IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Sergeant (E-5) **ROBERT B. BERGDAHL** United States Army, Petitioner v. **UNITED STATES,** Respondent	ANSWER TO THE PETITION FOR A WRIT OF CORAM NOBIS **Docket No. ARMY MISC 20200588** Tried at Fort Bragg, North Carolina, on 22 December 2015, 12 January, 17 May, 7 July, 22-24 August, 28 September, 14-15 November, 16 December 2016; 13 February, 8 August, 27 September, 16, 23, 25-26, 30-31 October 2017, and 1-3 November 2017, before a general court-martial appointed by the Commander, U.S. Army Forces Command, Colonel Christopher T. Frederickson (arraignment) and Colonel Jeffery R. Nance, military judges, presiding.

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

COMES NOW the United States, and files this response pursuant to this court's order, dated 26 October 2020, and in accordance with Rule 19(f)(1) of this Court's Internal Rules of Practice and Procedure. The government prays this honorable court deny the petition.

Statement of the Case and Facts

On 16 October 2017, a military judge sitting as a general court-martial convicted petitioner, pursuant to his pleas, of desertion with intent to shirk

hazardous duty and misbehavior before the enemy in violation of Articles 85 and 99, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 885, 899 (2012). *United States v. Bergdahl*, 80 M.J. 230, 232–33 (C.A.A.F. 2020). That same day, the military judge applied for a position as an immigration judge with the Executive Office for Immigration Review (EOIR).[1] (Pet'r App'x C). 16 October 2017—the day the military judge submitted his application—was the closing date for applications to be submitted through USAJOBS. (Gov't App. Ex. A). The EOIR announced the nineteen open positions for immigration judge on 25 September 2017. (Gov't App. Ex. A).

In his application, the military judge included his 24 February 2017 ruling on petitioner's first motion alleging apparent unlawful command influence (UCI)—relating to President Donald Trump's campaign comments[2]—as a writing sample. (Pet'r App'x C). Petitioner subsequently filed a second motion alleging apparent UCI on 17 October 2017 based on a statement made by President Trump after petitioner's guilty plea the day prior.[3] *Bergdahl*, 79 M.J. 512, 519 (Army Ct.

[1] There is no indication in the materials provided by petitioner whether the military judge submitted the application before or after petitioner's guilty plea.
[2] While he was a candidate for President, President Trump expressed his belief that petitioner "was a deserter and a traitor who should be severely punished." *Bergdahl*, 80 M.J. at 244.
[3] On 16 October 2017, after petitioner pleaded guilty, President Trump commented in response to a reporter's question during a press conference in the Rose Garden, "Well, I can't comment on Bowe Bergdahl because he's—as you know, they're—I guess he's doing something today, as we know. And he's also—they're setting up

Crim. App. 2019), *aff'd* 80 M.J. 230. In his ruling on that motion, the military judge concluded the defense met its burden to present some evidence that UCI occurred, but found that the "government met its burden to prove beyond a reasonable doubt that the UCI would not be an intolerable strain on the public's perception of the military justice system." *Id*. at 520. Despite finding there was no apparent UCI, "[t]he military judge stated that he would consider the President's comments as mitigation evidence on sentencing." *Id*.

The military judge sentenced petitioner on 3 November 2017 to a dishonorable discharge, reduction to the grade of E-1, and forfeiture of $1,000 per month for ten months. *Bergdahl*, 79 M.J. at 520; *Bergdahl*, 80 M.J. at 233; (Appendix). The military judge subsequently retired from the Army in 2018. (Pet'r App'x C). On 28 September 2018, the EOIR published a press release stating that the Attorney General appointed the military judge as an immigration judge with the EOIR. (Pet'r App'x C).

On direct appeal before this court and the Court of Appeals for the Armed Forces (CAAF), petitioner claimed that statements about him by the late Senator John McCain[4] and President Trump amounted to apparent UCI and requested this

---

sentencing, so I'm not going to comment on him. But I think people have heard my comments in the past." *Bergdahl*, 80 M.J. at 238.

[4] Senator McCain, while chairman of the Senate Armed Services Committee, told a reporter while petitioner's case was pending a referral decision, "If it comes out

court and the CAAF dismiss his conviction with prejudice. *See generally Bergdahl*, 79 M.J. 512; *Bergdahl*, 80 M.J. 230. On 16 July 2019, this court rejected petitioner's claims and affirmed petitioner's conviction and sentence. *Bergdahl*, 79 M.J. at 520–27. On 27 August 2020, the CAAF affirmed this court's judgment, finding no apparent UCI. *Bergdahl*, 80 M.J. at 244.

On the same day the CAAF affirmed this court's opinion, petitioner sent a Freedom of Information Act (FOIA) request to the EOIR seeking the military judge's employment application. (Pet'r App'x C). Petitioner filed a petition for reconsideration, on other grounds, on 7 September 2020. (Appendix). Petitioner received a response to his FOIA request on 15 September 2020. (Pet'r App'x C). These materials included the military judge's application and affiliated documents. (Pet'r App'x C). At the CAAF, petitioner requested to supplement the record with the military judge's application materials and that the materials be considered in conjunction with the petition for reconsideration. (Pet'r App'x C). The CAAF denied the petition for reconsideration and motion to supplement the record on 14 October 2020. *United States v. Bergdahl*, No. 19-0406/AR, 2020 CAAF LEXIS 569 (C.A.A.F. 2020). Petitioner filed a petition for a writ of coram nobis with this court on 23 October 2020.

---

that [petitioner] has no punishment, we're going to have a hearing in the Senate Armed Services Committee." *Bergdahl*, 80 M.J. at 236.

Reasons Why Writ Should Not Issue

The All Writs Act, 28 U.S.C. §1651 (2012), authorizes this court to issue writs in aid of its subject-matter jurisdiction. *Loving v. United States*, 62 M.J. 235, 246 (C.A.A.F. 2005). A writ of coram nobis is "'an extraordinary remedy'" which "'should not be granted in the ordinary case.'" *United States v. Denedo*, 556 U.S. 904, 917 (2009) (quoting *Nken v. Holder*, 556 U.S. 418, 437 (2009) (Kennedy, J., concurring) (*Denedo II*)). It may be used to address "fundamental" errors which must be corrected in order "'to achieve justice.'" *Denedo II*, 556 U.S. at 911 (quoting *United States v. Morgan*, 346 U.S. 502, 511 (1954)). "Because *coram nobis* is but an extraordinary tool to correct a legal or factual error, an application for the writ is properly viewed as a belated extension of the original proceeding during which the error allegedly transpired." *Denedo II*, 556 U.S. at 912–13. This court's jurisdiction to entertain this writ "derives from the earlier jurisdiction it exercised . . . on direct review." *Id*. at 914.

Before considering the merits of the petition, this court must be satisfied that the petition meets the stringent "threshold criteria" for consideration. *Denedo v. United States*, 66 M.J. 114, 126 (C.A.A.F. 2008) (*Denedo I*), *aff'd* 556 U.S. 904. Coram nobis relief requires the petitioner to show:

> (1) the alleged error is of the most fundamental character; (2) no remedy other than coram nobis is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information

> presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist.

Id. "Because these requirements are conjunctive, the failure to meet any one of them is fatal." *Matus-Leva v. United States*, 287 F.3d 758, 760 (9th Cir. 2002).

If a petition satisfies the *Denedo* threshold criteria, a petitioner still must demonstrate a "clear and indisputable right to the requested relief" in order to prevail on the merits. *Denedo I*, 66 M.J. at 126 (citing *Cheney v. United States Dist. Court*, 542 U.S. 367, 381 (2004)). In considering petitioner's writ, this court must be mindful that "judgment finality is not to be lightly cast aside;" and must be cautious and grant extraordinary writ relief only in "extreme cases." *Denedo II*, 556 U.S. at 916.

Here, although this court has jurisdiction to entertain the petition for coram nobis, petitioner fails to establish the necessary threshold criteria required for this court to consider the petition and grant relief to petitioner. Even if the petition satisfies the threshold criteria, petitioner is not entitled to relief on the merits because he fails to demonstrate that his entitlement to relief is clear and indisputable. Accordingly, this court should not issue the requested writ.

A. The petition does not meet the *Denedo* threshold criteria.

The instant petition is not eligible for review by this court because petitioner could have been discovered the information presented in the petition through the exercise of reasonable diligence prior to the original judgment. The fact that the military judge was appointed as an immigration judge with the EOIR was publicly announced on 28 September 2018 (Pet'r App'x C)—nearly ten months prior to this court's 2019 opinion affirming his conviction and sentence.[5] Petitioner offers no explanation for waiting to request the military judge's application materials until the day the CAAF affirmed this court's judgment, nearly two years after the military judge's appointment with the EOIR was announced. Had petitioner exercised reasonable diligence prior to this court's and/or the CAAF's opinions, he could have discovered and raised the information concerning the military judge during the ordinary course of appeal. *See Roy v. United States*, 2014 CCA LEXIS

[5] Should petitioner claim that the government was obligated to provide him with the information concerning the military judge's prospective or actual employment with the EOIR, no case law supports such a notion. The government is unaware of an unending duty to independently investigate every facet of a military judge's life. In fact, on one occasion, the CAAF found that the government's quest for disqualifying information about a military judge amounted to apparent UCI. *United States v. Salyer*, 72 M.J. 415, 426 (C.A.A.F. 2013) (noting that "a good-faith basis of inquiry under R.C.M. 902 does not create a correlating good-faith basis to access a military judge's official personnel file without his consent in search of personal matters with which to question and challenge the military judge."). "The normative method for addressing potential issues of disqualification is voir dire." *Id*.

364, at *9 (A.F. Ct. Crim. App. 17 June 2014) (finding that a petitioner seeking a writ of coram nobis could have discovered and presented, prior to the completion of direct appellate review, his challenge to a military appellate judge's appointment to the Air Force Court of Criminal Appeals (AFCCA) under the Appointments Clause because the appointment occurred three weeks prior to the AFCCA's issuance of its opinion on direct review).

Petitioner's failure to exercise reasonable diligence also resulted in his inability to bring this matter to this court's attention within the two-year time limit for filing a petition for new trial under Article 73, UCMJ. As this court has previously noted, "an extraordinary writ cannot be used as an end-run around the two-year time limit for considering a petition for new trial under Article 73, UCMJ." *Murray v. United States*, 2018 CCA LEXIS 47, at *7 (Army Ct. Crim. App. 31 Jan. 2018) (sum. disp.) (finding petitioner not entitled to coram nobis relief in the form of vacating his court-martial findings and sentence based on claim of prosecutorial misconduct because of his failure to seek relief earlier) (citing *Roberts v. United States*, 77 M.J. 615 (Army Ct. Crim. App. 2018).

Additionally, petitioner, through the writ, seeks this court to re-evaluate a previously litigated legal issue—apparent UCI resulting from Senator McCain's and President Trump's comments concerning petitioner. Consequently, this court should dismiss the petition.

B. Petitioner fails to establish a clear and indisputable right to relief.

Even if this court determines that the petition satisfies the *Denedo* threshold criteria, petitioner fails to establish a clear and indisputable right to relief. The military judge was not required to recuse himself from petitioner's case simply because he sought employment with the EOIR. Furthermore, the military judge's pending application with the EOIR between the day of petitioner's guilty plea and his sentencing fails to impact the CAAF's conclusion that there was no apparent UCI in petitioner's case. Accordingly, petitioner is not entitled to relief.

1. The military judge was not disqualified because of his pending employment application with the EOIR.

"An accused has a constitutional right to an impartial judge." *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (citing *United States v. Jones*, 55 M.J. 317, 320 (C.A.A.F. 2001)). To ensure that an accused receives an impartial judge, Rule for Courts-Martial (R.C.M.) 902 establishes the grounds for when a military judge must be disqualified from participating in a court-martial. Rule for Courts-Martial 902(a) generally provides that "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." Additionally, R.C.M. 902(b) establishes several specific circumstances under which a military judge must recuse himself, including when the military judge has "an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding." R.C.M. 902(b)(5)(B).

A claim questioning the impartiality of a military judge raised for the first time after trial is examined under the plain error standard of review.[6] *Martinez*, 70 M.J. at 157. "'[T]he test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt' by the military judge's actions." *Id*. (quoting *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)). "The appearance of impartiality is reviewed [] objectively and is tested under the standard set forth in *United States v. Kincheloe*, [14 M.J. 40, 50 (C.M.A. 1982)], i.e., '[a]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification.'" *Id*. at 158.

One instance when a military judge's impartiality might reasonably be questioned is where one party to the proceeding before the military judge is a prospective employer. *See In re Al-Nashiri*, 921 F.3d 224, 235 (D.C. Cir. 2019) ("Judges may not adjudicate cases involving their prospective employers."). This is not such a case, and petitioner's attempt to liken this case to *Al-Nashiri* is unavailing.

In *Al-Nashiri*, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) found a military commission judge's application

[6] "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *Id*. (citing *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008)).

for a position as an immigration judge with "the Department of Justice's Executive Office of Immigration Review" required his disqualification because attorneys in the employ of the Department of Justice appeared and litigated the government's position before him. *Id*. at 227, 237. The D.C. Circuit reasoned that the "average, informed observer would consider" the judge, Judge Spath, to have "presided over a case in which his potential employer appeared" because the "Attorney General himself is directly involved in selecting and supervising immigration judges," and "was a participant in Al-Nashiri's case from start to finish: he has consulted on commission trial procedures, he has loaned out one of his lawyers [to prosecute Al-Nashiri], and he will play a role in defending any conviction on appeal . . . ." *Id*. at 235–36.

In *United States v. Synder*, the AFCCA rejected an appellant's attempt to extend the D.C. Circuit's opinion in *Al-Nashiri* to Judge Spath's service as a military judge in a court-martial. 2020 CCA LEXIS 117 (A.F. Ct. Crim. App. 15 Apr. 2020) (unpub. op.), *pet. filed*, No. 20-0336/AF (C.A.A.F. 29 Jul. 2020). The *Synder* appellant argued that Judge Spath should have recused himself in the appellant's court-martial because his "'flaunting' of his experience as a judge advocate and military judge in his job application [as an immigration job with the EOIR] was disqualifying." *Id*. at *59. In support of this argument that Judge Spath was disqualified, the *Synder* appellant claimed that "Judge Spath excluded

two attachments that referenced sex offender registration consequences so as not to jeopardize his prospective DoJ employment; and . . . denied [a] motion for a continuance because he was clearing his docket in preparation to begin his immigration judge duties." *Id*. The AFCCA found that Judge Spath was not disqualified based on his job application with the EOIR because:

> The DoJ was not a party to [the] [a]ppellant's trial and did not have an identifiable interest in its result, nor was the Attorney General or anyone in the DoJ a participant. Neither the DoJ nor the Attorney General had a close association with military courts-martial generally, or in [the] [a]ppellant's case specifically.

Id. at *60. The AFCCA further rejected the *Synder* appellant's attempt to tie Judge Spath's employment application to his exclusion of two attachments that referenced sex offender registration—specifically, "SORNA, which the DoJ has a role in overseeing"—because the connection between the two was "tenuous." *Id*. at *61. The AFCCA found that there was "no reason to believe a DoJ hiring official would hear about the ruling and be pleased or displeased or that Judge Spath believed a DoJ hiring official would be aware of his ruling or that it would be any matter of consequence." *Id*. The AFCCA also rejected the notion that Judge Spath denied the continuance "for personal reasons or that an objective observer knowing the facts would conclude that he did. No evidence or reasonable inference suggests that Judge Spath was under pressure to move [the *Synder* a]ppellant's case hurriedly so that he could retire." *Id*. at 62.

For the same reasons the AFCCA concluded Judge Spath was not disqualified from the *Synder* appellant's court-martial, so too should this court with respect to the military judge in petitioner's court-martial. "There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001) (citation omitted). Petitioner has not overcome this presumption because an objective observer knowing all of the facts and circumstances would not question the military judge's impartiality based on his application as an immigration judge with the EOIR while acting on petitioner's 17 October 2017 UCI motion, and there is no evidence that the military judge had an interest that could be substantially affected by the outcome of the proceeding. R.C.M. 902(a), 902(b)(5)(B).

Like in *Synder*, the military judge's prospective employer was not a party to petitioner's case. Petitioner fundamentally misunderstands the nature of the military judge's prospective employer, the EOIR. The EOIR is a sub-organization of the Department of Justice (DOJ) and is responsible for adjudicating immigration cases, not military justice cases. Executive Office for Immigration Review, *About the Office*, https://www.justice.gov/eoir/about-office (last visited 31 Oct. 2020). Unlike Article III judges, immigration judges in the EOIR are not appointed or

supervised by the President. Rather, they are appointed by the Attorney General and directly supervised by the Director of EOIR. Immigration Judges, 8 C.F.R. § 1003.10(a) (2014); *see also* 8 U.S.C. § 1101(b)(4) (noting that immigration judges are appointed by the Attorney General); Executive Office for Immigration Review, *Office of the Director*, https://www.justice.gov/eoir/office-of-the-director (last visited 31 Oct. 2020) ("EOIR is headed by a Director who is responsible for the supervision of . . . all agency personnel in the execution of their duties in accordance with 8 CFR Part 1003.").[7] Nor is the President involved in any way in the hiring of immigration judges.[8] The EOIR, DOJ, and Attorney General were not a party to petitioner's court-martial, nor did were they in any way implicated in

[7] Although they are supervised by the Director, EOIR, immigration judges are required to exercise their own independent judgment in the execution of their duties. 8 C.F.R. § 1003.10(b). ("In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases."). Decisions by immigration judges "are subject to review by the Board of Immigration Appeals. . . ." 8 C.F.R. § 1003.10(c).

[8] Although immigrations judges are ultimately appointed by the Attorney General, they go through an extensive hiring process consisting of two interviews before different interview committees—an initial panel composed of three EOIR supervisory immigration judges and the Finalist Panel composed of "the Assistant Attorney General of Administration (AAG/A) (or a career-SES appointed employee designated by him), an employee designated by the Deputy Attorney General, and the EOIR director (or other senior EOIR official designated by the Director)"—neither of which include the Attorney General or President. Memorandum from James R. McHenry III, Director [EOIR] to the Attorney General, Subject: Immigration Judge and Appellate Immigration Judge Hiring Process, *available at* https://www.justice.gov/eoir/page/file/1280781/download.

petitioner's UCI motions. Furthermore, petitioner's allegation of apparent UCI bore absolutely no nexus to the work performed by the EOIR.

Given that the nexus between the President and the EOIR is non-existent, this court should reject petitioner's simplistic characterization of the military judge as seeking employment with "President Trump's Department of Justice." (Pet'r Br. 6). The D.C. Circuit in *Al-Nashiri* described the immigration judge position as being with "*the Department of Justice's* Executive Office of Immigration Review." *Al-Nashiri*, 921 F.3d at 227 (emphasis added). The President does not run the DOJ; rather, the organization is "head[ed]" by the Attorney General, who is nominated by the President and confirmed with the advice and consent of the Senate. 28 U.S.C. § 503 (1966). The EOIR, situated within the DOJ, is managed by an internal director who is neither the President nor the Attorney General. *See supra* p. 13–14.

Given these facts concerning the EOIR, this court should find that the military judge was not disqualified from presiding over petitioner's case because the EOIR was not a party to petitioner's court-martial and had no connection to the issues raised in his court-martial. It is simply unreasonable to characterize President Trump as petitioner's prospective employer, or to expand the EOIR as a party to include President Trump as petitioner wishes. An objective, reasonable person would not believe that the military judge's impartiality was in jeopardy

based on these circumstances.[9] Accordingly, petitioner fails to establish any error, let alone plain and obvious error, with respect to the military judge's impartiality or qualification to preside over his court-martial.[10]

Even if this court finds that the military judge was disqualified under R.C.M. 902, petitioner is not entitled to relief because the error did not materially prejudice him under Article 59(a), UCMJ. *See Martinez*, 70 M.J. at 159-60 (testing the disqualification of a military judge raised on appeal for prejudice). Additionally, petitioner fails to demonstrate that dismissal with prejudice—let alone dismissal

---

[9] Petitioner's further attempt to equate the military judge to Judge Spath because of certain rulings he made is unconvincing. (Pet'r Br. 7 n.1). The military judge issued his rulings on Defense Appellate Exhibits (DAE) 34, 65, and 66 before the EOIR published the job announcement on 25 September 2017. (Gov't App. Ex. A; Appendix). The military judge ruled on DAE 94—the defense motion to dismiss for unreasonable multiplication of charges—on the day of petitioner's guilty plea. (Appendix). The military judge found that the charges were not unreasonably multiplied for finding, but were for sentencing and that petitioner's sentence "will be limited to the maximum punishment for" the Article 99, UCMJ, offense. (Appendix). On direct review, this court found no error with respect to that ruling. *Bergdahl*, 79 M.J. at 517 n.2. Although the military judge issued his rulings on DAE 97—motion to dismiss for lack of personal jurisdiction—and 98—motion to dismiss Charge I—on 2 October 2017 (Appendix), petitioner did not challenge these rulings on appeal. Unlike the rulings by Judge Spath in *Al-Nashiri* which may have caused a "reasonable observer might wonder whether the judge had done something worth concealing," *Al-Nashiri*, 921 F.3d at 237, the rulings in no way suggest that the military judge was impartial.

[10] The government believes that further fact-finding as to the timeline of the military judge's employment process with the EOIR is neither relevant nor necessary given that the EOIR was not a party to the proceeding or implicated in the UCI motions concerning Senator McCain or President Trump. To the extent this court believes that such details are necessary to the disposition of the petition, this court may order the government to obtain an affidavit from the military judge.

without prejudice—is warranted under the three-part test in *Liljeberg v. Health Servs. Acquisition Corp*: "[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." 486 U.S. 847, 862 (1988). The analysis for the third *Liljeberg* factor is "similar to the standard applied in the initial R.C.M. 902(a) analysis." *Martinez*, 70 M.J. at 159–60. This analysis, however, is broader because this court does not limit its review "to facts relevant to recusal, but rather review the entire proceedings, to include any post-trial proceeding, the convening authority action, the action of the Court of Criminal Appeals, or other facts relevant to the *Liljeberg* test." *Id.*

A remedy is not required to preserve confidence in the military justice system in this case should this court find that the military judge was disqualified. Even if the military judge applied for the position with the EOIR immediately before petitioner's guilty plea on 16 October 2017, any risk the public would perceive injustice as to the finding of petitioner's guilt was non-existent, or at a minimum, considerably diminished, because petitioner pleaded guilty and the military judge acquitted him of the only contested portion of the case.[11] There is

[11] Petitioner pleaded guilty to a single day of desertion instead of the entire charged period approximating five years. (Appendix). The government attempted to prove the full five-year period of desertion, but the military judge acquitted petitioner as to that period. (Appendix).

no "risk of injustice to the parties" with respect to the sentencing phase of petitioner's court-martial because: 1) the military judge gave petitioner relief in his post-guilty plea UCI ruling by considering the President's comments as evidence in mitigation; 2) the military judge rejected the far more severe punishment argued for by the trial counsel[12] and by the President; and 3) petitioner received the sentence he requested. (Appendix). These same facts also support a conclusion that petitioner did not suffer material prejudice under Article 59(a), UCMJ. As the CAAF observed:

> [I]t is essential to note that the conduct [petitioner] engaged in, and the charges to which he pleaded guilty, were very serious offenses for which either a life sentence or the death penalty were authorized punishments. See Articles 85(c), 99(9), UCMJ. Moreover, these offenses were anathema to the military and its mission. And importantly, as a direct and foreseeable consequence of [petitioner's] misconduct, other members of the armed forces were injured—some severely—while seeking to find and rescue [petitioner]. . . . In light of these facts, it is wholly unrealistic to believe there was any scenario where: (1) upon his return to the United States, [petitioner] would not have been held accountable at a general court-martial for his offenses (to which he voluntarily pleaded guilty); and (2) [petitioner] would not have received the dishonorable discharge he himself subsequently requested.

Bergdahl, 80 M.J. at 233.

[12] The trial counsel requested the military judge sentence petitioner to fourteen years of confinement and a punitive discharge, which was considerably less than the maximum punishment. (Appendix).

Given the unique circumstances of this case, it is also not necessary to reverse petitioner's conviction to preserve justice in other cases. *Id.* at 245 (Stucky, C.J., concurring in part and dissenting in part) ("This case is unique in modern American military jurisprudence."). Finally, reversal of petitioner's conviction is not required to avoid undermining the public's confidence in the judicial process based on the sole fact of the military judge's post-retirement employment with EOIR given: 1) petitioner pleaded guilty; 2) the military judge acquitted him of the only contested portion of the case; and 3) the military judge sentenced petitioner in accordance with his request. Accordingly, reversal or reversal with prejudice is not warranted should this court find that the military judge was disqualified.

2. There was no apparent UCI in this case.

During his court-martial and on appeal, petitioner alleged that statements made by Senator McCain and President Trump amounted to apparent UCI that warranted his case be dismissed with prejudice. *See generally Bergdahl*, 79 M.J. 512; *Bergdahl*, 80 M.J. 230. To overcome a prima facie case of apparent command influence, the government must prove "beyond a reasonable doubt that the [UCI] did not place an intolerable strain upon the public perception's of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would [*not*] harbor a significant doubt about

the fairness of the proceeding." *Bergdahl*, 80 M.J. at 234 (internal quotations and citations omitted) (alteration and emphasis in original). Here, the fact that the military judge submitted a job application with the EOIR on the day of petitioner's guilty plea does nothing to impact the CAAF's conclusion that "a finding of apparent [UCI] is not warranted [in light of Senator McCain and President Trump's comments] because there was no intolerable strain on the military justice system." *Id*. at 239.

The CAAF primarily relied on two facts when it concluded that "no claim of unfairness regarding the guilty plea phase of the court-martial proceedings can prevail with respect to the findings portion." *Id*. at 242. First, the CAAF emphasized that petitioner pleaded guilty:

> [I]t cannot be emphasized strongly enough that [petitioner] *chose to plead guilty* to the offenses of desertion with intent to shirk hazardous duty and misbehavior before the enemy. In doing so, he explicitly agreed in open court that he was voluntarily pleading guilty *because he was in fact guilty* and not for any other reason.

Id. Second, the CAAF noted that petitioner "raised to the military judge the issue of apparent [UCI], the military judge offered [petitioner] the opportunity to *withdraw his plea of guilty*, and [petitioner] declined to do so." *Id*.

In finding that there was no apparent UCI with respect to sentencing, the CAAF found that "it would be difficult to discern how an impartial observer would

conclude that" petitioner's sentence was unfair given the serious offenses to which petitioner pleaded guilty, the evidence in aggravation, and petitioner's own request for a dishonorable discharge, and the military judge's subsequent imposition of that specific punishment on him. *Id.* The CAAF also noted that:

> that despite the sensational nature of this case, despite the public calls for the lengthy imprisonment of [petitioner], despite Senator McCain's threat that he would hold a hearing if [petitioner] did not receive a sentence to his liking, and despite the Commander in Chief's ratification of his statements that [petitioner] was a traitor who should be severely punished, the military judge imposed on [petitioner] *no prison time whatsoever*. Thus, an objective, disinterested observer would conclude that rather than being swayed by outside forces, the military judge was notably impervious to them.

Id. at 35-36 (emphasis in original).

