities, it made no difference whether the interference was UCI or called something else like "unlawful interference with access to witnesses."[45]

One year later, CAAF decided *United States v. Ayala*[46], which involved interference with the appellant's right to provide character letters in his clemency petition.[47] Ayala was convicted of stealing explosives while he was deployed to Saudi Arabia and mailing them back to Colorado.[48] After the trial, Ayala approached several witnesses about providing written character references for inclusion into his clemency packet.[49] All but one of the witnesses refused.[50] Ayala claimed that his sergeant major committed UCI by providing his counseling packet to one potential witness who declined to provide a letter after reading it.[51] A former sergeant major refused to provide a letter unless the current sergeant major agreed to provide one, which he declined to do.[52] Ayala's current and former company commanders and current battalion commander all declined to provide letters because they didn't want to be at odds with the current chain of command.[53] The court found that Ayala failed to sufficiently allege UCI because he could not prove that anyone acting with the mantle of authority unlawfully influenced or coerced any of the potential witnesses approached by Ayala's friend to write letters on his behalf.[54]

Notwithstanding the decisions in *Stombaugh* and *Ayala*, and the decades of precedent leading to those decisions, in *Barry*, nearly a quarter century later, the same court considered the same statute but expounded a vastly different interpretation. The majority claimed that the mantle of command authority was never a requirement under the UCMJ despite acknowledging that all of its precedent required unlawful influence exerted by those in formal command.[55] The court ironically exclaimed that "the plain language of Article 37(a), UCMJ, does not require one to operate with the imprimatur of command, and we decline to read a

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[45] *Id*. at 214.
[46] 43 M.J. 296 (C.A.A.F. 1995).
[47] *Id*.
[48] *Id*. at 297.
[49] *Id*. at 299.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Id*. at 300.
[55] *Barry*, 78 M.J. at 76.

supposedly implied condition into congressional silence."[56] The irony of course results from the fact that CAAF created the "supposedly implied condition" that it now shuns.[57]

Moreover, the majority seems to chide Congress into writing mantle of command authority into Article 37 declaring "we have faith that Congress knows how to change the law if it so desires."[58] After discussing the rest of *Barry* and reexamining the *Boyce* case, the author will urge Congress to take the majority up on its challenge to rewrite Article 37 immediately, before UCI jurisprudence gets any more confusing than it already is.

B. Did the DJAG commit UCI?

After finding that the DJAG could commit UCI, the second issue the court took up in *Barry* was whether or not any senior members of the Navy JAG Corps actually did commit UCI. Incidentally, if you're a fan of adverbial clauses and verb modifiers, this part of the opinion is what you've been waiting for your entire life. One particular clause in Article 37 sparked a colossal duel between Chief Judge Stucky and Judge Ryan over grammatical rules of interpretation. The clause in question states in part, that "no person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action … of any convening, approving, or reviewing authority with respect to his judicial acts."[59]

After reviewing the plain language of the statute, Chief Judge Stucky, writing for the majority, posited that the phrase "attempt to" only modifies the verb "coerce" and not the verb "influence."[60] In applying one of the cannons of statutory construction referred to as the "series qualifier canon", Stucky determined that a modifier can only modify a series of verbs only if there are no adverbs, prepositions, or articles that interrupt the sequence of verbs.[61] Because the phrase "by any unauthorized means"

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[56] *Id*.
[57] After concluding that mantle of command authority is not a statutory requirement, the court mentions in footnote 3 of the opinion that it "may be a relevant factor" in determining whether there has been a violation of Article 37, UCMJ. *Barry*, 78 M.J. at 77.
[58] *Id*. at 76.
[59] *Id*. at 78. (citing 10 U.S.C. 837 (2018)).
[60] *Id*.
[61] *Id*.

is an adverbial clause preceded by the coordinating conjunction "or", the modifier "attempt to" only applies when a person subject to the code tries to coerce the action of a convening, approving, or reviewing authority but nothing more, Stucky reasoned.[62] According to the Chief Judge then, a person subject to the code who attempts to coerce must do so with requisite intent, whereas the same person may influence an action via unauthorized means regardless of intent.[63] Judge Stucky found that even though the DJAG did not attempt or intend to influence RADM Lorge, he committed actual UCI nonetheless because Lorge felt like he had been susceptibly influenced by Crawford to make a decision he didn't want to make.[64]

