IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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Index of Brief

Index of Brief ii
Table of Authorities iii
Issue Presented 1
WHETHER THE CHARGES AND SPECIFICATIONS SHOULD BE DISMISSED WITH PREJUDICE OR OTHER MEANINGFUL RELIEF GRANTED BECAUSE OF APPARENT UNLAWFUL COMMAND INFLUENCE 1
Statement of Statutory Jurisdiction 1
Statement of the Case 1
Statement of Facts 2
Summary of Argument 17
Standard of Review 18
Law 18
Argument 21
A. The SASC and Senator McCain did not appear to unlawfully influence the preferral and referral of charges against Appellant. 32
B. President Trump's public comments made during his candidacy and presidency did not appear to influence the findings, sentencing, post-trial action, and appellate review in this case 41
1. President Trump's October 16, 2017, Rose Garden comment did not appear to influence Appellant's sentencing. 43
2. President Trump's post-sentence "disgrace" tweet did not appear to influence the convening authority's action 49
3. President Trump's comments did not appear to unlawfully influence the Army Court's review in this case. 52
C. Should this Court find that apparent UCI tainted Appellant's case, dismissal with prejudice is not an appropriate remedy 54
Conclusion 57

Table of Authorities

Military Courts

United States v. Allen, 20 C.M.A. 317, 43 C.M.R. 157 (1971) 42
United States v. Allen, 33 M.J. 209 (C.A.A.F. 1991) 26, 31, 38
United States v. Ashby, 68 M.J. 108 (C.A.A.F. 2009) 26, 34, 37
United States v. Ayers, 54 M.J. 85 (C.A.A.F. 2000) ..... passim
United States v. Barry, 78 M.J. 70 (C.A.A.F. 2018) 18, 32, 55, 37
United States v. Bergdahl, 79 M.J. 512 (A. Ct. Crim. App. 2019) ..... passim
United States v. Biagase, 50 M.J. 143 (C.A.A.F. 2002). 19, 20
United States v. Boyce, 76 M.J. 242 (C.A.A.F. 2017) ..... passim
United States v. Calley, 46 C.M.R. 1131 (A.C.M.R. 1973) ..... passim
United States v. Calley, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (C.M.A. 1973) 23
United States v. Dinger, 77 M.J. 447 (C.A.A.F. 2018) 26
United States v. Doherty, 5 C.M.A. 287, 17 C.M.R. 287 (1954) 42
United States v. Erickson, 65 M.J. 221 (C.A.A.F. 2007) 47
United States v. Estrada, 7 C.M.A. 635, 23 C.M.R. 99 (1957) 42
United States v. Fowle, 7 C.M.A. 349, 22 C.M.R. 139 (1956) 42
United States v. Grady, 15 M.J. 275 (C.M.A. 1983) 44
United States v. Gore, 60 M.J. 178 (C.A.A.F 2004) 55
United States v. Hamilton, 41 M.J. 32 (C.M.A. 1994) 37
United States v. Hutchins, 72 M.J. 294 (C.A.A.F. 2013) 21, 42
United States v. Lewis, 63 M.J. 405 (C.A.A.F. 2006) 54, 55
United States v. Mason, 45 M.J. 483 (C.A.A.F. 1997) 53
United States v. Rockwood, 52 M.J. 98 (C.A.A.F. 1999) 38
United States v. Salyer, 72 M.J. 415 (C.A.A.F. 2013) 18, 19, 20, 26
United States v. Schweitzer, 68 M.J. 133 (C.A.A.F. 2009). 53
United States v. Simpson, 58 M.J. 379 (C.A.A.F. 2003) ..... passim
United States v. Simpson, 55 M.J. 674 (A. Ct. Crim. App. 2001) 26, 32, 49
United States v. Stoneman, 57 M.J. 35 (C.A.A.F. 2002) 19
United States v. Thomas, 22 M.J. 388 (C.M.A. 1986) 18, 46, 47, 56
United States v. Wallace, 39 M.J. 284 (C.M.A. 1994) 18

Federal Courts

Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975) 23

Statutes

Article 1, UCMJ 41
Article 2, UCMJ ..... passim
Article 22, UCMJ 42
Article 32, UCMJ 4
Article 37, UCMJ ..... passim
Article 39, UCMJ 8, 13
Article 60, UCMJ 50
Article 66, UCMJ 1, 53, 54
Article 67, UCMJ 1
Article 85, UCMJ 1
Article 99, UCMJ 1
Article 118, UCMJ 22
Article 134, UCMJ 22

Rules

R.C.M. 104 ..... 17, 41, 42, 49
R.C.M. 504 42
R.C.M. 601 35

Regulations

Army Regulation 15-6, Procedures for Administrative Investigations and Boards of Officers (Oct. 2, 2006) 3
Army Regulation 27-10, Legal Service: Military Justice, para. 7-1 (Oct. 3, 2011) 46
Interim Army Regulation 27-10, Legal Service: Military Justice, para. 12-15 (Jan. 1, 2019) 54

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

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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On October 16, 2017, a military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of one specification of desertion in violation of Article 85, UCMJ, 10 U.S.C. § 885 (2012), and one specification of misbehavior before the enemy in violation of Article 99, UCMJ, 10 U.S.C. § 899 (2012). (R. at 1631). The military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit $1,000 pay a month for ten months, and to be discharged from the service with a dishonorable discharge. (R. at 2704). The convening authority approved the sentence as adjudged. (JA 658).

On July 16, 2019, the Army Court affirmed the findings of guilt and the sentence. *United States v. Bergdahl*, 79 M.J. 512 (A. Ct. Crim. App. 2019). On August 4, 2019, Appellant filed a Petition for Grant of Review, which this Court granted on November 5, 2019.

Statement of Facts

On June 30, 2009, while assigned to Observation Post (OP) Mest, Paktika Province, Afghanistan, Appellant left alone, without authority, to go to Forward Operating Base (FOB) Sharana. (R. at 1642). When he made the decision to leave, Appellant knew that he had guard duty and that he might be assigned to a convoy returning to FOB Sharana later in the day. (R. at 1645). Appellant intended to walk approximately twenty miles to FOB Sharana on foot, but the enemy captured him a few hours after he left OP Mest. (R. at 1645, 1650).

The United States (U.S.) military, military allies, and other governmental agencies engaged in numerous operations to find Appellant. (R. at 1779; JA 59). The search operations to find Appellant involved thousands of military and civilian personnel and delayed other operations. *Bergdahl*, 79 M.J. at 518. Several "[s]ervicemembers sustained serious injuries while searching for [A]ppellant." *Id.*; R. at 2016-2017, 2039-2040, 2046-2049; 2051-2052, 2104-2117, 2132-2142. On May 31, 2014, the U.S. government exchanged five Taliban detainees held at the U.S. detention facility in Guantanamo Bay, Cuba, to secure Appellant's release.

(JA 59). On June 2, 2014, several days after Appellant returned to U.S. control, the late Senator John McCain, a U.S. Navy retiree, made public statements about the efforts to recover Appellant and the propriety of the prisoner exchange deal with the Taliban. *Bergdahl*, 79 M.J. at 518; JA 59. Senator McCain became the Senate Armed Services Committee (SASC) Chairman in January 2015. *Bergdahl*, 79 M.J. at 521 n.10.

After Appellant returned to U.S. control and went through a reintegration program, Appellant was assigned to duty at Fifth Army Headquarters in Fort Sam Houston, Texas. *Bergdahl*, 79 M.J. at 518. Court-martial jurisdiction over Appellant was retained at the four-star level. *Id*. On June 16, 2004, the Director of the Army Staff appointed Major General (MG) Kenneth Dahl to investigate the circumstances surrounding Appellant's desertion from OP Mest in accordance with Army Regulation (AR) 15-6, Procedures for Administrative Investigations and Boards of Officers (Oct. 2, 2006). *Bergdahl*, 79 M.J. at 518. Between August 2014 and the referral of charges against Appellant in December 2015, the SASC Office of General Counsel (OGC) sought updates and information about the investigation and status of Appellant's case from the Deputy Chief, Investigations and Legislation, Army Office of Chief Legislative Liaison. (JA 59, 609-640,

Appellant's Br. Appendix).[1] The Army also communicated with the House Armed Services Committee (HASC) about the status of Appellant's investigation.[2] (JA 149).

On September 28, 2014, MG Dahl submitted his investigative report, finding that Appellant's unauthorized departure from OP Mest satisfied the elements of desertion with intent to shirk important service. (AR 15-6 Report, p. 38). Major General Dahl recommended forwarding the investigation to Appellant's convening authority "for whatever action, if any, the convening authority deems appropriate." (AR 15-6 Report, p. 45). Months later, on March 25, 2015, the Army preferred charges of desertion and misbehavior before the enemy. (JA 31-32). Appellant's Preliminary Hearing pursuant to Article 32, UCMJ, 10 U.S.C. § 832, took place in September 2015. (JA 130-145). At the hearing, MG Dahl testified and expressed his personal opinion that confinement would be inappropriate. (Article 32 Transcript, p. 310). On October 5, 2015, the Preliminary Hearing Officer (PHO)

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[1] The communications spanned before and after Senator McCain became Chairman of the SASC in January 2015. *Bergdahl*, 79 M.J. at 521 n.11; JA 609-641.