Plainly stated, petitioner's assertion that the military's application to be an immigration judge with the EOIR on the day of his guilty plea impugns the CAAF's finding of no apparent UCI with respect to his guilty plea or sentence is nonsensical.[13] That the military judge submitted the job application or did not

[13] Given that petitioner now challenges the CAAF's finding that there was no apparent UCI based on actions by the military judge being "the straw that [broke] the camel's back," (Pet'r Br. 11), the government solely focuses on alleged apparent UCI at the phases of the proceeding involving the military judge: the guilty plea and sentencing phases. Petitioner's claim does nothing to disrupt the CAAF's finding of no apparent UCI with respect to the investigative, preferral, referral, convening authority action or appellate review of the case. *Bergdahl*, 80 M.J. at 239–44.

disclose that he did has no bearing on whether there was apparent UCI in this case. In the context of the allegations of apparent UCI by Senator McCain and President Trump, none of the military judge's actions contribute to a finding of substantial doubt about the fairness of petitioner's trial. Petitioner's suggestion that the CAAF's characterization of the military judge, an active duty Army officer, as "impervious" was in error because of his application for employment with a sub-agency (EOIR) of an executive agency (DOJ) that is overseen by an internal director (Director, EOIR) is untenable. The military judge did not apply to work for President Trump. A conclusion that the military judge's job application with the EOIR[14] subjected him to "outside influence" by President is even less convincing than the failed bare assertion that there was apparent unlawful influence on the military judge by virtue of his position as an Army officer and the

[14] Petitioner places great significance on the fact that the military judge used his 24 February 2017 UCI ruling as the writing sample in his application, but disregards the fact that the only other time the military judge mentioned petitioner's case was in his explanation of "[e]xperience handling complex legal issues." (Pet'r App'x C). In that section of the application, the military detailed numerous other courts-martial he presided over; the military judge last referred to petitioner's case as a high-profile case with "many complex issues" that he was currently presiding over, and therefore could not "give details about the issues or parties involved." (Pet'r App'x C). Immediately prior to mentioning petitioner's case, the military judge emphasized that he has "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." (Pet'r App'x C). Petitioner's case is not mentioned at all on the military judge's resume. (Pet'r App'x C).

President as Commander-in-Chief.[15] *See Bergdahl*, 79 M.J. at 518; *Bergdahl*, 80 M.J. at 235-36; (Appendix).

[15] Petitioner's insinuation that the military judge misled petitioner or was not candid about his post-retirement plans is taken out of context and completely speculative. (Pet'r Br. 11). In the military judge's ruling on petitioner's 17 October 2017 UCI motion, the military judge stated when discussing petitioner's election to be tried by military judge alone:

> Under the UCMJ, that means that I am the decider of law, finder of fact and sentencing authority in this case. I have been on active duty for over 29 years. My mandatory retirement date is 1 November 2018. I have been a military judge for nearly 13 years. I was promoted to Colonel in April 2007. I have no hope of or ambition for promotion beyond my current rank. My only motivation as a military judge is and always has been to be fair and impartial and to do justice in every case. I am completely unaffected by any opinions President Trump may have about SGT Bergdahl.

Bergdahl, 79 M.J. at 520 n.9. In the same ruling, when discussing his finding that the President's comment did not place an intolerable strain on the public perception's of the military justice system, the military judge noted, "The evidence establishes beyond a reasonable doubt that I am uninfluenced by the President's comments and more importantly, that I hold no fear of any repercussions from anyone if they do not agree with my sentence in this case." *Id*. at 523 n.17. These statements occurred in the context of petitioner's allegation that the military judge was under pressure from the President—as Commander-in-Chief—to make certain decisions against petitioner and to please the President because of potential consequences to his military career. (Appendix). The military judge's subjective assessment that he is unaffected by President Trump's opinions is a further testament to the independence exercised by the military judge even in the context of his pending application of the EOIR, an application which informs his prospective employer that the military judge was so independent that he publicly castigated the sitting President of the United States. (Pet'r App'x C). Furthermore, the military judge's statement during voir dire on 23 October 2017 that he "does not expect to go anywhere but back home as soon as the Army is

If the military judge's application with the EOIR had any nexus to the petitioner's UCI allegations against President Trump, one would expect that the military judge would condone the President's comments. He did not. In fact, in the very writing sample the military submitted with his application—his 24 February 2017 UCI ruling concerning the President's campaign comments—he publicly condemned the President's words and actions as inappropriate. Far from approving the President's comments, the ruling highlighted the military judge's belief that the President's campaign comments were "troubling[,]" "disturbing[,]" and "disappointing." (Pet'r App'x C). The military judge "recognize[d] the problematic potential created by" the President's "conclusive and disparaging comments" and indicated that he would "take special care to ensure the comments [did] . . . not invade the trial." (Pet'r App'x C). The military judge put words into action when acting on petitioner's 17 October 2017 UCI motion—after the he submitted his application—when he gave a form of relief based on the President's 16 October 2017 Rose Garden comment despite finding no apparent UCI. (Appendix). The military judge offered petitioner the opportunity to withdraw his guilty plea and admitted all of the President's comments *as mitigation* during sentencing. *Bergdahl*, 79 M.J. at 520.

---

done with" him, (Pet'r App'x F), is not incongruent with the act of merely submitting an employment application when there has been no offer or acceptance of employment.

One would expect that the military judge would find the petitioner guilty of the contested portions of the charges if he was not impervious to the President's comments or, as petitioner alludes to, somehow took action favorable to President Trump for purposes of currying favor with the EOIR. He did not. Petitioner was found guilty of desertion with the intent to shirk hazardous duty and misbehavior before the enemy because he *pleaded guilty*. "In doing so, he explicitly agreed in open court that he was voluntarily pleading guilty *because he was in fact guilty* and not for any other reason." *Bergdahl*, 80 M.J. at 242 (emphasis in original). On the same day the military judge submitted his application—and after having been informed of the President's views by petitioner's previous UCI motion concerning his campaign comments—the military judge acquitted petitioner of the sole portion of the charges that he contested. (Appendix). Based on petitioner's own words during his plea colloquy, "no impartial observer would conclude that it was the comments made by the President of the United States and/or by" Senator McCain "that caused [petitioner] to pled guilty; rather it was the strength of the Government's evidence that caused him to take that step." *Id*. The military judge's actions with respect to the guilty plea phase of petitioner's court-martial dispel any perception that petitioner's court-martial was unfair in light of the President's comments simply because of the additional fact that the military judge applied for employment with the EOIR.

Further, one would also expect the military judge to harshly sentence petitioner in accordance with the President's desires—or at least impose a sentence approximating that requested by the government—if he was not impervious to the President's comments. He did not. Rather, the military judge, after a seven-hour deliberation, adjudged a sentence that included a dishonorable discharge and no confinement—precisely in accordance with petitioner's request and completely in disaccord with the punishment suggested by the President. (Appendix). As the CAAF noted, petitioner:

> [P]leaded guilty to deserting his unit with intent to shirk hazardous duty and of engaging in misbehavior before the enemy; American servicemembers were injured searching for [petitioner] after he chose to desert his post in a combat zone; the United States government was required to exchange five members of the Taliban who had been held at the U.S. detention facility in Guantanamo Bay, Cuba, in order to secure [petitioner's] release; and yet the military judge imposed as a sentence *only* a dishonorable discharge, a reduction in rank, and partial forfeitures of pay after [petitioner] specifically asked to receive a dishonorable discharge.

Bergdahl, 80 M.J. at 244 (emphasis added). The military judge's sentence has nothing to do with the President's comments or desires, or the military judge's application with the EOIR, but was "based solely on the serious offenses to which [petitioner] pleaded guilty and on the facts established during the Government's case in aggravation," such that even petitioner "recognized he was deserving of punishment when he asked to have a dishonorable discharge imposed upon him."

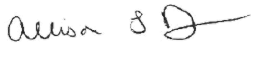
Id. at 243 ("'*But punishment is warranted for his actions, and the defense would request that you give Sergeant Bergdahl a dishonorable discharge . . . .*'") (quoting defense counsel). Eleven months later, despite the military judge's condemnation of the President's comments and imposition of a sentence the President called a "complete and total disgrace," *id.* at 238, the military judge began his employment with the EOIR. (Pet'r App'x C).

These circumstances reinforce the military judge's commendable judicial independence and dispel the appearance of any association between his actions in petitioner's case and his future employment prospects with the EOIR. Based on these circumstances, this court should reject petitioner's incredulous suggestion that an "objective, disinterested observer, fully informed of all the facts and circumstances," including the military judge's employment application, would "harbor a significant doubt about the fairness of the proceeding[,]" given the unique facts of this case. *Boyce*, 76 M.J. at 249. There was no apparent UCI in this case.

Conclusion

This court should deny the petition because petitioner fails to meet the threshold requirements for a writ of coram nobis and cannot demonstrate that his right to relief is clear and indisputable.

WHEREFORE, the government respectfully requests this court deny the petition for a writ of coram nobis.



ALLISON L. ROWLEY
Captain, Judge Advocate
Branch Chief, Government Appellate Division

JONATHAN S. REINER
Major, Judge Advocate
Appellate Counsel, Government Appellate Division

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government Appellate Division

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	APPELLANT'S PETITION
	)	FOR RECONSIDERATION
Appellee,	)	
	)	
v.	)	
	)	Crim. App. Dkt. No.
ROBERT B. BERGDAHL	)	ARMY 20170582
Sergeant (E-5)	)	
U.S. Army,	)	USCA Dkt. No. 19-0406/AR
	)	
Appellant.	)	September 7, 2020

TO THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES:

Index

Table of Cases, Statutes, and Other Authorities

Cases:

Supreme Court of the United States:

U.S. Court of Appeals for the Armed Forces:

Service Courts of Criminal Appeals:

Statutes:

Rules:

Other Authorities:

Petition for Reconsideration

Where an appellate court is closely divided on an issue "of the utmost concern" and there is reason to believe its initial decision was erroneous, reconsideration is warranted. *E.g., Reid v. Covert*, 354 U.S. 1, 3 (1957) (on rehearing). This is such a case. Pursuant to Rule 31, Sergeant Bergdahl respectfully requests reconsideration because the Opinion of the Court blurs the distinction between actual and apparent UCI; imputes to the observer knowledge far beyond that of a member of the general public; relies on matters neither asserted nor proven by the government; overlooks or discounts evidence that detracts from the Court's conclusion; and does nothing to deter political UCI. Because the Court overlooked or misapprehended the significant matters set forth below, reconsideration is warranted.

The decision seems to hold that this *cannot* be a case of apparent UCI because it's not a case of actual UCI: "[S]imply stated, it was the totality of the circumstances surrounding Appellant's misconduct rather than any outside influences that foreordained the Army's handling and disposition of the case." Plurality op. at 3. This is unquestionably an assessment of actual UCI. "*Therefore*, an objective, disinterested observer would not harbor any significant doubts about the ultimate fairness of these court-martial proceedings." *Id.* (emphasis added). The one follows from the other ("therefore") only by disregarding the difference in the tests for actual and apparent UCI.

I

THE DECISION MISAPPLIES THE TEST FOR APPARENT UCI

A

The legal standard

The legal standard 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. *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017). Apparent UCI will be found if that observer "might well be left with the impression," *United States v. Salyer*, 72 M.J. 415, 427 (C.A.A.F. 2013), that the system had been interfered with. *Cf. United States v. Calhoun*, 39 M.J. 485, 488 (C.A.A.F. 1998) ("Similarly, we decline to enshrine a right to private civilian counsel paid for by the Government unless an objective, disinterested observer, with knowledge of all the facts, *could reasonably conclude* that there was at least an appearance of unlawful command influence over all military and other government defense counsel.") (emphasis added).

What the observer would or would not conclude on the basis of any particular set of facts obviously cannot be determined with "technical precision." *United States v. Cruz*, 20 M.J. 873, 882 (A.C.M.R. 1985). One guidepost that reduces the danger that resolution of this critical issue may turn into a mere show of hands is the requirement that the government disprove beyond a reasonable doubt that the observer

would harbor a significant doubt. If the government fails to do so, the Court must find that apparent UCI occurred and proceed to the question of relief. "Any doubt must be resolved in favor of the accused," *United States v. Johnson*, 14 C.M.A. 548, 551, 34 C.M.R. 328, 331 (1964) (citing *United States v. Kitchens*, 12 C.M.A. 589, 31 C.M.R. 175 (1961)).

Three appellate judges have concluded that the government did not carry its burden beyond a reasonable doubt: one on the Army Court, *see United States v. Bergdahl*, 79 M.J. 512, 531 (A. Ct. Crim. App. 2019) (Ewing, J., concurring in part & dissenting in part), and two here. This is not a close case. But even if it were, the very fact that 40 percent of the Judges of this Court remain unpersuaded, coupled with the absence of any suggestion that the dissenting opinions suffer from some glaring error, militates against a finding that the government carried its high burden. *Cf. Scott v. Harris*, 550 U.S. 372, 396 (2007) (Stevens, J., dissenting) ("If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events.").

B

The claimed seriousness of Sergeant Bergdahl's offense and the contrast between the maximum punishment and the sentence relate to relief, not to whether apparent UCI occurred

In the past, the Court has been at pains to distinguish between actual and apparent UCI. *See United States v. Boyce*, 76 M.J. at 247-48; *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006). The decision blurs that distinction. This is apparent not only from the threshold language on page 3 (quoted at page 1 *supra*) and the passages quoted in the margin,[1] but also from the stress the decision lays on that fact that Sergeant Bergdahl pleaded to "very serious offenses" but was not sentenced to confinement. *See* Plurality op. at 3-4, 20 ("cannot be emphasized strongly enough"), 22-24.

---

[1] The following passages also clearly sound in actual UCI:

> [T]he record reflects that the decision-making at each stage of Appellant's court-martial proceedings was unaffected by any outside influences. Therefore, we are confident that an "objective, disinterested observer, fully informed of all the facts and circumstances would [not] harbor a significant about the fairness of these proceedings."

Plurality op. at 25 (citation omitted).

> Ultimately, however, this mitigation evidence does not overcome our firm conviction that the sentence adjudged in this case had nothing to do with the comments made by Senator McCain or President Trump and was instead based solely on the serious offenses to which Appellant pleaded guilty and on the facts established during the Government's case in aggravation.

Id. at 22-23.

There are two major problems with this. First, the seriousness of Sergeant Bergdahl's offenses (which involved a single act charged two different ways) is not fairly judged in the abstract according to the permissible maximum punishment, but in light of the facts and circumstances, including his motives, which were anything but malevolent. *See* Plurality op. at 21 ("good, albeit misguided motives"). Considering the fact that Sergeant Charles R. Jenkins, who, unlike Sergeant Bergdahl, not only defected in order to avoid combat in Vietnam, but collaborated with the enemy by appearing in propaganda leaflets and films and teaching English to North Korean military cadets, and in time enjoyed such benefits as being able to gain North Korean citizenship, marry, and raise a family, was jailed for only 30 days, of which he served 25, *see* Austin Ramzy, *Charles Jenkins, 77, U.S. Soldier Who Regretted Fleeing to North Korea, Dies*, N.Y. TIMES, Dec. 12, 2017, *permalink* https://nyti.ms/2l1oWLI, use of the authorized maximum punishment as the benchmark for determining the seriousness of Sergeant Bergdahl's offenses unfairly distorts the analysis. As the Court noted, "there is simply no evidence that Appellant sought to defect to or otherwise aid the Taliban." Plurality op. at 11.

Second, the offenses of which Sergeant Bergdahl was convicted were no more serious than the rape of which Airman Boyce was convicted. That rape occurred in February 2011. *United States v. Boyce*, ACM 38673, 2016 WL1276663 *1 (A.F. Ct. Crim. App. 2016). At that time, the permissible maximum punishment for rape was

"death or such other punishment as a court-martial may direct." *See Manual for Courts-Martial, United States* (2019 ed.), at A21-11 (former ¶ 45*f*(1)). As the plurality notes, death is an authorized punishment for misbehavior before the enemy, so this case and *Boyce* involved the same degree of seriousness. Neither was referred as capital.

This fact, and the further fact that Sergeant Bergdahl pled guilty while Airman Boyce's case was contested, make it impossible to reconcile the disparate outcomes of the two cases as to whether the government had carried its burden of proof in the face of a claim of apparent UCI. Moreover, the UCI here was far more dramatic, came from a higher official, and unlike *Boyce*, *see* 76 M.J. at 255 (Ryan, J., dissenting), was aimed at this particular accused and this particular case.

What is more, the plurality's stress on the seriousness of the offenses does not sound in apparent UCI. Rather, it implicitly addressed the distinct question of whether he received a windfall when he was sentenced. The parties have briefed and argued whether such a windfall did occur, and we have nothing to add beyond noting that in the court below Judge Ewing correctly observed that "the military judge's ultimate sentence was hardly a windfall." 79 M.J. at 534.

Windfall is certainly a factor, albeit not a dispositive one, to be taken into account fashioning relief. But the question of relief–and hence, of windfall–only arises once the Court has made a finding that apparent UCI occurred. To rely so heavily, even if not *in haec verba*, on the notion that Sergeant Bergdahl somehow "made out like a bandit" in deciding the *antecedent* question whether apparent UCI had even occurred puts the cart before the horse.

Once the alleged seriousness of the offense and the alleged leniency of the sentence are removed from the equation, it becomes even clearer that the government did not carry its burden of proof.

C

What knowledge is imputable?

The observer is deemed to be "a reasonable member of the public," *United States v. Lewis*, 63 M.J. at 415; *United States v. Salyer*, 72 M.J. at 423; *see also United States v. Boyce*, 76 M.J. at 252, rather than a member of the armed forces, a veteran, an attorney, a judge, or anyone else with specialized knowledge. At oral argument, opposing counsel correctly stated that the facts and circumstances to be imputed, apart from the facts of the case, are the "things that are in the [*sic*] general knowledge." Hearing Audio at 39:00-40:05. The decision departs from that standard, relying on matters that do not qualify and overlooking or discounting others that do. Because of the stakes in terms of public confidence and the personal involvement of

the country's highest public official, it is important that the most exacting scrutiny be applied in determining whether the government proved its case beyond a reasonable doubt.

1

The Court's Analysis is Over-Inclusive

In support of its determination that the observer would not harbor a significant doubt as to the fairness of the proceedings, the decision relies on propositions that impute to that observer a variety of arcane propositions that not only cannot be so imputed but also could not be taken judicial notice of by a judge trained in military law.

(a)

For example, the plurality claims, at 16, that "any observer of the military justice system would realize that it is not uncommon for a GCMCA to refer a case to a court-martial in a manner contrary to the recommendation of the Article 32, UCMJ, preliminary hearing officer, even in those instances where there is not a scintilla of unlawful command influence." It cites no authority for the assertion, which is "inside baseball" utterly unknown to the vast majority of Americans, including veterans, and indeed, even non-lawyer military personnel. *See United States v. Cruz, supra* (court "takes into account the unfamiliarity of the public with the military justice system").

This element of the plurality's analysis is also called into question by the changes Congress made in Article 32 in 2013 and 2016; however few Americans know about the old Article 32, even fewer conceivably know about the new one—much less the likelihood under either that a convening authority would reject the investigating or preliminary hearing officer's recommendation. As a result, to permit a proposition such as this to play any role in a matter as to which the government has the burden of proof beyond a reasonable doubt is unjustifiable. Its inclusion "after long consideration," Plurality op. at 16, of what is said to be a "close question," *id.* at 15, suggests that the government's case does not satisfy that burden. Significantly, and in a way to its credit, the government never argued the point made by the plurality.

(b)

Relatedly, the plurality writes, at 16, that "GEN Abrams stated unequivocally in a sworn affidavit that his decisions in this case were 'not impacted by any outside influence.'" It is certainly the case that he signed such an affidavit, but he did so well before the trial was concluded. As a result, his assertion gains the government nothing with respect to his refusal to grant post-trial clemency. His prospective insistence that he would continue to disregard outside influences is merely bravado of little or no probative value with respect to *later* events such as his Commander in Chief's announcement that the sentence was "a complete and total disgrace to our Country

and to our Military." As Judge Ewing observed, GEN Abrams's prior affidavit and testimony "do not project forward with enough force to meet the government's high burden following the President's day-of-sentencing tweet." 79 M.J. at 533.

(c)

In further support of its conclusion that an observer would not harbor a significant doubt (and making yet another claim the government never made), the plurality relies on what the convening authority *would have known*. Thus, it notes, at 18, that "although the preliminary hearing officer was not aware of [the] casualties, GEN Abrams served in military positions where he would be privy to such information." But the opinion cites nothing for the proposition that he was in fact aware of this information. Rather, it lays out a variety of circumstances that suggest that he might have known of the casualties. It asks too much of the observer that she *would* know, as a lay member of the public, that he *did* know of the casualties. To impute to the observer "recogni[tion] that GEN Abrams had ready access to this casualty information at the time he decided to send Appellant's case to a general court-martial rather than to the more limited special court-martial recommended by the Article 32, UCMJ, preliminary hearing officer," Plurality op. at 18-19, is to stretch the inquiry past the breaking point.

Perhaps recognizing the infirmity of its approach, the decision posits an alternative argument, also not advanced, much less proven, by the government:

> Even if GEN Abrams had no specific knowledge of any casualties at the time he referred the charges to a general court-martial, he was aware of the following: (1) United States Armed Forces conducted a massive, long-term manhunt for Appellant in hostile territory in Afghanistan; (2) during a search of that scale and in that location, it was likely that at least some casualties occurred; (3) the Article 32, UCMJ, preliminary hearing officer specifically noted in his report that evidence about casualties should be developed prior to making "a final decision on the disposition o[f] SGT Bergdahl's case"; (4) a referral of charges to a general court-martial instead of a special court-martial merely increases the *potential* maximum punishment that can be imposed on an accused and is not a mandate of a minimum punishment; and (5) evidence about casualties could be presented at trial or sentencing, so by referring Appellant's case to a general court-martial, GEN Abrams merely would be empowering the court-martial panel or the military judge to make an appropriate final disposition at that later juncture of the case. Thus, GEN Abrams's referral decision is consistent with the Article 32, UCMJ, preliminary hearing officer's recommendation.

Plurality op. at 19 n.15 (numbering and emphasis in original).

This alternative claim is unavailing because none of these "facts" would be known to the person in the street, and the fourth and fifth would not be known even by most active duty and Reserve Component personnel.[2]

---

[2] The fifth point is also difficult to reconcile with the plurality's emphasis elsewhere on the maximum punishment and the seriousness of the charges, since it turns on the notion that, after all, it remained up to the sentencing authority to adjudge a sentence. The Court cannot have its cake and eat it by relying on both propositions to support its conclusion that the government carried its burden of proof as to what an observer would conclude.

(d)

At pages 19-20, the plurality imputes to the observer a complicated chain of propositions that goes even further beyond any imputation this Court has approved in the past. It imputes to the lay civilian knowledge about [1] FORSCOM; [2] GEN Abrams's role as commander of FORSCOM; [3] the mission as described in a 1973 hearing before a subcommittee of the House Committee on Appropriations; and [4] the role of morale in achieving unit cohesion and other goals, as observed in a 1986 decision of the Supreme Court of which few members of the general public have ever heard.

From these premises, the observer is deemed to "recognize" [5] that "if GEN Abrams had chosen to refer Appellant's case to a special court-martial that was not even empowered to adjudge a bad-conduct discharge, his decision would have been devastating to military morale."

Pressing on, the plurality reasons, at 20, that—

> After all, [6] members of the armed forces *would have realized* that GEN Abrams made that referral decision despite the fact that he knew there was overwhelming evidence that Appellant had deserted in a combat zone and had engaged in misbehavior before the enemy, and [7] despite the fact that he knew that other servicemembers were injured or were likely injured in the course of the military's efforts to rescue Appellant from the consequences of his own misconduct. [Bracketed numbering and emphasis added.]

Proposition [6] is an imputation within an imputation: the observer would know something that in turn military personnel would know—*both without proof of*

any kind. Both [6] and [7] are assertions the government did not make, and it is not clear that it could prove them since it never tried to do so. Information about rescue efforts is classified and obviously not imputable to a member of the general public.

(e)

Repeatedly referring to the seriousness of the offenses, the plurality reasons that the observer would have expected the judgment in this case. The reality is that an objective observer would have wanted to know all of the circumstances, extenuating and mitigating as well as aggravating, before making a judgment. An observer who learned that the preliminary hearing officer had recommended a more lenient disposition would have good cause to wonder whether political pressure was the cause.

The decision notes that morale in the armed forces, together with good order and discipline, would demand consequences for the seriousness of the crimes. Here the plurality overlooked a significant point.[3] That morale demands a dishonorable discharge for a serious offense depends on the premise that such an offense had been committed. But even if that premise were correct–that good order and discipline depend on a perception of justice–then morale would be *deeply* offended by heaping

---

[3] There is another difficulty with the reliance on morale in the chain syllogism: it effectively shifts the focus from what a member of the general public would make of the circumstances to what a member of the armed forces would make of them.

charges on an accused under external pressure despite the presence of extraordinary mitigating factors.

In charging duplicative offenses, the government overreached, and it involves no stretch of the imagination to conclude that the observer would grasp that. She would have good reason to suspect that the government, in this highly politicized case, yielded to pressure and ratcheted a simple one-day UA into two offenses contrary to R.C.M. 307(c)(4), sent the case to a distant hand-picked command with which the accused had no relationship, and dedicated some 50 lawyers to the prosecution, *see* D APP 94, as if Sergeant Bergdahl had committed the crime of the century.

But suppose the fair-minded observer accepts the plurality's observation at 14 n.10 that the policy of not charging returning POWs who did not misbehave in captivity is unsettled. The appearance of *over*charging such a POW—especially one who had endured extraordinary hardship in captivity—under pressure from one of the most powerful figures in the specific part of the Legislative Branch that oversees not merely the armed forces but officer promotions remains inescapable here. In short, the "seriousness of the crimes" is at worst a two-edged sword that contributes nothing to the showing the government needed to make beyond a reasonable doubt.

(f)

The plurality places great weight on Sergeant Bergdahl's pleas, noting that they "cannot be emphasized strongly enough." Plurality op. at 20. But the validity of the pleas was a matter of heated controversy. The fact that the Court denied review on those issues as well as the unreasonable multiplication of charges does not remove them from the universe of matters that, in fairness, may be imputed to the observer under the plurality's excessively wide aperture.[4] Given the legal arcana the decision imputes to the observer for the undeserved benefit of the government, it should have taken the controversy over Sergeant Bergdahl's pleas into account on the *other* side of the equation. It did not do so.

Setting aside whether it is proper to impute knowledge of Sergeant Bergdahl's pleas to the observer without also imputing knowledge of his claim that they were improvident because of incorrect rulings by the military judge, they should have been counted, if anything, in the plus column for Sergeant Bergdahl. Especially given the arcane matters the decision imputes to the observer; it should also have imputed to the observer knowledge that a plea of guilty is a sign of contrition[5] and a

---

[4] Failure to grant review of an issue implies no judgment on the merits. *United States v. McGriff*, 78 M.J. 487 (C.A.A.F. 2019) (per curiam).

[5] The record does not support the assertion, Plurality op. at 21, that "it was the strength of the Government's evidence that caused [Sergeant Bergdahl] to" plead guilty. If the government's case was strong it was because he had voluntarily given

laudable step on the road to rehabilitation. For this reason, even if Sergeant Bergdahl's pleas were deemed to assist the government on the referral issue, they do not do so on the clemency issue. The pleas thus prove to be at worst a wash for purposes of what an observer would conclude as to the fairness of the proceedings.

(g)

Finally, the plurality relies (at 24) on the fact that "the United States government was required to exchange five members of the Taliban who had been held at the U.S. detention facility in Guantanamo Bay, Cuba, in order to secure Appellant's release." The government made no such claim in seeking the defend the decision below, presumably because whether or not Taliban members were released in exchange for Sergeant Bergdahl has no bearing on whether the complete denial of convening authority clemency was "a foregone conclusion." The prisoner exchange triggered a political firestorm almost immediately. Because Sergeant Bergdahl played no role in its negotiation, it cannot be relied on as a factor in validating the failure to afford him any clemency. An informed observer would in any event know that the

---

a full account of his conduct during the 2014 AR 15-6 investigation. He expressed contrition. If anything other than that and his overwhelming–and overwhelmingly understandable–desire (following five years of brutal Taliban captivity) not to be sent to prison can be said to have led him to plead guilty, it was not the strength of the government's case but the denial of his pretrial motions and the politicization of the entire matter. Having preserved his legal objections, there was no reason to withdraw his plea as long as the judge's rulings were intact.

United States brings home its own whenever possible and without punishing those who have not cooperated with the enemy.

* * *

In preparing this Petition, we carefully reviewed the government's briefs here and below as well as the recording of the oral argument. In neither the briefs nor the hearing did the government suggest that the Court should impute to the observer the numerous matters to which we refer here. Because the evidentiary onus was both heavy and on the government, this is fatal.

