IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. ROBERT B. BERGDAHL Sergeant (E-5) U.S. Army, *Appellant*.	)))))))))))	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. ARMY 20170582 USCA Dkt. No. 19-0406/AR

TO THE JUDGES OF THE UNITED STATES
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Issue Presented

WHETHER THE CHARGES AND SPECIFICATIONS SHOULD BE DISMISSED WITH PREJUDICE OR OTHER MEANINGFUL RELIEF GRANTED BECAUSE OF APPARENT UNLAWFUL COMMAND INFLUENCE

Statement of Statutory Jurisdiction

The Court of Criminal Appeals had jurisdiction under Article 66, UCMJ. This Court has jurisdiction under Article 67(a)(3), UCMJ.

Statement of the Case

Two charges were brought against appellant SGT Robert B. (Bowe) Bergdahl, each with one specification. Each alleged the same single June 30, 2009 incident at Observation Post Mest, Paktika Province, Afghanistan. The specification of Charge I, brought under Article 85(a)(2), UCMJ, read:

> In that Sergeant Robert (Bowe) Bowdrie Bergdahl, United States Army, did, on or about 30 June 2009, with the intent to shirk important service and avoid hazardous duty, namely: combat operations in Afghanistan; and guard duty at Observation Post Mest, Paktika Province, Afghanistan; and combat patrol duties in Paktika Province, Afghanistan, quit his place of duty, to wit: Observation Post Mest, located in Paktika Province, Afghanistan, and did remain so absent in desertion until on or about 31 May 2014.

The specification of Charge II, brought under Article 99(3), UCMJ, read:

> 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.

Sergeant Bergdahl challenged the legal sufficiency of the charges. He also sought dismissal or other relief for apparent UCI. Those efforts having failed, on October 16, 2017, without a pretrial agreement, he pleaded guilty in part and not guilty in part to Charge I, contesting the duration element except for the first day. After affording the government an opportunity to prove the 5-year period of desertion it had alleged, 27 R1676, the military judge found him guilty in accordance with his plea and not guilty as to the remainder of the charged period. 27 R1706. With exceptions and substitutions, the specification of Charge I read:

> In that Sergeant Robert (Bowe) Bowdrie Bergdahl, United States Army, did, on or about 30 June 2009, with the intent to shirk important service and avoid hazardous duty, namely: a convoy from Observation Post Mest to Forward Operating Base Sharana, Paktika Province, Afghanistan; and guard duty at Observation Post Mest, Paktika Province, Afghanistan; quit his place of duty, to wit: Observation Post Mest, located in Paktika Province, Afghanistan, and did remain so absent in desertion until on or about 30 June 2009.

27 R1631.

Sergeant Bergdahl also pleaded guilty to Charge II and its specification as reframed by the military judge. 27 R1631; AE49 at 4-5 (¶ 11). On November 3, 2017, the military judge sentenced him to a dishonorable discharge, reduction to Private (E-1), and forfeiture of $1,000 pay per month for 10 months. 30 R2704. On June 4, 2018, the convening authority approved the sentence. JA002.

Sergeant Bergdahl appealed to the Army Court. That court directed supplemental briefing on several specified issues relating to UCI on May 21, 2019,

JA057-058, and thereafter affirmed by divided vote. *United States v. Bergdahl*, 79 M.J. 512 (A. Ct. Crim. App. 2019), JA001. Judge Ewing dissented in part. Focusing on a day-of-sentencing tweet in which President Trump called the military judge's sentence "a complete and total disgrace to our Country and to our Military," JA027, he concluded that "the timing, specificity, and unequivocal nature of . . . the tweet make it impossible" to say with the requisite certainty that the government had carried its burden of proving beyond a reasonable doubt that an objective, disinterested observer would not "harbor a significant doubt about the fairness" of the proceedings. 79 M.J. at 533, JA028 (quoting *United States v. Boyce*, 76 M.J. 242, 248 (C.A.A.F. 2017)). He would have found that the convening authority's post-trial action was not free from apparent UCI, and accordingly would have set aside the dishonorable discharge portion of the sentence. 79 M.J. at 534, JA029.

Sergeant Bergdahl filed a timely petition for grant of review and supplement. Apparent UCI was one of four issues on which he sought review. The Court granted review on that issue on November 4, 2019.

Statement of Facts

A. Sergeant Bergdahl

Sergeant Bergdahl enlisted in the U.S. Coast Guard in 2006. After he was given an entry-level separation, the Coast Guard cautioned that he should not be reenlisted in any branch without a psychological evaluation. AE 66, 45 RE0688. The

Army enlisted him two years later without such an evaluation. Def. Ex. D. An in-depth psychological examination conducted after his release from enemy captivity found that he suffered from schizotypal personality disorder and PTSD at the time he left his post. JA573-6.

In May 2009, SGT Bergdahl joined his platoon at FOB Sharana, Paktika Province. 31 RE0060. The platoon was sent to establish a checkpoint at OP Mest. *Id*. at E0083. Around midnight on June 29, 2009, SGT Bergdahl left without authority, 27 R1659-60, to hike overland to Sharana, 31 RE0122-23, where he hoped to report unit leadership issues (which he believed to be severe and life-threatening) to a general officer. P Ex. 9, 31 RE0121-24, 27 R1658-60; 79 M.J. at 517-18, JA002. Before he could report to FOB Sharana, he was abducted by the Haqqani network, a Taliban affiliate. 27 R.1650.

Thus began almost five years of captivity during which SGT Bergdahl showed remarkable courage as well as fidelity to the Code of Conduct for Members of the Armed Forces of the United States, Article III of which provides:

> If I am captured, I will continue to resist by all means available. *I will make every effort to escape* and aid others to escape. I will accept neither parole nor special favors from the enemy.

Exec. Order No. 10631, 20 Fed. Reg. 6057 (1955), 3 C.F.R. 1954-1958 Comp. 266, https://www.archives.gov/federal-register/codification/executive-order/10631.html (emphasis added). On the first day, he attempted to escape but was quickly tackled

and beaten. JA542. Later, at another location, he escaped during a guard shift change, but was again recaptured. JA545-7. The conditions of his captivity grew worse. Suffering from dysentery, infected wounds, and malnutrition, beaten with copper electrical conduit, burned and chained to a metal bed frame, he was threatened with beheading if he again tried to escape. JA547-51. But he was undeterred. He tried to excavate his way out from a dirt-floored cell. JA552-54. When that failed, using a rock and a nail found in the dirt, over months he honed a pick – concealing it in the filth of his own dysentery – that he ultimately used to open his shackles, and escaped again. JA555-64. Alone, he made his way through hostile territory, attempting by dead reckoning to reach the Pakistani border, and evading recapture for eight days before succumbing to injuries and starvation. JA561-64. The Taliban returned him to captivity, and this time built a cage to hold him. JA568-69, JA598-604. Thereafter he was subjected to "torture . . . abuse . . . extreme neglect" and utter isolation. JA591-93. Sergeant Bergdahl endured the worst conditions anyone has experienced as a POW since the Vietnam War. JA596-97.

Asked at sentencing what sustained him during his ordeal, SGT Bergdahl told the military judge: "[N]ot letting them win." JA572. On May 31, 2014, he was exchanged for five former members of the Taliban government who had been detained at Guantánamo Bay. After repatriation, he worked working closely with intelligence analysts. His persistent observation and intrepid planning in captivity

gave him valuable insights into his captors and their methods. Even while readjusting from captivity and regaining his ability to speak, he provided a "gold mine" of intelligence. JA606-08.

Sergeant Bergdahl came home with permanent psychological wounds. D Ex. O (sealed). He suffers from schizotypal personality disorder, PTSD, social phobias and cognitive deficits. JA584-87. The evidence showed that he suffered from PTSD prior to captivity, suggesting that because he was already compromised when he fell captive, that experience was even more severe. JA581-82. His prognoses with respect to his schizotypal personality disorder and PTSD are poor. JA585-87.

This is the Soldier the President would denounce as a "traitor." He came home not to a welcome, but to a political firestorm with him at the center.

B. Senator McCain

In 2014, John S. McCain III was the ranking member of the Senate Armed Services Committee (SASC). On January 3, 2015, he became chairman. SASC has jurisdiction over military budgets and personnel, including, as Rule XXV, 1(c)(1) of the Standing Rules of the Senate provides, "[p]ay, promotion, retirement, and other benefits and privileges of members of the Armed Forces." Senator McCain's authority as ranking member and then chairman was profound, and colored by a unique personal history. A retired O-6, he was a naval aviator shot down over North Vietnam, recipient of the Silver Star, three Bronze Star Medals, two Purple Hearts,

and the Prisoner of War Medal. He served in the Senate, became a leader of his party, and in 2008 was its presidential nominee. Together with Secretary of Defense Chuck Hagel, he was, as to military matters, one of the nation's two most powerful and influential retired regulars.

Three days after SGT Bergdahl's return, Sen. McCain announced his displeasure with the prisoner exchange deal. D APP 23 at 47 ("this decision to bring PVT Bergdahl home – and we applaud that he is home – is ill-founded . . . it is a mistake, and it is putting lives of American servicemen and woman [*sic*] at risk. And that to me is unacceptable."); *see also* JA148-49 (stating, "I would not have made this deal . . . . I would not have put the lives of American servicemen at risk in the future.").

