IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

In re	)	**PETITIONER'S MOTION TO**
	)	**SUBMIT EXTRA-RECORD**
Sergeant	)	**FACTUAL MATTERS**
ROBERT B. BERGDAHL	)	
U.S. Army,	)	Docket No. ARMY MISC _____
	)	
Petitioner.	)	

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Sergeant Robert B. Bergdahl respectfully moves to submit extra-record factual matters. The attached document is the Department of Justice's September 15, 2020 response to a Freedom of Information Act request for the job application filed by the military judge who presided at petitioner's court-martial. That application forms the basis of the Petition for a Writ of Error Coram Nobis. The application relates to (i) whether the military judge violated his duty of disclosure and should have recused, (ii) whether the government carried its burden of proving beyond a reasonable doubt that an objective, informed member of the public would harbor a significant doubt as to the fairness of the proceedings, and (iii) whether Sergeant Bergdahl received a fair trial as required by Fifth Amendment due process.

The proffered materials were tendered to the United States Court of Appeals for the Armed Forces in support of a petition for reconsideration of that court's August 27, 2020 decision on direct appellate review. The Court of Appeals denied reconsideration and leave to file on October 14, 2020 without prejudice to petitioner's

right to file a writ of error coram nobis with the appropriate court, as he has today done.

Respectfully submitted.

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Certificate of Service

I certify that a copy of the foregoing was sent via electronic submission to the Clerk of Court and the Government Appellate Division on October 23, 2020.

Matthew D. Bernstein

Panel No. _____

GRANTED _____

DENIED _____

DATE _____

APPENDIX

U.S. Department of Justice
Executive Office for Immigration Review
Office of the General Counsel

5107 Leesburg Pike, Suite 2150
Falls Church, Virginia 22041

September 15, 2020

Via E-mail at [redacted]
Franklin Rosenblatt
[redacted]

Re: 2020-60055

Dear Mr. Rosenblatt:

This letter is in response to your Freedom of Information Act (FOIA) request dated August 27, 2020 to the Executive Office for Immigration Review (EOIR) in which you request records related to Immigration Judge Jeffrey Nance's application for employment at EOIR.

A search was conducted and records responsive to your request were located. With respect to your request for records related to a current federal employee, it is well-established that civilian federal employees who are not involved in in law enforcement or sensitive occupations have no expectation of privacy with respect to the parts of their successful employment applications that show their qualifications for their positions. In that regard, we are granting partial access to records responsive to your request.

Certain information within the records is exempt from disclosure under the Freedom of Information Act pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. *See* http://www.justice.gov/oip/foiapost/2012foiapost9.html.

You may contact the FOIA Officer or the EOIR FOIA Public Liaison by e-mail at EOIR.FOIARequests@USDOJ.GOV or by telephone number (703) 605-1297 for any further assistance and to discuss any aspect of your request. Please reference the FOIA control number. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College

Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at (202) 741-5770; toll free at (877) 684-6448; or facsimile at (202) 741-5769.

If you are not satisfied with the Executive Office for Immigration Review's determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: https://www.justice.gov/oip/submit-and-track-request-or-appeal. Your appeal must be postmarked or electronically transmitted within 90 days of the date of this response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

SHELLEY O'HARA Digitally signed by SHELLEY O'HARA
Date: 2020.09.15 15:54:41 -04'00'

Shelley M. O'Hara
Attorney Advisor (FOIA)

Jeffery R. Nance

(b) (6) [redacted]

SUMMARY OF QUALIFICATIONS

Highly accomplished judge/attorney with significant experience in the fields of criminal law, international/operational law, and employment law. An experienced litigator. Accustomed to working complex issues with multiple competing interests and making decisions in fast paced legal environments. Vast experience working with the federal interagency to achieve clients' objectives in a high-energy work environment. Experienced leader, manager, and teacher -- effective team member with strong interpersonal skills.

Top Secret clearance with SCI access.

PROFESSIONAL EXPERIENCE

United States Army, Judge Advocate General's Corps (1988 - Present)

2nd Judicial Circuit, U.S. Army Trial Judiciary, Fort Bragg, NC (May 2016—Present)
Chief Circuit Judge

- Perform duties comparable to those of a United States Federal District Court Judge.
- Preside over trials in General and Special Courts-Martial at various locations in the central United States and other places as required. Preside over death penalty and high profile cases as assigned – regardless of location.
- Supervise and rate five other military judges in the circuit.
- Ensure trials are conducted fairly, efficiently and in accordance with the law. Instruct jury members on the law applicable to each case. In trials without members, decide guilt or innocence and sentence if necessary.
- Supervise over 20 Military Magistrates in pre-trial confinement reviews and search authorization determinations.
- Provide regular training to dozens of trial and defense counsel.
- Serve as Editor In Chief of Military Judge's Benchbook -- a 1300 page, published legal tool for judges and litigators to use to prepare for trial and instruct the jury on the law. Supervise 6 other judges in this process

3rd Judicial Circuit, U.S. Army Trial Judiciary, Fort Leavenworth, KS (May 2014—May 2016)
Chief Circuit Judge