2

The Court's Analysis is Under-Inclusive

In deciding whether the government carried its high end-stage burden, the Court must consider not only those matters that support the government's no-intolerable-strain UCI defense (for that is what it is), but also those that point in the opposite direction. The decision appears either not to have done so or to have done so incompletely.

(a)

For example, the single paragraph the decision devotes to what the observer would make of the convening authority's failure to grant clemency, *see* Plurality op. at 24, takes no account of the contrary considerations cited by the defense. Sergeant Bergdahl received the severe punishment of a stigmatizing dishonorable discharge,

a five-pay-grade demotion, and the forfeiture of $10,000.[6] The considerations favoring clemency were substantial. Echoing a misleading government claim, *see* Gov't Br. at 51 (appellant "did not request any formal clemency"), and quoting the Army Court majority, 79 M.J. at 526, the plurality observes at 24 & n.5 that "Appellant's post-trial matters submitted to the convening authority were 'absent of any formal request for clemency in the form of a sentence reduction.'"

The language the plurality quoted fails to take proper account of the record. Sergeant Bergdahl's post-trial submission set out numerous considerations that in his view militated in favor of clemency. JA 643-44. As we explained at the hearing, Hearing Audio at 22:00-23:10, it did so in the context of a claim that the convening authority and SJA were disqualified because they were material witnesses as a result of their role in the spoliation of over 100 letters GEN Abrams had received about

---

[6] The plurality suggests, at 23, that the military judge's refusal to sentence Sergeant Bergdahl to confinement shows that the observer would conclude that the military judge was "impervious" to Senator McCain's hearing threat. This subtly recharacterizes that threat: Senator McCain did not threaten a hearing if Sergeant Bergdahl "did not receive a sentence to his liking." His precise words were "if it comes out that Sergeant Bergdahl has no punishment." JA 60. Sergeant Bergdahl's sentence may not have sent him to the U.S. Disciplinary Barracks, but it did include a punitive discharge that carries a lifelong stigma and precludes VA benefits. He has also suffered a five-figure forfeiture that, even allowing for inflation, most members of the general public would consider a significant penalty for a case that did not involve ill-gotten gains. The lack of a sentence to confinement is therefore no evidence that an observer would conclude that Senator McCain's threat had no effect.

the case but destroyed without furnishing copies to the defense. *See* JA 308-14, 321-23 (convening authority's testimony about spoliation). The SJA fully understood this context and made sure the convening authority did as well. *See* JA 655-56.

Plainly, before *anyone* could consider clemency, there had to be a decision on whether GEN Abrams (and the SJA) were disqualified. Hence, the defense asked that the time for post-trial submissions be deemed tolled pending action on the disqualification request. JA 647 (¶ 6). But to claim, as the Army Court majority did, that there was no "formal request" in the sense that Sergeant Bergdahl needed to state precisely *what* clemency he thought was warranted is not only to disregard his disqualification request but to engage in word play that should have no role in the adjudication of a matter as central to the administration of justice as a claim of apparent UCI. To imply that the absence of a "sum-certain" clemency request on these facts in any measure discounts the observer's consideration of the possibility that clemency had been denied because of UCI is indefensible.

We request that the Court re-examine the handful of pertinent pages of the Joint Appendix and see if it still comes away satisfied that it is fair to say Sergeant Bergdahl had not sufficiently indicated that he thought clemency was warranted; the only question was whether that would be decided by GEN Abrams or some other general officer who was not a disqualified material witness. To resolve any lingering doubt as to whether he and his SJA fully understood that Sergeant Bergdahl was

seeking clemency, one need look no further than the undated Addendum to the SJAR, where the SJA wrote: "I have considered the submissions by the defense, and in my opinion, clemency is not warranted." JA 655, at 657 (¶ 6). The Army Court majority's claim, which the plurality quotes with apparent approval, thus provides no basis for the plurality's failure to make a thorough examination of whether GEN Abrams's denial of clemency was indeed "a foregone conclusion."

Judge Ewing correctly observed below that "[a]s a matter of fact, appellant's chances at post-trial clemency were *not illusory*." 79 M.J. at 533 (emphasis added).[7] Given the applicable burden of proof and which party bears it, there is no way this Court can reach a different conclusion–unless GEN Abrams had an inelastic "no clemency" policy regarding the punishment of deserters. If he did, of course, that would raise yet other issues.

(b)

A second example of under-inclusion is found in footnote 16, where the Court "conclude[d] that an objective, disinterested observer would give little weight" to Sergeant Bergdahl's suggestion that his prosecution ran counter to American policy

---

[7] Judge Ewing was alert to the danger of actual-UCI analysis seeping into apparent-UCI analysis, cautioning that it is "not dispositive to assume *arguendo*, based on the convening authority's prior testimony and affidavit, that he was not actually influenced by the tweet, as that would only address *actual* UCI, and would leave as an open question the question of the appearance of UCI." 79 M.J. at 533.

with respect to the prosecution of returning POWs. The decision offers three reasons never advanced by the government: the OSD publication "is less than clear about the parameters of this so-called 'practice'"; the practice didn't apply to post-Vietnam armed conflicts; and we cited no specific instance in which the practice was invoked when the returned POW was a deserter and soldiers had been wounded in rescue efforts.

The government never denied that there was a longstanding policy not to prosecute returning POWs unless they misbehaved in captivity. Nor did it ever suggest that the policy had fallen into desuetude in the years since Senator McCain, Vice Admiral James B. Stockdale, Colonel Bud Day, and the other Vietnam Era POWs were repatriated. What is more, it had ample opportunity to examine its records of disciplinary actions in the post-Vietnam era and respond if our understanding of the policy was incorrect. The best it could do is insist, without reference to any evidence, that the policy somehow didn't apply to cases like this. *Compare* Gov't Br. at 33 *with* Appellant's Reply Br. at 1.[8] It is unreasonable, in a context in which the government has the burden of proof, to ask Sergeant Bergdahl to prove the negative proposition that there was no other case in which a Soldier deserted, others were

---

[8] The case of Sergeant Jenkins, to which we refer at page 5 *supra*, is readily distinguishable because he (a) was a defector and (b) collaborated with the enemy.

wounded looking for him, and he was later repatriated.

(c)

A third example of under-inclusion concerns the fact that the Army granted a waiver to permit Sergeant Bergdahl to enlist without first obtaining a psychological evaluation, as advised by the U.S. Coast Guard when he was disenrolled from boot camp. This is one of the "facts and circumstances" knowledge of which is properly imputed to the observer. While the plurality notes this history, Plurality op. at 21, it takes no account of it in assessing whether a member of the public would have harbored a significant doubt as to the fairness of the military justice process, even though the Army's failure was pertinent to both referral and clemency.

The opinion states that "the Army was not aware" of the Coast Guard's warning, Plurality op. at 21, but cites no evidence to that effect. The Army granted a waiver to permit Sergeant Bergdahl to enlist. It needed to do so because his DD214 included a reenlistment code (RE3L) that required one. *See* AR 15-6 Report 8.

(d)

Finally, the plurality fails to impute to the observer knowledge about President Trump and the late Senator McCain that bears on whether uniformed decision makers were "bombproof." As we have explained, an observer would have reason to know from relatively recent published sources that Senator McCain was perfectly willing to make good on threats to withhold favorable action on military promotions

unless he got his way. For his part, President Trump remains widely known for his long-running reality television program "The Apprentice," in which his star turn repeatedly involves firing people. *See generally* The Apprentice (American TV Series), WIKIPEDIA, https://en.wikipedia.org/wiki/The_Apprentice_(American_TV_series). A member of the public would also know of the steady flow of senior and not-so-senior officials he has fired since taking office.

This background, the convening authority's eligibility for assignment to even more prestigious assignments, and the fact that he was given such an assignment after refusing the grant Sergeant Bergdahl clemency, materially detract from the claim that an observer would not harbor a significant doubt about the fairness of the proceedings.

II

THE DECISION WILL NOT DETER POLITICAL UCI

The Chief Judge expressed a view that anyone familiar with this case will share: "Let us hope that we shall not see [the] like [of this case] again." But hope alone is not what Congress intended when it created the Court as a "bulwark" against UCI. *See United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). According to the *OED*, it is, among other things, "[a] powerful defence [*sic*] or safeguard." 1 OXFORD ENGLISH DICTIONARY 294 (Compact ed. 1987). Although the word can also imply a fixed structure, such as a rampart, a breakwater, or an extension of a ship's

sides above the level of the deck, *id.*, when applied to UCI the concept must be as malleable as the diverse UCI scenarios chronicled in the *Military Justice Reporter*. If "the vagaries of human nature" suggest that total success in eradicating UCI may never be realized, *United States v. Cole*, 17 C.M.A. 296, 297, 38 C.M.R. 94, 95 (1967), it is all the more important that the Court be alert to the changing realities of American life. Measures that may have seemed sufficient in one era–be it cultural, technological, or political–may be insufficient in the next.

Change in all three spheres has been swift, pervasive, and dramatic. Means of instant communication (and therefore vilification) are now broadly available, whether through social media or electronic mail. Not long ago, one would have noted with surprise that a political leader was "tweeting" on a social media platform. Today it is remarkable to find a politician who does not do so. Political actors are close students—and early adopters—of strategies they think will appeal to their base.

Adding to this volatile mix is the erosion of traditional news media with agreed-upon standards coupled with the explosive growth of cable news and the blogosphere, where those standards are at best severely diluted and at worst entirely missing. These are concerning and pertinent developments where, as here, a case has been politically charged from the beginning.

"We live in a time where truth falls victim to politically charged rhetoric and cable news trends more toward being entertainment than evidence-based journalism."[9] Previously observed norms have been abandoned. This phenomenon is not confined to President Trump, as witness Senator McCain's meddling and the willingness of scores of federal legislators to put their names on blatantly unconstitutional bills that seek to extract pounds of flesh from Sergeant Bergdahl. *See* Appellant's Br. at 43 & n.23; *see also* Chuck Hagel, Letter to the Editor, *Don't Politicize Our Judicial System*, WASH. POST, Sept. 4, 2020, *available at* https://www.washingtonpost.com/opinions/letters-to-the-editor/dont-politicize-our-judicial-sytem/2020/09/04/f2c11968-ed68-11ea-bd08-1b10132b458f_story.html (noting attempts by members of Congress to politicize the judicial system).

"Our government," Justice Brandeis wrote in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) "is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." So too, this Court models for other actors in the military justice process. The rigor with which it

---

[9] Justin Oshana, Opinion, *I Led the Prosecution Against Bowe Bergdahl. Trump Made My Job Much Harder*, WASH. POST, Aug. 31, 2020, *available at* https://www.washingtonpost.com/opinions/2020/08/31/i-led-prosecution-against-bowe-bergdahl-trump-made-my-job-much-harder/#comments-wrapper.

approaches UCI sends a message throughout the armed forces.[10] It also influences actors in the political branches, who will continue to feel the temptation to score political points by meddling in the retail administration of military justice in ways they would never dare to do with respect to cases in the Article III courts. Left undisturbed, the Court's decision will only encourage more political UCI.

Conclusion

When a key proposition of considerable moment to public confidence in the administration of justice and with constitutional overtones must be proven beyond a reasonable doubt, and as to which doubts are to be resolved in the accused's favor; where the matter is at best "a close question" that "give[s] great pause," requires "long consideration" and elaborate explanation, and in the end does not command more than a bare majority; that proposition should not be embraced.

The Court should grant the Petition for Reconsideration, determine that the government failed to satisfy its burden beyond a reasonable doubt, and order the charges and specifications dismissed with prejudice.

---

[10] The preliminary hearing officer has written that "[b]oth Congress and senior commanders should be cognizant of unintended messages that their actions send. . . ." Mark Visger, *The Canary in the Military Justice Mineshaft: A Review of Recent Sexual Assault Courts-Martial Tainted by Unlawful Influence*, 41 HAMLINE L. REV. 59, 98 (2019). The same principle applies to this Court.

Respectfully submitted,

EUGENE R. FIDELL
CAAF Bar No. 13979
Feldesman Tucker Leifer Fidell LLP
1129 20th St., N.W., Ste. 400
Washington, DC 20036
(202) 256-8675 (mobile)
efidell@feldesmantucker.com

FRANKLIN D. ROSENBLATT
CAAF Bar No. 36564
Butler Snow LLP
1020 Highland Colony Pkwy #1400
Ridgeland, MS 39157
(601) 985-4494
franklin.rosenblatt@butlersnow.com

JONATHAN F. POTTER
CAAF Bar No. 26450
Senior Appellate Counsel
Defense Appellate Division

STEPHEN A. SALTZBURG
CAAF Bar No. 26415
2000 H St., N.W.
Washington, DC 20052
(202) 994-7089
ssaltz@law.gwu.edu

STEPHEN I. VLADECK
CAAF Bar No. 36839
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

MATTHEW D. BERNSTEIN
Major, Judge Advocate
CAAF Bar No. 35859
Defense Appellate Division
(202) 838-7894
matthew.d.bernstein9.mil@mail.mil

MICHAEL C. FRIESS
Colonel, Judge Advocate
Chief Defense Appellate Division
CAAF Bar No. 33185

ANGELA D. SWILLEY
Lieutenant Colonel, Judge Advocate
Dep. Chief Defense Appellate Division
CAAF Bar No. 36437

SABIN WILLETT
CAAF Bar No. 37214

CHRISTOPHER L. MELENDEZ
CAAF Bar No. 37216

SEAN T. BLIGH
CAAF Bar No. 37215
Morgan, Lewis & Bockius LLP
One Federal St.
Boston, MA 02110-1726
(617) 951-8775
sabin.willett@morganlewis.com

Appellate Defense Counsel

September 7, 2020

Certificate of Compliance with Rule 37(a)

This Petition for Reconsideration complies with the typeface and type style requirements of Rule 37(a).

Eugene R. Fidell

Certificate of Filing and Service

I certify that I filed and served the foregoing Petition for Reconsideration on September 7, 2020, by emailing copies thereof to the Clerk of the Court, the Government Appellate Division, and the *amici curiae*.

Eugene R. Fidell

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

UNITED STATES OF AMERICA v. SGT Robert B. Bergdahl HHC, STB, U.S. Army FORSCOM Fort Bragg, NC 28310	Findings of Fact, Conclusions of Law and Ruling -- Defense Renewed Motion to Dismiss for Unlawful Command Influence 30 October 2017

1. The accused previously moved 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. Now, because of a 16 October public statement by President Trump, which, the defense argues, incorporated all those previous statements into his presidency, the defense renews this motion but prays for relief in the form of a limitation on the sentence to either no punishment or no confinement.

FINDINGS OF FACT

2. I considered the pleadings of the parties, all appellate exhibits submitted on the matter and not objected to by the parties, as well as the arguments of counsel. I find the following facts beyond a reasonable doubt:

a. Donald J. Trump was elected President of the United States on 8 November 2016. He was sworn in as the 45th President of the United States on 20 January 2017. In the approximately two years prior to being elected president, Mr. Trump, as he campaigned for the Republican Party nomination and in the general election, made numerous statements about the accused in this case. See D App 56 and Enclosures. All these comments by Mr. Trump were conclusory, condemning, and disparaging of the accused to various degrees.

b. From 9 August 2016 until 16 October 2017, Mr. Trump made no more public statements about the accused or his case.

c. President Trump's current term of office expires at 1200 on 20 January 2021. He is eligible to run for reelection for a second four year term. Were he to be elected

APPELLATE EXHIBIT 65

a second time, his first term would roll seamlessly into a second four year term. President Trump is the commander in chief over all DOD personnel - including me, the judges on ACCA, the GCMCA in this case (GEN Abrams) and the SJA in this case (COL Berry).

d. On 16 October 2017, the accused plead guilty to both charges and specifications -- one of desertion and the other of misbehavior before the enemy. The maximum punishment for these offenses at this court-martial is: confinement for life without eligibility for parole, a dishonorable discharge, reduction to Private E-1, and total forfeiture of all pay and allowances. This plea of guilty was accepted and the accused was found guilty at approximately 1300 on 16 October 2017. The court recessed at 1314.

e. At 1347 on 16 October 2017, President Trump and Senate Majority Leader Mitch McConnell held a joint news conference in the Rose Garden at the White House. Towards the latter part of that news conference, which ended at 1427, President Trump took a question from a reporter about SGT Bergdahl and his court-martial. The question was: "Do you believe that your comments in any way affected Bowe Bergdahl's ability to receive a fair trial? And can you respond to his attorney's claims that - -"

f. President Trump responded: "Well, I can't comment on Bowe Bergdahl because he's -- as you know, they're - - I guess he's doing something today, as we know. And he's also -- they're setting up sentencing, so I'm not going to comment on him. But I think people have heard my comments in the past."

g. The defense filed this motion to renew their previous motion to dismiss for UCI on 17 October 2017.

h. On 20 October 2017, The White House Office of the Press Secretary for President Trump issued a "Statement Regarding Military Justice." The statement stated essentially that the President "expects all military personnel who are involved in any way in the military justice process to exercise their independent professional judgement . . ." as they perform their duties with respect to the military justice system. The statement bears a striking resemblance to the statement by Secretary of Defense Chuck Hagel in August 2013. Secretary Hagel's statement was intended to address comments President Obama made about sexual assault cases in the military generally -- not about any particular case.

i. The accused elected trial by military judge alone on 27 September 2017. Under the UCMJ, that means that I am the decider of law, finder of fact and sentencing authority in this case. I have been on active duty for over 29 years. My mandatory retirement date is 1 November 2018. I have been a military judge for nearly 13 years. I was promoted to Colonel in April 2007. I have no hope of or

ambition for promotion beyond my current rank. My only motivation as a military judge is and always has been to be fair and impartial and to do justice in every case. I am completely unaffected by any opinions President Trump may have about SGT Bergdahl. In fact, I do not follow news reports about what he says or has said about SGT Bergdahl. The only reason I know about the things President Trump has said is because the defense provided them to me for purposes of these motions. As far as I know, President Trump has never said anything about me as a military judge or otherwise.

j. On 19 October 2017, General Abrams, the GCMCA in this case, swore by affidavit that he takes his role as GCMCA in this case seriously and understands his role and obligation under the law. He swears that all decisions he has made or will make in this case are at his own discretion and not impacted by any outside influence. On 20 October 2017, COL Vanessa Berry, the SJA in this case, swore to the same by affidavit with respect to her obligations under the UCMJ.

LAW AND ANALYSIS:

In arriving at my conclusions, I followed the following legal principles:

3. Unlawful command influence, known as UCI, is the mortal enemy of military justice. *U.S. v. Thomas*, 22 MJ 388, 393 (CMA 1986). The analytical framework for resolving UCI issues is clearly laid out in case law. *See, U.S. v. Biagase*, 50 MJ 143 (CAAF 1999); *U.S. v. Lewis*, 63 MJ 405 (CAAF 2006); *U.S. v. Boyce*, 76 MJ 242 (2017). For a claim of apparent UCI, the accused must show "some evidence" that unlawful command influence occurred. *Boyce,* at 249. This burden is low, but must be more than a mere allegation or speculation. *U.S. v. Salyer*, 72 MJ 415, 423 (CAAF 2013).

4. Once this burden is met by the accused, the burden shifts to the government to prove beyond a reasonable doubt that either the predicate facts proffered by the defense do not exist, or that the facts presented do not constitute UCI. *Boyce,* at 249. If this burden is met, that ends the matter.

5. If not, the government may seek to prove beyond a reasonable doubt that the UCI does not place an intolerable strain upon the public's perception of the military justice system AND that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceedings. *Id.* If the government meets this burden, no relief is appropriate. If they do not, then the court should fashion an appropriate remedy. Trial courts have wide discretion in fashioning an appropriate remedy. *Lewis*, at 416.

6. Accordingly, this court finds:

a. First, the defense has met its initial burden of providing some evidence, beyond mere speculation, that UCI exists. While somewhat ambiguous, the plain meaning of the President's words to any reasonable hearer could be that in spite of knowing that he should not comment on the pending sentencing in this case he wanted to make sure that everyone remembered what he really thinks should happen to the accused. He is the commander in chief of all the armed forces. He has the power to fire or otherwise take adverse administrative action against any active army officer involved in the trial of this case from sentencing forward.

b. Second, the government has failed to prove beyond a reasonable doubt that these predicate facts proffered by the defense do not exist or that they do not constitute UCI. While the inquiry as to whether the President's comments actually constitute UCI was a close question, applying the beyond a reasonable doubt standard, the government has failed to prove beyond a reasonable doubt that he comments do not constitute UCI.

c. Finally, the government has, however, met their burden to prove beyond a reasonable doubt that the UCI has not and will not place an intolerable strain on the public's perception of the military justice system AND that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of these proceedings. I, the military judge in this case, am the sole sentencing authority. The evidence establishes beyond a reasonable doubt that I am uninfluenced by the President's comments and more importantly, that I hold no fear of any repercussions from anyone if they do not agree with my sentence in this case. As their affidavits make clear, the same is true of GEN Abrams and COL Berry with respect to their respective post-trial duties in this case. If that were not enough, the statement by the President through his press secretary makes clear that he does not expect any certain sentence in this case and that he does expect me and everyone else involved in this case in any way to use our own discretion and judgment and do what we think is right under the law. All judges, including those at the Army Court of Criminal Appeals, are expected and presumed to know and properly apply the law. That includes the presumption that we will not be influenced in our independent duty to justice by any outside influence. Knowing these and all other facts referred to above, I find beyond a reasonable doubt that no reasonable, disinterested member of the public would harbor significant doubts about the fairness of these proceedings and no intolerable strain has been placed upon the public's perception of the military justice system.

d. However, I will consider the President's comments as mitigation evidence as I arrive at an appropriate sentence in this case. Furthermore, I will require anyone involved in any way in the exercise of discretion in any post-trial aspect of this case to read the statement from the White House Press Office of 20 October 2017 before they exercise that discretion -- unless the defense requests that I not issue that order.

RULING

7. The defense motion is DENIED.

JEFFERY R. NANCE
COL, JA
Military Judge

IN A GENERAL COURT-MARTIAL
SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY
FORT BRAGG, NORTH CAROLINA

UNITED STATES	)	Renewed Motion to Dismiss
	)	(Apparent UCI)
v.	)	
	)	
SGT Robert B. Bergdahl	)	
HHC, Special Troops Battalion	)	
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	17 October 2017

RELIEF SOUGHT

Sergeant Bergdahl renews his motion to dismiss the charges and specifications for apparent Unlawful Command Influence (UCI). Oral argument is requested.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The governing legal standards and allocation of burdens for apparent UCI cases are set forth in *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013), and *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017).

FACTS

On 20 January 2017, after President Trump took office, the defense moved to dismiss on the basis of apparent UCI arising from disparaging statements he had previously made about SGT Bergdahl. D APP 56. The Court found those statements "troubling," "disturbing," disappointing," and "problematic," but denied the motion, but expressly left the door open for further submissions by the defense. AE 36. SGT Bergdahl sought an extraordinary writ from the U.S. Army Court of Criminal Appeals, which denied the petition "without prejudice to raising these issues again to the military judge as the case develops." *Bergdahl v. Nance*, ARMY MISC 20170114 (Army Ct. Crim. App. 2017) (mem.). The U.S. Court of Appeals for the Armed Forces denied a writ-appeal petition. *Bergdahl v. Nance*, 76 M.J. 342 (C.A.A.F. 2017) (mem.).

On 16 October 2017, SGT Bergdahl pleaded guilty with exceptions and substitutions. His pleas were accepted and findings were entered at approximately 1:00 p.m. There was no pretrial agreement.

D APPELLATE EXHIBIT 108

At 1:47 p.m. on 16 October 2017, President Trump held a joint press conference in the Rose Garden with Senate Majority Leader Mitch McConnell. According to the official transcript, the following colloquy occurred between the President and a member of the press corps:

> Q Mr. President, Ronica Cleary with Fox 5.
>
> THE PRESIDENT: Yes.
>
> Q Do you believe that your comments in any way affected Bowe Bergdahl's ability to receive a fair trial? And can you respond to his attorney's claims that --
>
> THE PRESIDENT: Well, I can't comment on Bowe Bergdahl because he's -- as you know, they're -- I guess he's doing something today, as we know. And he's also -- they're setting up sentencing, so I'm not going to comment on him. **But I think people have heard my comments in the past.**

(Emphasis added.) Enclosure 1 to this motion is a copy of the transcript. Enclosure 2 is a DVD with a video of just the colloquy pertaining to this case.[1]

President Trump and Majority Leader McConnell in the Rose Garden, 16 October 2017

EVIDENCE AND WITNESS

---

[1] The video of the press conference can be found at https://www.youtube.com/watch?v=_g2mjHdM98w. The colloquy on which we rely appears at approximately 30:40. The official transcript can be found at https://www.whitehouse.gov/the-press-office/2017/10/16/remarks-president-trump-and-senate-majority-leader-mitch-mcconnell-joint.

The defense offers the transcript and a DVD of the colloquy reproduced above in support of the motion. We assume the government will not contest their authenticity and accuracy. If that is incorrect, we will ask that President Trump be called to testify telephonically.

LEGAL AUTHORITY

1. *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013)
2. *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017)

ARGUMENT

The apparent UCI issue was briefed in D APPs 56-57, 95 and 99, to which the Court's attention is respectfully invited. The present submission will briefly address only the latest development.

1. In the previous apparent-UCI proceedings, considerable attention was paid to the fact that President Trump was not in office when he made his numerous disparaging statements about SGT Bergdahl. The President yesterday made it unnecessary to resolve that issue for the important parts of the military justice process that have not yet occurred. His statement, made at a televised press conference that was one of the most salient public events of the day, removes any doubt about whether his campaign comments reflect his current opinion. He obviously knew about the day's proceedings in this Court. The plain meaning of his final comment – after and despite the disclaimers – was that his views now, months after Inauguration Day, are no different from what they were before then. Had they changed, he would have said so. His final comment, however, points in precisely the opposite direction.

2. The defense has previously briefed the issue of whether a civilian official's words and deeds can give rise to apparent UCI. D APP 57 at 5-6. Whatever may be the case where the offender is a service secretary, *see Boyce, supra*, at 246 n.3, an incumbent President, as Commander in Chief, is within the scope of that doctrine. Indeed, President Trump's attempt to steer clear of saying the wrong thing – even though he torpedoed it in his final comment – indicates that we are not alone in this view.

3. President Trump stands at the pinnacle of an unbroken chain of command that includes key participants in the remaining critical steps of the case. Among these are the Military Judge, the staff judge advocate, the general court-martial convening authority, and the judges of the Court of Criminal Appeals. A *Salyer* observer, informed of President Trump's reconfirmation of his pre-Inauguration comments, would therefore harbor a substantial doubt as to the fairness of the proceedings.

   a. The case is being tried judge-alone. The Court is an active duty commissioned officer serving under President Trump. Next week the sentencing phase will commence. President Trump's comment cast an impermissible shadow over this critical phase.

b. The proceedings will in due course be subject to review by the staff judge advocate and the general court-martial convening authority, each of whom is on active duty under President Trump. The GCMCA will have discretionary power to set aside the findings and reduce or disapprove the sentence for any reason or no reason. Art. 60(c), UCMJ; R.C.M. 1107 (former version). The same pall President Trump cast over the sentencing phase also extends to the SJA's and GCMCA's critical functions.

c. Given the authorized punishments, the adjudged sentence may qualify for mandatory review by the Court of Criminal Appeals, the judges of which are active duty commissioned officers, and enjoy sentence-review powers. *See* Art. 66, UCMJ. How is a *Salyer* observer to have confidence that SGT Bergdahl's case will receive the independent appellate review to which every accused is entitled under these circumstances? By the same token, even if the adjudged sentence were to fall below the CCA's jurisdictional threshold, SGT Bergdahl would still be entitled to meaningful review under Article 69, UCMJ. That review would be performed by a judge advocate serving under The Judge Advocate General. Both the reviewing judge advocate and the TJAG serve under President Trump.