[2] The HASC began investigating the agreement that resulted in Appellant's release after Appellant returned to U.S. control. The HASC released its report on December 9, 2015, prior to the referral of the charges against Appellant on December 14, 2015. *See* H. Comm. on Armed Services, *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. Soldier*, Dec. 9, 2015, *available at* https://republicans-0620armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg_uploaded/Report%20on%20the%20Inquiry%20into%20the%20Taliban%20Five%20Transfer_0.pdf.

issued his report wherein he found that there was probable cause that Appellant committed the charged offenses. (JA 130-145). The PHO recommended that the convening authority refer the charges to a special court-martial not empowered to adjudge a bad-conduct discharge. (JA 130-145).

The PHO called the absence of evidence at the hearing "demonstrating that anyone was killed or wounded during the search and recovery operations" for Appellant the "strongest factor" in making his recommendation as to forum. (JA 132-133). In accordance with an agreement between government and defense, the PHO observed that he did not consider evidence of casualties. (JA 133). The PHO further noted that the government employed a litigation strategy to not to introduce evidence of casualties at the hearing and that the rules pertaining to Preliminary Hearings at the time did not empowered him to fully explore and determine the occurrence and extent of casualties. (JA 133-134). The PHO also stated that he was "generally aware of claims of casualties that were made in the public media," but "[n]one of these claims of casualties" affected his decision in the case and that he "strictly based [his] findings and recommendations on the evidence presented to [him] at the Preliminary Hearing." (JA 133). The lack of evidence of casualties, along with Appellant's mitigation evidence, led the PHO to opine Appellant should not be confined or punitively discharged. (JA 130-145).

The PHO's recommendations became public on October 10, 2015. (JA 60). The following day, a reporter asked Senator McCain to comment on the PHO's recommendations. (JA 60). At the time, Senator McCain was promoting the presidential campaign of Senator Lindsey Graham. (JA 60). Senator McCain commented:

> If it comes out that he has no punishment, we're going to have to have a hearing in the Senate Armed Services Committee . . . 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 clearly is a deserter. We need to have a hearing on that.

(JA 60). The Division Chief, Investigations and Legislation, Army Office of Chief Legislative Liaison, expressed concern to the SASC OGC that Appellant's counsel might allege that Senator McCain's comments constituted unlawful command influence (UCI) and requested that Senator McCain issue a "curative" statement. (JA 60; 152-153, 624). Senator McCain did not issue such a statement. (JA 60). The SASC OGC continued to seek updates on the status of Appellant's case from the Army Legislative Liaison Office, just as it had done prior to Senator McCain assuming the role of Chairman of the SASC. (JA 60).

On December 14, 2015, General (GEN) Robert Abrams, Commander, United States Army Forces Command (FORSCOM) and the General Court-Martial Convening Authority (GCMCA) in Appellant's case, referred the charges against

Appellant to a general court-martial. (JA 31-32).[3] The convening authority's referral action comported with the advice of his Staff Judge Advocate (SJA), who disagreed with the PHO's recommendation and recommended that the charges against Appellant be referred to a general court-martial. (JA 145). That same day, the convening authority issued an order to the prospective panel members of Appellant's case prohibiting them from reviewing media coverage on Appellant.[4] (JA 391).

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[3] General Abrams assumed command on August 10, 2015. (JA 286).

[4] The order read:

> As a potential panel member, you must be able to impartially judge this case. Do not attempt to discover information on this matter outside of what you will be presented during the courts-martial proceedings. Do not expose yourself to media, written or electronic, about the facts surrounding the case, or speak with people with knowledge of the case. You are not to listen to, look at, watch or read any account of any incident concerning Sergeant Bergdahl. This order prohibits you from reading anything about this Soldier or the alleged incidents in any newspaper or magazine, including newspapers and magazines online. Err on the side of caution and avoid any situation where you may be exposed to information concerning Sergeant Bergdahl. Further, you are not to talk about this Soldier or the alleged incident with anyone. If someone approaches you and attempts to speak with you about this matter, or your potential participation as a court members in this case, you must immediately forbid him or her from doing so, and you must immediate report the facts and circumstances of the contact . . . ."

(JA 391).

On August 1, 2016, Appellant filed a motion to dismiss or limit his sentence to "no punishment[,]" because of Senator McCain's "punishment" comment. (JA 147-224). During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session on August 24, 2016, the convening authority, GEN Abrams, testified that Senator McCain and his staff did not communicate with him or his staff regarding Appellant and the disposition of the proceedings against him. (JA 318). General Abrams further testified that although he was aware of Senator McCain's October 11, 2015, comment, he believed the comment was inappropriate. (JA 319). General Abrams explained that he believed Senator McCain should not have made the comment because he was concerned about the potential effect of persistent publicity on the panel members. (JA 336). General Abrams further testified that he has "a responsibility as a convening authority to ensure that [Appellant] receives a fair trial," and a "responsibility and a duty . . . as a convening authority to be fair and impartial." (JA 326, 336). General Abrams affirmed he that took this duty "very seriously," he did not consider Senator McCain's comment in his referral decision, and that "no one [] has attempted to influence [him] in any way." (JA 319, 326). General Abrams stated that he had no fear of retribution to himself or his career based upon Senator McCain's statements, and believed he already attained the "the highest rank [he] [wa]s ever going to achieve." (JA 319, 326).

The military judge denied Appellant's motion because he determined that Senator McCain was not subject to the Article 37(a), UCMJ, 10 U.S.C. § 837(a), prohibition on UCI. (JA 64-67). The military judge found that even if Senator McCain was subject to Article 37(a), UCMJ, Appellant failed to meet his threshold burden because Senator McCain had no command authority over Appellant's court-martial and a fully informed objective member of the public "would recognize Senator McCain's ill-advised statements for just what they were – political posturing designed to embarrass a political opponent (President Obama) and gain some political advantage," while promoting Senator Graham's presidential bid. (JA 66).

On November 8, 2016, months after Appellant's UCI motion pertaining to Senator McCain, Mr. Donald Trump won the presidential election. (JA 78). On January 20, 2017, the day of President Trump's inauguration, Appellant filed a motion to dismiss alleging that President Trump's campaign comments constituted UCI.[5] (JA 337-393). The military judge denied the motion. (JA 77-84). The military judge reasoned that because President Trump was merely a candidate for president at the time he made the statements, he was not subject to Article 37(a),

[5] Over the course of 512 days of campaigning, Mr. Trump referred to Appellant in campaign speeches and campaign events on 65 different occasions. (JA 78). Candidate Trump's reference to Appellant only totaled 28 minutes out of 46 hours of speech time. (JA 78).

UCMJ. (JA 81). The military judge noted that the comments, although "troubling," were "nothing more than inflammatory campaign rhetoric" designed to "enflame the passions of the voting populace against his political opponent and in Mr. Trump's favor." (JA 82). The military judge also found that Mr. Trump's "disparagement of [Appellant] was designed to contrast what we gave (five 'really bad guys') for what we got in return (one 'deserter,' 'traitor' etc.)" and "contrast between Mr. Trump and his political opponents." (JA 83-84). The military judge found that "[n]o reasonable member of the public, apprised of all the facts and circumstances and seeing [political] rhetoric for what is it, 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." (JA 82). The military judge also addressed President Trump's campaign comments under the rubric of unfair pretrial publicity and found that Appellant failed to demonstrate prejudice attributed to the campaign comments. (JA 83-84). The military judge noted that the comments were "not so pervasive and unfair as to saturate the community and prevent any trier of fact from being impartial" but would assess the potential damage caused by prejudicial pretrial publicity at voir dire. (JA 82-83). The military judge further ruled that he would allow the parties to conduct "very liberal voir dire" and submit written panel questionnaires concerning President Trump's comments prior to trial. (JA 84).

On August 16, 2017, six months after the military judge denied Appellant's UCI motion related to campaign statements by President Trump, Appellant elected trial by military judge alone.[6] (Def. App. Ex. 90). On October 16, 2017, Appellant pleaded guilty in part to desertion (The Specification of Charge I) and guilty to misbehavior before the enemy (The Specification of Charge II).[7] (R. at 1631). Instead of pleading to the entire charged period of desertion, Appellant pleaded guilty to a single day. (R. at 1631). The military judge accepted Appellant's pleas. (R. at 1631, 1676, 1706). The government attempted to prove the full five-year period of desertion, but the military judge acquitted Appellant as to that period. (R. at 1676, 1706). That day, after the military judge accepted Appellant's pleas, in unrelated joint news conference with Senate Majority Leader Mitch McConnell at the White House Rose Garden, a reporter confronted President Trump about whether he believed that his comments affected Appellant's ability to receive a fair trial. (JA 86). 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,

[6] The military judge denied the motion on February 24, 2017.

[7] Specifically, as to The Specification of Charge I, Appellant pleaded guilty excepting the words "combat operations in Afghanistan;" substituting therefor the words: "a convoy from Observation Post Mest to Forward Operating Base Sharana," and further excepting the words "; and combat patrol duties in Paktika Province, Afghanistan." and "31 May 2014[,]" substituting therefore the word "30 June 2009[.]" (R. at 1631).

so I'm not going to comment on him. But I think people have heard my comments in the past."[8] (JA 86).