- Perform duties comparable to those of a United States Federal District Court Judge.
- Preside over trials in General and Special Courts-Martial at various locations in the central United States and other places as required. Preside over death penalty and high profile cases as assigned – regardless of location.
- Supervise and rate five other military judges in the circuit.
- Ensure trials are conducted fairly, efficiently and in accordance with the law. Instruct jury members on the law applicable to each case. In trials without members, decide guilt or innocence and sentence if necessary.
- Supervise 8-10 Military Magistrates in pre-trial confinement reviews and search authorization determinations.
- Provide regular training to dozens of trial and defense counsel.
- Serve as Editor In Chief of Military Judge's Benchbook -- a 1300 page, published legal tool for judges and litigators to use to prepare for trial and instruct the jury on the law. Supervise 5 other judges in this process.

3rd Judicial Circuit, U.S. Army Trial Judiciary, Fort Leavenworth, KS (July 2011—May 2014)
Circuit Judge

- Performed duties comparable to those of a United States Federal District Court Judge.
- Presided over trials in General and Special Courts-Martial at various locations in the central United States and other places as required. Presided over death penalty and high profile cases as assigned – regardless of location.
- Ensured trials are conducted fairly, efficiently and in accordance with the law. Instructed jury members on the law applicable to each case. In trials without members, decided guilt or innocence and sentence if necessary.
- Supervised 8-10 Military Magistrates in pre-trial confinement reviews and search authorization determinations.
- Provided regular training to dozens of trial and defense counsel.
- Editor of Military Judge's Benchbook -- a 1300 page, published legal tool for judges and litigators to use to prepare for trial and instruct the jury on the law. Supervised 5 other judges in this process.

5th Judicial Circuit, U.S. Army Trial Judiciary, Vilseck, Germany (July 2008—July 2011)
Chief Circuit Judge

- Performed duties comparable to those of a United States Federal District Court Judge.
- Presided over trials in General and Special Courts-Martial at various locations in the central United States and other places as required. Presided over high profile cases as assigned – regardless of location.
- Deployed to Iraq/Afghanistan and Kuwait to preside over courts-martial in theater of operations. Coordinated provision of judicial resources to entire CENTCOM and EUCOM AORs
- Supervised and rated three other military judges in the circuit.
- Ensured trials are conducted fairly, efficiently and in accordance with the law. Instructed jury members on the law applicable to each case. In trials without members, decided guilt or innocence and sentence if necessary.
- Supervised over 20 Military Magistrates located in six countries concerning pre-trial confinement reviews and search authorization determinations.
- Provided regular training to dozens of trial and defense counsel.

4th Judicial Circuit, U.S. Army Trial Judiciary, Fort Bliss, TX (July 2005—July 2008)
Circuit Judge

- Performed duties comparable to those of a United States Federal District Court Judge.
- Presided over trials in General and Special Courts-Martial at various locations in the western United States and other places as required.
- Ensured trials are conducted fairly, efficiently and in accordance with the law. Instructed jury members on the law applicable to each case. In trials without members, decided guilt or innocence and sentence if necessary.
- Supervised six Military Magistrates in pre-trial confinement reviews and search authorization determinations.
- Provided regular training to dozens of trial and defense counsel.

U.S. Army Trial Defense Service, Fort Gordon, GA (July 2003—July 2005)
Regional Defense Counsel

- Supervised, trained, and mentored 22 defense attorneys geographically dispersed in seven field offices in the Army's busiest region.
- Defended general officers and other high-profile accused soldiers for violations of the Uniform Code of Military Justice and other Army regulations and policies.
- Monitored travel budgets and defense counsel workloads.
- Organized training workshops for all defense counsel in entire U.S. Army Trial Defense Service (over 100 attorneys and paralegals).

V Corps, Heidelberg, Heidelberg, Germany/Baghdad, Iraq (July 2001—July 2003)

Chief, Operational/International Law/Chief, Military Justice

- Senior international and operational law advisor for high operations tempo, forward deployed, contingency Corps.
- Responsible for all operational law matters affecting V Corps and subordinate units.
- Deployed with Corps in this position for Operation Iragi Freedom – dynamic high intensity contingency operation.
- Responsible for all operational law, law of war, targeting and Geneva/Hague Convention issues.
- Once in occupation phase of operation – developed, implemented and commanded the Judicial Reconstruction Assistance Team responsible for aiding Iraqi Ministry of Justice in reconstituting criminal courts in Iraq and beginning criminal trials.
- In Germany, supervised three attorneys, two paralegals and several local national employees in meeting the international and operational law needs of the Army in Germany.
- Liaised with German officials on jurisdiction, local national employment and SOFA issues.
- As Chief of Justice, responsible for all military justice issues affecting all soldiers assigned to the largest area jurisdiction in Germany. Trained, mentored and led five attorneys and numerous paralegals in four branch offices.