Judge Ryan, who was joined by Judge Maggs, wrote a caustic rebuke to the majority opinion. First, she took umbrage with Judge Stucky's interpretation of the series qualifier cannon. According to *Blacks Law Dictionary*, there is a presumption that "when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series."[65] Under *Black's* interpretation then, the phrase "attempt to" would modify both "coerce" and "influence."[66] To reach any other conclusion, Ryan reasoned, would meet with truly absurd results.[67] To illustrate, why would Congress prohibit a person subject to the code from "attempting to coerce" the action of a convening authority but not prohibit that same person from "attempting to influence" the convening authority as long as the convening authority was not actually influenced?[68] It unquestionably makes no sense for Congress to hold such a view or to permit a UCI violation to hinge on whether the convening authority felt susceptible of feeling influenced, Ryan asserted.[69]

Ryan then noted that the court's recent decision in *Riesback* would have been wrong under the majority's new-found interpretation.[70] In *Riesbeck*, a unanimous court found that because the convening authority attempted to influence the action of a court-martial by stacking the panel with women, it found UCI and reversed the findings and sentence with

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[62] *Id*.
[63] *Id*.
[64] *Id*. at 79.
[65] *Id*. at 82.
[66] *Id*.
[67] *Id*.
[68] *Id*. at 83.
[69] *Id*.
[70] *Id*.

prejudice.[71] But under the majority's logic in *Barry*, the *Riesbeck* court should have held that there was no UCI despite the convening authority's attempt to influence the court-martial, because there was no evidence that the panel-stacking actually succeeded in influencing the case's outcome.[72] Judge Ryan pointed out that "both the statute and our case law, including our recent decision in *Riesbeck*, require intentional action in cases of unlawful influence."[73]

> In one final point of emphasis, Ryan observed:
> our interpretation of the text is fully consistent with this Court's past jurisprudence, as the majority concedes. This Court has consistently held that *actual* unlawful influence requires an intentional manipulation of the military justice system that results in an improper handling or disposition of a case. In other words, where this Court has found *actual* unlawful influence, we have concluded that the actor exerting the unlawful influence did so with specific intent or motive to 'unlawfully coerce or influence' the proceedings.[74]

Another absurd result of the majority's interpretation, according to Ryan, is its illogical conclusion that RADM Crawford committed UCI while VADM DeRenzi did not.[75] The *DuBay* judge specifically found that RADM Lorge had been influenced by both TJAG and DJAG's discussions about politics.[76] Admiral Lorge was concerned about remarks they both made regarding the politics involved in sexual assault cases and how the Navy would be viewed by Congress and the President if he didn't approve the findings and sentence in Barry's case.[77] Despite the fact that neither TJAG nor DJAG intended to influence the action of the Barry court-martial, RADM Lorge felt susceptible to their influence nonetheless and as such, both should have been found to have committed actual UCI, Ryan reasoned.[78] Instead, the majority concluded that since TJAG's comments

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[71] *Riesbeck*, 77 M.J. at 159-60.
[72] *Barry*, 78 M.J. at 83.
[73] *Id*. at 85.
[74] *Id*. at 84.
[75] Judge Ryan also noted that the majority's interpretation directly contradicted both party's positions on appeal. Both the government and defense appellate counsel argued that the words "attempt to" modified the phrase "by any unlawful means, influence the action" in their appellate briefs and during oral argument. *Id*. at 83.
[76] *Id*. at 85.
[77] *Id*.
[78] *Id*.

took place earlier in time and because DJAG's remarks were construed by Lorge to be legal advice, only DJAG committed actual UCI.[79]

Judge Ryan surmised that the majority had simply adapted its holding on apparent UCI in *Boyce* to conclude that there had been actual UCI committed in *Barry*.[80] In *Boyce*, the court held that any "improper manipulation of the criminal justice process, *even if effectuated unintentionally*, will not be countenanced by this Court."[81] In reaching the same determination in *Barry*, Ryan observed, the court was without statutory or case law support and she warned that the majority's "bizarre misapplication of its own newly minted test for actual unlawful influence will leave both the field and lower courts floundering to determine how and when unintentional conduct rises to an 'unlawful' level or constitutes 'improper manipulation."[82]

