

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

UNITED STATES)	Motion to Dismiss
)	
v.)	
)	
SGT Robert B. Bergdahl)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	20 January 2017

TABLE OF CONTENTS

Relief Sought.....	2
Burden of Persuasion and Burden of Proof.....	2
Facts	3
Witnesses and Evidence	7
Legal Authority	8
Question Presented.....	9

IS DISMISSAL REQUIRED WHERE A SUCCESSFUL PRESIDENTIAL
 CANDIDATE HAS, AS A PROMINENT ELEMENT OF HIS CAMPAIGN,
 REPEATEDLY AND VERY PUBLICLY CALLED A SOLDIER A TRAITOR
 WHO SHOULD BE EXECUTED AND MADE OTHER FALSE AND HIGHLY
 PREJUDICIAL STATEMENTS ABOUT THE SOLDIER’S CASE?

Argument.....	9
I. President Trump’s statements are prejudicial to Sergeant Bergdahl’s right to a fair trial and inimical to public confidence in the administration of military justice	9
II. The charges should be dismissed	19
A. There are no adequate alternative remedies	20
B. Dismissal is required to safeguard the credibility of the military justice system.....	22
Conclusion	24
Certificate of Service	24

RELIEF SOUGHT

Sergeant Bergdahl moves to dismiss the charges and specifications with prejudice. Oral argument and an evidentiary hearing are requested.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The defense, as moving party, has the burden of persuasion. Proof by a preponderance is required as to factual matters. R.C.M. 905(c)(1). The governing principles for cases of unlawful command influence (UCI) are summarized in *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013):

Article 37, UCMJ, states “No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof” While statutory in form, the prohibition can also raise due process concerns, where for example unlawful influence undermines a defendant’s right to a fair trial or the opportunity to put on a defense.

Allegations of unlawful command influence are reviewed de novo. *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006); *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999); *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994). On appeal, the accused bears the initial burden of raising unlawful command influence. Appellant must show: (1) facts, which if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness. *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999) (quoting [*United States v.*] *Biagase*, 50 M.J. at 143, 150 (C.A.A.F. 1999)). Thus, the initial burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). The quantum of evidence required to raise unlawful command influence is “some evidence.” *Stoneman*, 57 M.J. at 41 (quoting *Biagase*, 50 M.J. at 150) (internal quotation marks omitted).

Once an issue of unlawful command influence is raised by some evidence, the burden shifts to the government to rebut an allegation of unlawful command influence by persuading the Court beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence did not affect the findings or sentence. *Biagase*, 50 M.J. at 151.

Allegations of unlawful command influence are reviewed for actual unlawful command influence as well the appearance of unlawful command influence. “Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an ‘intolerable strain on public perception of the military justice system.’” *United States v. Lewis*, 63

M.J. 405, 415 (C.A.A.F. 2006) (citation and internal quotation marks omitted); *Stoneman*, 57 M.J. at 42-43 (quoting *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001)). The test for the appearance of unlawful influence is objective. "We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *Lewis*, 63 M.J. at 415. An appearance of unlawful command influence arises "where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id.* [Footnote omitted.]

FACTS

Sergeant Bergdahl is charged with single specifications under Articles 85 and 99, UCMJ. Charge Sheet. The charges were preferred on 25 March 2015 and referred on 14 December 2015. Trial is scheduled to begin on 18 April 2017.

- 11 June 2014. Secretary of Defense Chuck Hagel testified before the House Armed Services Committee. In response to a question from Rep. Jim Langevin he stated: "In the Army, in all of our reports, I have seen no evidence or finding that directly links any American combat death to the rescue or finding or search of Sergeant Bergdahl, and I've asked the question. We've all asked the question. I have seen no evidence, no facts presented to me when I asked that question." Mark Mazzetti & Charlie Savage, *Hagel Defends Bergdahl Trade as a Part of Waging War*, N.Y. Times, June 11, 2014, available at <https://www.nytimes.com/2014/06/12/world/asia/hagel-prepares-to-defend-bergdahl-trade.html>.
- 9 April 2015. President Trump called SGT Bergdahl a **traitor** in a *Breitbart News* interview.
- 23 April 2015. On the *John Fredericks* radio show President Trump called SGT Bergdahl a **traitor** and falsely claimed that **five or six lives were lost** searching for him.
- 16 June 2015. President Trump, in New York City, announced his candidacy for the Republican nomination. In launching his campaign he called SGT Bergdahl a **traitor** and a **no-good traitor**.
- 21 July 2015. At a rally in Bluffton, SC, President Trump called SGT Bergdahl a **no-good, rotten traitor**.
- 6 August 2015. In the first Republican debate President Trump called SGT Bergdahl a **dirty, rotten traitor** and incorrectly stated that **six Soldiers died** searching for him.
- 19 August 2015. In Derry, NH, President Trump called SGT Bergdahl a **dirty, rotten traitor** and incorrectly stated that **six Soldiers died** searching for him.
- 20 August 2015. Civilian defense counsel released a statement demanding an end to the vilification of SGT Bergdahl. See, e.g., Jim Forsyth, *Bergdahl lawyer slams candidate Trump over 'traitor' comments*, Reuters, Aug. 20, 2015, available at <http://www.reuters.com/article/us-usa-defense-bergdahl-trump-idUSKCN0QP29X20150820>. President Trump never responded.

- 21 August 2015. The following day, in Mobile, AL, President Trump called SGT Bergdahl a **traitor** and incorrectly stated that **at least six Soldiers died** searching for him.
- 27 August 2015. In Greenville, SC, President Trump incorrectly stated that **six Soldiers died** searching for SGT Bergdahl and that SGT Bergdahl “**went to the other side.**”
- 18 September 2015. MG Kenneth R. Dahl, who conducted the 2014 AR 15-6 investigation, testified at the public Article 32, UCMJ preliminary hearing: “My conclusion is that there were no Soldiers killed who were deliberately looking and searching for—in an effort to deliberately search and look for Sergeant Bergdahl. I did not find any evidence of that.” Art. 32 Tr. 308; see *also* 2014 AR 15-6 ROI at 42 n.355 (no evidence of Soldier deaths).
- 8 October 2015. In Las Vegas, NV, President Trump called SGT Bergdahl a **no-good traitor** and stated that “**in the good old days he would have been executed.**”
- 23 October 2015. In Miami, FL, President Trump called SGT Bergdahl a **dirty, rotten traitor.**
- 16 October 2015. In Tyngsboro, MA, President Trump called SGT Bergdahl a **traitor** and a **dirty, rotten traitor.** “If I win I might just have him floating in the middle of that place and drop him, boom. Let ‘em have him. Let ‘em have him. I mean that’s cheaper than a bullet.”
- 23 October 2015. In Miami, FL, President Trump repeatedly called SGT Bergdahl a **traitor.** He also called him a **dirty, rotten traitor** and incorrectly stated that “**[s]ix young, incredible, brave people died.**”
- 26 October 2015. In Atkinson, NH, President Trump called SGT Bergdahl a **dirty, rotten traitor.**
- 3 November 2015. Appearing on *Good Morning America*, President Trump twice called SGT Bergdahl a **traitor.**
- 9 November 2015. In Springfield, IL, President Trump called SGT Bergdahl a **dirty, rotten traitor** and incorrectly stated that **six Soldiers died** searching for him.
- 11 November 2015. In Manchester, NH, President Trump called SGT Bergdahl a **dirty, rotten traitor.** He incorrectly claimed that **six people died** going out looking for him and complained that “**He gets no jail time, he gets no jail time.**”
- 12 November 2015. In Fort Dodge, IA, President Trump called SGT Bergdahl a **no-good, dirty, rotten traitor** and incorrectly stated that **six people were killed** looking for him.
- 16 November 2015. In Knoxville, TN, President Trump called SGT Bergdahl a **dirty, rotten traitor.**
- 18 November 2015. In Worcester, MA, President Trump called SGT Bergdahl a **dirty, rotten traitor** and incorrectly stated that “**six young, great people were killed going after this bum.**” He again complained about recommendations that SGT Bergdahl not be sentenced to confinement.

- 23 November 2015. In Cleveland, OH, President Trump called SGT Bergdahl a **traitor**, a **dirty, rotten traitor**, a **horrible traitor**, and **“the worst.”**
- 24 November 2015. President Trump told *Time Magazine* that SGT Bergdahl was a **traitor** and **“a very bad person who killed six people, who went after him.”**
- 3 December 2015. At the Republican Jewish Coalition Presidential Forum in Washington, DC, President Trump three times called SGT Bergdahl a **traitor**, and also called him a **dirty, rotten traitor**. He incorrectly stated that **six Soldiers died** searching for him.
- 5 December 2015. In Davenport, IA, President Trump called SGT Bergdahl a **dirty, rotten traitor** and incorrectly stated that **six Soldiers died** searching for him.
- 5 December 2015. In Spencer, IA, President Trump called SGT Bergdahl a **“dirty, rotten traitor”** and incorrectly stated that **six people were killed** looking for him. He also complained that SGT Bergdahl **“is not even going to get a sentence,”** presumably referring to confinement. He suggested that SGT Bergdahl be **thrown out of an airplane without a parachute.**
- 7 December 2015. In Mt. Pleasant, SC, President Trump called SGT Bergdahl a **dirty, rotten traitor** and a **dirty, no-good traitor**, and incorrectly stated that **six Soldiers died** searching for him.
- 11 December 2015. In New York City, President Trump stated to the Pennsylvania Society that SGT Bergdahl **should be shot.**
- 11 December 2015. In Des Moines, IA, President Trump called SGT Bergdahl a **horrible, terrible, dirty, rotten traitor.**
- 14 December 2015. In Las Vegas, NV, President Trump called SGT Bergdahl a **traitor**, incorrectly stated that **five Soldiers were killed** looking for him, and promised that **“we will review his case.”**
- 14 December 2015. Civilian defense counsel issued a further statement asking for an end to the campaign of defamation against SGT Bergdahl. See, e.g., Jim Miklaszewski & Corky Siemaszko, *Sgt. Bowe Bergdahl Facing Court Martial*, NBC News, Dec. 14, 2015, available at <http://www.nbcnews.com/story-line/bowe-bergdahl-released/sgt-bowe-bergdahl-facing-court-martial-n479796>. President Trump never responded.
- 19 December 2015. In Cedar Rapids, IA, President Trump called SGT Bergdahl a **dirty, rotten traitor** and incorrectly stated that **five or six Soldiers died** looking for him.
- 21 December 2015. In Grand Rapids, MI, President Trump called SGT Bergdahl a **dirty, rotten deserter** and complained that **“Now, I hear he’s going to get off scot-free!”**
- 10 January 2016. Appearing on *Meet The Press*, President Trump called SGT Bergdahl a **traitor** and a **dirty, rotten traitor.**
- 13 January 2016. In Pensacola, FL, President Trump called SGT Bergdahl a **dirty, rotten, no-good traitor**, a **“whack job”** and a **“son of a bitch.”** He also incorrectly stated that **five (or probably six) Soldiers died** searching for him

and stated “Frankly, frankly, I would take that son of a bitch, I’d fly him back, I’d drop him right over the top.”

- 18 January 2016. In Lynchburg, VA, President Trump called SGT Bergdahl a **dirty, rotten traitor** and incorrectly stated that **six Soldiers died** going after him.
- 20 January 2016. In Tulsa, OK, President Trump called SGT Bergdahl a **dirty, rotten traitor** who **should be dropped into the heart of ISIS territory “before we bomb the hell out of it.”** He also incorrectly claimed that **five or six people died** going after him.
- 4 February 2016. In Exeter, NH, President Trump called SGT Bergdahl a **dirty, rotten traitor** and incorrectly claimed that we had **lost five people**.
- 5 February 2016. In Florence, SC, President Trump called SGT Bergdahl a **dirty, rotten traitor** and incorrectly claimed that **we lost six** great, young, beautiful soldiers.
- 8 February 2016. In Manchester, NH, President Trump called SGT Bergdahl a **dirty, rotten traitor** and incorrectly stated that **six people were killed** looking for him.
- 22 February 2016. In Las Vegas, NV, President Trump called SGT Bergdahl a **dirty, rotten traitor**, suggested that he **should be sent back and dropped off in the middle of the terrorists (maybe or maybe not with a parachute)** and incorrectly stated that **five or six Soldiers died** looking for him.
- 5 March 2016. In Orlando, FL, President Trump called SGT Bergdahl a **dirty, rotten traitor** and suggested that the **laws against treason should be loosened**.
- 19 March 2016. In Fountain Hills, AZ, President Trump called SGT Bergdahl a **traitor** three times and stated that **“supposedly five or six young beautiful soldiers were killed trying to find him.”**
- 10 April 2016. In Rochester, NY, President Trump called SGT Bergdahl a **traitor** and incorrectly stated that **five or six people were killed** looking for him.
- 14 June 2016. In Greensboro, NC, President Trump incorrectly stated that **“probably five and maybe six people, wonderful, young military people were killed** looking for” SGT Bergdahl. He also stated that **“in the old days, you know what would have happened to him, right? Quickly.”** At that point he pantomimed firing a rifle.
- 12 July 2016. In Westfield, IN, President Trump twice called SGT Bergdahl a **traitor**, stated that SGT Bergdahl **believed in the enemy**, and twice pantomimed firing a rifle when describing what would have been done to SGT Bergdahl in “the old days” and 20 years ago.
- 19 July 2016. President Trump received the Republican nomination for President.
- 9 August 2016. In Wilmington, NC, President Trump called SGT Bergdahl a **traitor**.
- 8 November 2016. President Trump was elected President.
- 20 January 2017. President Trump was sworn in and became Commander in Chief. U.S. Const. art. II, § 2, cl. 1.

A compendium (“Defense Compendium”) of President Trump’s known public statements about SGT Bergdahl is attached. D APP 56 Enclosure 1. The Defense Compendium also notes the number of times many of the enumerated comments were viewed by members of the public.

WITNESSES AND EVIDENCE

The defense will offer in evidence the enclosures to this motion as well as a Defense Video Exhibit (a DVD of some of President Trump’s public statements about SGT Bergdahl). The Defense Video Exhibit may also be found under today’s date on the defense’s *Bergdahl Docket* website, <https://bergdahldocket.wordpress.com/basic-case-documents/>, and on the YouTube website at <https://youtu.be/S2MJem950M>. With the Court’s permission, the defense will show and comment on this exhibit at the hearing.