On October 17, 2017, Appellant renewed his previous motion to dismiss for UCI based upon on President Trump's October 16, 2017, Rose Garden comment. Two days later the convening authority swore in an affidavit that he was "not aware of any comments that President Trump may or may not have said concerning [Appellant] since he" became President, took his role as a convening authority seriously, and understood his role and obligation under the law. (JA 87, 501-502). The convening authority also swore that any decision he had taken to date and "any future ones as GCMCA are within [his] own discretion based only on the law and materials properly submitted for [his] review," and any decisions he makes as GCMCA are his alone. (JA 87, 501-502). On October 20, 2017, the SJA signed an affidavit explaining her understanding of her obligations under the UCMJ and swore that no outside influence, to include statements by the President, would impact the recommendations or actions she would take in Appellant's case. (JA 503-504). On October 20, 2019, the White House Office of the Press Secretary issued a "Statement Regarding Military Justice" expressing the President's expectation that "all military personnel who are involved in any way in the military justice process [must] exercise their independent professional

[8] This comment will hereinafter be referred to as the "Rose Garden comment."

judgment" in the performance of their military justice duties and that there are "no expected or required dispositions, outcomes, or sentences in any military justice case . . . ." (JA 86, 505). On October 23, 2017, during an Article 39(a), UCMJ, session litigating the UCI motion that Appellant filed the previous week, the military judge gave Appellant an opportunity to withdraw his plea; Appellant affirmatively chose not to. (R. at 1719-1721).

The military judge denied Appellant's motion to dismiss based upon the Rose Garden comment. (JA 85-89). The military judge found that Appellant met his burden to provide "some evidence" that UCI existed and that the government failed to prove beyond a reasonable doubt that the facts proffered by defense did not exist or did not constitute UCI. (JA 88). However, the military judge 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 and that an objective, disinterested observer would not harbor a significant doubt about the fairness of [Appellant's] proceedings." (JA 88). In his ruling, the military judge noted that his mandatory retirement date is November 1, 2018, and that he has "no hope of or ambition for promotion beyond his current rank." (JA 86). The military judge also stated:

> 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 new 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.

(JA 86-87).

Although the military judge found that the government met its burden, he stated he would consider the President's comments as mitigation evidence on sentencing. (JA 88). The military judge ultimately admitted President Trump's campaign statements against Appellant as mitigation evidence during sentencing. (R. at 2584; Def. Ex. P). The military judge also stated that he would require anyone involved "in any post-trial aspect of [Appellant's] case to read" the "Statement Regarding Military Justice," but Appellant declined this offer. (JA 12, 88).[9]

On November 3, 2017, the military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit $1,000 pay per month for ten months, and to be dishonorably discharged from the Army. (R. at 2704). Following the announcement of the sentence, President Trump posted on Twitter (tweeted), "The

[9] Even though Appellant declined the military judge's offer, the "Statement Regarding Military Justice" was included in the record of trial as an enclosure to Government Appellate Exhibit 103. (JA 505).

decision on Sergeant Bergdahl is a complete and total disgrace to our Country and to our Military." (JA 649).

On May 8, 2018, Appellant requested that the convening authority and SJA disqualify themselves and that a new convening authority and SJA be appointed. (JA 645-647). Among other reasons for alleging disqualification of the convening authority was warranted, Appellant alleged the convening authority was "[n]earing to completion of his FORSCOM assignment [and] may soon be nominated for one of the most prestigious four-star billets in the Army or joint force." (JA 646-647). Appellant further speculated President Trump would "seek to withhold opportunities from – and even publicly humiliate – a convening authority who decided to wield lawful clemency authority" in Appellant's case. (JA 647). Appellant's disqualification request was denied. (JA 648). Appellant subsequently submitted his post-trial matters on May 16, 2018. (JA 643-644). In his submission, Appellant noted several grounds for clemency, but only requested that the convening authority and SJA disqualify themselves or proceed towards "an expeditious action and transmission of the record to the Army Court . . . ." (JA 644). Appellant included President Trump's November 3, 2018, tweet, as an enclosure. (JA 644, 649). In her advice, the SJA noted Appellant's allegation that President Trump's "disgrace" tweet constituted apparent UCI and listed the various grounds for clemency provided by Appellant. (JA 655-657). The SJA opined that

Appellant's case did not warrant clemency. (JA 657). The convening authority approved the sentence adjudged on June 4, 2018. (JA 658).

Months later, on April 26, 2019, while Appellant's appeal pended before the Army Court, President Trump tweeted, "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 terroist [sic] hostages plus, who soon went back to battle, for traitor Sgt. Bergdahl!" (JA 659).[10]

At the Army Court, Appellant claimed that he was denied a fair trial, or fair post-trial processing, or the appearance thereof, based upon Senator McCain and President Trump's public statements. *Bergdahl*, 79 M.J. at 517. As to Senator McCain, the Army Court agreed with the military judge that the Appellant failed to meet his initial burden of demonstrating some evidence of UCI. *Id*. at 521-522. The Army Court similarly found that Appellant failed to show any evidence of UCI with respect to the campaign remarks by President Trump prior to his inauguration. *Id*. at 522-523. As to President Trump's Rose Garden comment, the Army Court agreed with the military judge "there was not an intolerable strain on

[10] In his brief, Appellant refers to additional comments later made by President Trump. (Appellant's Br. at 14-16). While Appellant included these comments in the Joint Appendix, these comments are not a part of the record of trial in this case and should not be considered by this Court.

the public's perception of the military justice system because a fully informed observer would not harbor a significant doubt as to the fairness of the proceedings." *Id*. at 523-524. The Army Court found that the President's November 3, 2017, tweet violated Rule for Courts-Martial (R.C.M.) 104(a)(1), but that under an apparent UCI analysis, the government met its burden to demonstrate that a fully informed observer would not have a significant doubt as to the fairness of the proceedings. *Id*. at 524-525. The Army Court also rejected Appellant's assertion that the appellate process was tainted by UCI due to President Trump's April 26, 2019, tweet, finding that Appellant failed to meet his threshold burden because there was "no nexus between the tweet and the appellate process." *Id*. at 527. The Army Court found that the cumulative effect of President Trump's pre-sentencing comment and November 3, 2017, tweet "could not reasonably be perceived by a disinterested member of the public as improper command influence or otherwise indicative of an unfair proceeding." *Id*. Accordingly, the Army Court affirmed the findings of guilty and sentence. *Id*. at 531.

Summary of Argument

This Court should find that Senator McCain and President Trump's public comments did not create the appearance of UCI in the preferral, referral, findings, sentencing, or post-trial processing and appellate review of this case. Appellant's assertion of apparent UCI is based on the presence of theoretical pressure and the

mere *potential* of the Chairman of the SASC or the President to detrimentally affect the careers of the convening authority, military judge, and judges of the Army Court. This speculation is insufficient for a finding of apparent UCI. Moreover, Appellant pleaded guilty and his sentence comported with the sentence requested by his counsel. In light of the circumstances surrounding the comments and the referral, findings, sentencing, and post-trial review of this case, an "'objective, disinterested observer . . . would [*not*] harbor a significant doubt about the fairness of the proceeding." *United States v. Boyce*, 76 M.J 242, 249 (C.A.A.F. 2017).

Standard of Review

Allegations of UCI are reviewed *de novo*. *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018) (citing *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). This Court reviews a military judge's findings of fact in a ruling on a motion regarding UCI under a clearly erroneous standard. *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994).

Law

"Command influence is the mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986). Congress specifically prohibited the exercise of UCI in Article 37(a), UCMJ:

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

Military courts recognize two types of UCI: actual and unlawful. *Boyce*, 76 M.J. at 247. "Actual unlawful command influence has commonly been recognized as occurring when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." *Id*. at 247. Apparent unlawful influence is the appearance of UCI and "is as devastating to the military justice system as the actual manipulation of any given trial." *Id*.; *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002). To prevail on a claim for apparent UCI, an appellant must first demonstrate "some evidence" of UCI. *Id*. at 249 (quoting *Stoneman*, 57 at 41). Although an appellant's initial burden is low, "the evidence presented must consist of more than 'mere allegation or speculation.'" *Id.* at 249 (quoting *Salyer*, 72 M.J. at 423). If an appellant meets this threshold burden, the burden then shifts to the government to show beyond a reasonable doubt that: (1) the predicate facts do not exist; or (2) that the facts presented do not constitute UCI. *Id*. (citing *Salyer*, 72 M.J. at 423); *see also United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 2002) ("[T]he Government

must persuade the military judge and the appellate courts beyond a reasonable doubt that there was no unlawful command influence or that the unlawful command influence did not affect the findings and sentence."). If the government fails to meet this burden, then it may prevail if it proves beyond a reasonable doubt "the [UCI] did 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 proceeding.'" *Id.* (citing *Salyer*, 72 M.J. at 423; *Biagase*, 50 M.J. at 151). Although not dispositive:

> A determination that an appellant was not personally prejudiced by the unlawful command influence, or that the prejudice caused by the unlawful command influence was later cured, is a significant factor that must be given considerable weight when deciding whether the unlawful command influence placed an "intolerable strain" on the public's perception of the military justice system.