U.S. Army Southern European Task Force (Airborne), Vicenza, Italy (July 1999—July 2001)
Deputy Staff Judge Advocate

- Served as primary assistant to the Staff Judge Advocate in providing complete range of legal services to the Southern European Task Force (Airborne), a forward deployed contingency unit responsible for responding to various contingency operations within the EUCOM, CENTCOM and USAREUR areas of responsibility.
- Provided legal advice to the SETAF Commanding General and his staff.
- Responsible for day-to-day operations of the legal office.
- Lead, mentored and trained all military and civilian personnel within the office.
- Served as the Staff Judge Advocate for rear operations and when the SJA is absent.

1st Armored Division, Bad Kreuznach, Germany (June 1997—July 1999)
Chief, Military Justice

- Responsible for the administration of military justice within the 1st Armored Division jurisdiction. Trained, mentored and lead four prosecutors and numerous paralegals and support staff.
- Advised commanders, the SJA, the DSJA, and law enforcement on all criminal law matters.
- Managed all criminal justice matters in three branch offices throughout the jurisdiction.

U.S. Army Litigation Division, Arlington, Virginia (July 1994—June 1996)
Litigation Attorney

- Defended Army and DOD officials in federal court against employment discrimination claims asserted by Army civilian employees.
- Investigated facts, researched legal and regulatory issues, prepared pleadings and appeared in federal court to defend the Army position.
- Coordinated with DOJ, DOD and Army General Counsel and local installation attorneys.
- Advised the Army Staff on civilian personnel issues.

10th Area Support Group, Okinawa, Japan (July 1991—July 1994)
Chief, Operational/International Law/Chief, Military Justice

- Performed duties of DSJA for a general court-martial jurisdiction. Oversaw general office legal operations. Acted as SJA when SJA is absent. Served as chief of criminal and administrative law. Lead and trained numerous paralegals and local national civilian employees in providing these legal services to the command.
- Advised all commanders on criminal and administrative law matters. Served as legal advisor to law enforcement personnel.

101st Airborne Division (Air Assault), Fort Campbell, KY (Dec 1988—July 1991)
Defense Counsel/Claims Attorney

- In initial assignment as JAG Officer served as claims attorney. Reviewed, adjudicated and paid personnel claims. Investigated and disposed of tort claims. Pursued delinquent claims under the Federal Medical Care Recovery Act.
- In second assignment of initial tour, zealously defended numerous soldiers at jury and bench trials, achieving several acquittals and dismissal of charges.

SIGNIFICANT MILITARY AWARDS

- Legion of Merit (x2)
- Bronze Star Medal
- U.S. Army Meritorious Service Medal (x6)
- U.S. Army Commendation Medal (x3)
- U.S. Army Achievement Medal (x2)
- Iraq Campaign Medal (1st and 7th Phase)
- Global War on Terrorism Expeditionary Medal
- Global War on Terrorism Service Medal
- Overseas Service Ribbon (x5)
- Air Assault Badge

EDUCATION

LL.M, Military Law (Criminal Law Emphasis), The U.S. Army Judge Advocate General's School and Legal Center, Charlottesville, VA (1997)

J.D., J. Reuben Clarke School of Law, Brigham Young University, Provo, UT (1988)

B.A., Political Science, Brigham Young University, Prove, UT (1985)

BAR ADMISSIONS

District of Columbia 1990
Utah 1988
United States Supreme Court 1997

ACADEMIC SCHOLARSHIPS AND AWARDS

- U.S. Army ROTC Full Academic Scholarship.
- Distinguished Honor Graduate, U.S. Army Air Assault School.
- Criminal Law Specialty award with LLM Graduation.
- Awarded Level 4 (highest) Criminal Law Special Skill Identifier.

PUBLICATIONS AND PRESENTATIONS

- "A View from the Bench: Proper Use of Prior Statements." The Army Lawyer, July 2011.
- "A View from the Bench: So, You Want to be a Litigator?" The Army Lawyer, November 2009.
- "Representing the Army in Civilian Personnel Cases at the Administrative Level with a View Toward Court Litigation." The Army Lawyer, May 1995.
- Presenter: "Military Justice Practice, Procedures and Current Issues." J. Reuben Clark Law Society Annual Conference, Kansas City, MO, February 14, 2014.
- Presenter: "Military Judge's Benchbook," 58th Military Judge's Course, The Judge Advocate General's School, Charlottesville, VA, April 2015.
- Presenter: "Military Judge's Benchbook," 59th Military Judge's Course, The Judge Advocate General's School, Charlottesville, VA, April 2016.
- Senior Presenter, Senior Judge Panel Discussion, U.S. Army Trial Judiciary Sexual Assault Legal Issues Training, Fort Belvoir, VA, August 2016.
- Guest Lecturer: Special Victims Counsel Regional Training, Fort Bragg, NC, March 2017.

- Presenter: “Military Judge’s Benchbook,” 60th Military Judge’s Course, The Judge Advocate General’s School, Charlottesville, VA, April 2017.
- Evaluator: Guilty Plea Practical Exercise, 60th Military Judge’s Course, The Judge Advocate General’s School, Charlottesville, VA, May 2017.