Witnesses may be dispensed with if the government stipulates that (a) the matters set forth above under Facts and in the Defense Compendium accurately describe President Trump’s public statements and accompanying gestures; (b) the video clips collected in the Defense Video Exhibit are authentic; (c) neither President Trump nor anyone acting on his behalf has ever withdrawn or disavowed his public statements about SGT Bergdahl; and (d) no Soldier died searching for SGT Bergdahl. If the government is unwilling or unable to so stipulate, testimony will be required from:

1. President Donald J. Trump, The White House, 1600 Pennsylvania Ave., N.W., Washington, DC 20500, (202) 456-1414.¹ Synopsis (items (a)-(c) above): he will testify that the matters set forth above under Facts and in the Defense Compendium accurately describe his public statements and accompanying gestures; that the video clips collected in the Defense Video Exhibit are authentic; and that neither he nor anyone acting on his behalf has ever withdrawn or disavowed his public statements about SGT Bergdahl.
2. Charles T. Hagel, former Secretary of Defense, 920 Towlston Rd., McLean, VA 22102-1036, (703) 757-5823. Synopsis (item (d) above): he will testify, based on official reports presented to him, that no Soldier died as a direct and proximate result of the charged offenses.
3. LTG Kenneth R. Dahl, Commander, U.S. Army Installation Management Command, 2405 Gun Shed Rd., Fort Sam Houston, TX 78234-1223, (210) 466-0660. Synopsis (item (d) above): same, based on the AR 15-6 investigation he conducted in 2014.

LEGAL AUTHORITY

1. U.S. Const. art. II, § 2, cl. 1
2. U.S. Const. art. III, § 3, cl. 1
3. U.S. Const. amend. 5

¹ President Trump is not immune from the duty to testify so long as doing so does not interfere with the performance of his official functions. *Clinton v. Jones*, 520 U.S. 681 (1997).

4. U.S. Const. amend. 8
5. U.S. Const. amend. 22
6. Art. 4(a), UCMJ
7. Art. 16(1)(A), UCMJ
8. Art. 25(d)(2), UCMJ
9. Art. 37(a), UCMJ
10. Art. 41(a), UCMJ
11. Art. 43, UCMJ
12. Art. 51(c)(1), UCMJ
13. Art. 55, UCMJ
14. Art. 56, UCMJ
15. Art. 71(a), UCMJ
16. Art. 88, UCMJ
17. Art. 98, UCMJ
18. Art. 134, UCMJ
19. Art. 142(b)(1), UCMJ
20. Art. 142(c), UCMJ
21. 10 U.S.C. § 629(a) (2012)
22. 10 U.S.C. § 1161(a)(3) (2012)
23. 18 U.S.C. § 2381 (2012)
24. R.C.M. 201(b)(5)
25. R.C.M. 502(a)(1)
26. R.C.M. 905(c)(1)
27. R.C.M. 906(b)(11)
28. R.C.M. 912(f)(1)(N)
29. R.C.M. 1002
30. Mil. R. Evid. 508
31. *Manual for Courts-Martial, United States* (2016 ed.) ¶ 60.c.(5)(b)
32. *Gen. Hull's Trial* (1814)
33. *United States v. Haupt*, 330 U.S. 631 (1947)
34. *United States v. Fowle*, 7 C.M.A. 349, 22 C.M.R. 139 (1956)
35. *Trop v. Dulles*, 356 U.S. 86 (1958)
36. *United States v. Calley*, 22 C.M.A. 534, 48 C.M.R. 19 (1973)
37. *Staton v. Mayes*, 552 F.2d 908 (10th Cir. 1977)
38. *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983)
39. *United States v. Brice*, 19 M.J. 170 (C.M.A. 1985)
40. *Clisham v. Board of Police Comm'rs*, 223 Conn. 354, 613 A.2d 254 (1992)
41. *United States v. Wallace*, 39 M.J. 284 (C.M.A. 1994)
42. *D'Aurizio v. Borough of Palisades Park*, 899 F. Supp. 1352 (D.N.J. 1995)
43. *Clinton v. Jones*, 520 U.S. 681 (1997)
44. *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999)
45. *United States v. Richter*, 51 M.J. 213 (C.A.A.F. 1999)
46. *United States v. Villareal*, 52 M.J. 27 (C.A.A.F. 1999)
47. *United States v. Wiesen*, 56 M.J. 172 (C.A.A.F. 2001)
48. *United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2002)
49. *United States v. Barrazamartinez*, 58 M.J. 173 (C.A.A.F. 2003)

50. *United States v. Dowty*, 60 M.J. 163 (C.A.A.F. 2004)
51. *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006)
52. *United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006)
53. *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009)
54. *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010)
55. *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011)
56. *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013)
57. *United States v. Rivaschivas*, 74 M.J. 758 (Army Ct. Crim. App. 2015)
58. *United States v. Rapert*, 75 M.J. 164 (C.A.A.F. 2016)
59. *In re Bergdahl*, Misc. Dkt. No. 17-0069/AR (C.A.A.F. 7 December 2016) (Order)

QUESTION PRESENTED

IS DISMISSAL REQUIRED WHERE A SUCCESSFUL PRESIDENTIAL CANDIDATE HAS, AS A PROMINENT ELEMENT OF HIS CAMPAIGN, REPEATEDLY AND VERY PUBLICLY CALLED A SOLDIER A TRAITOR WHO SHOULD BE EXECUTED AND MADE OTHER FALSE AND HIGHLY PREJUDICIAL STATEMENTS ABOUT THE SOLDIER'S CASE?

ARGUMENT

I

PRESIDENT TRUMP'S STATEMENTS ARE PREJUDICIAL TO SERGEANT BERGDAHL'S RIGHT TO A FAIR TRIAL AND INIMICAL TO PUBLIC CONFIDENCE IN THE ADMINISTRATION OF MILITARY JUSTICE

President Trump's statements deny SGT Bergdahl the due process right to a fair trial and constitute apparent UCI.

A traitor is a person who commits treason. BRYAN A. GARNER, *BLACK'S LAW DICTIONARY* 1635 (9th ed. 2009); see also *AMERICAN HERITAGE DESK DICTIONARY AND THESAURUS* 763 (2014); *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1842 (5th ed. 2011).² "Treason against the United States, shall consist only in levying war against them,

² See also *THE OXFORD ENGLISH DICTIONARY* 241 (1971): "2. *spec. [i.e., specifically]* One who is false to his allegiance to his sovereign or to the government of his country; one adjudged guilty of treason (including formerly *petit treason*) or of any crime so regarded. Also *fig.* or in extended sense." In *United States v. Barrazamartinez*, 58 M.J. 173, 176 (C.A.A.F. 2003), which involved a prosecutor's one-time (and never objected-to) reference to the accused in a marijuana case as "almost a traitor," the lead opinion noted the figurative definition and remarked that trial counsel's argument "gives us pause." Judge Gierke wrote only for himself and Chief Judge Crawford. Judge Baker's dissent rejected the suggestion that "trial counsel used the word traitor in its colloquial and descriptive, and not in its constitutional sense to describe someone who commits treason, like Benedict Arnold." *Id.* at 177. Judge Efron concurred in the result, finding that both the lead opinion and the dissent's interpretations of trial counsel's argument were reasonable. *Id.* Chief Judge (as he now is) Erdmann is the only remaining member of the *Barrazamartinez* court. He joined Judge Baker's dissent. President Trump's repeated and unqualified references to SGT Bergdahl as a traitor, to

or in adhering to their enemies, giving them aid and comfort.” U.S. Const. art. III, § 3, cl. 1; 18 U.S.C. § 2381 (2012).

A court-martial may only try offenses that are “subject to court-martial jurisdiction.” R.C.M. 201(b)(5). Treason is not subject to trial by court-martial. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 629 & n.74 (2d ed. 1920 repr.) (citing, e.g., *Gen. Hull’s Trial* (1814), at 118). It is not a listed offense in the punitive articles. As a capital offense, it “may not be tried under Article 134.” *Manual for Courts-Martial, United States* (2016 ed.) ¶ 60.c.(5)(b); Art. 134, UCMJ (application of general article to “crimes and offenses not capital”).

“[T]he labeling of an accused as a ‘traitor’ is particularly inflammatory.” *Barrazamartinez, supra*, 58 M.J. at 178 (Baker, J., dissenting); see also *id.* at 176 (Gierke, J.) (“potentially inflammatory term”). Sergeant Bergdahl has never been charged with, indicted for, or convicted of treason. Nonetheless, President Trump referred to him as “traitor Bergdahl” and repeatedly described him as, variously, a traitor,³ a “dirty, rotten traitor,”⁴ a “no-good traitor,”⁵ a “dirty, no good traitor,” and “a horrible traitor.”⁶ He did this at rally after rally across the country.⁷

which the defense objected, cannot plausibly be read as merely figurative. In any event, he at least twice applied the specific term “treason” to SGT Bergdahl.

³ 9 April 2015, Breitbart News Interview; 23 April 2015, The John Fredericks Show, VA; 16 June 2015, Trump Tower, NYC, NY; 21 August 2015, Mobile, AL; 16 October 2015, Tyngsboro, MA; 3 November 2015, GMA, ABC, NYC, NY; 23 November 2015, Cleveland, OH; 24 November 2015, *Time Magazine*; 3 December 2015, Republican Jewish Coalition Presidential Forum, Washington, DC; 14 December 2015, Westgate Las Vegas Resort and Casino, Las Vegas, NV; 19 March, Fountain Hills, AZ; 10 April 2016, Rochester, NY; 12 July 2016, Westfield, IN; 9 August 2016, Wilmington, NC.

⁴ On one occasion President Trump described SGT Bergdahl as “a dirty, rotten deserter.”

⁵ *E.g.*, 16 June 2015, Trump Tower, NYC, NY; 21 July 2015, Bluffton, SC; 8 October 2015, Las Vegas, NV; 12 November 2015, Fort Dodge, IA; 13 January 2016, Pensacola Bay Center, Pensacola, FL.

⁶ *E.g.*, 6 August 2015, GOP Debate, Cleveland, OH; 21 July 2015, Bluffton, SC; 19 August 2015, Derry, NH; 27 August 2015, Greenville, SC; 16 October 2015, Tyngsboro, MA; 23 October 2015, Miami, FL; 26 October 2015, Atkinson, NH; 9 November 2015, Springfield, IL; 11 November 2015, Manchester, NH; 12 November 2015, Fort Dodge, IA; 16 November 2015, Knoxville, TN; 18, November 2015, Worcester, MA; 23 November 2015, Cleveland, OH; 3 December 2015, Republican Jewish Coalition Presidential Forum, Washington, DC; 5 December 2015, Davenport, IA; 5 December 2015, Spencer, IA; 7 December 2015, Mt. Pleasant, SC; 11 December 2015, Des Moines, IA; 19 December 2015, Cedar Rapids, IA; 10 January 2016, *Meet The Press*; 13 January 2016, Pensacola Bay Center, Pensacola, FL; 20 January 2016, Tulsa, OK; 4 February 2016, Exeter, NH; 8 February 2016, Manchester, NH; 23 February 2016, Las Vegas, NV; 5 March 2016, Florida; 12 July 2016, Westfield, IN.

⁷ President Trump did not limit himself to rallies. He sent this tweet on 3 June 2014:

Follow

President Trump suggested loosening the laws on treason⁸ and ominously promised to review SGT Bergdahl's case.⁹ He asserted that SGT Bergdahl had defected to the enemy,¹⁰ saying "he went to the other side" and "negotiated with terrorists." He called him "the worst,"¹¹ "no good," "this bum," a "whack job," "this piece of garbage," and a "son of a bitch."¹² In President Trump's eyes, SGT Bergdahl is "a very bad person who killed six



Donald J. Trump

Verified account

@realDonaldTrump

Bowe Bergdahl walked off the base after he was told not to. Solders died looking for him. U.S. should NEVER have made the deal! PUNISHMENT?

RETWEETS 300

LIKES 321

6:09 AM - 3 Jun 2014

<https://twitter.com/realdonaldtrump/status/473813786885775360>.

⁸ 5 March 2016, FL. This would require amending Article III, § 3 of the Constitution. Treason is the only criminal offense specifically provided for in the Constitution and is in a league of its own from the standpoint of stigma. See *United States v. Haupt*, 330 U.S. 631, 648 (1947) (Murphy, J., dissenting) (noting "traitor's stigma"). Over the entire history of the United States, only a handful of people have been convicted of treason against the federal government. These include "Tokyo Rose" (Iva Toguri D'Aquino, who was pardoned by President Ford), "Axis Sally" (Mildred Gillars), and 2LT Martin James Monti, an Army Air Forces flight officer who defected and joined the Waffen SS in 1944. Adam Yahiyeh Gadahn was indicted for treason in 2006 for having given aid and comfort to Al Qaeda, Adam Lichtblau, *American in Qaeda Tapes Accused of Treason*, N.Y. Times, Oct. 12, 2006, at A22, but was never apprehended. He was killed in a drone strike in Waziristan in January 2015. Eric Schmitt, *Adam Gadahn Was Propagandist for al Qaeda Who Sold Terror in English*, N.Y. Times, Apr. 23, 2015, at A12. President Trump should not have associated SGT Bergdahl with these individuals. (The poet Ezra Pound was famously arraigned on a charge of treason but was found to be insane and committed to St. Elizabeth's Hospital in Washington, DC. John Walker Lindh, the so-called "American Talib," was not charged with treason. Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PENN. L. REV. 863, 865 n.5 (2006); see Memorandum from John Yoo, Dep. Ass't Att'y Gen., to William J. Haynes II, Gen. Counsel, Dep't of Defense, 21 December 2001, at 8, available at <https://www.justice.gov/sites/default/files/olc/legacy/2009/12/30/aclu-ii-122101.pdf> (noting potential problems of proof and credibility).)

⁹ E.g., 14 December 2015, Las Vegas, NV.

¹⁰ 27 August 2015, Greenville, SC. In one statement, President Trump referred to SGT Bergdahl as a spy.

¹¹ 23 November 2015, Cleveland, OH.

¹² 13 January 2016, Pensacola, FL.

people.”¹³ He repeatedly and falsely insisted that Soldiers – variously five,¹⁴ six,¹⁵ or either five or six in number¹⁶ -- died searching for him. President Trump also repeatedly observed that deserters used to be shot,¹⁷ implying and at times saying outright that SGT Bergdahl deserves the death penalty. He pantomimed executions by rifle and pistol shot,¹⁸ complete with sound effects,¹⁹ with the same implication.