While it considered whether, contrary to DoD policy dating to the Vietnam Era, to charge a returning POW who had behaved properly in captivity, the Army came under intense pressure from Sen. McCain to do just that. In 2014 and early 2015, his staff repeatedly pressed the Army concerning its charging decision making. JA612; *see* Appendix.[1] It demanded information on SGT Bergdahl's pay status, captivity-related pay, and other entitlements. JA616-19. On March 23, 2015,

[1] For ease of reference, the correspondence is summarized in the Appendix of SASC UCI ("Appendix," at 49 *infra*). It shows just how powerfully the chairman's influence was felt. The government stipulated to the accuracy of the cited news accounts. D APP 28 encl. 1, JA226.

SASC's counsel requested to know "by close of business" when U.S. Army Forces Command (FORSCOM) would announce action on the charges. JA612. Two days later, charges were preferred. The Army immediately notified SASC. JA620-21.

The pressure intensified. In May 2015, SASC pressed for information about the Article 32, UCMJ, preliminary hearing. JA614, 629. In June 2015, Sen. McCain told *Army Times* that the committee he now chaired would begin an "official examination" of the Bergdahl case "as soon as the final decision is rendered." Appendix.

A critical phase of Sen. McCain's intrusion took place later in 2015. During the summer, at the Article 32 hearing, MG Kenneth R. Dahl, who had conducted an extensive AR 15-6 investigation, testified that confinement "would be inappropriate." JA151 (quoting Art. 32 Tr. 310). At the conclusion of the preliminary hearing, the defense urged the hearing officer to "recommend that the medical evaluation board process should be permitted to go forward. And in terms of the basic matter at hand, we are willing to note that the record provides probable cause for a 1-day AWOL, in violation of Article 86." Art. 32 Tr. 380.

The hearing officer wound up recommending that the Article 85 and 99(3) charges be referred to a special court-martial *not empowered to adjudge a bad-conduct discharge*, but observed that neither confinement nor a punitive discharge was warranted. JA132.

Sen. McCain reacted swiftly. "If it comes out that [SGT Bergdahl] has no punishment, we're going to have to have a hearing in the Senate Armed Services Committee," he said. Appendix. He added that SGT Bergdahl – as to whom charges had not even been *referred* – "is clearly a deserter." *Id*. SASC demanded updates on the referral decision throughout October and November. JA609-11, 624, 633, 636. On December 9, 2015, the House Armed Services Committee chimed in, noting in a report on the detainee transfer that it would "remain abreast of the disciplinary process which is underway." Appendix.[2]

On December 14, 2015, GEN Robert B. Abrams, Commander of FORSCOM, rejected the recommendations of MG Dahl and the preliminary hearing officer (LTC Visger) and referred the charges to a general court-martial at Fort Bragg, more than a thousand miles from SGT Bergdahl's duty station. D APP 23 at 48; 13 R1. The Army had already assigned a special prosecution team to FORSCOM. D APP 23 at 2-3. It would grow to more than 50 judge advocates and support staff.

Absent Sen. McCain's pressure and that of candidate Trump (discussed below), all of this might have been hard to understand. At issue was a junior enlisted Soldier who, on the night of June 30, 2009, hoping to run overland through hostile

[2] Sen. McCain never withdrew either the threat or the accusation. Neither he nor SASC took any curative steps.

territory to report to an American base, crossed the wire, missed a guard shift, and thereafter endured five years of hell.

C. President Trump

"Troubling" as Sen. McCain's conduct was in the military judge's view, JA066, worse was to come. From the outset of his campaign for the presidency, candidate Donald J. Trump attacked SGT Bergdahl, repeatedly whipping up audiences with calls for his execution.

Candidate Trump referred to the appellant as "traitor Bergdahl," describing him at rally after rally across the country as a "dirty, rotten traitor," a "no-good traitor," a "dirty, no-good traitor," and "a horrible traitor." *See generally* Defense Video Exhibit; JA667 (video); JA360-390 (compendium of remarks). Candidate Trump attacked him relentlessly; given the undisputed record, the vitriol was astonishing. Sergeant Bergdahl, he asserted, "went to the other side" and "negotiated with terrorists." *E.g.*, JA367, 369. He was "the worst," "no good," "this bum," a "whack job," "this piece of garbage," a "son of a bitch," and "a very bad person who killed six people." Candidate Trump repeatedly and falsely insisted that Soldiers – variously five, six, or either five or six in number – died searching for him.[3]

[3] Three Soldiers were injured, one of whom died this year. Jamiel Lynch & Ralph Ellis, *Mark Allen, soldier injured in 2009 search for Bowe Bergdahl, dies*, CNN (October 14, 2019, 9:35 PM), https://www.cnn.com/2019/10/14/us/mark-allen-dies-

Candidate Trump became a master at whipping up his rallies with fury at SGT Bergdahl. He noted that deserters used to be shot, implying and at times saying outright that SGT Bergdahl deserved the death penalty. With the same implication, he pantomimed executions by rifle and pistol shot, complete with sound effects. As crowds cheered, he said that SGT Bergdahl should be dropped from an airplane over Afghanistan, or alternatively into the hands of ISIS fighters (whom the United States would proceed to bomb). JA382, 385.

A persistent theme in this Niagara of abuse was the claim that SGT Bergdahl was a traitor. "[T]he labeling of an accused as a 'traitor" is particularly inflammatory." *United States v. Barrazamartinez*, 58 M.J. 173, 178 (C.A.A.F. 2003) (Baker, J., dissenting); *see also id*. at 176 (Gierke, J.) ("potentially inflammatory term"). A traitor is a person who commits treason. BRYAN A. GARNER, BLACK'S LAW DICTIONARY 1635 (9th ed. 2009); *see also* AMERICAN HERITAGE DESK DICTIONARY AND THESAURUS 763 (2014); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1842 (5th ed. 2011). "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." U.S. Const. art. III, § 3, cl. 1; 18 U.S.C. § 2381 (2012). There has never been any evidence that SGT Bergdahl committed treason. He was never

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soldier-who-searched-for-bowe-bergdahl/index.html. Mr. Trump continues to assert incorrectly that five or six Soldiers died searching for SGT Bergdahl. *See* p. 16 *infra*.

charged with that supremely heinous offense, and his conduct in captivity was in keeping with the Code of Conduct and the high standards of the U.S. Armed Forces.

In sum, Candidate Trump publicly—

- predetermined SGT Bergdahl's guilt, repeatedly labeling him a traitor (and on occasion a deserter);
- advocated punishments that are unauthorized, cruel, unusual, and indeed criminal;
- broadcast highly emotional but inaccurate matters in aggravation;
- made factually inaccurate statements about SGT Bergdahl;
- dismissed evidence of psychological issues that would doubtless qualify as matter in mitigation; and
- promised to review the case once he reached office.

Sergeant Bergdahl appears to be the only accused in the history of the U.S. Armed Forces to have been vilified in this way by *any* commander, never mind by the Commander in Chief. In the past, even the most glancing comments of senior officers have raised concern. For example, President Obama's isolated and generic observation that anyone found guilty of sexual assault should receive a dishonorable discharge referred to no specific accused. Even so, it was the subject of prompt curative statements from both the White House Counsel and the Secretary of Defense. That was not enough for one distinguished military judge, who found apparent UCI and entered an order precluding a punitive discharge. *United States v. Johnson* (N-M. Trial Jud., Hawaii Cir., June 12, 2013) (Fulton, J.), JA113, *noted in*

Monu Bedi, *Unraveling Unlawful Command Influence*, 93 WASH. U. L. REV. 1401, 1421-22 nn.127, 133 (2016).

Nothing in the past compares with this case, with a President's targeted, virulent attacks on a single Soldier. While nothing could have "clarified" or "cured" invective this extreme, neither President Trump, nor any spokesperson for him or the Army, ever "walked back" his statements or suggested that he had been misquoted or misunderstood.

The statements summarized above and included in the Defense Video Exhibit were made when President Trump was a candidate and, unlike Sen. McCain, not subject to Article 37(a), UCMJ. On January 20, 2017, however, Candidate Trump became President Trump. Rather than disavowing his campaign-trail statements about SGT Bergdahl, he ratified and reminded people of them after taking office. On October 16, 2017, he said 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 sentencing, so I'm not going to comment on him. *But I think people have heard my comments in the past.*

JA488 (emphasis added).

The Army Court thought this ratification too tame and the personal attacks too remote – that somehow the abuse Candidate Trump had heaped on SGT Bergdahl had faded. 79 M.J. at 524. But no evidence was offered, and none would be

plausible, that those attacks had been forgotten – and certainly not by those who now served in the chain of command.

Removing any doubt on that point, President Trump stayed on SGT Bergdahl's case. Immediately after the sentencing, he tweeted: "The decision on Sergeant Bergdahl is a complete and total disgrace to our Country and to our Military." JA642. That widely-noted communication came before the staff judge advocate's review, the convening authority's unfettered-discretion clemency review, and appellate review by the Army Court.