COMMUNITY ACTIVITIES

- Law Day activities in partnership with local schools.
- Volunteer service with community groups in four countries and eight states.
- Youth development and mentorship.

QRFs for Immigration Judge Job Announcement Number: IJ-10045466-17-TW

Jeffery R. Nance – Applicant 16 October 2017

1) Ability to demonstrate the appropriate temperament to serve as a judge.

I have served as a military judge for over 12 years. One of the primary requirements to be selected to serve as a military judge is judicial temperament. Of course, selecting someone to the bench who has never served on the bench before involves an evaluation of their temperament without actually seeing it but by looking at other aspects of their past performance. Once on the bench as a military judge, however, if a judge does not display proper judicial temperament, he or she is soon reassigned off the bench. I have had 12 annual performance evaluations since becoming a military judge. (b)(6) (b)(6) I have attached one of those evaluations to my application packet. Furthermore, my reputation among my peers, superiors and the counsel who have practiced before me for over 12 years is of impeccable, patient, thoughtful and measured judicial temperament. I think it is the most important quality a judge should possess.

3) Substantial litigation experience, preferably in a high volume context.

In 28 years as an Army lawyer and judge I have spent all but three of those years in litigation – both criminal and civil. In 12 years as a military judge, I have presided over more than 500 cases at a rate of between 40 and 80 per year. The case volume is cyclical. Sometimes I would have a docket filled every week for months with contested trials, guilty pleas and motions hearings. This required that I prepare well in advance of trials and anticipate possible issue and be ready to resolve those accurately and timely. Often the contested trials would take an entire week or more. I have presided over complex and high- profile cases including capital litigation and high profile war crimes trials while maintaining my normal docket at the same time. For three years of this time, I deployed to Iraq and Afghanistan on a regular basis and presided over cases in those combat theaters. Prior to becoming a judge I served as a defense counsel and trial counsel and civil litigation attorney in numerous jurisdictions for a total of 9 years. During my two years as a defense counsel I tried 101 courts-martial of various lengths and complexities. As a trial counsel I tried nearly 100 cases in three years including several murder, rape and aggravated assault trials. As a civil litigation attorney for two years, I represented the U.S. Army in Federal district court in approximately 65 law suits claiming employment discrimination. This litigation involved extensive motions practice, deposition taking and actual bench and jury trials (the law was changed to allow jury trials in Title 7 cases just before I was assigned to this position). In other supervisory litigation positions over a three year period I tried and supervised other attorneys in trying dozens of complex criminal trials all over the world – including in Iraq and Afghanistan.

4) Experience handling complex legal issues.

I was the presiding judge in U.S. v. Hatley and U.S. v. Mayo – both charged with murdering by execution, Iraqi civilians who they had illegally detained. These cases involved conspiracy, immunity issues, multiple co-accused, and significant international media attention. Additionally, there were no dead bodies ever found and the murders took place in a combat zone in Iraq. Thus, there were complex evidentiary issues, discovery issues, witness travel issues and international law issues (the trials were held in Germany, the home base of the accused's, rather than Iraq and the Germans did not want to allow the Iraqi witnesses into Germany for the trials.) I was also the presiding judge in the case of U.S. v. SSG Daniel Rosas -- a complex drug importation and distribution conspiracy involving several soldiers from a unit that deployed for 30 day periods to Columbia to help that government interdict the cocaine trade there. The 6 soldiers in the conspiracy were charged with executing a scheme to smuggle large quantities of cocaine into the US aboard military flights and then sell that cocaine to drug dealers in and around El Paso, Texas. This was a complex case with many evidentiary issues, international law issues, and much media attention. I presided over the trial of the leader of the conspiracy (Rosas) and several other members of the conspiracy. Additionally, I was the presiding judge in U.S. v. SSG Robert Bales – a case referred to a capital trial where the accused was found guilty of murdering 16 Afghani old men, women and children. There were four lawyers for each side, extensive motions practice, complex evidentiary issues, difficult jury empaneling concerns and worldwide media attention. In my estimation and that of my superiors, I presided over these cases with expert legal ability, superb judicial temperament and application of adroit and practical solutions to procedural, security and logistics concerns. Finally, more than 200 of the more than 500 cases I have presided over as a judge and fully half of the approximately 250 cases I tried as a defense counsel or prosecutor were sexual assault trials. These cases always involve tricky privilege, privacy and evidentiary issues. Added to that the increased attention these cases have received in the past 5+ years by the media and congress and the judge's duty to ensure a fair trial only becomes harder. Still, I have always been able to properly balance the rights of the accused, the victim and the interest of society to ensure that justice is done in every case. I am currently the presiding judge in U.S. v. SGT Robert Bergdahl. Because this in ongoing litigation, I cannot give details about the issues or parties involved. Suffice to say, it has received significant national and international media attention and involves many complex issues.

6) Knowledge of judicial practices and procedures.