¹³ 24 November 2015, *Time Magazine*.

¹⁴ 14 December 2015, Westgate Las Vegas Resort and Casino, Las Vegas, NV.

¹⁵ 6 August 2015, GOP Debate, Fox News, Cleveland, OH; 19 August 2015, Derry, NH; 27 August 2015, Greenville, SC; 9 November 2015, Springfield, IL; 24 November 2015, *Time Magazine*; 3 December 2015, Republican Jewish Coalition Presidential Forum, Washington, DC; 5 December 2015, Davenport, IA; 5 December 2015, Spencer, IA; 7 December 2015, Mt. Pleasant, SC; 18 January 2016, Liberty University, Lynchburg, VA.

¹⁶ 23 April 2015, The John Fredericks Show, VA; 21 August 2015, Mobile, AL; 19 December 2015, Cedar Rapids, IA; 13 January 2016 Pensacola Bay Center, Pensacola, FL; 23 February 2016, Las Vegas, NV; 19 March 2016, Fountain Hills, AZ; 14 June 2016, Greensboro, NC; 12 July 2016, Westfield, IN.

¹⁷ 5 December 2015, Spencer, IA; 11 December 2015, Pennsylvania Society, Plaza Hotel, NYC, NY; 14 June 2016, Greensboro, NC.

¹⁸ 14 June 2016, Greensboro, NC; *see also, e.g.*, 19 August 2015, Derry, NH, *available at* https://www.youtube.com/watch?v=b3ci0S0RjXw&feature=em-share_video_user; 12 July 2016, Westfield, IN; <https://www.youtube.com/watch?v=P9echYidpoA> (“boom”).

¹⁹ 12 July 2016, Westfield, IN; *see also* Editorial, *The Soldier Donald Trump Called a Traitor*, N.Y. Times, Nov. 27, 2016, at SR10, *available at* <http://nyti.ms/2g3Sq7h> (Derry, NH, 19 August 2015, “Bing bong”).



Rally audiences were asked whether SGT Bergdahl should be dropped out of an airplane,²⁰ and if so, whether it should be with or without a parachute.²¹ President Trump at times asked whether SGT Bergdahl should be dropped from an airplane into the place from which he was rescued and at other times asked whether he should be dropped into the hands of ISIS fighters²² (whom the United States would proceed to bomb).²³ In effect, President Trump was suggesting not merely that SGT Bergdahl, a native-born citizen, be expelled (a punishment that would violate both Article 55, UCMJ, and the Eighth Amendment, see *Trop v. Dulles*, 356 U.S. 86 (1958)),²⁴ but that he be expelled under circumstances that would lead to his death either by falling from a great height or at the hands of the Nation's enemies.

Those in attendance at the rallies cheered President Trump. They booed at the mention of SGT Bergdahl.

In sum, President Trump publicly—

- predetermined SGT Bergdahl's guilt, repeatedly labeling him a traitor (and on occasion a deserter)
- advocated punishments that are not only unauthorized but cruel and unusual²⁵
- broadcast highly emotional but unfounded matter in aggravation
- opposed leniency
- dismissed evidence of psychological issues that would qualify at least as matter in mitigation
- promised to review the case once he gets into office

It is not unheard of for a candidate for elective office to make statements that turn out to have significant post-election legal ramifications. *E.g.*, *Clisham v. Board of Police Comm'rs*, 223 Conn. 354, 613 A.2d 254 (1992); *Staton v. Mayes*, 552 F.2d 908 (10th Cir. 1977). Questions have also arisen from time to time as a result of statements by incumbent Presidents about criminal matters, and it is instructive to review that history. But

²⁰ *E.g.*, 5 December 2015, Spencer, IA. President Trump suggested dropping SGT Bergdahl from an airplane numerous times. He also suggested various forms of physical violence against SGT Bergdahl. See *generally* Defense Video Exhibit.

²¹ 5 December 2015, Spencer, IA; 23 February 2016, Las Vegas, NV.

²² 20 January 2016, Tulsa, OK; 23 February 2016, Las Vegas, NV.

²³ 20 January 2016, Tulsa, OK.

²⁴ A citizen cannot be removed (the immigration law term for deportation). BRANDON L. GARRETT & LEE KOVARSKY, *FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION* 485 (2013). "It is possible for U.S. citizens to be deported—not because they are expatriated or denaturalized—but by mistake." *Id.*

²⁵ Death flights are not an American tradition. Compare Calvin Sims, *Argentine Tells of Dumping 'Dirty War' Captives Into Sea*, N.Y. Times, Mar. 13, 1995.

there has never been a military justice case like this and there is no precedent for President Trump's sustained *ad hominem* attack on an individual citizen.

President Jefferson made no bones about his belief that his own former Vice President, Aaron Burr, was guilty of treason. He referred to Burr by name as "the prime mover" of a conspiracy in a message to Congress. Thomas Jefferson, Special Message to Congress on the Burr Conspiracy (22 January 1807) ("whose guilt is placed beyond question"), *available at* <http://millercenter.org/president/jefferson/speeches/speech-3497>. "Reported and often reprinted in the partisan network of newspapers across the country, reports of the president's proclamation gave instant credibility to the sensationalist attacks against Burr already widely circulating." R. KENT NEWMYER, *THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION* 36 (2012). Mr. Jefferson's effort failed; Burr got a trial presided over by Chief Justice John Marshall (who enjoyed the protection of life tenure under Article III) – and was acquitted.

Not surprisingly, Presidents have become far more circumspect in the intervening 200 years.

Thus, while President Nixon publicly stated in August 1970 that accused mass-murderer Charles Manson was guilty, press secretary Ron Ziegler walked it back within half an hour, claiming "there is no attempt to impute liability to any accused." PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, RICHARD NIXON, 1970, at 643 n.1; see Katherine Q. Seelye, *Other Presidents Who Weighed in on Big Cases*, *The Caucus: The Politics and Government Blog*, N.Y. Times, July 24, 2009, *available at* http://thecaucus.blogs.nytimes.com/2009/07/24/other-presidents-who-weighed-in-on-big-cases/?_r=0. President Nixon himself issued a clarification that amounted to a retraction four hours later. Richard M. Nixon, Statement About Remarks in Denver, Colorado, Aug. 3, 1970, *in* PUBLIC PAPERS, *supra*, at 644; see Robert B. Semple, Jr., *Impulsive Nixon Action*, N.Y. Times, Aug. 5, 1970, at 21, *available at* <http://nyti.ms/1GXCjvm>. None of these is true of President Trump's repeated comments about SGT Bergdahl. Plainly, moreover, the Manson incident pales in comparison because (1) Manson was being tried in California state court, not a federal court; (2) President Nixon made the comment only once; and (3) the White House immediately recognized the inappropriateness of the comment.

President Clinton's problematic 1998 comment on National Public Radio about the case against "Unabomber" Theodore J. Kaczynski, see Jennifer Warren & Mark Gladstone, *Clinton Supports Trial in Unabomb Case*, L.A. Times, Jan. 21, 1998, *available at* <http://articles.latimes.com/1998/jan/22/news/mn-10935>, is also readily distinguishable from President Trump's statements. It was a one-time remark and, importantly, evinced no opinion on the defendant's guilt or innocence, but simply suggested the case should go to trial.

Turning from civilian criminal justice to the annals of military justice, there have been times when senior officers and even a President have made comments that gave

rise to fair-trial concerns.²⁶ But these too are readily distinguishable from President Trump's statements. Thus, an isolated comment President Obama made that anyone found guilty of sexual assault needed to receive a dishonorable discharge²⁷ was generic and was the subject of prompt curative statements from the White House Counsel²⁸ and Secretary of Defense Chuck Hagel.²⁹

That episode is a far cry from the case at bar, for here there is a lengthy string of statements, which focused laser-like on a single Soldier. And neither President Trump nor any spokesperson for him, the previous administration, or the Army ever "walked them

²⁶ Modern Presidents have typically avoided comment on pending cases. Asked about the pending court-martial of an Army reservist, President Kennedy said at an 18 April 1962 press conference:

Upon learning that a private first class faced a court-martial for writing a letter critical of my actions, I contacted the Secretary of the Army who has the difficult task of maintaining military discipline, and he agreed with me that such offenses are more misguided than criminal in intent. Therefore, I have asked the Army to cancel the trial of Pfc. Larry D. Chidester at Fort Lewis, Washington . . . in the . . . spirit of the Easter week . . .

John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697, 1768 n.366 (1968). President Clinton prudently declined to comment on the Aviano AB ski gondola case acquittal. See *United States v. Ashby*, 68 M.J. 108, 127 (C.A.A.F. 2009), noted in COL James F. Garrett, COL Mark "Max" Maxwell, LTC Matthew A. Calarco & MAJ Franklin D. Rosenblatt, *Lawful Command Influence: Talk Offense, Not Offender; Talk Process, Not Results*, ARMY LAW. Aug. 2014, at 4, 5 n.8. Further back in time, when asked by a reporter for *The New York World* about a high-profile military commission case, President Andrew Johnson "quietly explained that the matter was pending before the U.S. Supreme Court [see *Ex parte McCardle*, 74 U.S. 506 (1868)] and that it was improper for him to express an opinion in advance of the Court's decision." Luke M. Milligan, *The "Ongoing Criminal Investigation" Constraint: Getting Away with Silence*, 16 WM. & MARY BILL OF RGTS. J. 747, 756 & n.46 (2008) (citing JAMES E. POLLARD, *THE PRESIDENTS AND THE PRESS* 423 (1947)). Among other instances spanning more than a century, Prof. Milligan cites

the refusal of President Ronald Reagan to comment publicly on the federal prosecution and conviction of his would-be assassin [John W. Hinckley, Jr.]. Another, more recent, example is President George W. Bush's refusal to comment about the investigation into abuses at Abu Ghraib. Bush's press secretary explained that "[i]f the Commander-in-Chief says anything that might be regarded as prejudicial to the proceedings, those who are conducting the inquiries and those who might be called upon to conduct trials are . . . going to be hamstrung."

Milligan, *supra*, at 757 & nn.49-50 (footnotes omitted). Prof. Milligan noted the George W. Bush administration's refusal to comment on the prosecution of former (and now deceased) National Security Advisor Sandy Berger. *Id.* at 757 n.50.

²⁷ Jennifer Steinhauer, *Remark by Obama Complicates Military Sexual Assault Trials*, N.Y. Times, July 13, 2013, available at <http://www.nytimes.com/2013/07/14/us/obama-remark-is-complicating-military-trials.html>.

²⁸ *Id.* (quoting Kathryn Ruemmler, White House Counsel).

²⁹ CBS News, *Hagel Aims to Blunt Obama Remarks on Military Sexual Assault*, Aug. 15, 2013, available at <http://www.cbsnews.com/news/hagel-aims-to-blunt-obama-remarks-on-military-sexual-assault/>. Memorandum from the Sec'y of Defense to the Military Members of the Dep't of Defense, Integrity of the Military Justice Process (6 August 2013), noted in Garrett *et al.*, *supra*, at 4, 5 n.9.

back” or suggested that he had been misquoted or misunderstood.³⁰ Given the nature of the statements, which through repetition and positive audience response became a signature campaign theme, any attempt to recant them after the filing of this motion and safely after President Trump became Commander in Chief would be deeply cynical and unworthy of credence.

Further back in time, 1LT William L. Calley, Jr.’s defense counsel objected, among other things, to the fact that President Nixon referred to the My Lai Massacre as a massacre. The Court of Military Appeals was unpersuaded that 1LT Calley had been denied a fair trial for this and other reasons. In *United States v. Calley*, 22 C.M.A. 534, 537, 48 C.M.R. 19, 22 (1973), Judge Quinn wrote:

First official government statements were to the effect that a full investigation would be conducted to determine whether the killings took place and, if so, to establish the identity of those responsible. Later statements described what occurred at My Lai as a massacre and promised that those who perpetrated it would be brought to justice. By the time of the trial few persons in the United States who read, watched or listened to the daily news would not have been convinced that many Vietnamese civilians, including women and children, had been killed during the My Lai operation. *It is by no means certain, however, that the conviction that people had died included a judgment that Lieutenant Calley was criminally responsible for those deaths. Our attention has not been called to any official statement or report that demanded Lieutenant Calley’s conviction as the guilty party.*

³⁰ In contrast, President Obama immediately clarified a comment he had made about the principal military commission defendants in an interview with Chuck Todd. NBC News, *Obama: Alleged 9/11 leader will be executed*, 18 November 2009, available at http://www.nbcnews.com/id/34015727/ns/us_news-security/#.WDsTIXeZPs9:

TODD: Khalid Sheikh Mohammed – can you understand why it is offensive to some for this terrorist to get all the legal privileges of any American citizen?

OBAMA: I don’t think it will be offensive at all when he’s convicted and when the death penalty is applied to him.

TODD: But having that kind of confidence of a conviction – I mean one of the purposes of doing – going to the Justice Department and not military court is to show [off to] the world our fairness in our court system.

OBAMA: Well —

TODD: But you also just said that he was going to be convicted and given the death penalty.

OBAMA: Look – what I said was people will not be offended if that’s the outcome. I’m not pre-judging; I’m not going to be in that courtroom, that’s the job of prosecutors, the judge and the jury.

Jack Pitney, *RN & Manson, Obama & Khalid Shaikh Mohammed*, 19 November 2009, available at <https://www.nixonfoundation.org/2009/11/rn-manson-obama-khalid-sheikh-mohammed/>.

(Emphasis added.) What was missing in *Calley* – a predetermination of criminal responsibility -- is present in living color in President Trump's statements about SGT Bergdahl.

It is of course true that at the time of the statements summarized above, listed in the compendium, and reproduced in the Defense Video Exhibit, President Trump was not yet in office. Nor was he subject to Article 37(a), since he was not independently subject to the Code, unlike Sen. John S. McCain, a retired regular whose comments and threat were at issue in *In re Bergdahl*, Misc. Dkt. No. 17-0069/AR (C.A.A.F. 7 December 2016) (Order). Even so, every accused – to include SGT Bergdahl – has a right to the presumption of innocence and a fair trial as a matter of Fifth Amendment due process. *E.g.*, *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011); Art. 51(c)(1), UCMJ. For the reasons explained in Point II(B) below, the circumstances we have described also implicate the institutional concerns that have given rise to the doctrine of apparent UCI and call for the same vigilant allocation of burdens of proof and decisive remedial measures.