Id. at 248 n.5. If the government fails to meet this evidentiary burden, prejudice is presumed and courts will fashion an appropriate remedy. *Id*. at 248, 250 ("[T]he prejudice involved . . . is the damage to the public's perception of the fairness of the military justice system as a whole and not the prejudice to the individual accused."). If the government meets its burden, then an appellant is not entitled to relief. *Id*. at 250.

Argument

Appellant's demand that this Court dismiss his case with prejudice is unavailing. His demand is predicated on the faulty premise that "[a]ll phases of this case were subject to apparent UCI," and the mere utterance of public comments concerning an appellant or case by a congressional representative or senior civilian leaders of the military, without more, amounts to apparent UCI. (Appellant's Br. at 21). The government does not dispute that Appellant's case received significant attention from the media, and was subject to commentary from Senator McCain and President Trump, mostly during his candidacy and, to a far lesser extent, during his presidency. However, "[w]hile it is tempting to be critical of officials who comment on pending cases and prudent for lawyers and judges to advise against doing so at all, there is a difference between what is safe or prudential and what is required as a matter of law or violates Article 37, UCMJ." *United States v. Hutchins*, 72 M.J. 294, 313 (C.A.A.F. 2013) (Baker, C.J., dissenting).

Appellant's court-martial is not the first court-martial commented on by members of Congress or senior civilian leaders of the military, nor is he the first appellant to assert that he had an unfair trial because of widely publicized commentary by such individuals. For example, in *United States v. Calley*, appellant Calley was convicted, "in much publicized proceedings," of three

specifications of premeditated murder and one of assault with intent to commit murder in violation of Articles 118 and 134, Uniform Code of Military Justice, 10 USC §§ 918 and 934. 46 C.M.R. 1131, 1138 (A.C.M.R. 1973). At the Army Court of Military Review (ACMR), Calley alleged that "publicized statements of policy and factual conclusions made by the President of the United States, Secretary of State, Secretary of Defense, Secretary of Army, and the Chief of Staff prejudicially influenced the [] members toward returning findings of guilty. . . ."[11] *Id*. at 1157. The ACMR disagreed and found that the statements made by those high-ranking civilian and military officials, including the then-President, did not constitute UCI. *Id*. at 1161. The ACMR distinguished the comments in *Calley* from those found by military appellate courts to "have been generative of unlawful command influence," such as "written directives and lectures to prospective court members containing suggestions of the desires and prerogatives of the convening authority" and announcements of local policies specific to an accused. *Id*. (citations omitted). The ACMR noted that "[t]he evil of these practices is their

[11] Among the statements at issue was President Richard Nixon's December 9, 1969, news comment that the event in My Lai was an "unjustified . . . massacre," and, "That's why I'm going to do everything I possibly can to see that all the facts in this incident are brought to light, and that those who are charged, if they are found guilty, are punished . . . ." *Id*. at 1157-1158. Another statement at issue was the Secretary of State's November 26, 1969, televised comment, "I think that if the allegations are true, it is a shocking, shocking incident and all we can do is to court-martial any responsible persons and to show the world that we don't condone this." *Id*. at 1158.

tendency to inhibit members in the full and free exercise of that discretion with which they are vested by the Code. Press releases or prior discussions of individual cases by high officials do not *per se* cause the same evil." *Id*. The ACMR noted that the comments were uttered approximately a year before trial, hat the court members had little or no recollection of the statements, and there was no showing "that the court members were or felt they were under pressure from higher authority to return any particular finding." *Id*. at 1162. Therefore, the ACMR found that there was "no fair risk of the exertion of improper command influence upon them." *Id*.[12]

This Court has similarly found that mere public commentary by senior leaders of the military, without more, does not constitute apparent UCI. In *United States v. Ayers*, this Court rejected an appellant's assertion that an appearance of UCI was raised by the "enormous pretrial publicity, to include clear and succinct commentary by Army's military and civilian senior leadership," including the Secretary of Defense and Secretary of the Army, concerning a class of similar cases at another installation. 54 M.J. 85, 93 (C.A.A.F. 2000). This Court found

[12] The Court of Military Appeals (CMA) rejected Calley's claim that the amount of pretrial publicity his case received through the media, press, and the comments by the President, Secretary of State, Secretary of the Army, and members of Congress, made it impossible for him to receive a fair trial. *United States v. Calley*, 22 U.S.C.M.A. 534, 536-538, 48 C.M.R. 19 (C.M.A. 1973). On collateral review, the Fifth Circuit agreed with the CMA. *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975).

that the *Ayers* appellant "failed to carry his initial legal burden of showing that the alleged unlawful command influence had a logical connection to [his] court-martial, in terms of its potential to cause unfairness in the proceedings" because "the views of the senior leadership were not injected into appellant's court-martial, by arguments of counsel or otherwise." *Id*. at 95. (internal quotations and citations omitted).

In *United States v. Simpson*, an appellant alleged that comments, including the use of phrases such as "no leniency" and "severe punishment," made by senior military and civilian leadership, including the Secretary of the Army, the Assistant Secretary of the Army for Manpower and Reserve Affairs, and the Chief of Staff of the Army, "improperly influenced the disposition of charges and actions of the court-martial." 58 M.J. 368, 376 (C.A.A.F. 2003). This Court found that the *Simpson* appellant did not meet his threshold burden because he could not demonstrate a nexus between the specific comments and appellant's court-martial. *Id*. at 375. In particular, this Court noted "[n]one of the statements were transmitted directly to persons involved in the court-martial process, nor were they communicated through command channels." *Id*. at 376. Additionally, the "phrases at issue were not otherwise repeated or disseminated in a manner so direct or pervasive as to undermine the reasonableness of the assertions by persons involved in Appellant's court-martial either that they were unaware of such comments or

that they did not regard the media reports as reflecting command policy." *Id*. This Court also considered "the extensive ventilation of the unlawful command influence allegations at trial." *Id*.

The government acknowledges the concern that public comments by senior leadership of the military may have a chilling effect on the military justice system. *See Boyce*, 76 M.J. at 253 (Stucky, C.J., dissenting) (noting that when a "commander-in-chief, relevant senior government leaders, and members of Congress . . . publically [sic] castigate individual convening authorities because they disagree with how that convening authority exercised his or her statutory discretion and demand convening authorities exercise that discretion in a specific manner, they send a perceptible chill over the entire military justice system that may affect the right of an accused to a fair trial"). However, "a correctible legal error of apparent unlawful command influence must be based upon more than the theoretical presence of influence on a particular convening authority." *Boyce*, 76 M.J. at 256. (Ryan, J., dissenting).

This Court concluded in *Simpson* and *Ayers* that theoretical pressure assumed from public comments by senior officials did not constitute apparent UCI. Without a nexus between the comments and court-martial, like the injection of the comments into trial by counsel as a means to sway a particular result, such an allegation merely constitutes UCI "in the air." *Boyce*, 76 M.J. at 249-50 (citing

Salyer, 72 M.J. at 423) ("[The] initial burden of showing potential unlawful command influence is low, but it is more than mere allegation or speculation."). "There must be something more than an appearance of evil to justify action by an appellate court in a particular case. Proof of command influence in the air, so to speak, will not do." *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991), *overruled in part on other grounds by United States v. Dinger*, 77 M.J. 447 (C.A.A.F. 2018); *see also United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 2009) ("Mere speculation that unlawful command influence occurred . . . is not sufficient."); *Calley*, 46 C.M.R. at 1142 ("Influence in the air, so to speak, is a contradiction in terms. An object and effect upon the object must be identified for influence to exist."). Moreover, this Court "will not presume that a military judge has been influenced simply by the proximity of events which give the appearance of command influence in the absence of a connection to the result of a particular trial." *Allen*, 33 M.J. at 212. "The mere fact of a conviction or lengthy sentence does not establish a cause and effect relationship with unlawful command influence." *United States v. Simpson*, 55 M.J. 674, 690 (A. Ct. Crim. App. 2001).

In contrast to *Ayers* and *Simpson*, *United States v. Boyce* is the foremost example where this Court found apparent UCI because of pressure on a convening authority by superiors acting in response to policy concerns and public scrutiny. In *Boyce*, the Chief of Staff of the Air Force called and informed a convening

authority that the newly appointed Secretary of the Air Force "'lost confidence'" in him and that he could voluntarily retire at a lower grade or be relieved of command because of referral and clemency decisions he made in other sexual assault cases. *Boyce*, 76 M.J. at 245, 251-252. A few days prior to this action, the convening authority read an article where a senator indicated that the convening authority "would be retiring soon." *Id*. at 251. A member of the SASC who voted on the Secretary of the Air Force's confirmation commented on the convening authority's clemency decisions and stated "commanders need to be held 'accountable' for their handling of sexual assault convictions." *Id*. at 251. Three hours after the phone call, the convening authority chose to retire. *Id*. at 252. In his retirement request, the convening authority noted that his "decisions as a [GCMCA] come under great public scrutiny" and that "subsequent sexual assault cases" in his jurisdiction might suffer as a result. *Id.* The convening authority received the referral packet in the *Boyce* appellant's case on the same day the Chief of Staff contacted him and the subsequent submittal of his retirement request, and his referral action occurred several days later. *Id*. The Secretary of the Air Force and the Chief of Staff of the Air Force did not take any "prophylactic steps" to ensure that the convening authority's action in subsequent sexual assault cases "did not give rise to the appearance of unlawful command influence." *Id*. at 252.