Five years ago I was appointed to be the editor of the U.S. Army Military Judge's Beenchbook. This is a 1300+ page published treatise designed to help military judges of all services apply up to date law and criminal procedure properly. As the editor, I am required to stay abreast of new developments in the statutory and case law that affects military practice and to write, propose and make changes to the Benchbook necessary to keep the Beenchbook current with the law and help judges avoid error that might otherwise occur. In addition to making approximately 15 - 20 changes each year, I recently completed a cover to cover scrub of the entire Beenchbook to correct deficiencies that have developed over the past 10+ years as the treatise has been updated. Naturally, all this work requires me to have expert knowledge of the judicial practices and procedures that apply to our practice. Furthermore, I have taught these practices and procedures to new and experienced judges from all services at our annual inter-service and bi-annual army training.

UNITED STATES ARMY TRIAL JUDICIARY
SECOND JUDICIAL CIRCUIT, FORT BRAGG, NORTH CAROLINA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Findings of Fact, Conclusions of Law and Ruling -- Defense Motion to Dismiss for Unlawful Command Influence**
SGT Robert B. Bergdahl **HHC, STB, U.S. Army FORSCOM** **Fort Bragg, NC 28310**	)	
	)	**24 February 2017**

1. The accused moves this Court to dismiss the charges against him because a candidate for President of the United States, Donald J. Trump, made numerous public comments describing him as a deserter, a traitor, responsible for the death of five or six soldiers and many other similar comments disparaging of the accused personally as well as expressing an opinion about his guilt and promising that, if the accused didn't get jail time and Mr. Trump were elected President, he would review the case.

FINDINGS OF FACT

2. I considered the pleadings of the parties, as well as all appellate exhibits submitted on the matter and not objected to by the parties. I find the following facts by a preponderance of the evidence:

a. Beginning as early as June 2014, well before he announced his candidacy for the Republican nomination for President of the United States, Mr. Trump began expressing his opinion that the accused is a traitor and that President Obama made a "terrible deal" when he traded five Taliban prisoners detained at Guantanamo for the accused.

b. On 25 March 2015, charges of desertion and misbehavior before the enemy were preferred against SGT Bergdahl.

c. Mr. Trump repeated similar comments to those mentioned above until he announced that he would seek the Republican Party nomination for President of the United States on 16 June 2015. As his campaign activity increased, the same general theme persisted in all the comments he made about the accused. See the Compendium to Defense Appellate Exhibit 56 as well as the DVD marked as an enclosure at page 57 of Defense Appellate Exhibit 56.

d. On 19 July 2016, Mr. Trump received the Republican Party nomination for President.

e. The last public comments about the accused or his case were made on or about 9 August 2016.

f. The campaign for President in 2016, as with most political campaigns, was often marked by incendiary campaign rhetoric, not only between the opposing parties, but within each party, as numerous candidates vied for their party's nomination. In over 512 days of campaigning where Mr. Trump participated in literally hundreds of speeches and public campaign events, Mr. Trump referred to the accused in 65 separate instances. Those 65 instances total over 46 hours of total speech time. References to the accused total 28 minutes of the 46 hours.[1]

g. On 8 November 2016[2], Mr. Trump was elected the 45th President of the United States.

LAW AND ANALYSIS

3. Unlawful Command Influence (UCI) is the "mortal enemy of military justice." *United States v. Thomas*, 22 MJ 388, 393 (C.M.A. 1986). Article 37, of the Uniform Code of Military Justice (UCMJ) was enacted by Congress to prohibit commanders and convening authorities from attempting to coerce, or by unauthorized means, influence the action of a court-martial, or any member thereof, in reaching the findings or sentence in any case. Article 37(a), UCMJ. UCI is the improper use, or perception of use, of superior authority to interfere with the court-martial process. *See*, Gilligan and Lederer, COURT-MARTIAL PROCEDURE, Volume 2 §18-28.00 (2d Ed. 1999).[3] UCI is most often exerted on members of any of the following

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[1] The government avers but offers no evidence that: "A Lexis Nexis search for "Trump" together with "Bergdahl" for the entire period of Mr. Trump's campaign, a total of 512 days, results in 1,506 references. By contrast, in the *fourteen days* prior to the election a search for "Trump" and "Benghazi" results in 1,496 hits. In the *four days* prior to the election a search for "Trump" and "Obamacare" results in 1,806 hits. Attempts to search for the latter two combinations beyond those short windows were unsuccessful, because they both resulted in more than 3,000 hits. Additionally, a simple Google search for "Trump" and "Bergdahl" results in approximately 560,000 hits. By contrast, a (Google) search for "Trump" and "Benghazi" results in 5,370,000 hits; "Trump" and "Mexico Wall" results in 17,200,000; "Trump" and "Obamacare" results in 26,300,000; and "Trump" and "China" results in 111,000,000." If true, these statistics would seem to indicate that SGT Bergdahl was not a significant part of Mr. Trump's campaign strategy.

[2] The election took place on 8 November 2016 but the election was not called for Mr. Trump until the early morning hours of 9 November.