II. United States v. Boyce

Sixteen months before CAAF issued its "newly-minted test" for actual UCI in *Barry*, it decided *United States v. Boyce*, which also upended longstanding precedent with regard to apparent UCI claims. To recap quickly, Airman Rodney Boyce was convicted by a court-martial panel of raping and assaulting his wife in violation of Articles 120 and 128 of the UCMJ.[83] He was sentenced to be confined for four years, reduced to the lowest enlisted grade, and to be dishonorably discharged.[84] The CAAF was asked to decide whether the GCMCA had been subjected to UCI by the Air Force Chief of Staff when he made the decision to refer Boyce's case to a general court-martial.[85]

The GCMCA in this case, was none other than Lieutenant General Craig A. Franklin who had gained notoriety for his decision to set aside the rape conviction of a popular Air Force pilot named Lieutenant Colonel James Wilkerson after Wilkerson had been convicted of sexually assaulting a houseguest who spent the night in his family quarters after

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[79] *Id*.
[80] *Id*. at 84.
[81] *Id*. (citing *Boyce*, 76 M.J. at 246).
[82] *Id*.
[83] United States v. Boyce, 2016 CCA Lexis *198 (A.F. Ct. Crim. App. Mar. 24, 2016).
[84] *Id*.
[85] *Boyce*, 76 M.J. at 244.

attending a USO concert.[86] Franklin's decision to exercise his Article 60 powers to set aside Wilkerson's rape conviction set off a firestorm of controversy in the media and triggered an historic hearing by the Personnel Subcommittee of the Senate Armed Services Committee (SASC).[87] The Personnel Subcommittee of the SASC ultimately decided to recommend eliminating the convening authority's ability to set aside the findings and sentence in sex assault cases and several other serious felony-level offenses, thus greatly curtailing the convening authority's nearly unfettered ability to grant clemency.[88]

Shortly after the Wilkerson debacle, Lt. Gen. Franklin, in keeping with his SJA's advice this time, declined to refer a subsequent rape case to general court-martial.[89] Three months later, a new Air Force Secretary had been appointed and shortly thereafter, General Franklin received a telephone call from the Air Force Chief of Staff who told him in effect, that the new Secretary had lost confidence in his ability to command.[90] The Chief proceeded to give Franklin two options: he could voluntarily retire from the Air Force at the lower grade of major general, or he could wait for the new Secretary to fire him.[91] Three hours after the phone call, General Franklin decided to retire.[92] But before he did, his SJA brought him the referral packet for *United States v. Boyce*. The SJA advised General Franklin to refer the case to a general court-martial, which Franklin promptly did.[93] Two days later, Franklin announced that he would step down as the Third Air Force Commander and two months after that, he officially retired.[94]

On appeal, the CAAF opinion written by Judge Ohlson quickly determined that there had been no actual UCI exerted on General Franklin

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[86] Robert Draper, *The Military's Rough Justice on Sexual Assault*, N.Y. TIMES MAGAZINE, Nov. 26, 2014, https://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html.
[87] *Boyce*, 76 M.J. at 244-45.
[88] Press Release, U.S. Senate Committee on Armed Services, Chairman and Ranking Member on Armed Services Reach Agreement with House Counterparts Regarding the National Defense Authorization Act for Fiscal Year 2014 (Dec. 9, 2013), https://www.armed-services.senate.gov/imo/media/doc/Press%20release.pdf.
[89] *Boyce*, 76 M.J. at 245.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *Id*. at 246.
[94] *Id*.

in making his referral decision.[95] The court then focused on whether the Chief of Staff's conversation with General Franklin gave the appearance of UCI. Before issuing its holding though, the majority opinion provided a great overview of the development of apparent UCI jurisprudence at CAAF over the years. The first case where the court acknowledged the impropriety of apparent UCI took place in 1954 in *United States v. Knudson*.[96] The first time the court actually overturned the conviction of a service member because of an apparent UCI claim happened in 1964 in *United States v. Johnson*.[97] Thirty years later, in 1994, CAAF's current standard for assessing apparent UCI emerged in *United States v. Mitchell*.[98]

