

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

UNITED STATES)	Defense Reply to Government
)	Response to Motion to Dismiss
v.)	
)	
SGT Robert B. Bergdahl)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	6 February 2017

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INTRODUCTION

The Motion to Dismiss, D APP 56, demonstrated that President Trump's comments are prejudicial to Sergeant Bergdahl's right to a fair trial and inimical to public confidence in the administration of military justice. It explained that dismissal is required to safeguard the credibility of the military justice system.

The defense having raised an issue of apparent UCI by the requisite "some evidence," *United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 1999), the burden shifts to the government. See *generally* D APP 56, at 2.¹ The government's response, G APP 68, does not discharge that burden. The motion should therefore be granted.

¹ Hoping to elude the shifted UCI burden of proof, the government seeks to change the subject to whether SGT Bergdahl's case is one of "unfair pretrial publicity." G APP 68, at 1 & nn.1-2, 4-5, 8-12. The Motion to Dismiss asserts interrelated Fifth Amendment due process and apparent UCI claims. D APP 56, at 9, 18, 22-23. While the Court must address those claims, it is free to evaluate the evidence (including the matters to which the government has stipulated) to determine *sua sponte* as well whether relief should be granted on the distinct theory the government has injected. The doctrine of "invited error," invoked in G APP 68, at 1 n.2, is inapposite: (1) Season 2 of the *Serial* podcast did not begin airing until 10 December 2015, see *Serial* (podcast), Wikipedia, [https://en.wikipedia.org/wiki/Serial_\(podcast\)#Season_2_.282015.E2.80.9316.29](https://en.wikipedia.org/wiki/Serial_(podcast)#Season_2_.282015.E2.80.9316.29), § 2.2, *after* some parts of the media had taken to using SGT Bergdahl as a piñata in order to score political points against President Obama and *after* President Trump began vilifying SGT Bergdahl; and (2) the defense released the transcript of then-MG Dahl's interview of SGT Bergdahl only *after* the government attached an excerpt to one of its pleadings. See G APP 10, at 12-15. Both the government's observation that President Trump's "references to SGT Bergdahl constitute nothing more than a drop in the ocean of [campaign] coverage," G APP 68, at 12, and its reliance on occasions when President Trump did *not* refer to him or referred to other candidates, *id.* at 11, suggest desperation. That is equally true of its claim that an inconsistency lurks in the defense's having objected to President Trump's comments and "going out of [our] way to rebroadcast the material, both by placing their video compilation on YouTube and now by seeking to play it in court." *Id.* at 3 n.7. SGT Bergdahl cannot be faulted for posting on the defense website a key exhibit that provides direct evidence of events that form the basis for a dispositive motion. President Trump's comments had been seen and heard by thousands upon thousands of people. In contrast, fewer than 5000 people have viewed the Defense Video Exhibit, which was not made available to the public until 12:01 p.m., 20 January 2017, just before the motion was filed.

ARGUMENT

1

THE BURDEN HAS SHIFTED TO THE GOVERNMENT

Under *Biagase*, all SGT Bergdahl must do to shift the burden to the government is adduce “some evidence.” The threshold is “low” and all that need be shown is a “logical connection” to the case. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). These basic requirements have been met.

Sergeant Bergdahl invited the government to stipulate to several matters, D APP 56, at 7. The government stipulated to critical matters² and that is sufficient to shift the burden. It was equivocal, however, as to the ground truth of President Trump’s repeated claims that some number of Soldiers died searching for SGT Bergdahl. G APP 68, at 2-3. It stipulated to the statements attributed to former Secretary of Defense Chuck Hagel and MG Dahl with the caveat that they were speaking only on the basis of what they then knew. G APP 68, at 2-3 & n.6. That too is sufficient to satisfy the “low” “some evidence” threshold requirement, but if the Court is for any reason not satisfied on that score, we invite its attention to the Army investigative materials uncovered by the producers of the *Serial* podcast³ and the statement last year by CSM Ken Wolfe: “The families who. . . who