[3] No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, 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. Article 37(a), UCMJ, 10 U.S.C. § 837(a) (2012).

populations: (1) Subordinate commanders in the preferral or referral process, (2) Potential panel members for the trial, and (3) Potential witnesses testifying in the trial. It can be exerted by commanders as well as those acting with the "mantle of command authority" and can be intentional or inadvertent.

4. UCI can manifest in a multitude of different situations. *See United States v. Gore*, 60 MJ 178, 185 (C.A.A.F. 2004). Furthermore, "[t]he term 'unlawful command influence' has been used broadly in our jurisprudence to cover a multitude of situations in which superiors have unlawfully controlled the actions of subordinates in the exercise of their duties under the UCMJ." *United States v. Hamilton*, 41 MJ 32, 36 (C.M.A. 1994). UCI can occur in one of two ways: either through 1) Actual UCI or 2) Apparent UCI. Thus, even if there is no actual UCI, there may still be apparent UCI. The military judge must take affirmative steps to ensure that both forms are eradicated from the court-martial in question. *United States v. Lewis,* 63 MJ 405, 416 (C.A.A.F. 2006). The "appearance of unlawful command influence is as devastating to the military as the actual manipulation of any given trial." *Lewis,* 63 MJ at 407. The question of whether there is apparent UCI is determined "objectively." *Id.* This objective test for apparent UCI is similar to the tests that are applied in determining questions of implied bias of court members or in reviewing challenges to military judges for an appearance of a conflict of interest. *Id.* The focus must be on the "perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *Id.* The central question to ask is whether an "objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding." Id. In *United States v. Rockwood*, 52 MJ 98, 130 (C.A.A.F. 1999), the Court noted that "public criticism of military operations – including withering critiques of strategy, tactics, personnel policies, and human rights concerns – is inherent in a democracy." The Court noted that the prohibition against UCI does not require senior military and civilian officials to refrain from addressing such concerns, though it does prohibit those "with the mantle of command authority from deliberately orchestrating pretrial publicity with the intent to influence the results in a particular case or a series of cases, as the pretrial publicity itself may constitute unlawful command influence. Even the perception that pretrial publicity has been engineered to achieve a prohibited end – regardless of the intent of those generating the media attention – may lead to the appearance of unlawful command influence."

5. In *United States v. Biagase,* the U.S. Court of Appeals for the Armed Forces set forth the analytical framework to be applied to allegations of UCI. The Court placed the initial low burden on the defense to raise the issue by "some evidence." *United States v. Biagase,* 50 MJ 143, 150 (C.A.A.F. 1999). To meet this "some evidence" standard of proof, the defense must show some facts which, if true, would constitute UCI, and it must show that such evidence has a "logical connection" to the court-martial at issue in terms of potential to cause unfairness in the proceedings. *United States v. Stoneman,* 57 MJ 35, 41 (C.A.A.F. 2002). Once the issue has been raised, the

burden then shifts to the government. To meet its burden, the government may show either that there was no UCI or that any UCI will not taint these particular proceedings. If the government elects to show that there was no UCI, then it may do so either by disproving the predicate facts on which the allegation of UCI is based or by persuading the Military Judge that the facts do not constitute UCI. The government may choose not to disprove the existence of UCI but prove that the UCI will not affect these specific proceedings. Whichever tactic the government chooses, the required quantum of proof is beyond a reasonable doubt. *Stoneman,* 57 MJ at 41 (citing *Biagase*, 50 MJ at 151).

6. Even if actual or apparent UCI is found to exist, the Military Judge "has broad discretion in crafting a remedy to remove the taint of unlawful command influence," and such a remedy will not be reversed on appeal "so long as the decision remains within that range." *United States v. Douglas,* 68 MJ 349, 354 (C.A.A.F. 2010). The Military Judge should attempt to take proactive, curative steps to remove the taint of UCI and, therefore, ensure a fair trial. *Id.* The CAAF has long recognized that, once UCI is raised "…it is incumbent on the military judge to act in the spirit of the UCMJ by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings." *United States v. Gore*, 60 MJ 178, 186 (C.A.A.F. 2004) (citations omitted).

7. Closely related to UCI but requiring a different burden and quantum of proof is the doctrine of unfair pretrial publicity. Pretrial publicity is unfair if it denies an accused a fair trial in violation of his 5th and 6th Amendment rights. Unfair pretrial publicity requires the accused to demonstrate some actual identifiable prejudice attributable to said pretrial publicity. *Irwin v. Dowd*, 366 US 717 (1961); *United States v. Gray*, 51 MJ 1 (1999). As an exception to that rule, when pretrial publicity is so pervasive and unfair that it saturates the community and precludes an accused from having his trial heard by a trier of fact that is not so prejudiced against him that they cannot impartially hear the evidence and decide the case according to that evidence and applicable law, prejudice is presumed and there is no further need for the accused to show actual bias. *Skilling v. United States*, 561 U.S. 358 (2010); *Gray* at 28.