Considering these circumstances, this Court found that the *Boyce* appellant met his burden of demonstrating "some evidence of unlawful command influence by the Secretary of the Air Force and/or the Chief of Staff of the Air Force regarding the referral of the instant case to a general court-martial." *Id*. (quotations omitted). The Court found that the actions of the Secretary of the Air Force and Chief of Staff of the Air Force placed an "intolerable strain upon the public's perception of the military justice system" because members of the public would "question whether the conduct of the Secretary of the Air Force and/or Chief of Staff of the Air Force improperly inhibited [the convening authority] from exercising his court-martial jurisdiction in a truly independent and impartial manner as is required to ensure the integrity of the referral process." *Id*. at 252-253.

Appellant's case is manifestly different from *Boyce*. Unlike in *Boyce*, politics did not appear to "control [the] charges, disposition decisions, sentencing, and clemency." (Appellant's Br. at 46). In stark contrast to *Boyce*, no evidence even hints that the convening authority, the SJA, military judge, or Army Court were contacted by Senator McCain, President Trump, or their staff. No evidence suggests that the convening authority, the SJA, military judge, or Army Court felt any pressure to take a particular action in Appellant's case or that their careers would suffer because of a particular action that they took or might take in

Appellant's case. The balance of the evidence, as discussed *infra*, demonstrates that those individuals were not "inhibited" from acting in an "independent and impartial manner" by Senator McCain and President Trump. *Boyce*, 76 M.J. at 252-253. There is no evidence that Senator McCain leveraged his authority as Chairman of the SASC or that President Trump leveraged his authority as Commander-in-Chief to affect the careers of the convening authority, the SJA, military judge, or the judges of the Army Court.

Neither Senator McCain nor President Trump's comments created a demonstrable "chill" on the convening authority, the SJA, military judge, or judges of the Army Court. The comments were not specifically disseminated to the convening authority, SJA, military judge, or judges of the Army Court; rather, they were made to the public at-large. For example, neither the military judge nor the convening authority were aware of the President's Rose Garden comment. (JA 86-87, 501-502). The Army Court was not aware of the President's April 26, 2019, "traitor" tweet. *Bergdahl*, 79 M.J. at 527. Senator McCain and President Trump's comments were only "injected" into Appellant's court-martial through Appellant's motion raising UCI. *See Ayers*, 54 M.J. at 95. Government counsel did not use the comments during their case to advocate or suggest a particular result to the prejudice of Appellant. Rather, the opposite occurred, to Appellant's benefit: the

military judge considered President Trump's comments as mitigation evidence during Appellant's sentencing case. (JA 88).

The convening authority, military judge, and judges of the Army Court uniformly criticized all or some of the comments and did not interpret them as directives or command policy. For example, the convening authority expressed, under oath, his belief that Senator McCain's comments were "inappropriate," and later, after President Trump's Rose Garden comment, emphasized that his decisions as GCMCA were, and will be, based solely on his independent discretion. (JA 87, 501-502). The convening authority actively sought to protect the potential members of Appellant's court-martial from pretrial publicity by issuing them an order, on the same day he referred the case, that prohibited them from reading or speaking about Appellant. (JA 391). The military judge characterized Senator McCain's comments as "ill-advised" statements designed to achieve a political purpose of embarrassing a political opponent. (JA 66). Similarly, the military judged found that President Trump's pre-inaugural comments were "troubling" and "disappointing" political rhetoric. (JA 82-83). The Army Court, in its opinion recognized several inaccuracies in President Trump's statements, rather than citing the comments with a stamp of approval.[13]

[13] For example, Appellant notes that President Trump said individuals died while searching for Appellant, but the Army Court noted that the government produced no evidence indicating such. *Bergdahl*, 79 M.J. at 518 n.3; Appellant's Br. at 10.

Senator McCain and President Trump's comments did not appear to influence Appellant's court-martial. The military judge found Appellant guilty in accordance with his plea. The military judge did not find Appellant guilty of the entire charged period of desertion despite the government's attempt to prove the greater period. The military judge sentenced Appellant in accordance with the sentenced advocated for by his counsel. The convening authority declined to grant clemency in accordance with the advice and opinion of his SJA. Appellant's claims of UCI amount to nothing more than UCI "in the air." *Allen*, 33 M.J. at 209. The "military justice system is not so fragile" that it cannot withstand public, political commentary by members of Congress or the President when those individuals have not actually leveraged their authority over the individuals involved in a courts-martial as a means to extort or exhort a particular action. *Bergdahl*, 79 M.J. at 517. Accordingly, for these and the following reasons, this Court should affirm the findings and sentence in this case.

The Army Court noted that President Trump's tweet referring to the exchange of Appellant for "five terroist [sic] hostages" was inaccurate because the United States does not take hostages." *Bergdahl*, 79 M.J. at 526 n.26. The Army Court also recognized that President Trump's reference to Appellant as a "traitor" was inaccurate in light of the offenses he was charged with and pleaded guilty to. *Id*. at 527 n.27.

A. The SASC and Senator McCain did not appear to unlawfully influence the preferral and referral of charges against Appellant.

Appellant's allegation that his case "was born" by apparent UCI from the SASC lacks merit. (Appellant's Br. at 21). Article 37(a), UCMJ, encompasses individuals listed in Article 2, UCMJ, 10 U.S.C. § 802. As the Army Court noted, Article 2, UCMJ, "was not intended to include a member of Congress." *Bergdahl*, 79 M.J. at 521-522. In *Simpson*, the Army Court observed that:

> [B]y its terms, Article 37, UCMJ proscriptions are limited to persons subject to the UCMJ. While actions by civilians not subject to the UCMJ may cause unlawful impact on those who are, no military court has ever held that congressional action actually constitutes an Article 37, UCMJ, violation.

Simpson, 55 M.J. at 685 n.24. Moreover, "[p]ressures external to the military justice system – and a convening authority who *feels influenced* by such pressures – are altogether different from a person subject to the [UCMJ] attempting to coerce or influence a convening authority, which is what Article 37(a), UCMJ . . . requires." *Barry*, 78 M.J. at 80 (Ryan, J., and Maggs, J., dissenting). Accordingly, to the extent Appellant suggests that the SASC – an entity "external to the military justice system" – exerted pressure on the military justice system as to the preferral of charges against Appellant, this does not constitute unlawful command influence. *Id*.

This Court should also reject Appellant's assertion that the "departure from the decades-old policy of not prosecuting returning POWs except for offenses committed in captivity" and emails between the SASC and the Army demonstrate the SASC's purported influence on the preferral decision. (Appellant's Br. 21-22). Appellant's desertion and misbehavior before the enemy makes this case different from a typical POW case. A 15-6 investigating officer (IO) found that Appellant's unauthorized departure from OP Mest satisfied the elements of desertion with intent to shirk important service and recommended the forwarding of the investigation to the convening authority for "whatever action, if any, [he] deems appropriate." (AR 15-6 Report, p. 38, 45). Appellant had the opportunity to interview the accuser who preferred charges and the convening authority. (R. at 502). Appellant provides no evidence that the IO, PHO, or accuser felt influenced or had contact with members of the SASC, or that the comments could be "reasonably perceived as carrying the force of command influence." *See Simpson*, 58 M.J. at 375 ("[To] the extent that Appellant relies upon specific comments by . . . Members of Congress, Appellant has not shown that the personnel involved in the disposition of charges or the court-martial panel were aware of such comments or that such comments could reasonably be perceived as carrying the force of command influence.").

Additionally, the email exchanges between the SASC OGC and the Army Office of Chief Legislative Liaison are not evidence of pressure tantamount to UCI. The emails are simply requests from the SASC for updates on the status of the 15-6 investigation and case against Appellant. The responses from the Army Office of Chief Legislative Liaison are neutral in nature, even indicating at one point that "there is no charge sheet or even a decision to go that way." (JA 622, 614-619). A later email on March 23, 3015, prior to the referral of charges, from the SASC OGC to the Army Office of the Legislative Liaison asking, "when will FOSCOM announce," is an open-ended question pertaining to the timing of the convening authority's disposition decision. (JA 612). Nothing in the emails between the SASC OGC and the Army Office of the Chief Legislative Liaison suggests the SASC's interest in Appellant's case was anything other than official. *See Ashby*, 68 M.J. at 128-129 (finding that Appellant failed to show that "senior military officials' interest in the [investigation] was anything other than proper, official, and lawfully directed at completing a quality and thorough investigation). No evidence suggests that the IO, PHO, convening authority, or SJA had knowledge of the innocuous e-mails. Accordingly, Appellant fails to demonstrate that the SASC influenced the inception of Appellant's case.

Turning to Appellant's allegation that Senator McCain's October 11, 2015, "demand for punishment," constituted apparent UCI because the convening

authority's referral decision "appeared to comply" with Senator McCain's comment, this Court should agree with the Army Court and military judge that this comment did not amount to apparent UCI. *Bergdahl*, 79 M.J. at 521-522; Appellant Br. at 23-24. Assuming that Senator McCain was subject to Article 37(a), UCMJ, because his status as a military retiree subjected him to Article 2, UCMJ,[14] Appellant has not met his burden to show "some evidence" that Senator McCain's comment was an attempt to coerce or influence the action of a court-martial or the convening authority. *Boyce*, 76 M.J. at 249.