² The government identified what it thought was an error in the Defense Compendium entry for President Trump’s 18 July 2015 comments. *Compare* D APP 56, at 30, *with* G APP 68, at 2 & n.5, 17 (“a search of the transcript provided by the Federal News Service confirms that Mr. Trump did not reference SGT Bergdahl during this speech”). The Defense Compendium is correct. The pertinent video and transcript can be found at https://archive.org/details/FOXNEWSW_20150719_100000_FOX_and_Friends_Sunday/start/7414/end/7474, at, depending on the user’s computer, the 5:03 or 6:03 a.m. point for Eastern Time Zone viewers. The comments were made at a press conference following the candidates’ individual interviews. This may account for the government’s misunderstanding.

³ Sarah Koenig, *Was Anyone Killed Looking for Bowe Bergdahl? Some Hard Evidence at Long Last*, *Serial*, Oct. 6, 2016, <https://serialpodcast.org/posts/2016/10/was-anyone->

lost sons during this deployment, to let them know that their . . . their sons did not die looking for PFC Bergdahl. Their sons didn't die looking for him.”⁴

Because the threshold “some evidence” requirement is met, the burden shifts to the government. As explained in Point 4, it has failed to carry that burden.

2

THE DEFENSE SHOULD BE PERMITTED TO PLAY THE VIDEO IN OPEN COURT

The government has not objected to the Defense Video Exhibit but has objected, G APP 68, at 3, to the defense’s request to play it at the upcoming Article 39(a) session. See D APP 56, at 7. The government’s basis for objecting is that it, “the Court and the public have all had the opportunity to review the Defense’s video compilation.” G APP 68, at 3. The point is not well taken. Without being able to show the video, our ability to comment on it in argument will be compromised. What is more, SGT Bergdahl has a right under both the Sixth Amendment and the *Manual for Courts-Martial* to a public trial. U.S. Const. amend. 6; R.C.M. 806.

The government may prefer that as few people as possible view this devastating video,⁵ but it has not argued that, at 28 minutes, it is too long to play in court. Given the

[killed-looking-for-bowe-bergdahl-some-hard-evidence-at-long-last](#) (analyzing AR 15-6 reports). “Serial’s reporting showed that despite the strong beliefs of some of Bergdahl’s fellow soldiers and superiors, his poor decision cost no one their lives.” Melissa Locker, *Serial season two: why did the ‘must-listen show’ suffer a sophomore slump?*, The Guardian, Apr. 5, 2016, <https://www.theguardian.com/tv-and-radio/2016/apr/05/serial-season-two-bowe-bergdahl-podcast>.

⁴ Serial Podcast, Season 2, Episode 11, *Present for Duty*, Mar. 31, 2016, <https://serialpodcast.org/season-two/11/present-for-duty/transcript>; Nancy Montgomery, *Command sergeant major: No troops died searching for Bergdahl*, Stars & Stripes, Mar. 31, 2016.

⁵ The exhibit cannot be found on the FOIA website. See RMDA Freedom of Information Act Library, *US v. Bergdahl*, <https://www.foia.army.mil/ReadingRoom/Detail.aspx?id=103>.

significance of the issue, allowing it to be played in open court will facilitate argument by counsel and colloquy with the Court. The matter is within the Court's sound discretion, R.C.M. 801(a)(3), but making the session as informative as possible for participants and spectators would hardly be an "unnecessary waste of time." See *id.* (Discussion).

A PRESIDENT CAN CAUSE APPARENT UCI

According to the government, "[i]t is not even clear whether Article 37, UCMJ applies to the senior leadership of the Department of Defense or to the President when they are not acting as convening authorities, as they are not subject to the [code]." G APP 68, at 6. President Trump is outside the ambit of Article 2, UCMJ. But the notion that neither he nor any other President who is not a retired regular can exert UCI or trigger apparent UCI jurisprudence (and remedies) is deeply subversive of public confidence in the administration of military justice. The linchpin of apparent UCI is precisely the effect on public confidence, as cases such as *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006), and *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013), make clear.

