

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

UNITED STATES	)	Defense Reply to Government
	)	Response to Eighth Defense
v.	)	Motion to Compel (Apparent
	)	Unlawful Command Influence)
SGT Robert B. Bergdahl	)	
HHC, Special Troops Battalion	)	
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	1 September 2017

SUMMARY

The defense requested an order directing Trial Counsel to submit to an interview. He refused, stating no reason. D APP 95 at 20. Now, faced with a motion to compel, D APP 95, he has in effect provided an unsworn statement. G APP 96. As a fact witness, his unsworn statement is not evidence. We need to interview him now more than ever so we can make an informed decision as to whether he must be required to testify under oath and whether others (whose names he knows but we do not) must as well. This is Discovery 101.

The government also refused to turn over unredacted copies of the 13 pages of email that were attached to D APP 95, thereby preventing us from conducting our own independent investigation to test Trial Counsel's unsworn submission.

LEGAL AUTHORITY

As noted in the motion to compel, the prosecution and defense and the court-martial have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process. Rule for Court-Martial (RCM) 703(a). Each party is entitled to the production of evidence that is relevant and necessary. RCM 703(f)(1).

ARGUMENT

1. Trial Counsel concedes that he is the individual who was in contact with the White House after Inauguration Day. G APP 96 at 1. Beyond that, he has provided an account of the facts that we are unable to test in the usual fashion of adversary proceedings. The Court should not tolerate this. Neither we nor it can properly be placed in the position of simply having to accept the prosecutor's unsworn account of events to which there are other witnesses (whose identities remain unknown to us) as well as documentary evidence.

2. The government argues that the defense has not shown that the items the defense seeks are material, relevant or necessary to the preparation of the defense. G APP 96 at 1, 3. That argument is mistaken for three reasons. First, it is never too late to raise a claim of unlawful command influence, which has long and justifiably been considered “the mortal enemy of military justice.” *E.g., United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). Second, while the Court denied a UCI motion earlier this year, AE 36, that denial – contrary to the government’s apparent view, G APP 96 at 2 – is not *res judicata*. There has been no final judgment and although AE 36 was the subject of extraordinary writ practice, it has never been subject to regular appellate review under Articles 66-67, UCMJ. Finally, the Court expressly left the door open to the defense to press its apparent UCI claim in light of subsequent developments. AE 36 at 8 ¶ 15. The defense’s unearthing of FORSCOM’s emails, which we still have only in redacted form, is such a development.

3. As explained in the motion to compel, the Trump administration’s failure to issue a *Hagel* statement is evidence that President Trump’s views are precisely as they were before he took office. This is relevant to the UCI issue. Without interviewing Trial Counsel, seeing the unredacted emails, and being able to identify and interview the individuals at the White House with whom he dealt, our ability to fully investigate will have been thwarted.

4. The government’s response reveals that the administration adopted a wait-and-see attitude, contingent on the outcome of the apparent UCI motion to dismiss. D APP 56; see D APP 95 at 3. What that means is that there was neither remorse about nor a repudiation of the campaign of vilification. If President Trump no longer believed the terrible things he said about SGT Bergdahl when running for office, he would have said so when the opportunity presented itself, and D APP 56 presented a golden opportunity to do so. That the administration decided it could stand pat and hope for the best on the motion to dismiss (as Trial Counsel asserts)\* itself confirms that, as stated in D APP 95 at 3, President Trump’s views are precisely as they were before the Inauguration. Trial Counsel’s account therefore inadvertently confirms our point.

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\* Trial Counsel’s account is baffling since it implies that if the Court had granted the defense’s motion to dismiss, *that* would have been a good time to issue a *Hagel*. But obviously, doing so then would have served no remedial purpose since the Court would already have found that apparent UCI had occurred. Put another way, a statement *then* would have been a clear case of closing the barn door after the cows had fled. Trial Counsel’s claim that it is “simply incorrect” that the administration “affirmatively rejected suggestions for remediation,” G APP 96 at 2, is an exercise in semantics and overlooks the rest of his account, which explicitly describes a wait-and-see decision by the White House. A decision to wait and see is by definition a decision *not* to act at the moment. As for whether White House staff ever consulted President Trump on this matter, neither we nor the Court have any way of knowing that if we cannot find out who on the staff Trial Counsel interacted with – and who, if anyone, the staff member(s) in turn consulted, and so on up the White House food chain.

5. Trial Counsel is an advocate in this case. What is more, because his own activities are at issue, he has a personal horse in the race. To allow him to insist that his version of events must be accepted and to block our ability to probe it is to deny the accused the right to discovery and to litigate issues of great moment not only to SGT Bergdahl but to public confidence in the administration of justice. The government properly concedes (G APP 96 at 2) that “[a] Trial Counsel’s personal conclusion regarding the question of UCI is, obviously, not controlling.” Neither is a Trial Counsel’s version of the facts.

CONCLUSION

The Court should direct the government to produce unredacted copies of the emails and require Trial Counsel to make himself available for an interview substantially before the next scheduled Article 39(a), UCMJ, session.



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CERTIFICATE OF SERVICE

I certify that I emailed the foregoing to the Court and Trial Counsel on 1 September 2017.



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