The evidence easily passes the low apparent UCI threshold. *Salyer, supra; Boyce, supra.*

4. It has long been observed that UCI is the "mortal enemy of military justice." *E.g., Boyce, supra*, 76 M.J. at 246. The Court must take decisive action because the critical terms it employed in the course denying SGT Bergdahl's Inauguration Day apparent-UCI motion did not have the necessary effect. What we said in our motion is even more apt today than it was when we filed it:

> There are times when an insult to the fair administration of justice is so sustained, palpable and recent, and comes from such a source, that the integrity of the military justice system is necessarily at stake and the strong medicine provided by the doctrine of apparent UCI is required. This is such a case.

CONCLUSION

The defense's threshold having been satisfied, the burden of proof now rests on the government.

for
EUGENE R. FIDELL

Civilian Defense Counsel

For

LTC FRANKLIN D. ROSENBLATT
MAJ OREN GLEICH
MAJ JASON D. THOMAS
CPT JENNIFER D. NORVELL
CPT NINA S. BANKS

P. SABIN WILLETT
CHRISTOPHER L. MELENDEZ
KIRSTEN B. WHITE

CERTIFICATE OF SERVICE

I certify that I emailed the foregoing Renewed Motion to Dismiss (Apparent UCI) to Trial Counsel on 17 October 2017. Trial Counsel has also today been furnished a copy of the DVD referred to in the Supplemental Motion.

FRANKLIN D. ROSENBLATT

The White House
Office of the Press Secretary

For Immediate Release

October 16, 2017

Remarks by President Trump and Senate Majority Leader Mitch McConnell in Joint Press Conference

Rose Garden

1:47 P.M. EDT

THE PRESIDENT: Thank you very much. I just want to say that we just spent quite a bit of time inside with the Senate Majority Leader Mitch McConnell, who has been a friend of mine for a long time, long before my world of politics, early into his world of politics, I think. But we've been friends for a long time.

We are probably now, despite what we read, we're probably now -- I think, at least as far as I'm concerned -- closer than ever before. And the relationship is very good.

We're fighting for the same thing. We're fighting for lower taxes, big tax cuts, the biggest tax cuts in the history of our nation. We're fighting for tax reform, as part of that. We are getting close to healthcare. We'll come up in the early- to mid-part of next year. We're going to have a vote; I think we already have the votes. We feel confident we have the votes. We pretty much know what the plan is.

I believe Republicans and Democrats are, as we speak, working together very hard, right now -- working together to do an intermediate plan, a short-term plan, because Obamacare is a disaster. The rates have gone up. The premiums have gone up. The deductibles have gone through the roof. I mean, it's terrible. If you look at the deductibles, unless you really have a problem, you're not going to be able to use them.

So we have been working together long and hard. We think we're in good shape for the budget, we hope. And we hope to be in good shape with, again, the largest tax cuts ever passed in this country. It's going to spur business. You look at other countries, what they've done -- and we're competing with other countries. When China is at 15 percent, when I hear that Ireland is going to be reducing their cooperate rates down to 8 percent from 12. But you have other countries also reducing. We can't be at 35 percent and think we're going to remain competitive in terms of companies and in terms of jobs. So we worked on that.

I was very honored to see a man that I've had a lot of respect for, James Lee Witt, of the Clinton administration -- the head of FEMA. He gave us an A-plus; I just see -- it just came out. And I've always had respect for him. He gave us -- he's the FEMA director of the Clinton administration -- gave us an A-plus for how we responded to the hurricane aftermath -- all of the hurricanes. And that includes Puerto Rico.

So I just want to thank Mr. Witt, wherever you may be now, wherever you may be listening. I just want to say, I really much appreciate it. Because that took it out of politics -- out of the world of politics, in that he was with the Clinton

administration and I'm sure remains loyal to the Clinton administration. I hope he does.

So just to finish off, my relationship with this gentleman is outstanding, has been outstanding. We are working very hard to get the tax cuts. We will continue to work hard to get the healthcare completed. I'm going to be surprising some people with an economic development bill later on, but I haven't even told Mitch because I want to focus on tax cuts and some other things right now.

One of the unspoken elements that we discussed at lunch -- and it just is not talked about -- yes, we got a great justice, Justice Gorsuch, into the United States Supreme Court. He is going to be outstanding, hopefully for many, many years. But something that people aren't talking about is how many judges we've had approved, whether it be the court of appeals, circuit judges, whether it be district judges. We have -- tremendous -- right now under review; the Democrats are holding them up beyond anything -- beyond comprehension, they're holding them up.

I mean, frankly, they have terrible, terrible policy -- terrible policy -- and perhaps they're not even good politicians, but they are good at obstruction. So I looked at some of these numbers, between the judges -- and I want to say that we will set records in terms of the number of judges.

And if you read the Wall Street Journal, I have to give them a little bit of a -- a person, a writer, I won't mention names -- but you can see who has really been a really fair person -- wrote an article or wrote an editorial, in a sense, saying how well we're doing with judges and appointments. I think it's one of the big unsung things of this administration, in addition to the fact that we have had a lot of legislation passed on the VA and lots of other things.

But the judge story is an untold story. Nobody wants to talk about it. But when you think about it, Mitch and I were saying, that has consequences 40 years out, depending on the age of the judge, but 40 years out. So numerous have been approved. Many, many are in the pipeline. The level of quality is extraordinary.

And I just wanted to say that we're working very closely on that also, and getting really great reviews from those people and, in many cases, some

scholars that have been studying it. There has never been anything like what we've been able to do together with judges.

So with that, I'd like to have Mitch say a few words, and if you want to do a little question-and-answer, we can do that also.

Thank you very much. Thank you.

LEADER MCCONNELL: Well, thank you very much, Mr. President. I want to underscore what the President said. We have the same agenda. We've been friends and acquaintances for a long time. We talk frequently. We don't give you a readout every time we have a conversation. But frequently we talk on the weekends about the issues that are before us.

Obviously passing a budget, which enables tax reform and tax reduction comes next, then a supplemental to take adequate care of those who have been harmed by the natural disasters we've been afflicted with lately. And, of course, the Senate's unique role -- it seems to be a lot of people forget -- we're in the personnel business. There are 1,200 of the President's nominations subject to confirmation in the Senate. The House is not in the personnel business. We are.

The single-most significant thing this President has done to change America is the appointment of Neil Gorsuch to the Supreme Court. But it's not just the Supreme Court. There are a lot of vacancies at both the circuit court and district court level, as the President has indicated, of young, conservative -- and when we say conservative about a judge, what we're talking about here are, the kind of the people the President is appointing to the courts believe that the role of a judge is to try to rule based upon what the law says, not what they hoped the outcome would be.

Justice Scalia used to say, if the judge is not occasionally unhappy with the conclusion he reached, he's not a very good judge. Or as Justice Gorsuch put it down in my state a couple of weeks ago, judges don't wear red, they don't wear blue -- they wear black.

And those are the kind of people the President is sending up to the Senate to be confirmed. Many of them, as he pointed out, are younger and will be on the bench for a long time, and have a great deal to do with what kind of country we're going to have far into the future.

Legislatively, obviously the top priority is tax reduction. And I think what the President and I would both like to say to you today, contrary to what some of you may have reported: We are together totally on this agenda to move America forward.

THE PRESIDENT: John.

Q Mr. President, in terms of the timetable for tax reform, the Speaker of the House, Paul Ryan, has said he wants to get it done by the end of this year. He would make the House stay through the Christmas break in order to get it done. The Senate Majority Leader has said we'll get it done this Congress. Would you be okay if tax reform were not passed until next year as opposed to this year?

THE PRESIDENT: Well, I would like to see it be done this year, John. I would like very much to see it be done this year. So we won't go a step further. If we get it done, that's a great achievement.

But don't forget it took years for the Reagan administration to get taxes done. I've been here for nine months, a little more than nine months. I can say the same thing for healthcare. If you look at Obama -- first of all, if you look at Clinton, they weren't able to get it done. If you look at other administrations, they weren't able to get it done. President Obama, after a long period of time, was able to finally push it through, but pushed through something that's now failed -- really failing badly. But again, we're meeting -- Democrat, Republican are meeting right now, and right now they're working on something very special.

But I have to tell you, I really believe that we have a very good chance, and I think Mitch feels the same way, of getting the taxes done, hopefully fairly long before the end of the year. That's what we'd like to see.

Go ahead.

LEADER MCCONNELL: Let me just add to what the President said. The goal is to get it done this calendar year. But it is important to remember that Obama signed Obamacare in March of year two. Obama signed Dodd-Frank in July of year two. We're going to get this job done, and the goal is to get it done by the end of the year.

THE PRESIDENT: And just to finish up for Mitch -- and we're nine months, right? So we could have a long way to go, but that's okay.

Yes.

Q Thank you very much. Do you both have confidence in Representative Tom Marino to be your drug czar? And on healthcare, in your recent (inaudible), you said, "The only problem I have with Mitch McConnell is that after hearing repeal and replace for seven years, he failed. That should never have happened." Do you still (inaudible)?

THE PRESIDENT: Well, let's go to the second part of your question, with Mitch. Again, we've been doing healthcare for, really, seven months, and probably six months, if you think about it, because we started in probably a total of six months. Others were 2.5 years, and much more than that. Others were eight years, and they didn't get it passed. This man is going to get it done, and I think get it done long before anybody else, and I think it's going to be a great healthcare.

As far as Tom Marino, so he was a very early supporter of mine -- the great state of Pennsylvania. He's a great guy. I did see the report. We're going to look into the report and we're going to take it very seriously. Because we're going to have a major announcement, probably next week, on the drug crisis and on the opioid massive problem. And I want to get that absolutely right. This country -- and, frankly, the world -- has a drug problem. The world has a drug problem. But we have it, and we're going to do something about it.

So I'm going to have a major announcement on that problem next week. We're going to be looking into Tom.

Q Thank you, Mr. President. Trey Yingst with One America News Network. I'd like to ask you: Do you support the plan by people who previously served in your administration, such as the Steve Bannon, to primary Republican candidates in the 2018 elections who do not support your agenda?

THE PRESIDENT: Well, I have a very good relationship, as you know, with Steve Bannon. Steve has been a friend of mine for a long time. I like Steve a lot. Steve is doing what Steve thinks is the right thing. Some of the people that he may be looking at, I'm going to see if we talk him out of that, because, frankly, they're great people.

What Mitch will tell you is that maybe, with the exception of a few -- and that is a very small few -- I have a fantastic relationship with the people in the Senate, and with the people in Congress. I mean, I have a -- with our House of Representatives. I have a great relationship with political people. If you read the papers, you think -- I'm like on one island and they're like on the other. Well, it's not the way it is.

We have a fantastic relationship. I'm friends with most of them, I can say. And I don't think anybody could have much of a higher percentage. But I'm friends with most of them. I like and respect most of them, and I think they like and respect me.

Just so you understand, the Republican Party is very, very unified. When we get things approved, we have to go through hell because we have no Democrat support, we have nobody. We don't have a vote from the Democrats. As an example: massive tax cuts -- we may not get any Democrat votes. Now, we also may get three of four, but we may get no -- for massive tax cuts. We're the highest-taxed country in the world, and yet we may get no Democrat support. And that's because they're obstructionists and they just basically want us to do badly, but that's not going to happen.

Yes, go ahead.

Q On the opioid crisis, I listened to you on the campaign trail talk about that repeatedly. You said you watched the "60 Minutes" report last night. Number one, do you want to reverse the law that Congressman Marino helped pass that DEA whistleblowers say has contributed to the expansion of the opioid crisis?

THE PRESIDENT: We're going to look at that very closely.

Q And does his sponsorship of that law in any way undermine your confidence in him as drug czar?

THE PRESIDENT: Well, he's a good man. I have not spoken to him, but I will speak to him and I'll make that determination. And if I think it's one percent negative to doing what we want to do, I will make a change, yes.

Q Mr. McConnell --

Q Mr. President --

THE PRESIDENT: One second. Yes.

Q What about declaring a written national emergency for this crisis? You've talked about it but you haven't put that piece of paper together.

THE PRESIDENT: We are going to be doing that next week. By the way, you know that's a big step. By the way, people have no understanding of what you just said. That is a very, very big statement. It's a very important step. And to get to that step, a lot of work has to be done and it's time-consuming work. We're going to be doing in next week, okay?

Q Did you have a chance, during your lunch today, to discuss the comments that Steve Bannon made this weekend? And what do you make of those comments, declaring war on the Republican Party, declaring war on you?

LEADER MCCONNELL: Look, you know, the goal here is to win elections in November. Back in 2010 and 2012, we nominated several candidates -- Christine O'Donnell, Sharron Angle, Todd Akin, Richard Mourdock. They're not in the Senate. And the reason for that was that they were not able to appeal to a broader electorate in the general election.

My goal as the leader of the Republican Party in the Senate is to keep us in the majority. The way you do that is not complicated. You have to have nominate people who can actually win, because winners make policy and losers go home. We changed the business model in 2014; we nominated people who could win everywhere. We took the majority in the Senate. We had one skirmish in 2016; we kept the majority in the Senate. So our operating approach will be to support our incumbents and, in open seats, to seek to help nominate people who can actually win in November. That's my approach and that's the way you keep a governing majority.

Q Mr. President, earlier today you criticized drug companies and also insurance companies, saying that drug companies were charging prices that are too high --

THE PRESIDENT: Yes.

Q -- and insurance companies were taking government money --

THE PRESIDENT: Exactly right.

Q What specifically would you like to see both of those types of companies do?

THE PRESIDENT: So the insurance companies have made a fortune with Obamacare -- an absolute fortune. As you know, what I did with the cuts at the end, which were all going -- you know, you're talking about hundreds of millions of dollars a month going right into the pockets of the insurance companies. And I'm very happy with what I did.

And because of that, people are talking now. Democrats are talking to the Republicans for a short-term taking care of, what we will call, healthcare so that people can have good healthcare without a big spike. You would have had massive spikes -- you already have. I mean, every year the massive spikes to Obamacare have been ridiculous.

As far as -- and I didn't speak to Mitch about this today, but a priority of mine -- and you know that this is coming up -- will be the cost of prescription drugs. We are going to get the costs way down, way down, and those drugs companies -- so you have the insurance companies, in the one case; in the other case -- actually, with regard to both, you have the drug companies.

They contribute massive amounts of money to political people -- I don't know, Mitch, maybe even to you. But I have to tell you, they contribute massive amounts of money. Me, I'm not interested in their money. I don't need their money. I will tell you, you have prescription drugs -- you go to England, you go to various places, Canada -- you go to many, many countries, and the same exact pill from the same company, the same box, same everything, is a tiny fraction of what it costs in the United States.

We are going to get drug prices -- prescription drug prices way down because the world has taken advantage of us. The world has taken advantage of us when that happens, so that's going to be very important.

Q Thank you. On healthcare, there are about 6 million people that get subsidies to help pay for Obamacare -- about 70 percent, by one study of a couple of states that you won in November --

THE PRESIDENT: Yeah.

Q Now that you've cut off these payments, are you going to ensure that those people will still get help from the federal government to pay --

THE PRESIDENT: Well, that's what we're looking to do, Joe. We want to get it down so that people can have affordable healthcare. Look, you look at some states -- 116 percent up. In Alaska, over 200 percent up. In other states, 50 percent, 70 percent up, and those are some of the states that are doing better. Obamacare is a wreck, it's a mess, it's destroying lives. We want to get it in those states -- the states that I did so well in -- but also in states that I didn't win.

I want to get healthcare that's much more affordable and much better healthcare, and that's what we're doing.

Yes.

Q Let me ask you about tax reform.

THE PRESIDENT: Go ahead -- tax reform.

Q Yes, tax reform. You had said the other day that there were some adjustments being made.

THE PRESIDENT: Yeah.

Q Gary Cohn said today that there would be some things that are negotiable. What exactly, in your eyes, is negotiable? And then, for the Leader, you said that the top priority is tax reduction -- you did not say tax reform -- in 2017, Leader McConnell. So can you commit specifically to tax reform in 2017? For the both of you.

THE PRESIDENT: So we are doing minor adjustments. We want to make sure that the middle class is the biggest beneficiary of the tax cuts and tax reform. And that's, I'm sure, what Mitch meant also, because people get it confused.

We are doing massive tax cuts. We're also doing simplification and reform. Simplification, where, literally, if we can do it on page; now, in some cases, it may be two pages. But we're doing major simplification. We're bringing the categories down from -- if you include zero, because there are zero -- we're bringing it from eight to four. That's a big, big simplification, just that alone.

But we are doing the massive cuts. And I will say this: Wherever I've been, this has been so popular with the people. Now we have to get a couple of additional people to raise their hands.

Mitch.

LEADER MCCONNELL: Yeah, I agree with the President, it's about both reduction and reform. It's been 30 years since this kind of effort was undertaken successfully, and we're going to succeed this time. The bills, the details of them, will be written by the Ways and Means and Finance Committees after we approve the budget. And obviously, the budget opens the path to tax reform. But it's a both -- it's about both -- about both reform and reduction.

Q Why haven't we heard anything from you so far about the Soldiers that were killed in Niger? And what do you have to say about that?

THE PRESIDENT: I've written them personal letters. They've been sent, or they're going out tonight, but they were written during the weekend. I will, at some point during the period of time, call the parents and the families -- because I have done that, traditionally. I felt very, very badly about that. I always feel badly. It's the toughest -- the toughest calls I have to make are the calls where this happens, soldiers are killed. It's a very difficult thing. Now, it gets to a point where, you know, you make four or five of them in one day -- it's a very, very tough day. For me, that's by far the toughest.

So, the traditional way -- if you look at President Obama and other Presidents, most of them didn't make calls, a lot of them didn't make calls. I like to call when it's appropriate, when I think I'm able to do it. They have made the ultimate sacrifice.

So, generally, I would say that I like to call. I'm going to be calling them. I want a little time to pass. I'm going to be calling them. I have -- as you know, since I've been President, I have.

But in addition, I actually wrote letters individually to the soldiers we're talking about, and they're going to be going out either today or tomorrow.

Yes.

Q General Kelly said just last week that you believe that Cuba could stop the attacks against Americans. Do you believe them, that Cuba is -- do you believe Cuba is responsible?

THE PRESIDENT: I think Cuba knew about it, sure. I do believe Cuba is responsible. I do believe that. And it's a very unusual attack, as you know, but I do believe Cuba is responsible, yes.

Q Roy Moore, down in Alabama, has said that he believes homosexuality should be illegal and that Muslims should be barred from serving in the U.S. Congress. What makes you comfortable with someone with those beliefs serving in the U.S. Senate? And the same question to you, Mr. Leader.

THE PRESIDENT: Well, I'm going to be meeting with Roy sometime next week, and we're going to talk to him about a lot of different things. But I'll be meeting with him.

He ran a very strong race. The people of Alabama, who I like very much and they like me very much, but they like Roy. And we'll be talking to him, and I can report to you then. Okay?

Go ahead.

Q Mr. President, this is a question for you and for Leader McConnell following up on your comments on the budget. One of the issues outstanding right now is what the Senate Judiciary Committee will (inaudible) of blue slips. I'm wondering what your position is, Mr. President, and what your position is, Leader McConnell. Because, you know, (inaudible) that right now gives Democrats leverage over the appointments.

LEADER MCCONNELL: I can give you my position. The blue slip, for those of you who are not familiar with it, is a custom determined by the Chairman of the Judiciary Committee. And Senator Grassley can give you his view of how he views this. I'll give you my view.

My view is that a blue slip on a circuit judge is simply a notification of how you're going to vote. To conclude otherwise would have left us in the following position at the beginning of this Senate. Forty-eight Democratic senators would have been able to blackball 62 percent of the circuit judge nominees. That's

simply not a tenable place to land in a Senate that now deals with judges with a simple majority.

So my own personal view is that a blue slip on a circuit judge should simply be a notification of how you intend to vote.

THE PRESIDENT: We could talk blue slips, but my attitude is I just want really capable people going to the courts.

Peter.

Q Mr. President, in 2012 you tweeted that "Obama's complaints about Republicans stopping his agenda are BS," in your words, "since he had full control for two years." You wrote, "He can never take responsibility." But today, you've said about some of the challenges right now in Congress and in Washington, "I'm not going to blame myself, I'll be honest. They're not getting the job done." So what's different then than now?

THE PRESIDENT: Well, let me just explain what's different. We have nominations pending right now, and we have 182 approved -- if you look at this: the number that he had approved was 65 percent and 70 percent, and we have 39 percent. They're holding up every single nomination.

Q How about the agenda broadly?

THE PRESIDENT: Schumer and the group are holding up every single nomination. They are obstructing. They're doing -- I'm telling you, they're not good politicians, but they're very good at obstruction.

They are holding up every single nomination, and I will tell you, Peter, it's not right. It's really not right. They'll bring them right out to the end at last minute. What they're doing is unfair.

So you look at even Bush, you look at Obama, you look at Clinton, and you look at Bush original, you have 389 versus 182 -- these are approvals. You look at Clinton, 357 versus 182. You look at President Obama, 364 versus 182. These are nominations approved, and what they're doing to us -- we have unbelievable people, and they're waiting to be approved. They've been waiting for a long period of time.

Now, I do believe that Mitch is going to start pushing them very hard, and he can do that, and he wants to do that. He also wants to get the judicial nominations through, and he wants to get them through fast, too.

Go ahead, John. Go ahead, John.

Q Can I just follow on that, if I could, please? You seemed to have a budding spirit of cooperation with the Senate Minority Leader and the House Minority Leader when it came to the budget, when it came to this idea of finding a fix for DACA. But every proposal that you have floated since then, they have very critically rejected. So where is this relationship?

THE PRESIDENT: Well, I hope to have a relationship. If we don't, we don't. I mean, we have races coming up, as you know, in a year from now. I think we're going to probably do very well. I can say this: If we get taxes approved, we're going to do unbelievably well.

Many of the senators are running in states that I won by massive amounts -- 20, over 20 percent, sometimes 30 percent; I guess in one or two cases, by over 40 percent over the Democrat.

Q But do you think you can work with them?

THE PRESIDENT: Well, we're going to let you know that. I would like to give you that answer in about seven years from now, is that okay? Meaning, one plus seven.

John, I hope to be able to because I like the concept of bipartisan. But right now, they are doing nothing but obstructing. And really, if you think about it, they're against major tax cuts that's going to make our country stronger and more competitive. That's a hard thing to win an election on, and I believe that some Democrats will be voting for us when it comes to the tax cuts.

Q With this economic development bill that you mentioned, can you give us any of the details of what your plans are?

THE PRESIDENT: I'm going to be proposing an economic development bill in the not-too-distant future. I want to get tax cuts, obviously, done first; maybe even healthcare. But I think somewhere in between or shortly thereafter I'm going to be developing an economic development bill that will put us so far

ahead of other countries you will not even believe it. That will be very important.

Q Thank you, Mr. President. Last week, your administration made two major announcements on rolling back the Iran Deal and getting rid of the cost-sharing reductions as part of Obamacare. And a lot of criticism has been leveled at your administration saying that, really, all you're doing is --

THE PRESIDENT: And a lot of praise.

Q Fair enough, sir. Rolling back -- a lot of what you're doing is simply rolling back everything your predecessor accomplished. Is there a single policy of your predecessor that you specifically do not want to touch, sir?

THE PRESIDENT: Well, we're very opposite in terms of incentives and incentives for jobs and other things. And if you look at what's happened, we just hit a new high today again in the stock market. We've picked up, Mitch, as of this moment, $5.2 trillion in stock market value. We have the lowest unemployment rate in -- I believe it's almost 17 years. We're doing well.

We're going to be doing immigration work that's going to be outstanding, and we're going to have people coming into our country based hopefully on a merit system, not just coming in randomly. But they're going to be coming in based on a merit system where they can help us. Because I have companies moving into this country -- you saw what happened with the automobile industry last week with five major plants. We have companies pouring back into this country for the first time in anybody's memory. We are actually going to be, fairly soon, at a point where we're going to need workers. Our country is going to do so well. But the tax cuts are going to be a major, major part of it.

Q Sir, is there a policy you'd want to keep in place though? Is there a single policy you'd keep in place?

THE PRESIDENT: Well, not too many, I must say. It's the opposite side of the spectrum.

Peter. Go ahead, Peter.

Q Earlier, you said that President Obama never called the families of fallen soldiers. How can you make that claim?

THE PRESIDENT: I don't know if he did. No, no, no, I was told that he didn't often. And a lot of Presidents don't; they write letters. I do --

Q (Inaudible.)

THE PRESIDENT: Excuse me, Peter. I do a combination of both. Sometimes -- it's a very difficult thing to do, but I do a combination of both. President Obama I think probably did sometimes, and maybe sometimes he didn't. I don't know. That's what I was told. All I can do -- all I can do is ask my generals. Other Presidents did not call. They'd write letters. And some Presidents didn't do anything. But I like the combination of -- I like, when I can, the combination of a call and also a letter.

One at a time. Go ahead.

Q Thank you. If it would help you -- if it would help Special Counsel Robert Mueller get to the end of the Russia investigation, would you --

THE PRESIDENT: Well, I'd like to see it end. Look, the whole Russian thing was an excuse --

Q Would you (inaudible).

THE PRESIDENT: Excuse me. Excuse me. The whole Russia thing was an excuse for the Democrats losing the election, and it turns out to be just one excuse. I mean, today Hillary blamed Nigel Farage. That one came out of nowhere. So that was just an excuse for the Democrats losing an election that, frankly, they have a big advantage in the Electoral College. They should always be able to win in the Electoral College, but they were unable to do it.

So there has been absolutely no collusion. It's been stated that they have no collusion. They ought to get to the end of it because I think the American public is sick of it.

Go ahead. Go ahead.

Q Mr. President, Ronica Cleary with Fox 5.

THE PRESIDENT: Yes.

Q Do you believe that your comments in any way affected Bowe Bergdahl's ability to receive a fair trial? And can you respond to his attorney's claims that --

THE PRESIDENT: Well, I can't comment on Bowe Bergdahl because he's -- as you know, they're -- I guess he's doing something today, as we know. And he's also -- they're setting up sentencing, so I'm not going to comment on him. But I think people have heard my comments in the past.

Go ahead. Go ahead.

Q Will you extend the deadline for DACA recipients if Congress can't pass the bill by March?

THE PRESIDENT: Well, they should be able to do something. But we need very stronger border security, and we do want the wall.

Go ahead.

Q My question is about the fires in Northern California. They feel like they've been left out from --

THE PRESIDENT: No, they haven't. In fact, I spoke to Governor Brown. We had a great conversation. We have FEMA there. And as you know, James Lee Witt gave us an A-plus, and I think if he didn't include the fires, he would include the fires also. We have FEMA there. We have military there. We have first responders there. It's a tragic situation. But we're working very closely with the representatives from California, and we're doing a good job.

Go ahead, back. Yes, go ahead, back.

Q Mr. President, in the wake of an avalanche of allegations made against Harvey Weinstein, your campaign is being subpoenaed for any documents relating to sexual harassment allegations made against you. Do you have a response to that?

THE PRESIDENT: All I can say is it's totally fake news. It's just fake. It's fake. It's made-up stuff, and it's disgraceful what happens. But that's happens in the world of politics.

Jon.

Q Mr. President, on the wall, are you going to insist that you must have wall funding before you can sign something for the DREAMers or for spending for the rest of the year?

THE PRESIDENT: Our country needs a wall. Mexico, you see what's happening there. You see what just happened yesterday with one of their big political leaders. Mexico is not doing particularly well when it comes to the kind of thing that we have great interest in. Drugs are pouring across our border. We're stopping it, but we need a wall to really stop it. We need a wall in this country. You know it. I know it. Everybody knows it. We have to have a wall, so that's going to be part of it.

Q (Inaudible.)

THE PRESIDENT: The Puerto Rico situation is so -- because as you know --

Q Do you maintain that the federal response has been outstanding?

THE PRESIDENT: Oh, I think -- well, that's according to the Clinton administration's head of FEMA, it's been outstanding.

Puerto Rico is very tough because of the fact it's an island. But it's also tough because, as you know, it was in very poor shape before the hurricanes ever hit. Their electrical grid was destroyed before the hurricanes got there. It was in very bad shape, was not working, was in bankruptcy, owed $9 billion. And then on top of that, the hurricane came.