Presidential (and Secretary of Defense) UCI was recognized in *United States v. Saunders*, 2015 CCA LEXIS 156 (A.F. Ct. Crim. App. 2015). In *United States v. Hutchins*, 72 M.J. 294, 302 (C.A.A.F. 2013), Judge Ryan, concurring, indicated that civilian officials could exert UCI (there, the Secretary of the Navy). Chief Judge Baker, dissenting on other grounds, wrote about UCI by senior civilian leaders in terms that complemented her discussion of the issue:

[A]n accused has a due process right to a fair trial and appeal, free from the undue influence of superiors, whether they are military officers or civilians in policy and administrative positions. Thus, regardless of whether Article 37, UCMJ, applies to the Secretary of the Navy, unlawful influence by a

civilian official may present a due process "error of constitutional dimension." See *Biagase*, 50 M.J. at, 149-50 (citing *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986)). Based on these due process considerations, while this Court has never explicitly stated so, it has applied an Article 37-based analysis to prohibit unlawful command influence by civilians who are in positions of authority in the military civilian hierarchy, but not subject to the UCMJ, including the Secretary of the Navy who exercises administrative command of the Department of the Navy.

Id. at 313. If a service secretary's acts can constitute UCI (or a UCI-like due process violation), *a fortiori* a President's acts can do so. We have already addressed whether President Trump's never-disavowed campaign-trail comments came with him into the White House. See D APP 56, at 21-22; see also Point 4 *infra*.

4

THE GOVERNMENT HAS FAILED TO CARRY ITS BURDEN

When parties agree on precious little, it is appropriate to note where there is common ground. The burdens of proof and persuasion are common ground. D APP 56, at 2-3; G APP 68, at 3-4. That is where it ends.

The government insists that "no objective, disinterested observer could harbor significant doubts about the fairness of the proceedings when taking all of the facts into account." G APP 68, at 7. It has the burden of showing this by proof beyond a reasonable doubt. It has failed to carry that burden.

The following bullets set out in **bold** type the matters on which the government relies at G APP 68, at 7-8. Our comments follow.

- **An observer would know that, when he was a mere candidate, he had no government or military position.** That is not the issue. President Trump's pre-Inauguration comments remain a matter of record. The Court's attention is invited to D APP 56, at 22. Had Secretary Clinton prevailed in the Electoral

College, SGT Bergdahl would not be advancing an apparent UCI claim; she didn't.

- **President Trump has made no comment regarding SGT Bergdahl since August 2016.** This is immaterial. The damage was done through repeated public comments over a protracted period and August 2016 is not shrouded in the mists of history. There can be no doubt about what President Trump thinks of SGT Bergdahl. In a democratic society, it is a core premise that statements made by those who seek elective office must be taken seriously, especially when those statements are made repeatedly.
- **President Trump has made no comment regarding SGT Bergdahl since taking office two weeks ago.** This *is* material, but cuts against the government's argument. A campaign says much about what a candidate believes and how he or she will govern if elected. Just the other day President Trump stated that "I am a man of my word. I will do as I say . . ."⁶ His conduct since 20 January 2017 as to such important questions as immigration policy, building a wall on the border at Mexico's expense, and the type of jurist he would appoint to fill Justice Scalia's seat on the Supreme Court confirms the broad continuity of his positions before and since he took office. He certainly had a strong and adverse position about SGT Bergdahl during the campaign and, as the government has stipulated, "neither President Trump nor anyone acting on his behalf has ever withdrawn or disavowed his statements." G APP 68, at 2. The failure

⁶ *Full Transcript and Video: Trump picks Neil Gorsuch for Supreme Court*, N.Y. Times, Jan. 31, 2017, <https://www.nytimes.com/2017/01/31/us/politics/full-transcript-video-trump-neil-gorsuch-supreme-court.html?emc=eta1>.

of supervisory officials such as The Judge Advocate General to address the matter – while understandable now that President Trump is commander in chief – is relevant to the extent that had she (or others) done so, their actions “could have had an impact on the public’s perception and perhaps restored some confidence in the military justice system.” *United States v. Lewis, supra*, 63 M.J. at 416 n.4.⁷