Then in 2006, in *United States v. Lewis*,[99] Chief Judge Erdmann sketched out a detailed roadmap of the burdens of proof for assessing UCI claims.[100] He laid out the accused's burden of proving an actual UCI claim which requires him to demonstrate: 1) facts, that if true, constitute UCI; 2) the court-martial proceedings were unfair to the accused (he was prejudiced); and 3) the UCI was the cause of the unfairness.[101] Chief Judge Erdmann remarked that even where the court couldn't find actual UCI, it must also look to determine whether apparent UCI placed "an intolerable strain on the public perception of the military justice system."[102] He announced that the test for apparent UCI is similar to the test the court applies in determining whether a court member has implied bias or whether a military judge has a conflict of interest:[103]

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[95] *Id*. at 250. The majority concluded that there had been no actual UCI committed because there was more than one corroborating witness, there was ample physical evidence, the Article 32 investigating officer recommended the charges all be referred to a general court-martial, and the SJA recommended that the charges all be referred to a general court-martial. Given that, there is no reasonable likelihood, according to the court, that a different convening authority standing in General Franklin's shoes would have made any different referral decision.

[96] *Id*. at 247 (citing United States v. Knudson, 4 C.M.A. 587, 598 (1954)).

[97] *Id*. (citing United States v. Johnson, 14 C.M.A. 548, 551 (1964)).

[98] *Id*. (citing United States v. Mitchell, 39 M.J. 131, 151 (C.M.A. 1994)). The court did an excellent job laying out the distinction between actual and apparent UCI in the context of these and other historic cases and laying out the development of the burdens and standards regarding claims involving he appearance of UCI.

[99] 63 M.J. 405 (C.A.A.F. 2006).

[100] *Id*.

[101] *Id*. at 413.

[102] *Id*. at 415.

[103] *Id*.

> We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus, the appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.[104]

After reviewing Judge Erdmann's analysis in *Lewis*, Judge Ohlson concluded that unlike an actual UCI claim where prejudice to the accused is required, there is no requirement to demonstrate prejudice in order to prevail on an apparent UCI claim.[105] To the contrary, Ohlson observed, the prejudice involved in apparent UCI "is the damage to the public's perception of the fairness of the military justice system as a whole and not the prejudice to the individual accused."[106] In footnote 5 of the opinion, Ohlson explained that while a determination that the accused was not personally prejudiced by the UCI or that it was later cured remains a "significant factor that must be given considerable weight" it is not dispositive of the underlying concern that the public taint of an appearance of UCI may still exist.[107]

After reviewing the history of General Franklin's handling of the three sexual assault cases, the majority concluded that members of the public would rightly 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."[108] Despite the majority's new interpretation of how to assess apparent UCI claims, an examination of CAAF's UCI jurisprudence prior to *United States v. Boyce* reveals that the court has consistently assessed apparent UCI claims for prejudice in the past.

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104 *Id*.
105 *Boyce*, 76 M.J. at 248.
106 *Id*. at 249.
107 *Id*.
108 *Id*. at 252.

III. Prejudice was Always Required in Apparent UCI Claims

In *United States v. Salyer*[109], decided in 2013, CAAF considered whether UCI resulted in the military judge's decision to recuse himself after repeated and invasive attempts by the government to have him removed.[110] Corporal Salyer was charged with possession and distribution of child pornography.[111] The military judge made a ruling that the definition of "child" meant anyone under the age of 16 and not the age of 18 as the government contended.[112] Government counsel met to discuss the ruling and during the meeting there was mention that the judge married his wife when she was just 17 years old.[113] Trial counsel pulled the judge's personnel file, confirmed the rumor, and then conducted voir dire of the judge using excerpts from his personnel record.[114] The judge admitted that his wife was only 17 when they married and the trial counsel immediately moved to disqualify him for actual and implied bias.[115] After deliberating on the matter overnight and later the next day, the military judge reluctantly recused himself.[116]

The majority reviewed the government's actions during the proceedings and concluded that the attempt to remove a military judge from a particular case depending on whether he was viewed as favorable or unfavorable to the prosecution's case placed an intolerable strain on the public's perception of the military justice system.[117] Having then found that apparent UCI affected this particular case, the majority matter-of-factly noted that it would "now test for prejudice."[118] The exact prejudice CAAF was looking for was whether a disinterested member of the public would believe that the accused "received a fair trial free from the effects of unlawful command influence."[119]

The CAAF decided a remarkably similar case in 2006. In *United States v. Lewis*[120], the government tried to convince a female military