Now, you're going to have to build a whole new electrical plant system. We're not talking about generators. We moved -- Puerto Rico now has more generators, I believe, than any place in the world. There are generators all over the place. The fact is, their electrical system was in horrible shape before and even worse shape after.

So we are working right now -- as you know, relief funds were just approved and are in the process of being approved by Congress. And that includes Texas, by the way. That includes Florida. And it also includes Puerto Rico, the U.S. Virgin Islands, et cetera. But it was in really bad shape before. We have done -- I will say this, we have done --

Q (Inaudible) -- Mr. President, people don't have drinking water.

THE PRESIDENT: Well, we've delivered tremendous amounts of water. Then what you have to do is you have to have distribution of the water by the people on the island. So we have massive amounts of water. We have massive amounts of food. But they have to distribute the food, and they have to do this. They have to distribute the food to the people on the island.

So what we've done is we now actually having military distributing food -- something that really they shouldn't have to be doing.

But if you look at the governor, who is a good man, by the way, but if you look at the governor of Puerto Rico, he himself has said we've done an outstanding job. And most people have said we've done an outstanding job. But Puerto Rico is a very tough one.

Yes, go ahead.

Q (Inaudible) support for the 20-week abortion ban bill. How important is this bill to you? And what are you doing to work with Leader McConnell (inaudible) gets through the Senate?

THE PRESIDENT: Well, I'll let Mitch. You want to talk about that, Mitch?

LEADER MCCONNELL: Was the question about the 20-week --

Q (Inaudible.)

LEADER MCCONNELL: Yeah, well, it's supported by virtually all of my members, and we expect to have a vote on it at some point.

THE PRESIDENT: Go ahead.

Q Thank you, Mr. President. Previous Presidents who have traveled to South Korea have gone to the demilitarized zone. There are those who believe this would be the worst time to do that because it would be viewed as provocative. How do you view what you're trying to accomplish in South Korea? Do you intend to go to the DMZ?

THE PRESIDENT: Well, I'll be going, as you know, to South Korea, to China, to Japan, to Vietnam for the summit. We have a big economic summit there. I may be going to the Philippines also. We've been invited to the Philippines, so

I may be going to the Philippines. And I look forward to all of them. We haven't set the details as of this moment.

Q Are you afraid of provoking North Korea by going to the DMZ?

THE PRESIDENT: We'll take a look at that. I didn't hear in terms of provoking, but we will certainly take a look at that.

Q Thank you, sir. A quick follow-up on an earlier question. You discussed the special counsel and the investigation currently. Are you considering firing Robert Mueller?

THE PRESIDENT: No, not at all.

Q One quick follow-up on Iraq, sir. On Iraq, the Kurdish forces and Iraqi forces last night were clashing in northern Iraq. Are you concerned about a larger conflict in the region while U.S. forces are still advising on the ground?

THE PRESIDENT: We don't like the fact that they're clashing. We're not taking sides, but we don't like the fact that they're clashing.

Q Do you support the Kurdish referendum for independence?

THE PRESIDENT: Let me tell you, we've had for many years a very good relationship with the Kurds, as you know. And we've also been on the side of Iraq, even though we should have never been in there in the first place. We should never have been there. But we're not taking sides in that battle.

John.

Q Mr. President, in an interview earlier today, Hillary Clinton said that she did not believe that players taking a knee in the NFL was about disrespecting the flag -- at complete odds with the way that you have referred to this. You fired back in a tweet saying that you hope that she runs again in 2020. Why --

THE PRESIDENT: Oh, I hope Hillary runs. Is she going to run? I hope. Hillary, please run again.

Go ahead.

Q So she's at odds with you over whether or not this is disrespecting the flag. Is she right or is she wrong?

THE PRESIDENT: I think she's wrong. Look, when they take a knee -- there's plenty of time to do knees and there's plenty of time to do lots of other things. But when you take a knee --

Q She says taking a knee is reference to --

THE PRESIDENT: But when you take a knee -- well, that's why she lost the election. Honestly, it's that thinking -- that is the reason she lost the election.

When you go down and take a knee or any other way, you're sitting essentially for our great national anthem, you're disrespecting our flag and you're disrespecting our country. And the NFL should have suspended some of these players for one game. Not fire them -- suspended them for one game. And then if they did it again, it could have been two games and three games and then for the season. You wouldn't have people disrespecting our country right now.

And if Hillary Clinton actually made the statement that, in a form, sitting down during the playing of our great national anthem is not disrespectful, then I fully understand why she didn't win. I mean look, there are a lot of reasons that she didn't win, including the fact that she was not good at what she did. But I will tell you that is something that I had just heard about, and I think that her statement in itself is very disrespectful to our country.

Thank you very much.

Q Sir, what about police-involving shootings? Sir, what about police-involved shootings as it relates to the NFL? That is what the players are saying is the crux of why they're taking the knee, sir. The police-involved shooting issue, what would you do about that?

THE PRESIDENT: It is very disrespectful to our country when they take a knee during our national anthem. It is very --

Q (Inaudible.)

THE PRESIDENT: Just hear it. Hear it. It is very disrespectful to our country when they take a knee during the national anthem, number one. Number two, the people of our country are very angry at the NFL. All you have to do is look at their ratings and look at their stadiums. You see empty seats where you

never saw them before. A lot of people are very angry at it. It is highly disrespectful. They shouldn't do it.

Thank you very much, everybody. Thank you.

Q Mr. President, is healthcare now Trumpcare?

THE PRESIDENT: I don't think so.

END

2:27 P.M. EDT

IN A GENERAL COURT-MARTIAL
IN THE SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY
FORT BRAGG, NORTH CAROLINA

UNITED STATES	)	
	)	
v.	)	GOVERNMENT RESPONSE TO
	)	DEFENSE RENEWED MOTION TO
BERGDAHL, ROBERT BOWDRIE	)	DISMISS (APPARENT UCI)
(BOWE)	)	
SGT, U.S. Army	)	
HHC, Special Troops Battalion	)	20 October 2017
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	

I. RELIEF SOUGHT

The Court has already ruled that the statements made by then-Candidate Trump regarding SGT Bergdahl did not constitute Unlawful Command Influence (UCI). AE 36. The mere fact that President Trump has acknowledged the existence of those statements does nothing to alter that conclusion. As such, the Government requests the Court deny the Defense Renewed Motion to Dismiss (Apparent UCI).

II. BURDEN OF PERSUASION AND BURDEN OF PROOF

In the context of a motion claiming unlawful command influence (UCI), the initial burden is on the Defense to "show facts which, if true, constitute unlawful command influence." *United States v. Biagase*, 50 M.J. 143, 150 (1999). Second, the Defense must show "that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id.* "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." *Id.* The Defense is required to present "'some evidence'" of unlawful command influence. *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 300 (1995)). Third, if the Defense has made the requisite showing under the first two steps, the burden shifts to the Government to: (1) disprove "the predicate facts on which the allegation of unlawful command influence is based"; (2) persuade the military judge "that the facts do not constitute unlawful command influence"; or (3) prove at trial "that the unlawful command influence will not affect the proceedings." *Id.* at 151. "Whichever tactic the Government chooses, the quantum of proof is beyond a reasonable doubt." *United States v. Stoneman*, 57 M.J. 35, 41 (2002) (citing *Biagase*, 50 M.J. at 151).

G-APPELLATE EXHIBIT 103
PG 1 of 12

III. FACTS

The Government incorporates by reference the facts as alleged in G App 68, the Government Response to the Defense Motion to Dismiss, and G App 96, the Government Response to the Eighth Defense Motion to Compel.

On 27 September 2017 the Court denied the Eighth Defense Motion to Compel during an Article 39(a) session. Although no written ruling was issued, the Court did recognize what it described as a "logical fallacy" in the Defense argument that the theoretical[1] failure to disclaim statements which had already been determined to not constitute UCI could somehow transform them into UCI.

On 16 October 2017 the Accused entered pleas of guilty to both charges,[2] a providence inquiry was conducted, and the Court entered findings of guilty.

Later that day, President Trump conducted an unrelated press conference with Senate Majority Leader Mitch McConnell, during which he addressed a wide variety of issues. During that press conference, President Trump answered approximately 43 questions from reporters, including the following:

QUESTION: Do you believe that your comments in any way affected Bowe Bergdahl's ability to receive a fair trial? And can you respond to his attorney's claims that...

TRUMP: Well, I can't comment on Bowe Bergdahl, because he's -- as you know, they're -- I guess he's doing something today, as we know. And he's also -- they're setting up sentencing, so I'm not going to comment on him. But I think people have heard my comments in the past.

On 20 October 2017 the White House issued the following statement:

> Military justice is essential to good order and discipline, which is indispensable to maintaining our armed forces as the best in the world. Each military justice case must be resolved on its own facts. The President expects all military personnel who are involved in any way in the military justice process to exercise their independent professional judgment, consistent with applicable laws and regulations. There are no expected or required dispositions, outcomes, or sentences in any military justice case, other than those resulting from the individual facts and merits of a case and the application to the case of the fundamentals of due process of law by officials exercising their independent judgment.

Encl. 3.

---

[1] As the Government explained in its response, no request for any such statement was ever made, and as such, no one ever actually declined to disclaim the President's prior statements.

[2] The Accused entered a plea by exceptions and substitutions to Charge I. The Court ultimately convicted the Accused of the substituted words and figures.

IV. EVIDENCE

Enclosure 1. Affidavit of GEN Robert B. Abrams
Enclosure 2. Affidavit of COL Vanessa A. Berry
Enclosure 3. Statement by The White House Office of the Press Secretary

V. LAW AND ARGUMENT

The prohibition against Unlawful Command Influence is found in Article 37, Uniform Code of Military Justice ("UCMJ"), which states:

> 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 exercise of its or his functions in the conduct of the proceeding. 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, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

Unlawful command influence can occur in two forms: actual or apparent.[3] The question of whether there is apparent UCI is determined "objectively." *United States v. Lewis*, 63 MJ 405, 416 (2006). The test for apparent UCI is whether an "objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceedings." *Id.*

a. The Defense has not alleged any new facts which would constitute UCI

The President's statements during the 16 October 2017 press conference are the only new facts that the Defense has averred in their Renewed Motion. The President explicitly stated that he would not comment regarding SGT Bergdahl because there was a proceeding occurring that day and because sentencing was approaching. The final line of his answer is nothing more than an acknowledgment of the existence of his prior comments. He did not repeat or adopt his prior statements.

Despite the Defense's efforts to cast the statement "[b]ut I think people have heard my comments in the past" as some sort of turning point moment, the reality is that the statement is a truism in the highest sense of the word. The prior statements were not UCI at the time they were made and were not transformed into UCI upon his election. It would be absurd to conclude that the statements have now become UCI simply because he acknowledged having made them (a point that was never in contention).

---

[3] The Defense has only alleged apparent UCI.

The Court has already concluded that the prior comments, made in his capacity as a candidate, did not "rise to the level of 'some evidence' required for the defense to meet its initial burden." AE 36 at 6. Those comments remain what they have always been, "statements of a private citizen" that were "clearly made to enflame the passions of the voting populace against his political opponent and in Mr. Trump's favor." *Id.*

The Defense concludes from the last line of the President's answer that "his views now, months after Inauguration Day, are no different from what they were before then.[4] Had they changed, he would have said so." D App 108 at 3. Implicit in this argument is a recognition that the President's 16 October 2017 statement did not, in and of itself, contain any objectionable content. Thus, as a threshold matter, the Defense has not alleged any new facts which, if true, would themselves constitute UCI.

Instead, the Defense's Renewed Motion is based on the same flawed premise that the Court has already rejected: that the President's failure to disclaim his prior statements, which the Court has already determined were not UCI, transforms those statements into UCI. The Court appropriately recognized and rejected this logical fallacy when the Defense raised it as part of their Eighth Defense Motion to Compel and should do so again here. Put simply, the Defense has not alleged any new fact which, if true, would constitute UCI, and as such, has not met the threshold burden.

b. Assuming arguendo that the President's comments rise to the level of "some evidence" no objective disinterested observer would harbor any doubts about the fairness of the proceedings

The Defense advances a claim of apparent UCI only; they have not alleged that any of the proceedings to date or any of the participants have been impacted in any manner by any comments made by President Trump. The test for apparent UCI is based on an analysis of an objective, disinterested observer fully informed of all the facts and circumstances. Definitionally, such a person would already be aware of the prior comments made by then-Candidate Trump, such that the mere acknowledgment of their existence by now-President Trump would in no way add to the universe of information that an objective observer would have in evaluating the fairness of the military justice system. The facts surrounding the prior comments made by Candidate Trump remain the same as they did when the Defense raised their original motion. The comments were all made in the context of the 2016 Presidential campaign, they constituted a small fraction of what Mr. Trump said on the campaign trail and a miniscule portion of what was covered overall in the context of the election. Any objective, disinterested observer would continue to recognize the comments for what the Court has already concluded they were, "nothing more than inflammatory campaign rhetoric." AE 36 at 6.

---

[4] This line also reveals an error in the manner in which the Defense approaches the issue of UCI. Contrary to their belief that the existence of apparent UCI can be established by attempting to discern what the President's subjective feelings are, the actual standard relies on the question of what a disinterested objective observer would believe about the fairness of the proceedings.

The statement made by the President on 16 October 2017 was nothing more than an acknowledgment that he made statements previously as a candidate. The 20 October 2017 statement from the White House makes clear that "[t]he President expects all military personnel who are involved in any way in the military justice process to exercise their independent professional judgment, consistent with applicable laws and regulations." Encl. 3. Moreover, "[t]here are no expected or required dispositions, outcomes, or sentences in any military justice case, other than those resulting from the individual facts and merits of a case and the application to the case of the fundamentals of due process of law by officials exercising their independent judgment." Encl. 3.

The law has long recognized and supported the use of such statements to remove the alleged taint—both actual and apparent—of UCI from the proceedings. *See e.g. United States v. Jessup*, 1992 CMR Lexis 736. To the extent that there was any question regarding the President's position based on his 16 October 2017 press conference, the statement clearly resolves it: the President expects that all personnel involved in the military justice system will exercise independent judgment to ensure fairness.

In addition to this unequivocal statement from the President, an objective, disinterested observer would also be aware of the procedural posture of this case as it presently exists, otherwise they would not be fully informed of all the facts and circumstances. The single comment made by the President occurred after findings had been entered. Thus, all that remains is sentencing and post-trial proceedings. Indeed, the Defense specifically limits their allegations to the appearance of influence over the participants in the post-findings phase, specifically the Court, the SJA and GCMCA, and the Judges of the Army Court of Criminal Appeals or The Judge Advocate General as appropriate. The Defense offers no evidence to suggest that any of those individuals are aware of, or would be impacted by, the President's press conference, other than the generic assertion that as commissioned officers they are ultimately under the command of the President. This, by itself, is not enough to cause an objective, disinterested observer who is fully informed of all facts and circumstances to harbor significant[5] doubts about the fairness of these proceedings for a variety of reasons.

The Court previously recognized the value of *voir dire* on panel members as it relates to this issue, concluding that "[i]t 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." AE 36 at 6. The Court, having already dealt with the prior litigation regarding this issue, is of course fully aware of the prior statements made by Candidate Trump. The Defense has not sought to either *voir dire* the Court or move to disqualify as a result of that knowledge, nor has the Court *sua sponte* done so, as presumably it would if it believed that it had been

---

[5] In their pleading, the defense uses the phrase "substantial doubt." This is not the standard articulated in *United States v. Boyce, 76 M.J. 242.* Noticeably, they also limit the scope of the information received by the objective, disinterested observer to the most recent comment made by President Trump. That is also not the standard.

improperly influenced.[6] Similarly, the affidavits of both GEN Abrams, in his capacity as General Court Martial Convening Authority, and COL Berry, the Staff Judge Advocate, make clear that neither were impacted in any manner.

This conclusion is even clearer when taking into consideration the current procedural posture of this court-martial. The Accused has already pled guilty, and that plea has already been accepted by the Court. The sentencing authority in this case is also the Court. "Military judges are presumed to know the law and to follow it absent clear evidence to the contrary."[7] *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) *citing United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). There is no evidence, much less clear evidence to the contrary, that the presumption will not hold here. The Navy Marine Court of Appeals used this presumption as one of their factors in finding no apparent UCI when the accused selected a judge alone trial in a case concerning President Obama's May 2013 comments concerning sexual assaults in the military. *United States v. Guin*, 75 M.J. 588, 597 (N.M.C.C.A. 2016) (unpublished). The standard at issue is one where "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a *significant doubt* about the fairness of the proceeding." (emphasis added) *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017) *citing United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). Accordingly, even if the Defense has shifted the burden to Government, the Government has clearly proved beyond a reasonable doubt that the disinterested objective observer would not harbor any doubt, much less significant doubt, as to the fairness of the proceedings.

Finally, one of the factors the United States Court of Appeals for the Armed Forces has used in the past in determining whether there was apparent UCI is whether there has been "the extensive ventilation of the unlawful command influence allegations at trial through testimony, documentary evidence, briefs, arguments of counsel, and a detailed written decision by the military judge...." *United States v. Simpson*, 58 M.J. 368, 376 (C.A.A.F. 2003). The fact that this motion will be litigated in open court where both the public and the press will be present, and there will be a complete record of the facts, to include no impact on any party, forces that disinterested, objective observer to only one inevitable conclusion—the proceedings are fair.

VII. CONCLUSION

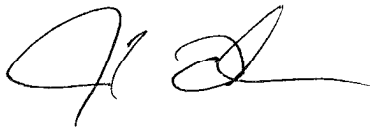
In denying the Defense's first attempt to have this case dismissed for apparent UCI, the Court concluded that "[n]o reasonable member of the public, apprised of all the facts and circumstances and seeing campaign rhetoric for what it is, would believe that because Candidate Trump said those troubling things and is now President Trump, the accused has been or will be denied a fair trial." It strains credulity to suggest that the President's statement acknowledging that which was already publicly known would alter that conclusion. The Defense has failed to offer any new evidence which, if true, would

---

[6] Though Defense has not requested *voir dire* of the Court, the Government intends to do so. The Government is confident once that *voir dire* is complete as part of presenting evidence concerning this motion, the lack of impact on the Court by the statement will be absolutely clear to any outside observer.

[7] This same presumption would also apply to the Judges on the Army Court of Criminal Appeals.

constitute UCI. As such, they have failed to meet the initial burden. Even if the comments made by the President on 16 October 2017 did constitute some evidence, no disinterested objective observer would harbor any doubts about the fairness of the proceedings for all of the reasons already outlined by the Court in its prior rulings and in addition, as a result of the statement from the White House on 20 October 2017. As such, the Defense Renewed Motion to Dismiss should be denied.



JUSTIN C. OSHANA
MAJ, JA
Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Defense Counsel on 20 October 2017.

JUSTIN C.
OSHANA MAJ, JA
Trial Counsel

AFFIDAVIT OF GENERAL ROBERT B. ABRAMS

TO THE HONORABLE JUDGE JEFFREY NANCE OF THE UNITED STATES MILITARY COURT FOR THE SECOND JUDICIAL DISTRICT, FORT BRAGG, NC:

I, GEN Robert B. Abrams, after being sworn upon my oath, make the following statement concerning my knowledge in the case of United States v. Sergeant Robert Bergdahl.

1. I am currently the Commanding General, U.S. Army Forces Command ("FORSCOM") and the General Court-Martial Convening Authority (GCMCA) in United States v. Sergeant Robert Bergdahl. I assumed command of FORSCOM on 10 August 2015.

2. I am not aware of any comments that President Trump may or may not have said concerning Sergeant Bergdahl since he assumed the Office of the President.

3. My role as a GCMCA is one of the most important authorities I have as the Commanding General of FORSCOM. I fully understand my role and responsibilities in executing this authority. As a GCMCA it is essential that I remain fair and impartial in every legal action where I execute GCMCA authority. It is my duty to ensure that all proceedings are guided only by the laws and regulations that govern the military justice system. This is my solemn duty that I take with the utmost seriousness and steadfast commitment. This is crucial to ensure a fair and just system. Decisions I make are mine alone in the execution of my GCMCA authority.

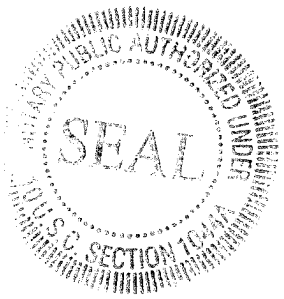
4. As I previously testified, all decisions already made by me and any future ones as the GCMCA are within my own discretion based only on the law and materials properly submitted to me for my review. I will continue to vigilantly guard my independent decision making as the GCMCA as required under the Uniform Code of Military Justice. My decisions will not be impacted by any outside influence.

Robert B. Abrams
General, US Army

ACKNOWLEDGEMENT

WITH THE UNITED STATES ARMED FORCES)
)
AT FORT BRAGG, NORTH CAROLINA)

SUBSCRIBED, SWORN TO, AND ACKNOWLEDGED before me, by the said Robert B. Abrams, who personally appeared before me and after the contents of the attached one page Affidavit thereof had been read and explained, acknowledged that he had signed the said attached instrument freely and voluntarily for the use, purpose, and consideration set forth therein on this 19th day of October, 2017.



MILITARY NOTARY PUBLIC (10 U.S.C. §1044a)

My Commission Expires: 19 September 2020

AFFIDAVIT OF COLONEL VANESSA A. BERRY

TO THE HONORABLE JUDGE JEFFREY NANCE OF THE UNITED STATES MILITARY COURT FOR THE SECOND JUDICIAL DISTRICT, FORT BRAGG, NC:

I, COL Vanessa A. Berry, after being sworn upon my oath, make the following statement concerning my knowledge in the case of United States v. Sergeant Robert Bergdahl.

1. I am currently the Staff Judge Advocate (SJA), U.S. Army Forces Command ("FORSCOM"). I assumed the position in February 2013.

2. I am aware of the comment made by President Trump on 16 October 2017 concerning the case of United States v. Sergeant Robert Bergdahl.

3. I take the role and responsibilities as the SJA under the Uniform Code of Military Justice with the utmost seriousness. I understand that my candor in providing advice solely based on the law and appropriate underlying facts is critical to a just and fair administration of military justice. I have done so throughout my tenure and will continue to do so.

4. No outside influence—including any statements by the President—will impact my recommendations or actions that I will take as the SJA in SGT Bergdahl's court-martial. All actions by me are my own and will be independently made based on my understanding of the law and the underlying relevant facts. I have done this throughout my career and this will not change in my continued service to my client—the U.S. Army.

Vanessa A. Berry
Colonel, Judge Advocate

ACKNOWLEDGEMENT

WITH THE UNITED STATES ARMED FORCES)
)
AT FORT BRAGG, NORTH CAROLINA)

SUBSCRIBED, SWORN TO, AND ACKNOWLEDGED before me, by the said Vanessa A. Berry, who personally appeared before me and after the contents of the attached one page Affidavit thereof had been read and explained, acknowledged that he had signed the said attached instrument freely and voluntarily for the use, purpose, and consideration set forth therein on this 20th day of October, 2017.

MILITARY NOTARY PUBLIC (10 U.S.C. §1044a)

My Commission Expires: 19 September 2020

From the Press Office

Speeches & Remarks

Press Briefings

Statements & Releases

Nominations & Appointments

Presidential Actions

Legislation

Disclosures

The White House
Office of the Press Secretary

For Immediate Release October 20, 2017

Statement Regarding Military Justice

Military justice is essential to good order and discipline, which is indispensable to maintaining our armed forces as the best in the world. Each military justice case must be resolved on its own facts. The President expects all military personnel who are involved in any way in the military justice process to exercise their independent professional judgment, consistent with applicable laws and regulations. There are no expected or required dispositions, outcomes, or sentences in any military justice case, other than those resulting from the individual facts and merits of a case and the application to the case of the fundamentals of due process of law by officials exercising their independent judgment.

MJ: All right.

Accused and Defense Counsel, please rise.

[The accused and his defense counsel did as directed.]

MJ: Sergeant Robert Bowdrie Bergdahl, I now ask you: How do you plead? Before receiving your plea, I advise you that any motion to dismiss or grant other appropriate relief should be made at this time.

Everyone can be seated, I believe, except Sergeant Bergdahl and Major Gleich.

ADC: Yes, Your Honor.

[The other defense counsel did as directed.]

ADC: Your Honor, the accused, Sergeant Bergdahl, pleads as follows:

To The Specification of Charge I: Guilty, except the words and figures: "combat operations in Afghanistan"; Substituting therefor the words: "a convoy from Observation Post Mest to Forward Operating Base Sharana"; Further excepting the words and figures "; and combat patrol duties in Paktika Province, Afghanistan," and "31 May 2014", Substituting therefor the words and figures "30 June 2009". To the excepted words and figures: Not Guilty. To the substituted words and figures: Guilty. To Charge I: Guilty.

To The Specification of Charge II: Guilty. To Charge II: Guilty.

[The court-martial closed at 1108, 16 October 2017.]

[The court-martial opened at 1300, 16 October 2017.]

MJ: The court is called to order. All parties who were present when the court recessed [sic] are again present.

Accused and Defense Counsel, please rise.

[The accused and his defense counsel did as directed.]

MJ: Sergeant Robert B. Bergdahl, this court finds you:

Of The Specification of Charge I: Guilty, except the words and figures, "combat operations in Afghanistan"; Substituting therefor the words, "a convoy from Observation Post Mest to Forward Operating Base Sharana"; Further excepting the words and figures, "and combat patrol duties in Paktika Province, Afghanistan," and "31 May 2014"; Substituting therefor the word and figures "30 June 2009".
Of the excepted words and figures: Not Guilty
Of the substituted words and figures: Guilty.
Of Charge I: Guilty.

Of The Specification of Charge II and Charge II: Guilty.

You may be seated.

[The accused and his defense counsel did as directed.]

MJ: Sergeant Bergdahl, we now enter the sentencing phase of the trial where you have the right to present matters in extenuation and mitigation; that is, matters about the offenses or yourself that you want me to consider in deciding an appropriate sentence for you. In

to recess until the 23rd when we will begin the sentencing case in this trial.

Before we do that, we do need to take care of some housekeeping matters. One has to do with the UMC motion, the other has to do with the witness issues that we've discussed by e-mail but apparently have been resolved. And then one has to do with sort of a communications issue with respect to one witness that I wanted to talk to you about.

First, with respect to the UMC motion: Defense's motion to dismiss for unreasonable multiplication of charges is denied. However, I do consider this to be an unreasonable multiplication of charges for sentencing, and the accused's sentence will be limited to the maximum punishment for the largest of the two offenses, which is the Article 99 offense.

Any questions about that?

I'll give more detailed findings of fact and conclusions of law on this UMC issue at a later date ----

ADC: No questions, Your Honor.

MJ: ---- if I think it's appropriate.

So these witnesses -- am I correct in understanding that there is no longer any dispute about the method or manner in which

any witness is to appear before the Court in the sentencing portion of the trial?

TC: That's correct, sir. My understanding is that, at this point, we have agreed to remote testimony for, I believe, it's now three witnesses. And we believe we've worked out a stipulation that will negate the need for one of the witnesses, who was potentially the subject of that request, to testify at all.

Then there's still some issues that we need to figure out in terms of whether or not it's going to be VTC or telephonic. We will endeavor to do VTC for as many of the witnesses as we can and telephonic as an alternative to the degree that they're unable to basically -- the civilians who have more difficulty getting to a video-teleconference.

MJ: Sure.

TC: But other than that, I believe that, at this point, we have worked out all of those issues.

MJ: Is that your understanding, Defense?

ADC: Yes, Your Honor.

MJ: Okay. Thank you.

What I will say -- I understand that there may be some issue concerning one witness needing to testify -- who you want to

have testify by VTC needing to testify by SIPR VTC and that that is the only way that witness can appear by VTC. Unless that witness has classified information that that witness needs to discuss, that witness will not testify by VTC SIPR.

If its unclassified information, the witness will testify by telephone or by some other method; but we will not have a closed-session where there is no classified information to be discussed.

Weighing the constitutional questions at play at that, I find that they trump any issues of personal appearance by VTC of that witness versus telephonic appearance by that witness.