8. While similar in many ways, such as the nature and scope of the factual inquiry, the potential impact on the trial and the ways to address and remedy the problems, UCI and unfair pretrial publicity differ in one important way: UCI is unique because the command nature of the military makes interference or the appearance of interference with the criminal justice system particularly devastating and pernicious. Such concerns do not exist in federal criminal courts because neither juries nor judges are subject to the command authority of anyone in the executive branch prosecuting the case. In the military justice system, everyone – juries (panel members), judges, prosecutors, defense counsel, court reporters and the commanders who decide whether to send a case to trial – is a part of the Executive branch and ultimately answerable to the President of the United States – the Chief

Executive. This structure is necessary because military justice is as much a readiness issue as it is a justice issue; thus, it must stay a function of command. However, when that same command structure is abused to weight the scales against the accused, the system fails, the accused is deprived of important constitutional guarantees of fairness and the military justice system ceases to deliver justice.

9. Nevertheless, we do not have a traditional UCI construct here because, though Commander in Chief, the President is not "subject to this chapter." Furthermore, because this is the military and the alleged unlawful influencer is the President, we do not have a traditional unfair pretrial publicity issue either. Thus, the court will analyze both.

10. As said, even were he now "subject to this chapter[4]," when he made the referenced comments about the accused and his alleged offenses, he was only Candidate Trump and was not then in any way "subject to this chapter." Therefore, he could not commit actual UCI. Furthermore, the Court is not persuaded that even President Trump is able to commit actual UCI. The Court finds that he is no more "subject to this chapter" now than he was before he took the oath of office. He simply has no actual ability to control what happens in the trial of the accused. He cannot select the panel members, he has no authority to control witnesses, he does not supervise the trial or defense counsel and he does not make discrete decisions about trial or pretrial matters in this case. The closer question, and the question the whole defense UCI claim turns on, is: Do the President's statements about the accused made before he was elected President carry over with him into office such that they can and do constitute apparent UCI? On this point, the defense lately cites this Court to a recently issued Memorandum Opinion from The United States District Court for the Eastern District of Virginia --Tareq Aqel Mohammed Aziz, et al., v. Donald Trump. *Aziz v. Trump*, Civil No. 17-116 (E.D. Va. Feb. 13, 2017). In this civil case, the plaintiffs petitioned the federal district court for a preliminary injunction prohibiting enforcement of Executive Order (EO) 13,769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." The plaintiffs claimed that the EO was overbroad and, by its plain reading, applied to legal permanent residents in violation of their 1st and 5th Amendment rights. In commenting on whether the President's pre-election statements about the subject of a "Muslim Ban" should be considered in deciding whether EO 13,769 should be read to apply to a particular religious group with legal status in the United States in spite of *post hoc* assurances by the administration that it did not, the District Court, paraphrasing the US Supreme Court in an unrelated case, stated, "Just as . . . the world is not made new every morning, a person is not made new simply by taking the oath of office." *Aziz* at 15. However, this comment was made regarding the propriety of limiting the temporal scope of the purpose inquiry in a 1st Amendment establishment of religion

[4] Which, by a strict reading of Article 37 and Article 2, UCMJ, he is not. Furthermore, no case law of which the Court is aware, indicates that "subject to this chapter" includes the President, much less a private citizen candidate for President.

case. The Court does not find the analysis sufficiently analogous to be helpful to the resolution of the issue here.

11. The multitude of comments[5] made by Candidate Trump is troubling. Doubtless, they were made without consideration of their possible impact on the trial of the accused. However, they were clearly made to enflame the passions of the voting populace against his political opponent and in Mr. Trump's favor. Candidate Trump's comments were disturbing and disappointing; however, they do not rise to the level of "some evidence" required for the defense to meet its initial burden. Apparent UCI must still be UCI and the statements of a private citizen, even if running for President, cannot be unlawful command or influence. No reasonable member of the public, apprised of all the facts and circumstances and seeing campaign rhetoric for what it is, would believe that because Candidate Trump said those troubling things and is now President Trump, the accused has been or will be denied a fair trial. This is particularly true when we consider that no member of the venire has even been questioned to determine if they are even aware of these statements or, if aware, have been improperly influenced by them.[6] This is simply not a matter that can be ascertained at this point in the proceedings. Add to this the fact that President Trump has, thus far, made no statement about the accused or his court-martial and the unreasonableness of any public opinion that may exist that the accused cannot get a fair trial is even starker. This fact is also strong circumstantial evidence that his comments were nothing more than inflammatory campaign rhetoric. Certainly, partisans on either side of this case or on either side of the political divide in this country may have strongly held opinions about this case. But the reasonable member of the public the law is interested in does not live at the far ends of the political spectrum. No *reasonable* member of the public, apprised of all the facts and circumstances present here, would harbor a significant doubt about the fairness of the proceeding where the potential panel members have yet to be questioned about their knowledge of the statements by Mr. Trump or their bias on the matter. It could easily be that each and every panel member questioned in *voir dire* will honestly and convincingly say they have either never heard the comments or, having heard them, would not be prejudiced against the accused by them. We simply do not know. Because of that, the defense has failed to establish some facts which, if true, would constitute UCI or establish that such evidence has a "logical connection" to this court-martial in terms of potential to cause unfairness in the proceedings. *Stoneman*, at 41. However, after *voir dire*, if it appears the landscape on this issue has changed, the defense is free to renew its motion.