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109 72 M.J. 415 (C.A.A.F. 2013).
110 *Id*.
111 *Id*. at 417.
112 *Id*. at 418-20.
113 *Id*. at 420.
114 *Id*.
115 *Id*.
116 *Id*. at 421.
117 *Id*. at 427.
118 *Id*.
119 *Id*. (citing *Lewis*, 63 M.J. at 415).
120 63 M.J. 405 (C.A.A.F. 2006).

judge to recuse herself because of a relationship she had with the female civilian defense counsel.[121] During trial counsel's voir dire, the judge explained that she occasionally saw civilian defense counsel at the barn where she rode horses and the defense counsel boarded hers.[122] After the judge refused to recuse herself, the government filed a written motion for reconsideration alleging among other things, that the judge had failed to disclose that she and the defense counsel had been seen leaving a play together in LaJolla, California.[123] In support of its motion, trial counsel called the SJA as a witness.[124] The SJA testified that there had been a rumor floating around that the two had been on a date while the *Lewis* case was pending[125] The SJA then pointed to civilian defense counsel's body movement in the courtroom and the way the judge let her "stroll around" like she was in charge as further evidence that the judge was clearly biased in her favor.[126] The following morning, the judge announced that she would recuse herself because of the government's crass and slanderous behavior in bringing up unsubstantiated allegations about an affair between her and the civilian defense counsel.[127]

On appeal to CAAF, Lewis's appellate counsel argued that the government's outrageous conduct created the appearance "that a command can de-select military judges and orchestrate the parties to a court-martial."[128] Appellate counsel argued that the government's actions were prejudicial to Lewis and not harmless beyond a reasonable doubt.[129] The government claimed in response that there had been no UCI and that even if there was, there was no "demonstrable prejudice" to the accused.[130] In conducting its analysis, CAAF once again examined whether the accused had been prejudiced by the government's actions. Specifically, the court found that "a reasonable observer would have significant doubt about the fairness of this court-martial in light of the Government's conduct with respect to MAJ CW."[131] It also held that the government had failed to convince the court that Lewis had received a trial "free from the

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121 *Id*.
122 *Id*. at 408.
123 *Id*. at 410.
124 *Id*.
125 *Id*.
126 *Id*.
127 *Id*. at 411.
128 *Id*. at 412.
129 *Id*.
130 *Id*.
131 *Id*. at 415.

effects" of unlawful command influence.[132] The court's use of the term "effects" of in this context, can only refer to "prejudice."

In light of both *Salyer* and *Lewis*, Judges Stucky and Ryan argued in separate dissenting opinions that the majority's new test for judging apparent UCI claims made little sense. They both argued that if, as the majority correctly concluded, neither the Air Force Chief of Staff nor Secretary committed actual unlawful command influence, it would be incredibly difficult to understand how an objective, disinterested, fully informed observer would doubt the fairness of the proceedings.[133] Judge Ryan then cited to the court's opinion in *Salyer* where it held:

> [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' of an individual case, and a finding of substantial prejudice to the rights of the accused.[134]

In addition to trampling on its own precedent, Judge Ryan argued that the court violated federal law every time it reverses the findings and sentence in cases involving apparent UCI claims where there was no evidence of prejudice to the accused.[135] Article 59(a) of the UCMJ states that a "finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."[136] Judge Ryan agreed with the majority's finding that there was not one iota of prejudice to Boyce, but complained that having found no evidence of prejudice, the majority still granted Boyce relief despite the restriction Article 59(a) placed on the court.[137] Ryan opined that "Congress had good reason to tether appellate relief to Article 59(a)'s requirement of prejudice to the accused, and thus [I] respectfully dissent from the majority's conclusion that this case was 'properly presented.'"[138]

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[132] *Id*.
[133] *Boyce*, 76 M.J. at 254.
[134] *Id*. at 256 (citing *Salyer*, 72 M.J. at 423).
[135] *Id*. at 254.
[136] *Id*. (citing 10 U.S.C. § 859(a)(2018)).
[137] *Id*.
[138] *Id*. at 256.

IV. Congress should amend Article 37

Assuming Judge Ryan is right, what can Congress do to tether the court back to case law precedent, ensure consistency in its future opinions, and prevent it from violating federal law in future UCI cases? The only real assurance is for Congress to revise Article 37 of the UCMJ. Fortunately, amending the statute is a relatively easy fix.