The difference between those two things cannot possibly be important enough to trump the constitutional issues associated with that person testifying by telephone or not by telephone.

ADC: No issues from the defense, Your Honor.

TC: I'm not even sure that I'm a hundred percent sure who we're talking about, but I think I do. And I think it is a defense witness; so obviously, the government doesn't have any issues.

MJ: All right. Let's see. Is that all we need to discuss then?

TC: Just to confirm, Your Honor, for the purposes of the proceedings beginning on the 23rd, I just wanted to confirm our scheduling -- that we do not intend to have any proceedings on Friday?

MJ: The 27th, that's right.

TC: And that the plan is to end at 1500 on each day that we're presenting testimony?

MJ: That's right. Unless, the defense tells me they want to go longer to take a witness that they want to get done for that day or something. You know, I mean, I'm willing to flex on that 1500 end time but, obviously, at the defense's discretion on that.

TC: Yes, sir. We'd just ask for some degree of certainty. Because of the number of witnesses that are coming in, we're staggering travel. So if we're going to go significantly past that, we would potentially need to adjust fire on that.

MJ: We're not going to go significantly past that.

TC: Yes, sir.

MJ: I'm just talking about -- you can't -- it's impossible to end work right on the dot every day.

TC: Certainly.

MJ: So we just need to be prepared to go a little bit longer or a little less. And I'm sure your witness TPFDL will work out just fine.

TC: Yes, sir. Nothing further from the government.

MJ: All right. Defense?

[Pause.]

ADC: I'm sorry, Your Honor. I just want to check with the team.

MJ: Sure.

[Pause.]

ADC: Nothing further from the defense, Your Honor.

MJ: Okay. The court is in recess.

[The court-martial recessed at 1314, 16 October 2017.]

[END OF PAGE]

CDC: Thank you. May it please the Court, I would like to comment on the government's response to the renewed motion and also on the principles that should guide the Court in fashioning relief.

But first, with the Court's leave, I would like to ask the court reporter to play a very brief portion of a video exhibit that has been marked as Defense Appellate Exhibit 109.

[Defense Appellate Exhibit 109 was published to the screens in the courtroom.]

CDC: Thank you.

The renewed motion, like the initial one that we filed on January 20th, asserts a claim of apparent UCI, unlawful command influence. The governing law is set forth in the *Boyce* case. *Boyce* did not break any new ground. It and the other authorities cited on pages five and six of D App 56 make it clear that a President's words and deeds can constitute UCI. The government's response never disputes this.

The statement issued by the Office of the White House Press Secretary late on Friday implicitly but unmistakably acknowledges the point.

Whatever may have previously been the case with respect to the statement and conduct that gave rise to the January 20th motion,

President Trump, last Monday, reconfirmed the campaign trail words and deeds on which the president -- that the Court commented adversely in its February 24th decision.

It is worth a moment, even though I know you've just seen it, to recall the president's words in the Rose Garden. He said -- and having been asked with particularity about Sergeant Bergdahl, "Well, I can't comment on Bowe Bergdahl, because he is -- as you know -- they're -- I guess he is doing something today as we know. And he's also -- they're setting up sentencing. So I am not going to comment on him, but I think people have heard my comments in the past."

From this we learn three things, we learn:

First, that President Trump was aware that it was improper for him to comment. His ostensible refusal to comment is strong evidence that he was aware that an incumbent President's words can constitute UCI, although he might not have known the precise legal terminology.

Second, we learn that his pre-inauguration statements were an accurate reflection of his current views. His final comment, beginning with that telltale word "but," unmoors him from the disclaimer it immediately followed and let the cat out of the bag,

not that there was any real doubt about the persistence of his often repeated views about Sergeant Bergdahl.

Third, we learn that if the Court's prior decision was intended on some level to have a chilling effect on the president, it proved ineffective where the rubber meets the road.

If this were January 2021, and President Trump were about to leave office, either by not seeking re-election or by failing in the attempt, perhaps no one would care. But that is not the case. He will be President for the duration of this case, through to finality. Experience, unfortunately, teaches that merely disapproving of his now reconfirmed statements is insufficient.

The government's effort to deny President Trump's plain meaning is unpersuasive. There is no need for me to belabor that point.

In other respects, the government's response is ill conceived. For example, self-serving assurances by the convening authority and his staff judge advocate that they will be fair and independent, far from carrying the government's onerous burden of proof, are simply not probative.

The "statement" regarding military justice adds nothing. It is transparently plagiarized from a memorandum Secretary Hagel

issued on August 6th, 2013, a copy of which trial counsel provided to the White House on February 13th, 2017.

In this regard, I refer the Court to D App 95 at pages 11 and 12. Those are e-mails if you recall.

MJ: I remember those.

CDC: The Hagel memorandum, which at least had some human being's signature on it, had never been withdrawn. The one paragraph version reissued on Friday was, therefore, on top of everything else, superfluous.

Friday's -- I am not going to belabor the -- where things in the "statement" were lifted from in the Hagel memorandum. Sergeant Johns, one of our paralegals, generated this very helpful exhibit with arrows and color coding which makes the point better than I can.

Friday's statement was obviously generated in response to our motion. It neither withdraws nor apologizes for the Rose Garden comment. In fact, it never even mentions it. According to a story the Associated Press moved later on Friday, the White House refused to confirm that the statements even related to Sergeant Bergdahl.

And I will be happy to give the reference to that or a printout if there is any dispute over this.

Finally, both President Obama's comment about the need to give everyone who commits sexual assault a dishonorable discharge and Secretary Hagel's follow-on memorandum were generic. Neither one named anyone in particular. But President Trump's comments last Monday and the earlier ones that he ratified that day referred by name to Sergeant Bergdahl. Soldier-specific UCI cannot be cured generically.

In summary, on this part of my submission, Your Honor, it's difficult to imagine a less contrite, more grudging or, in the end, less effective attempt to walk-back an improper presidential statement. President Trump could have returned to the Rose Garden and personally disavowed his prior statements. In our view, that would not have cured the problem he created, but there's no reason to reach that question because he hasn't done those things.

Now, to the question of remedies. Fashioning remedies for UCI is committed to the Court's broad discretion. It may be useful to try to identify neutral principles that should govern and, as you will see in one case, not govern the exercise of that discretion. So if the Court will bear with me.

First, the remedy should be reasonable, and it should be tailored to the particular UCI and to the interest being vindicated.

I have a few bullets under that rubric.

In cases of apparent UCI, the interest being vindicated is not merely that of fairness to the accused but also, and arguably more urgently, that of public confidence. Where, as here, the government is unable to prove beyond a reasonable doubt that an objective observer fully informed of the circumstances would harbor a substantial doubt as to the fairness of the proceedings -- here, the post-findings proceedings, nothing less than public confidence in the administration of justice is at stake.

Similarly, that the individual whose words give rise to the apparent UCI is the Commander and Chief is highly salient and demands the greatest judicial firmness.

That the Court has already had occasion to express its concern over particular statements also militates in favor of firmness in framing relief. The White House, which understandably took an interest in the government's response to our January 20th motion -- and for this I refer you to D App 95 at page 5 -- was long aware of the dim view the Court took of President Trump's pre-inauguration statements about Sergeant Bergdahl. Trial Counsel sent the White House a copy of the Court's ruling the day it was

issued. We know this from D App 95 at page 9, which is an e-mail indicating transmission of AE 36.

The remedy should reflect the procedural posture of the case. Here, the offending act occurred after pleas were accepted and findings entered. As you reconfirmed this morning, Sergeant Bergdahl has not asked to withdraw his pleas as he had a right to do. The Court's focus should be on the case downstream from findings. This includes both sentencing and everything that follows.

The remedy, finally, should reflect the specific nature of the offending statements. Here, President Trump reconfirmed statements that repeatedly call for Sergeant Bergdahl to be severely punished. He was particularly offended that, notwithstanding the nearly five years of enemy captivity to which the government has previously stipulated, Sergeant Bergdahl might not be sentenced to confinement.

A second neutral principle is that if two remedies are equally warranted, the Court should opt for the greater. The reason for this is that, as a remedial doctrine, UCI should be administered liberally and in a way best calculated to achieve its important purpose.

A third neutral principle is that the remedy should send a message not only to the offending official but to his or her subordinates and to the public. This means not only that the Court must take firm and decisive action but that that action should be separately stated rather than baked into a sentence. Submerging UCI relief into a sentence blunts the message and thwarts meaningful appellate review.

A final neutral principle concerns not something the Court should consider, but something to which it should give no heed; that is, the fact that some UCI remedies may be appealable under Article 62 of the UCMJ while others are not should play no role in deciding what relief is appropriate. If the proper remedy under the first three principles I have proposed is one that can be appealed, so be it.

In conclusion, the Court should rule, explicitly as a UCI remedy, that the sentence will not exceed the sentence of no punishment or at the very least, Your Honor, will not include confinement.

Given President Trump's call for confinement and his explicit promise to review the case if there is none, taking

confinement off the table is absolutely essential if the integrity of the military justice system is to be preserved.

Thank you, Your Honor.

MJ: Trial Counsel?

TC: Sir, the government's position is, at the outset, that the defense has not offered any new evidence which, if true, would constitute UCI and, as such, there is no burden shift to the government to establish beyond a reasonable doubt that no disinterested, objective observer would harbor any significant doubts about the fairness of the military justice system.

And if we go back, Your Honor, to the discussion that we had -- I believe it was on 27 September at our last 39(a) where we dealt with the defense's motion to compel that was related to the question of UCI because it was for un-redacted e-mails and some additional information concerning the White House -- one of the things that we discussed at that point was the logical fallacy that something which the Court had already determined was not UCI, either actual or apparent, had been transformed into UCI by the failure to disclaim it. And that is ----

MJ: Don't we have something different here?

TC: We do not.

MJ: How so?

TC: Because all that has occurred on its face is an acknowledgement by the president that he believes that people have heard the comments that he made in the past. That ----

MJ: What does the word "but" mean in that context?

TC: Well, if you look at the ----

MJ: To you what does it mean?

TC: I think what it means, Your Honor, is that the president was being directly responsive to the question that was -- that was asked. He's ----

MJ: I think he was being directly responsive to the question that was asked.

TC: But doing nothing more than acknowledging the existence of those statements does not transform them. That does not change the fact that the statements were made, the context that they were made in, or the number or type of people who would have heard them in the past.

MJ: Well, this is an interesting discussion because words have meaning.

TC: Yes, sir.

MJ: And "but" means what?

TC: Yeah. It is -- it is intended, clearly, to separate out the statement that follows from some portion of what happened previously.

MJ: As an exception.

TC: Well, I'm not sure that it necessarily has to be an exception.

MJ: So what does "but" mean?

TC: It is a recognition in this case, because of the -- if you look back at the particular question that is asked, implicit in that question is, of course, the existence of these statements, themselves.

So the president saying, "I am not going to comment on this at this time," because he recognizes the nature of the proceedings that is happening, and then saying, "But I recognize that people" -- or -- "But I believe that people have heard my comments in the past," is not an explicit endorsement of those statements.

MJ: However, the "but" is a transition between the sentence that talks about the sentencing case in this case, and the president's reference to his prior comments. So you cannot divorce the transitional word from the sentence that preceded it.

I don't know how you do that?

TC: I don't think you have to do that, Your Honor. I think that they -- they stand together to mean both that the president is recognizing that he cannot at this point make additional comments about that and then, in response to the reporter's question about the existence of his prior comments, recognizing that they were made and that people had heard them.

But again that does nothing to change the nature of those comments. It doesn't do anything to affect the fact that, as the Court has already recognized, they were made in the context of the campaign by an individual who was legally incapable of committing any form of UCI at the time that those statements were made.

MJ: You don't see this as a statement by now the president of the United States in response to a specific question about the sentencing proceeding in this case, referring to the sentencing proceeding in this case and incorporating, by reference, everything he said as a candidate for presidency?

TC: I do not.

First, the question itself is not specific to the sentencing. It's a question of whether or not he is -- I believe, that his comments have impacted Sergeant Bergdahl's ability to receive a fair proceeding. That makes sense given the timing of it,

but it was not clear that it was specific to the question of sentencing.

But more to the point, no. I think that the president is very clear initially, in recognizing that in his new capacity as the president, that he will not offer additional commentary. The recognition of those past comments, again, changes nothing. It's not like the comments didn't exist until the president acknowledged that he had made them.

As we argue in the brief, simply acknowledging the existence of a thing does not change its nature, nor does it make it suddenly something that exists. It existed at the time. It existed in the context that it existed, and there's no reason to believe that an objective observer -- and I don't even think we get there again because ----

MJ: But maybe -- I'm sorry. That may be true that if I accept your conclusion that all he's doing is he is acknowledging the existence of the thing. And I'm not sure that I'm able to do that given the context not only of the question, which was cut off before it was completed, but also the fact that in spite of the initial disavowment -- well, I shouldn't say disavowment -- the initial acknowledgement that he shouldn't say anything, he goes on to say

something and talk about the sentencing in this case which he obviously knew was pending and then referring back to the things that he's said before.

TC: In the context of what he said specifically about sentencing, he is talking about how he will not make additional comments with regard to that. So it's both a recognition of the fact that he believed that -- what I assume he's referring to is that when he says he's going to do something that Sergeant Bergdahl was intending to enter pleas. And it probably just wasn't something that he was aware of that that had already, in fact, occurred.

But then the next sentence is the same thing, "And then they're going to set up sentencing, so I'm not going to comment on that."

So, no, I don't think that in any way serves as an adoption of those statements. And if you look at the defense's argument what they are saying is had he wished to disavow his statements, he would have done so. That's in their latest filing. So what they recognize is that, on its face, the statement that he made last week is not, by itself, any form of UCI and that unless you reach the secondary conclusion that he is attempting to either adopt or fail to disavow

those statements, then as a result we are now into the apparent UCI paradigm.

But that's the same logical fallacy that they were making before; that is, the failure to disavow a thing, when potentially presented with the opportunity to do so -- we disagree, of course, that that is what happened as it relates to the transmission of the Hagel memo prior to this.

But the logic is the same. The statements, themselves, have not changed. Their context has not changed. The only thing that the defense can point to that is new is a statement that again, on its face, does nothing more than acknowledge the existence of the statements.

Surely, Your Honor, had the president said something along the lines of, "And I continue to believe all of that now," the defense would be pointing to that and grasping onto that as a much stronger form of their argument here. And the fact that they can't do that is strong evidence of the fact that this is nothing more than an acknowledgement of those prior statements and, as such, we don't even think we get to the burden shift.

But even if we did, it's the government's position that we have established beyond a reasonable doubt that no disinterested,

objective observer would harbor any doubts about the fairness of the proceeding.

And counsel's argument about how the statements from the Convening Authority and the SJA should not be persuasive simply don't recognize the realities of the many methods by which a court can be assured that the public will have confidence in the fairness of the proceedings.

The Court, itself, recognized that in its original ruling on this issue when you discussed the use of *voir dire* and the fact that a panel member could give an honest and convincing answer that they either had not heard of the comments that were made by Candidate Trump or that they would not be impacted by them. This Court also heard testimony -- live testimony from General Abrams in the past, as it related to the question on Senator McCain. And as part of that, the Court asked him additional questions about one of Candidate Trump's statements.

So the Court has already concluded that it is possible for an individual to make an honest and convincing statement that they are not going to be impacted by that. And I would submit that we've had that, now at this point, from three of the individuals who are left to do anything in this case: the Court, in the short *voir dire*

that we did earlier; the Convening Authority; and the Staff Judge Advocate.

The only people that remain at that point are the judges of the Army Court of Criminal Appeals and the Court of Appeals for the armed forces. As we've pointed out and we're confident is the same as we believe it to be with this Court, judges are presumed to know the law and expected to follow it. We are -- have no doubt and don't think that any reasonable member of the public would have any doubt that the judges of the Armed Forces Court of Criminal Appeals would be able and would, in fact, give Sergeant Bergdahl fair consideration on appeal.

MJ: Well, and the CAAF judges are also not subject to the orders of the president. They're certainly appointed by the president or nominated by the president.

TC: Yes, sir.

MJ: And -- but they serve for -- what is it?

TC: A fixed 15-year term.

MJ: 15-year term.

TC: Yes, sir.

MJ: One time, nonrenewable.

TC: Yes, sir. And the defense does not even ----

MJ: No.

CDC: It's renewable.

MJ: It's renewable. They just -- once they've done 15, most of them have had enough of it?

CDC: If not before then.

MJ: Yeah. In any case, not subject to the orders of the president like you and I are.

TC: Yes, sir. And I think ----

MJ: And the judges on ACCA are, Army Court of Criminal Appeals are.

TC: Yes, sir. But again, given the position of those judges and the importance that I am sure -- and that the law presumes that judges place on their independent judicial responsibilities, any member of the public would have no doubt about the fairness of these proceedings.

But again you've got to still go back to Your Honor's prior ruling, and this can't be viewed in a vacuum, right? So a reasonable, disinterested, objective member of the public is not simply aware of a statement that was made last week. They continue to be aware of the overall context in which the original statements

were made. And in that context, the Court has already concluded that there was no apparent UCI.

MJ: Well, but the reasons for that tend to be eroded when the now-President of the United States arguably adopts those statements.

TC: But one -- again, the government does not believe that has, in fact, occurred.

But if you look back to Your Honor's ruling, there is, in fact, only one point where the Court makes reference to the fact that then-Candidate Trump has not mentioned Sergeant Bergdahl in his capacity as President Trump. And it is in the -- the portion of Your Honor's ruling where you have already concluded that the statements did not constitute UCI. The Court wrote that it was even more apparent that this was not something that would cause concern among a member of the public.

MJ: Right, but that was because of the context in which the statements were made previously, which were as an effort to get himself elected president.

TC: Yes, sir.

MJ: And that people would -- I think the words I used were, "would recognize the statements for what they were, campaign rhetoric designed to embarrass a political opponent."

TC: And the government's position is that's still what they are. Again, you don't ----

MJ: So what political opponent is he trying to embarrass when he makes the statements in the Rose Garden with ----

TC: Sir, he, again, did not say anything even remotely close to the nature of the statements that he made while on the campaign trail ----

MJ: And that ----

TC: ---- and surely if he had, we would be dealing with a very different motion from the defense and that they would latch on to that more than anything else in support of their argument.

MJ: That assumes that your interpretation is correct that, "But I think people have heard my comments in the past," cannot be inferred to mean that, "That's what I think."

TC: Well ----

MJ: "That's what I think about the sentencing thing coming up that I just talked about."

TC: I think that's certainly one part of the argument that the government is advancing that that is not what should be read into that.

But I also think that we need to take a step back from this and look at what the actual standard here for apparent UCI is because it is not simply: Can we attempt to divine what the President of the United States or any senior commander actually believes?

The standard is: What would a disinterested, objective observer aware of all of the facts believe about the ability of this accused to get a fair trial? And would they have significant doubts about the fairness of the proceedings?

So it is not as simple as saying, "Can we figure out what Donald Trump thinks?" That may play some part. You know, if the president came forward and tried to give some kind of statement that was directive in nature or something like that, that would certainly be relevant.

But the standard is still what does that disinterested, objective observer believe? And the reality is, given both procedural posture of this case -- so this is not something that even the defense alleges had any impact on the findings because, of course, this allegedly new evidence occurred after the fact -- and the individuals who are left in the process -- the statements that they have made and, in fact, the statement that came out of the White House that whether the defense likes it or not in terms of it was

lifted, I think they said -- or plagiarized --I'm not sure even how that would be relevant at this point. It's ----

MJ: If something works, why change it?

TC: Yes, sir. And the reality about that is that the prior statement was made on behalf of President Obama. We now have a new administration.

So you have a clear and unequivocal statement on what the president's expectation is as it relates to military justice that comes from the White House -- arguably a more significant statement than simply the Secretary of Defense, a subordinate of the Commander in Chief -- signing a statement that makes it unambiguously clear that the president expects that everyone involved in the system will exercise their duties independently and that there are no expected or anticipated sentences in any case.

So it's an interesting argument from the defense, who has repeatedly pointed out that the lack of a Hagel statement or a Hagel-like statement is some form of evidence and that the failure of the White House to have issued one in the past was evidence of UCI; but now that there is such a statement out there, that it bears no weight.

So, Your Honor, for all of those reasons, we can attempt to read into what that statement that the president made last week means; but on its face, it is not an explicit adoption or admission of his prior statements. As such, it does not constitute evidence, which if true would be apparent UCI. And more to the point, given everything that the government has been able to demonstrate up until this point with regard to the actors remaining in the process -- their clear and, I think, convincing statements that they are not impacted in any way by these statements. The context in which the statements, themselves, were made, which the government still believes is relevant to that determination, and the statement that came from the White House which, if there was any doubt, the government believes has resolved that doubt in terms of what the president expects members of the military to do as it relates to military justice.

So for all those reasons, the government would ask that the Court deny the defense renewed motion to dismiss.

MJ: I'm just having a hard time with your interpretation of what "but" means in that context.

I mean, let me read it to you again, substituting the commonly understood definition of the word "but."

"Well, I can't comment on Bowe Bergdahl, because he's -- as you know, they're -- I guess he's doing something today as we know. And he's also -- they're setting up sentencing, so I'm not going to comment on him other than to say I think people have heard my comments in the past," or "except that I think people have heard my comments in the past," or "on the contrary, I think people have heard my comments in the past."

Why is that not -- I mean, the member of the public that we're interested in, in maintaining confidence in the military justice system is going to use common understandings of words and is going to be influenced by context. That's the way most of us and most of the general public comes to understand what someone means by what they say.

And so why should I believe that the average member of the public is going -- apprised of all the facts and circumstances is going to put some clever interpretation on the word "but" and say that it does not mean an exception to, "I'm not going to say anything about sentencing except everything I said before."

Why -- I don't -- I'm having a hard time, logically, getting there.

TC: I think there are three points that I would say in response to that, Your Honor.

First, with all due respect to the president, if we're going to break the entirety of his statement down in terms of trying to interpret the grammar, it's not the best constructed three sentences that we've ever seen.

MJ: Well, people don't talk the way they write anyway.

TC: I agree.

MJ: And we're all -- we're all guilty of that. You look at the transcript of this case. There are going to be hyphens. There are going to be ellipses. Well, maybe not hyphens; but there are going to be breaks and changes in thought and interjections of ideas. People don't talk the way they write. I got that.

TC: But I think, Your Honor, that what that means for trying to interpret what this statement overall means is that, while the Court can certainly look to what the commonly held understanding of the word "but" means, you also have to look at the context of the first two statements, which on their face are a recognition that, in his capacity as President given the place that we are in the proceedings, that he cannot comment.

And again, on its face, all he is doing in the next sentence is acknowledging in response to the reporter's question ----

MJ: You keep saying that.

TC: Your Honor, because I think that is clearly what the words themselves mean. In order to get beyond that, we have to try to interpret what the president meant, not what he explicitly said.

MJ: But that's what communication is all about. You interpret what somebody means by the context of the comment that they made.

TC: Well, I think you ----

MJ: And----

TC: ---- I think you initially ----

MJ: Let me finish.

TC: ---- look at the words.

MJ: Let me finish.

And certainly what you say is one possible interpretation. I think it's a strained interpretation. I think the less strained and easier and more likely interpretation is, "Look, on Bowe Bergdahl, people have told me I shouldn't comment on that, but I think everybody knows what I think about Bowe Bergdahl."

TC: Well and again, I think Your Honor is now reading now even additional things into this. So the point that I'm making, sir, is ----

MJ: I'm just a normal guy.

TC: Yes, sir. All I'll say, sir, is that I think that at the outset, the way that we interpret what someone means is by what the words themselves are. So the lack of an actual adoption of the -- or, "I still believe that," type of language, the government believes is significant.

We don't, in the end, believe that any of this is controlling because, again, the standard for UCI is not this kind of back and forth and can we figure out what the president believes or desires? It is taking everything into context. What would the disinterested, objective observer conclude -- and not simply conclude, but would it rise to the level of harboring significant doubts about the fairness of the proceedings?

MJ: Well, yeah. That's the farther end of the analysis. Right now, we're talking about some evidence of UCI.

TC: Yes, sir. But I do think that that is connected in terms of when you have to ultimately make that conclusion about the disinterested, objective observer.

The fact that the statement is not an explicit adoption or repetition of the prior statements that were made is a factor that the Court should consider in making a determination about what this disinterested, objective observer would believe and conclude that that person would not harbor doubts at all, but certainly no significant doubts, about the fairness of the proceeding when you take into context everything else about both the original comments, the stage of the proceeding that we're at, the individuals who remain in terms of making decisions relating to this case, the statements that those people have made about their ability to remain fair and impartial, and finally, the statement from the White House issued specifically with regard to military justice.

And we don't have to try and divine what the president is trying to say in that statement; it is explicit. The President expects that everyone involved in the military justice system will exercise their judgment independently and does not have any expectation for a particular sentence in any case.

So this is -- this is the reason why the disinterested, objective observer is not asked to make a judgment about UCI based on a single point in time. It's the context overall that becomes important and, when you take all of those factors into account, even

if you conclude that the use of the word "but" transforms this into the threshold of some evidence necessary to shift the burden, the overwhelming weight of the evidence establishes beyond any reasonable doubt that nobody would have any significant doubts about these proceedings.

And subject to your questions, Your Honor, that's all I have.

MJ: On page 5, you say, "The Defense offers no evidence to suggest that any of those individuals are aware of or would be impacted by the press conference other than generic ----

CDC: I'm sorry, Your Honor. I couldn't hear you.

MJ: I'm sorry.

On page 5 of your brief, Government Appellate 103, Government, you say, "The defense offers no evidence to suggest that any of those individuals are aware of, or would be impacted, by the president's press conference, other than the generic assertion that, as commissioned officers, they are ultimately under the command of the president."

TC: Yes, sir.

MJ: This is referring to me, the SJA, the GCMCA, the judges on ACCA, and The Judge Advocate General.

TC: And that ties back, Your Honor, to what we then reference in the next paragraph. So when the Court, in its original ruling, recognized the potential value of *voir dire*, one of the factors was that it was -- it was possible that, in response to questions, individuals would say they'd never heard any of the comments or they would be able to give honest and convincing answers that they had heard them but that they were not impacted by them.

So the -- you know, Defense, at the time that they filed this motion, could have asked to interview the SJA or the Convening Authority. They could have asked, themselves, to *voir dire* Your Honor on all of those questions. And certainly, if you had -- so I think the way that I sometimes analyze these things is: Let's imagine the worst-case scenario and then sort of backwards plan from there.

Surely if they had done that, and you had said, "Yep. I've heard it, and I can't be fair," we would be in a very different place in terms of what would that disinterested, objective observer believe. So the absence -- initially, the absence of any evidence that these people were even aware of these comments and now the affirmative evidence that at least the Convening Authority was not aware of the comments and that Your Honor was only aware of them as a

result of the briefing suggests strongly that that person would not harbor any significant doubts about the proceedings.

MJ: Well, and sort of to add to the *voir dire* in case it wasn't clear, I wasn't asked the specific question. But I don't have any doubt whatsoever that I can be fair and impartial in the sentencing portion of this trial. I'm not influenced by these matters in the least and certainly not in a negative way towards Sergeant Bergdahl.

TC: And, sir, the point sort of again ties back into that if the value of *voir dire* in a panel case is that the public would be aware that the individuals who were involved in making determinations at that point about the guilt/innocence merits phase would not be impacted and that that conclusion and that knowledge is relevant in the determination that they would not harbor any significant doubts, then surely the statements by the people who remain in the process at this point serve the same function.

MJ: Okay. That's all the questions I have. Thank you.

Let's give Mr. Fidell his chance now.

CDC: Thank you, Your Honor.

It's certainly a strange situation in which the Court is asked to rule on its own credibility.

MJ: We're asked to do that all the time.

CDC: On its own credibility?

MJ: Well, on -- when we are *voir dire*d and asked and challenged for cause -- which nobody has done in this case. Nobody's asked me to recuse myself -- we're asked to rule on our credibility.

[Pause.]

MJ: Certainly. You don't think so?