President Trump has made it impossible for SGT Bergdahl to obtain a fair trial. He used the opportunity presented by his campaign rallies and fired-up crowds of supporters to condemn SGT Bergdahl *by name* time after time. Thousands of people were in attendance and thousands more viewed the rallies live or via television or the popular YouTube video service. Sergeant Bergdahl's case was one of a small number of recurring themes. It early on became possible to predict more or less precisely what terms of opprobrium would be heaped on him. The only question was *when* – not *whether* – the candidate would get around to him. President Trump transformed his rallies into a televised traveling lynch mob.

Justice cannot be done and public confidence in military justice cannot be maintained under these circumstances.³¹

II

THE CHARGES SHOULD BE DISMISSED

The charges should be dismissed because there are no effective alternative remedial. Dismissal with prejudice is essential in order to safeguard the credibility of the military justice system.

³¹ The effect of President Trump's references to SGT Bergdahl must also be viewed against the backdrop of other events, such as the fact that the chairman of the Senate Armed Services Committee in October 2015 publicly labelled him a deserter and threatened a hearing if he were not punished (*i.e.*, sentenced to confinement). See *generally* Petition for a Writ of Mandamus, *In re Bergdahl*, *supra*. There is no way to measure the synergistic effect of President Trump's and Sen. McCain's statements, but it would be idle to treat them in isolation from one another.

There Are No Adequate Alternative Remedies

Dismissal is a remedy of last resort. *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010). It is appropriate here because the other potential remedies are inadequate.

1. *Prophylactic order*. On 14 December 2015, the general court-martial convening authority issued an order to panel members concerning pretrial publicity. It provided in part:

. . . Do not attempt to discover information on this matter outside of what will be presented during the court-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 concerned Sergeant Bergdahl. This order prohibits you from reading anything about this Soldier or the alleged incidents in any newspapers or magazine, including newspapers and magazines online. . . .

D APP 56 Enclosure 2 (¶ 2). This order, which addressees were required to acknowledge, was a prudent measure, but the list of potential members to whom it was directed became stale because of the passage of time and personnel transfers and retirements. New members will need to be detailed (and similarly warned). Since President Trump's last known public vilification of SGT Bergdahl occurred on 9 August 2016, ordering them to disregard news accounts would be like shutting the barn door after the horse has bolted.

2. *Voir dire*. R.C.M. 912(f)(1)(N) mandates excusal for cause whenever it appears that a person "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." This provision would be of little value if SGT Bergdahl is able to ask members only whether they heard President Trump's comments, agree with them, and can put them aside. Sergeant Bergdahl must be afforded an opportunity to "cut to the chase" and ask the straightforward question whether they voted for President Trump. Under Mil. R. Evid. 508, however, that information is privileged, *see generally D'Aurizio v. Borough of Palisades Park*, 899 F. Supp. 1352 (D.N.J. 1995), and SGT Bergdahl will therefore never be in a position to intelligently exercise his right to make challenges. Mil. R. Evid. 508 also applies to the Military Judge. While the political vote privilege "has rarely generated case law," 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE ch. 507, at 507-1 (Mark S. Brodin ed., Matthew Bender 2d ed. 1997), it applies here. Furthermore, as explained in Point II(B) below, the President, as Commander in Chief, wields great power over the careers of officers and his opinions are necessarily entitled to respect by all military personnel, whether or not they voted for him. It will never be possible to know the true extent of the subconscious impact President Trump's statements about SGT Bergdahl have had on

panel members. See *United States v. Brice*, 19 M.J. 170, 172 n.3 (C.M.A. 1985) (noting role of even “subtl[e] or imperceptibl[e]” effects on triers of fact).

3. *Liberal grants and additional peremptory challenges.* Affording SGT Bergdahl the benefit of a liberal-grant rule for challenges for cause or additional peremptory challenges would not cure the problem created by the R.C.M. 508 privilege. He would have to be afforded an infinite number of peremptory challenges if – as the rule provides – he was precluded from asking the key question about who each member voted for. See ¶ 2 *supra*. It would be an endless cycle.

4. *Curative instructions.* Even the most direct instruction to members will not cure the fair-trial problem President Trump spent over a year to create. Citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054-55 (1991), Prof. Milligan argues that “procedural mechanisms such as voir dire and jury instructions adequately neutralize any prejudicial effects of pre-trial publicity.” Milligan, *supra*, at 797. That is all well and good in the usual case, but the protracted nature and specificity of President Trump’s vilification of SGT Bergdahl as well as the unique relationship between a President and members of the armed forces make this anything but the usual case. There is no way to know what subconscious impact President Trump’s statements would have on military personnel called upon to adjudicate the case. Cf. AE 29 (¶ 9), at 5 (noting inefficacy of curative instruction with respect to evidence of injuries).

5. *Punishment cap.* Limiting the maximum punishment that may be adjudged to No Punishment (as R.C.M. 1002 permits) or ruling out confinement or a punitive discharge³² would not satisfactorily remedy President Trump’s characterization of SGT Bergdahl as (among other things) a very bad person who should be executed, his shock that there were official recommendations against confinement, e.g., <https://www.youtube.com/watch?v=P9echYidpoA>, and his false claims that Soldiers died searching for him. President Trump’s comments went not only to whether and how severely SGT Bergdahl ought to be punished, but to the more fundamental question of his guilt or innocence. SGT Bergdahl has a right to a fair trial in both phases of the court-martial, not just the second. Relief that was limited to sentencing would therefore be inadequate.

6. *Change of venue.* “The place of trial may be changed when necessary to prevent prejudice to the rights of the accused. . . .” R.C.M. 906(b)(11). Because President Trump’s campaign of vilification spanned the country and the related videos have been available to anyone with a television, computer or smartphone, a change of venue would be an empty gesture.

³² The preliminary hearing officer recommended that the charges against SGT Bergdahl be referred to a special court-martial not authorized to adjudge a bad-conduct discharge. Both he and MG Dahl (who conducted the 2014 AR 15-6 investigation) believed, on the evidence available to them, that confinement was unwarranted.

7. *Exclusion of government evidence.* Evidence is typically excluded as a sanction for misconduct by one party or the other. While the Court could direct that, as a remedial measure, the government be precluded from adducing evidence in aggravation (or in response to defense evidence in extenuation and mitigation) in the event there is a sentencing phase, we do not believe that remedy would be sufficient because President Trump's statements go not only to sentencing but to the guilt phase of the case.

B

Dismissal is Required to Safeguard the Credibility of the Military Justice System

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

President Trump's statements, amplified by the echo chamber of today's politicized media and social media, have not become shrouded in the mists of history. Although he was a private citizen when he uttered them, he is now our Nation's Chief Executive and Commander in Chief. As such, he is anything but simply a head bureaucrat.

Like a number of other high federal and state officials, President Trump is protected by Article 88, UCMJ.³³ Congress has made him a convening authority, Art. 22(a)(1), UCMJ, and has given him sweeping military justice rule making authority under which he promulgates the *Manual for Courts-Martial*. Art. 36, UCMJ, and determines maximum punishment limits. Art. 56, UCMJ. His personal approval is necessary for military executions. Art. 71(a), UCMJ. He nominates and commissions officers, and can remove their names from promotion lists. 10 U.S.C. § 629(a) (2012). In time of war he can dismiss any officer. 10 U.S.C. § 1161(a)(3) (2012); see Art. 4(a), UCMJ.³⁴ He nominates the service chiefs, The Judge Advocates General, and senior civilian defense officials. He nominates and may remove judges of the United States Court of Appeals for the Armed Forces. Arts. 142(b)(1), (c), UCMJ.

³³ The judge advocates whose names appear below are subject to Article 88. Sergeant Bergdahl's right to the effective assistance of counsel would protect them from prosecution if anything in this motion were to violate that provision. In the interest of avoiding that constitutional issue and out of respect for the office President Trump occupies, the defense has taken pains to remain well outside the reach of Article 88 in characterizing his conduct in this motion.

³⁴ This is a "time of war" for purposes of the President's power to dismiss officers. Maj. Gen. (Ret) Charles J. Dunlap Jr., *Can Presidents 'fire' senior military officers? Generally, yes . . . but it's complicated*, Lawfare, 15 September 2016, available at <https://sites.duke.edu/lawfire/2016/09/15/can-presidents-fire-senior-military-officers-generally-yes-but-its-complicated/> (citing *United States v. Rivaschivas*, 74 M.J. 758 (Army Ct. Crim. App. 2015) ("time of war" for Art. 43, UCMJ purposes)). The sweeping nature of the President's power and influence is also apparent from the fact that he or she may promote an officer who has not been recommended by a promotion board. *Promotion of Marine Officer*, 41 Op. Att'y Gen. 291 (1956), noted in David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941, 1031-32 n.352 (2008).

President Trump is Commander in Chief. U.S. Const. art. II, § 2, cl. 1. He may exercise command. AR 600-20, Personnel—General: Army Command Policy ¶ 1-5a (6 Nov. 2014). Because he is at the pinnacle of the chain of command, what he says not only has direct and indirect legal consequences, but symbolic potency; he sets the command climate for all of the armed forces. What is more, “respect for the principle of civilian supremacy” is “central” for the armed forces, *United States v. Rapert*, 75 M.J. 164, 171 (C.A.A.F. 2016), and President Trump is the current embodiment of that supremacy.

Had President Trump not been elected, this case would have to be analyzed in pure due process terms (and, like any case, it remains subject to such analysis). However, because he was elected and has become Chief Executive, the case becomes subject to the more exacting standards of apparent UCI jurisprudence. By not repudiating them, President Trump has brought his earlier statements with him into the White House. Common sense teaches that an amnesia epidemic will not suddenly strike the pool of potential members after last year’s long, hard-fought and vivid political battle. That President Trump has only today taken the Oath of Office does not wipe clean the slate of memory, either in the Nation as a whole or within the Army. His statements remain a matter of record but take on even greater salience now that he has assumed the duties of the Nation’s highest office. It would exalt form over substance to treat those statements as immune from apparent UCI concerns because he wasn’t President when he made them.³⁵ They cannot be scrubbed from the record as if he had simply put on a clean shirt for the Inauguration. They are as much the “mortal enemy of military justice” as the endless variations that fill the volumes of the *Military Justice Reporter*, and should be treated no differently.

The “appearance of impartiality cannot be maintained in a trial unless the members of the court are left unencumbered from powerful external influences.” *United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983) (quoting *United States v. Fowle*, 7 C.M.A. 349, 352, 22 C.M.R. 139, 142 (1956)). It is hard to imagine a more powerful external influence than repeated public statements by an individual who has become Commander in Chief. President Trump’s statements place “an intolerable strain on public perception of the military justice system.” “A reasonable member of the public” – “an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.” *Lewis, supra*, 63 M.J. at 415 (quoted in *Salyer, supra*, 72 M.J. at 423). Here, as in *Salyer*, “the actions at issue strike at the heart of what it means to have an independent military judiciary and indeed a credible military justice system.” 72 M.J. at 428.

³⁵ By way of analogy, suppose a person who was not subject to the Code was nominated to be Secretary of the Army, made statements at his or her Senate Armed Services Committee confirmation hearing that were like President Trump’s, and was thereafter confirmed and sworn in without having repudiated those statements. Such a case would have to be analyzed as one of apparent UCI as well as due process. The case at bar is even more compelling because President Trump’s statements were made repeatedly and the office of President is unique and stands on a materially different footing than the service secretaries.

The circumstances strongly support SGT Bergdahl's belief that he cannot obtain a fair trial. It is easy enough to discount that belief because he is an interested party. What cannot be dismissed, however, are the institutional costs. The circumstances require the military justice system to defend itself. Administrations come and go, but the credibility of the system must remain the lodestar. As a result, whether the circumstances are viewed through the prism of due process or as a matter of apparent UCI, the charges and specifications should be dismissed.

CONCLUSION

The charges and specifications should be dismissed with prejudice.


For EUGENE R. FIDELL

Civilian Defense Counsel

For

LTC FRANKLIN D. ROSENBLATT
MAJ JASON D. THOMAS
MAJ OREN GLEICH
MAJ LOUIS M. SCAPICCHIO
CPT JENNIFER D. NORVELL
CPT NINA S. BANKS
1LT LORENA M. MAREZ

CERTIFICATE OF SERVICE

I certify that I emailed the foregoing Motion to Dismiss to the Court and Trial Counsel on 20 January 2017.