More was to come. On April 26, 2019, while SGT Bergdahl's appeal was pending below, the President again called him a traitor, tweeting: "No money was paid to North Korea for Otto Warmbier, not two Million Dollars, not anything else. This is not the Obama Administration that paid 1.8 Billion Dollars for four hostages, or gave five terrorist hostages [*sic*] plus, who soon went back to battle, for traitor Sgt. Bergdahl!" JA659.

The President's interference has continued during this appeal.

Last month, after the Court granted review on whether the charges "should be dismissed or other meaningful relief granted" (an action that was duly reported in the news media, *e.g.*, Patricia Kime, *Top military appeals court to review Bergdahl case for interference by Trump and McCain*, Military Times (Nov. 6, 2019), https://www.militarytimes.com/pay-benefits/2019/11/06/top-military-appeals-

court-to-review-bergdahl-case-for-interference-by-trump-and-mccain/), President Trump again tweeted about him: "Our great war-fighters must be allowed to fight. I would not have done this for Sgt. Bergdahl or Chelsea Manning." JA660.[4]

On November 25, 2019, in the Oval Office with Bulgarian Prime Minister Boyko Borrisov, the President was asked about other military justice cases, but took the occasion to return to the subject of SGT Bergdahl (as well as PVT Manning, who has no connection to this case):

> Q Mr. President, are you at all concerned that with some of your comments about the Navy Secretary and Lieutenant Colonel Vindman, that you're disparaging members of the armed forces?
>
> PRESIDENT TRUMP: No, I think what I'm doing is sticking up for our armed forces. And there's never been a President that's going to stick up for them and has, like I have, including the fact that we spent two and a half trillion dollars on rebuilding our armed forces.
>
> And some very unfair things were happening. You let Sergeant Bergdahl go. You let others go, including a young gentleman, now a person who President Obama let go, who stole tremendous amounts of classified information. And you let that person go. But Sergeant Bergdahl — we just lost another[5] man who went after — you know he died last week. He went after — from — he was paralyzed from just

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[4] The context of the tweet was the President's clemency and other favorable action concerning Army and Navy personnel convicted of or charged with crimes ranging up to murder. *See* Dave Phillips, *Trump Clears Three Service Members in War Crimes Cases*, N.Y. Times, Nov. 16, 2019.

[5] *Sic*. The President's suggestion here and in the next paragraph that anyone was killed while searching for SGT Bergdahl is mistaken. Only MSG Allen died, passing away 10 years after he was wounded. *See* note 3 *supra*. (Footnote added.)

about the neck down, and he died last week, going after Sergeant Bergdahl, trying to find Sergeant Bergdahl.

So when you have a system that allows Sergeant Bergdahl to go, and you probably had five to six people killed — nobody even knows the number, because he left — and he gets a slap on the wrist, if that; and then you have a system where these warriors get put in jail for 25 years — I'm going to stick for our warrior. [*sic*] I will stick up for the warriors.

Okay, thank you very much everybody.

Q Mr. President what do you make of —

PRESIDENT TRUMP: The person I'm talking about is Chelsea Manning, by the way, if you had any doubt. So you have Chelsea Manning, who after — after Chelsea Manning was, I assume, pardoned by President Obama, Chelsea Manning went around and badmouthed President Obama, on top of everything else.

So when you have a Chelsea Manning who stole classified information and did many, many things that were not good and gets pardoned — or whatever happened — and you have a Sergeant Bergdahl who gets — virtually nothing happens; a slap on the wrist — and then they want to put these warriors in jail for 25 years. One of them, Lorance, served six years in jail; had many years left as a fighter. No, we're not going do that to our people.

Remarks by President Trump and Prime Minister Borissov of the Republic of Bulgaria Before Bilateral Meeting, Nov. 25, 2019, JA661-66.

References to the Record

Record citations are by volume and page, cited as "[Vol]_R[page]." Portions of the record included in the Joint Appendix are cited as "JA[page]."

Summary of Argument

The military judge correctly described this as "an unusual case, perhaps unique in all the annals of military justice." JA084 (¶ 15).

Sergeant Bergdahl met his threshold burden to show some evidence of UCI through proof of tweets, undisputed public statements and SASC communications. The government failed to meet its consequent burden to prove beyond a reasonable doubt that a fully-informed objective observer would not harbor a significant doubt as to the fairness of the proceedings. The case has numerous notable features: an inexplicable departure from the decades-old policy of not prosecuting returning POWs except for offenses committed in captivity, a SASC chairman demanding punishment, a convening authority rejecting the preliminary hearing officer's recommendations, an attack by the President on the military judge, and the absence of any explanation of how the convening authority analyzed the question of clemency.

As the dissenting judge in the Army Court believed, a remedy was necessary. In light of the intensity and public nature of the apparent UCI, and the personal involvement of the Commander in Chief, the Court cannot perform its high function

as a "bulwark" against UCI unless, going further than the dissenting judge would have done,[6] it dismisses the charges and specifications with prejudice.

Argument

THE CHARGES AND SPECIFICATIONS SHOULD BE DISMISSED WITH PREJUDICE OR OTHER MEANINGFUL RELIEF GRANTED BECAUSE OF APPARENT UNLAWFUL COMMAND INFLUENCE

No principle is more fundamental to American military justice than the ban on unlawful influence. It is the "mortal enemy" of military justice, *United States v. Boyce*, 76 M.J. 242, 246 (C.A.A.F. 2017) (citing *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)), and as Judge Ewing observed, "[the] risk is exacerbated when [it] comes from the top." JA026, 79 M.J. at 532 (citing *United States v. Estrada*, 7 C.M.A. 635, 641, 23 C.M.R. 99, 101 (1957) (Secretary of the Navy)).

UCI issues are reviewed *de novo*. *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018); *United States v. Chikaka*, 76 M.J. 310, 313 (C.A.A.F. 2017); *Boyce*, 76 M.J. at 249 n.7; *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013).

Boyce, which rejected a claim of actual UCI but reversed a sentence on apparent UCI grounds, sets out the governing principles. Sergeant Bergdahl carried an initial burden to show "some evidence" that the facts constituting the apparent UCI occurred. 76 M.J. at 249; *see United States v. Stoneman*, 57 M.J. 35, 41

[6] Judge Ewing's recommended relief failed to take important apparent UCI into account. *See* note 25 *infra*.

(C.A.A.F. 2002); *see also United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995) ("The quantum of evidence necessary to raise unlawful command influence is the same as that required to submit a factual issue to the trier of fact [*i.e.*, "some evidence]."). While the evidence presented must consist of more than "mere allegation or speculation," the burden on the defense is "low." *Salyer*, 72 M.J. at 423.

Once an accused makes the threshold showing, the burden shifts to the government to prove beyond a reasonable doubt that the predicate facts either (a) did not occur or (b) did not place 'an intolerable strain' on the public's perception of fairness. *Boyce*, 76 M.J. at 248. To address "intolerable strain," courts consider the record from the point of view of a hypothetical, disinterested observer. This "observer" is "fully informed of all the facts and circumstances," *id.* at 249; *United States v. Lewis*, 63 M.J. 405, 414-15 (C.A.A.F. 2006); *Salyer*, 72 M.J. at 427 (considering the impression of apparent UCI resulting from the "appearance in the record" of the government's inappropriate actions to unseat a trial judge), and takes into account the "totality of the circumstances," *Boyce,* 76 M.J. at 252, including collateral conduct that may occur early, at the referral stage. *Id*. at 252-53 (considering the Secretary of the Air Force's impact on the convening authority at the referral stage).

The government must prove beyond a reasonable doubt that this hypothetical observer would [not] harbor a significant doubt about the fairness of the proceeding.'" *Boyce*, 76 M.J. at 249; *Salyer*, 72 M.J. at 423; *Lewis*, 63 M.J. at 415. If it does not carry that burden, the court must fashion an appropriate remedy. *Boyce*, 76 M.J. at 250; *Lewis*, 63 M.J. at 416.[7]

Sergeant Bergdahl's threshold burden was certainly met. As a convening authority, President Trump was forbidden by R.C.M. 104(a)(1) to criticize the sentence. The pattern of disparaging remarks against SGT Bergdahl, which the President ratified in the Rose Garden, also constituted apparent UCI. Chairman McCain, as a retired regular (and hence subject to the Code), was within the ambit of Article 37(a), UCMJ. 79 M.J. at 521-22. Because both men's comments implicated the right to fairness in the charging, disposition, prosecution, clemency, and appellate phases, SGT Bergdahl carried his threshold burden. The government having advanced no evidentiary challenge to the predicate facts, the UCI battle was

[7] In *Boyce*, the Court held that pressure from the Secretary of the Air Force to prosecute sex crimes created an appearance of UCI in the convening authority's referral of such charges against Airman Boyce. Judge Stucky dissented, noting that (in stark contrast to this case) there was no evidence that that the secretary was even aware of Airman Boyce's case. But even in dissent, Judge Stucky observed with concern that when senior public officials "publicly castigate" those involved, they "send a perceptible chill over the entire military justice system." 76 M.J. at 253. Judge Ryan also dissented, but shared "the majority's frustration" with the chilling effect noted by Judge Stucky. *Id.* at 256.

fought out on "intolerable strain" territory, where the government failed to carry its burden.