CDC: Well ----

MJ: We have to say, "I am fair. I can be fair and impartial. I don't have any doubt I can be fair and impartial." And then we have to say, "I will not recuse myself, because I can be fair and impartial." That's ----

CDC: I have this sense that there's something circular there but -- let me move on.

MJ: Nevertheless, it's the rule.

CDC: I'm going to make a further request for judicial notice.

MJ: Okay.

CDC: And that is that both The Judge Advocate General and the judges of the Army Court are active duty officers -- either active duty or Reserve in the case of some of the Army Court judges.

MJ: Yeah. I don't know if there's any Reserves.

CDC: There are no civilians that I know of.

MJ: No. There aren't any civilians. There could be, but there aren't.

CDC: Right.

MJ: And I don't think there are any Reserve judges on the Army Court right now, but there could be. Either way, if they were, they would be subject to the president's orders.

CDC: Right. And the same for The Judge Advocate General, who I think by statute ----

MJ: Absolutely.

CDC: ---- has to be ----

MJ: Absolutely.

CDC: Right. And I ----

MJ: So I don't have any problems ----

CDC: Okay.

MJ: ---- taking judicial notice of that.

Government, any issues with that?

TC: No, sir.

CDC: I wanted to highlight one fact, and I'm -- I'm not going to, you know, recycle the colloquy that you have had thus far.

It occurred to me, as I listened to counsel, that the government has never quarreled with the principles that we proposed in my opening remarks. There's no dispute.

Finally, if it would assist the Court and the court reporter, I would be happy to provide a typescript of my earlier comments.

MJ: Well, I think she already has them, pretty much, type-scripted.

CDC: I have it if it would -- if it would assist the Court.

MJ: I'll let her say that, whether it does or not assist her.

[The court reporter indicated a negative response.]

MJ: I took copious notes of your principles.

CDC: Okay. Unless there are any further questions, that concludes our presentation.

MJ: Okay. I have no further questions.

All right. So my understanding, based upon our communications, is that we are going to be in recess here in a minute until ten o'clock on Wednesday.

Well, let me ask this question, Defense: Your prayer for relief was that I dismiss the charges and specifications. And then, in your argument, I think you did not ask for that.

Has the defense changed its view about what it wants as a remedy, or are you just including those other two things as fallback positions?

CDC: Your Honor, this is -- we filed this as a -- this is a little bit longwinded, but if you bear with me…

MJ: No, no.

CDC: We filed it as a renewed motion to dismiss, because the original motion was a motion to dismiss. But at issue, we think, considering the procedural posture of the case and thinking here of one of the principles that I proposed, what we're really talking about is the -- the sentencing phase and, of course, the appellate review and respective sentencing.

We preserve our position with regard to the January 20th motion. That's -- that's baked in so to speak.

MJ: Sure.

CDC: So ----

MJ: Yeah. Okay.

CDC: ---- so ----

MJ: All right.

CDC: ---- I think that answers your question.

MJ: Yes. It does. It does.

It's unfortunate that 23-year-old Private First Class Bergdahl, when he made that decision, did not understand his mental disease and defect at that time. And he probably, hypothetically, shouldn't have been in the Army. But with this issue, Your Honor, you should keep in perspective that the crimes that he committed were military-specific crimes. He left his post, and he was gone for a few hours to which -- he was then tortured for five years by the Taliban and left with severe, long-lasting, physical and psychological issues that he will carry with him for the rest of his life.

Punishment should be just, Your Honor, and Sergeant Bergdahl acknowledges that. He acknowledges that by accepting responsibility for his actions. And in considering punishment, the defense would request that, based on the natures of nature of these crimes being military-specific crimes and Sergeant Bergdahl's mitigating circumstances of his schizotypal personality disorder that he didn't understand -- the defense requests that you characterize his sentence appropriately -- or excuse me -- characterize his service appropriately. And an appropriate sentence that the defense would submit to the Court is a sentence of no confinement.

Sergeant Bergdahl has been punished enough. Even the most glorious of confinement facilities would serve no rehabilitative purpose or any principle under our *Manual for Courts-Martial* with regard to an appropriate sentence, based on what Sergeant Bergdahl has suffered at the hands of his Taliban captors for five years and the long-standing physical effects that he would have from that.

But punishment is warranted for his actions, and the defense would request that you give Sergeant Bergdahl a dishonorable discharge and characterize his service appropriately.

However, Your Honor, justice is not sending him back somewhere where he is going to be taken out of society when he's demonstrated, now eight years later, after going through five years of captivity, that he is ready to be a productive member of society and move forward.

And based on that, Your Honor, the defense respectfully requests that you sentence Sergeant Bergdahl to a dishonorable discharge. Characterize his service appropriately but give him an opportunity to move forward with [sic] what he's suffered at the hands of the Taliban.

Thank you.

TC: Yes, sir.

MJ: And then I will close the court now, reopen, recess, come back Friday morning, and ----

TC: Yes, sir. Open the court.

MJ: Open the court -- well, yeah. And recess -- or close the court for further deliberations.

TC: Yes, sir.

MJ: All right. The court is closed.

[The court-martial closed at 1144, 2 November 2017.]

[The court-martial opened at 1653, 2 November 2017.]

MJ: The court is called to order. All parties who were present when the court closed are again present.

Anything we need to talk about before we recess?

TC: No, Your Honor.

ADC3: No, Your Honor.

MJ: Very well. The court is in recess.

[The court-martial recessed at 1653, 2 November 2017.]

[END OF PAGE]

[The court-martial was called to order at 0902, 3 November 2017.]

MJ: The court is called to order. All parties who were present when the court recessed are again present.

Counsel, anything before I close the court?

TC: No, sir.

ADC3: Um ----

TC: Oh, sorry ----

ADC3: Yeah.

TC: Yeah. I'm sorry. Go ahead.

ADC3: Your Honor, we do have a request to seal two exhibits.

MJ: What are they?

ADC3: We would ask to seal Appellate Exhibit 67 and Defense Exhibit O.

MJ: Defense Exhibit O.

[Pause.]

MJ: Okay. And Appellate Exhibit 67, you say?

ADC3: Yes, sir.

MJ: Okay. I understand O.

67 -- oh, these are the -- okay. These are the Army enlistment documents that also have some ----

ADC3: Personal information.

MJ: ---- older stuff -- older, prior service stuff in there.

ADC3: Yes, sir.

MJ: All right. Any objection to that?

TC: No, sir.

MJ: All right. Defense Exhibit O is sealed, and Appellate Exhibit 67 is also sealed.

ADC3: Thank you, sir.

MJ: I'll sign those orders, and those are sealed.

Anything else?

ADC3: No, sir.

TC: No, sir.

MJ: Very well. The court is closed.

[The court-martial closed at 0903, 3 November 2017.]

[The court-martial opened at 1133, 3 November 2017.]

MJ: The court is called to order. All parties who were present when the court closed are again present.

Accused and Defense Counsel, please rise.

[The accused and his defense counsel did as directed.]

MJ: Sergeant Robert B. Bergdahl, this court-martial sentences you:

To be reduced to the grade of E-1;
To forfeit $1,000 pay per month for 10 months; and
To be dishonorably discharged from the service.

You may be seated.

[The accused and his defense counsel did as directed.]

MJ: Is there anything else to take up before the court adjourns?

TC: No, sir.

CDC: There is, Your Honor.

In the court's last written order, and I forget what the appellate exhibit number is, you inquired -- you indicated that you would enter a particular order if we requested.

MJ: Yes.

CDC: You may recall the last little paragraph.

MJ: I do.

CDC: The answer to the court's question is no, and I would like to give you the briefest of explanations.

MJ: Okay.

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

UNITED STATES OF AMERICA v. SGT Robert B. Bergdahl HHC, STB, U.S. Army FORSCOM Fort Bragg, NC 28310	Findings of Fact, Conclusions of Law and Ruling -- Defense Motion to Disqualify Convening Authority and Vacate Referral and for Other Relief 30 September 2016

1. The accused moves this court disqualify the convening authority and vacate the referral, and order that, in the event the charges are re-referred to court-martial and any findings of guilty are entered, the sentence may not exceed "no punishment." Before the court could rule on this motion, the defense submitted a supplemental motion and requested the court also adduce further evidence on the issue of disqualification of the convening authority. This ruling will address both the motion (D APP 38) as well as the supplement and motion to adduce further evidence (D APP 46). The defense bears the burden of persuasion on all issues.

FINDINGS OF FACT

2. I considered the pleadings of the parties, the testimony of SGT Destiny Daughtrey and General Robert Abrams, 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. Prior to taking command of U.S. Army Forces Command (FORSCOM) General Abrams served as the senior military assistant to the Secretary of Defense. In this position, General Abrams was present at briefings regarding the efforts to recover SGT Bergdahl from the Haqqani Network[1] and was aware of the negotiations to do so. These briefings concerned the feasibility and risk associated with the plans to recover SGT Bergdahl. After SGT Bergdahl was returned to U.S. control, General Abrams briefed the Secretary of Defense concerning SGT Bergdahl's condition while SGT Bergdahl was being treated and evaluated at a military hospital. General Abrams was not present when the AR 15-6 investigation report by MG Dahl was briefed to the Secretary of Defense. He did read the executive summary of that report.

[1] The Haqqani network is an Afghan guerilla insurgent group fighting against US-led NATO forces and the government of Afghanistan.

APPELLATE EXHIBIT 21

b. From September 2012 to July 2013, then Major General Abrams, serving as the Commanding General, 3rd Infantry Division, deployed to Afghanistan and served as the Regional Command South commander under the International Security Assistance Force (ISAF-RC South). In that position, he received briefings on efforts to recover SGT Bergdahl. However, he was never personally involved, nor were any soldiers under his command ever involved, in any efforts to recover SGT Bergdahl.

c. In his duties prior to taking command of FORSCOM, General Abrams never made a decision, exercised any command discretion or chose a course of action regarding SGT Bergdahl or efforts to recover him. He never advocated for any position regarding SGT Bergdahl or efforts to recover him. And, he never took any direct action nor ordered soldiers under his command to take direct action to recover SGT Bergdahl.

d. In approximately September 2015, after taking command of FORSCOM, General Abrams began receiving unsolicited letters from members of the public, whom he did not know advocating their opinions as to what should happen to SGT Bergdahl. Most of these letters were received after General Abrams referred the charges against SGT Bergdahl to general court-martial on 14 December 2015. After receiving the first letter, General Abrams consulted his Staff Judge Advocate who told him he was not required to retain the letters. From that time forward, General Abrams would look at the letters and, once he determined that they related to this case and were not a letter from a concerned parent regarding one of the soldiers under his command, placed the letters in the burn bag to be destroyed by one of his aides. It has been his practice for many years to treat all material for destruction as if it were top secret so as to avoid any accidental disclosure of classified material. Though he did not destroy the letters himself, he is confident they were shredded and burned according to common practice with all matter placed in the burn bag.

e. General Abrams received approximately 100 such letters. None of them claimed any first or even second hand knowledge about any facts in the case or about SGT Bergdahl personally. All of the letters, as General Abrams recalls, were from older American citizens who had served in WWII or Korea. None of the letters made any threats against SGT Bergdahl or General Abrams if he did not follow their recommendations. General Abrams did not follow up or direct any of his staff to follow up on any of the letters. He did not reflect upon them or contemplate their content. He did not consider them at all in making his decision to refer the charges in this case to general court-martial. General Abrams is very experienced with the military justice system, particularly as a General Court-martial Convening Authority (GCMCA), and is committed to his duty to be fair and impartial. Thus, he applied that principle and "tuned out the outside noise" with respect to the letters.

f. On 9 October 2015, the defense submitted objections to the Article 32 Hearing Officer's report and recommendations to the Special Court-martial

Convening Authority (SPCMCA). This four page document was included in matters submitted to General Abrams to consider as he decided whether to refer the charges in this case to court-martial or to take some other action. General Abrams read the document before making his decision.

g. Prior to referring this case to trial, General Abrams never had any communication of any kind with Senator McCain or members of his staff regarding SGT Bergdahl or efforts to recover him. Neither Senator McCain nor members of his staff have ever even attempted to contact General Abrams or members of General Abrams' staff. Though aware of Senator McCain's comments to the effect that if SGT Bergdahl were not court-martialed and sent to jail he would hold hearings on the matter, General Abrams was not affected by those comments and did not consider them in making his decision as to the disposition of the charges against SGT Bergdahl. In fact, General Abrams thought the comments were inappropriate and that Senator McCain should not have made them.

h. General Abrams has no fear of retribution to himself or his career if action he has taken or may take in this case is not consistent with Senator McCain's apparent views about what should be done. Neither Senator McCain nor anyone else has threatened or otherwise tried to forcefully influence General Abrams decisions in this case. Though several members of the general public have expressed their opinions (mostly favoring referral to court-martial) to him by mail, General Abrams did not consider nor was he influenced by any of those opinions.

i. On 19 August 2016, in response to defense motion on this matter, General Abrams prepared, swore to and signed an affidavit setting forth his recollection of what he said in an 8 August 2016 interview with defense counsel. This document was produced after his SJA asked if he would be interested in providing a statement about what transpired in the interview to be used to answer the defense motion to disqualify him (the subject of this motion). He said he would be glad to do so, he provided guidance to the SJA, the SJA office drafted the affidavit based on his guidance, General Abrams edited it between four and six times to ensure it accurately reflected his recollection of the interview and then he reviewed and signed and swore to the final version. All the words in the affidavit are his own. During the course of the production of this affidavit, General Abrams occasionally dealt directly with trial counsel without any member of the defense team being present.

j. No member of the prosecution team has ever given General Abrams legal advice. He has received his legal advice on this and all other military justice matters before him from his Staff Judge Advocate.

k. In October and November of 2015, trial counsel submitted, thru the Staff Judge Advocate, requests to General Abrams that 10 additional attorneys be appointed to the prosecution team on temporary duty status. General Abrams

approved those requests. The requests were not provided to the defense until after they were approved.

l. On 14 December 2015, General Abrams referred the charges against SGT Bergdahl to General Court-martial. This decision was contrary to the advice of the Article 32 PHO but consistent with the pre-trial advice of his SJA. That pretrial advice was provided to the defense along with the referred charges and other papers normally accompanying the charge sheet when served upon the defense.

m. Between January and May 2016, General Abrams approved several requests for expert assistance from the prosecution. These requests and approvals were not provided to the defense until after they were approved. Defense objected to trial counsel about what they characterized as *ex parte* communications with the GCMCA about the case.

n. At some point during the pendency of the Article 32 preliminary hearing in 2015, the government sent some *ex parte* emails to the Article 32 PHO, LTC Burke. Some of these emails concerned certain defense requests about the Article 32 hearing and included draft responses to the defense requests for LTC Burke to sign. He signed them unedited denying the defense requests.

o. When defense first requested to interview General Abrams, he denied the request. Later, at the Court's suggestion, he agreed to be interviewed by the defense. However, he stipulated that trial counsel must be present. On 8 August 2016, the interview was conducted with trial counsel present.

p. The defense has requested to interview the SJA about trial counsel contacts with General Abrams. The SJA has denied these requests.

LAW AND ANALYSIS

3. The military justice system has a unique construct. This construct was put in place by Congress decades ago to ensure that the balance between the rights of the accused and good order and discipline in the armed forces of this nation were properly balanced. As with every other endeavor to balance such interests, certain adjustments have been made through the years to better accomplish both goals. One aspect of the court-martial process that has never changed is that no commander with the authority to convene a court-martial may do so in a case where he is an accuser. Rule for Courts-Martial (RCM) 601; Uniform Code of Military Justice (UCMJ), Article 22. An accuser is defined by the UCMJ as: ". . . a person who signs or swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any person who has an interest other than an official interest in the prosecution of the accused." UCMJ, Article 1(9). Thus, a commander,

who is the person who swore the charges and signed the DD Form 458 preferring the charges, cannot be the same person who refers those charges to court-martial. This is known as a "statutory disqualification." *United States v. Hill,* 46 MJ 870 (ACCA 1997). It also goes without saying that a person serving as trial counsel in a case cannot also refer the case to trial and otherwise serve as convening authority pre or post-trial.[2] Likewise, a person who is the victim of a crime or has such a personal interest in the outcome of a case that a reasonable person could impute to him a personal interest or feeling in the outcome of the case, may also be considered an accuser and, thus, disqualified from acting as a convening authority in that particular matter. *United States v. Ashby 68 MJ 108, 130 (2009); United States v. Jeter,* 40 MJ 6 (CMA 1992).[3] A personal or other than official interest in the prosecution of a particular case has not been ascribed to a commander who testified on a dispositive suppression motion. He was not disqualified from taking post-trial action in the case. *United States v Gudmundson,* 57 MJ 493 (2003). In *Gudmundson,* the court stated that a convening authorities' testimony at trial is not *per se* disqualifying but may be so if it indicates that he has a personal connection to the case or is other than of an official or disinterested nature. *Id.* No case has held that a convening authority loses his objective non-personal status if he has *ex parte* communications with the trial counsel or the defense counsel. In fact, quite the opposite is true by analogy. In *United States v. Fisher,* 45 MJ 159 (1996), the convening authority was not found to be a personal accuser and, thus, disqualified as the convening authority in a case where he made statements critical of the defense counsel during the trial and after the convening authority had testified for the government on a suppression motion. If not a personal accuser when he criticizes the defense counsel as if he were a prosecutor, one is left to wonder how he could be considered an accuser (or prosecutor) in a case where he has had *ex parte* communications with the trial counsel.

4. The consideration of the law on accuser disqualification is important to the defense's contention that General Abrams, because he is the GCMCA, is precluded from having *ex parte* communications with the parties to this proceeding. The defense cites no law for this proposition. And, the law discussed above points the other way. In order to sustain a motion to disqualify the convening authority, the defense needs to prove that he has lost (or never had) a neutral and detached position and instead has become personally involved in the prosecution of the case. Nothing about *ex parte* communications with the prosecutors in this case, in-and-of themselves, proves that to be the case. Even if one assumes for the sake of argument that such *ex parte* communications are prohibited by law, there is no

---

[2] Article 6(c), UCMJ.

[3] A convening authority suspected of a similar offenses may be disqualified out of an abundance of caution to preserve the appearance of fairness. *United States v. Kroop,* 34 MJ 628 (AFCMR 1992), *aff'd* 38 MJ 470 (CMA 1993), *United States v Anderson 36 MJ 963 (AFCMR 1993);* Convening authority disqualified from taking post-trial action in a drug case where he made public comments indicating an inelastic attitude concerning his post-trial responsibilities. *United States v Davis,* 58 MJ 100 (2003); *see also, United States v Thomas,* 22 MJ 388, 394 (CMA 1986) (Listing examples of unofficial interests that have disqualified convening authorities.) .

defense. *United States v. Eslinger*, 70 MJ 193, 198 (2011). The defense speculation that the letters could have contained evidence admissible in sentencing beyond such improper opinions is not supported by the evidence. First, General Abrams testified that none of them contained any firsthand knowledge of the facts of the case or the accused. Second, the one letter that he received of which a copy was preserved supports this testimony. Finally, presumably, anyone who might have written General Abrams who knows the accused well enough to have the knowledge to speak to his character certainly should be known by the accused and his defense counsel. Surely, there are a plethora of individuals who can provide such evidence if needed. Any chance that there is one among the letters received by General Abrams who knows the accused, expressed a favorable opinion as to his character and, yet, is unknown to the accused or his counsel and thus, his or her favorable testimony lost to the defense, will certainly be overcome by other similar, more reliable evidence the defense may produce on this issue. Whatever the case, the court has heard no evidence or law that stands for the proposition that the defense posits on this issue.

8. Also, in its prayer for relief in D APP 46, the defense urges this court to:

1.) Hold the Motion to Disqualify (D APP 34) in abeyance until new evidence can be taken and a hearing held. The Court held its ruling in abeyance until a 39(a) session could be held on 28 September 2016. Because the Court does not believe additional evidence is necessary on this issue and will not order the SJA to make herself available for an interview, further abeyance is not necessary.

2.) Order the government to disclose all of its *ex parte* communications with the GCMCA. The court declines to do so. In its pleadings on this matter, the government has represented as officers of this court that no member of the prosecution has ever provided any legal advice to General Abrams or advocated any position to him concerning referral of these charges, appointment of experts or other members of the trial and defense teams, the extension of the accused's ETS date or the decision regarding the accused's request for administrative action (see D APP 44). The defense has presented no evidence to this court to indicate otherwise. Simply put, not all contacts with the convening authority are prohibited and some are even required by the law. Contacting him *ex parte* as a witness on a motions hearing is not evidence that other more nefarious and potentially improper contacts have occurred.

3.) Direct the SJA make herself available for an interview. Nothing submitted by the defense supports this request.

9. In summary, nothing about General Abrams involvement in this matter to date disqualifies him in any way from serving in the capacity of convening authority in this case. He has no personal knowledge of the facts of the case, he has not destroyed

evidence in the case, he has not been improperly influenced by Senator McCain, letters from the public or the trial counsel in the performance of his duties as convening authority, and he did not improperly ignore the defense submissions to the Article 32 appointing authority as he was deciding whether to refer the charges to trial. Any *ex parte* communications he may have had with trial counsel were not inappropriate and do not disqualify him as the convening authority. And, he is not disqualified merely because he was a witness in the motions hearing to resolve the facts surrounding this defense motion to disqualify him.

RULING

10. Defense motion is DENIED.

JEFFERY R. NANCE
COL, JA
Military Judge

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

UNITED STATES OF AMERICA v. SGT Robert B. Bergdahl HHC, STB, U.S. Army FORSCOM Fort Bragg, NC 28310	Findings of Fact, Conclusions of Law and Ruling -- Defense Motion in Limine (Inability to Return) 22 June 2017

1. The defense moves this Court *in limine* pursuant to RCM 906(b)(13) for a determination that a period of desertion or unauthorized absence ends when a soldier is prevented from returning to military control because he has been taken prisoner or abducted. I considered the written motions of the parties, all matters appended thereto, and the oral arguments of counsel.

FINDINGS OF FACT

2. I find the following facts by a preponderance of the evidence:

a. On 25 March 2015, the accused was charged with one charge, one specification of desertion with intent shirk important service and avoid important duty beginning on 30 June 2009 and ending when he was returned to military control on or about 31 May 2014.[1]

b. Very soon after he left his OP and during almost the entirety of his absence, the accused was held captive/hostage by the Haqqani Network, a Taliban affiliated organization. During the entirety of the time in question, the United States (along with coalition forces) was engaged in combat operations against the Taliban and the Haqqani network.

LAW AND ANALYSIS

3. The defense urges that in order for them to be able to advise SGT Bergdahl and in order for him to make an informed decision about how he should plea and the possible maximum punishment for that plea, they need to know whether a period of desertion or unauthorized absence ends when a soldier is prevented from returning because he is taken prisoner or abducted at some point after the period of absence

[1] The accused was also charged with one charge, one specification of misbehavior before the enemy in violation of Article 99, UCMJ. That charge is not relevant to this motion.

Appellate Exhibit 48

APPELLATE EXHIBIT 48
PG 1 of 2

begins. The Court is not persuaded that such a determination is necessary or appropriate at this time or for the purposes the defense cites.

4. If the accused were to plead guilty to the lesser included offense to Charge I of Absence Without Leave or Going From His Place of Duty for the period of time when he left until the period of time he was captured/abducted by the Taliban, the Court would conduct a providence (Care) inquiry to determine beyond a reasonable doubt, whether the accused committed every element of whichever lesser offense to which he pled. In either case, the maximum punishment, at that point, for the offense to which the accused would have pled guilty, is clearly set forth in the MCM. *See* ¶ 10.e.(1), (2)(a). Of course, since the government has charged the greater offense, they have the option of going forward in an effort to prove that greater offense. If they do "go forward" and contend that the accused was absent longer than the period of time to which he has pled guilty, they must prove, beyond a reasonable doubt, that he was voluntarily absent for that period of time. If they are unable to do so, the accused cannot be found guilty of the greater offense. If they are able to do so, the maximum punishment for that offense is also plainly set forth in the MCM. *See* ¶ 9.e.(1).

5. What the defense is really seeking is a determination by this Court that, under the circumstances described above, the accused was not voluntarily absent once he was captured and, therefore, the government cannot prove any greater offense beyond a reasonable doubt. But, this is a question of fact for the trier of fact to determine after being properly instructed on the applicable law. This is not a question for the Court to determine at this point in the proceedings.

6. However, if the defense would like to offer a motion to urge the Court to give certain specific tailored instructions to the trier of fact at the appropriate time, the Court will be glad to consider such a motion and to instruct the trier of fact consistent with applicable law. In the alternative, the Court will consider this motion as such a motion and provide tailored instructions on the law as the Court deems appropriate.

RULING

7. Defense motion *in limine* is DENIED.

JEFFERY R. NANCE
COL, JA
Military Judge

Appellate Exhibit 48

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

UNITED STATES OF AMERICA v. SGT Robert B. Bergdahl HHC, STB, U.S. Army FORSCOM Fort Bragg, NC 28310	Findings of Fact, Conclusions of Law and Ruling -- Defense Motion to Dismiss - Failure to State an Offense 29 June 2017

1. The defense moves this Court dismiss Charge II and its specification pursuant to RCM 905(b)(2) for failure to state an offense. I considered the written motions of the parties, all matters appended thereto, if any, and oral arguments of counsel.

FINDINGS OF FACT

2. I find the following facts by a preponderance of the evidence:

a. On 25 March 2015, the accused was charged with one charge, one specification of misbehavior before the enemy in violation of Article 99, UCMJ.[1]

b. The wording of that charge is as follows: In that Sergeant Robert (Bowe) Bowdrie Bergdahl, United States Army, did, at or near Observation Post Mest, Paktika Province, Afghanistan, on or about 30 June 2009, before the enemy, endanger the safety of Observation Post Mest and Task Force Yukon, which it was his duty to defend, by intentional misconduct in that he left Observation Post Mest alone; and left without authority; and wrongfully caused search and recovery operations.

LAW AND ANALYSIS

3. "The due process principle of fair notice mandates that 'an accused has a right to know what offense and under what legal theory' he (may) be convicted." *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) (citing *United States v. Medina*, 66 M.J. 21, 26-27 (C.A.A.F. 2008)). A charge states an offense if it puts the accused on notice of the offense against which he must defend himself. *United States v. Curtiss*, 42 CMR 4 (CMA 1970); *United States v. Barner*; 56 MJ 131 (2001). "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication . . . ," pleads jurisdiction, places the accused on notice, and protects him

[1] The accused was also charged with one charge, one specification of desertion with the intent to avoid hazardous duty or to shirk important service in violation of Article 85, UCMJ.

Appellate Exhibit 49

APPELLATE EXHIBIT 49
PG 1 OF 6

against double jeopardy. RCM 307(c)(3). Each specification must directly, or by clear implication, allege every essential element of the offense or it is fatally deficient and must be dismissed. *United States v. Watkins*, 21 MJ 208 (CMA 1986). Though the Manual for Courts-martial (MCM) provides model specifications, those model specifications are not fool-proof -- they are not "the law."

4. Rules of common English Grammar dictate that semicolon use in a list of things should occur only if there are commas appearing elsewhere in that list. For example: "Present at the meeting were the following: J. Smith, President; E. Snow, Secretary; and P. Pratt, Treasurer." Thus, items of a list having no commas internal to each item in the list should be set off by commas, not semicolons. For example: "The Panda Bear likes to eat stems, shoots, and leaves."[2] The model specification from the MCM provides, in pertinent part: ". . . by . . . (intentional misconduct in that he/she became drunk and fired flares, thus revealing the location of his/her unit) . . ."[3] MCM ¶ 23.f.(3).

5. The elements of Article 99(3) are as follows: 1) That it was the duty of the accused to defend a certain command, unit, place, ship, or certain military property; 2) That the accused committed certain disobedience, neglect, or intentional misconduct; 3) That the accused thereby endangered the safety of the command, unit, place, ship, or military property; and 4) That this act occurred while the accused was before or in the presence of the enemy. In this case, the government chose not to plead "disobedience," "neglect," or "in the presence of the enemy." They did, however, plead "intentional misconduct" and "before the enemy." Intentional misconduct does not include a mere error in judgment. MCM ¶ 23.c.(3)(b). No more legal guidance as to what is or is not "intentional misconduct' is provided in the statute.