MAJ OREN GLEICH

Compendium of Trump Campaign Comments about Sergeant Bergdahl

January 20, 2017

Date	Venue	Statement	Source
2JUN14	Fox and Friends	"And unlike our traitor where we gave five killers, you know, five real enemies of the state. Uh, Bergdahl."	http://www.wnd.com/2014/06/trump-taliban-swap-catastrophe/
15JUL14	Fox News	<p>"I look at this five to one trade, we have a traitor, we have five killers that are looking to destroy this country and that's the kind of a trade we make for a traitor and now I just heard, Martha, you with 350,000 dollars in back pay he's going to get 350,000 dollars in back pay and he was a traitor. Evan (Buetow) sounds terrific, he uh, he said that he mailed all his stuff back home. And how is it possible that he and his other folks that were, you know, that knew this man so well and that knew exactly what happened weren't interviewed having to do with the investigation they weren't even talked to having to do. So I don't think the White House knew what they were doing when they made the deal, they didn't have their facts before- you know when you make a deal you have to have your facts, it's the first thing I tell people, to make a deal you have to have your facts, they didn't have the facts..."</p> <p>"So here we trade five killers that want to destroy us, that are already back in service, to try and knock us out and we trade five killers for one traitor and now we're going to give the traitor \$350,000 and we put him back to work like nothing happened and they don't investigate, and they don't call people like Evan (Buetow) that know exactly what happened. And then you have the weird thing that you just mentioned with the parents. I mean, the father was a pretty weird dude to start off with the way he acted, I thought when</p>	http://video.foxnews.com/v/3675791826001/?#sp=show-clips

		I first saw him I said, 'Woah Woah, that does not look like Duck Dynasty, there's a little bit of a difference there, there's uh, that look is a little different then Duck Dynasty. At first I wasn't exactly sure but I said, 'Woah'. And then I watched the father's action, I watched his statements, I watched his words and I said, 'this is a weird situation going on'. Now the guy gets released and he doesn't even want to talk to his parents"	
28JUL14	Fox News	<p>TRUMP: "I'm looking at this guy, did we do it for the right one, you know? It looks like maybe he was a deserter, was he a deserter? You tell me."</p> <p>FF: "Sounds like it. Almost all evidence does and evidently there might even be video of him leaving the base."</p> <p>TRUMP: "He doesn't even want to come back to the parents. The parents are saying he can't speak English now, we can't this, we can't get in touch with him, I mean, what's going on, but you know the, the interesting thing is when they released him, all of his comrades refused to clap, they refused to say anything, I mean they were very upset."</p> <p>FF: "You're referring to the Secretary Defense Hagel who addressed the troops at Bagram Air Base and to silence after he made the announcement."</p> <p>TRUMP: "Well I know nothing about Hagel other than at his confirmation hearing, I watched. It was the worst performance I had ever seen in the history of confirmations. I mean he was before the various folks that were asking him questions- I have never seen anyone do so poorly. He couldn't get a sentence out. He's our Secretary of Defense so..."</p> <p>FF: "He didn't do much better yesterday in explaining what went into it."</p> <p>TRUMP: "A terrible deal we made by the way. This is a terrible deal. Every soldier and every American is at risk right</p>	https://archive.org/details/FOXNEWSW_20140728_10000_FOX_and_Friends/start/4080/end/4140

		<p>now that was a terrible deal. Now, on top of it, let's hope that's not so, but we're hearing lots of bad things about the person we took."</p> <p>FF: "It seems as though it's a systemic issue when it comes down to leadership here, you understand the art of negotiation and Susan Rice is saying 'We didn't negotiate with the Taliban here and the terrorists' but in fact would you say that we lost this negotiation?"</p> <p>TRUMMP: "Well this isn't even close, and this is a terrible precedent, I mean what we're doing is terrible. So now you have this soldier that's going to be looked in to and I think that's going to turn up being a disaster, and the father with the tweets, I don't know if you saw the father with the tweets but they were really like, anti-American. But I think it's going to turn out to be a catastrophe."</p>	
27FEB15	CPAC Conference	<p>"Now, we have a thinking...Bowe Bergdahl, we all know, Berg [sic] we sell, we make a deal, Bowe Bergdahl for five killers, five terrorists who are right now out there trying to kill us. This is the kind of thinking, and you don't even hear anything about it anymore, people forget. It's like the one week schedule, they forget. The Bowe Bergdahl deal is emblematic of what's going on in this country, all our deals are like that and we can't let it continue to happen."</p>	<p>https://www.c-span.org/video/?324558-11/donald-trump-remarks-cpac&start=455 @7:25</p>
9APR15	Breitbart News interview	<p>"It's no different than the situation with Sergeant Bergdahl, which I call the five-for-one deal. That deal is emblematic of something. Who would give back one traitor for five killers that are now free and back in the service of killing people? Five-for-one and the one we got is a traitor. We should really give Sergeant Bergdahl back to them. The five-for-one-deal is emblematic of the way we negotiate."</p>	<p>http://www.breitbart.com/national-security/2015/04/09/exclusive-donald-trump-obama-totally-out-negotiated-by-iran-taliban-virtually-every-country-in-the-world/</p>

23APR15	The John Fredericks Show, VA (radio)	<p>Donald Trump: “It’s like Bergdahl. You know I use that as an example. Five for one. We get Bergdahl, they get five killers, leaders, who are now back on the- you know, trying to kill us all, right?”</p> <p>John Fredericks: “And we get a traitor.”</p> <p>Donald Trump: “And we get a traitor. I’d send him back, I’d call- You know sometimes you renegotiate a deal, I’d send him back, even if we don’t get their five guys back, they’ll get ‘em back anyway. But I’d send Bergdahl back, let them, we don’t have to, we don’t have to- you know in the old days you’d execute Bergdahl. You know when with this country was strong, and powerful, and meant something you would execute Bergdahl. Now he’s being- They, they said, ‘Oh well, he had some psychological problems.’ And you know, the General that was there, these are not General Patton, these are not General Douglas McArthur the General that went there knew all about this! Before the trade! I figured maybe it slipped through, maybe they didn’t know. They knew all about it, this General met with the five or six soldiers that told him the guy was a traitor! And we probably lost five lives and maybe now six lives of guys that went out looking for him and trying to get him back. So you know, as far as I’m concerned, send Bergdahl back, drop him right in the middle of those characters and they’ll take care of him.”</p>	<p>http://www.johnfredericksradio.com/political-insigher-trump-unplugged-on-the-john-fredericks-show/</p> <p>https://www.youtube.com/watch?v=pLmi8fN5CAg @12:10 (635 views as of 17JAN17)</p>
9MAY15	Freedom Summit Greenville, NC	<p>“We got Bergdahl, they get five leaders, killers that want to kill us all. And they’re all back on the battlefield, by the way, and we got this piece of garbage named Bergdahl. Who, years ago, (crowd cheers), who years ago we would’ve shot for treason and now they’re saying, ‘well, you know, he doesn’t feel good, he had a hard life.’ When I saw his father standing with Obama, I said, ‘Woah, woah, woah! Woah!’ (Crowd laughs). I love the guys at Duck Dynasty, they stay</p>	<p>https://www.youtube.com/watch?v=5wq7Y0xVXzc @20:10 (9,065 views as of 17JAN17)</p>

		at my luxury hotels, but this, this did not look like Duck Dynasty guys.”	
16JUN15	Campaign launch, NYC	“He’s the one (President Obama) that did Bergdahl. We get Bergdahl, they get five killer terrorists that everybody wanted over there. We get Bergdahl. We get a traitor. We get a no-good traitor, and they get the five people that they wanted for years, and those people are now back on the battlefield trying to kill us. That’s the negotiator we have.”	http://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/
23JUN15	MD GOP Dinner	“We save a Sergeant Bergdahl, who’s a traitor, a no good traitor. We lose six lives over this guy. And yet James Foley is beheaded. We didn’t fight for James Foley. He was this wonderful guy whose parents I got to know very well over the last few months. Actually, up in New Hampshire. We didn’t fight for James Foley, he was beheaded and he was a wonderful young man. But we fought to get a traitor, who, when our country was strong, would’ve been executed for desertion. We lost six, great, young people trying to find him, and they all knew that he deserted and Obama knew that he deserted. And yet we took him back- I call him the five for one President- and we gave five killers, and leaders, who are now back on the battlefield trying to kill everybody, including us, by the way.”	https://www.youtube.com/watch?v=ySP2tDgPoN4 @21:20 (80 views as of 17JAN17)
23JUN15	MD GOP Dinner w/CNN	“We get Bergdahl, right? We get Bergdahl, think of it, they get five killer leaders that are out there trying to kill everybody and behead everybody right now, and we get a traitor named Sergeant Bergdahl. Six people died trying to	https://www.youtube.com/watch?v=ibCf6ZuXD7E (126 views as of 17JAN17)

		get this traitor. Six people. And yet James Foley, we gave up on him and he's beheaded. I want James Foley, I don't want Bergdahl, I want James Foley. So we have stupid people, we have people that don't know what they're doing. It's amateur hour"	
11JUL15	Las Vegas, NV	"I mean here's a guy- Sergeant Bergdahl. We get Bergdahl, a traitor, a no good traitor, who in the good old days would've been executed. We get Bergdahl, they get five killers that are right now back on the battlefield. The five people that they most wanted, they got them, and we got Bergdahl."	http://thehill.com/policy/defense/256437-trump-says-bergdahl-should-be-executed https://www.youtube.com/watch?v=qXjz3qLufv8 @27:45 (841,531views as of 17JAN17)
11JUL15	Phoenix, AZ	"We have Sergeant Bergdahl, a traitor. (Crowd boos). So we negotiate for Sergeant Bergdahl, a no good traitor- six people were killed trying to find him. Six young, in this case men, went out to try and get him. Six of 'em never came back. Six people died, and we have Sergeant Bergdahl. And here's our deal, this is just like the stupid deal that we're making with Iran, on nuclear. This is just like everything else we do, the deals we went and made with China, the deals we make with Mexico. We don't know what we're doing. So we get Bergdahl, a no good traitor, and frankly, you know I renegotiate deals every once and awhile, not too often. But, I'd send him back, and if they don't want him, send him back anyway. I want to renegotiate that. They get- they get five killers that are right now back on the battlefield trying to kill everybody, including the people in this room. And these were the five people that they most wanted."	https://www.youtube.com/watch?v=ls3m7NUOqxs @1:03:05 (989,379 views as of 17JAN17)
14JUL15	CNN, VA	"It's like Sergeant Bergdahl, we get a traitor named Sergeant Bergdahl and they get, look what they get- they get their five guys they most wanted anywhere in the world. Who makes	https://www.youtube.com/watch?v=V6OfBWrcObs

		deals like this? And by the way, with Bergdahl, six people died trying to get that traitor back. So we get Bergdahl, they get five guys that they wanted, that's not the way you deal."	@1:45 (2,159 views as of 17JAN17)
18JUL15	Family Leadership Summit, Fox News	"Persons captured, they're heroes as far as I'm concerned, unless they're a traitor like Bergdahl, he was captured, he's no hero."	https://archive.org/details/FOXNEWSW_20150719_10000_FOX_and_Friends_Sunday?q=trump+bergdahl#start/7414/end/7474
21JUL15	Bluffton, SC	"I've seen one sided deals before, this is like Sergeant Bergdahl. We get a traitor, a no-good, rotten traitor, like Bergdahl, and they get five killers that they most wanted in the whole world who are right now back on the battlefield trying to kill everybody, including us, okay? What kind of a deal is this? Not good, right? (Referring to audience member) I like that, stand up! Who said that? I like that. You're right, lousy, lousy deal. But we only make lousy deals. I call Obama the five-for-one President. We get Bergdahl, they got five guys they dream of, okay?"	http://www.politifact.com/ruth-o-meter/statements/2015/jul/23/donald-trump/trump-quantanamo-prisoners-swapped-bowe-bergdahl-a/ https://www.youtube.com/watch?v=g0dre-LxWFs @31:50 (22,575 views as of 17JAN17)
6AUG15	GOP Debate I, Fox News, Cleveland, OH	"You look at Sergeant Bergdahl, we get Bergdahl, a traitor and they get five of the big great killers leaders that they want."	http://video.foxnews.com/v/4406746003001/watch-a-replay-of-fox-news-prime-time-presidential-debate/?#sp=show-clips @1:24:55
19AUG15	Derry, NH	"Take Sergeant Bergdahl, does anybody remember him? (Crowd boos). So, so this is the way we think. So we get a traitor named Bergdahl, a dirty, rotten traitor (crowd applauds), who by the way when he deserted, six young, beautiful people were killed trying to find him, right? And you don't even hear about him anymore! Somebody said the other day, 'Well he had some psychological problems.' You	http://www.wsj.com/video/trump-bergdahl-a-dirty-rotten-traitor/F83D4013-58A3-4A8E-BE95-74DAC2A03BB1.html

		know, you know in the old days (mimics shooting a rifle), bing, bong! (Crowd cheers). When we were strong, when we were strong. So we get Bergdahl, a traitor, and they get five of the people that they most wanted anywhere in the world, five killers that are right now back on the battlefield doing a job. That's the kind of deals we make! That's the kind of deals we make, right? Am I right?"	https://www.youtube.com/watch?v=b3ci0S0RjXw (38,905 views as of 17JAN17)
21AUG15	Mobile, AL	"Has anybody heard of Sergeant Bergdahl, the traitor? (Crowd boos). No, no the traitor. I call President Obama the five for one President. We get Sergeant Bergdahl a traitor, who, by the way, six people, at least, that we know of, six people were killed trying to get this guy back. Six people, they went after him. They wanted to get him back. So we get Sergeant Bergdahl and they get five people that they desperately wanted for years that are right now back on the battlefield trying to kill everybody, including us."	http://www.washingtonpost.com/politics/trumps-audacious-southern-spectacle-is-part-of-his-strategy/2015/08/21/31da2a88-4812-11e5-846d-02792f854297_story.html https://www.youtube.com/watch?v=XLCdDI3GAzE @16:20 (75,641views as of 17JAN17)
27AUG15	Greenville, SC	"Sergeant Bergdahl, right? We know Sergeant Bergdahl, a traitor. Six people died looking for him, he left! He deserted, went to the other side. He didn't realize the other side wasn't treating him so nice, you know they were not too nice to him. They roughed him up. But- he says good (points to audience member, crowd laughs). I agree, good! Drop him back, let's re-trade that deal. So we get Bergdahl a traitor- these are the same people that make our trade deals- we get Bergdahl, a traitor that we don't want. I don't want him, do you- does anybody want him? (Crowd boos). And they knew that he was a traitor because they had a General and a Colonel interviewing the guys and the people that were with him! So they knew he left! It wasn't like, oh they found out later. They knew before the deal was made. So we get a	http://thehill.com/blogs/blog-briefing-room/252125-trump-univision-anchor-is-a-lunatic https://www.youtube.com/watch?v=kTMn49vZjxY @19:50 (10,127 views as of 17JAN17)

		traitor named Bergdahl- six people died trying to find him- we get him, they get five killers that they've wanted for ten years. They were released and now they're on the battlefield trying to kill everybody, including us."	
8OCT15	Las Vegas, NV	"We're tired of Sergeant Bergdahl, who's a traitor. (Crowd cheers). He's a traitor, a no-good traitor, who should've been executed (crowd cheers). We get Sergeant Bergdahl and they get five of the biggest killers that they've wanted more than any people, more than any people, for years! They've been trying to get these five killers and they're all now back on the battlefield, and we've got Bergdahl, and yesterday I heard he probably won't even serve any time and 30 years ago he would've been shot! (Crowd boos)."	https://www.youtube.com/watch?v=QgtDZGO8ES0 @1:06:05 (8,579 views as of 17JAN17)
11OCT15	Fox News Judge Jeanine	"Well I think it's a disgrace, he was a deserter 100%, I know you agree with this and he was a deserter 100% it's not like the old days, in the old days you deserted you were in big trouble. Today they want to find all sorts of excuses- I don't know what, it's crazy, it's just crazy what's going on with our country is absolutely insane. Five good, great soldiers, wonderful, young people and probably six were killed looking for him. And now what do we get? We get him, which you can have him, we get him, and they get, they get five of the great killers that they've wanted for ten years, they've wanted these people back. This is a typical trade with Obama, we get Bergdahl and they get five killers, no good."	http://video.foxnews.com/v/4550198667001/?#sp=show-clips
14OCT15	Richmond, VA	"That's like Sergeant Bergdahl. We got a guy (crowd boos), it's true, no it's true. We have a guy- six young people, great people, were killed looking for him. We get Bergdahl, they get five of the great killers that they've wanted for ten years, right? These are the deals that we make because we have leadership that doesn't know what the hell it's doing. (Crowd cheers). Now in the old days, with Bergdahl, who is a traitor,	https://www.youtube.com/watch?v=BVZn1RQW-aE @48:00 (37,927 views as of 12DEC16) This video was removed by an unknown user on or before 17JAN17