- **President Trump’s comments were made in the context of faulting President Obama for allegedly poor negotiating skills in connection with the prisoner exchange that free SGT Bergdahl (in contrast with his own negotiating skills).** President Trump’s larger goal is irrelevant. He said what he said about SGT Bergdahl, over and over, and that is what counts.
- **The references to “traitor” and “treason” were “clearly intended to be understood by their colloquial meaning,” President Trump not being an attorney and “speaking in the context of a political campaign.”** Playing *Hamlet* without Hamlet, the government has neither submitted a declaration from President Trump nor offered to call him as a witness. It does not claim to have consulted him when preparing its response to the motion (for which it

⁷ The Army has been on notice for months that a UCI motion was being prepared in response to President Trump’s comments. *E.g.*, Amanda Dolasinski, *Sgt. Bowe Bergdahl lawyers say Trump ‘traitor’ comments warrant dismissal*, Fayetteville Observer, Nov. 16, 2016; Sig Christenson, *With Trump’s election, defense lawyer doubts Bergdahl can get fair trial*, San Antonio Express-News, Nov. 9, 2016. A perfunctory statement issued at Fort Bragg the day President Trump took office and the defense motion was filed did nothing to address the issue, much less satisfy the Court of Appeals’ suggestion in *Lewis*. See Richard A. Oppel Jr., *Bergdahl, Called ‘Dirty Rotten Traitor’ by Trump, Seeks End to Charges*, N.Y. Times, Jan. 21, 2017 (“A spokesman at Fort Bragg, where the court-martial is to be held, did not comment specifically on the motion but said the military remained committed to ‘ensuring this ongoing legal proceeding’s fairness and impartiality’”).

obtained an enlargement), nor did he make himself available when we asked him for an interview. In any event, this part of the government's UCI defense is without merit on its own terms. President Trump's repeated references to SGT Bergdahl as a traitor or as a person who had committed treason speak for themselves. The vast majority were uttered when SGT Bergdahl was known to be facing charges. It doesn't take a law degree to know that it is a very serious business to repeatedly describe a citizen – but *especially* a Soldier who is the accused in a pending criminal case -- as a traitor.

- **“There is evidence that suggests that [SGT Bergdahl’s] actions may have contributed to [Soldier] fatalities” and President Trump’s “reliance on [media] reports was not unreasonable and his comments cannot be said to be false.”** These assertions are fallacious. Reasonableness is not the issue; truth is, and whether and why a person has died is a matter of fact.⁸ Passing over the fact that the government has not submitted the evidence to which it

⁸ According to the government,

as the claims regarded [*sic*; presumably should read “regarding”] fatalities connected to SGT Bergdahl’s misconduct were the subject of widespread coverage in multiple media outlets, Mr. Trump’s reliance on the reports was not unreasonable and his comments cannot be said to be false.

G APP 68, at 8. Even if President Trump’s claims were “not unreasonable” because of media reports (a proposition we cannot concede without knowing which specific media he allegedly relied on), that scarcely means the claims “cannot be said to be false.” The government provides no specifics and we have been unable to probe the matter independently because he ignored a defense request for an interview. It has admitted that it cannot prove the truth of the matter – and hence that it cannot show under *Biagase* that “the predicate facts do not exist” as to President Trump’s claims. It also implies that he was referring to SGT Bergdahl’s moral responsibility, rather than his legal responsibility. There is no basis for such a distinction in President Trump’s recorded comments, which were plainly made with reference to the military justice process, not some abstract philosophical inquiry into morality.

refers, evidence that only (a) “suggests” that actions (b) “may have” (c) “contributed” to fatalities, see *also* G APP 68, at 2-3 n.6 (“This is not to say, however, that there is no evidence *suggesting* a connection” (emphasis added)), is transparently insufficient on an issue as to which the government has the burden of proof beyond a reasonable doubt. If this is the best it can do – and the Court must assume that the government put the matter as strongly as the information available to it could justify -- it is immaterial to whether a *Salyer* observer would harbor a doubt about the fairness of the proceedings.