All phases of this case were subject to apparent UCI. As to the inception of the case, *Boyce*'s hypothetical observer would note, among other things, that (1) after pressure from SASC, for SGT Bergdahl, the Army departed from longstanding practice of not prosecuting returning POWs except for offenses committed in captivity, *see* VERNON E. DAVIS, THE LONG ROAD HOME: U.S. PRISONER OF WAR POLICY AND PLANNING IN SOUTHEAST ASIA 154-55 (OSD 2000) (quoted in D APP 66 at 9); (2) the preliminary hearing officer's recommendation was followed swiftly by intense pressure from Sen. McCain to punish SGT Bergdahl, and that pressure was in turn followed by a referral for a general court-martial, without explanation for why the preliminary hearing officer's recommendation was rejected; (3) SGT Bergdahl was charged not at his home duty station in Texas, but by a distant command with which he had no prior connection; and (4) the Army dedicated resources out of all proportion to the case. The hypothetical observer would also be aware of the political objective, which was to use the prisoner exchange as an opportunity to attack President Obama. Vilifying SGT Bergdahl was a handy way to achieve that objective.

As we show below, the case was born in the interference of SASC, and proceeded through SASC's demand for punishment to President Trump's

vilification of SGT Bergdahl before, during, and after trial, during the appeal, and continuing, startlingly, to the present.

A. Senator McCain's threat to hold a hearing if SGT Bergdahl were not punished constituted apparent unlawful influence

SASC set the interference in motion by early criticism of SGT Bergdahl and pressure on the Army to prefer charges, along with ominous declarations that it would review the matter later. *See generally* Appendix. Sen. McCain sharpened that interference with a bald threat to conduct a hearing if SGT Bergdahl were not punished. Appendix. "Oversight turns to influence when Congress demands that commanders take specific actions on cases." Misti E. Rawles, *Congressional Oversight: The New Mortal Enemy of Military Justice?* 90 (unpublished LL.M. thesis, The Judge Advocate General's School of the Army 2000), http://www.dtic.mil/dtic/tr/fulltext/u2/a439865.pdf; *see also id*. at 126. More broadly, the military justice system's hard-won credibility is squandered when Congress interferes in an individual court-martial. *Id*. at 126:

> Notwithstanding McCain's protest that he is "not prejudging" the issues, he also asserts Bergdahl is "clearly a deserter." Members of Congress, like ordinary citizens, have been known to act like armchair jurors in criminal cases. Like all of us, McCain enjoys First Amendment protection for his opinions. Unlike most of us, he enjoys Speech or Debate Clause protections for his statements made in connection with legislative proceedings. He also serves as the powerful chairman of the Senate committee with legislative authorization and oversight jurisdiction over the military. When McCain speaks, people at all levels of the Pentagon and in uniform around the world pay attention — perhaps including uniformed military judges.

> More troubling than his opinion of guilt, though, is McCain's threat to hold a hearing if Bergdahl receives "no punishment." A Senate Armed Services Committee spokesman later said that the committee has been conducting oversight not just of Bergdahl's conduct, but also of the policies that led to the prisoner swap without prior congressional notice. He added that McCain "wants the legal proceedings to run their course before making a determination how best to continue the committee's oversight work." But both McCain's original comments and the follow-up clarification do little to assuage concerns over the threatened hearing. Instead, they suggest that McCain may use his committee's oversight function in a coercive manner — to threaten and, in the face of a court-martial judgment not to punish, to bring Bergdahl's tribunal to a congressional hearing to face an unpleasant exercise in public shaming. Further, given that a hearing is only necessary if the result does not fit his perception of a just outcome, it maximizes the threat's potential to improperly influence the court-martial itself.

Andrew M. Wright & Megan Graham, *McCain's Hearing Threat and the Bergdahl Court-Martial*, Just Security, Nov. 6, 2015, https://www.justsecurity.org/27437/mccains-hearing-threat-bergdahl-court-martial/, D App 41, at 3.

Senator McCain's demand for punishment followed almost instantly upon media reports of the preliminary hearing officer's recommendation. Appendix. His comments were in turn widely reported, including within the Pentagon. *The New York Times* account was summarized in the Army's *Daily News Clips*, published by the Office of the Chief of Public Affairs, for October 13, 2015. JA165. The *Times* story was reproduced in full in that day's DoD *Morning News of Note*. JA175. *Army Times* published an *Associated Press* story the same day, and it was noted in the October 14, 2015 *Daily News Clips*. JA182.

The threat of a hearing was not an idle one. Every current and recent general and senior officer (or aspirant) knows that SASC is capable of punishing officers.[8] It is difficult to imagine a more blatant threat to the fair administration of military justice, or to public confidence in it, than the one Sen. McCain uttered. Neither he nor any member of SASC – *majority or minority, past or present* – ever repudiated it, and the hypothetical observer would have noted that the convening authority's referral appeared to comply.

The military judge refused to give Article 37 its plain meaning despite the fact that the chairman was a retired naval officer, AE 19 at 3, and hence subject to the Code. JA064-065. Alternatively, he insisted that Sen. McCain "simply has no authority over the military services or its members." JA065.[9] The Army Court correctly ruled that Article 37 applied to Sen. McCain, 79 M.J. at 521-22, JA008, but dismissed "the link between the role of the SASC and issues that [he] may have had with other Army officials and policies [as] speculative at best." *Id*. at 522 n.13,

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[8] *See, e.g.,* Craig Whitlock, *General's Promotion Blocked Over Her Dismissal of Sex-Assault Verdict*, Wash. Post, May 6, 2013, https://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html; Darren Samuelsohn, *General Out Over Sex Case Decisions*, Politico, Jan. 8, 2014, http://www.politico.com/story/2014/01/air-force-sexual-assault-craig-franklin-101900.

[9] A person who lacks the "mantle of command authority" can exert unlawful influence. *Barry*, 78 M.J. at 76-77.

JA009. The military judge had remarked that the SASC chairman was merely "an elected public official who has one vote in one chamber of [C]ongress among 535 votes that may be cast on any issue [a]ffecting the funding or regulation of the military." JA065& n.5.

Both the SASC general counsel and the Army saw this quite differently. JA628-29 (SASC general counsel: "I am concerned about a Senate hearing on this issue while there is an ongoing military justice case. Please provide the Army's views on the implications . . . ."), JA628 (Army reply, citing UCI issues: "The Army strongly opposes any Congressional event at this time and, in particular, a hearing focused on matters related to SGT Bergdahl"). *See also* JA624 (Army email suggesting a curative statement following Sen. McCain's remarks).

The convening authority testified that he was aware of Sen. McCain's comments and that he found them "inappropriate." JA319. He claimed they had no effect on him, but admitted that he was concerned that they could have an impact on potential panel members, and insisted that he was not concerned about future dealings with SASC since he had already reached the highest rank he was ever going to achieve. JA326. Critically, though, he neglected to mention that future

assignments to even more responsible positions than command of the U.S. Army Forces Command would require SASC approval and Senate confirmation.[10]

A fully informed, objective observer would know of SASC's role in the confirmation of commissioned officers for promotion and special assignments.[11] The record shows that the Army was highly attentive to Sen. McCain. *See generally* Appx.; JA624, 628-29.

The Army Court's ruling with respect to SASC's involvement was incorrect. Conceding that Sen. McCain's statements were "ill-advised," the majority held that they did not "rise to the level of an 'intolerable strain' on the military justice system" because an informed observer would recognize them "for just what they were –

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[10] On October 11, 2018, GEN Abrams was confirmed by the Senate to the grade of General while serving as Commander, U.S. Forces Korea. 164 Cong. Rec. S6805 (daily ed. Oct. 11, 2018).

[11] *See also* Tom Vanden Brook, *McCain blasts Army for considering recruits with history of self-mutilation, vows action*, USA Today, (Nov. 14, 2017, 4:26 PM), https://www.usatoday.com/story/news/politics/2017/11/14/mccain-blasts-army-considering-recruits-history-self-mutilation-vows-action/863898001/. Sen. McCain's threat to withhold confirmations in response to a revised Army policy on self-mutilation had the desired effect almost immediately. *See* Tom Vanden Brook, *Army says USA TODAY story forced it to drop plans for waivers for high-risk recruits*, USA Today, (Nov. 15, 2017, 2:26 PM), https://www.usatoday.com/story/news/politics/2017/11/15/army-says-usa-today-story-forced-drop-plans-waivers-high-risk-recruits/866626001/. Not one to be trifled with, he stalled all confirmations until he got information he was seeking about naval mishaps and the tragic Niger ambush. *See* Kyle Jahner, *Sens. Prod Pentagon Legal Picks on North Korea, Sex Assault*, Law 360, Nov. 14, 2017.

political posturing designed to embarrass a political opponent (President Obama) and gain some political advantage." *Id*. at 522, JA009-010.

But that political design was precisely the point. The chairman's motive was to embarrass a political opponent, but the means of achieving that embarrassment, for a powerful person subject to the Uniform Code of Military Justice, was to illegally interfere in the Army's treatment of SGT Bergdahl, and ensure that punishment ensued. A disinterested observer would connect Sen. McCain's demands and the charges and punishment that ensued, and in doing so note that punishment contradicted the recommendations of the general officer who conducted an elaborate, months-long AR 15-6 investigation and the Lieutenant Colonel judge advocate who had closely examined the facts in the preliminary hearing. The intersection of those facts defines "significant doubt," as both the Army and the SASC staff recognized when each wisely (but unsuccessfully) tried to get Sen. McCain to abandon the UCI collision course on which he had embarked. *See* D APP 41.