		it was treason! You shoot him! He would get shot! (Crowd cheers). They think he won't even get jail time anymore! Well he had some psychological difficulty, they don't really know what happened, wasn't feeling so good. We are just heading in the wrong direction."	
16OCT15	Tyngsboro, MA	"Sergeant Bergdahl, right? (Crowd boos). No, no, think of this guy. In the old days, he'd get shot for treason right? Right? These guys would tell you, they're too nice but they know, believe me, they know. But Sergeant Bergdahl. So we have Bergdahl. So we get Bergdahl, this is the way we trade, this is, like, emblematic of everything we do. We get Bergdahl, a rotten traitor who should be frankly, who negotiated with terrorists, who left, who six people died looking for him, who, by the way, the other night on every television! They said he won't even go to prison! (Crowd boos). Because think of it, did you hear this? Because well he might have psychological problems. He's not feeling so good. Can you believe it? So we get Bergdahl and they get five of the people that they most want, total killers, leaders who are now back fighting trying to kill everybody in their bed. That's what they get. They get the five people they most wanted and we get one traitor. I'll tell you what. Probably can't do it, but if I win I may just have him floating right in the middle of that place and drop him, boom. Right in the middle, let 'em have him! Let 'em have him. I mean that's cheaper than a bullet."	https://www.youtube.com/watch?v=Cslky5Maftc @26:10 (139,384 views as of 9DEC2016) This video was removed by an unknown user on or before 17JAN17
23OCT15	Miami, FL	"Think about Sergeant Bergdahl, a traitor (crowd boos), a traitor! Think of him. He's a dirty, rotten traitor. Six people died going after him, they died! Six young, incredible, brave people died. The deal is we get traitor Bergdahl, they get five of the best people that they have, that they've been after for ten years, they get five killers that are right now leading and back on the battlefield trying to kill everybody, including	https://www.youtube.com/watch?v=ZvsVP_G30t4 @46:10 (144,343 views as of 17JAN17)

		<p>you, and we get Bergdahl, a traitor, okay? We get Bergdahl. And then, two days ago it came out, that Bergdahl! They don't want to put him in jail. You know in the old days (mimics shooting a rifle), boom. Firing squad. No, it's true (mimics shooting a rifle). I love the Second Amendment, I love the Second Amendment. (Crowd cheers). So two days ago, it comes out that Sergeant Bergdahl won't even have to go to jail. No, think of it. (Crowd boos). Where have we gone? Where have we gone? What's going on with our country? Okay? I'll tell you one thing; if I win, it's not going to be my most important job, not if, ehh we have to say if, hey look, look- (points to the audience) they're all going, 'Not if, when!.' Alright, alright. Okay, I have a- you know what the word should be if but you know what, they're going crazy up here, they're saying 'when, when, when', so when! Okay? When! When. And I hope so, because I'll tell you- we can make our country so great again, we'll make it so great. But I promise you, we will be reopening that Bergdahl disaster, we will be reopening it. It's going to be reopened."</p>	
26OCT15	Atkinson, NH	<p>"Sergeant Bergdahl, we get Bergdahl, a dirty rotten traitor, who's not even going to go to jail! He would've been shot 20 years ago. We get Bergdahl, think of it, we get Bergdahl and they get five killers that they've wanted for ten years that are right now back on the battlefield killing people. And believe me they want to kill everybody in this place too. That's the deal we made, that's emblematic of the deals we make."</p>	<p>http://nhpr.org/post/trumps-targets-media-carson-and-obama-order</p> <p>https://www.youtube.com/watch?v=U06yfv8dfuo @17:50 (49,241 views as of 17JAN17)</p>
27OCT15	MSNBC	<p>"Sergeant Bergdahl. We get Bergdahl, they get five of the killers that they've wanted for a long period of time."</p>	<p>https://archive.org/details/MSNBCW_20151027_10000_Morning_Joe?q=bergdahl+start/3960/end/4020</p>

3NOV15	GMA, ABC, New York, NY ("Crippled America" Book release)	"I always mention as an example Sergeant Bergdahl, a traitor. We get Sergeant Bergdahl and they get five of the people they wanted, and they wanted badly. And that's not the way it's going to work anymore. So we write about it in the book."	http://abcnews.go.com/GMA/video/donald-trump-discusses-family-crippled-america-34933000 This video was removed by an unknown user on or before 8DEC16 https://www.youtube.com/watch?v=ZSIXkOX6n3s @1:20 (96,128 views as of 17JAN17)
9NOV15	Springfield, IL	"I always say Sergeant Bergdahl, that's military. But we get a dirty, rotten traitor, who I'd like to dump right back where we got him (crowd cheers). You know, he left! He left. Six people got killed looking for him, right? He left because he said, 'Oh.' When I looked at his father I said, 'Woah, woah, what have we here?' Right? I said, 'Woah what's this all about?' So, he left and he thought, 'Oh this is going to be wonderful,' and oh then they knocked the hell out of him. He didn't have a good time. I don't think he'll be going there anytime soon, right? But here's the amazing thing, in the old days when we were strong and wise, we shoot a guy like that. A traitor! He's a traitor. He's a traitor. (Crowd cheers). No, no, we shoot him! I don't care! In the old days, when we were strong, and wise, traitors were treated very, very harshly. If you look at what happened last week, they feel that he wasn't really 100% feeling well. Perhaps he should get no jail time whatsoever. No, do you believe this? This is what- okay, so here's the way we negotiate. I call Obama the five for one President. We get Bergdahl, they get five of	https://theconservativetrenchouse.com/2015/11/09/Donald-Trump-Rally-In-Springfield-Illinois-Livestream/ https://www.youtube.com/watch?v=0euhRxQCNzs @51:35 (158,361 views as of 17JAN17)

		their best, toughest, meanest killers that they've been trying to get out of there for nine years, right?"	
11NOV15	Manchester, NH	<p>"We don't have victories with Sergeant Bergdahl. With this traitor, this dirty, rotten traitor. (Crowd applauds). He gets no jail time, he gets no jail time. No, think of it. Right? Twenty-five, fifty years ago, thirty years ago, what would they have done? Bing (mimics handgun firing with his hand). Right? (Points to Audience member). He just said it, I didn't have to say it, I'm just imitating him, bing (mimics handgun firing with his hand). No, he's going to get no jail time, nothing! They say, 'Well he wasn't feeling so-.' Six people died going out looking for him. So we make a deal. I call him the five for one President. This is the way we deal. Whether it's economics or military. He makes a deal, five of their best, most wanted people. We get Bergdahl, they get five killers that are right now back on the battlefield looking to kill everybody, including us. This is the deal we make. And they knew he was a traitor before they made the deal. I figured well maybe they got snookered, maybe they didn't know. They had a General and a Colonel seeing everybody in that division, and they're all saying, 'No he left, he's a traitor.' So they knew it was, you know, they're dealing with a traitor. If I heard he was a traitor I'd say, 'That's okay, no deal, you can keep him.' I would say we never want him back (pointing to audience member), right Steve? We don't want him back."</p>	<p>http://www.wmur.com/politics/after-strong-debate-trump-makes-early-morning-appearance-at-recordsetting-politics-and-eggs-event/36388534</p> <p>https://www.youtube.com/watch?v=H4c3c8qdNDM @28:55 (69,433 views as of 17JAN17)</p>
12NOV15	Fort Dodge, IA	<p>"I see Sergeant Bergdahl, a traitor, a no good, dirty, rotten traitor (crowd cheers). And we knew he was a traitor before we made the deal. They had a General and they had a Colonel talking to all of the young people that were with him as soldiers. And what happened? Six people went out looking for him, six people were killed. So six people were lost looking for him. And what happens now? In the old days he would've been shot for being a traitor. He's going to get</p>	<p>http://www.bostonglobe.com/news/politics/2015/11/13/the-most-stunning-quotes-from-donald-trump-iowa-remarks/uoGOHIWcIQhWERGMYEIO5J/story.html</p>

		<p>nothing! I heard the other day, I was watching- they've recommending no jail time, no nothing. I mean seriously, in the old days, when you were a young guy (Trump points to audience member), right? When I was, they would've, they would've... it's gone! When we were strong and when we were smart. You're a traitor, you're shot! So he went out, he left! He deserted, he left, and they recommended nothing. But here's the thing, so we knew he was a traitor and we made the deal anyway, I wouldn't have made the deal. I would've said, oh he's a traitor? That's okay, they can have him for the rest of his life. (Crowd cheers). No, I would've done it! I wouldn't even want him, you know, frankly they're so brutal that's not a good life. See it turned out to be a little tougher than he thought. He thought he'd go over, 'Hey babe how you doin'? How you guys doin'?' Boom, boom, boom (mimics punching), they beat the crap out of him, which is fine. That's fine. I'm happy about that (crowd laughs). I don't think he's going there for a vacation, you know he thought he was going to go and say hello to the enemy and talk to the enemy. But what happens is, he came out and now what we did, knowing he was a traitor, we gave them, I call Obama the five for one president, we gave them five of the best killers that they most desperately wanted, and they wanted them for nine years. We gave them five people that are right now back on the battlefield doing all sorts of damage, wanting to kill everybody, including you, and that's our deal. I call him five for one. And the one's no good. Frankly I'd take the one and drop him right back where the hell he came from, you know, if you want to know the truth. (Crowd cheers). I really would."</p>	<p>https://www.youtube.com/watch?v=apaToLjdRp4 @23:15 (913,430 views as of 17JAN17)</p>
16NOV15	Knoxville, TN	<p>"The worst to me was Bergdahl. We get Bergdahl, they get five killers they've wanted for nine years! And we get Sergeant Bergdahl, a dirty, rotten traitor (crowd cheers)."</p>	<p>http://www.breitbart.com/big-government/2015/11/17/do</p>

			nald-trump-vows-bomb-s-isis-ridicules-weakness-obama-clinton/ https://www.youtube.com/watch?v=eHgB6g2FDq0 @30:00 (59,289 views as of 17JAN17)
18NOV15	Worcester, MA	<p>“I use it all the time, it’s not a financial deal although you could say it’s even financial, but we can get Sergeant Bergdahl, a dirty, rotten traitor (crowd boos), and give them, and give them five of the greatest killers on Earth that they’ve been after for nine years. But that’s the deal. So we get Bergdahl, a traitor, and we knew he was a traitor, and six people, six young, great people were killed going after this bum. Six people! Now in the old days- there’s my man (points to audience member), stand up. What do we do with Sergeant Bergdahl 50 years ago? That’s right. Boom (mimics a handgun firing with his hand). Boom! A great veteran. Boom! He’s gone! He’s gone! Six people killed looking for Bergdahl, and we give five people to get him back. And we knew he was a traitor because we had a General and a Colonel go and interview all of the soldiers that he dealt with and that he was with. They said he deserted. So they knew. You know it’s one thing they made a mistake, but they knew! We can’t do things like that anymore. And by the way, on Bergdahl, I see the other day, no time! They don’t want to give him any time! They’re letting him out! They’re not only going to not shoot him (crowd boos), they let him out! They said, ‘Well, he’s been through a lot, oh yeah, been through a lot.’ Six young great people died looking for him. And he’s recommended to get nothing! Zero! And we can’t let that happen anymore.”</p>	https://www.washingtonpost.com/news/post-politics/wp/2015/11/18/nine-things-that-happened-during-donald-trumps-visit-to-worcester/?hpid=hp_hp-more-top-stories_pp-trump-115am%3Ahomepage%2Fstory https://www.bostonglobe.com/metro/2015/11/18/watch-live-donald-trump-hosts-rally-worcester/a444uyJfl6yU9uvq6G7hnK/story.html https://www.youtube.com/watch?v=6QWuC7GAKac @12:00 (913 views as of 17JAN17)

23NOV15	Columbus, OH	<p>“Sergeant Bergdahl, the worst, the worst! He’s a traitor, he’s a dirty, rotten traitor (crowd cheers). And I always say, we get Bergdahl, a horrible traitor who deserted! In the old days you get shot! (Mimics a handgun firing with his hand). We get Bergdahl, and this is the way we negotiate, they get five of the greatest killers that they know, they’ve been after them for nine years! So they get these five guys that are now back on the battlefield trying to kill everybody including all of us. We just don’t have a clue.”</p>	<p>http://www.cleveland.com/open/index.ssf/2015/11/donald-trump-holds-campaign-rally-in-columbus-live-coverage.html</p> <p>https://www.youtube.com/watch?v=reBkHeQdiy4 @1:07:40 (115,869 views as of 17JAN17)</p>
24NOV15	Time Magazine	<p>TIME: I have never heard a politician sort of celebrate the extrajudicial punishment of someone. And this goes back to that mean tough talk thing that we were talking about before.</p> <p>TRUMP: Well I think Bergdahl is a very bad person who killed six people, who went after him, you know, six people went after him. And the amazing thing is that the government knew that he was a traitor before they made the deal. Because they had a general and a colonel interviewing all of the people that he was with in his group.</p>	
3DEC15	Republican Jewish Coalition Presidential Forum, Washington, DC	<p>“Sergeant Bergdahl, alright? Sergeant Bergdahl. We get a traitor they get five of the greatest killers that they’ve wanted for nine years, you know the deal was five for one. And they knew he was a traitor before we made the deal, you know about Sergeant Bergdahl. He deserted. Six people were killed trying to get him back. They were looking for him. A General and a Colonel went to see all those people, they said, ‘No he deserted, he was a traitor.’ And we still made the deal! So we get a traitor- we can give him back, do you want to renegotiate deals, some of us renegotiate deals. I would say about 99.9- is there anybody that doesn’t renegotiate deals in this room? This room negotiates- I want to rene- this room. Perhaps more than any room I’ve ever</p>	<p>https://www.youtube.com/watch?v=PQYOvDmWqjo @17:10 (111,424 views as of 17JAN17)</p>

		spoken to. Maybe more. It's okay, I've been called a nut a couple of times too. But the fact is I want to renegotiate that deal. I want to drop him right smack in the middle of where he came from. The hell, they can have him! Even if we don't get the five guys back because that's not going to happen, because you know where they are right now? They're right now all back on the battlefield fighting us, and trying to kill us and killing anybody that gets near 'em. So they get their five guys that they wanted, for nine years they've wanted 'em! And we get a dirty, rotten traitor."	
5DEC15	Davenport, IA	"We have a Sergeant Bergdahl who is a dirty, rotten traitor (crowd cheers). Six people were killed, six people, going out trying to get him back. Six young, great people. I watched the mothers and the fathers talking about it. They knew he was a traitor when they made the deal, and yet Obama and his geniuses made a deal. Sergeant Bergdahl a dirty, rotten traitor, for five guys that they've tried to get for the last nine years out of Gitmo. They've tried to get them for the last nine years, and now they have them. And they're back out on the battlefield trying to kill everybody, and if they get the chance they'll be trying to kill you, and all of us."	https://www.youtube.com/watch?v=mm9BDH77r00 @1:26:00 (43,489 views as of 17JAN17)
5DEC15	Spencer, IA	"Whether it's Sergeant Bergdahl where we get a dirty, rotten traitor. Six people were killed looking for him, and now he's not even going to get a sentence it looks like, can you believe it? You know 25 years ago he's shot. Fifty years ago they don't even wait a week. Seventy years ago they do it the first hour, right? He knows (pointing to audience member). Today they announce probably he'll be receiving no punishment, can you believe it? Six young, great people, soldiers, killed looking for him. He deserted! So here's our deals; and these are the same deals we make with Iran, the same deals we make economically with China, Japan, Mexico. We get Bergdahl a dirty, rotten traitor who's no	https://www.youtube.com/watch?v=4rWyQM-E8Aw @13:15 (35,995 views as of 17JAN17)