12. Assuming, for the sake of argument, that the defense has met their initial burden, the government must prove beyond a reasonable doubt that there was no UCI or that any UCI will not taint these particular proceedings. If the government elects to show

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[5] *See* paragraph 2c above.

[6] The defense does not allege or imply that any potential witness has been intimidated into not testifying by Mr. Trump's comments. Should such occur, the Court will reconsider its ruling on this matter.

that there was no UCI, then it may do so either by disproving the predicate facts on which the allegation of UCI is based or by persuading the Military Judge that the facts do not constitute UCI. The government may choose not to disprove the existence of UCI but prove that the UCI will not affect these specific proceedings. *Id.* Here, the government has not chosen to challenge the predicate facts -- the statements by Candidate Trump. Instead, the government has sought to persuade this court that the statements do not constitute UCI or, at least, cannot be said to constitute UCI until the members are subject to *voir dire*. The Court is persuaded that this is true.

13. As previously stated, Mr. Trump's statements made as a candidate for President of the United States cannot pull him under even the apparent UCI umbrella. It is simply not logical, meaning reasonable, to conclude that because he made those statements when he was running for office in a heated and contentious campaign, now that he is President, the accused cannot possibly receive a fair trial. The reasonable observer would know that his comments were typical campaign rhetoric designed to make his opponent look bad and win support for himself. Furthermore, this reasonable member of the public will have the opportunity to observe the *voir dire* process and hear the evidence in the case as well as the Court's instructions on the law and evidence. They will know that the accused is not charged with "treason" and that the death penalty is not authorized for either of his charged offenses. The Court will take special care to ensure that the comments by Mr. Trump do not invade this trial. After all that, the reasonable member of the public will have no doubt that the accused has received a fair trial, uninfluenced by Mr. Trump's comments. It would not be appropriate or prudent for the Court to decide that is not possible without determining if the eventual fact finders have been influenced and are unable to impartially hear the evidence and instructions and give the accused a fair trial.

14. Similarly, on the issue of unfair pretrial publicity, the defense has failed[7] to persuade the Court that there is, at this point, some actual identifiable prejudice attributable to Mr. Trump's comments. Again, the place that might occur is amongst the prospective panel members. However, we cannot make that determination until we have had a chance to inquire into their impartiality. And, the comments by Mr. Trump that might be considered pretrial publicity are not so pervasive and unfair as to saturate the community and prevent any trier of fact from being impartial. Mr. Trump's comments about the accused were a relative few out of thousands he made as he campaigned for election for nearly two years. They made up a very small percentage of all he said to get elected and were always couched in terms of the Obama administration, necessarily including Ms. Clinton, having made a "bad deal," which Mr. Trump said he would never make. His disparagement of the accused was designed to contrast what we gave (five "really bad guys") for what we got in return (one "deserter," "traitor," etc.). The name calling and characterization of the accused's actions were designed to make that contrast, and the contrast between Mr.

[7] Indeed, though they do not do so affirmatively, it appears that they concede this issue, based upon the facts and arguments they offer on this issue.

Trump and his political opponents, as stark as possible. The accused was merely the foil for delivering that political message. All reasonable members of the public and potential panel members will know that was what he was doing and will not allow the rhetoric to affect their impartiality. The cases dealing with presumptive prejudice sufficient to establish a due process violation involve media saturation covering significant facts, evidence and opinions in a particular case as well as constant exposure to a limited and discrete jury pool. None of that exists here. The pool of prospective members in this case comes from all of FORSCOM with duty assignments all over the world. The media coverage in the form of Mr. Trump's comments has not been constant, confined to a geographic area or pervasive. And, Mr. Trump has said nothing about the accused or his case since August 2016. Under these facts, the Court cannot find a due process violation sufficient to make amelioration measures futile.

15. Still, the Court recognizes that this is an unusual case, perhaps unique in all the annals of military justice. On top of the obvious unique aspects, we have a man who eventually became President of the United States and Commander in Chief of all the armed forces making conclusive and disparaging comments, while campaigning for election, about a soldier facing potential court-martial for actions that had already captured the attention of the public. The Court recognizes the problematic potential created by these facts. Therefore, in order to vigilantly ensure a fair trial, the Court will require the parties to submit a member's questionnaire on these issues which will be provided to the members well in advance of trial and returned for review by the parties well prior to *voir dire*. The Court will also allow very liberal *voir dire* on this topic. These measures are not implemented as a remedy for UCI, as the Court finds none at this point. They are provided to ensure that a thorough process for vetting the panel members is in place to ensure that there has been no UCI and that the accused receives a fair trial. If, after that process is complete, the defense believes the legal landscape has changed on this matter, they are free to renew this motion.

RULING

16. Defense motion is DENIED.

JEFFERY R. NANCE
COL, JA
Military Judge