The government having failed to prove its case beyond a reasonable doubt, the Army Court erred in failing to find that Sen. McCain's conduct constituted apparent UCI.

B. The government also did not meet its high burden of proof as to the pre-inaugural statements President Trump ratified after taking office

A President enjoys sweeping powers as Commander in Chief. U.S. Const. art. II, § 2, cl. 1. He is "the ultimate military authority." *United States v. Gleason*, 78 M.J. 473, 476 (C.A.A.F. 2019). When he expresses strong views with respect to the guilt and punishment of a specific Soldier facing a court-martial before the legal process has run its course, public confidence in the fairness of the military justice system is shaken. The President's unique status must be taken into account when considering whether a disinterested observer, *fully informed of all the facts and circumstances*, would harbor a significant doubt as to the fairness of the proceedings. *Salyer*, 72 M.J. at 423; *see Bergdahl*, 79 M.J. at 532, JA026 (Ewing, J., concurring in part and dissenting in part, commenting that the risk of UCI is exacerbated when it "comes from the top").

The President's ratification of his prior abuse of SGT Bergdahl. The military judge accepted pleas at 1:00 p.m. on October 16, 2017. 27 R1676. Within an hour, *see* AE 65 at 2, President Trump appeared in the Rose Garden for a press conference. He said:

> 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.*

JA488 (emphasis added).

"[P]eople" had indeed heard them. And thus, before the sentencing, Candidate Trump's *pre*-inaugural disparaging comments became *post*-inaugural, *i.e*., *presidential*. The military judge thought that, while this amounted to apparent UCI, it imposed no intolerable strain on the military justice system. He said, however, that he would take the President's comments into account as mitigation evidence.[12] The Army Court correctly noted that whatever adjustment the military judge made would not have "cure[d] the taint of UCI" had he found UCI. 79 M.J. at 524 n.19, JA013. Since there was UCI, it follows that SGT Bergdahl should have been afforded relief for it then and there, if not later – and certainly now, as the appellate process approaches it conclusion.

The Army Court described the comments the President ratified in the Rose Garden as remote in time. *Id*. at 524, JA012; *id*. at 533 n.36, JA028 (Ewing, J., dissenting in part). But the government offered no evidence that his campaign-trail vilification had somehow "burned off." He breathed new life into that vilification by ratifying his comments a few days before sentencing, and his remark — "I think people have heard my comments in the past" – was not simply evidence of the potency of those comments. It was a message and reminder to subordinates.[13]

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[12] In other words, he acknowledged that there was a profound appearance of interference that he had to deal with in some way.

[13] President Trump would not comment *now*, he said, "but" people had heard his past comments. The topic of the conversation was SGT Bergdahl's pleas, and the word

The Army Court observed that it was SGT Bergdahl who had brought the Rose Garden ratification to the trial court's attention, 79 M.J. at 523-24, JA012-013, and the "disgrace" tweet to the attention of the Army Court itself. *Id*. at 524, JA013. It also relied on the assurances of the military judge, staff judge advocate and convening authority that they would not be affected by President Trump's statements. These observations might have been relevant to a suggestion of *actual* UCI, but do not address how the matter would appear to a member of the public aware that uniformed judges were to resolve substantial apparent UCI issues involving the President himself, while he, their ultimate superior, continued to weigh in publicly. Coming from military subordinates, facile assurances about not having been influenced in fact are simply not proof beyond a reasonable doubt as to what a disinterested member of the public would make of the circumstances.[14] *Cf.* 79 M.J. at 533, JA027-028 (Ewing, J., dissenting in part).

"but" was a pointed signal of what the President wanted next, in sentencing. This was directly confirmed by his immediate response to the sentence a few weeks later.

[14] The Army Court noted a generic statement the White House Press Office issued at the behest of trial counsel (D App 95 at 11-12) following the Rose Garden episode as proof that President Trump "does not expect any certain sentence in this case." 79 M.J. at 523 n.17, JA012. But the "disgrace" tweet proved the statement to have been a mirage. The Army Court also noted that SGT Bergdahl declined an offer by the military judge to require downstream actors to read the statement. *Id*. at n.18, JA012. SGT Bergdahl declined that offer because (a) the White House's generic statement was without value (a point President Trump personally validated two weeks later); (b) a military judge cannot issue orders to the Army Court; and (c) the statement would be in the record anyway, 30 R. at 2705, as indeed it is. G APP 103 at 12, 37

The President's Denunciation of the Military Judge. The "disgrace" tweet, an official statement, *Knight First Amend. Inst. at Columbia Univ v. Trump*, 925 F.3d 226, 234-36 (2d Cir. 2019), violated R.C.M. 104(a)(1)[15] because the President is a convening authority. Art. 22(a)(1), UCMJ. The majority below recognized that it placed a strain on the military justice system, conceding "that the President's words could have a chilling effect on this military judge or on similarly situated appellants." 79 M.J. at 527, JA017. Nonetheless, it deemed that strain "tolerable." It observed that the April 2019 "traitor" tweet was "not a per se violation of R.C.M. 104(a)(1)" and found "no nexus between [it] and the appellate process." *Id*. at 527, JA017-018. It held that SGT Bergdahl had not carried his threshold burden, concluding mistakenly that "the cumulative effect could not reasonably be perceived by a disinterested member of the public as improper command influence or otherwise indicative of an unfair proceeding." *Id*. at 527, JA018-019.

R310. The Army Court also erred in relying on the "absen[ce] of any formal request for clemency in the form of sentence reduction," 79 M.J. at 526, JA017, because SGT Bergdahl's post-trial submissions expressly cited numerous substantial grounds for the exercise of clemency. JA643-44

[15] "No convening authority or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings."

Apparent UCI jurisprudence requires consideration of "the totality of the circumstances." *Boyce*, 76 M.J. at 252. Because it excluded both Sen. McCain's threat and the President's "traitor" tweet, JA009-10, 017-18, the Army Court's cumulative-UCI analysis was incomplete. *See also* note 25 *infra* (discussing dissenting opinion). The low threshold burden SGT Bergdahl had to meet with respect to that tweet was plainly satisfied because the case was still pending before the Army Court, a body that enjoys sweeping powers and is composed entirely of President Trump's military subordinates.

In a case involving the Nation's most powerful public official who is *ex officio* the military's Commander in Chief, the Army Court's conclusions did not satisfy *Boyce's* "totality of the circumstances" requirement. 76 M.J. at 523, 526. This Court should emphatically not accept the Army Court's fantastical claim that the entire sequence of documented events "*could* not" (emphasis added) in the circumstances trouble a disinterested fully informed observer. 79 M.J. at 527, JA018-019.[16]

[16] Equally remarkable is the Army Court's assertion that when R.C.M. 104(a)(1) is violated, only the military judge has something to complain about. 79 M.J. at 526 n.25, JA017. UCI is the mortal enemy not of military *judges,* but of military *"justice*," *e.g., Boyce*, 76 M.J. at 246 (emphasis added). "The Constitution protects judicial independence not to benefit judges, but to promote the rule of law. . . ." William H. Rehnquist, 2004 Year-End Report on the Federal Judiciary 4 (Jan. 1, 2005), https://www.supremecourt.gov/publicinfo/year-end/2004year-endreport.pdf.

C. The Army Court erred in its treatment of apparent UCI during the post-trial and appellate phases of the case

Clemency. After sentencing, the case entered the "critical post-trial process." *See* 79 M.J. at 534, JA029 (Ewing, J., dissenting in part). In this phase, the convening authority was bound to consider the sentence and had the power under the rules in effect at the time, to reduce it. *See Barry*, 78 M.J. at 77-79. As Judge Ewing observed, "Appellant was entitled to a post-trial convening authority's action untainted by UCI," 79 M.J. at 533, JA028, and did not get one. *Id*. at 534, JA029.

The majority below rejected SGT Bergdahl's argument that the undisputed facts surrounding the post-trial phase amounted to incurable apparent UCI. But as Judge Ewing pointed out, the prospect of clemency here was hardly illusory. *Id*. at 533, JA028. Sergeant Bergdahl had been held as a POW for almost five years, was tortured and abused, behaved entirely properly while a POW, and on return assisted the Joint Personnel Recovery Agency and other officials in the course of debriefings and making himself available to SERE trainers. 29 R2323-27. He cooperated fully with the AR 15-6 investigation and answered all questions without seeking a grant of immunity. Both the preliminary hearing officer and MG Dahl recommended leniency. Judge Ewing's reasoning is unanswerable:

> [T]he convening authority knew precisely what a person he was otherwise duty-bound to obey thought he should do about appellant's case at action – that is, *grant no clemency*. Moreover, the [*Boyce* observer] would also know that the convening authority knew this. . . . After the President's tweet, and before taking action on appellant's case

> (and affirming the sentence as adjudged), the convening authority said – nothing. . . . The timing, specificity, and unequivocal nature of the President's day-of-sentencing tweet make it impossible, in my view . . . for the government to satisfy its "beyond a reasonable doubt" burden.

