

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

UNITED STATES)	
)	
v.)	GOVERNMENT RESPONSE TO
)	EIGHTH DEFENSE MOTION TO
BERGDAHL, ROBERT BOWDRIE)	COMPEL
(BOWE))	
SGT, U.S. Army)	
HHC, Special Troops Battalion)	31 AUGUST 2017
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

I. RELIEF SOUGHT

The Government requests the Court deny the Defense's Eighth Motion to Compel as the Defense has not shown, by a preponderance of the evidence, that the items requested are material to the preparation of the defense.

II. BURDEN OF PERSUASION AND BURDEN OF PROOF

The Defense, as the moving party, has the burden of persuasion in accordance with RCM 905(c)(2), and the burden of proof is preponderance of the evidence in accordance with RCM 905(c)(1).

III. FACTS

The Government incorporates the facts from G App 68, the Government's response to the Defense Motion to Dismiss for Unlawful Command Influence. Additionally, the Government avers the following facts:

The facts section of the Defense Motion includes several conclusions that are simply incorrect. Most significantly, the Defense assertion that "Trial Counsel sought to persuade the Trump administration to issue a statement along the lines of the one Secretary of Defense Chuck Hagel issued..." is flatly incorrect. Trial Counsel had several conversations with an attorney assigned to the National Security Council (NSC) Legal Office regarding the Defense Motion to Dismiss and potential courses of action *in the event* that the Motion was granted. The Hagel statement was sent as part of those conversations, as an example of what *could* become necessary if the Court concluded that then-Candidate Trump's comments constituted UCI. Because the Motion was denied, Trial Counsel never requested that such a statement be issued. As the White House was never

asked to do so, the assertion that they "affirmatively rejected suggestions for remediation" is simply incorrect.¹

IV. EVIDENCE

No additional evidence is required to resolve the Motion. As the defense's motion is based on an entirely incorrect premise, they should not be permitted to call Trial Counsel in what would amount to nothing more than a fishing expedition.

V. LAW AND ARGUMENT

The Court has already considered and rejected the Defense claim that the statements of then-Candidate Trump constituted either actual or apparent UCI. The logical flaw in the Defense's current Motion is the notion that statements which have been judicially determined to not constitute UCI are magically transformed into UCI by the failure to disclaim them. Since the Court has already determined that the statements themselves are not UCI, whether or not President Trump disclaimed them is utterly irrelevant. As a result, the evidence that the Defense seeks is similarly irrelevant, and on that basis alone, the Motion should be denied.

Moreover, as discussed in the Facts section above, the Defense leaps to a variety of conclusions based on emails received as part of a Freedom of Information Act request that are simply incorrect. They assume that an email discussing the statement by Secretary Hagel constituted a request by the prosecution to have the White House issue such a statement in this case (which it didn't), that the request was routed to the President (which it wasn't), and that the President declined to issue such a statement (which he didn't).

To allay any concerns that the Defense has, no member of the prosecution has anything close to the type of access to the President as suggested by the Defense motion. As made clear in the Government's Response to the Defense Discovery Request, the White House has not given any instructions to the prosecution or to anyone in the chain of command regarding this case. Moreover, Trial Counsel did not then, and does not now, believe that any such remediation statement was necessary, and did not then, and has not since, suggested that such a statement be issued.

Even if the failure to disclaim statements which have already been determined to not be UCI could somehow turn them into UCI, and even if the Trial Counsel had requested that the White House issue such a statement, the Defense Motion is still fundamentally flawed, as it incorrectly places the question of whether a particular comment constitutes UCI in the hands of the Trial Counsel, rather than the Military

¹ A variety of other conclusory statements in the Defense Motion are also incorrect. For instance, the Defense claim that "[t]he Department of Justice was also consulted, presumably because of the pendency of the 'Muslim ban' cases in the Fourth and Ninth Circuits" is both wildly speculative and totally incorrect. A Department of Justice attorney was involved in assisting with the discovery process for documents in the possession of the National Security Council. He continued to provide similar advice after the change in administration.

Judge. A Trial Counsel's personal conclusion regarding the question of UCI is, obviously, not controlling.

VI. CONCLUSION

The Defense has failed to establish that any of the information they seek to compel is relevant or necessary. Their entire position is based on a series of incorrect conclusions regarding Trial Counsel's contacts with attorneys at the White House, and ignores the reality that this Court has already ruled on the issue of UCI regarding Candidate Trump's comments. The Motion should therefore be denied.



JUSTIN C. OSHANA
MAJ, JA
Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Defense Counsel on 31 August 2017.



JUSTIN C. OSHANA
MAJ, JA
Trial Counsel