- **President Trump’s suggestions for particular penalties “clearly comprise campaign rhetoric” and no one would have thought he was serious about suggesting the death penalty or dropping SGT Bergdahl from an airplane.** President Trump made a variety of inflammatory remarks, commonly suggesting execution and in several instances deriding possible matter in mitigation. The government does not dispute that he made those statements, and while some of them may have been outlandish, taken as a whole they clearly indicate his view that the harshest possible penalties should be imposed. Panel members, prospective defense witnesses, and the GCMCA (who testified last year that he has no plan to retire, and will soon be under consideration by President Trump for other four-star positions) would have every reason to take them seriously since they were uttered by the person who is now President.

In support of its argument, the government has cited the Court’s 26 September 2016 ruling that dismissed comments by Sen. John S. McCain as “political posturing designed to embarrass a political opponent and gain some political advantage.” AE 19, at

8.⁹ But that decision, if anything, actually supports SGT Bergdahl's case. In language that is fatal to the government's argument but nowhere mentioned in its response, the Court explained that Chairman McCain, while powerful, "has absolutely no command authority or color of command authority." That can scarcely be said of President Trump. See *generally* D APP 56, at 21-22. Additionally, Chairman McCain's comments were far less inflammatory than President Trump's and his staff at least made a gesture – mealy-mouthed and ineffectual as it was -- at walking them back.¹⁰ The contrast with President Trump's lengthy and never-disavowed War on Bergdahl as chronicled in the Defense Compendium could not be sharper.

Whistling past the graveyard, the government has sought to assure the Court that President Trump's "comments have not resulted in any concerns about the fairness of these proceedings." G APP 68, at 8. We respectfully disagree. The facts and circumstances are deeply inimical to public confidence and the government should have admitted as much. One reason it may have decided not to do so is that the person responsible is President of the United States and commander in chief. The government's position, laced with fantastical reasons to downplay the nature, gravity and scope of his comments, bespeaks indifference to the threat apparent UCI poses to public confidence in military

⁹ The government's quotation from the decision omits a parenthetical reference to President Obama as well as two footnotes.

¹⁰ See Richard A. Oppel Jr., *John McCain's Comments on Bowe Bergdahl Bring Rebuke From Lawyer*, N.Y. Times, Oct. 13, 2016.

justice.¹¹ Far from constituting proof beyond a reasonable doubt that public confidence has not been compromised, the record requires a diametrically opposite assessment.¹²

CONCLUSION

For the foregoing reasons and those previously stated, the charges and specifications should be dismissed with prejudice.


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¹¹ Accessing a military judge's service record and making an allegedly well-intended *ex parte* call to his supervisor led to a dismissal with prejudice in *Salyer*. What happened here, involving remarks by a person who now occupies the highest office in the land, is far worse in terms of the implications for public confidence.

¹² With one exception, the government has not disputed what we said about why remedial measures short of dismissal (such as disallowing confinement as a potential punishment) are inadequate. See *generally* D APP 56, at 19-21. The only one they even address is additional *voir dire*, as if that will fix everything. G APP 68, at 12-15. It won't. Granting that remedy in a case that concerns apparent UCI involving the President of the United States is like leaving a tip instead of paying the bill. It will do nothing to remediate the injury to public confidence. (To be clear, our submission is not that the only question we would ask on *voir dire* would be the one that is barred by Mil. R. Evid. 508; rather, without being able to ask, at some point, "Colonel, who did you vote for?," *voir dire* would be entirely inadequate.)

CERTIFICATE OF SERVICE

I certify that I emailed the foregoing Defense Reply to Government Response to Motion to Dismiss to the Trial Counsel on 6 February 2017.

A handwritten signature in black ink, appearing to read "Oren Gleich". The signature is fluid and cursive, with the first name "Oren" being more prominent than the last name "Gleich".

MAJ OREN GLEICH