79 M.J. at 533, JA027.

Appeal. The same facts bore on the appellate phase. Through no fault of its own, the Army Court received the case under the shadow of what the dissent aptly described as "an unequivocal rebuke of the military judge's in-court sentencing decision [which] left no doubt that, in the President's opinion, the "'disgrace' of appellant's sentence was that it was disgracefully light." 79 M.J. at 533, JA027. The Army Court did not address the impact of *apparent* unlawful command influence during the appellate phase, commenting only that it had not *actually* been influenced. *Id*. at 527, JA018. Sergeant Bergdahl's claim, however, was one of apparent UCI.

Boyce's hypothetical observer does not read actual intent from the minds of appellate judges. But he does know that the Army Court is composed of President Trump's uniformed subordinates, none of whom has life tenure, and all of whom require SASC approval for promotions. He knows that those judges reviewed the case following a public statement by their Commander in Chief clearly suggesting that "no clemency" should be granted. *See* 79 M.J. at 533, JA027. And he now knows that SGT Bergdahl's core arguments as to both UCI and other contentions were rejected.

The government's burden was to prove its responsive case beyond a reasonable doubt. The dissent's reasoning that that burden was unmet with respect to the clemency phase compels the same conclusion in the appellate phase. To be clear, this was not a problem of the Army Court's making. It was imposed from above and put the Army Court in an impossible position: it could not affirm (as it did) without undermining public confidence in the process.

Close cases may present hard questions as to what knowledge can be imputed to an objective, fully informed observer and when the strain on public confidence has become "intolerable."[17] But this is not a close case.

A strain is "tolerable" only when the government proves it so beyond a reasonable doubt. Evidence is required; mere intuition or armchair political science hypotheses do not suffice. Whether a strain on public confidence is tolerable is a fact-intensive inquiry. The overall gravity of the threat to public confidence posed by the specific case must be assessed. Thus, apparent UCI arising from conduct of a junior commander in a case out of public view presents a substantially lesser threat to public confidence than does apparent UCI arising from the conduct of senior

[17] *E.g., Salyer; United States v. Sullivan*, 74 M.J. 448 (C.A.A.F. 2015) (4-1 decision) (judicial disqualification); *United States v. Bagstad*, 68 M.J. 460 (C.A.A.F. 2010); *United States v. Wiesen*, 56 M.J. 172 (C.A.A.F. 2001) (senior-subordinate relationships among members); *see also United States v. Townsend*, 65 M.J. 460, 467 (C.A.A.F. 2008) (challenge for cause) (Baker, J., dubitante).

officials. Only overwhelming evidence can suffice where, as here, the most senior officials' conduct is at issue in a highly-publicized case.

The government never mustered evidence of the nature and quality needed to show beyond a reasonable doubt that the words and deeds at issue did not place an intolerable strain on "public perception of the military justice system." *Boyce*, 76 M.J. at 248 (quoting *Stoneman*, 57 M.J. at 42-43). It cannot overcome the hypothetical observer's cumulative knowledge that:

- It is unprecedented to charge criminally a returning POW except for misconduct as a POW; while it is undisputed that this POW's behavior as a POW was courageous;
- The prosecution was launched from a distant command hand-picked by the Department of the Army, even though SGT Bergdahl had no prior relationship to that command;
- The convening authority rejected recommendations of both the investigating officer and the preliminary hearing officer without explanation;
- The Army dedicated resources out of all proportion to the case;
- Two charges were laid for precisely the same act, one of them theoretically raising the death penalty;
- SGT Bergdahl was charged with short desertion, as opposed to AWOL, when the government conceded that his purpose in being absent from his post was to undertake a personally dangerous trek in order to report to a U.S. Army FOB; and
- SGT Bergdahl's guilty plea was a function of his unique trauma as a long-term Taliban POW and well-grounded fear of confinement by military authorities (*see* p. 38-40 *infra*).

The hypothetical observer also knew that:

- Sen. McCain repeatedly intervened and pressured the Army during the drawing of the charges;
- Sen. McCain demanded punishment after the preliminary hearing officer recommended against it;
- All of the cited events in and after 2015 occurred under the shadow of President Trump's persistent attacks on SGT Bergdahl, his ratification of them as President, and his unlawful denunciation of the military judge; and
- As Judge Ewing observed, apparent UCI "infected the critical post-trial process," where SGT Bergdahl's chances at clemency "were not illusory," and the adjudged sentence was "hardly a windfall." 79 M.J. at 533, JA029.

The law imputes to the hypothetical observer all of this knowledge, and then requires the government to prove beyond a doubt that public confidence in the proceedings has not been compromised. The government faced a heavy burden and did not carry it.

D. Sergeant Bergdahl's pleas neither mitigate the apparent UCI nor justify affirmance

The Army Court relied heavily on SGT Bergdahl's pleas, 79 M.J. at 526 n.25, 527 n.27. But where apparent UCI is at issue, an accused's pleas are irrelevant, and should not be considered when determining whether the government has met its ultimate burden. As the Court explained in *Boyce*, "unlike actual unlawful command influence where prejudice to the accused is required, no such showing is required for a meritorious claim of an appearance of unlawful command influence." 76 M.J.

at 248. *See, e.g.*, *Lewis*, 63 M.J. at 414-15 (affirming a finding of apparent UCI in guilty-plea case); *Bergdahl*, 79 M.J. at 534, JA029 (Ewing, J., dissenting in part) (opining that UCI remedy is appropriate based on clemency-phase facts, notwithstanding guilty pleas).

To be sure, courts may consider prejudice to the accused (or cure of the apparent UCI, where that occurs) in determining whether there has been an intolerable strain on the public's perception of the fairness of the military justice system. *Boyce*, 76 M.J. at 248 n.5. But *Boyce* also teaches that in cases involving interference by powerful officials, public perception is unaffected by the circumstances of the accused. "The underlying facts leading to the charges and convictions in this sexual assault case are not directly relevant to the [apparent UCI] issue before us." *Id*. at 244.

At least two aspects of this record show that the public perception of unfairness could not have been mitigated by the guilty pleas. First, SGT Bergdahl is a returning POW who was tortured and held in virtual solitary for almost five years – who was literally caged by the enemy. That he was prosecuted *at all* is remarkable and created an unusual appearance. The disposition decision conformed with the SASC chairman's demand for punishment[18] despite the preliminary hearing officer's

[18] By the time of trial, the government sought a 14-year sentence. 30 R2668.

recommendation. The appearance was rather that the accused was being used as a tool for the political purposes of occupants of and aspirants for high office, and that his prosecution was therefore politically motivated.[19] This placed an intolerable strain on public perception that no plea could allay.

Second, the pleas could have no bearing on public perception of the clemency phase that by definition followed the pleas, and particularly on the convening authority's utter silence in that phase. Sergeant Bergdahl had been traumatized by

[19] The hypothetical observer would have noted not only that it was unusual to refer charges *at all* for a returning POW who had committed no offense whatever in captivity, but that the convening authority's *choice* of the charges to be referred appeared at best unusual. Whether or not the particular charges here were legally proper (a question that is not before the Court given the limited grant of review), that observer would know that reported cases reveal no precedent for charging a soldier under Art. 85, UCMJ, when it was undisputed that his objective in leaving his post was to reach another U.S. installation (here, FOB Sharana), and in the process expose himself to far greater personal danger than would have been the case had he remained with his unit. That observer would also know that the reported cases reveal no precedent for preferring charges under Art. 99(3), UCMJ, under similar circumstances. The convening authority's discretionary decision to refer two grave charges -- the more serious of which (Misbehavior Before the Enemy) was so bespoke that it required the military judge to perform surgery on it -- for a single act, as opposed to a single simple charge of unauthorized absence, *see supra* at 8, further contributed to the appearance of UCI. Finally, that observer would be aware of the longstanding policy favoring the disposition of allegations at the lowest level, R.C.M. 306(b), a policy of disposition lenity that would appear to apply with particular force to returned POWs whose behavior in enemy hands had been above reproach. Given the hypothetical observer's imputed knowledge of matters such as these, it was impossible for the government to carry its burden of proof beyond a reasonable doubt.

almost five years of Taliban captivity. JA542-43.[20] Sick, beaten, and alone, he showed extraordinary courage in repeated escape attempts. JA544, 552. He returned home to find the loudest voice in the land falsely branding him a traitor and calling for his execution. *See* pp. 10-14 *supra*. This is a much better than plausible case for clemency. That there should be no clemency, without explanation, under the twin shadow of the President's excoriation of the accused and denunciation of the military judge, created a public perception of unfairness that cannot be cured by any remedy short of dismissal with prejudice.[21]

E. Strong remedial action is essential

Neither the military judge nor the Army Court reached the remedial stage of apparent UCI analysis. This Court therefore addresses the question of relief on an unusually clean slate.

Several principles can be distilled from the cases. Relief must be "meaningful" and should "eradicate" the UCI. *Barry*, 78 M.J. at 79. It should reflect the totality of the circumstances. *Boyce*, 76 M.J. at 249, 252. Relief is not precluded

[20] SGT Bergdahl suffered from PTSD before the Army inexplicably enlisted him without a psychiatric evaluation, contrary to a Coast Guard recommendation. JA576-79. That personal history left him at profound disadvantage in coping with the horrific trauma he endured in captivity. JA579-83.