First, Congress should resolve the debate over adverbial clauses, dangling participles, and the statutory canons Judges Stucky and Ryan had so much fun arguing about in *Barry* by inserting the words "attempt" and "to" into the phrase "by any unauthorized means, influence the action of a court-martial". Article 37(a) of the statute would be amended to read:

> No person subject to this chapter may attempt to coerce, or by any unauthorized means, *attempt to* influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

This particular fix would address Judge Ryan's concern that the court's current interpretation wrongfully infers that Congress only wanted to prohibit persons subject to the UCMJ from attempting to coerce but not from attempting by unauthorized means to influence the action of a convening authority.[139] This simple inclusion would make clear that no one subject to the code may attempt/intend to do either.

The next revision addresses the judicially-created concept of the mantle of command authority. As we can see from the language of Article 37 and from every case ever adjudicated prohibiting UCI, Congress was primarily concerned about commanders wielding their power to unlawfully influence subordinate commanders and others involved in the court-martial process. Notwithstanding Congress's clear intent, CAAF found in *Barry*, after reading the plain language of the statute, that DJAG (who is not a commander), "just like any other military member, is capable of committing unlawful influence."[140] Government counsel had it right in *Barry* when he argued that the only way DJAG could commit UCI is if he

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[139] *Barry*, 78 M.J. at 83.
[140] *Id*. at 76.

had been acting with the mantle of command authority.[141] That position is clearly supported by the case law cited to in this article, all of which originated at the CAAF. The good news is, there is also an easy fix for this issue. Congress should insert the phrase "and acting with the mantle of command authority" after the phrase "No person subject to this chapter" such that it would read:

> No person subject to this chapter and *acting with the mantle of command authority*, may attempt to coerce or, by any unauthorized means, *attempt to* influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

This particular revision would bring the court back in line with more than seventy years of decisions recognizing this important concept in UCI jurisprudence.

This next revision will address the court's holding in *Boyce* that there need not be a showing of substantial prejudice to the accused when litigating apparent UCI claims. As discussed earlier in the article, apparent UCI is a doctrine of the court's creation. There is absolutely no reference to apparent UCI in Article 37, UCMJ. One way to ensure that CAAF honors its precedent and doesn't run afoul of Article 59(a), is to formally acknowledge the doctrine in Article 37, UCMJ and then forbid appellate courts from setting aside the findings or sentence of a court-martial unless the UCI substantially prejudiced the accused. At the end of Article 37 then, there should be a new paragraph (c) that reads:

> The finding or sentence of a court-martial may not be held incorrect on the ground of an error of law, including error involving actual unlawful command influence or the appearance of unlawful command influence, unless the error materially prejudices the substantial rights of the accused.[142]

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[141] *Id*.

[142] This language is taken word-for-word from Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2018).

In addition to making these three particular revisions, Congress should also add two additional paragraphs in Article 37 in order to formally recognize actions that superior convening authorities can take that do not constitute UCI. The statute already recognizes the ability to teach general or instructional courses in military justice so long as they "are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of the court-martial."[143] It also covers statements and instructions made by the military judge, counsel, or president of a special court-martial in open court.[144] There are two other areas that merit further consideration.

Colonels Jim Garrett and Max Maxwell, Lieutenant Colonel Matt Calaraco, and Major Frank Rosenblatt coauthored an excellent article in 2004 discussing the difference between lawful command emphasis and unlawful command influence.[145] In it, they argued that "Commanders may easily, and legally, influence the progression of a case or investigation without influencing a subordinate commander at all through the use of a withholding policy."[146] In support of their assertion, they cite to the April 20, 2012 withholding memo issued by the Secretary of Defense who mandated that all sexual assault cases be withheld for initial disposition to the first O-6 special court-martial convening authority in the chain of command.[147] The most notable aspect of the memo, they wrote, "is the lack of reference to how any commander should dispose of a case beyond the process."[148] Instead, the Secretary encourages subordinate commanders to engage the process, review the case file, conduct their own independent review as necessary, and to make recommendations.[149] Only then could the convening authority be able to determine an appropriate disposition.[150] Congress should include an additional paragraph in Article 37, UCMJ to formally recognize this familiar concept. The proposed addition could read:

> A superior convening authority may withhold the authority of a subordinate convening authority to dispose

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143 10 U.S.C. § 837 (2018).
144 *Id*.
145 James F. Garrett et al., *Lawful Command Emphasis: Talk Offense, Not Offender; Talk Process, Not Results*, ARMY LAW., Aug. 2014.
146 *Id*. at 15.
147 *Id*.
148 *Id*.
149 *Id*.
150 *Id*.