		<p>good, and they get five of the biggest, worst killers that they have in that part of the world, and those guys are all back now on the battlefield trying to kill everybody, and us, and that's what we get. That's the way we negotiate. And we knew, I said, 'Well they must've made a mistake, they probably didn't know he was a deserter.' I mean he's a dirty, rotten traitor and they knew because they had a General and a Colonel interviewing his people that he worked with and he was with! And they said 'no, he deserted.' So they knew before we made, and they made the deal anyway. I don't know what's with these people. I don't want him. Maybe we can send him back. Let's fly him over, we'll dump him right in the middle, throw him out of the plane. Should we give him a parachute, or not? I say no! No, don't give him a parachute. I don't, why, why would we want to waste a parachute? See, see we don't run our country actually with love. We're not, we're not treating our country right. We're not treating the people of our country right. When you do things like that you're running it not with love, you're running it with stupidity but you're running almost, there's a certain hatred, you're just doing the wrong thing. And the way we negotiate is ju- I use Bergdahl as an example sometimes because while it's not an economic thing, although it actually is to a certain extent, that's the deals we make."</p>	
7DEC15	Mt. Pleasant, SC	<p>"Our President makes a deal for Sergeant Bergdahl a dirty, rotten, no good traitor. (Crowd boos). Who, think of it, they knew he was a traitor because a General and a Colonel went to see his group. Six people were killed looking for him, okay? Six people were killed, young, unbelievable, I watched the parents on television. I've seen the parents. But I watched the parents on television. Devastated. Will never be the same. They left to try and bring him back. He left! He deserted. You know, in the old days when we were a strong</p>	<p>http://www.c-span.org/video/?401762-1/donald-trump-campaign-rally-mount-pleasant-south-carolina</p> <p>https://www.youtube.com/watch?v=1Od9Bdfadv</p>

		country, it would be (mimics firing a rifle) boom, gone. No it's called desertion! Now the other day I heard they won't even do anything to him. Can you believe it? They think he's going to get away with nothing, he's going to have nothing. So he left, oh they treated him pretty rough though. He said, 'Oh I shouldn't have done this. This isn't working out the way, this isn't working out the way I thought.' Anyway, so we get him back and here's the deal we make, we get a dirty, no good traitor, six people killed trying to find him, they get five of their greatest killers that they've been after, after! Think of it, for six years, in fact I hear nine years. So they get these total- right now they've gone, they're out on the battlefield trying to kill everybody in front of 'em, including you folks, I hate to tell you. So we get Bergdahl and they get five of the killers they've wanted for many years."	@12:40 (64,375 views as of 9DEC16) This video was removed by an unknown user on or before 17JAN17
11DEC15	Pennsylvania Society, Plaza Hotel, NYC, NY	"...suggested that Army deserter Bowe Bergdahl should be shot." – <i>Things get violent at Donald Trump Speech at NYC luncheon</i> , 11DEC15 Tribune-Review	http://triblive.com/news/adminpage/9612972-74/trump-hotel-protestors#axzz3u6QvEtiK
11DEC15	Des Moines, IA	"The decisions that are made. Bergdahl. Where we get Bergdahl and they get five killers. We get this horrible, dirty, rotten sp- this horrible traitor. We get this horrible, terrible traitor and they get five killers that they've wanted for nine years. The worst killers and they're all back on the battlefield."	https://www.youtube.com/watch?annotation_id=annotation_386379671&feature=iv&src_vid=BGbmcW2fldU&v=yR1IIGTVmpE @29:35 (726 views as of 9DEC16) This video was removed by an unknown user on or before 17JAN17

14DEC15	Westgate Las Vegas Resort & Casino, Las Vegas, NV	<p>“Now I hear Bergdahl, no jail time for Bergdahl. I mean, no jail time! (Crowd boos). We have a man there who left. He’s a traitor. He left. Five people killed looking for him and what happens? Like, for years he’s been under the same thing. And I hear there’s not going to be jail time, it’s incredible. You know, 50 years ago, what would have happened? Boom(Mimics shooting a rifle, the crowd cheers). Twenty-five years ago, probably the same thing but it would’ve taken longer; ten years ago, jail time; five years ago, a couple of years; now, he’s going to get nothing. He’s going to get nothing (crowd boos). Well I’ll tell you what, I’m just thinking of it now for the first time, if I get in, we will review his case, I promise you.”</p>	<p>https://www.youtube.com/watch?v=VuVmBgR5mIY @21:25 (210,758 views as of 17JAN17)</p>
19DEC15	Cedar Rapids, IA	<p>“I look at a Sergeant Bergdahl, I call him the five for one, where he’s a traitor, a dirty rotten traitor. Where, no, when you think about it, where, where we lose, where we lose five people, probably six... dead! Great young people. I see the mothers and fathers on television talking about how great their son was etcetera in this case sons. But I watch the people they’re like, they’re like devastated, their lives are a disaster it’s just horrible. Talking about how great, drawn pictures. Killed looking for this guy that we don’t, that we shouldn’t even want. Now when we made the deal we knew he was a traitor because they had a General and a Colonel there talking to everybody that knew him. And they knew he left, and that he was a traitor. So we lose five or six people and we make a deal. We knew this. So we give them five of the worst killers that are right now all back on the battlefield, you’ve been seeing it. Five of the people they’ve wanted for nine years, we release them and give them back for one dirty rotten traitor that I’d like to make sure this guy, frankly, I’d drop him right back in the middle of the area that we took him from, you wanna know the truth (crowd cheers). I’d love</p>	<p>http://theconservativetreehouse.com/2015/12/19/yug-e-donald-trump-rally-cedar-rapids-iowa-330pm-est-live-stream/</p> <p>https://www.youtube.com/watch?v=RSVbjs57R_Q @16:10 (192,726 views as of 17JAN17)</p>

		that! But... and now I'm hearing he may not get any prison time, can you believe it? So I always say this; 50 years ago he gets a bullet (mimics holding a rifle) right? Twenty-five years ago we started getting a little weaker, probably doesn't get a bullet, probably gets a hell of a long time in jail though, maybe even the rest of his life. Ten years ago started getting a little weaker, probably 10-15 years. And today we're talking about, oh well he didn't feel good, he decided he didn't want to do this, you know, he had a headache, and he's really regretted his decision. I don't know if you saw him, he didn't like the orders he was given. Can you believe how stupid and weak and ineffective our country is being? So it's... it's very sad. So I call him the five for one, I mean he's a five for one president. He makes these horrible deals. He doesn't know. See, that's a deal. I mean it's people but it's a deal. We get Bergdahl and they get five people that they want."	
21DEC15	Grand Rapids, MI	"We have guys like Bergdahl who get caught, I mean, he left, he was a deserter, he was a deserter. He was a dirty, rotten deserter and we lost five and maybe six young, great, brilliant, wonderful people trying to bring him back. They were killed, right? So he deserts, now, sixty years ago they would've been shot within a very short period of time, right? Twenty-five years ago, probably shot! Ten years ago, long term in prison. Now, I hear he's going to get off scot-free! Why? (Crowd boos). No, no, think of it. And then we traded this guy who as far as I'm concerned we can take him and drop him right back in the middle."	https://www.youtube.com/watch?v=hXeFm0OecKk @12:10 (53,714 views as of 17JAN17)
10JAN16	Meet The Press	"I always bring up Bergdahl. We get a traitor, they get five people that they've wanted for nine years, and they're back on the battlefield, trying to kill everybody, including us. And we get a dirty, rotten traitor."	http://www.nbcnews.com/meet-the-press/meet-press-january-10-2016-n493596

13JAN16	Pensacola Bay Center, Pensacola, FL	<p>"I always bring this up, I always bring this up. We get a dirty, rotten, no-good traitor named Bergdahl. Sergeant Bergdahl. And they get, they get, five of the greatest people that they know. The biggest killers and believe me they're back out there and the President says 'Oh they're not back in the battle,' but believe me folks, they're back on the battlefield and they want to kill everybody here and they want to kill everybody there. So we get this dirty, rotten, no-good traitor who 20 years ago would've been shot, who 40 years ago they would've done it within the first hour, and who now might not, maybe nothing's going to happen. Don't forget, with Bergdahl we lost at least five people and I watched the parents on television, I've seen the parents, I've met one of the parents, who're devastated, ruined, destroyed. And they were killed going out to try and bring him back, and they lost five people, probably six, by the way. But at least five people. And we knew that he was a traitor because we had a Colonel and a General go and do the interviews before we made the deal. And everybody in the platoon, everybody was saying he walked off, he's a traitor. They said he's a whack job but we made this deal knowing. Now I would've said 'Oh really? He's a traitor? Pass! Let 'em have him, he's done.' Frankly, frankly, I would take that son of a bitch, I'd fly him back, I'd drop him right over the top, I'm telling you. I'm telling you."</p>	<p>https://www.youtube.com/watch?v=SV0B3uCW-EU @1:26:25 (132,571 views as of 17JAN17)</p> <p>http://wkrg.com/2016/01/13/donald-trump-calls-bowe-bergdahl-dirty-rotten-no-good-traitor/</p>
18JAN16	Liberty University, Lynchburg, VA	<p>"Sergeant Bergdahl! Anybody ever hear of Sergeant Bergdahl? We get Sergeant Bergdahl, a dirty, rotten traitor, six people died going after him. Six people died going after Sergeant Bergdahl. We get Bergdahl, they get five of the great killers that they wanted for the last nine years. So we get Bergdahl, a traitor and we knew he was a traitor before the deal because they had a General and a Colonel talking</p>	<p>https://www.washingtonpost.com/opinions/the-gospel-according-to-trump/2016/01/19/b63977b4-bef7-11e5-83d4-42e3bceea902_story.html;</p> <p>https://www.ijreview.com/</p>

		to the people that he was with. So we knew that he was a traitor. Who would make deals like this? Who does it?"	2016/01/517519-trump-on-bowe-bergdahl-hes-a/ https://www.youtube.com/watch?v=E32ZPa4LGkM @38:05 (111,192 views as of 17JAN17)
20JAN16	Tulsa, OK	<p>"We have Sergeant Bergdahl, a dirty, rotten traitor, right? (Crowd boos). A dirty, rotten, no good traitor. Five people were killed. Five people looking for Bergdahl, and probably six, but five people at a minimum were killed looking for Sergeant Bergdahl, right? We make a deal knowing, because you had a General and a Colonel there talking to the people that knew him. You had a General and a Colonel that knew he was a dirty traitor. And what happened? We give them five people that they most wanted for nine years that are now back on the battlefield, don't believe the press, and if they're not now, they will be soon. So we give them five people and we get this dirty, rotten traitor. No good folks. We don't make deals like that anymore. We don't make deals like that. As far as I'm concerned, we take him, we fly him over to the area, nice heavily densed area loaded up with ISIS and before we bomb the hell out of ISIS we drop Bergdahl right in the middle of 'em. (Crowd cheers). Amazing. Amazing. Amazing!"</p>	http://www.tulsaworld.com/news/elections/trump-embraces-angry-voters-at-boisterous-tulsa-rally/article_70e04a75-9b65-5ebc-a2de-1914e2118ee8.html https://www.youtube.com/watch?v=2lx5D8FissM @2:01:15 (83,853 views as of 17JAN17)
2FEB16	Milford, NH	<p>"But we can no longer be the stupid country, we can no longer be the country that's led by incompetent people, we can no longer be the country that takes Sergeant Bergdahl, a traitor, a dirty rotten traitor, and take him, and take him, and swap him for five of the biggest killers that they have in the Middle East, that they've coveted and wanted for a period of at least nine years. So think of it, we get Bergdahl and they get these five killers that are already back in the</p>	https://www.c-span.org/video/?404064-1/donald-trump-campaign-rally-milford-new-hampshire&start=3678 @1:01:15

		battlefield trying to kill everything in front of them, including us. We're not making deals like that anymore folks. We're not making deals like that anymore."	
4FEB16	Exeter, NH	"We're not going to take a Sergeant Bergdahl, who is a dirty rotten traitor, and trade where we get Bergdahl, and they get five of the people they've most coveted for nine years, and they are now back on the battle field killing people and wanting to kill you."	http://www.cbsnews.com/news/donald-trump-unconcerned-about-ground-organization/ https://www.youtube.com/watch?v=WCp_ANlftg@50:40 (79,572 views as of 17JAN17)
5FEB16	Florence, SC	"Sergeant Bergdahl, a traitor. Right? He's a traitor. He's a dirty, rotten traitor by the way. So Sergeant Bergdahl, he's a traitor. He left. He walked. He thought he was going to have a wonderful life, you know, celebrating whatever they celebrate. So, he leaves, we lose six people- get killed- great, young, beautiful soldiers. I see their parents. Great, young, beautiful soldiers, get killed, they go out, and they're looking and they're looking, and they get killed. Probably viciously killed. They're dead, right? We get Bergdahl back- now we had a General and a Colonel and they were interviewing everybody. They knew he was a traitor. It wasn't like, oh they made a mistake, you know you can see that. You would like that! How can you be that stupid, but this is far worse. We knew he was a traitor. So our deal is, we get Bergdahl and they get five killers that they've coveted, that they've wanted for nine years. And they're now, all out back on the battlefield trying to kill us all.	https://theconservativetrenchouse.com/2016/02/05/donald-trump-rally-in-florence-south-carolina-700pm-est/ https://www.youtube.com/watch?v=8DatCiaEUDs@1:00:25 (164,923 views as of 17JAN17)