[21] The hypothetical member of the public would be fully aware, for example, that as a result of the overcharging and the command's denial of clemency, this former POW, although treated brutally by the enemy, is statutorily ineligible for VA benefits. 38 U.S.C. § 5303(a).

by the accused's offense, *Barry* (sexual assault); *Riesbeck*, 77 M.J. 154 (forcible rape), or his plea. *See generally* pp. 37-40 *supra*.

The remedy should be proportional to the UCI. *Cf. United States v. Zarbatany*, 70 M.J. 169 (C.A.A.F. 2011) (Art. 13, UCMJ, credit). It is pertinent that the UCI is "egregious," *Boyce*, 76 M.J. at 252, or had the capacity to do "catastrophic mischief." *United States v. Chikaka*, 2018 WL 6052748 at *4 (N-M. Ct. Crim. App. Nov. 15, 2018), *set aside on other grounds*, 79 M.J. 27 (C.A.A.F. 2019) (mem.). In other words, one size of UCI relief does not fit all.

The seniority of the actor and whether he or she is still in office bear on remedies, just as they do in considering the intolerable strain question. *See* pp. 32, 36 *supra*. Similarly, while a high official need not even know of the accused for his act to constitute apparent UCI, *Boyce*, 76 M.J. at 251; *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003), the SASC chairman's and the President's actual knowledge of Bergdahl's case, their manifest efforts to influence it, and the President's enduring personal malevolence toward SGT Bergdahl constitute matters in aggravation calling for the sternest of remedies.

Curative measures may be afforded weight where effective, *Boyce*, 76 M.J. at 248 n.5; *Chikaka*, 2018 WL 6052748 at *6, but there were none here. Neither Sen. McCain nor President Trump ever retracted their offending statements or acknowledged their error. The October 20, 2017 White House Press Office's

"Statement Regarding Military Justice," JA505 (which was generated only after a defense motion to dismiss cited the Rose Garden ratification), did not even mention SGT Bergdahl and in any event was promptly contradicted by the President himself with his "disgrace" tweet.[22] Neither the Secretary of Defense, the Secretary of the Army nor The Judge Advocate General of the Army ever undertook any curative measure.

With those principles and undisputed facts in mind, the Court should consider the impact of its decision in this case upon the principals here: SGT Bergdahl, SASC, the President, and, in the end, the public.

Sergeant Bergdahl. It has been said that UCI relief should not produce a windfall, *see Boyce*, 76 M.J. at 253 n.10, but even in *Boyce,* where strong evidence of rape and assault supported both the referral and the conviction, the "windfall" factor did not preclude relief. Nor does it preclude relief here. In part that is because the primary interest vindicated in an apparent UCI case is the public interest in fostering confidence in the military justice system. *See generally* Rachel E. VanLandingham, *Military Due Process: Less Military & More Process*, 94 TUL. L.

[22] The statement does not quote President Trump, bear his signature, or even mention his name. It is in the White House's online collection of briefings and statements, *see* https://www.whitehouse.gov/briefings-statements/statement-regarding-military-justice/, but is omitted from the Office of the Federal Register's Compilation of Presidential Documents. *See* govinfo.gov/app/collection/cpd/2017/10.

REV. 1, 50. In part, relief would not be a windfall because half a century of Department of Defense policy disfavors the prosecution of returning POWs. And in large part dismissal can be no windfall to *this* Soldier: abused by a barbaric enemy for five years, embroiled in legal proceedings for *another* five plus years (and more), his life on hold even today. *See* 79 M.J. at 533 (Ewing, J., dissenting in part) (characterizing clemency as "not illusory"). President Trump's public vilification is likely to leave him an object of public hostility for years. The President branded him a traitor as recently as this year, and while the case has been pending here publicly compared him to a Soldier who betrayed the Nation's secrets, and indicated that SGT Bergdahl is less deserving than a convicted war criminal.

When the abuser is the Commander in Chief, the abuse has consequences. Shortly after sentencing, 100 Members of Congress expressed to the acting Secretary of the Army their "firm belief that Private Bergdahl should not be awarded back pay." Brendan McGarry, *Lawmakers to Army: Don't Award Bergdahl Back Pay*, Military.com, Nov. 20, 2017 (with link to the letter: https://crawford.house.gov/uploadedfiles/crawfordletter.pdf). Members introduced a bill whose very *title* singled out SGT Bergdahl *by name* for the denial of back pay, H.R. 4413, 115th Cong. § 1 (2017) ("No Back Pay for Bergdahl Act").[23] The 100-

[23] Because the bill was transparently unconstitutional, *see* U.S. Const. art. I, § 9, cl. 3, the House quickly introduced a fig leaf — H.R. 4437, 115th Cong. (2017) — which omitted SGT Bergdahl's name but would have applied to him alone. *See id*.

Member letter and the House bills show that SGT Bergdahl continues to be the object of deeply hostile official attention.

SASC. SASC has watched this case closely. Dismissal would provide a firm and necessary reminder that its Article I, § 8, role in military justice is limited to systemic oversight, the appropriation of funds, and the passage of substantive legislation. Insubstantial relief, much less affirmance, on the other hand, would only encourage more meddling in individual cases through jawboning and threats trenching on decisions committed by law to another Branch. Separation of powers issues rarely arise in the military justice context, *e.g., Loving v. United States*, 517 U.S. 748 (1996), but SASC certainly created one here.

The President. President Trump has shown himself to be unrepentant, impervious to admonitions from a sitting military judge, indifferent to his own Press Office's unspecific "Statement," willing to disparage not only a Soldier, but the military judge himself, and even today prone to intervene in the regular administration of justice under the UCMJ. Future Presidents will either be guided by the political utility of the current Commander in Chief's actions, or encouraged to avoid duplicating them by strong relief here. Only one remedy can deter such

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§ 1(b) (amendment to Art. 85, UCMJ "shall apply only with respect to a member of the Armed Forces who, during the one-year period beginning on October 1, 2017, is guilty of desertion as described in subsection (d)").

behavior by this and future Presidents: to dismiss the charges with prejudice – making it clear to all that attempts to unlawfully interfere in military justice for political ends will backfire.

The Military Justice System. This is the most compelling apparent UCI case ever to reach the Court. While the President's ire has long focused on SGT Bergdahl, his anger goes to the military justice system itself. His November 25, 2019 Oval Office remarks make this clear.[24]

Neither *Lewis* nor *Salyer* involved the appearance of command influence affecting the accused's guilt or innocence, the sentence, or clemency; each involved efforts by the government to unhorse a military judge. Yet in each case the Court found apparent UCI and ordered the charges dismissed with prejudice. *Salyer*, 72 M.J. at 428; *Lewis*, 63 M.J. at 416. The Court noted in each that, absent a sanction, the reasonable observer might perceive that the military justice system had permitted the government to achieve an improper objective. *Salyer*, 72 M.J. at 428; *Lewis*, 63 M.J. at 416. The incentives here are sharper. Absent a powerful sanction, the objective observer could only conclude that senior officials may exert influence over

[24] "So when you have *a system that allows Sergeant Bergdahl to go*, and you probably had five to six people killed — nobody even knows the number, because he left — and he gets a slap on the wrist, if that; and then you have *a system where these warriors get put in jail for 25 years* — I'm going to stick for [*sic*] our warrior." (Emphases added.)

military cases without consequence whenever they deem it politically expedient, and that politics may control charges, disposition decisions, sentencing, and clemency.

Although its record pales before this one, *Boyce* provides guidance. At issue was the conduct of senior officials and the apparent influence of that conduct on a convening authority. The command influence involved only the convening authority phase, and came from officials who were not even aware of the accused. The issue was whether the referral of charges was influenced by political pressure for more aggressive prosecution of sex crimes. There was no suggestion that any of this even appeared to affect the disposition of Airman Boyce's trial, once it was commenced. Still, the apparent impact at the convening authority phase alone was too much for a majority of the Court, which properly ordered the charges dismissed with prejudice.

The Court should compare the *indirect* case in *Boyce* with the *direct* case here: targeted insistence by the SASC chairman on punishing SGT Bergdahl, a convening authority who rejected the preliminary hearing officer's recommendation, a clemency phase conducted under the shadow of the President's attack on the military judge and the accused, and — seasoning *everything* — unprecedented personal attacks on a Soldier by the Commander in Chief. This is a far more compelling case than *Boyce.* It calls for a remedy at least as forceful.

The availability and efficacy of alternative remedies bear on remedial action for apparent UCI. Where, as here, the offender is not on active duty, remedies that

can both deter recurrence and vindicate the high public interest at stake are elusive. Senator McCain was subject to the Code, but his legislative office and personal heroism (ironically, as a POW) precluded any chance that he would have been disciplined for violating Article 98(2), UCMJ (*see* new Article 131f, UCMJ). For his part, the President remains unrepentant, and there appears to be no alternative remedy where he is concerned. Only relief that is proportionate to the UCI and sufficient to deter him and other high officials from engaging in similar conduct in the future will protect that confidence.