Appellant alleges that the convening authority's decision to refer Appellant's case to a general court-martial against the recommendation of the PHO evidences apparent UCI. As an initial matter, there is no requirement that a convening authority adopt the recommendation of a PHO. *See generally* R.C.M. 601. Furthermore, Appellant overlooks a compelling reason why the PHO made such a recommendation: the government's tactical decision (and agreement with the defense) to forgo presenting evidence of casualties at the preliminary hearing and Appellant's mitigating circumstances. (JA 130-145). The appropriateness of a

[14] The military judge found that Senator McCain retired from the Navy in 1981 but made no finding as to his pay status. (JA 64-65). Article 2, UCMJ, encompasses "[r]etired members of a regular component of the armed forces who are entitled to pay." UCMJ art. 2. Absent Senator McCain's status as a retiree, his service in Congress does not subject him to Article 37, UCMJ. *Bergdahl*, 79 M.J. at 521-522.

sentence based upon any evidence of injuries ultimately presented and mitigating circumstances is a consideration for the sentencing authority at trial.[15] The convening authority's referral action was consistent with the SJA's recommendation the charges be referred to trial by general court-martial. The convening authority explicitly and credibly stated that he was not influenced under oath. (JA 326) ("[No one] – and I mean no one – has attempted to influence me in any way."). Additionally, the convening authority testified that while he knew of Senator McCain's comment, he believed the comment was "inappropriate" and did not consider it when making his referral decision. (JA 319). In light of these facts, the convening authority's disagreement with the PHO's recommendation does not constitute evidence that he appeared to be influenced by Senator McCain's "punishment" comment.

Appellant further asks this Court to speculate as to the "pressure" placed on the convening authority and his referral action because of Senator McCain's position and authority as Chairman of the SASC and the timing of Senator McCain's comment. However, "[m]ere speculation that unlawful command influence occurred because of a specific set of circumstances is not sufficient."

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[15] As the Army Court noted, the record of trial in this case demonstrates that there were in fact servicemembers who sustained serious injuries while searching for Appellant; the government presented this evidence during sentencing. *Bergdahl*, 79 M.J. at 518; R. at 2016-2017, 2039-2040, 2046-2049; 2051-2052, 2104-2117, 2132-2142.

Ashby, 68 M.J. at 128-29. Nothing in the record suggests that at the time of referral, the convening authority had an assignment or promotion pending before the SASC. Even during the post-trial processing of Appellant's case, Appellant continued to speculate that the convening authority was "[n]earing the completion of his FORSCOM assignment [and] may soon be nominated for one of the most prestigious four-star billets in the Army or joint force." (JA 646-647). At the time of his referral decision, the convening authority believed he had obtained his terminal rank and position in the Army, and had "no fear of retribution or concern for [his] career" if any of his actions "did not comport with Senator McCain's apparent view of the matter." (JA 319, 326). As a retiree, Senator McCain was far removed from the military justice personnel participating in Appellant's case, including the convening authority. Senator McCain had no command control or authority, or mantle of authority, over Appellant's court-martial.[16] Neither Senator McCain nor any member of his office communicated with the convening authority or his staff as he made his referral decision. (JA 318). Appellant attributed weight to the fact that neither Senator McCain nor any member of the SASC repudiated

[16] Although Article 37(a), UCMJ, "does not contain a statutory *requirement* for a mantle of command authority," whether or not the alleged influence is acting under the "mantle of command authority" may be a relevant factor for determining whether there is a violation of Article 37, UCMJ." *Barry*, 78 M.J. at 76-77, 76 n.3 (emphasis in original) (citing *United States v. Hamilton*, 41 M.J. 32, 37 (C.M.A. 1994)).

the comment, but fails to acknowledge that neither Senator McCain nor the SASC "attempted to any take action for or against the convening authority or any member of the court-martial.[17] *Bergdahl*, 79 M.J. at 522.

In sum, Appellant fails to demonstrate any connection between Senator McCain's comments and the actions of any person involved with his court-martial besides mere timing. This is insufficient for a finding of apparent UCI. *See Allen*, 33 M.J. at 212 (noting that appellate courts will not presume that a party to a court-martial "has been influenced simply by the proximity of events which give the appearance of command influence in the absence of a connection to the result of a particular trial."); *United States v. Rockwood*, 52 M.J. 98, 102-03 (C.A.A.F. 1999) (finding that appellant had not satisfied his burden to show "some evidence" of UCI where he alleged "the entire command was put in the position of defending its own conduct at the court-martial" and that the "'command would lose face' unless [he] was convicted"). Senator McCain's comment had no nexus to the actions taken by the convening authority in this case.

Even if this Court concludes that Appellant met his threshold burden, Senator McCain's comment, for the aforementioned reasons, did not rise to the

[17] As Appellant even notes in his brief, SASC's authority is limited "to systemic oversight, appropriation of funds, and the passage of substantive legislation." (Appellant's Br. at 44). The HASC and SASC held hearings prior to the courts-martial in *Calley* and other high-profile courts-martial and civilian cases. *See Calley*, 46 C.M.R. at 1145 n.10; JA 227-228.

level of "an intolerable strain on the public's perception of the military justice system." *Boyce*, 76 M.J. at 249 (internal quotations omitted). As the military judge and Army Court found, "'[a] reasonable member of the public knowing all the facts and circumstances would recognize Senator McCain's ill-advised statements for just what they were – political posturing designed to embarrass a political opponent (President Obama) and gain some political advantage.'"[18] *Bergdahl*, 79 M.J. at 522-523; JA 66. No evidence exists that the convening authority interpreted Senator McCain's comment as a mandate or that he considered the comment during his referral decision. Rather, he dismissed them as "inappropriate" and clearly expressed his belief that he remains independently responsible for his actions as a GCMCA. (JA 319, 326). At the time of referral, Appellant did not seek the recusal of the SJA or convening authority based on impartiality or bias because of Senator McCain's comment. (JA 271-279).

An objective, fully informed observer would also know that months prior to Senator McCain's comment about holding a hearing, the SASC OGC indicated to the Army Chief Office of Legislative Liaison Senator McCain's interest in having a Senate hearing on the exchange deal that resulted in Appellant's release. (JA 628). The SASC OGC sought the Army's input on such a hearing. (JA 628). The

[18] Appellant also acknowledges that the political objective of Senator McCain's comments "was to use the prisoner exchange as an opportunity to attack President Obama . . . ." (Appellant's Br. 21).

Army Office Chief of Legislative Liaison expressed concern about such a hearing and any ensuing publicity that might result because, "[t]he Army has taken great care to avoid any actual impropriety or appearance of impropriety in the disciplinary decision making process in [Appellant's] case" and expressed concern about the impact of a hearing on fact-finders at trial. (JA 628). These emails indicate that the Army, rather than succumbing to Senator McCain's desires out of a fear of repercussion, proactively sought to ensure the fairness of Appellant's case. *See Simpson*, 58 M.J. at 377. ("[W]e note that senior officials and the attorneys who advise them concerning the content of public statements should not only consider the perceived needs of the moment, but also the potential impact of specific comments on the fairness of any subsequent proceeding in terms of the prohibition against [UCI]."). There is no evidence that the SASC held such a hearing.

Although Senator McCain later publicly verbalized, prior to referral, an intent to have a hearing "[i]f it comes out that [Appellant] has no punishment," the convening authority's testimony is clear that he did not consider or condone the comment. (JA 60). Even if the convening authority referred the case in accordance with the PHO's recommendation to refer the case to a special court-martial not empowered to adjudge a punitive discharge, Appellant still would have been subject to punishment if found guilty. Appellant ultimately pleaded guilty

and received a dishonorable discharge in accordance with his request. In light of these circumstances, Senator McCain's "punishment" comment "did not place an intolerable strain upon the public's perception of the military justice system and [] an objective, disinterested observer, fully informed of all the facts and circumstances [] would [*not*] harbor a significant doubt as to the fairness" of Appellant's proceeding. *Boyce*, 76 M.J. at 249 (internal quotations omitted).

B. President Trump's public comments made during his candidacy and presidency did not appear to influence the findings, sentencing, post-trial action, and appellate review in this case.

This Court should not grant Appellant relief based upon President Trump's public comments because they did not appear to influence the findings, sentencing, or post-trial review of this case. As an initial matter, presidential candidates, as mere members of the public, are not subject to Article 37(a), UCMJ, or R.C.M. 104. The plain text of Article 37(a), UCMJ, defines UCI as being committed by a person subject to the Code, as defined in Article 2, UCMJ, commanding officers, or the convening authority of the court-martial at issue. The President did not convene Appellant's court-martial, is not subject to the Code, and is not a commanding officer because he is not a commissioned officer. *See* Article 1(3) (defining "commanding officer" as including "only commissioned officers"). Contrary to the Army Court's interpretation that R.C.M. 104(a)(1) encompasses any convening authority, R.C.M. 104(a)(1) should be read consistently with Article

37(a), UCMJ, to encompass only the conduct of convening authorities in the specific case at issue, commanders, and individuals subject to Article 2, UCMJ. *Bergdahl*, 79 M.J. at 524-525. Accordingly, R.C.M. 104(a)(1) restricts the President only when he convenes courts-martial using his authority under Article 22, UCMJ, 10 U.S.C. § 822, and R.C.M. 504.