> of certain categories of offenses or offenses in an individual case. If the superior convening authority does not limit the independent discretion of the subordinate convening authority over an offense which they have authority to dispose of, there is no violation of this chapter.

Lastly, Congress should also add a paragraph to the statute recognizing the responsibility of superior convening authorities to mentor their subordinates on military justice matters. The CAAF addressed this particular idea in *United States v. Stirewalt*[151], decided in 2004.[152] Stirewalt had been convicted of raping several of his female shipmates.[153] The Coast Guard Court of Criminal Appeals (CGCCA) found that the military judge erred in his Military Rule of Evidence (MRE) 412 analysis so it set aside most of the sex-related charges and the sentence but authorized a sentence rehearing for the remaining findings of guilt.[154]

During his second appeal, Stirewalt argued that all of the charges referred for retrial should be set aside due to UCI.[155] He specifically alleged that the O-5 convening authority who ordered the Article 32 investigation had been unlawfully influenced to do so by one of the O-6s who happened to be the Eighth Coast Guard District Chief of Staff.[156] According to the military judge's findings of fact, Lieutenant Commander Crawley conducted two conference calls with his O-6 boss to discuss the Stirewalt investigation.[157] During both calls, there were two other O-6s on the line, one of whom was Captain Prokop, the Chief of Staff.[158] During one call, Captain Prokop "very clearly and forcefully" made his opinion known that the allegations "were too serious to go to a captain's mast and that they warranted an airing at an Article 32."[159] The judge also found that the other captain listening in on the conversations made it very clear both times to Lieutenant Commander Crawley that the disposition decision was his alone to make.[160]

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151 60 M.J. 297 (2004).
152 *Id*.
153 *Id*. at 298.
154 *Id*. at 299.
155 *Id*. at 300.
156 *Id*.
157 *Id*. at 300-01.
158 *Id*.
159 *Id*. at 301.
160 *Id*.

The CAAF concluded that there had been no UCI committed by Captain Prokop on Lieutenant Commander Crawley.[161] The majority reasoned that "there is nothing inherently suspect about an officer in Lieutenant Commander Crawley's position electing to consult with his chain of command concerning the potential investigative and procedural options when faced with allegations of serious misconduct."[162] The court was also persuaded by the fact that both conversations weren't initiated by Captain Prokop, the superior, but rather by Lieutenant Commander Crawley, his subordinate.[163] Congress should likewise formally acknowledge a superior convening authority's obligation to mentor his or her subordinates by inserting an additional paragraph in Article 37 which could read:

> (i) A superior convening authority may discuss particular offenses and general military justice-related matters with a subordinate convening authority.
> (ii) A subordinate convening authority may seek advice from a superior convening authority with regard to a specific offense or offenses and on military justice matters in general.
> (iii) A superior convening authority may not interfere with the independent discretion of a subordinate convening authority by directing that an offense or offenses by disposed of in a certain way.

If Congress wanted to send a strong message about eliminating UCI, it could make UCI a punishable offense under the UCMJ. Right now, the only way to punish persons subject to the UCMJ who commit UCI is under Article 98. Article 98 deals with "noncompliance with procedural rules."[164] In theory, if the UCI delays the court-martial proceedings in any way or the person committing the UCI knowingly or intentionally fails to comply with any provision of the UCMJ regulating the court-martial proceedings at any stage, they can be charged under this particular punitive article.[165]

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161 *Id*.
162 *Id*.
163 *Id*.
164 10 U.S.C. § 898 (2018).
165 *Id*.

Congress could create a completely separate punitive article or it could include UCI as an Article 134 general disorder which already has a prejudice requirement built into it. Short of that however, Congress should seize the opportunity to enact the proposals examined above. This would serve to realign CAAF with its previous precedent where intent had always been a requirement in actual UCI claims and where prejudice to the accused had always been required in apparent UCI claims. In enacting these measures, Congress could do much, as Judge Ryan astutely observed in the *Barry* case, to prevent the field and lower courts from "floundering" any further because of the court's bizarre interpretations of its own UCI jurisprudence.[166]

[166] *Barry*, 78 M.J. at 85.