"Complete and total" are the words the President chose to employ in excoriating the military judge for SGT Bergdahl's sentence. Given Sen. McCain's efforts to influence the charging decisions and punishment and the President's years of demonizing SGT Bergdahl, only relief that is equally "complete and total" will be proportionate to the apparent UCI. As the "bulwark" against UCI, *Thomas*, 22 M.J. at 393; *Boyce*, 76 M.J. at 253, it falls to the Court to order that relief.[25]

[25] Judge Ewing thought the proper relief was to set aside the dishonorable discharge because LTC Visger had recommended referral to a court not authorized to adjudge a punitive discharge. 79 M.J. at 534, JA029-030 (Ewing, J., dissenting in part). He saw that as the proper baseline because it preceded the "disgrace" tweet. But as we have explained, there was *other* apparent UCI before the convening authority acted, thanks to both Sen. McCain and President Trump.

Conclusion

The decision below should be reversed and the charges and specifications dismissed with prejudice. In the alternative, a sentence of No Punishment should be approved or other meaningful relief granted.

Respectfully submitted,

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APPENDIX OF SASC UCI

DATE	EVENT	REFERENCE
June 2, 2014	SASC chairman McCain states: "I would not have made this deal [exchanging SGT Bergdahl for five Taliban leaders held at Guantanamo Bay, Cuba]. I would have done everything in my power to repatriate him and I would have done everything I possibly could. But I would not have put the lives of American servicemen at risk in the future."	JA148-49
August 25, 2014	SASC minority counsel asks the Army for an update on the AR 15-6 investigation and SGT Bergdahl's current pay status, captivity related pay, and other entitlements ("good to know before the Members return")	JA616-19
August 26, 2014	Army legislative counsel sends SASC information on SGT Bergdahl's pay and allowances and the pending AR 15-6 investigation.	JA615
December 19, 2014	The Army receives a HASC inquiry concerning the status of the AR 15-6 investigation.	JA641
December 22, 2014	SASC minority counsel responds, referring to a planned December 23, 2014 Army briefing at the White House.	JA613
January 7, 2015	SASC general counsel emails the Army and HASC about the "15-6 brief."	JA623
January 28, 2015	The Army advises SASC general counsel that "no one is authorized to be speaking publicly about the way ahead on SGT Bergdahl's case. I have confirmed with FORSCOM; there is no charge sheet or even a decision to go that way."	JA622

DATE	EVENT	REFERENCE
March 23, 2015	SASC general counsel requests information by close of business on when FORSCOM will announce action on the charges. "Trying to manage Chairman's desire to make a statement but need info."	JA612
March 25, 2015	Charges are preferred. The Army immediately notifies SASC.	JA620-21
May 5, 2015	SASC general counsel asks the Army whether the preliminary hearing is "still on for 8 July."	JA614, 629
May 5, 2015	SASC general counsel emails the Army: Thanks. I mentioned to MG Richardson today that Chairman McCain is interested in a hearing on Bergdahl & the Taliban 5 [redacted]. I am concerned about a Senate hearing on this issue while there is an ongoing military justice case. Please provide the Army's views on the implications of conducting a hearing during an ongoing investigation that would help me inform the Chairman of his options.	JA628-29
May 7, 2015	The Army replies: [First name redacted], thank you for the opportunity to provide our thoughts on this very important issue. The Army strongly opposes any Congressional event at this time and, in particular, a hearing focused on matters related to SGT Bergdahl. A hearing will create legal issues during the UCMJ process, including giving the appearance of the denial of the fair administration of justice for SGT Bergdahl. With charges preferred against SGT Bergdahl, and an Article 32 preliminary hearing	JA628

DATE	EVENT	REFERENCE
	scheduled for July 8, 2015, the Army opposes any public airing of the facts of the investigation or the pre-decisional disciplinary process. Commanders must be free of outside influence in making disciplinary decisions. The same holds true for empaneling court members for a court-martial should a decision to refer the case for trial by court-martial be made. Court members must only apply the facts presented at the court-martial and legally admitted by the presiding Military Judge. Excessive pre-trial publicity and, more importantly, statements by elected officials with oversight responsibilities at a hearing will have an impact and may give the appearance of pressuring court members/finders of fact to make decisions consistent with a pre-determined result; this would equate to a denial of due process and the right to a fair trial. The Court of Appeals of [*sic*] the Armed Forces has often said that unlawful command influence (UCI) is the mortal enemy of military justice and has often applied corrective action when UCI is found. The Army has taken great care to avoid any actual impropriety or appearance of impropriety in the disciplinary decision making process in this case. Any hearing focused on SGT Bergdahl would raise significant legal issues and may undermine our judicial process. To this end, the Army opposes any Congressional hearings that cover matters related to SGT Bergdahl; any requirements to produce documents or evidence; and any requirements for personnel involved in the UCMJ process, to include the administrative and criminal investigations, to testify at a hearing. To do so, or be compelled to do so, would be	

DATE	EVENT	REFERENCE
	unprecedented and deviate from defense oversight committees' longstanding practice of deference to allow on-going military justice matters to proceed to completion without direct congressional involvement.	
June 8, 2015	The Army emails SASC general counsel about Defense's extraordinary writ (*Bergdahl v. Milley*, 75 M.J. 9 (C.A.A.F. 2016) (mem.), seeking recusal of GEN Mark A. Milley as convening authority because of his pending SASC consideration to be Chief of Staff of the Army.	JA625, 630
June 8, 2015	SASC general counsel responds: "Thanks, [first name redacted]. Welcome to my world."	JA630
June 18, 2015	Chairman McCain tells *Army Times* that SASC will begin its official examination of the Bergdahl case "as soon as the final decision is rendered" and that Milley's confirmation won't be affected. SASC confirmation hearing would be scheduled "as soon as they send [Milley] over."	JA151
September 18, 2015	MG Dahl testifies in Preliminary Hearing that confinement "would be inappropriate."	Art. 32 Tr. 310.
October 5, 2015	LTC Mark A. Visger, preliminary hearing officer, recommends that the charges be referred to a special court-martial not empowered to adjudge a bad-conduct discharge, and observes that neither confinement nor a punitive discharge are warranted.	JA132
October 10, 2015	*Stars and Stripes* reports on the results of the preliminary hearing.	JA151

DATE	EVENT	REFERENCE
October 11, 2015	Chairman McCain states: "If it comes out that [SGT Bergdahl] has no punishment, we're going to have to have a hearing in the Senate Armed Services Committee. … And I am not prejudging, OK, but it is well known that in the searches for Bergdahl, after—we know now—he deserted, there are allegations that some American soldiers were killed or wounded, or at the very least put their lives in danger, *searching for what is clearly a deserter.* We need to have a hearing on that."	JA151-52(emphasis added)
October 12, 2015	SASC spokesman Dustin Walker states that SASC "will continue its longstanding oversight of the entire matter of Sergeant Bergdahl, not just his conduct, but also the administration policy that led to the release of five high-value Taliban detainees without congressional notification, as required by law." "Chairman McCain wants the legal proceedings to run their course before making a determination how best to continue the committee's oversight work."	JA152
October 13, 2015	The Army emails SASC general counsel: "Need some assistance. As you are likely aware, Chairman McCain has publicly announced he will "hold a hearing" if SGT Bergdahl does not go to jail. As we both know, UCI technically requires a commander to make a comment. However, in this case, coming from the Chairman of the oversight committee has raised some serious concerns across the Army (including from SGT Bergdahl's defense counsel, along the	JA624, 633

DATE	EVENT	REFERENCE
	lines of "if Bergdahl goes to jail, we're raising a UCI motion and will call SEN McCain as a witness. "Obviously, the Chairman's statement is out there. But if it is at all possible to have him issue a curative statement (e.g., '…faith in the UCMJ process and senior commanders to make the right decisions…') that could be tremendously helpful, even if just posted to his or the Committee's website. If in the realm of the possible, I can send you a statement we think would work."	
October 13, 2015	SASC general counsel responds: "Thanks, [first name redacted]. We will consider options."	JA633
October 15, 2015	The Army sends SASC general counsel the text of a *The New York Times* op-ed entitled, "Mr. McCain's Irresponsible Remarks About Sgt. Bergdahl." SASC general counsel responds: "Thanks, [first name redacted]. We saw it."	JA 626, 631-32
November 4, 2015	SASC general counsel requests a status report on SGT Bergdahl's case.	JA609-11, 636
November 5, 2015	The Army provides SASC with a status report.	JA609, 634
December 9, 2015	HASC issues its "Report on the Inquiry into The Department of Defense's May 2014 Transfer to Qatar of five law-of-war detainees in connection with the recovery of a captive U.S. soldiers," reciting that it will, "remain abreast of the disciplinary process which is underway. The Committee will ensure that standard procedures are properly implemented	JA153-54

DATE	EVENT	REFERENCE
	and administered, and that Sgt. Bergdahl's behavior is adjudicated as required."	
December 14, 2015	Charges against SGT Bergdahl are referred for general court-martial at Fort Bragg.	JA032

Certificate of Compliance with Rule 24(d)

This brief complies with the type-volume limitation of Rule 24(d) because the brief, including the Appendix of SASC UCI, contains 13,263 words. It also complies with the typeface and type style requirements of Rule 37.

Matthew D. Bernstein

Certificate of Filing and Service

I certify that I served and filed the foregoing Brief on Behalf of Appellant on December 4, 2019, by emailing copies thereof to the Clerk of the Court, the Government Appellate Division, and the *amici curiae*.

Matthew D. Bernstein