However, the government recognizes that this Court has noted that public comments by senior civilian leadership of the military may present a "due process error of constitutional dimension" and analyzed such comments using an UCI analysis. *See*, *e.g.*, *Hutchins*, 72 M.J. at 313 (Baker, C.J., dissenting) (Noting than an accused has a due process right to a fair trial and appeal "free from the undue influence of superiors, whether they are military officers or civilians . . . . Thus, regardless of whether Article 37, UCMJ, applies to the Secretary of the Navy, unlawful influence by a civilian official may present a due process 'error of constitutional dimension'") (citing *United States v. Allen*, 20 C.M.A. 317, 43 C.M.R. 157 (1971); *Id*. at 302 (Ryan, J., concurring) (applying UCI test to the Secretary of the Navy); *United States v. Estrada*, 7 C.M.A. 635, 23 C.M.R. 99 (1957); *United States v. Fowle*, 7 C.M.A. 349, 22 C.M.R. 139 (1956); *United States v. Doherty*, 5 C.M.A. 287, 17 C.M.R. 287 (1954)); *Boyce*, 76 M.J. at 246 n.3 (deeming it "appropriate" to accept a government concession that this Court's jurisprudence pertaining to unlawful influence applied in a case involving actions

of the Secretary of the Air Force); *Simpson*, 58 M.J. at 376-377 (finding no UCI by the Secretary of the Army and other senior leaders); *Ayers*, 54 M.J. at 95 (rejecting claim of apparent UCI by the Secretary of Defense and Secretary of the Army); *Calley*, 46 C.M.R. 1131, 1160 (finding no UCI by senior civilian leaders of the military and military officials including the President). With this framework in mind, this Court should conclude that Appellant is not entitled to relief based upon President Trump's comments made during his candidacy and presidency for the following reasons.

1. President Trump's October 16, 2017, Rose Garden comment did not appear to influence Appellant's sentencing.

Even if this Court agrees with the military judge and Army Court that Appellant met his initial burden of demonstrating "some evidence" of UCI with respect to President Trump's October 16, 2017, Rose Garden comment, an objective, disinterested fully informed observer would not harbor significant doubt that Appellant received a fair trial despite the President's comments. First, Appellant's counsel, during argument on the UCI motion, conceded that the focus of the UCI "should be on the case downstream from findings. This includes both sentencing and everything that follows." (JA 512). President Trump made the Rose Garden comment years after the preferral and referral of charges against Appellant, and after the military judge accepted Appellant's guilty plea.

Therefore, the Rose Garden comment had no impact on preferral, referral, or the findings of guilt against Appellant.

Second, the "comments in the past" that President Trump referred to were made prior to his inauguration and ceased on August 9, 2016, well before he assumed the presidency and over a year before the Rose Garden comment. (JA 85). The military judge found that President Trump's campaign comments were purely political in nature, intended for a political goal of attacking political opponents, and were "not so pervasive and unfair as to saturate the community and prevent any trier of fact from being impartial." (JA 82).

Third, the comment, made to the public at large and in response to a reporter's question, did not appear to be a "deliberately orchestrated" attempt to manipulate the outcome of Appellant's court-martial. *See Simpson*, 58 M.J. at 374. In no fashion did the government leverage or attempt to leverage the President's comments to gain a favorable outcome during sentencing. *See United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983) ("What is improper is the reference [command policies] before members in a manner which in effect brings the commander into the deliberation room. It is the spectre of command influence which permeates such a practice and creates the appearance of improperly influencing the court-martial proceedings which must be condemned.") (internal quotations and citations omitted). The military judge indicated that he never heard

President Trump's comments apart from Appellant's UCI motion. (JA 86-87). Likewise, the convening authority also indicated after the Rose Garden comment that he "was not aware of any comments that President Trump may or may not have said concerning [Appellant] since he assumed the Office of the President." (JA 501-502). To the extent that any of President Trump's comments could have been interpreted to be policy rather than politics, the "Statement Regarding Military Justice" issued after the President's statement clarified it was the executive's desire for military commanders to exercise their own independent discretion in military justice. (JA 505). This statement ameliorated any apparent taint, along with the military judge's offer to order "anyone involved in any way in the exercise of discretion in any post-trial aspect of this case to read" the statement. (JA 88-89, 505). However, Appellant "demurred" the offer. *Bergdahl*, 79 M.J. at 524 n.18.

Fourth, had Appellant chosen to be tried by a panel, the military judge would have allowed the defense and government to submit panel questionnaires and allowed "very liberal voir dire" concerning President Trump's comments. (JA 84). When Appellant raised the issue of the President's campaign statements at trial, he did not allege bias or influence on the convening authority, the military judge, the military prosecutor, or other officers assigned to the court-martial. Rather, Appellant premised his request for dismissal based upon the effect of the

comments on panel members. (JA 84, 355-357). Appellant's concern about the tainting of his venire dissipated when he chose to be tried by military judge alone.[19]

Fifth, the Army Court found that the "military judge, the SJA, and convening authority credibly explained that they were not and would not be influenced by the President's statement." *Bergdahl*, 79 M.J. at 524. Indeed, there is no evidence President Trump communicated with the military judge or convening authority, or in any way threatened repercussion for the exercise of their independent authority and discretion in Appellant's case. By regulation, the military judge was vested with a set period of tenure. Army Regulation 27-10, Legal Service: Military Justice, para. 7-1 (Oct. 3, 2011).

Sixth, during the providence inquiry, Appellant affirmed his understanding to the military judge that he faced a maximum punishment of reduction to E-1, total forfeiture of all pay and allowances, life without parole in confinement, and a dishonorable discharge. (R. at 1673). Appellant also understood that he could withdraw his plea of guilty before the military judge announced his sentence. (R. at 1676). Appellant does not assert that had President Trump not made comments

[19] Appellant does not assert that he chose to be tried by military judge alone because of concerns about the impact of the statements on the venire. *See Thomas*, 22 M.J. at 396 ("[A]bsent some specific claim to the contrary, we shall not assume that an accused chose trial by judge alone because of concerns about the impartiality of the court members.").

about him, he would have not pleaded guilty. In fact, on October 23, 3017, after Appellant filed the motion alleging UCI because of the President's Rose Garden comment, Appellant affirmatively declined the opportunity to withdraw his plea. (R. at 1720-1721). *See Thomas*, 22 M.J. at 395 ("The possibility that, if General Anderson had not interfered, an accused who entered pleas of guilty might have pleaded not-guilty, introduced evidence, and obtained an acquittal is so remote that it does not disturb us -- especially where no specific claim to this effect has been made.").

Seventh, Appellant elected to be tried and sentenced by the military judge, who is "presumed to know the law and to follow it absent clear evidence to the contrary" and is bound to adhere to a code of judicial ethics. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). The military judge litigated Appellant's previous UCI motions was therefore aware of Appellant's concerns about UCI. The military judge recognized President Trump's comments as "disappointing" and admitted all of the President's comments as mitigation evidence at sentencing. (R. at 2703). This had the effect of removing any apparent taint on Appellant's sentencing proceeding. The military judge also noted, when he litigated Appellant's UCI motion concerning President Trump's campaign statements, that the fact-finder and sentencing authority in Appellant's court-martial "will know that the accused is not charged with 'treason' and the

death penalty is not authorized for either of his charged offenses." (JA 83). The military judge also indicated that he would "take special care to ensure the comments by Mr. Trump do not invade this trial." (JA 83). These statements obviate any appearance that President Trump's comment influenced the military judge. Additionally, the military judge acquitted Appellant of the contested portion of the desertion charge. (R. at 1676, 1706).

Appellant essentially received the sentence he considered appropriate. His counsel noted during argument on this allegation of UCI at trial, prior to sentencing, that "[g]iven 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." (JA 512-514). During sentencing argument, Appellant's counsel argued that an appropriate sentence in this case would be no confinement and specifically requested that the military judge sentence Appellant to a dishonorable discharge. (R. at 2693-2694). The military judge deliberated on a sentence for over seven hours. (R. at 2701-2703). In the end, he sentenced Appellant to reduction to the grade of E-1, forfeiture of $1,000 pay a month for ten months, and a dishonorable discharge. In essence, Appellant received the sentence he advocated for as being appropriate. The military judge's sentence was far below the government's request that the military judge sentence Appellant to fourteen

years confinement and a punitive discharge, and considerably less than the maximum punishment. (R. at 2670). "Had the results of this trial been preordained by command pressure, one might expect that the court members would have . . . deliberated far less and sentenced far more harshly." *Simpson*, 55 M.J. at 690.

Accordingly, this Court should find that the government met its burden of demonstrating beyond a reasonable doubt that President Trump's Rose Garden comment "did not place an intolerable strain upon the public's perception of the military justice system and [] an objective, disinterested observer, fully informed of all the facts and circumstances [] would [*not*] harbor a significant doubt as to the fairness" of Appellant's proceeding. *Boyce*, 76 M.J. at 249 (internal quotations omitted).

2. President Trump's post-sentence "disgrace" tweet did not appear to influence the convening authority's action.

Assuming that President Trump's "disgrace" tweet constituted admonishment, reprimand, or censure of the court-martial or military judge in violation of R.C.M. 104 or Article 37(a), UCMJ, Appellant is not entitled to relief because the facts in this case do not demonstrate that that an objective, fully informed observer would harbor a significant doubt regarding the fairness of the post-trial processing in Appellant's case.