6. Case law on Article 99(3) is scarce -- particularly with respect to what is or is not intentional misconduct. Two ancient[4] cases are all that are available of superior court guidance as to the meaning of these words. They are: *United States v. Carey,* 15 CMR 112 (1954) and *United States v. Miller,* 44 CMR 849 (ACMR 1971). In *Carey,* the Court of Military Appeals, considering a claim of insufficiency of the evidence to support the findings of guilty, considered whether the actions of a Korean Conflict tank commander in getting drunk while his tank was defending a portion of a defensive line where the enemy was 2500 yards from his position, constituted "intentional misconduct." The Court found: "(T)hat such intoxication constitutes intentional misconduct, there is no doubt, for drunkenness is a violation of Article 134 . . . , and, when it occurs while on duty, it is a violation of Article 112 . . ." *Carey*, at 116. The Court went on to find that "every essential element . . . was established beyond a reasonable doubt." *Id.* The Court explained that because of vagueness in what constituted misbehavior in the past, the drafters of the current Article 99

---

[2] Eats, Shoots and Leaves: The Zero Tolerance Approach to Punctuation, Lynne Truss (2003).

[3] The Court notes that this clause is properly punctuated according to standard rules of English Grammar.

[4] No negative implication as to the validity of these cases is intended by use of the term "ancient."

determined to give it more definition. *Id* at 115. Thus, they provided more specific language to remove from the offense "mere error(s) in judgment," (but, rather) contemplate(ing) a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand . . . a violation of a definite law." *Id.* (Internal quotations omitted.)

7. *Miller* looks at the issue from the opposite side -- what conduct did not constitute "intentional misconduct." The Army Court considered a situation where Miller, on guard duty during an enemy attack on a fuel depot during the Vietnam War, found himself surprised, unprotected, and outgunned. In response, he played dead on the floor of his flimsy, tin-sided guard shack. *Miller*, at 849. The Army Court found that this was "not much different from taking cover" and, thus, not misconduct (though certainly intentional). *Id* at 853. Interestingly, in arriving at this conclusion the Court stated: "While we might speculate that the accused should have done more than (he) did, there is not a scintilla of evidence to show that (he) violated any specific orders or instructions by remaining in the gate shack during the brief but violent enemy attack." *Id.* Thus, this determination is clearly a fact specific, rather than a strict legal, determination, because, specific actions that might have been intentional misconduct under one circumstance -- say where an accused had time to contemplate the situation and his actions and could have helped fight off the attack but failed to do so -- did not constitute intentional misconduct under the particular circumstances present in *Miller*. And, violation of "instructions," had there been evidence of such, could have satisfied the intentional misconduct element.

8. A military criminal statute is not void for vagueness unless the accused "could not reasonably understand that his contemplated conduct is proscribed." *Parker v. Levy*, 417 US 733, 757 (1973) (quoting *United States v. Harriss,* 347 US 612, 617 (1954)).[5] As the Court stated in *Parker*: "The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation." (Internal citations omitted). *Id.*

9. The Court is persuaded that Charge II and its specification does state an offense. The accused is on fair notice that he must defend himself for leaving Observation Post Mest alone and without authority, thereby wrongfully causing search and recovery operations. Certainly, this notifies him that he has to defend himself from

---

[5] The Court in *Parker* reasoned that because of the factors differentiating military society from civilian society the proper standard for determining vagueness is the standard that applies to criminal statues regulating economic affairs rather than the stricter standard applied to criminal statues regulating speech. In *Parker*, the Court was concerned with Article 133 and 134 (Clause 1 and 2) offenses. These offenses are very similar to Article 99 in that they seek to criminally proscribe conduct which, had it not occurred in the military context, would never have been criminal. To determine whether an Article 99 charge is constitutionally vague without considering the military context of the offense would gut the statute and frustrate congressional intent.

the charge that he has intentionally committed a series of interrelated acts before the enemy which, even if not particularly proscribed by some other criminal statute, are without authority and wrongful and, thus, criminal. This language eliminates from consideration any conduct that might be an error in judgment. Even if one were to apply the *Carey* holding as establishing a rule of law that "intentional misconduct" means that the charged misconduct must violate some other punitive article of the UCMJ, the Court is persuaded that, taken together, this series of alleged misconduct by the accused could potentially be a violation of several other Articles of the UCMJ.[6] However, this Court is not persuaded that *Carey* establishes such a rule. The *Carey* court, deciding if the evidence was sufficient to support a conviction, reviewed the evidence with respect to each element of an Article 99(3) charge. Addressing the "intentional misconduct" element, the court found that the evidence was sufficient because the conduct in question would violate Articles 112 and 134. This does not mean that all misconduct charged under Article 99(3) must violate some other criminal provision in order to sustain a conviction for this offense. Had Congress so intended, they certainly could have included such language, as they have done with other offenses. There mere inclusion by the *Carey* court of other punitive Articles as types of "intentional misconduct" does not exclude other misconduct not specifically proscribed by some criminal statute from being "intentional misconduct."

10. The *Miller* case supports this reasoning. In deciding that Miller's conduct was not "misconduct" as contemplated by Article 99(3), the Army Court found that there was no evidence that his lying on the floor of the guard shack was any type of misconduct. The Court reasoned that Miller's conduct might have been, as far as the evidence showed, the result of being surprised, dazed, or knocked down; or that he may have been simply taking a few moments to gather themselves and figure out what to do; or that he made a conscious decision that leaving the guard shack would have been useless under the circumstances. Without some evidence to establish that the accused was under some "specific order" or "instruction" to do something other than what (he) did, the court was not convinced that, "under the attendant circumstances," the accused's conduct constituted intentional misconduct within the meaning of Article 99. *Miller* at 853.

11. Regarding the issue of the government's use of semicolons in the specification - this is an incorrect use of this punctuation device. However, unlike statutory construction, the Court is not bound by the government's grammatical errors in deciding what is charged. Furthermore, the accused, for that matter, cannot reasonably be said to have been misled by these grammatical errors. There is no doubt to this Court that the use of the "and" conjunction after each semi-colon and the interrelated dependence of the ideas expressed in each allegedly erroneously created independent clause, controls the meaning. These are dependent clauses that mean: The accused left OP Mest alone and without authority and, thereby, wrongfully caused search and recovery operations. Had the government looked closely at the

[6] Article 85, Article 86, Article 92, and Article 134 (Clause 1) just to name a few.

model specification in the MCM they would have noticed that the model specification provides precisely the sentence construction they needed for this specification. Whatever the case, this is a scrivener's error that cannot be said to mislead the accused or to make the specification invalid for failure to state an offense. The Court is open to suggestions from the parties as to how to address any confusion this poor drafting may cause the panel members.

12. Turning now to the defense contention that, if the court finds that the misconduct referred to in Article 99(3) need not be a violation of a separate criminal statute in order to state an offense, this particular statute is void for vagueness, the court is not persuaded by this argument. The very strong presumption in evaluating acts of congress favors validity. Here, the defense contends that if misconduct does not exclusively mean criminal misconduct, then no accused could ever know what non-criminal act might be more than a mere error in judgment. This argument ignores not only the huge gulf between mere errors in judgment and criminal misconduct but, it also ignores the important role factual context plays in each charge. There is simply no way the accused could not reasonably have understand that his conduct was proscribed. Furthermore, the alleged conduct cannot even be said to be "marginal" misconduct. The government avers that the accused left his combat outpost intentionally, without authority and for the purpose of causing search and recovery operations, which he ultimately did cause. The specification alleges that all of this was done "before the enemy." How could such alleged conduct be characterized as anything other than misconduct under any definition of the word? Finally, Article 99(3) must be evaluated with a less strict test than the average civilian criminal statute because Articles of the UCMJ are designed to get at more than simply criminal conduct. The UCMJ is concerned with the good order and discipline of the members of the Armed Forces. So, unlike the recalcitrant Wal-Mart employee, a service member really can earn himself a federal criminal conviction for repeatedly being late to work. Perhaps no Article of the UCMJ more pointedly addresses the issue of good order and discipline than Article 99. For, if a soldier misbehaves before the enemy, he has violated the most basic aspect of who he is expected to be and what he is expected to do as a soldier. The Court's conclusion here does not mean that the government will be able to prove this or any of the other element of this offense beyond a reasonable doubt. However, they have clearly pled (stated) an offense and have earned the burden of trying to do so.

RULING

13. Defense motion to dismiss is DENIED. However, any implied contention by the government in their pleadings on this matter that they have actually pled disobedience, neglect, and in the presence of the enemy, is not persuasive. Those portions of Article 99(3) are pled neither expressly nor by implication. The accused does not have to concern himself with defending against disobedience, neglect, or in the presence of the enemy.

JEFFERY R. NANCE
COL, JA
Military Judge

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 - Lack of Personal Jurisdiction (D App 97)
SGT Robert B. Bergdahl HHC, STB, U.S. Army FORSCOM Fort Bragg, NC 28310	)	
	)	2 October 2017

1. The defense moves this Court dismiss all Charges and specifications because they believe the Court lacks personal jurisdiction over the accused. I considered the written motions of the parties, all matters appended thereto, if any, and oral arguments of counsel. The burden of persuasion is on the government to prove the facts related to this matter by a preponderance of the evidence.

FINDINGS OF FACT

2. I find the following facts by a preponderance of the evidence[1]:

a. On 25 March 2015, the accused was charged with one charge, one specification of desertion with the intent to avoid hazardous duty or to shirk important service in violation of Article 85, UCMJ, and one charge, one specification of misbehavior before the enemy in violation of Article 99, UCMJ. Each of these charges alleged that the accused was a member of the United States Army both at the time of the alleged commission of the offenses (on or about 30 June 2009) and at the time of preferral of charges.

b. On 12 June 2008, the accused enlisted in the Army for a term of three years and 16 weeks. His end term of service (ETS) date at that time was o/a 1 October 2011.

c. On or about 30 June 2009, while serving with his assigned unit in Afghanistan, the accused went missing and was captured by the Taliban o/a 1 July 2009. He returned to military control on 31 May 2014.

d. SGT Bergdahl's enlistment was extended one year as his 1 October 2011 ETS date approached and he was, as far as the Army knew, still under the control of

[1] By email dated 13 September 2017 and marked as AE 61, the government agreed to the facts alleged in the defense motion (D App 97) but not to the defense's conclusions associated with those facts.

Appellate Exhibit 63

APPELLATE EXHIBIT 63
Pg 1 of 5

the Taliban. One year later, while he was still under the control of the Taliban, his enlistment was extended by 10 more years - to 1 October 2022.

e. On 4 August 2010 a Board of Inquiry convened to consider the accused's status. That board recommended that his status remain "missing-captured." The board also discussed whether the accused had violated the UCMJ but ultimately decided to wait until they had an opportunity to interview the accused to reach a conclusion on this issue. AE 62.

f. On 14 July 2014, after the accused had gone through medical examination incident to his return to military control and had participated in debriefings by other Army personnel, he was assigned to his present unit and a FLAG was initiated. AE 62.

g. In July 2015, the accused applied for and received access to his Savings Deposit Plan account. AE 62.

h. On 24 June 2016 the accused requested that Army Human Resources Command issue a discharge certificate with a 1 October 2011 discharge date and an honorable characterization of service.

i. The accused has never been issued a DD 214 nor had a final accounting of pay.

j. After he went through the first two phases of re-integration,[2] the accused was re-assigned to 5th Army, U.S. Army North. This happened sometime in July 2014. When the accused was about to be assigned to his unit, LTG Percy Wiggins, Commander of U.S. Army North and 5th Army, received a telephone call from the Secretary to the Army General Staff. He was told that the accused was being assigned to his unit and that he was responsible to take care of the accused but that UCMJ would be retained at a higher level. His SJA, who was present at the conversation, commented that he thought that meant FORSCOM would exercise jurisdiction. LTG Wiggins assumed that was true as well. When the accused came to him the Dahl[3] AR 15-6 investigation was still under way. LTG Wiggins did not get involved in the FLAG process. That was done by his BN Commander. LTG Wiggins emphasized that his people focus on re-integrating the accused, making sure that he was safe, and ensuring that he was treated like every other soldier. Though he was aware of significant media attention regarding the accused, he did not pay much attention to it and did not really give their reports of desertion much credit.

---

[2] Re-integration in this instance is a three phase process which usually begins in country and progresses quickly back to CONUS. It involves medical care, debriefing, decompressing, support, return to duty and other necessary aspects. The Army unit responsible for this process is U.S. Army South -- located at Fort Sam Houston, TX.

[3] Referring to Major General Dahl, the AR-15-6 investigating officer.

LAW AND ANALYSIS

3. Personal jurisdiction under the UCMJ is set forth in Article 2. Paragraph (a)(1) provides that: "The following persons are subject to this chapter: (1) Members of the regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment . . ." Paragraph (b) describes what constitutes becoming a valid "member" of an armed force per paragraph (a) as a "voluntary enlistment of any person who has the capacity to understand the significance of enlisting . . ." Paragraph (c) was added to Article 2 in 1979 to overrule case law that found a lack of jurisdiction where there was a defective enlistment. *United States v. Russo,* 1 MJ 137 (CMA 1975). This amendment codified the concept of constructive enlistment as a way of establishing personal jurisdiction where the mutual intent of the parties can be established by certain factors and which contain the two same basic elements, voluntariness and competency, that exist in paragraph (a). The language of paragraph (c) is broad and general and serves as a catch all to allow personal jurisdiction over individuals who might be serving under otherwise defective enlistments. Paragraph (c) cannot be read in any way to limit paragraph (a).[4] It expands it.

4. Personal jurisdiction does not necessarily terminate at the end of a contractual term of service. *Rules for Courts-Martial* (RCM) 202(a) discussion, (c)(1). There must be delivery of a discharge certificate (commonly referred to as a DD 214) and a final accounting of pay. 10 U.S.C. § 1168(a); *United States v. Nettles*, 74 MJ 289 (2015); *United States v. Melanson*, 53 MJ 1 (2000); *Smith v. Vanderbush*, 47 MJ 56 (1997); *United States v. King*, 27 MJ 327 (CMA 1989).[5] Such jurisdiction continues despite even unreasonable delay by the government in discharging a service member at the end of an enlistment -- even if that service member objects. *United States v. Poole*, 30 MJ 149 (CMA 1990). And, jurisdiction continues even if the government fails to comply with service regulations requiring affirmative action to extend his enlistment. *United States v. Hutchins*, 4 MJ 190 (CMA 1978); *United States v. Williams*, 21 MJ 254 (ACMR 1985). However, if, after expiration of his enlistment, the service member demands a discharge and no action is taken to discharge or try him within a reasonable time, jurisdiction may expire. *United States v. Douse,* 12 MJ 473 (CMA 1982).

5. The defense basic contention is that because the accused was unlawfully retained for 11 years beyond his original ETS date in October 2011 the government lost jurisdiction over him on that date and cannot try him for the charged offenses. In

---

[4] *See generally,* Fredrikson, "The Unsheathing of a Jurisdiction Sword: The Application of Article 2(c) to Reservists," Army Lawyer, July 2004.

[5] The number of cases that establish this fundamental legal principle are legion. For the sake of economy, the Court has only mentioned a few.

support of this proposition the defense cites several Article III[6] court opinions dealing with the validity of enlistment contracts when the government failed to follow its own regulations. This Court does not dispute the validity of those cases. However, even assuming without deciding that the extension of the accused for 11 years beyond his ETS date was not valid, that is not determinative of court-martial jurisdiction. The cases the defense cites simply do not apply to the question of personal court-martial jurisdiction. Jurisdiction, as has been previously stated, is established by a valid enlistment and continues until there is delivery of a DD 214 and a final accounting of pay.[7]

6. In this case, there is no dispute that in June 2008 the accused voluntarily enlisted in the United States Army.[8] In June or July of 2009 he went missing and soon was believed, based on solid intelligence, to be in the hands of the enemy. Soon thereafter and well before his 2011 ETS date, the accused was listed on military roles as "missing/captured." His ETS date was first extended by one year and then by an additional ten years. After he was returned to military control in May 2014, the accused was properly processed through the Army's re-integration process. Simultaneously, an AR 15-6 investigation was begun into the facts and circumstances concerning the accused's falling into the hands of the enemy. The accused was interviewed and provided a statement as part of this investigation. The accused was FLAGd almost as soon as he returned to military control. And, soon after the AR 15-6 investigation was completed, court-martial charges were preferred against him. Over a year later, two years after he returned to military control and more than five years after his 2011 ETS date, the accused requested to be discharged retroactive to June 2011. That request was denied.

7. There is nothing about the facts and circumstances surrounding either the accused's original enlistment, the extension of his ETS date while in the control of the enemy, or the processing of the accused after he was returned to military control that shows any evidence that he was ever discharged from the service as that term is defined in court-martial jurisdiction statutes, regulations, or jurisprudence. His enlistment was voluntary and valid. The extension of his ETS date was appropriate under the circumstances. He was never discharged from the service for purposes of

---

[6] Referring to Article III of The Constitution of the United States of America. Defense references include United Supreme Court cases as well as Federal Circuit and District Court cases.

[7] And, even beyond that, where a service member received his DD 214 and final accounting of pay in a foreign country and was told how much money he would receive but still had not accessed that money in his bank account in the United States, jurisdiction was held to still apply to him and he was brought back to Germany to face trial. *United States v. Brevard,* 57 MJ 789 (ACCA 2002).

[8] During the hearing on this motion, defense counsel in-artfully referred to the accused's "capacity" to enlist when he meant to argue that his enlistment was not voluntary because it was extended for 11 years without his consent or request. When the Court sought clarification, the defense consulted with the accused and discussed amongst themselves and then assured the Court that they had no evidence and no reason to believe that the accused was not competent to enlist when he enlisted in 2008. The defense affirmatively eschewed any claim of lack of capacity.

court-martial jurisdiction. Accordingly, this court-martial has personal jurisdiction to try the accused for the charges against him.

RULING

8. The defense motion to dismiss for lack of personal jurisdiction is DENIED.

JEFFERY R. NANCE
COL, JA
Military Judge

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

UNITED STATES OF AMERICA v. SGT Robert B. Bergdahl HHC, STB, U.S. Army FORSCOM Fort Bragg, NC 28310	Findings of Fact, Conclusions of Law and Ruling -- Defense Motion to Dismiss Charge I (Condonation of Desertion) (D App 98) 4 October 2017

1. The defense moves this Court dismiss Charge I and its specification (Desertion) pursuant to Rules for Courts-Martial (RCM) 907 because the General Court-Martial Convening Authority has condoned any desertion alleged to have taken place. I considered the written motions of the parties, all matters appended thereto, if any, the testimony of witnesses, and oral arguments of counsel. The burden of persuasion is on the defense to prove the facts related to this matter by a preponderance of the evidence.

FINDINGS OF FACT

2. I find the following facts by a preponderance of the evidence:

a. On 25 March 2015, the accused was charged with one charge, one specification of desertion with the intent to avoid hazardous duty or to shirk important service in violation of Article 85, UCMJ, and one charge, one specification of misbehavior before the enemy in violation of Article 99, UCMJ.

b. On or about 30 June 2009, while serving with his assigned unit in Afghanistan, the accused went missing and was captured by the Taliban o/a 1 July 2009.

c. An Army Regulation (AR) 15-6 investigating officer was immediately appointed and conducted an investigation. In his 4 August 2009 findings, the IO concluded that the accused had voluntarily absented himself from his unit "in search of some kind of adventure" but that it would be impossible to determine exactly why he left until he was returned to military control and was questioned. His military status was listed as "duty status - whereabouts unknown" (DUSTWUN) and eventually changed to "missing/captured."

Appellate Exhibit 64

APPELLATE EXHIBIT 104
PG 185

d. SGT Bergdahl's enlistment was extended one year as his 1 October 2011 ETS[1] date approached and he was, as far as the Army knew, still under the control of the Taliban. One year later, while he was still under the control of the Taliban, his enlistment was extended by 10 more years - to 1 October 2022.

e. On 4 August 2010 a Board of Inquiry convened to consider the accused's status. That board recommended that his status remain "missing-captured." The board also discussed whether the accused had violated the UCMJ but ultimately decided to wait until they had an opportunity to interview the accused to reach a conclusion on this issue.

f. The accused returned to military control on 31 May 2014 and his duty status was changed to "present for duty."

g. On or about 14 July 2014, after the accused had gone through medical examination incident to his return to military control and had participated in debriefings by other Army personnel, he was assigned to his present unit and a Flag[2] was initiated.

h. When the accused was about to be assigned to his unit, LTG Percy Wiggins, Commander of U.S. Army North and 5th Army, received a telephone call from the Secretary to the Army General Staff. He was told that the accused was being assigned to his unit and that he was responsible to take care of the accused but that UCMJ would be retained at a higher level. His SJA, who was present at the conversation, commented that he thought that meant FORSCOM would exercise jurisdiction. LTG Wiggins assumed that was true as well. When the accused came to him the Dahl[3] AR 15-6 investigation was still under way. LTG Wiggins did not get involved in the FLAG process. That was done by his BN Commander. LTG Wiggins emphasized that his people focus on re-integrating the accused, making sure that he was safe, and ensuring that he was treated like every other soldier. Though he was aware of significant media attention regarding the accused, he did not pay much attention to it and did not really give their reports of desertion much credit.

i. On 14 July 2014, the accused was counseled by his new battalion commander on the plan to take care of him while the investigation occurred and that he had been FLAGd pending the investigation.

j. On or about 14 July 2014, the accused was put to work as a human resources NCO. He was counseled by his NCO chain of command on what was expected of him and how to conduct himself as an NCO. He has continued to perform these duties while investigations and UCMJ process have occurred.

---

[1] End Term of Service.
[2] Suspension of Favorable Personnel Action (Flag), AR 600-8-2.
[3] Referring to Major General Dahl, the AR-15-6 investigating officer.

k. On 28 September 2014, MG Dahl completed his investigation and forwarded it to the Director of the Army Staff.

l. On 22 December 2014, the Director took action and forwarded the report of investigation to the FORSCOM commander for action, if any, that he deemed appropriate.

m. On 9 January 2015, the accused was attached to FORSCOM for the administration of military justice.

n. Charges were preferred against the accused and another Flag put in place on 25 March 2015 and, after an extensive Article 32 Pretrial Hearing, those charges were referred to General Court-Martial by the FORSCOM commander on 14 December 2015.

LAW AND ANALYSIS

3. To say that the doctrine of condonation of desertion is an infrequent issue in courts-martial jurisprudence is a great understatement. There is very little case law on the matter, and what does exist is ancient. Nevertheless, the principle of constructive condonation of desertion as a bar to prosecution has been clearly set out in the Manual for Courts-Martial since at least as far back as 1917. *A Manual for Courts-Martial, Courts of Inquiry and of Other Procedure Under Military Law*, Chapter IX, Para. 151, p. 70 (1917). In current day, Rule for Courts-Martial 907(b)(2)(D)(iii) provides that: "Constructive condonation of desertion established by unconditional restoration to duty without trial of a deserter by a general court-martial convening authority who knew of the desertion," is barred from prosecution.

4. For this bar to prosecution to apply, the accused must be restored to full duty by the General Court-martial Convening Authority (GCMCA). *United States v. Linerode,* 11 CMR 262 (CMA 1953). The decision must have been an informed one, that is, the GCMCA must have known of the desertion. *United States v. Scott*, 20 CMR 366 (CMA 1956); *United States v. Merrow*, 32 CMR 739 (CMA 1962). The decision must have amounted to an unequivocal decision by the GCMCA to essentially pardon the accused. *Merrow*, at 743. Finally, the return to duty must be unconditional. *Scott,* at 370. It is not sufficient if someone other than the GCMCA restores the accused to full duty, even if the GCMCA knew of the restoration. *Id.* And, the mere assigning a soldier pending investigation and/or trial with work to do while thus pending is not alone sufficient to constitute a full and unconditional return to duty. *Linerode*, at 271. Every soldier, regardless of his UCMJ status, must be given something useful to do.

5. In this case, LTG Wiggins was a GCMCA. However, it was clear to LTG Wiggins from the moment the accused was assigned to him, that he was not the accused's GCMCA -- that is, Wiggins knew that all UCMJ action over the accused was reserved to a higher level, probably FORSCOM. The case law is not clear that the condoner has to be the GCMCA with authority over the actual desertion offense. However, because condonation acts as a constructive pardon, it is only logical that the GCMCA with authority over the charge being constructively pardoned should be the one whose actions result in the constructive pardon. One cannot condone that which one has no authority to condemn.

6. Next, even assuming, for the sake of argument, that LTG Wiggins had the authority to condemn and condone, he had almost no knowledge of any desertion. By his testimony under oath all he knew of any desertion was that the media had used such words in connection with the accused. He properly discounted that information as unreliable media buzz. What he did know was that MG Dahl was conducting an investigation to get to the bottom of what actually happened. That investigation had just begun when the accused was assigned to LTG Wiggins' command. LTG Wiggins was not the commander in charge of the accused when the events later alleged to constitute desertion are alleged to have occurred. And, DA had told him to not concern himself with anything other than the care and feeding of the accused. As a dutiful Army officer, that is exactly what he did. LTG Wiggins did not have the requisite knowledge of the facts of the alleged desertion required in order to condone it.

7. Finally, it was LTC Fabiano, the accused's battalion commander, not a GCMCA, who restored him to duty by assigning him useful work to do. And, that restoration was not unconditional because LTC Fabiano initiated a Flag on the same day he took charge of the accused and gave him work to do. Furthermore, it would strain reason to suggest that a person in SGT Bergdahl's position in July 2014 should simply be shunted aside to fend for himself for something to do until all investigations and appropriate action had been taken -- no matter what that action turned out to be. If the defense position were to apply, no soldier pending charges for desertion could ever be given work to do while his case was pending or he would be pardoned. That is not logical, economical, smart, practical, or in the best interest of the accused in most cases and certainly not in the best interest of SGT Bergdahl in this case. The accused was returned by his BN Commander not his GCMCA and that return to duty was not unconditional. Even if news reports of what PAO said are true, no PAO officer can restore the accused to duty; and even if he or she did, they are not the GCMCA. Furthermore, there is no evidence any of these people were speaking on behalf of the GCMCA for purposes of condonation of desertion. A statement by a public affairs officer that "He is just another soldier in the U.S. Army" does not mean that the GCMCA has condoned his desertion.

8. The defense argument that because the two Flags were imposed by someone other than the GCMCA and because they were improper FLAGS they have no impact on the issue of condonation of desertion is not well made. It is true that the Flags were not imposed by the GCMCA. However, it is also true that the GCMCA did not return the accused to duty. That action was done by the officer who initiated the July 2014 Flag. It would make no sense for the GCMCA who had not been the person to place duties on the accused to be the person who initiated the Flag. The defense argument that the Flag did not serve as a condition on the accused's duties, ignores the purpose of a Flag. Under this Flag the accused could not be promoted, he could not PCS, he could not ETS, he could not reenlist, he could not be administratively discharged, he could not receive an award for his performance or good conduct, he could not attend military schools, he could not take advance or excess leave, and he could not receive a reenlistment bonus -- just to name a few. If those are not conditions on his duty, then there could be none. The defense contends that the return to duty by the BN Commander should be imputed to the GCMCA but in the same document contends that the conditions placed on that duty should not also be imputed. They are trying to have it both ways. The bottom line, however, is that the accused was not unconditionally returned to duty. He was being investigated for some serious allegations and he and everyone else knew that he was not free to go and needed something to do until everything was resolved. That is what happened. No one, especially not any GCMCA condoned any desertion with which the accused is now charged.

RULING

9. The defense motion to dismiss Charge I for condonation of desertion is DENIED.

JEFFERY R. NANCE
COL, JA
Military Judge

CERTIFICATE OF SERVICE, U.S. v. BERGDAHL (Misc 20200588)

I certify that a copy of the foregoing was sent via electronic submission to civilian appellate counsel and the Defense Appellate Division (***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice @mail.mil***), on the 16th day of November, 2020.

DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822
Daniel.l.mann.civ@mail.mil