8FEB16	Manchester, NH	<p>“We’re angry when we make a Sergeant Bergdahl deal, who’s a dirty, rotten traitor, where six people were killed looking for him and trying to bring him back, killed! Six young, great people, killed, looking for Sergeant Bergdahl and we make this swap knowing that he was a traitor. They had a Colonel and a General talking to these people, and talking to the people that worked with him; they knew he was a traitor. They knew it! And we make a deal, Sergeant Bergdahl, we get, and they get five of the worst killers that they’ve coveted, they’ve coveted, for the last nine years, okay? We’re tired of deals like this.”</p>	<p>http://www.breitbart.com/big-government/2016/02/08/donald-trump-makes-last-pitch-to-new-hampshire-before-primaries-to-packed-stadium/</p> <p>https://www.youtube.com/watch?v=bVnn2cYrQJo @15:40 (5,551 views as of 17JAN17)</p>
8FEB16	Londonderry, NH	<p>“When we see Sergeant Bergdahl, where we get Bergdahl, a traitor, who six people got killed looking for him, and they get five killers that are back on the battlefield or soon will be. That’s not what we want.”</p>	<p>https://www.youtube.com/watch?v=SPBX_vQoDUA @52:30 (36,258 views as of 17JAN17)</p>
17FEB16	Bluffton, SC	<p>“We take Bergdahl, Sergeant Bergdahl, we- you know he’s a traitor. So, we get Bergdahl, six people died looking for Sergeant Bergdahl, right? We get Bergdahl, they get five of the greatest killers that they wanted and coveted for nine years. We get one, they get five. He’s a traitor, they’re the best they have. And they’re now out on the fields or soon will be, killing people again. I don’t get it, I don’t get it. I say, ‘where do these people come from? Where do they come from?’ And we knew that he was a traitor when we made the deal because we had a General and a Colonel go interview all the people that knew him. You know, from his platoon. And we knew that he was a traitor. So why would we make a deal? Let ‘em keep him, I would’ve said keep him! You can have him. I’d give him back. I’d actually give him back. I’d fly over, drop him right on top. You know, just, (makes airplane flight motion with his hand), bing! (Crowd cheers).”</p>	<p>https://www.youtube.com/watch?v=rrEpea-2Sa0 @29:30 (73,820 views as of 17JAN17)</p>

22FEB16	Las Vegas, NV	<p>“Every trade deal we make is stupid. Whether it’s Sergeant Bergdahl where it’s five for one and five or six people got killed looking for him. So we get a traitor and they get five killers that they’ve coveted for years, for nine years. We get one, they get five, ours is no good, let’s send him back drop him right in the middle of the damn thing. (Crowd gives applause). Boom fly over. Fly over! Fly over! Drop him, maybe you give him a parachute maybe you don’t, I don’t know. Depends if we have an extra parachute. Probably, probably we give him a parachute if we have an extra one around. But it wouldn’t help him. He went out into that world he didn’t find it too comfortable folks, you know? They slapped him around pretty good. He thought he was going to go out, he’d be treated wonderfully. I think they slapped him around pretty good. He came back, he couldn’t get back fast enough. Five, maybe six, probably six people were killed looking for him. We had a general and a Colonel that went to see his platoon and went to see his group and they all said he deserted. And we knew he deserted when we made the deal. Now why would you make a deal for a deserter and give up five people who they most want that are out trying to kill everybody, including us. Why would we give up, why would we give up five killers, why? For one dirty, rotten traitor.”</p>	<p>https://www.youtube.com/watch?v=9hbUr0Y09cw @24:30 (213,269 views as of 17JAN17)</p> <p>www.nytimes.com/politics/first-draft/2016/02/23/donald-trump-on-protester-id-like-to-punch-him-in-the-face/</p>
24FEB16	Virginia Beach, VA Regent University	<p>“Were gonna be the smart country, instead of the dummies that everyone laughs at. They laugh at us, because we have people that don’t know what they’re doing. Like Sergeant Bergdahl, we get Bergdahl, a traitor, they get five killers that they’ve coveted, they’ve wanted for nine years. And those five killers are back on the battlefield or soon will be. But these are the ones they wanted, these five. So we knew he was a traitor before we made the deal because we had a General and a Colonel interviewing all of the people that he</p>	<p>https://www.c-span.org/video/?405439-1/donald-trump-regent-universitys-presidential-candidate-forum&start=1012 @16:55</p>

		worked with in the military. They knew he left. Six people died looking for him, five definitely, probably six. Died, they went out looking for him. They tried to get him back. He left. And we get, that's the way we negotiate. We get Bergdahl, they get five great killers for them, the people that they want. Not going to happen anymore."	
5MAR16	Orlando, Florida	"You're going to feel so proud of your country again, you're not going to be embarrassed with Sergeant Bergdahl. We get Bergdahl, we get Bergdahl, right? We get a dirty, rotten, traitor, six people, five people, probably six people died trying to find him so we get Bergdahl and they get five of the biggest killers that they've been coveting and that they've wanted for years. I call him the one for five President, that's no trade folks."	http://pilotonline.com/news/media/videos/trump-wants-to-loosen-laws-against-torture/youtube_10bc0ed7-1ffd-5b89-ae31-3dcf7ee364d7.html This video was removed by an unknown user on or before 01 December 2016 https://www.youtube.com/watch?v=zRw1TS7kX2s@1:11:20 (60,706 views as of 17JAN17)
19MAR16	Fountain Hills, Arizona	"Sergeant Bergdahl, five for one, right? We get Bergdahl, they get five, who's a traitor (referring to Bergdahl) we get Bergdahl they get five of the great killers they've coveted for a period of nine years, and they got 'em. And those guys are now back on the battlefield trying to kill us all and we got a traitor. Big deal. And by the way, a traitor that supposedly five or six young beautiful soldiers were killed trying to find him and get him back."	https://www.youtube.com/watch?v=ZL5dVEYLFjQ@52:30 (36,387 views as of 17JAN17)
4APR16	Milwaukee, WI	"We have Sergeant Bergdahl, right? We get Bergdahl, a traitor (crowd boos), no, no! Think of it, this is a same- this is a negotiation! We get Bergdahl, and they get, what do they get? Five of their most coveted killers that have been in jail	https://www.youtube.com/watch?v=oegg2phZhDY@41:30 (174,873 views as of 17JAN17)

		for eight years in Gitmo, which we're not closing down, by the way, okay? We're going to run it a lot better (crowd cheers). So we get Bergdahl, a traitor, who five or six, probably six people were killed going out to try and get him back. He left, he's a traitor. So we get Bergdahl, and that's what we get, and they get five people that are right now back on the battlefield or soon to be back on the battlefield trying to kill everybody in sight, including us (points to crowd), okay?"	
10APR16	Rochester, New York	"I talk about Sergeant Bergdahl. We get Bergdahl, a traitor, you know? We get a traitor, who by the way six people- at least, but six people, five known, but six people were killed looking for him. So we get Bergdahl and they get five of the people that they most coveted in Gitmo which we're keeping open by the way, 100%, then we'll fill it up. So they get five killers that they most coveted that they most wanted of anything, alright."	http://video.foxnews.com/v/4896765471001/exclusiv-e-former-bergdahl-platoon-mates-endorse-trump/?#sp=show-clips https://www.youtube.com/watch?v=NqRMaD3HWHo&t=2108s @35:10 (285,997 views as of 9DEC16) This video was removed by an unknown user on or before 17JAN17
3JUN16	Redding, CA	"Sergeant Bergdahl, we get Bergdahl, they get five of the greatest killers that they have. They've been after them for nine years. I call him the five for one president."	https://www.c-span.org/video/?410524-1/donald-trump-campaigns-redding-california&start=2315 @38:30

10JUN16	Richmond, VA	<p>“Sergeant Bergdahl, we get Bergdahl, a traitor (crowd boos). We get Bergdahl, we get one, they get five of the greatest killers that they have in the world and those five people are back out there now trying to kill all of us and anybody else that walks near ‘em. What the hell kind of a deal? That’s a five for one President, we have a President that doesn’t know what the hell he’s doing, folks, I’m telling you.”</p>	<p>https://www.youtube.com/watch?v=3qXEh8eQ7n8 @21:30 (34,930 views as of 17JAN17)</p>
14JUN16	Greensboro, North Carolina	<p>“We don’t win anymore. We don’t win with Sergeant Bergdahl. Remember Sergeant Bergdahl? Remember? We get Bergdahl- this is a typical Obama trade, I call him the five-for-one president- we get Bergdahl and they get five of the worst killers that they wanted for nine years who are now back on the battlefield trying to kill everybody including this group right here (referring to those at the rally). I’m not gonna let it happen folks. This is the deal we make. And by the way, probably five and maybe six people, wonderful, young military people were killed looking for Bergdahl after he deserted, okay? Think of it. Now in the old days, you know what would have happened to him, right? Quickly. (Makes shooting rifle gesture) In the old days. Ten years ago, it wouldn’t have been pretty but he would’ve lived. And today they’re talking about maybe nothing’s gonna happen to him. Because this is where we’ve come, this is where we’ve come to. We cannot continue to be politically correct we cannot continue with what’s happening in our country is devastating, folks.”</p>	<p>https://www.youtube.com/watch?v=tT3wG_Wz0Ho @1:15:10 (116,732 views as of 17JAN17)</p>
12JUL16	Westfield, Indiana	<p>“I call Obama the five-for-one President. So we have a traitor named Sergeant Bergdahl. So Sergeant Bergdahl thinks he likes their way of life, obviously, ‘Oh they have a wonder way of life’. So one day he leaves we lose five and maybe six but five at least people looking for him. They were killed. They were killed by the enemy. They go out they’re looking for him. They knew he left. Everybody with him they</p>	<p>http://www.realclearpolitics.com/video/2016/07/12/trump_were_not_closing_gitmo_were_going_to_fill_it_up.html (38:45)</p>

		<p>knew he left because he was all whacked out and a believer in them and not us. So they knew he left. So knowing that, in fact I think they had a Colonel and I believe a General talking to the people that knew him! And they told the Colonel and the General that he left, he deserted!</p> <p>Remember the old days? A deserter, what happened? (makes shooting rifle gesture) Bang. Twenty years ago it was (makes shooting rifle gesture) bang but slowly. Ten years ago it was long prison but today they're probably talking about nothing. That's where we've come. But I call him the five-for-one so we get Bergdahl, right, a traitor. They get five of the most vicious killers that they have that they've been after for nine years to get him out and they bring him and they're back on the battlefield trying to kill everybody including us."</p>	<p>https://www.youtube.com/watch?v=dM6o3D9rTVE @25:50 (25,763 views as of 17JAN17)</p>
5AUG16	Greenbay, WI	<p>"You tell me who makes these deals? It's like Sergeant Bergdahl, right? So we trade a dirty rotten traitor, where five or maybe even six people were killed when he deserted and we knew that they were killed and we knew he was a traitor. We trade for five of the greatest killers, the greatest killers in the Middle East. The five people that they wanted the most. That's our deal. So we get a traitor, and they get five people that are right now, most of them, already back on the battlefields trying to kill everybody including us. No more folks. It's called the five for one President right?"</p>	<p>https://www.c-span.org/video/?413593-1/donald-trump-endorses-speaker-ryan-ahead-primary&transcriptQuery=bergdahl&start=4582 @1:16:25</p>
9AUG16	Wilmington, NC	<p>"Whether it's Sergeant Bergdahl where we get Bergdahl who was a traitor and they get five of the greatest killers they wanted for eight years. We get Bergdahl. I call it the five for one trade."</p>	<p>https://www.youtube.com/watch?v=SDn5yu7rxWo</p> <p>This video was removed by an unknown user on or before 1DEC16 (8,779 views as of 10 AUG 2016)</p>

			https://www.youtube.com/watch?v=t1RA7awOSwM @6:35 (41,124 views as of 17JAN17)
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DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY FORCES COMMAND
4700 KNOX STREET
FORT BRAGG, NORTH CAROLINA 28310-5000

S: 16 December 2015

AFCG

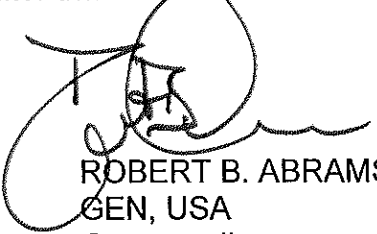
14 December 2015

MEMORANDUM FOR Courts-Martial Panel Members

SUBJECT: Order to Courts-Martial Panel Members (Pretrial Publicity)

1. On 14 December 2015, I referred the case of United States v. Sergeant Robert Bowdrie (Bowe) Bergdahl to a General Court-Martial under Court Martial Convening Order Number 1, of which you are a member.
2. 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 will be presented during the court-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 member in this case, you must immediately forbid him or her from doing so, and you must immediately report the facts and circumstances of the contact, **in writing**, to CW3 Christina Porter.
3. Please sign and return the enclosed acknowledgment to CW3 Christina Porter, Office of the Staff Judge Advocate, United States Army Forces Command at christina.m.porter3.mil@mail.mil, not later than 16 December 2015.

Encl
as



ROBERT B. ABRAMS
GEN, USA
Commanding



DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY FORCES COMMAND
4700 KNOX STREET
FORT BRAGG, NORTH CAROLINA 28310-5000

MEMORANDUM FOR RECORD

SUBJECT: Acknowledgement of Order to Courts-Martial Panel Members (Pretrial
Publicity)

I acknowledge that on _____ December 2015 I received the Order to
Courts-Martial Panel Members (Pretrial Publicity) dated 14 December 2015 in the case
of United States v. SGT Bergdahl. I have read it and will comply with its terms.

Signature

Placeholder-Defense Video Exhibit