President Trump did not direct the "disgrace" tweet at the convening authority or urge him to take a specific action with respect to the exercise of his authority under Article 60, UCMJ, 10 U.S.C. § 860 (2012).[20] *See Boyce*, 76 M.J. at 253 (Stucky, C.J., dissenting). Approximately seven months elapsed between the tweet and the convening authority's action. During this passage of time, President Trump made no further comments about Appellant or his case. There is no evidence that the President's criticism of the military judge caused or appeared to cause the convening authority to violate his duty to act impartially in Appellant's case. The convening authority made clear on multiple occasions the seriousness with which he took his duty to act independently of politics. (JA 326, 336, 501-502).

Before declining to exercise his discretionary authority to grant clemency under Article 60, UCMJ, the convening authority had before him for consideration the entire record including Appellant's specific request for a dishonorable discharge and Appellant's post-trial submissions raising this error. The convening authority received legal advice from a competent legal advisor who, in an affidavit, affirmed her commitment to the fair and full consideration of Appellant's case. In an affidavit submitted prior to taking action, the convening authority contemplated

[20] The 2012 version of Article 60, UCMJ, applied to Appellant's court-martial; at action, the convening authority had the power to disapprove the findings and sentence in Appellant's case and order a re-hearing.

future attempts to influence him and swore that any future decisions "within my own discretion [will be] 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 GCMCA as required under the [UCMJ]. My decisions will not be impacted by any outside influence." (JA 501). Appellant did not file a post-trial motion to dismiss and his post-trial matters did not request any formal clemency; Appellant only requested the recusal of the SJA and the convening authority or speedy appellate proceeding. (JA 643).

Appellant's request that the convening authority recuse himself and his allegation of apparent UCI was based on the speculative assertion that President Trump "could seek to withhold opportunities from – and even publically [sic] humiliate – the convening authority" should he decide to grant clemency. (JA 647). Specifically, Appellant surmised that the convening authority could be influenced by President Trump because he was "[n]earing the completion of his FORSCOM assignment, [and] may soon be nominated for one of the most prestigious four-star billets in the Army or joint force," and President Trump "has complete authority to scuttle the nomination of a senior military officer he does not like or to reward one he does." (JA 647). (JA 646-647). There is no evidence that the President's comment had any effect, or the appearance thereof, on the convening authority's post-trial review and discretionary clemency decision during

the post-trial processing of this case. Accordingly, President Trump's "disgrace" tweet "did not place an intolerable strain upon the public's perception of the military justice system and [] an objective, disinterested observer, fully informed of all the facts and circumstances [] would [*not*] harbor a significant doubt as to the fairness" of the convening authority's post-trial review of Appellant's case. *Boyce*, 76 M.J. at 249 (internal quotations omitted).

3. President Trump's comments did not appear to unlawfully influence the Army Court's review in this case.

This Court should agree with the Army Court that Appellant did not meet his threshold burden of demonstrating "some evidence" of UCI with regard to President Trump's April 26, 2019, tweet referring to Appellant as a "traitor." (JA 659). The primary focus of the tweet was President Trump's assertion that he did not pay money to North Korea with respect to Otto Warmbier. President Trump's couched his reference to Appellant in terms of comparing his actions with respect to Otto Warmbier with those of President Obama's prisoner exchange deal securing Appellant's release.[21] (JA 659). A common-sense reading of the tweet indicates that it is nothing more than political in nature: President Trump

[21] President Trump made the tweet after media reports that the United States paid two million dollars for the case of Otto Warmbier while he was comatose and incarcerated in North Korea. Caitlin Oprysko, *Trump denies he paid North Korea $2 million for Otto Warmbier*, Politico (Apr. 26, 2019, 08:31 AM), https://www.politico.com/story/2019/04/26/trump-north-korea-otto-warmbier-1290440 (last accessed Dec. 27, 2019).

attempted to contrast his actions with those of a former president of a different political party. This tweet did not reference any judicial officer, the Army Court, Appellant's court-martial or Appellant's appeal. Significantly, the Army Court noted that it "would have no knowledge of the President's statement but for the submission by [A]ppellant." *Bergdahl*, 79 M.J. at 527.

With regard to the President's Rose Garden comment and "disgrace" tweet, even if this Court finds that Appellant met his burden to show "some evidence" of UCI, an objective, fully informed observer would not believe that the President's comments deprived Appellant of a fair and impartial appellate review by the Army Court under Article 66, UCMJ. "In the absence of evidence to the contrary, judges of the Courts of Criminal Appeals are presumed to know the law and to follow it." *United States v. Schweitzer*, 68 M.J. 133, 139 (C.A.A.F. 2009) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). Absent such evidence, courts will not conclude that unlawful command influence affected a judge. *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998). The judges of the Army Court have a *sua sponte* duty to recuse themselves if they cannot act impartially and are forbidden by their oath and the Code of Conduct for United States Judges from considering outside factors in conducting their review and rendering their decision. Additionally, the judges on Army Court are judicial officers well-versed in this Court's UCI jurisprudence.

Months after President Trump made the statements, after a thorough review of the record, the Army Court issued an opinion thoroughly reviewing Appellant's claim of UCI. In the opinion, the Army Court did not hesitate to note inaccuracies with respect to President Trump's statements. *See supra* note 13. There is no evidence that the President or his staff contacted the judges of the Army Court, or threated repercussion in the absence of a particular outcome. In fact, Interim Army Regulation 27-10, Legal Service: Military Justice, para. 12-15 (Jan. 1, 2019), vests the judges of the Army Court with a set period of tenure. Accordingly, because an objective, fully informed observer would not harbor a significant doubt about the fairness of the Army Court's review under Article 66, UCMJ, this Court should find that Appellant is not entitled to relief.

C. Should this Court find that apparent UCI tainted Appellant's case, dismissal with prejudice is not an appropriate remedy.

Should this Court find that any of the comments at issue in this case amounted to apparent UCI, this Court should fashion an appropriate remedy by considering "both the specific unlawful influence" and "the damage to the public perception of fairness." *United States v. Lewis*, 63 M.J. 405, 416 (C.A.A.F. 2006). Dismissal with prejudice, as requested by Appellant, is not an appropriate remedy in light of the nature of the findings and sentence in this case. Appellant primarily bases his assertion that his case warrants dismissal of his case with prejudice on the principal of deterrence and conjecture that he could never receive a fair trial.

(Appellant's Br. at 40-47). This presumes that Senator McCain and President Trump's past comments taint any future convening authority, military judge, venire, or military justice actor. But Appellant's post-trial request that the convening authority recuse himself, thereby allowing a different convening authority to consider his post-trial matters, demonstrates that Appellant himself did not believe the military justice system was so tainted. If Appellant believed that another convening authority and another SJA could fairly administer his post-trial processing, this Court should not find the speculative chilling effect of Senator McCain and President Trump's comments strong enough to warrant dismissal with prejudice of the charges.

Dismissal of charges with prejudice is a "drastic remedy" that "is warranted 'when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings'" or "'where the error cannot be rendered harmless.'" *United States v. Barry*, 78 M.J. at 79 (quoting *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004); *Lewis*, 63 M.J. at 416. This Court must "look to see whether alternate remedies are available" apart from dismissal. *Lewis*, 63 M.J. at 416.

This Court should decline to grant Appellant a sweeping remedy and instead fashion an appropriate remedy tailored to the specific instances in which it finds apparent UCI. *Lewis*, 63 M.J. at 416. For example, should this Court find that apparent UCI influenced the sentencing proceeding, this Court may order a

sentence reassessment or sentence rehearing. *See Thomas*, 22 M.J. at 397 (noting that for allegations that sentencing was impacted by UCI, "a rehearing on sentence or meaningful reassessment of the sentence, if possible, would be the appropriate remedy."). If this Court finds that apparent UCI was limited to Appellant's post-trial processing and, specifically, the action taken by the convening authority, then this Court may order a new post-trial consideration and action. This would be consistent with the relief asked for in Appellant's post-trial submissions, *i.e.* that the SJA and convening authority recuse themselves from the post-trial process. (JA 655). These options allow this Court to adequately address the particular instances of apparent UCI. Accordingly, should this Court find apparent UCI, this Court should decline to dismiss the charges against Appellant with prejudice.

In contrast to those appropriately tailored remedies, dismissal with prejudice would actually provide Appellant a permanent windfall – a windfall this Court cautioned against in *Boyce* – of the setting aside of findings of guilt *that he pleaded to* and the setting aside of a sentence that he primarily *asked for and received*. *See Boyce*, 76 M.J. at 253 n.10 (dismissing the findings and the sentence without prejudice and authorizing a rehearing because dismissal without prejudice would give the *Boyce* appellant "an improper windfall [] because he did not suffer individualized prejudice in this case."). As the Army Court noted, dismissal with prejudice in light of Appellant's plea and sentence "would be illogical and not

enhance public perception of the military justice system." *Bergdahl*, 79 M.J. at 526 n.25. Accordingly, should this Court find apparent UCI existed in this case, it should craft an appropriate remedy less than dismissal with prejudice.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.


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I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 3rd day of January 2020 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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